SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 20, 2013 2:33 PM
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 10CA2559, 08CV9799 JOHN HICKENLOOPER, in his official capacity as Governor of the State of Colorado; and THE STATE OF COLORADO, Petitioners, v. FREEDOM FROM RELIGION FOUNDATION, INC.; MIKE SMITH; DAVID HABECKER; TIMOTHY G. BAILEY; and JEFF BAYSINGER, Respondents.	▲ **COURT USE ONLY** ▲ Case No. 12SC442
JOHN W. SUTHERS, Attorney General DANIEL D. DOMENICO, Solicitor General* MICHAEL FRANCISCO, Assistant Solicitor General* MATTHEW D. GROVE, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: 720 508-6157 FAX: 720 508-6104 E-Mail: matt.grove@state.co.us Registration Nos: 32038, 39111, 34269 *Counsel of Record	

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 5,652 words.

It does not exceed 30 pages.

~~The brief does not comply with CAR 28(g) because it exceeds the word and/or page limit. A motion to accept the over length brief has been filed contemporaneously with the brief.~~

The brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Or

~~The opponent did not address standard of review or preservation. The brief contains statements concerning both the standard of review and preservation of the issue for appeal.~~

/s/ Michael Francisco

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

INTRODUCTION

The Plaintiffs in this case have pursued an aggressive standing argument that, if adopted, would eviscerate the remaining limits on standing for constitutional litigation in Colorado. The Governor's opening brief carefully distinguished between taxpayer standing and citizen standing, hewing to this Court's historical differentiation between the two doctrines. In response, Plaintiffs doubled-down on the doctrinal confusion by conflating two distinct lines of cases, and concluding that Colorado permits "Taxpayer-Citizen Standing," a phrase foreign to this Court's precedent. Plaintiffs' persistence in muddling standing doctrine shows why this case could be used to clarify this jurisdictional requirement. The Plaintiffs' theory that "taxpayer" standing requires no actual connection to taxation should be rejected.

If this Court reaches the merits, Plaintiffs radical interpretation of the Preference Clause should likewise be rejected. The non-coercive, honorary proclamations do not rise to the level of unconstitutionally giving a preference, by law, to a denomination or mode of worship.

Under plain text of the constitution, Colorado precedent, or persuasive Establishment Clause precedent, the proclamations are valid.

ARGUMENT

I. There are no limits to Plaintiffs' theory of standing.

For Plaintiffs to establish standing in this case, this Court will need to adopt a theory of standing with no limits. Plaintiffs would allow any citizen to challenge any government action for any alleged violation of the Colorado Constitution. According to the Answer Brief: "The applicable test for standing in Colorado, in the final analysis, involves a single inquiry as to whether a plaintiff-taxpayer has averred a violation of a specific constitutional provision." Ans. Br. at 21 (citation omitted). The passive voice is telling. Simply allege a violation of the constitution and there is standing. There is no need for the challenged action to relate to taxpayers or the use of tax dollars, as has traditionally been the case with taxpayer standing.

Such a theory would accommodate public interest groups, including Freedom From Religion Foundation here, who desire to police

every minutia of state government, even down to the use of a few kilobytes on a computer in the Governor's office. Taken at face value, as future courts and litigants will, the unmoored standing doctrine advanced by the Plaintiffs would water down the Colorado standing requirements to the point where any individual or interest group could seek an advisory opinion about the constitutionality of any government conduct. This case is an attack on the "taxpayer" in the formula of taxpayer standing. This litigation does not challenge an appropriation and expenditure of taxpayer money. Colorado courts have heretofore never applied the admittedly liberal standing rules to be so broad.

Plaintiffs transform taxpayer standing into a doctrine allowing for advisory opinions at the behest of anybody, not just the Governor and General Assembly who do, in fact, have standing to seek advisory opinions from this Court. *See* COLO. CONST. art. IV, § 3 (this court can answer "important questions upon solemn occasions when requested by the governor, the senate, or the house of representatives."); *e.g. In re: Interrogatory Propounded by Governor John Hickenlooper*, 312 P.3d 153, 2013 CO 63, p.35 (Colo. 2013) (Marquez, J., dissenting) ("Colorado

is one of a small minority of states in which the supreme court is authorized to issue advisory opinions on questions presented to it by the Governor or legislature."). This Court's longstanding practice of rarely considering requests for advisory opinions under Article IV, section 3 contrasts with the Plaintiffs' broad taxpayer standing theory where advisory opinions are the rule, not the exception.

Without any connection to status as taxpayers, and thus to appropriations and expenditures of tax dollars, the doctrine would open the courthouse doors to many future litigants to challenge virtually any government action, not just appropriation and expenditures of tax dollars. In fact, in one recent case citizens and a different public interest group have relied on the *Freedom From Religion Foundation* lower court decision as the basis for asserting a taxpayer standing theory to challenge some of the new firearms laws in Colorado – without any requirement to show an expenditure or appropriation of tax dollars related to the claims. The Response to the state's motion to dismiss on standing grounds quotes at length the broadest holding of the court below whereby use of office paper, computer hard drives, staff time and

the like are sufficient to maintain a "taxpayer" standing case. *Compare* 2012 COA 81, ¶ 21; *with* Resp. to Mot. To Dismiss, *Rocky Mtn. Gun Owners et al v. Hickenlooper*, No. 2013 CV 33879, p.3-4 (Dec. 13, 2013) (quoting same), attached as Appendix A. If the Plaintiffs' theory of broad holding of "taxpayer-citizen" were to be adopted it will invite litigation for what are effectively advisory opinions at the behest of citizens.

In essence, Plaintiffs seek to shift the doctrine of "taxpayer standing" to a concept of "public interest standing" (Plaintiffs' words). This would mark a sea change in Colorado standing law. *See, e.g.*, *Anderson v. Suthers*, 2013 COA 148, ¶ 17 (Colo. App. Nov. 7, 2013) ("Colorado has not adopted general public interest standing, and we are not inclined to do so here.") Rather than adopting this limitless theory of standing, this Court should either clarify that standing requires a greater showing of injury than what was alleged here, or conform Colorado standing law to federal standing rules. Either way, this Court should clarify the law of taxpayer standing and reverse the holding below.

II. Colorado standing requires more than government overhead to support a constitutional challenge.

Standing, under Plaintiffs' theory, only requires an allegation that the government violated a constitutional provision, with nothing more. Ans. Br. at 21. Plaintiffs support their interpretation by over-emphasizing a few quotes from some cases. On closer examination, however, these general statements of standing policy should not be interpreted to override the more specific requirements of taxpayer standing.

A. Taxpayer standing cannot be based on a mere allegation that government use of overhead is unconstitutional.

The Governor contends that taxpayer standing must be based on the expenditure of tax funds, as typically reflected in the General Assembly's appropriations process, and the doctrine should not be extended to reach government overhead or "staff time," as Plaintiffs characterize the record. All of this Court's prior taxpayer standing cases have involved appropriations and expenditures of tax money, not overhead. *See Dodge v. Dept. of Social Servs.*, 650 P.2d 70, 71 (Colo.

1979); *Nicholl v. E-470 Highway Auth.*, 896 P.2d 859, 866 (Colo. 1995); *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 891-92 (Colo. 2001); *and Barber v. Ritter*, 196 P.3d 238, 245-46 (Colo. 2008). Similarly in *Hotaling v. Hickenlooper* the Court of Appeals found the lack of any appropriated or expended State taxpayer funds to be fatal to the asserted taxpayer standing. 275 P.3d 723, 726-27 (Colo. App. 2011).

Plaintiffs flatly reject any such limit to taxpayer standing. In fact, Plaintiffs would ask this Court to rule that *taxpayer* standing has nothing to do with taxes or paying taxes, but instead is a misnamed vehicle to challenge any claimed governmental violation of any constitutional provision. Thus Plaintiffs admit, "[t]his principle is not limited to tax and spend challenges." Ans. Br. at 21; *see also* CD p.167 Pls. Resp. to Interrog. ("The plaintiffs do not contend that any line item in the State's budget is specific to the declaration of Days of Prayer"). To support this broad construction of standing, Plaintiffs rely primarily on general statements in non-taxpayer standing cases and not on the actual articulation of taxpayer standing. Ans. Br. At 18-23 (citing *Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977); *Ainscough v. Owens*,

98 P.3d 851 (Colo. 2004); and *Boulder Valley Sch. Dist. RE-2 v. Colorado St. Bd. Of Educ.*, 271 P.3d 918 (Colo. App. 2009).)

In the end, Plaintiffs defend a starkly different view of taxpayer standing than the Governor has articulated. The lack of any tax dollar appropriation or expenditure, according to Plaintiffs, is irrelevant because it "is patently inconsistent with Colorado's broad policy of public interest standing." Ans. Br. at 24. This generic, "broad" policy, Plaintiffs contend, trumps the foundational principle of taxpayer standing: taxpayers have an interest in assuring that the expenditure of their tax dollars (or burden on taxation) is not appropriated and spent in violation of the non-establishment provisions of the constitution. The doctrine has always been about taxation and taxpayers as such.

The Answer Brief, again, draws from the most generalized statements of standing in this Court's precedent and asks for this Court to apply these non-dispositive statements in a way that would permit standing in a circumstance unlike any prior taxpayer standing cases. *See* Ans. Br. 18-21. For example, Plaintiffs frequently rely on *Ainscough* and characterize the decision as "conferring standing on a wide class of

plaintiffs." Ans. Br. at 18. But that case was not even a taxpayer standing case; it involved a claim of general or citizen standing and merely described taxpayer standing in passing. In *Ainscough* the injury was direct and personal; State employees were deprived of the longstanding payroll deductions they were entitled to and they sued based on this personal interest, not based on their status as taxpayers. 90 P.3d at 857.

The Plaintiffs also rely on two cases involving claims under Taxpayer's Bill of Rights, a unique constitutional provision that provides for an individual cause of action. COLO. CONST. art. X, § 20(1) ("Individual or class action enforcement suits may be filed …"). Both *Barber* and *Nicholl* are thus taxpayer standing cases where the issue of standing is dictated by the constitutional provision itself, not general taxpayer standing considerations. The risk that these unique cases would be misunderstood was not lost on the concurring justices in *Barber*, who expressed concern that the majority opinion could be understood as removing all limits on taxpayer standing. 196 P.3d at 254

(Eid, J., concurring in the judgment). That is exactly what Plaintiffs urge here.

Plaintiffs dismiss the need for any nexus between taxpayer standing and the actual payment of taxes. In fact, when the case has lacked any government expenditure of tax funds, this Court held that taxpayers did not have standing. *Brotman*, 31 P.3d at 891 ("Thus, because [the challenged conduct] have no effect on the Ranch as taxpayer … [w]e therefore hold that it was error for the court of appeals to conclude that the Ranch had standing as a taxpayer under *Dodge*."). The opinion below misunderstood or overlooked this case and, in doing so, purported to expand the jurisdiction of Colorado courts to situations in which there is no nexus between the challenged action and the taxpayers qua taxpayers.

To the extent that previous cases have made general statements about Colorado's broad rule of standing, this Court should clarify that those general statements do not overrule the doctrine's other specific requirements. *See Barber*, 196 P.3d at 257 ("[W]e should take this opportunity to disavow some expansive dicta in those cases --- dicta

upon which petitioners rely – suggesting that taxpayers have standing not only to challenge expenditures of taxpayer funds, but to challenge *any* alleged unconstitutional action of the government.") (Emphasis original.) (Eid, J., concurring in judgment). If necessary, the statements could be overruled, particularly given the lack of any reliance interest to weight against such a clarification and the good that will come from departing from the rule. *See, e.g.*, *People v. LaRosa*, 293 P.3d 567, 574 (Colo. 2013) (applying stare decisis and abandoning corpus delicti rule).

B. This Court should recognize the requirement that taxpayer standing bear a "nexus" to plaintiffs status as a taxpayer.

Rejecting Plaintiffs' claims in this case would not demand the wholesale abandonment of taxpayer standing in Colorado. Rather, this Court could retain the doctrine while adopting the commonsense requirement that a plaintiff demonstrate a substantial nexus between the challenged action and the plaintiff's claim that his tax dollars are being misused. *See Hotaling*, 275 P.3d at 725. If a nexus is required,

then Plaintiffs in this case will not have standing as they challenge the use of government overhead, not any perceptible use of their tax dollars.

Plaintiffs cannot satisfy the nexus requirement in *Hotaling* because their claims bear no connection to their status as taxpayers, particularly given the lack of any appropriation of taxpayer funds for the challenged government conduct. The taxpayer nexus requirement is consistent with Colorado case law and is an important limitation on the otherwise broad doctrine of taxpayer standing. *Id.* at 726-27. This Court should enforce the nexus requirement for taxpayer standing and hold that Plaintiffs here lack taxpayer standing on that basis. The Plaintiffs simply cannot satisfy the requirement.

C. Citizen standing, as with taxpayer standing, cannot be based on mere allegation that government use of overhead is unconstitutional.

To the extent Plaintiffs claim to have shown citizen standing, not taxpayer standing, the case presents a generalized grievance that is insufficiently direct and not particularized. If Plaintiffs cannot show standing based on challenging government action as violating the state

constitution following *Dodge* then the same claims cannot establish general, citizen standing. Apart from the special rules of taxpayer standing a citizen's disagreement with government action is too abstract to confer standing.

In this case Plaintiffs' theory of injury is that the Day of Prayer proclamations violate the Preference Clause of the Colorado Constitution, and thus they are "injured" by living in a state where this gubernatorial action does not comply with the constitution. But every citizen in the state could claim this precise injury, if indeed the challenged actions violated the preference clause. Because every citizen could assert the same legal injury the case presents a generalized grievance and thus there is no legally sufficient injury for standing purposes.

In response Plaintiffs argue their case is not merely a generalized grievance because non-believers personally care about the Governor not appearing to support religion. Ans. Br. at 25. This confuses the legal concept of injury, dispositive for standing purposes, with the non-legal concept of how plaintiffs care more about the challenged conduct than

others. Indeed, Plaintiffs' desired relief, a permanent injunction prohibiting future governors from issuing certain proclamations, exposes the generalized nature of their claimed injury. The issue is not how the Plaintiffs were personally exposed to the proclamations in the record; the issue is that they believe courts should opine on *any* proclamation about prayer, regardless of whether those proclamations would be known to them.

Plaintiffs also ask this Court to look to the merits of their claim to find they have standing based on their "unavoidable" exposure to the proclamations. Ans. Br. at 26. But Plaintiffs had no specific contact with the proclamations beyond a vague reference to media coverage. CD p. 166. In any event, Colorado courts do not look to the merits of a claim (as these facts would require) when determining standing. *Wimberly*, 570 P.2d at 539.

If Plaintiffs' theory of citizen standing were correct then any citizen would have standing to challenge any government action as being unconstitutional and the claimed unconstitutionality itself would be sufficient to show an injury for standing purposes. This would

eliminate the requirement that a plaintiff suffer an injury-in-fact. Such an unprecedented ruling would expand Colorado standing law far beyond any of this court's prior cases.

III. Colorado standing should expressly adopt federal standing limits.

Colorado courts have long looked to federal standing cases as persuasive authority when determining the contours of the state's own standing requirements. The seminal case of *Wimberly* adopted its two-prong standing test from a then-recent U.S. Supreme Court case. 570 P.2d at 538 (following *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970)). The *Dodge* decision, first crystallizing taxpayer standing as a unique doctrine in Colorado, likewise looked to U.S. Supreme Court authority. 600 P.2d at 72 (citing *Flast v. Cohen*, 392 U.S. 83 (1968).

The United States Supreme Court's holding in *Hein v. Freedom From Religion Foundation* provides a compelling reason to clarify Colorado's taxpayers standing doctrine under the Preference Clause (analogous to the Establishment Clause at issue in *Hein*) as not

conferring standing for challenges to executive branch action. 551 U.S. 587 (2007). The Answer Brief completely ignored this decision. Such oversight could hardly have been unintentional as Plaintiff Freedom From Religion Foundation in this case was also the plaintiff in *Hein*.[1]

As in this case, Freedom From Religion Foundation (and its members) challenged executive branch action as sending the message that non-religious citizens are outsiders. *Compare* CD p.124; *with* 551 U.S. at 595. In fact, the case in *Hein* was even stronger as the record

---

[1] The *Amicus* brief of the Humanist Association does address *Hein* at the very end of the brief. (Amicus Br. p.35). Counter-intuitively, it raises the concurring opinion of Justices Scalia and Thomas as somehow undermining the persuasive value of the case. That those justices would adopt an even more limited taxpayer standing rule, however, does not undermine the force of the majority opinion. Likewise the citation-dump footnote of commentators who have criticized *Hein*, Humanist Amicus Br. at 36, n.37, cannot be given much weight. An equal or greater number of seemingly-random law review citations could easily be produced to criticize any given Supreme Court standing case, or to praise *Hein* itself. In fact, at least one of the sources cited actually supports the Governor's position that standing should not extend to taxpayers broadly; the opposite conclusion from the general background section cited in the footnote. *Compare* Jonathan H. Adler, *God, Gaia, the Taxpayer, and the Lorax: Standing, Justiciability, and Separation of Powers After* Massachusetts *and* Hein, 20 REGENT U.L.REV. 175, 197 (2008) ("In my view, the urgency of environmental concerns or the importance of the Establishment Clause do not justify transgressing the traditional bounds of Article III.); *with Ans. Br. n.37* (citing same at 187 as "calling *Hein* 'irrational'", when article was actually describing precedent *prior to Hein* as "irrational").

reflected executive branch expenditures, but the Supreme Court found the lack of any congressional appropriation to be fatal. This case lacks both an appropriation and expenditure. All the policy reasons supporting the result in *Hein* thus apply with greater force here.

In addition to the reasons given by the U.S. Supreme Court for avoiding generalized claims of taxpayer standing the Plaintiffs in this case ask the judicial branch to issue relief purporting to restrain all future Colorado Governors from engaging in certain speech. 2012 COA 81, ¶143. Such an injunction would be a prior restraint of speech and in tension with the respect for separation of powers between the judiciary and the executive.

Since this Court decided *Dodge* in 1979, Colorado has experimented with a taxpayer standing doctrine that many have considered to be easier to meet than federal taxpayer standing. Justice Dubofski's concurrence in *Dodge* questioned the prudence of this departure from persuasive federal precedent:

> I believe that the majority opinion in this case also 'has no boundaries.' Giving every citizen or taxpayer standing to litigate his personal views of constitutionality, legality or the public

> interest 'would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.' 600 P.2d at 383 (Dubofsky, J., specially concurring) (internal citation omitted).

Likewise, in *Barber*, the most recent taxpayer standing case, three Justices concurred and again called into question the prudence of recognizing taxpayer standing to be more broadly available than taxpayer standing in the federal courts:

> The majority …. stretches the concept of standing so far that, after today, virtually *any* taxpayer can bring *any* claim alleging that a government entity has acted in an unconstitutional manner. Such generalized grievances about government operations do not constitute a controversy to be decided by the judiciary, but rather should be directed to the General Assembly or the executive branch. 196 P.3d at 254 (Eid, J., concurring in the judgment) (emphasis original)

These bookends of concern have now become manifest. This case, again, asks this Court to contemplate the continued vitality of allowing taxpayers to challenge government action based on nonexistent personal injury. Taxpayer standing is an exception to the general rule that generalized grievances are either not justiciable (the federal rule), or limited to the Governor and General Assembly, at the discretion of

this Court (the Colorado rule). This Court should apply the rule to the increasingly generalized taxpayer disputes and align Colorado with the federal rule. This clarification of standing law, even if a change, would be a welcomed development in the doctrine of taxpayer standing in Colorado courts. The alternative is to embrace 'governance by injunction,' which is precisely what Plaintiffs seek in this case.

IV. The Challenged Proclamations Comply with the Preference Clause of the Colorado Constitution.

A. The plain text and purpose of the Preference Clause allow for honorary prayer proclamations.

The Governor argues for a straightforward application of the plain meaning of the text of the Preference Clause. Plaintiffs ignored this analysis, instead noting "the Preference Clause of the Colorado Constitution is construed like the Establishment Clause of the First Amendment…" Ans. Br. at 28.[2] Before looking to persuasive federal

[2] Unlike Plaintiffs, the *ACLU* amicus brief addressed at length the issue of looking to the plain text independent of federal Establishment Clause precedent. It largely agreed with the Governor on the need to look at the "text and purpose," Amicus Br. at 21, it even calls for this Court to avoid *Lemon*, "we contend that *Lemon* should not be the principal guiding rule for construing the Preference Clause." *Id.* At 25.

precedent, this Court should apply the plain text of the Preference Clause. This Court can thus avoid wading into the Establishment Clause thicket and simply resolve this case under the plain text of the Preference Clause.

Plaintiffs' case cannot survive a serious application of the plain meaning of the Preference Clause. First, there is no [1] "law" at issue. Plaintiffs do not argue otherwise. The ACLU amicus argues, inconsistent with its overall request for an independent state constitutional analysis, that prior court cases have applied the Preference Clause to government actions falling short of the plain meaning of "law." That may be so, but it does not justify continuing the application in situations that do not involve the government giving, "by law," a preference. In particular here, the challenged government action merely allows religious and non-religious groups to have equal treatment with others. Without the force of law, the challenged proclamations lack the same risk of coercion or establishment of religion common to other Preference Clause cases.

Second, the Plaintiffs have not shown how the Governor's practice of issuing hundreds of honorary proclamations a year gives a [2] "preference" to a [3] "religious denomination or mode of worship." As the Governor argued, the constitutional concept of "preference" in the Colorado Constitution requires more than a showing of equal treatment whereby religious and nonreligious groups are both given access to a form of government acknowledgement.

Regarding the third Preference Clause requirement, *amici* point to the presence of scripture references in the challenged proclamations, and the nature of prayer, as showing a preference of a "mode of worship." In essence, *amici* argue prayer in any form is a "mode of worship" and thus the challenged proclamations violate the clause.

On the contrary, the undisputed context of how the Governor's office issues honorary proclamations show how there is no "preference" being granted. It is not as if the Governor has a policy of accepting only requests for religious proclamations, or that the proclamations require "prayer" and prohibit "meditation."

In addition, the "mode of worship" in the Preference Clause does not mean that any government acknowledgement of prayer or citation of a bible verse is unconstitutional, as Plaintiffs and their amici seem to suggest. While this Court has never fully explored the meaning of "mode of worship," it did declare in a perfunctory manner that reading the scriptures in public schools is not a "mode of worship" supporting an established church. *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927), *overruled other grounds*, *Conrad v. City and County of Denver*, 656 P.2d 662, 670 n.6 (Colo. 1982) ("Conrad I").

Rather than barring any passing citation to the Bible, the better understanding of the Preference Clause text is that adopting a specific form of liturgy by law, as England did with the adopting of the Book of Common Prayer, would be giving a "preference" to a "mode of worship." *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2104, 2112-13 (2003) (reviewing adoption of form of liturgy as element of establishment in England). In fact, rejected proposals for use of "mode of worship" in the federal Constitution are considered to be

narrow rule, implying that Congress would have retained authority over other aspects of establishment. *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 559 (2011).

In short, the fact that prayer is part of traditional religious activity does not prove that a prayer proclamation, formal or honorary, is a legal preference of a particular mode of worship. The challenged proclamations do not legally exclude forms of prayer, as was the case with the established church across the Atlantic. Whatever their wisdom, the practice of issuing honorary proclamations, even rarely about a prayer, does not transgress the text or purpose of the Preference Clause.

B. The challenged proclamations are constitutional under *Marsh v. Chambers*.

The Governor has argued for the application of *Marsh v. Chambers* as the best federal precedent to follow in this case. 463 U.S. 783 (1982). Despite being the most closely analogous federal Establishment Clause case, Plaintiffs treat *Marsh* as an inconvenient

case not worthy of mention until nearly the end of the Answer Brief, p.38. Plaintiffs' main argument against *Marsh* is to distinguish the case on its facts, claiming the "pedigree of antiquity" in that case differs from the challenged proclamations. The Answer Brief lacks any substantial analysis of the long history of formal prayer proclamations, as discussed in the Opening Brief. Instead, Plaintiffs continue to insist on the narrowest possible analysis of the challenged proclamations, treating them as being new to Colorado in 2004.[3] This misses the point.

Executives in Colorado have a long history, going back to the time of the adoption of the Colorado Constitution, of issuing prayer proclamations. The framers of the Colorado Constitution presumably must have viewed these practices as not violating the Preference Clause. It would be an anomaly if openly exhortative prayer proclamations, the historical practice in Colorado, were constitutional,

[3] Ironically, Plaintiffs want an extremely specific factual context to overcome *Marsh*, but then argue for the broadest possible factual context, dwelling at length on the personalities and beliefs of the National Day of Prayer Task Force, to try and show a violation under *Lemon*.

but the benign by comparison honorary proclamations were unconstitutional.

Plaintiffs also offer a disputed interpretation of a few Founders' views of prayer proclamations as undermining the strength of *Marsh*. This too misses the mark in Colorado. What is relevant is the practice and views of the authors of the Colorado Constitution, not the purported view of Thomas Jefferson. By applying the analysis of *Marsh* this Court need not take a position on the various views and practices of the U.S. Presidents. In particular, the practice of Andrew Jackson, Answer Brief at 42, says nothing about the intention of the Founders of the U.S. Constitution and even less about the authors of the Colorado Constitution. The history of public prayer at the time of adoption of the Colorado Constitution remains essentially unrebutted.

Finally, Plaintiffs make much of a footnote in *Allegheny County v. ACLU* when the Court, addressing a dispute with the dissent over the role of *Marsh* in Establishment Clause cases, noted that the National Day of Prayer "could well be distinguished" from the legislative prayer at issue in *Marsh*. 492 U.S. 573, 603 n.53 (1989). Plaintiffs want this

Court to understand the footnote as undermining the Governor's prayer proclamations. Of note, however, Plaintiffs quoted every word of footnote 52, save for the last sentence. That omitted sentence is telling: "But, as this practice [proclaiming the National Day of Prayer] is not before us, we express no judgment about its constitutionality." Also, at the federal level the National Day of Prayer is governed by a statute, 36 U.S.C. § 119, and thus it involves a higher degree of formal government involvement. In any event, the dispute in *Allegheny County* over the scope of *Marsh* has little to do with the reasons for this Court to look to *Marsh* as opposed to *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Supreme Court in *Allegheny County* simply continued to follow the *Lemon* line of cases in a similar factual circumstance. That case challenged the display of a crèche, the very same scenario addressed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), a decision following *Lemon*. This is simply not a crèche case.

This case involves government conduct relating to prayer. The challenged prayer proclamations are more like the prayer at issue in *Marsh* than like the display of a crèche in *Allegheny County*. Prayer

proclamations, like legislative prayer, do not transgress the non-establishment values of the federal or Colorado constitution.

C. The challenged proclamations are constitutional under *Lemon v. Kurtzman*.

In any event, the challenged proclamations comply with the various progeny of *Lemon* and its well-known three-prongs of analysis. (The third prong of analysis is no long an issue as Plaintiffs have not claimed any excessive entanglement.)

As to the first prong, Plaintiffs argue the proclamations lack a secular purpose, and thus have an impermissible religious purpose. The Governor pointed to the District Court's finding of the general, secular purpose, as well as the cases which clarify that challenged actions can have some religious purpose, so long as the predominant purpose is not advancing religion. Opening Br. at 37. The honorary proclamations at issue are not an exhortation to pray. They are simply an acknowledgement of the historic role of religion and the fact that some citizens will pray on a certain day. In fact, when the Governor's office issues an honorary proclamation on nearly every day of the year, as the

record reflects, it is not "implausible and far-fetched," Ans. Br. at 28, to believe the practice of issuing honorary proclamations is indeed secular and benign.

On the often-dispositive second prong of analysis, the Governor explained how the challenged proclamations do not endorse religion and do not have the effect of advancing religion over nonreligion. Plaintiffs have little answer to the nature of honorary proclamations in general. The reality of hundreds of honorary proclamations a year being issued, year after year, is too inconvenient to be acknowledged, let alone answered, by Plaintiffs. The most they can muster is to speculate that a governor would not "issue a proclamation of racial invective … even if a private party requested such a proclamation." Ans. Br. at 32. While undoubtedly true, this is beside the point. The reasonable observer would know about the ubiquity of honorary proclamations and would accordingly understand the challenged proclamations here as merely reflecting a practice of equal access whereby the Governor liberally issues such proclamations upon request.

Plaintiffs continue to misrepresent Establishment Clause precedent in an effort to shore up their case under *Lemon*. For example, Plaintiffs quote a Tenth Circuit case, *Utah Gospel Mission v. Salk Lake City*, 425 F.3d 1249, 1260 (10th Cir. 2005) as showing that "symbolic benefit to religion is enough" presumably to violate the constitution. Ans. Br. at 30. *Utah Gospel Mission*, however, squarely rejected the alleged "symbolic" endorsement claim. *Id.* Digging deeper, the underlying "symbolic" case being quoted, *Friedman v. Board of County Commissioners*, 781 F.2d 777, 781 (10th Cir. 1985) rejected, over multiple dissents, a county seal that featured a cross and motto. That case has been undermined by more recent Tenth Circuit precedent which upheld a different city seal in New Mexico which featured three crosses. S*ee Weinbaum v. Las Cruces*, 541 F.3d 1017, 1025 (10th Cir. 2008). And in any event, the precedent does not show that government conduct merely referencing religion or citing the bible is enough to violate the Preference Clause.

The *Utah Gospel Mission* decision is more to the point in this regard. Government programs akin to "equal access" are not

unconstitutional simply because they allow churches to advance religion. 425 F.3d at 1260. As the Supreme Court has explained, *Lemon* only prohibits activity where "the government itself has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987). Plaintiffs have not made such a showing. Plaintiffs can only prevail if this court adopts an extreme view of the Preference Clause that would involve this court in striking down many government actions that have been found to be constitutional.

As a good example, Plaintiffs sum up the endorsement analysis by asserting that the challenged proclamations are "every bit as offensive to the Preference Clause as a Christian nativity display[] at Christmas time …" Answer Br. at 34. But this Court carefully examined a crèche, displayed in Denver at Christmas, and found that it did *not* violate the Preference Clause. *See Conrad v. Denver*, 724 P.2d 1309, 1310 (Colo. 1986) ("Conrad II"). It is telling that Plaintiffs' legal arguments would, evidently, lead to the opposite result. That Plaintiffs are offended with

government conduct, as the plaintiffs were in *Conrad*, is not enough to show a violation of the Colorado Constitution.

The Preference Clause, even glossed with the endorsement test and the *Lemon* prongs of analysis, does not support Plaintiffs' desire to prevent Colorado Governor's from issuing the challenged proclamations.

CONCLUSION

Based on the foregoing reasons and authority the Governor respectfully requests that this Court reverse the court of appeals.

Respectfully submitted this 20th day of December, 2013

JOHN W. SUTHERS
Attorney General

/s/ _Michael Francisco_____
DANIEL D. DOMENICO
Solicitor General
MICHAEL L. FRANCISCO
Assistant Solicitor General
MATTHEW D. GROVE
Assistant Attorney General
Office of the Colo. Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6000

Attorneys for Petitioners John Hickenlooper and the State of Colorado

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within REPLY BRIEF upon all parties in the manner indicated this 20th day of December, 2013, addressed as follows:

Respondents' Counsel via email: rbolton@boardmanclark.com

Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
Box 927
Madison, WI 53701-0927

Respondents' Counsel via ICCES

Daniele W. Bonifazi
John H. Inderwish
6377 S. Revere Parkway #400
Centennial, CO 80111

/s/ Michael Francisco

DATE FILED: December 20, 2013 2:33 PM

Reply Brief - Appendix A

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80523 Phone Number: (720) 865-8301	DATE FILED: December 13, 2013 4:18 PM FILING ID: D834946C928C2 CASE NUMBER: 2013CV33879
Plaintiffs: Rocky Mountain Gun Owners, a Colorado nonprofit corporation, National Association for Gun Rights, Inc., a Virginia non-profit corporation, John A. Sternberg, and DV-S, LLC, a Colorado limited liability company d/b/a Alpine Arms Defendant: John W. Hickenlooper, in his official capacity as Governor of the State of Colorado	▲ COURT USE ONLY ▲
Barry K. Arrington, #16,486 Arrington Law Firm 7340 East Caley Avenue, Suite 360 Centennial, Colorado 80111 Phone Number: (303) 205-7870 FAX Number: (303) 463-0410 E-mail: barry@arringtonpc.com Attorney for Plaintiffs	Case Number: 2013CV33879 Division 203
RESPONSE TO MOTION TO DISMISS	

Plaintiffs submit the following response in opposition to defendant's motion to dismiss the First Amended Complaint. Defendant has moved to dismiss pursuant to C.R.C.P. 12(b)(1) for lack of standing and C.R.C.P. 12(b)(5) for failure to state a claim upon which relief may be granted.

I. RESPONSE TO RULE 12(b)(1) MOTION

A. Standard of Review

To have either taxpayer or general standing in Colorado, the plaintiff must show he has suffered (1) an injury-in-fact to (2) a legally protected interest. *Wimberly v. Ettenberg*, 194 Colo. 163, 166, 570 P.2d 535, 538 (1977). Unlike the narrower federal

test for standing, plaintiffs in Colorado benefit from a relatively broad definition of the concept. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) ("Although necessary, the test [for standing] in Colorado has traditionally been relatively easy to satisfy."); *Boulder Valley Sch. Dist. RE-2 v. Colorado State Bd. of Educ.*, 217 P.3d 918, 923 (Colo. App. 2009).

To assess the injury-in-fact issue, a court accepts a plaintiff's allegations set forth in a complaint as true. *Ainscough*, 90 P.3d at 857. The injury may be tangible, such as economic or physical harm. *Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n*, 620 P.2d 1051, 1058 (Colo. 1980). The injury may also be intangible, such as a deprivation of a legally created right or the "interest in ensuring that governmental units conform to the state constitution." *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008) (*quoting Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 866 (Colo. 1995)).

The second prong -- a legally protected interest -- is satisfied when the plaintiff has a claim for relief under the Constitution, the common law, a statute, or a rule or regulation. *Ainscough*, 90 P.3d at 856. Like the injury-in-fact, the legally protected interest may be tangible, such as an interest arising out of property, a contract, or a statute which confers a privilege. *Wimberly*, 194 Colo. at 166, 570 P.2d at 537. The legally protected interest may also be intangible, such as an interest in free speech, or "an interest in having a government that acts within the boundaries of our state constitution." *Ainscough*, 90 P.3d at 856.

In the context of Colorado taxpayers bringing actions in which they allege the government has failed to conform to the Colorado Constitution, taxpayer standing is extremely broad. Indeed, "**When a plaintiff-taxpayer alleges that a government**

action violates a specific constitutional provision, such an averment satisfies the two-step standing analysis." *Boulder Valley Sch. Dist. RE-2,* 217 P.3d at 924 (emphasis added). The first prong of the *Wimberly* test requiring an injury-in-fact is satisfied by a generalized complaint that the government is not conforming to the state constitution. *Id*. This necessarily satisfies the second prong of the *Wimberly* test because the claim arises out of a legally protected interest under the constitution. *Id*. Thus, the supreme court has interpreted *Wimberly* to confer standing any time a plaintiff alleges that a governmental action that harms him is unconstitutional. *Barber,* 196 P.3d at 246 (*quoting Ainscough*, 90 P.3d at 856).

In *Hotaling v. Hickenlooper,* 275 P.3d 723, 726 (Colo.App. 2011), the court held there must be some "nexus" between the plaintiff's status as a taxpayer and the challenged governmental action. *Id*. However, the nexus can be exceedingly slight, as the Colorado Court of Appeals noted only a few months ago in *Freedom from Religion Foundation, Inc. v. Hickenlooper*, __P.3d __ (Colo.App. 2012) [2012 *Colo.App. LEXIS* 741], *writ of certiorari granted* (2013) (hereinafter "*Freedom from Religion*"), a case in which the court analyzed extensively the same standing issues implicated in this matter.

In *Freedom from Religion*, Colorado taxpayers brought an action under the Preference Clause of the Colorado Constitution seeking to enjoin Governor Hickenlooper from continuing his practice of issuing an annual honorary proclamation declaring the first Thursday of May to be the Colorado Day of Prayer. The governor argued that the taxpayers lacked standing to bring the claim. The court rejected the governor's argument and held that the taxpayers did have standing to bring the constitutional challenge.

The court noted that in *Conrad v. City & County of Denver*, 656 P.2d 662, 668 (Colo. 1982), the supreme court held that taxpayers had standing to bring a claim against the City and County of Denver for the use of municipal funds for the display and storage of a religious crèche. Although the economic injury was indirect and difficult to quantify, the court found it was sufficient for standing purposes. *Freedom from Religion*.

The court then analyzed whether the taxpayers had standing under the *Wimberly* two-prong test. It found that the following minimal expenditures met the test:

> °materials and supplies to create the paper proclamations for the National Day of Prayer Task Force and for any person who subsequently requested a copy;
>
> °postal expenses for mailing the proclamations to the National Day of Prayer Task Force and to any person who subsequently requested a copy;
>
> °space on the computer server used to store the electronic copy of the proclamation;
>
> °salaried members of the Governor's office who, as part of their duties, received, processed, created, and distributed the proclamations; and
>
> °the cost of security to protect the Governor during his attendance at the 2007 Colorado Day of Prayer event on the Capitol Steps.

Id.

The court stated:

> **Although these expenses may be 'at best indirect and very difficult to quantify,' they are sufficient to demonstrate a tangible injury-in fact**.
>
> In addition, the taxpayers claim an intangible injury-in-fact to their interest as taxpayers in having a government that does not promote religion in a manner contrary to the Preference Clause. **An alleged governmental violation of the Constitution is an injury-in-fact sufficient for a plaintiff to have standing in Colorado.**

> Second, the taxpayers' claim is based on a legally protected interest because it arises under the Colorado Constitution.
>
> We conclude that there is a nexus between the taxpayers and the governmental action of issuing the Colorado Day of Prayer proclamations. As discussed above, the record shows that, although the exact amount is not clear, the Governor spent state funds each year in order to issue the proclamation**. Such a nexus, though slight, is sufficient for standing in Colorado.** . . . This leads us to further conclude that the taxpayers suffered an injury-in-fact to a legally protected interest. Therefore, we ultimately conclude that the taxpayers may bring this claim.

Id. (emphasis added; internal citations omitted).

Thus, defendant's suggestion on page 6 of his motion that plaintiffs must claim that their tax burden will increase as a result of the new laws or that their personal tax dollars have been expended to enforce the statutes in order to sustain taxpayer standing is without support in the law.

B. Application of the *Wimberly* Test

In this case, plaintiffs clearly meet the Wimberly two-prong test for standing. First, they have alleged both tangible and intangible injury-in-fact. Plaintiffs' tangible and intangible injuries include:

1. The deprivation of their right to due process under Article II, Section 25 of the Colorado Constitution by placing in the hands of a private third party complete and unfettered discretion concerning whether they may engage in a lawful transfer of their firearms. Complaint, paragraphs 18-24.

2. Deprivation of their "interest in ensuring that governmental units conform to the state constitution" in that the statutory scheme created by HB 1229 constitutes an unconstitutional delegation of executive and legislative power. Complaint, paragraphs 25-27.

3. A burden on their right to keep and bear arms that violates Article II, Section 13 of the Colorado Constitution by making the private transfer of firearms subject to the absolute, unfettered and unreviewable discretion of third parties. Complaint, paragraphs 28-35.

4. A burden on their right to keep and bear arms that violates Article II, Section 13 of the Colorado Constitution due to a ban on certain ammunition magazines that effectively bans many of the firearms they own. Complaint, paragraphs 36-47.

5. A burden on their right to keep and bear arms that violates Article II, Section 13 of the Colorado Constitution due to the fact that the statute's "continuous possession" requirements make it impossible for plaintiffs to use or share their firearms in ordinary and innocent ways. Complaint, paragraphs 36-47.

Second, plaintiffs' claims are based on a legally protected interest because they arise under the Colorado Constitution. *Freedom from Religion*, *supra*.

Thus, both parts of the test are met, and plaintiffs have standing to pursue their claims. Defendant might object on the ground that under this formulation standing has accrued merely by plaintiffs' allegations that the government has violated the state constitution. The Supreme Court anticipated this criticism and addressed it in *Barber*:

> **We acknowledge that this reasoning may appear to collapse the *Wimberley* two-part test into a single inquiry as to whether the plaintiff-taxpayer has averred a violation of a specific constitutional provision**. However, Colorado case law requires us to hold that when a plaintiff-taxpayer alleges that a government action violates a specific constitutional provision such as Amendment 1, such an averment satisfies the two-step standing analysis.

Barber v. Ritter, 196 P.3d 238, 246-47 (Colo. 2008) (internal citations and quotations omitted; emphasis added).

Finally, with respect to the required ever so slight nexus between plaintiffs' claims and their standing as taxpayers, defendant states that plaintiffs have not made any allegations about funds required by or expended on the two laws being challenged. This is simply not true. Paragraph 5 of the complaint states:

> 5. Plaintiffs and/or their members pay taxes in the State of Colorado. **Defendant seeks to expend state funds to enforce statutes that are, as set forth in detail below, contrary to the Constitution of the State of Colorado**. Plaintiffs and/or their members have therefore suffered [] an injury-in-fact because they seek review of what they claim are unlawful government expenditures which are contrary to Colorado's state government. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008).

(Emphasis added)

Importantly, plaintiffs' allegation that defendant will expend public funds to enforce unconstitutional statutes stands unrebutted. Therefore, it must be accepted as true. *Ainscough*, 90 P.3d at 857. Accordingly, contrary to defendant's assertion, plaintiffs have established the "nexus" between defendant's unconstitutional conduct and plaintiffs' status as taxpayers.

Finally, two of the plaintiffs (Rocky Mountain Gun Owners and National Association for Gun Rights, Inc.) are organizations rather than individuals. If, however, the individual plaintiffs have standing, it is not necessary to address the organizations' standing separately since they alleged the same claims. In *Freedom from Religion* the court stated:

> We need not further decide whether [Freedom from Religion Foundation, Inc.] has standing because it raises claims that are identical to the taxpayers' claims. See *Lobato [v. State*, 218 P.3d 358, 368 (Colo. 2009] ("Because we have subject matter jurisdiction due to the standing of [some of the plaintiffs], it is not necessary to address the standing of parties bringing the same claims as parties with standing."). Thus, FFRF may continue as a plaintiff in this case.

In summary, plaintiffs have met the *Wimberly* test and have standing to bring the claims set forth in their complaint.

II. RESPONSE TO RULE 12(b)(5) MOTION

A. Standard of Review

Defendant has also moved to dismiss the complaint pursuant to C.R.C.P. 12(b)(5) for failure to state a claim. Thus, he bears a very heavy burden of persuasion, because dismissal of a complaint pursuant to Rule 12(b)(5) is a disfavored remedy to be granted very rarely and only under the most extraordinary of circumstances. In *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995), the Supreme Court summarized the rules governing review of such a motion:

> **We view with disfavor a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim and uphold a trial court's grant of such a motion only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief**. We . . . accept all averments of material fact contained in the complaint as true. C.R.C.P. 12(b)(5) motions are rarely granted under our notice pleadings. Under our standard of review, allegations in the complaint must be viewed in the light most favorable to the plaintiff. Also, it is fundamental that, in passing upon a motion to dismiss a complaint, the court can consider only matters stated therein and must not go beyond the confines of the pleading. The chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of plaintiff's claims. Such a complaint should not be dismissed on motion for failure to state a claim so long as the pleader is entitled to some relief upon any theory of the law.

Id., 908 P.2d at 1098 (emphasis added; internal citations and quotation marks omitted).

As set forth in detail below, defendant has fallen well short of meeting his burden of demonstrating "beyond doubt" that plaintiffs can demonstrate "no set of facts" in support of their claims.

B. The Statute Violates Plaintiffs' State Constitution Due Process Rights

Paragraphs 18 through 24 of the complaint state a claim for deprivation of plaintiffs' due process rights protected by Article II, Section 25 of the Colorado Constitution. Specifically, the complaint states that pursuant to subsection C.R.S. § 18-12-112(a), before completing a transfer of a firearm, a transferor "shall require that a background check . . . be conducted," as if a private transferor has the authority to "require" such a check to be conducted on his behalf. Obviously, a private transferor has no such authority. Complaint, paragraph 19.

Only a federally-licensed firearms dealer ("FFL") may conduct the required background check, but no FFL is required by law to perform this service for any private transferor. Complaint, paragraph 20. Neither the transferor nor the transferee has any authority to require any FFL to perform the check. *Id.* Nor is any governmental official authorized to require any FFL to conduct the required check. *Id.* Nor is there any penalty imposed on any FFL who declines to accommodate any covered firearms transfer. *Id.* Nor is there any process for review of an FFL's decision to refuse to complete the required check. *Id.*

Not only does the statutory scheme impose no duty on any FFL to perform the required check, it actually creates substantial disincentives for FFLs to conduct the check. Complaint, paragraph 21. Any FFL who chooses to provide such an accommodation may not charge a fee commensurate with the value of its services, because HB 1229 caps any such fee at $10. *Id.* Moreover, HB 1229 requires FFLs to comply with all state and federal requirements, as if they were selling a firearm out of their own inventory. *Id.*

Thus, FFLs are put at risk of noncompliance with laws that could result in substantial criminal penalties and the loss of their license — all for a meager $10 fee. *Id.*

Additionally, there is nothing in HB 1229 that would prohibit an FFL from arbitrarily denying the check service to one person and granting it to another. Complaint, paragraph 22. Under the statute an FFL has complete discretion to grant or to deny such assistance. *Id.* Moreover, an FFL can set whatever non-monetary terms it wishes to complete the check. For example, it may provide assistance only to transferors who are regular customers or require parties to buy items from its inventory as a condition of performing the check. *Id.*

In summary, under the statutory scheme, firearms transferors and transferees must depend absolutely on a private third party in order to effect a lawful firearms transfer, and if they fail to effect a legal transfer they are subject to criminal liability and punishments. Yet that third party – the FFL – has complete and unfettered discretion to deny the requested check. Complaint, paragraph 23.

"Criminal liability and punishments should not be predicated upon a third party's unfettered discretion." *People v. Vinnola*, 494 P.2d 826, 831 (Colo. 1972). Such discretion is at odds with constitutional due process. *Id*. *Heninger v. Charnes*, 200 Colo. 194, 613 P.2d 884, 886 (Colo. 1980) (Article II, Section 25 incorporates equal protection). Accordingly, HB 1229 violates the Due Process Provision of Article II, Section 25 of the Colorado Constitution.

Defendant responds by asserting that the mere presence of a third-party mechanism for accessing government background checks is not problematic. Motion, p. 11. Defendant seems to be implying that since a government employee is the

one doing the actual check against the database, plaintiffs have no reason to complain. A significant problem with defendant's argument is that it focuses on the background check itself. Defendant fails to address the issue raised by plaintiff, i.e., that a private third party has unfettered discretion whether to allow him **access** to that governmental background check. If plaintiffs were able to access the background check directly, they would have a remedy. The government agent tasked with performing the check would have a statutory duty to perform it for all persons who requested it, and if he failed to do so plaintiffs would have a right to compel him to do so under C.R.C.P. 106. In contrast, if an FFL refuses – for whatever reason – to submit the paperwork to the government for a background check, plaintiffs have no remedy. There is no statutory provision requiring any FFL to submit such background check requests. The effect of this provision, therefore, is to make the legality of plaintiffs' firearms transfers depend on the whim of a private third party who is accountable to no one.

The following sentence from defendant's motion is especially telling: "It is entirely within the control of the parties transferring the firearm to either obtain a valid background check *prior to the transfer*, or to simply not engage in the transfer." That is exactly correct. Those are plaintiffs' options. Get a private unaccountable third-party to allow them legally to exercise their constitutional rights or forego exercising their constitutional rights unless they also want to become a criminal in the process. Forcing that choice on plaintiffs violates their right to due process guaranteed by the Colorado Constitution.

Defendant blithely suggests that if FFL A refuses to perform the background check, FFL B will. That is a factual allegation disguised as a legal argument, and as such

it is inappropriate for defendant to raise it as part of his motion to dismiss. *Abts v. Board of Education*, 622 P.2d 518, 522 (Colo. 1980) (on motion to dismiss court may consider only those matters raised within four corners of complaint). If, at a later stage in the litigation, defendant is prepared to demonstrate that FFLs all over the state are prepared to risk their licenses for $10.00, he will have an opportunity to do so. At this stage of the litigation, plaintiffs' factual allegation – i.e., that FFLs are not eager to perform these checks and indeed have disincentives to do so – must be accepted as true. *Rosenthal v. Dean Witter Reynolds, Inc, supra.*

C. HB 1229 Constitutes an Unconstitutional Delegation of Executive Authority and an Unconstitutional Delegation of Legislative Authority.

Paragraphs 26 and 27 of the complaint set forth a claim that HB 1229 constitutes an unconstitutional delegation of executive authority and an unconstitutional delegation of legislative authority. First, defendant renews his standing objection by claiming that plaintiffs have suffered no injury-in-fact as a result of these unconstitutional delegations. In making this argument, defendant ignores that fact that the supreme court has held that an injury may be intangible, such as a deprivation of the plaintiffs' "interest in ensuring that governmental units conform to the state constitution." *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008).

Turning to merits of the claim, the complaint alleges that the General Assembly could have established direct access to the CBI by private firearms transferors, thus guaranteeing equal and fair access. Complaint, paragraph 26. Instead, the legislature has chosen to substitute FFLs as intermediate agents to administer the law at no cost to the state. *Id*. In so doing, it has unconstitutionally delegated executive power to FFLs, empowering them to take care – if they choose to perform checks – that the provisions of

HB 1229 are faithfully executed. *Id*. This is a power vested in, and the duty assigned to, the governor by Article IV, Section 2 of the Colorado Constitution. *Id*. Accordingly, HB 1229 violates the executive powers provision of Article IV, Section 2 of the Colorado Constitution, and plaintiffs have stated a claim.

Defendant argues that HB 1299 does not constitute an unconstitutional delegation of executive power. He rests this argument on the following proposition: "Beyond the ministerial acts of confirming identity and communicating the information provided by the buyer of Form 4473, the FFL **has no substantive role**." Motion, p. 14 (emphasis added). This assertion is not true and ignores the thrust of plaintiffs' allegations. Far from having "no substantive role," the FFL has an enormous substantive role, because the process cannot be commenced at all unless he consents. An FFL has unlimited discretion to deny any prospective transferor access to the necessary background check. It is difficult to understand why defendant believes this constitutes "no substantive role" in the process.

HB 1229 also unconstitutionally vests legislative power in Colorado FFLs, contrary to Article V, Section 1 of the Colorado Constitution which vests all legislative powers in "the general assembly consisting of a senate and a house of representatives, both to be elected by the people." Complaint, paragraph 27. Under HB 1229, an FFL has absolute discretion to decide whether it would be in the "public good" to assist any proposed transfer of a firearm, without any policy constraint or standards specified by the General Assembly. *Id*. Such unrestrained discretion may not be delegated. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 420-21 (1935). It is for the legislature — not for private entities such as a FFLs — to dictate policy and to set standards governing whether

any proposed firearms transfer should be submitted to a criminal background check. *See Colorado Auto & Truck Wreckers Ass'n. v. Dept. of Revenue*, 618 P.2d 646, 651 (Colo. 1980). Accordingly, HB 1229 violates the legislative powers provision of Article V, Section 1 of the Colorado Constitution, and plaintiffs have stated a claim.

Defendant cites *Swisher v. Brown*, 402 P.2d 621, 626 (Colo. 1965), for the proposition that the "legislature does not abdicate its function when it describes what job must be done, who must do it, and the scope of his authority." That is certainly true and that is exactly what the legislature has **not** done in this case. It has not declared:

1. What job must be done. Under HB 1229, no job "must" be done. Each FFL has absolute and unfettered discretion to bar a private firearms transferor from access to the background check for any reason or no reason.

2. Who must do it. Again, under the statute, no one "must" do anything.

3. The scope of authority. There is no limit whatsoever placed on the FFL's discretion.

Thus, the very case cited by defendant completely undermines his argument.

D. Several Provisions of the Colorado Constitution Provide Greater Protections to Civil Liberties than their Federal Counterparts.

The Colorado Supreme Court has held that various provisions of the Colorado constitution provide greater protection to civil liberties than their federal counterparts. *See, e.g., Bock v. Westminster Mall Co*., 819 P.2d 55, 59 (Colo. 1991) (free expression); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) (same); *People v. Ford*, 773 P.2d 1059 (Colo. 1989) (same); *Parrish v. Lamm*, 758 P.2d 1356, 1365 (Colo. 1988) (same); *People v. Seven Thirty-Five East Colfax, Inc*., 697 P.2d 348, 356 (Colo. 1985) (same); *People v. Berger*, 185 Colo. 85, 521 P.2d 1244 (1974) (same); *In Re*

Hearings Concerning Canon 35, 132 Colo. 591, 296 P.2d 465 (1956) (same); *Cooper v. People*, 13 Colo. 337, 22 P. 790 (1889) (same); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) (searches and seizures); *People v. Oates*, 698 P.2d 811, 818 (Colo. 1985) (same); *People v. Corr*, 682 P.2d 20, 27 (Colo. 1984) (same); *People v. Sporleder*, 666 P.2d 135, 139-40 (Colo. 1983) (same); and *Charnes v. DiGiacomo*, 200 Colo. 94, 98-100, 612 P.2d 1117, 1119-21 (1980) (same).

The Supreme Court has held that a court must engage in a partially factual inquiry to determine whether any particular provision of the Colorado Constitution affords greater protection to civil liberties than its federal counterpart. *Bock v. Westminster Mall Co*., 819 P.2d 55, 59 (Colo. 1991). In particular, the scope of the protection depends on the text of the provision in question and the history and traditions of the people of Colorado. *Id*. Because of the partially factual nature of the inquiry (i.e., an inquiry into the history and traditions of the people of Colorado), this issue cannot be resolved without a full factual record. Plaintiffs are prepared to develop that factual record with respect to Article II, Section 13 of the Colorado Constitution, but they obviously will have no opportunity to do so if their complaint is dismissed at this state of the litigation. In any event, the *Bock v. Westminster Mall Co*. question cannot be resolved without that factual record, which, in itself, is reason to deny defendant's motion to dismiss.

E. Article II, Section 13 of the Colorado Constitution Provides Greater Protections to Colorado Citizens' Right to Keep and Bear Arms then Does the Second Amendment.

Article II, Section 13 of the Colorado Constitution states in pertinent part: "The right of no person to keep and bear arms in defense of his home, person and property . . . shall be called in question . . ." A *Bock v. Westminster Mall Co*. analysis leads to the

conclusion that his provision provides greater protection to the right to keep and bear arms than does the federal Second Amendment.

First, the text provides a much more specific, and therefore greater protection to the right to keep and bear arms in defense of home, person and property than does the text of the Second Amendment. By enumerating broader areas of significance, the state provision protects a broader class of rights. Moreover, the Second Amendment states that the right to bear arms "shall not be infringed." Article II, Section 13 states that the right shall not even be called into question, much less infringed. Thus, the language of the state provision is clearly broader than the language of the federal provision. Finally, the reservation about concealed carry of firearms does not change this conclusion. The state free speech clause contains a similar reservation about the "abuse" of the freedom of speech. Nevertheless, as noted above, the Colorado Supreme Court has held that the earlier text in the provision provides greater rights than the First Amendment. *cf.*, *Diversified Management v. Denver Post*, 653 P.2d 1103, 1111 (Colo. 1982) (Erickson, J. dissenting) (majority's holding that Colorado Constitution provides broader protection ignores abuse restriction).

Turning to the second prong of the inquiry, i.e., the history and traditions of the people of Colorado, plaintiffs have alleged that Colorado was part of the old west. Complaint, paragraph 32. As such it has a strong libertarian history stretching back over 150 years insofar as firearms are concerned. *Id*. Thus, the history and traditions of the state also support the conclusion that the state constitution protects a broader class of rights than the Second Amendment. *Id*. At this stage of the litigation these factual allegations must be accepted as true.

Accordingly, both the text of the Colorado Constitution and the history and traditions of its people support the conclusion that Article II, Section 13 provides greater protections to the right to keep and bear arms than the Second Amendment to the federal constitution.[1]

Interestingly, defendant asserts instead of a vigorous protection of the fundamental right to keep and bear arms, the Colorado Supreme Court would apply "a low level of scrutiny." Incredibly, it appears that defendant believes Article II, Section 13 of the Colorado Constitution provides **less** protection to the right to keep and bear arms than the Second Amendment. If that is the case, Article II, Section 13 would be a dead letter, because the Second Amendment sets a floor for the scope of the right to keep and bear arms, and if the Colorado Constitution were interpreted to provide less protection than the Second Amendment, the Colorado Constitution would become irrelevant and play absolutely no role in protecting this fundamental right. As noted above, however, given the text of the provision and the history and traditions of the people of Colorado, it is difficult to imagine that the Colorado Supreme Court would hold that the state provision is a dead letter.

[1] Defendant points out that in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994), the Colorado Supreme Court did not address the issue of whether Article II, Section 13 provides greater protection to individual rights than the Second Amendment. That is certainly true and easily explained. In 1994 the United States Supreme Court had not yet held that the Second Amendment right to keep and bear arms applied to the states through the Fourteenth Amendment. The federal court did not make such a holding until 2010 in *McDonald v. Chicago*, __ U.S. __, 130 S.Ct. at 3047 (2010). Accordingly, in 1994 the Colorado court had no opportunity to consider whether the state provision protected a broader right than the federal provision, much less decide that issue.

F. *Robertson* Does Not Foreclose Plaintiffs' Third and Fourth Claims for Relief

1. *Robertson* Indirectly Affirms that Article II, Section 13 Provides for Greater Protection to the Right of Self-Defense than the Second Amendment

Defendant faults plaintiffs' assertion that Article II, Section 13 of (the Colorado Constitution provides a broader protection than its federal analogue, citing *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994). Motion, p. 15. Defendant is mistaken, however, because far from undermining the proposition that the Colorado Constitution provides greater protection than the United States Constitution to the right to keep and bear arms, *Robertson* provides unambiguous support for that proposition.

In *Robertson*, the Colorado Supreme Court discussed favorably the case of *People v. Ford*, 193 Colo. 459, 568 P.2d 26, 28 (1977), in which it had concluded that a flat prohibition on the right of certain felons to possess firearms was subject to the guarantee of Article II, section 13, and held that the constitution required recognition of an affirmative defense to the statute if a defendant shows that his purpose in possessing weapons was the defense of his home, person and property. *Robertson*, 874 P.2d at 329. In contrast, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court stated that there is nothing in its opinion that casts doubt on the longstanding prohibition on the possession of firearms by felons. *Id*., 554 U.S. at 626, 627 n. 26.

The *Robertson* court also affirmed that Article II, Section 13 of the Colorado Constitution secures to unnaturalized foreign born residents the right to keep and bear arms for self-defense. *Id*., 874 P.d at 328, *citing People v. Nakamura*, 99 Colo. 262, 62 P.2d 246 (1936). In contrast, the *Heller* court announced that the right to keep and bear

arms guarantee in the Second Amendment belongs only to Americans, i.e., "all members of the political community." *Id*. at 580-81. *cf. U.S. v. Carpio-Leon*, 701 f.3d 974 (4th Cir. 2012) (no right for illegal alien to possess firearm).

In light of these endorsements of higher protection, it ill behooves defendant to rely on the decision of the United States Court of Appeals for the District of Columbia in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*) which upheld the District's limits on magazine capacity. As the defendant acknowledged in his motion to dismiss, in *Heller II* the court applied a mild form of intermediate scrutiny to reach that conclusion, instead of applying the more detailed analysis and stringent rule of reasonableness and legitimacy employed in *Robertson*.

2. *Robertson* Does Not Apply a "Low Level" of Scrutiny to Firearms Regulations

Defendant has asserted that the Colorado Supreme Court has adopted an interpretation of the state's constitutional right to keep and bear arms that is highly deferential to the legislative exercise of its police power. Motion, p. 15. Defendant is mistaken. In *Robertson* the court held that the question in each case is whether the law at issue constitutes a **reasonable** exercise of the state's police power, in pursuit of a **legitimate** governmental interest. *Id*., 874 P.2d at 329, 331. Whether a statute or ordinance is reasonably related to a legitimate government interest, is a question for the court to decide in light of all of the facts and circumstances. *Id*., 874 P.2d at 331. Manifestly, "reasonableness" determinations must be made based on a fully developed factual record and are therefore inherently not amenable to resolution at the motion to dismiss stage.

Thus, in *Robertson,* it was for the court to decide based on a fully developed factual record whether the Denver assault weapon ban was reasonably related to legitimate health and safety needs of the community, or whether that ban unreasonably and illegitimately interfered with the use of firearms in the protection of home, person and property. In *Robertson,* after reviewing the record the court concluded that the unique characteristics of assault weapons coupled with the prevalent use of such weapons for criminal purposes posed a substantial threat to the health and safety of the citizens of Denver. *Id*., 874 P.2d at 332. Therefore, the court found that, because the ordinance applied to only a narrow class of weapons, carving out a small category of arms did not significantly interfere with the full exercise of the people's right to bear arms in self-defense. *Id*., 874 P.2d at 333.

In contrast with the Denver ordinance, the *Robertson* court reaffirmed an earlier decision striking down a Lakewood municipal ordinance proscribing the possession or use of any deadly weapon except in one's home. *Id*., 874 P.2d at 328. The court explained:

> In voiding the ordinance as overbroad, we observed that it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police power be reasonably classified as unlawful and thus, subject to criminal sanctions.

Id.

In this case the complaint alleges as a factual matter that HB 1229's prohibition on private sales of firearms unless a private unaccountable FFL agrees to submit papers for a background check criminalizes conduct that cannot reasonably be found to be unlawful, and places an unreasonable burden upon firearm owners who are left without

any enforceable right to obtain the required background check. This is not a reasonable exercise of the state's police power. Rather it is an unconstitutional delegation of that police power to a private entity whose business interest is in direct conflict with the private owner who seeks to transfer a perfectly lawful firearm. To be sure, defendant contests the factual allegations in the complaint and asserts that it will be easy for private transferors to convince FFLs to risk their licenses for a $10.00 fee. Ultimately, this Court will need to resolve this factual dispute, but it cannot resolve critical factual issues such as this while ruling on a motion to dismiss.

Similarly, defendant asks the Court to reject plaintiffs' factual allegations concerning the practical effects of HB 1224. In *Robertson*, the ammunition magazine limitations were confined to a narrow class of unique weapons, the prevalent use of which was allegedly for criminal purposes (i.e., so-called "assault weapons"). In this case plaintiffs have made numerous detailed allegations – which in ruling on the pending motion to dismiss the Court must accept as true – concerning the practical effect of the magazine limits imposed by H.B 1224. Complaint, paragraphs 35-47. The upshot of those allegations is that HB 1224 effectively "amounts to a ban on having a functional, operating unit for most handguns and a very large fraction of rifles." Complaint, paragraph 47. Thus, unlike the narrow ban on a specific class of enumerated weapons at issue in *Robertson*, HB 1224 infringes directly upon the legitimate use of weapons for defense of person, property, and home.

G. After *McDonald*, Strict Scrutiny is the Appropriate Level of Review

Defendant notes that in *Robertson* the court declined to decide whether the right to keep and bear arms is "fundamental," and that is true. The court determined that under

the particular facts of that case it did not need to decide the question. *Id.*, 874 P.2d at 329. This matter has now, however, been resolved by the United States Supreme Court. *McDonald v. Chicago*, __ U.S. __, 130 S.Ct. at 3047, 3042 (2010) (right to keep and bear arms is "fundamental"). There is no question, therefore, that if *Robertson* were decided today, the Colorado Supreme Court would not use the same framework of analysis that it used in 1994. At the very least, the court would undoubtedly acknowledge the "fundamental" status of the right, and in that regard the supreme court has long held that regulations that burden "fundamental" rights should be subjected to strict scrutiny.[2] "Where a fundamental right is affected [] the state has the burden of establishing that the act is necessarily related to a compelling governmental interest." *Austin v. Litvak*, 682 P.2d 41, 49 (Colo. 1984). *Accord, National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 700 F.3d 185, 194, 195 (5th Cir. 2011) (a regulation that threatens the core of the right to keep and bear arms triggers strict scrutiny). For the reasons enumerated above, the Court cannot determine whether the statutes would survive either a *Robertson* analysis or a strict scrutiny analysis in the absence of a fully developed factual record, and therefore defendant's motion to dismiss must be denied.

H. HB 1229 Violates Article II, Section 13 of the Colorado Constitution

In their Third Claim for Relief plaintiffs allege that HB 1229 violates Article II, Section 13 of the Colorado Constitution. Taking the allegations of the complaint as true, and applying the *Robertson* analysis, this Court should find that the complaint does in fact state a claim upon which relief may be granted.

[2] Indeed, In *Heller II* Judge Kavanaugh explained that under *Heller* and *McDonald* the standard of review actually should be higher than strict scrutiny, based on the "text, history and tradition, not by a blaning test such as strict scrutiny or intermediate scrutiny." *Id.*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

The right to transfer a firearm is within the scope of the right to keep and bear arms. Implicit in the meaning of the phrase "keep and bear arms" is the right to acquire arms for the purpose of keeping and bearing them. Indeed, it is unclear how anyone would "keep" something if he had no power to receive that thing in the first place. The right to "keep" would certainly contemplate a right to manufacture, but it would also extend to a right to receive a thing made by others by sale or gift. And a right to receive would imply in another the power to transfer. Without protecting the right of a transferor to convey a firearm, a transferee of that firearm would be prohibited from exercising his right to "keep," and therefore "bear," arms in self-defense. Surely, therefore, the state may not enact an outright prohibition on transfers of firearms from one citizen to another, because subsumed within the right to keep and bear arms is the right to transfer arms to another. Indeed, the right to transfer should be considered within the core of the right to keep and bear arms, because it is furthers the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." c*f., Heller*, 554 U.S. at 635. Accordingly, HB 1229 clearly burdens the right to keep and bear arms.

Important factual issues preclude granting defendant's motion to dismiss. Plaintiffs maintain that given Colorado's history and traditions, the right to transfer a firearm should be considered to be at the very core of the right to keep and bear arms protected by the Colorado Constitution. Complaint, paragraphs 32, 34 and 35. This factual issue, (i.e., Colorado's history and traditions) cannot be resolved on a motion to dismiss.

Furthermore, the complaint alleges that HB 1229 makes the right to transfer a firearm subject to the absolute, unfettered and unreviewable discretion of third party

FFLs who have substantial disincentives to cooperate with private firearms transferors, and this creates an unreasonable burden on plaintiffs' right to transfer firearms. Such an unreasonable burden on the right to keep and bear arms violates Article II, Section 13 of the Colorado Constitution. *Robertson*, 874 P.2d at 329, 331.

In response, defendant essentially requests the Court to resolve a factual dispute in his favor and attempts to add numerous factual matters into the record in a section of his motion he calls, tellingly, "**Factual** and legal background." Motion, pgs. 9-11 (emphasis added). However, a Rule 12(b)(5) motion serves as a test of the formal sufficiency of a plaintiff's complaint. *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001). Plaintiff's factual allegations must be taken as true. *Id*. In ruling on such a motion, a court may consider only those matters stated within the "four corners" of the complaint. *Abts v. Board of Education*, 622 P.2d 518, 522 (Colo. 1980); *Dillinger v. North Sterling Irrigation District*, 135 Colo. 100, 308 P.2d 608, 609 (1957). Therefore, at this stage of the litigation defendant is not allowed to contest plaintiffs' factual allegations. Nor is he allowed to add factual allegations of his own. Therefore, the Court must disregard all of defendant's factual averments when ruling on his motion to dismiss.

I. HB 1224 Violates Article II, Section 13 of the Colorado Constitution

1. The Complaint States a Claim Upon Which Relief May be Granted

In their Fourth Claim for Relief plaintiffs allege that HB 1224 violates Article II, Section 13 of the Colorado Constitution. As with HB 1299, taking the allegations of the complaint as true, and applying the *Robertson* analysis, this Court should find that the complaint does in fact state a claim upon which relief may be granted.

Plaintiffs allege that HB 1224 outlaws magazines that hold more than 15 rounds of ammunition, all tubular shotgun magazines that hold more than 28 inches of shells, and all nontubular shotgun magazines that hold more than 8 shells. Complaint, paragraph 35. By outlawing most box and tube magazines, HB 1224 outlaws an essential component of many common firearms. Complaint, paragraph 45. An overwhelming percentage of handguns and substantial number of rifles currently manufactured in the United States are semi-automatic, which means that most of them store their ammunition in detachable box magazines. *Id.* Rifles which use box or tube magazines are not limited to semi-automatics, but also include pump action, bolt action, and lever action rifles. (HB 1224 exempts lever action guns which use tube magazines, but not lever action guns which use box magazines; the bill also exempts rimfire rifles which use tube magazines, but does not exempt such rifles that use box magazines.) *Id.*

The effect of HB 1224's various provisions is the widespread ban on functional firearms. Complaint, paragraph 46. The prohibition of so many box and tube magazines of any size, and the prohibition of magazines greater than 15 rounds, directly and gravely harm the ability of law-abiding citizens to use firearms for lawful purposes, especially self-defense. *Id.*

HB 1224 amounts to a ban on having a functional, operating unit for most handguns and a very large fraction of rifles. This certainly creates a burden on the right to keep and bear arms. Accordingly, plaintiffs have stated a claim upon which relief may be granted. *Robertson,* 874 P.2d at 329, 331.

2. The Court Should Reject Defendant's Absurdly Narrow Interpretation of the Word "Arm"

Defendant argues that Article II, Section 13 of the Colorado Constitution does not protect the right to own any ammunition magazine, because an ammunition magazine is not itself an "arm." Motion, p. 18. Defendant's argument proves too much. Carried to its logical conclusion, it would allow the state to completely ban all arms one piece at a time on the ground that a rifle stock is not itself an arm; a receiver is not itself an arm; a firing pin is not itself an arm; a barrel is not itself an arm; a trigger is not itself an arm, a round of ammunition is not itself an arm, etc.

Defendant might argue that magazines are different from, for example, firing pins, because the latter is "essential" to the operation of a firearm and the former is not. Such a distinction could not be the basis of constitutional analysis, however, because the government does not have the power to ban all components of a firearm other than those that are absolutely essential to its operation. Otherwise, the government could ban all but the most rudimentary firearms. A firing pin, for example, is not in fact essential to the operation of a firearm as evidenced by the fact that rudimentary firearms existed for hundreds of years before the invention of the firing pin (first matchlocks and then flintlocks). In contrast to defendant's position, it is not necessary for a regulation to render the ownership of operable firearms absolutely impossible before a regulation implicates constitutional scrutiny. Rather, a regulation burdens the right to keep and bear arms if it renders that right less effective.

Accordingly, defendant's suggestion that the state has the power to ban all parts of a firearm so long as the firearm is not rendered "inoperable," Motion, p. 18, does not reflect the law. Under defendant's reasoning the state could ban magazines altogether, leaving the citizens of the state to defend themselves with only firearms that can be

loaded with one round of ammunition at a time. Further, under defendant's reasoning the state could ban all revolvers. After all, banning pistols with revolving cylinders that allow them to hold more than one round of ammunition does not operate as a ban on pistols that hold only a single round of ammunition. In summary, the Court should reject defendant's contention that a regulation that burdens an integral part of many firearms does not in any way implicate the right to keep and bear arms.

3. *Robertson* Itself Refutes Defendant's Claim that an Ammunition Magazine is Not an Arm Within the Meaning of Article II, Section 13.

Not only does defendant's claim that a magazine is not an "arm" protected by the right to keep and bear arms fail as a matter of simple logic, but also his assertion is directly contradicted by *Robertson*. In that case, the Denver ordinance's ban on assault weapons was based on two factors: (i) their alleged rapid rate of fire; and (ii) the alleged capacity to fire an inordinately large number of rounds without reloading. *Id*., 874 P.2d at 327. In its analysis of the constitutionality of the ban, the Court made no distinction between the rapid fire capability and magazine capacity, treating both as integral features of a firearm, and therefore subject to scrutiny under the Article II, Section 13 guarantee of the right to keep and bear arms. *See Robertson*, 874 P.2d at 331-33. If the magazine were only an accessory and not an arm, as defendant now contends, the court would have said so. But it did not, and for obvious reasons. It was the combination of the two components that constituted the targeted "assault weapons," as defined by the Denver ordinance. *See id*., 874 P.2d at 336, Appendix, Section 38-130(a) and (b).

J. The Complaint States a Cause of Action with Respect to the "Removable Floorplate" and "Continuous Possession" Issues

1. The Court Should Reject Defendant's Attempt to Turn His Motion to Dismiss Into a Stealth Motion for Summary Judgment

Before turning the merits of these issues, plaintiffs once again request the Court to consider the procedural status of defendant's motion. Instead of limiting his analysis to the four corners of plaintiffs' complaint, defendant has attempted to inject numerous additional factual issues into the record in the course of his discussion of the "removable floorplate" and "continuous possession" issues, Motion, pp. 21-25. Indeed, defendant has attempted to turn his motion to dismiss into a stealth motion for summary judgment.

As noted above, however, in ruling on a motion to dismiss for failure to state a claim, a court may consider only those matters stated within the four corners of the complaint. *Abts v. Board of Education*, 622 P.2d 518, 522 (Colo. 1980); *Dillinger v. North Sterling Irrigation District*, 135 Colo. 100, 308 P.2d 608, 609 (1957). Ironically, defendant's attempt to contest factual issues only serves to highlight why his motion to dismiss should be denied so that the litigation may proceed in order for the parties to develop a factual record on which the Court may base its decision.

2. The Complaint States a Claim With Respect to the "Removable Baseplate" Issue

The complaint states a cause of action upon which relief may be granted with respect to the, "removable floorplate" issue. Specifically, plaintiffs allege that the chief sponsor of HB 1224 and Governor Hickenlooper have both publicly confirmed that HB 1224 bans all magazines with removable floor plates, even if they do not violate the capacity limits, arguing that they can be "readily converted to accept" additional rounds of ammunition. Complaint, paragraph 36. The magazines for most handguns, for many rifles, and for some shotguns are detachable box magazines. The very large majority of

detachable box magazines contain a removable floor plate. The removable floor plate allows the user to clear ammunition jams, clean the inside of the magazine, and perform maintenance on the internal mechanics of the magazine. Complaint, paragraph 37.

The fact that a magazine floor plate can be removed "inherently creates the possibility" that the magazine can be extended through commercially available extension products or readily fabricated extensions, such that nearly every magazine can be readily converted to exceed the capacity limits set by HB 1224. Complaint, paragraph 38. Some rifles have fixed box magazines, which are permanently attached to the rifle. However, some of these also have removable floor plates. The possibility that the fixed magazine's floorplate can be removed means that the rifle itself is banned by HB 1224, since it cannot be separated from, or used without, the magazine. Complaint, paragraph 39. A ban on certain types of fixed magazines is necessarily a ban on the rifles to which they are fixed. Complaint, paragraph 40.

Defendant disagrees with plaintiffs' **factual** allegations that HB 1224 is tantamount to a ban on many magazines with removable baseplates, and argues that magazine base plates are "designed" for "maintenance and cleaning" rather than designed "to allow easy expansion." Motion, p. 21. Defendant misunderstands the meaning of the statute. The word "design" cannot be read to mean the design of the basic purpose — that a magazine was "designed" with the sole purpose "to be converted" into something else. Rather, "design" means a functional design, meaning it functions fine on its own, but if one decides to convert it, it is "designed to be readily converted."

Defendant's understanding is nonsensical, since under his reading of the statute the magazine ban would apply to nothing. Defendant seems to believe there are

magazines "whose objective features demonstrate that it has been designed for quick and ready expansion." *Id*. But there is no magazine that was designed with the sole purpose to later be expanded to hold additional rounds. If the manufacturer wanted the magazine to hold additional rounds, it would simply manufacture the magazine to do so. No manufacturer says "I've designed something that is not good enough for its intended purpose, until you add additional parts." All magazines are "designed" to hold exactly the number of rounds they hold. Rather, a manufacturer often would say "if you would like to expand the capacity of this magazine, I have designed it to be easily convertible."

The statute as written either means what plaintiffs allege (banning large numbers of magazines), in which case defendant agrees that it "would likely violate the Second Amendment" (Motion, p. 22), or it means what defendants allege (banning only magazines with the original design to be converted), in which case it has no application whatsoever to the real world.

Defendant also disagrees with plaintiffs' **factual** allegation that claims that "the law does not ban guns, or any category of gun . . ." Motion, p. 22. But if, as plaintiffs allege (and that allegation must be accepted as true), the law bans magazines with removable baseplates, this amounts to a functional ban on the guns that accept those magazines. Defendant argues, essentially, "the law does not ban cars, it only bans wheels and tires, so there's no problems for your car."

3. The Complaint States a Claim With Respect to the "Continuous Possession" Issue

The complaint states a cause of action upon which relief may be granted with respect to the, "continuous possession" issue. Specifically, plaintiffs allege that HB 1224 allows the possession of grandfathered magazines only if two separate requirements are

satisfied: First, they must be owned on July 1, 2013. Second, the owner must maintain "continuous possession" of the magazine. Complaint, paragraph 41. The requirement for "continuous possession" makes it impossible for firearms to be used or shared in ordinary and innocent ways, such as a gun owner loaning his or her firearm with the magazine to a spouse, family member, or friend; entrusting it to a gunsmith for repair; a military reservist leaving firearms and their associated magazines with a spouse when he or she is called into service away from home; or even temporarily handing a firearm with its magazine to a firearms safety instructor so that the owner can be shown by the instructor how to better grip, aim, or otherwise use the firearm. Complaint, paragraph 42. The requirement of "continuous possession" prohibits the grandfathered owner from ever allowing anyone to hold or use his firearm if the firearm is in a functional state (with a magazine inserted) – calling into question the right to keep and bear arms secured by Article II, Section 13 of the Colorado Constitution. Complaint, paragraph 43.

4. Defendant Has Previously Acknowledged that HB 1224 is Susceptible to the Interpretation Advanced by Plaintiffs

Significantly, defendant himself has acknowledged in the parallel federal court litigation that the statute is susceptible to exactly the construction plaintiffs have given it. On June 6, 2013, defendant filed a motion in the federal court in which he requested the court to certify certain questions concerning HB 1224 to the Colorado Supreme Court. Governor's Motion for Certification of Questions of Law to the Colorado Supreme Court (a copy of the motion is attached hereto as Exhibit A). In the certification motion the governor specifically stated that "HB 13-1224 is subject to a range of interpretations. Some of these might raise vagueness concerns, and others may not. But what is clear is that the vagueness question is close enough that a definitive interpretation of the law from

the Colorado Supreme Court may well obviate the Plaintiffs' vagueness challenges altogether." Certification Motion, pp. 4-5. The Governor then requested the federal court to certify the following two questions:

> Does [HB 1244's] definition of "large-capacity magazine" amount to a ban on functional magazines for most handguns and many rifles, or does it apply only to magazines that are principally used with extensions or devices that increase the combined capacity to more than 15 rounds?
>
> Does the grandfather clause contained in HB 13-1224, which applies when an owner "maintains continuous possession" of a large capacity magazine after July 1, 2013, apply when the owner allows another person to temporarily hold, use, or share it for lawful purposes?

Certification Motion, p. 6.

It goes without saying that if the statutes were susceptible to only the interpretation advanced by defendant now in this case, there would have been no reason for defendant to request the certification in the federal case.

Defendant now points to certain "Technical Guidance" issued by the Attorney General and asserts that these questions have been resolved. The problem with the Governor's assertion are many-fold. First, the Attorney General is the governor's lawyer in this case. It would be anomalous indeed for a party's lawyer to come in and inform the Court, essentially, that there is no need for it to resolve the issues of fact and law raised in the complaint, because he has already resolved the issues for the Court. Second, the Attorney General's opinion is just that, his opinion. It is not the law. It is not binding on the Court. It is not binding on local prosecutors. It is not even binding on his client, the governor, who indeed has issued statements to the contrary. Complaint, paragraph 36. Third, the Attorney General's opinion is a fact not alleged in the complaint. As such, it is not proper for the Court to consider it at this stage of the litigation.

III. CONCLUSION

For reasons set forth above, plaintiffs respectfully request the Court to deny defendant's motion to dismiss.

/s/ Barry K. Arrington
_____
Barry K. Arrington
Attorney for plaintiffs

Of Counsel
William J. Olson
Herbert W. Titus
Robert J. Olson
William J. Olson, P.C.
370 Maple Ave. W., Ste.4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

CERTIFICATE OF SERVICE

The undersigned certifies that on December 13, 2013 the foregoing was served via ICCES on:

David C. Blake, Esq.
Michael Francisco, Esq.
Matthew D. Grove, Esq.
Office of the Colorado Attorney General
1300 Broadway, 6th Floor
Denver, Colorado 80203

/s/ Barry K. Arrington
_____
Barry K. Arrington