IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO OUTFITTERS ASSOCIATION, *et al.*,	)	
Appellants,	)	Nos. 14-1290
v.	)	
JOHN W. HICKENLOOPER,	)	
Appellee.	)	

On Appeal from the United States District Court for the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 13-CV-1300-MSK

OPENING BRIEF OF APPELLANTS NONPROFIT ORGANIZATIONS, DISABLED FIREARMS OWNERS AND FIREARMS MANUFACTURERS AND DEALERS

Respectfully submitted,

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Oral Argument Is Requested
District Court Order Attached

January 16, 2015

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Appellants in No. 14-1290 state that the parent corporation of Appellant Magpul Industries is MIC Holding, LLC. No other Appellant has any unidentified parent corporations, nor is any Appellant a publicly held corporation.

s/Peter J. Krumholz
Peter J. Krumholz

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STATEMENT OF RELATED CASES

This appeal has been consolidated with No. 14-1292. These appeals arise from the district court's decision in 13-CV-1300. Appellants in 14-1290 adopt and incorporate the arguments set forth in the brief of the Sheriffs and David Strumillo.

INDEX OF EXHIBITS

INTRODUCTION

This case involves two criminal statutes enacted by the Colorado General Assembly in 2013. House Bill 13-1224 (HB1224), codified at C.R.S. § 18-12-112 and attached hereto as Exhibit 2, generally prohibits firearm magazines capable of holding 16 rounds or more (hereinafter "sixteen-plus magazines"). House Bill 13-1229 (HB1229), codified at C.R.S. § 18-12-302 and attached hereto as Exhibit 3, dramatically expands firearms background checks to private sales and most temporary loans exceeding 72 hours, and requires that all such checks be conducted in-person at a gun store.

Both bills violate the Second and Fourteenth Amendments to the United States Constitution as well as the Americans with Disabilities Act (ADA). HB1224's purported justification for banning historically legal and popular arms used for core Second Amendment protection of hearth and home is based upon speculation that the statute would in fact enhance public safety. Criminalizing routine, non-sale transfers of firearms conducted without in-store processing, as HB1229 does, imposes a dramatic burden on the Second Amendment right to acquire a firearm with virtually no justification in the record for such a burden. Indeed, the record shows that HB1229 is so ineffective that it accomplishes the reverse of its purported objectives.

The applicable standards for assessing alleged violations of the Second Amendment are well-established. A court must first assess the burden a law places on Second Amendment rights. If the law burdens Second Amendment rights, then the government must satisfy, at a minimum, intermediate scrutiny and demonstrate the law advances the government's stated interest, and that the law is narrowly tailored.

Plaintiffs introduced evidence how HB1229 criminalizes routine firearm acquisition and how HB1224's ban on the use of sixteen-plus magazines in semiautomatic firearms (something that hundreds of thousands of Coloradans did routinely prior to its enactment) harmed lawful self-defense with no corresponding benefit to the public. The trial court discounted this evidence and upheld both measures – going so far as to question whether any party had standing to challenge either measure.

Plaintiffs respectfully submit that the trial court erred in both minimizing the burden on Second Amendment rights, and in failing to require the Defendant to meet his burden to justify infringing those rights. The trial court also erred by not requiring the Defendant to show that the stated objectives of these statutes cannot be achieved through less restrictive means. The trial court engaged in something akin to Justice Bryer's interest-balancing test expressly rejected in *Heller*, with the

corresponding inappropriate deference to the Colorado legislature and the Defendant. The trial court also completely misapplied the applicable ADA precedent, mishandled legislative history, and erred in addressing Plaintiffs' Fed. R. Evid. 702 motion.

Plaintiffs respectfully submit that the record below provides the basis for this Court to hold that both statutes violate the Second Amendment, either facially or as-applied.

STATEMENT OF JURISDICTION

On June 26, 2014, the United States District Court for the District of Colorado entered a final judgment against Appellants and in favor of Defendant John W. Hickenlooper. (Findings of Fact, Conclusions of Law, and Order[1]) Appellants filed a timely Notice of Appeal on July 28, 2014. (JA.7:1802) This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[1] The trial court's opinion is attached hereto as Exhibit 1. Citations to the opinion appear as "Op." followed by the page number. Citations to the Joint Appendix will appear as "JA" followed by the volume number and page number.

STATEMENT OF THE ISSUES

1. Did the trial court err in holding that HB1229 – which mandates full in-store processing for all private firearm transfers, including temporary transfers of more than 72 hours – does not violate the Second and Fourteenth Amendments?

2. Did the trial court err in holding that HB1224 – which bans all magazines capable of holding more than 15 rounds – does not violate the Second and Fourteenth Amendments to the United States Constitution?

3. Did the trial court err in holding that HB1224 and HB1229 do not violate Title II of the Americans with Disabilities Act?

4. Did the trial court err in failing to rule on Plaintiffs' Joint Motion to Strike Expert Testimony pursuant to Fed. R. Evid. 702, where such failure has denied this Court the opportunity to gauge whether the District Court adequately performed its gatekeeping function?

5. Did the trial court err in its application of constitutional scrutiny by considering evidence that was not presented to the legislature before it enacted the challenged statutes?

STATEMENT OF THE CASE

On March 15, 2013, the Colorado General Assembly passed HB1224, which bans sixteen-plus magazines, with some limited exceptions. On March 18, 2013, the General Assembly passed HB1229, which requires that non-commercial sales of firearms, as well as loans lasting more than 72 hours and the return of loaned firearms, be conducted only after an in-store check where a gun store processes the transfer as if the store were selling the firearm from its own inventory.[2] Defendant signed both bills and they became effective on July 1, 2013.[3]

A. Pretrial Proceedings

Plaintiffs challenged both statutes as violating the Second Amendment as interpreted by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Plaintiffs also challenged HB1224's "grandfather clause" (permitting ownership of sixteen-plus

[2] The exceptions include antique firearms, transfers among immediate family members (but not in-laws or persons in the household including stepchildren), transfers by operation of law (*e.g.*, bequests), transfers that occur at a shooting range or at a shooting competition, "while hunting," and temporary transfers for firearms maintenance. (C.R.S. § 18-12-112(6)) Violation of HB1229 is punishable as a Class 1 misdemeanor and the person violating the statute is banned from possessing any firearm for two years.

[3] This Statement of the Case supports both this brief and the one filed in the companion appeal, No. 14-1292.

magazines so long as "continuous possession" is maintained) as unconstitutionally vague, and challenged both statutes under the ADA. (JA.1:43)

Plaintiffs included 55 of 62 Colorado Sheriffs, the Colorado Farm Bureau (over 23,000 members), the National Shooting Sports Foundation (a firearms trade association with over 11,000 members nationwide and over 400 in Colorado), citizens with physical disabilities, Outdoor Buddies (a nonprofit dedicated to giving disabled citizens access to the outdoors), licensed firearm dealers, the Colorado State Shooting Association, retired law enforcement officers, Magpul Industries (a magazine manufacturer), the Colorado Outfitters Association, Women for Concealed Carry, and Colorado Youth Outdoors (a nonprofit devoted to strengthening family relationships by teaching youth and families about outdoorsmanship and firearms).

In the wake of the legislation, the Attorney General (counsel for the Defendant) issued two "Technical Guidances." (JA.23:4964, 4967) They attempted to address obvious legal problems with the legislation. The Attorney General released the first one the day this lawsuit was filed. HB1224 not only bans sixteen-plus magazines but also magazines with a capacity of 15 or fewer rounds that are "designed to be readily converted" to sixteen-plus magazines. The import of this provision is to ban all magazines with a removable base plate because the potential

to remove the base plate and add an extender makes almost all magazines "readily convertible." The first Technical Guidance also attempted to clarify the grandfather clause that requires "continuous possession" of all sixteen-plus magazines owned pre-July 1, 2013, to maintain lawful ownership of them.

Plaintiffs moved for a preliminary injunction challenging the "designed to be readily converted" provision and the "continuous possession" mandate as violating the Second Amendment, despite the Attorney General's attempt to clarify the statute. (JA.1:227) The night before the scheduled hearing on July 10, 2013, Plaintiffs and Defendant agreed to additional language (originally proposed as a stipulation for court approval) and Plaintiffs agreed to withdraw their motion. (JA.9:556, 1859)

At the hearing, the trial court surprised both sides by declining to enter the stipulated order. (JA.9:1859) As a result, the parties agreed the proposed stipulated language would be included in the Attorney General's second Technical Guidance (JA.9:1873), which was released later that day.[4]

Defendant moved to dismiss the plaintiff Sheriffs in their official capacity and challenged the standing of all Plaintiffs to assert vagueness challenges to HB1224's "designed to be readily converted" language and "continuous

[4] The second Technical Guidance also has major flaws, particularly given that it contradicts the first Technical Guidance, which was not rescinded.

possession" requirement. (JA.3:639) The trial court granted Defendant's motion as to the "designed to be readily converted" language, finding that the Technical Guidances eliminated any genuine threat of prosecution for violating this provision, but denied Defendant's motion as to the "continuous possession" requirement, finding that any plaintiff who would be prevented from lending sixteen-plus magazines to family members had sufficient standing to assert the vagueness challenge. (JA.5:1041-48) The trial court granted Defendant's motion challenging the Sheriffs' standing in their official capacity. The court completely dismissed them from the case, even though the complaint had stated that all Sheriffs were suing in both their individual and official capacities, and Defendant had expressly disclaimed any challenge to individual capacity standing.[5] (JA.5:1048-55)

The trial court conducted a hearing on December 19, 2013, at which it allowed 11 Sheriffs to re-enter the case in their individual capacities by filing an amended complaint. (JA.9:1876, 1885-86) These Sheriffs were either term limited and/or had already announced that they would retire and thereby lose their partial law enforcement exemption under HB1224. Of note, counsel for the Defendant, in

[5] Plaintiffs challenged Defendant's reliance upon the Technical Guidances as a vehicle for "clarifying" the legislation to correct legal defects. Inter alia, they are not formally published and could be revoked by a new Attorney General.

arguing for allowing additional dispositive motions, acknowledged that a finding that magazines were "arms" under the Second Amendment, and were in "common use," would mean that "we probably lose, frankly." (JA.9:1896)

In the final pretrial conference (JA.9:1911), the trial court addressed the Defendant raising yet again the question of the Plaintiffs' standing. The court allowed Defendant to file another brief on the issue, but expressed skepticism at raising the issue again on the eve of trial. (JA.9:1915-16)[6]

B. Trial and the Trial Court's Decision

Trial was held March 31 through April 10, 2014. (JA.8:1838-54) Most of Plaintiffs' case focused on meeting Plaintiffs' burden to establish the statutes' impact on Second Amendment rights as outlined in Plaintiffs' pretrial brief. Much of this evidence was not addressed by the trial court's decision – especially evidence related to HB1229's requirement for in-store processing for temporary transfers exceeding 72 hours – including the return of such firearm.

The parties stipulated to the admission of the legislative history related to both bills. (JA.22:4665, 5530-5629) Plaintiffs argued that the Defendant could not rely on evidence outside the legislative history to meet his burden to establish the

[6] The trial court's decision and its discussion of standing were, to say the least, a surprise to Plaintiffs – especially in light of the December 19 ruling on the 11 Sheriffs and the bases for their being allowed in the case.

state interests to be achieved and the necessary fit between the statutes and those interests. The trial court agreed with limiting the stated interests to the legislative history, but allowed the Defendant to rely on evidence introduced at trial that the legislation advanced those interests. Thus, almost none of the State's evidence had been considered by the General Assembly.

1. HB1229

Before HB1229, full background checks (in-person, in-gunstore, completion of extensive forms, and approval from the Colorado Bureau of Investigations prior to consummation of sale) were required for firearms purchased commercially and for firearms purchased at gun shows. HB1229 expanded in-store processing to not just private sales, but to every temporary transfer of a firearm exceeding 72 hours (with narrow exceptions). C.R.S. § 18-12-112(1) to -112(5) Under HB1229, routine loans of firearms to friends and participants in an array of shooting programs and activities must go through in-store processing first, ***and*** the same in-store processing is required when these firearms are returned to their original owners. *Id.* At trial Plaintiffs demonstrated the burden this places on acquiring a firearm for lawful purposes. The trial court disregarded this evidence to such an extent that it questioned whether any Plaintiff had standing to challenge HB1229.

(Op.19) A brief summary of the evidence related to just two organizations demonstrates otherwise.

Bob Hewson, the Executive Director of Colorado Youth Outdoors (CYO), testified that CYO routinely loans firearms to youths and their parents to teach them safety and proficiency in firearm use, while also providing instruction and events for novices. CYO serves over 10,000 youth and family members each year. (JA.10:1966)

HB1229 threatens CYO and Hewson individually in a number of specific ways. First, firearms are routinely transferred among staff and volunteers. (JA.10:1974) HB1229's requirement for full in-store checks before firearms are transferred among CYO staff and volunteers (and upon return) imposes a huge, needless burden which has already threatened the organization. (JA.10:1991) CYO operates two "core-curriculum" shooting programs, one based in Loveland and the other in Colorado Springs. (JA.10:1965) In the wake of HB1229's effective date, CYO attempted to transfer firearms from Loveland to Colorado Springs. (JA.10:1974-76) Upon discovering exposure under HB1229, CYO contacted the El Paso County Sheriff who instructed the Colorado Springs instructor to attempt to obtain an in-store check. (JA.10:1976) CYO could not find a licensed gun store to

perform the necessary background check to transfer the firearms from one CYO program to the other. (JA.10:1975-82)

Second, CYO "owns" 22 shotguns and 14 rifles. (JA.10:1958) Under HB1229, it is unclear whether Hewson is the "transferor" or the "transferee" for firearms acquired by CYO under HB1229. (JA.10:1962-63) In-store processing requires the naming of an individual for purposes of filling out the necessary forms, yet the owner of the firearms is CYO. At the time of trial, a shipment of firearms was being held by the gun store with which Hewson and CYO routinely dealt because of concerns about who the "transferee" would be under HB1229 for firearms that belonged to CYO. (JA.10:1963) That gun store, moreover, will not even perform in-store processing for private, non-sale transfers. (JA.10:1976)

Third, HB1229 has effectively halted CYO's sharing of its firearms with other firearms-related organizations. In one situation, CYO loaned firearms to the Loveland Police Department. (JA.10:1991-94) When it came time to return the firearms to CYO, it became apparent that HB1229 probably required a background check,[7] which was resolved only when the Chief of Police and District Attorney

[7] As described in Part V.A.2 of the Sheriffs' brief, HB1229 has no exemption allowing for the acquisition or transfer of firearms by law enforcement (even temporarily in the line of duty), triggering the same mandatory in-store check on the police officers as with any private individual.

expressly declined to prosecute any violations. (JA.10:1993-94) Fourth, firearms are routinely loaned to CYO's program participants. While the transfers sometimes fall within the exceptions to obtaining a full in-store check, the exceptions often do not apply. (JA.10:1967-72)

On cross-examination, Hewson was asked questions about transfers related to CYO's programs, and the trial court advised Hewson about a potential self-incrimination risk related to his answers. (JA.10:2018-20, 2031)[8]

Farmers and ranchers represented by the Colorado Farm Bureau (CFB) are also adversely impacted by HB1229. CFB testified through Nick Colglazier, a farmer who testified about his personal experience and as CFB's Director of Public Policy, State Affairs.

Firearms are routinely transferred among workers on farms and ranches as part of normal operations.[9] (JA.12:2552-61) In order for a farmer or rancher to

[8] The trial court felt compelled to ensure that Hewson understood the potential consequences of testifying about potential violations. (JA.10:2019) Yet, the trial court disregarded the obvious burden the statute imposed on him.

[9] In footnote 14 of its opinion, the trial court opined that there was no testimony by any organization involving firearm acquisition by its members. This is incorrect. Colglazier's testimony involving farmers and ranchers (JA.10:2252-61), Dahlberg's testimony about Women for Concealed Carry members (JA.11:2221), and Hewson's testimony about CYO participants (JA.10:1974-76), all relate to individual members acquiring a firearm, not the organizations themselves. Similarly, in footnote 13, the trial court questions whether the Second Amendment

lend a firearm to an employee, both of them must travel to a gun store willing to provide in-store processing for private transfers. The same process must be repeated when the employee returns the firearm. Most farming and ranching operations require long hours just to perform the necessary work, and they are an hour or more away from the nearest town and gun store. Significantly, in many rural areas of Colorado, there are no gun stores even willing to process private temporary transfers. (JA.12:2562-64)[10] The exceptions in HB1229 do not ameliorate the burdens it places on Colorado's farmers and ranchers. (JA.12:2563-68)[11]

The record lacks any evidence justifying the burden placed on private ***transfers*** as opposed to private ***sales***. The trial court relied only on evidence

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protects "the right of an owner of a firearm to lend" a firearm. However, the thrust of Plaintiffs' case on HB1229 is plainly about both loaning and acquiring firearms.

[10] Two Plaintiff FFLs testified to the negative impact HB1229 has on their operations – especially HB1229's $10 cap on the amount a federally licensed gun store can charge for performing a private background check. (JA.13:2633-37, 2688-89)

[11] Colglazier also testified how the Colorado Bureau of Investigation's (CBI's) electronic background check system could be expanded to make background checks for private sales less burdensome – a less restrictive alternative.

related to private ***sales*.** (Op.39) There is no evidence to support the imposition of the burden caused by background checks for any transfer over 72 hours.[12]

2. HB1224

HB1224 prohibits acquisition of sixteen-plus magazines after July 1, 2013, with exceptions for certain classes and a grandfather provision that allows existing owners to possess them if they maintain "continuous possession."[13] The following facts were stipulated to and undisputed:

> 10. . . . Although the total number is not known, the number of lawfully owned semi-automatic firearms that utilize a detachable box magazine with a capacity greater than 15 rounds is in the tens of millions.
>
> 19. Semi-automatic firearms equipped with detachable box magazines with a capacity greater than 15 rounds ***are used for multiple lawful purposes***, including recreational target shooting,

[12] The trial court stated: "Ronald Sloan, the Director of the Colorado Bureau of Investigation, testified that background checks on private ***transfers*** are denied at a rate as high, if not higher than, the denial rate of sales at retail or gun shows." (Op.39 (emphasis added)). In fact, the trial court appears to have referred to the wrong witness. The only evidence that could support such a statement came from James Spoden. However, his testimony and exhibits do not break down background check data for the type of temporary transfers at issue that Plaintiffs challenge here. Indeed, Spoden acknowledged that he was not aware of any such data. (JA.14:3037) Defendant relied upon one national expert (Webster) to try to establish the importance of background checks on private sales. He did not address temporary transfers. (*See, e.g.*, JA.15:3153-54)

[13] The principal arguments involving HB1224 are in the Sheriffs' brief. This section of the statement of the case is included so that the Court has one statement of the case involving both related appeals.

> competition shooting, collecting, hunting, and ***are kept for home defense and defense outside the home***.
>
> 22. ***Many full-sized 9mm semi-automatic pistols are sold at retail with magazines with capacities of greater than 15*** . . . .

(JA.6:1502-04) (emphasis added)

In addition, three witnesses testified who use sixteen-plus magazines for the core Second Amendment right of self-defense in their homes. Plaintiffs Dylan Harrell and David Bayne are paraplegics who use wheelchairs. Both testified that they use standard, factory-supplied sixteen-plus magazines for defense of themselves and their families.[14] Harrell testified that he would be at a significant disadvantage confronting one or more home intruders because he cannot flee; because of muscle weakness, he must lay a firearm in his lap in order to change a magazine. (JA.11:2248-49) He keeps an AR-type semiautomatic rifle in a gun safe next to his front door with a 40-round magazine, and a standard 17-round handgun in a safe in his bedroom. (JA.11:2245-47) Being forced to change magazines while in his wheelchair would render him defenseless. (JA.11:2250-51)[15] Bayne offered similar testimony. (JA.12:2587)[16]

[14] Bayne moved from Colorado before trial. This does not diminish his testimony about HB1224's impact on persons with disabilities.

[15] Harrell testified as an individual plaintiff and as an officer of Outdoor Buddies. He testified about the impact HB1229 would have on Outdoor Buddies' highly

Elisa Dahlberg testified on behalf of Women for Concealed Carry. She became proficient with firearms as an Air Force M.P. and with the Aurora Police Department. (JA.11:2212) She uses a Smith & Wesson M&P 9 millimeter, a semiautomatic handgun that came with three standard 17-round magazines. (JA.11:2214) She uses it for self-defense in her home, and keeps it in a safe next to her bed. *(Id.)* She also uses two Smith & Wesson AR-type firearms with 30-round magazines for home defense. (JA.11:2212-17)[17]

Most of the remaining testimony on HB1224 was from experts. Plaintiffs' expert Michael Shain demonstrated that magazines are an integral part of semiautomatic firearms, and Massad Ayoob testified about the importance of sixteen-plus magazines in defensive gun use – especially for persons with physical

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specialized firearms used for persons with disabilities, and the need to transfer them for more than 72 hours. (JA.11:2239-41) He also testified about his personal experience having difficulty locating an FFL willing to process his in-person/in-store check so that he could sell a firearm to another individual. (JA.11:2244)

[16] Expert witnesses for both sides acknowledged that a potential victim is defenseless during the time it takes to change a magazine. (JA.11:2289-90, 2292-94; JA.16:3475, 3486; JA.17:3553, 3555)

[17] Dahlberg testified that the 17-round magazines are important to her because they were made by the manufacturer and are extremely reliable, making her safer in a self-defense situation. (JA.11:2216) She could not obtain HB1224-compliant magazines from the manufacturer because of consistent unavailability (JA.11:2217) – contrary to the trial court's assertion. (Op.28) The trial court found that Dahlberg/Women for Concealed Carry was the one person/organization with standing to challenge HB1224. (Op.12-13)

disabilities. He explained why this is so even though firing 16 or more shots is rare. (JA.11:2314)

Defendants relied primarily upon expert testimony to defend HB1224. John Cerar (a consultant and former N.Y.P.D. officer) opined that sixteen-plus magazines were not "necessary" for self-defense. (*See* JA.16:3375) Douglas Fuchs (Police Chief in Redding, Connecticut) opined "that the more often an armed assailant, mass shooter, active shooter, has to exchange magazines . . . that gives civilian and law enforcement the opportunity to take action." (JA.16:3480)[18]

Jeffrey Zax, an economist, opined that banning sixteen-plus magazines would reduce their availability by making them "more costly to acquire," (JA.17:3589) and introduced a statistical analysis he performed involving confiscated magazines of more than 10 rounds in Virginia. He testified that in most "violent interactions," a firearm's reserve capacity is very important, even though people rarely fire all the shots they could. (JA.17:3657-60)

Despite HB1224's ban of magazines that traditionally have been both legal and preferred by millions nationwide, the trial court found that HB1224 imposed very little burden on Second Amendment rights. The court acknowledged that

[18] The trial court did not expressly address Plaintiffs' 702 objections, making it impossible to determine whether evidence was admissible or not. Accordingly, there is an inadequate record on which to base an appellate challenge.

HB1224 "affect[s] the use of firearms that are both widespread and commonly used for self-defense," but concluded that "people can [still] adequately defend themselves" and therefore the burden on Second Amendment rights "is not severe." (Op.27-28) The trial court found that there was "no showing of a severe impact on the defensive shooter" caused by HB1224.

The trial court found that HB1224's ban on sixteen-plus magazines was substantially, and equally, related to reducing the number of shots fired by criminals and by lawful defenders. (Op.28) The court also credited Fuchs' and Cerar's testimony that a "critical pause" could give potential victims an opportunity to act or escape, or to allow law enforcement to act.[19]

The trial court rejected Plaintiffs' evidence and argument that HB1224 would do more harm than whatever evidence of good Defendant had mustered. (Op.35)

3. Vagueness and ADA

[19] The trial court did not specifically find that banning sixteen-plus magazines would in fact lead to more "critical pauses." Indeed, in rejecting Plaintiff's evidence related to impact on the ***defensive*** use of sixteen-plus magazines, the trial court observed: "there are too many external variables to permit a conclusion that pauses effectively compelled on both sides are necessarily better or worse than having no such pauses on either side." (Op.34) As shown below, the evidence on "critical pauses" introduced by the Defendant was discredited at trial.

The trial court rejected Plaintiffs' vagueness and ADA claims. On vagueness, the trial court required Plaintiffs to show that "continuous possession" was unconstitutionally vague in all applications and held that Plaintiffs failed to meet that test. Plaintiffs in closing argument had stated that "continuous possession," if construed according to the second Technical Guidance (while ignoring the first Technical Guidance) was not vague in some applications (magazine rentals at a firing range) and was vague in other applications (long-term family sharing).

As for the ADA, the trial court rejected Plaintiffs' disparate impact claim that relied upon the impact on disabled shooters such as Dylan Harrell, David Bayne, and Outdoor Buddies' members. The court rejected as a matter of law that HB1224, a statute, could be challenged under the ADA, and characterized Plaintiffs' evidence as insufficient.

SUMMARY OF ARGUMENT

HB1229 and HB1224 are unconstitutional under the Second and Fourteenth Amendments. The Defendant failed to establish the theoretical benefits purportedly advanced by either statute. The Defendant also failed to demonstrate that the means chosen to achieve those theoretical benefits actually work to achieve those

benefits – whether this Court applies strict scrutiny, intermediate scrutiny (properly defined) or something in between.

The trial court erred in other material ways. It failed to perform the necessary gate-keeping function under Fed. R. Evid. 702 and admitted speculative evidence, including and especially evidence that supported the Defendant's claim about the benefit of a "pause" and its significance to HB1224. The trial court also erred in finding Plaintiff Federally Licensed Firearms Dealers (FFLs) lacked standing, applied an incorrect test to Plaintiffs' ADA Title II claim, and misapplied the test for assessing legislative history when a fundamental right is at issue.

ARGUMENT

I. SEVERAL RECENT FEDERAL COURT DECISIONS HAVE APPLIED RIGOROUS LEVELS OF SCRUTINY TO FIREARMS LAWS APPLICABLE TO LAW-ABIDING CITIZENS

Since *Heller* and *McDonald*, federal courts have almost universally adopted a First Amendment framework for analyzing Second Amendment rights, based in part on *Heller* itself. *E.g.*, 554 U.S. at 634-35; David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 427-32 (2014).

Several recent decisions in other circuits describe the rigor with which courts should examine laws that burden the arms-bearing rights of law-abiding citizens.

Most recently, the Sixth Circuit applied strict scrutiny to determine whether a federal statute prohibiting the possession of firearms by individuals who have been committed to a mental institution violated the Second Amendment, as applied to an individual who had had no problems since a brief suicidal episode decades earlier. *Tyler v. Hillsdale County Sheriff's Dep't*, -- F.3d --, 2014 WL 7181334 (6th Cir. Dec. 18, 2014).

In *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), the Seventh Circuit invalidated a Chicago ordinance that banned shooting ranges. The court required "a more rigorous showing" than intermediate scrutiny, "if not quite 'strict scrutiny.'" *Id.* at 708.

The Ninth Circuit in *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), addressed the county's interpretation of the State's "good cause" requirement for obtaining a concealed carry permit. The county rejected all permit applicants whose "good cause" was the mere desire for self-defense, without some showing of a specific threat. *Id.* at 1148. In invalidating the county's interpretation, the court concluded that the Second Amendment protects the right of responsible, law-abiding citizens to bear arms outside the home for self-defense. *Id.* at 1173. The Ninth Circuit's opinion contains a critique of other circuits (in particular, the Second, Third, and Fourth Circuits) whose Second Amendment analyses have

adopted exactly the approach advocated by Justice Breyer's *Heller* dissenting opinion, but rejected by the *Heller* majority:

> All three courts referenced, and ultimately relied upon, the state legislatures' determinations weighing the government's interest in public safety against an individual's interest in his Second Amendment rights to bear arms. . . . [S]uch an approach ignores the *Heller* court's admonition that "the very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."

Id. at 1176-77 (quoting *Heller*, 554 U.S. at 634).

Finally, the Eastern District of California recently held that a statute imposing a 10-day waiting period between purchase and delivery of a firearm violated the Second Amendment as applied to the plaintiffs. *Silvester v. Harris*, -- F. Supp. 2d --, 2014 WL 4209563 (E.D. Cal. Aug. 25, 2014), *appeal docketed*, No. 14-16840 (9th Cir. Sept. 25, 2014). The court addressed at length the Second Amendment burdens imposed upon the plaintiffs, *id.* at *10, 27-28, and the court's discussion of those burdens is instructive for the purposes of evaluating the burdens imposed in the instant case, which are described in Section IV.A, *infra*.

II. PLAINTIFFS ASSERTED AS-APPLIED CHALLENGES TO THE STATUTES

The trial court assumed that Plaintiffs assert only facial challenges to HB1229 and HB1224 (Op.8 n.8, 38), but that assumption is belied by case law and Plaintiffs' complaint. First, this Court has recognized that constitutional claims can

contain both as-applied and facial challenges. *United States v. Carel*, 668 F.3d 1211, 1217 (10th Cir. 2011).

Second, in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), the Court stated that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Id.* at 331. Thus, this Court has "recognized that for both facial and as-applied challenges, 'the relevant constitutional test . . . remains the proper inquiry.'" *Olson v. City of Golden*, 541 Fed. Appx. 824, 830 (10th Cir. 2013) (quoting *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012)).

Third, the complaint makes plain that, with respect to HB1229, Plaintiffs asserted an as-applied challenge. Paragraph 197 of the Fourth Amended Complaint alleges that "[t]he prohibition of non-commercial, ***temporary transfers*** is an infringement of the Second Amendment." (Emphasis added.) And as the trial court acknowledged, Plaintiffs "focus their challenge on the effect of the statute on *temporary* transfers, when ownership of the firearm does not change." (Op.36) This underscores that the challenge is, in part, as-applied. Plaintiffs challenged the portion of HB1229 that, in light of their particular circumstances, burdens their ability to acquire firearms via temporary transfers.

Fourth, an individual need not violate the law and risk prosecution in order to challenge it. *Ezell*, 651 F.3d at 695. This is true whether the challenge is as-applied or facial. *E.g.*, *American Civil Liberties Union v. Alvarez*, 679 F.3d 583, 591 (7th Cir. 2012) (allowing as-applied pre-enforcement challenge); *see also* Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 785 (2009) (the Roberts Court has employed "a quite broad understanding of what constitutes an as-applied challenge," and has allowed challenges to be brought pre-enforcement).

There is always some uncertainty in a pre-enforcement challenge, but that uncertainty only precludes such a challenge if it undermines the credible threat of prosecution. *Alvarez*, 679 F.3d at 594. In this case, the district court demonstrated there was a credible threat of prosecution when it advised counsel to instruct a witness of his Fifth Amendment rights in response to a question about CYO's transfer of firearms to class participants off the organization's property. (JA.10:2018-19)[20]

III. A HIGHER LEVEL OF SCRUTINY IS REQUIRED THAN THE DEFERENTIAL REVIEW APPLIED BY THE TRIAL COURT

[20] At a minimum, and on this record, CYO is entitled to as-applied relief for the routine transfers it makes as part of its ongoing programs (most especially intra-organizational transfers), and Outdoor Buddies is entitled to as-applied relief for the transfer of its specialized firearms for members and participants.

The Tenth Circuit follows the two-step analysis most circuits have adopted for Second Amendment challenges. This Court must first consider whether the law burdens Second Amendment rights. *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010). "If it does, the court must evaluate the law under some form of means-end scrutiny." *Id.* The trial court purported to apply intermediate scrutiny, but did not follow its requirements.

A. Strict Scrutiny Is the Appropriate Standard

There are several reasons to apply a higher level of scrutiny in this case. First, unlike other firearms laws this Court has examined, HB1229 and HB1224 are laws of general applicability that apply to every law-abiding citizen. *See, e.g.*, *Reese*, 627 F.3d at 800-01 (persons subject to domestic protection orders); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1165 (10th Cir. 2012) (illegal aliens). Where a statute burdens the rights of law-abiding citizens,[21] it is closer to the core of the Second Amendment right and therefore deserving of a higher level of scrutiny. *See Tyler*, 2014 WL 7181334, at *24-25 (cases in which the challenged laws concern non-law-abiding citizens are "one step removed from the core constitutional right"); *Ezell*, 651 F.3d at 703 ("plaintiffs *are* . . . 'law-abiding,

[21] The Second Amendment protects a personal right to keep and bear arms, but the right is not limited only to self-defense. *McDonald*, 561 U.S. at 780 ("Second Amendment protects a personal right to keep and bear arms…***most notably*** for self-defense within the home").

responsible citizens' . . . and their claim comes much closer to implicating the core of the Second Amendment right" (emphasis in original)).

Second, the Supreme Court has indicated that there is a presumption in favor of strict scrutiny when a fundamental right is involved. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Tyler*, 2014 WL 7181334, at *15. Because the Second Amendment right is fundamental, *McDonald*, 561 U.S. at 778, and the statute in this case implicates law-abiding citizens, strict scrutiny is appropriate.

Third, in assessing the fit between a challenged firearms law and its purported objectives, courts applying intermediate scrutiny tend to unduly defer to the judgments of the legislature. *E.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (deferring to state legislature's "belief" that regulation of handgun possession would have "an appreciable impact on public safety and crime prevention"). However, as the Ninth Circuit pointed out in *Peruta*, 742 F.3d 1144, such an interest-balancing approach "is near identical to the freestanding 'interest-balancing inquiry' that Justice Breyer proposed – and that the majority explicitly rejected – in *Heller*." *Id.* at 1176; *see Heller*, 554 U.S. at 636 ("the enshrinement of constitutional rights necessarily takes certain policy choices off the table").

Even if this Court deems strict scrutiny inapplicable to HB1229 and HB1224, intermediate scrutiny is not the only remaining option. In *Ezell*, for example, the Seventh Circuit applied a standard it deemed "not quite strict scrutiny." 651 F.3d at 708.[22] Under that standard, the court inquired whether there was a "close fit" between the statute and the actual public interests it serves. *Id.* at 709; *see also Tyler*, 2014 WL 7181334, at *11 ("intermediate and strict scrutiny are not binary poles in the area of heightened scrutiny").

B. Even Under Intermediate Scrutiny, a Statute Must Advance the State's Interest in "a Direct and Material Way"

Although strict scrutiny is the appropriate test, the same result obtains under intermediate scrutiny. Intermediate scrutiny requires the government to prove an important governmental objective and a "substantial relationship" between that objective and the restriction at issue. *Reese*, 627 F.3d at 802. Other courts have stated that the government's stated objective must be "significant, substantial, or important," and that there must be a "reasonable fit" between the challenged regulation and the asserted objective. *Id.* at 803-04.

Although intermediate scrutiny only requires the fit to be "reasonable," not "perfect," it still demands that the government show that the regulation will

[22] *Ezell* involved prohibitions on firing ranges. The regulations/prohibitions at issue here much more directly impact core Second Amendment rights.

alleviate the asserted harms "to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), quoted in *Silvester*, 2014 WL 4209563, at *27. In other words, the challenged regulation must advance the Government's interest in "a direct and material way." *Edenfield*, 507 U.S. at 771; *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

Under the intermediate scrutiny standard, then, a restriction "may not be sustained if it provides ***only ineffective or remote support*** for the government's purpose." *Edenfield*, 507 U.S. at 770 (emphasis added); *see also Silvester*, 2014 WL 4209563, at *27 (applying *Edenfield* in Second Amendment challenge).

As discussed in Section IV.B.2., the record in this case established that HB1229 is so ineffective that it actually accomplished the reverse of the General Assembly's purported objective in passing the law; background checks decreased. With respect to HB1224, as explained in the Sheriffs' opening brief and below, it is far too sweeping to reasonably fit the State's asserted objectives.

IV. THE COURT ERRED IN CONCLUDING THAT HB1229 DOES NOT VIOLATE THE SECOND AMENDMENT

A. HB 1229 Burdens Second Amendment Rights

HB1229 is very broad, requiring every law-abiding citizen who acquires a firearm for more than 72 hours to travel with the owner and together obtain a formal background check in the presence of an FFL gun store. The store has no

legal obligation to process the transaction, and if it does, it may charge no more than a $10 fee. When the firearm is returned, everyone must repeat the process.

Requiring background checks in such a broad, all-encompassing manner is absurd and cannot survive even intermediate scrutiny. *Ezell*, 651 F.3d at 703.

1. HB1229 burdens the acquisition of firearms

The trial court expressed "grave doubt" about whether HB1229 implicates the Second Amendment at all, perhaps based on the premise that Plaintiffs only intend to loan firearms. (Op.37) Plaintiffs proved, however, that HB1229 impacts citizens' ability to ***acquire*** firearms in a myriad of circumstances.[23] Every transfer involves someone acquiring a firearm: for example, a farmhand acquiring a rifle to protect a farm (JA.12:2552), or a woman obtaining a loaned handgun to protect herself in a domestic violence situation (JA.11:2221). The ability to acquire firearms is at the core of the Second Amendment right: "One cannot exercise the right to keep and bear arms without actually possessing a firearm." *Silvester*, 2014 WL 4209563, at *27; *see also Ezell*, 651 F.3d at 704 (the right to possess arms for protection implies a corresponding right to acquire them).

[23] *See also, e.g.*, JA.10:1962-63 (discussing CYO's difficulties with acquiring new firearms due to HB1229); JA.11:2239-40 (discussing impact of HB1229 on the ability of individuals to acquire firearms modified to accommodate disabilities).

The trial court also incorrectly concluded that HB1229 made it no more difficult to acquire firearms in private transfers than to acquire them in commercial sales. (Op.37) In the case of a commercial purchaser of a firearm, a buyer is in the presence of the retailer, who is happy to fill out the various required federal forms and records, conduct the background check and include the costs in the purchase price. Thus, the paperwork and background check are completed in the same place where the transaction itself takes place. However, a temporary transfer is unlikely to take place anywhere near a gun store that can conduct a background check – even if the nearest gun store were willing to perform it.[24] HB1229 thus imposes additional burdens that are not present in commercial transactions.

2. HB1229 burdens the ability of non-profit organizations and their members to acquire firearms

Several Plaintiffs are non-profit organizations dedicated to teaching firearms safety and facilitating access to hunting and shooting sports in general. HB1229 does far more harm than simply imposing an administrative burden on these organizations. It threatens their ability to carry out their missions, and therefore has significant societal impacts.

[24] Plaintiffs' evidence at trial that large numbers of FFLs in Colorado are refusing to perform background checks for private transfers was not rebutted. (JA.12:2562-64; JA.13:2633-37, 2688-89) Gun store owner Tim Brough testified: "I don't believe any FFLs, including Cabelas, the box stores, mom and pop shops, I don't think anybody is doing private party background checks." (JA.13:2637)

Plaintiff Harrell testified that Outdoor Buddies owns very specialized and modified firearms that allow disabled individuals to engage in recreational activities such as hunting and target shooting. (JA.11:2239) For example, Outdoor Buddies has firearms modified to allow amputees or quadriplegics to aim and fire using a breath-activated trigger. (JA.11:2240) Such modified firearms frequently change hands for more than 72 hours, which triggers the in-store processing requirement in virtually every instance. (*Id.*) The burden of requiring in-store processing for each transfer is significant, particularly for a non-profit organization. Moreover, HB1229 burdens not just the organization, but also its members, whose ability to ***acquire*** the modified firearms is hampered by the need to accompany the transferor to a gun store.

Another aspect of HB1229 further burdens non-profit organizations. Subsection 1(b) requires that the transfer of a firearm to a corporate entity requires in-store processing for every individual who ***may*** possess the firearm. In the case of CYO, the universe of officers, employees, and class participants who may come into possession of a CYO firearm is large – each requiring separate in-store processing. (JA.10:1962) At the time of trial, CYO had paid for firearms which it still had not taken possession of, because of the concerns with HB1229. (JA.10:1963) HB1229 harms the right of nonprofit organizations, including CYO,

to acquire firearms – thereby impacting Colorado youth who will have fewer opportunities to learn the skills necessary to responsibly handle firearms.

3. HB1229 inconveniences citizens in ways that other courts have viewed as Second Amendment burdens

When two participants to a private firearm transaction – many of whom live in rural areas – must wander off together in search of a gun store willing to conduct a private background check, it imposes significant costs. (JA.12:2563) Other courts have found such costs to constitute a Second Amendment burden: "The multiple trips required to complete a transaction can cause disruptions in work and personal schedules, extra fuel expense, and wear and tear on a car depending upon where a firearm or a firearms dealer is located in relation to the purchaser." *Silvester*, 2014 WL 4209563, at *10.

4. HB1229 disincentivizes FFLs from doing private background checks, further adding to the burden

Nothing in HB1229 ***requires*** an FFL to conduct an in-store check. Two FFL Plaintiffs testified that their gun stores would not do checks for private sales, loans, or returns of loans because the $10 fee cap is less than the cost to provide such services. (JA.13:2633-37, 2688-89) Processing requires logging the firearm into an Acquisition and Disposition record book, supervising the recipient filling out of

17 questions and multi-item fields in ATF Form 4473, then him- or herself filling out at least 13 fields in the same form. After the FFL contacts the CBI by phone or internet and, after waiting, receives approval to go ahead with the transfer, the FFL must then log the disposition in the Acquisition and Disposition record book. Beyond the federal requirements, the dealer must also keep records of the buyer's "occupation," and or the gun's caliber and finish. C.R.S. §§ 12-26-102, 18-12-112(2)(b) The labor costs of all this are considerably more than the $10 statutory cap, and a mistake by the FFL could result in non-renewal of its license. (JA.13:2633-37, 2688-89)

The record shows that large numbers of FFLs are refusing to process private transfers. Hewson, for example, encountered two FFLs who refused to do the checks for a transfer between CYO's Loveland facility and its Colorado Springs location. (JA.10:1975-76) Plaintiff Harrell testified it took three weeks to conclude a sale because the first two FFLs he approached refused to do the required check. (JA.11:2244) Michele Eichler, who owns and operates an outfitting business, testified that the firearms retailer in Trinidad, Colorado, from which her business regularly purchases firearms, refused to process private transfers. (JA.13:2740)

Defendant did not rebut this testimony. Indeed, Ronald Sloan, the head of CBI, which runs the State's background check system, admitted that his office had

received complaints from citizens who were having difficulty finding FFL's to process private transfers. (JA.14:3076)

The trial court disregarded this evidence, concluding that more than 600 FFL's were "actively performing" private background checks. (Op.38) The record does not support this finding. CBI's James Spoden testified that 635 FFL's reported running a private background check "of any type" between July 2013 and February 2014. (JA.14:3014-15; JA.24:5108) Spoden conceded, however, that the 635 figure included "private sales at gun shows, private sales at non-gun shows, private sales between two individuals, [and] private sales interstate." (JA.14:3014) Spoden readily admitted that there was no way to tell how many of those 635 FFL's had processed private transfers now mandated by HB1229 (intrastate private sales or loans, not taking place at a gun show), and no way of finding out. (JA.14:3037)

5. The trial court implicitly held that HB1229 burdens citizens when it gave a Fifth Amendment instruction to one of Plaintiffs' witnesses

Finally, the burden of HB1229 on law-aiding citizens was demonstrated by the trial court's instruction to counsel to advise Hewson of his Fifth Amendment rights in connection with a question about whether CYO made loans of firearms to class participants off of CYO property. (JA.10:2018-19) Hewson's potential

criminal exposure manifests HB1229's burden on his Second Amendment rights. *See Reese*, 627 F.3d at 801 ("there is little doubt" that the challenged law burdened Second Amendment conduct by criminalizing the possession of otherwise legal firearms).

B. The State Failed to Carry Its Burden on the Second Step of the *Reese* Analysis

The trial court's analysis of the second step was flawed. First, the court found the legislature had engaged in "reasoned analysis" in concluding that it was necessary and beneficial to require in-store processing for private ***transfers*** – although the evidence considered by the legislature and produced by Defendant exclusively involved private ***sales***. Second, the trial court concluded that Defendant had carried his burden of showing a reasonable fit between the statute and its asserted objective – even though the statute actually accomplished the opposite of its purported objective.

1. The trial court's analysis of the State's purported objective mirrored the State's defective evidence on that point

Under heightened scrutiny, the first step is to assess whether the State has identified an "important" or "compelling" governmental interest that the statute addresses. The important/compelling distinction is less relevant in the Second Amendment context, because the government's stated interest almost always has

something to do with preventing violent crime, injury, or death. *Tyler*, 2014 WL 7181334, at *18.

Yet, even on this point, the trial court's assessment was flawed. The trial court devoted a single paragraph to HB1229's purported objective:

> The Court first looks to Colorado's asserted objective in passing § 18-12-112. Colorado asserts that the objective in passing the statute was to ensure public safety and aid in crime prevention by closing a loophole in the background check statutes applicable to gun sales by dealers and at gun shows. The General Assembly considered evidence that almost 40% of ***gun purchases*** are made through ***private sales*** in person or over the internet; 62% of ***private sellers*** on the internet agree to ***sell to buyers*** who are known not to be able to pass a background check; and 80% of criminals whose use guns in crime acquired one through a ***private sale***. The General Assembly also considered evidence that a high percentage of gun crimes are committed by individuals with prior arrests or convictions, which would trigger a denial in a background check, and that closure of the loophole would reduce the number of firearms that are easily passed into the trafficking market and made more accessible for use in crime. The Court finds that the General Assembly used ***reasoned analysis*** in concluding that it was ***necessary and beneficial*** to require background checks for ***private transfers*** of firearms to help prevent crime and improve public safety, both important governmental interests.

(Op.38-39 (emphases added)) The trial court relied upon evidence concerning private ***sales*** – the only kind adduced by Defendant[25] – and leapt to the conclusion

[25] Regarding actual private sales, the only evidence that restrictions on them really do advance a state interest came from Webster. (Op.39-40) All of his evidence was seriously flawed. Inter alia, Webster admitted at trial that his data tables contained hundreds of errors, because his assistant had transposed some columns, resulting in the wrong numbers being attached to the wrong states. (JA.13:3213-17;

that the State engaged in "reasoned analysis" that it was "necessary and proper" to extend in-store processing to all private ***transfers*** without evidentiary support.

2. HB1229 does not advance the State's interest "in a direct and material way"

The State has not carried its burden of showing a close or reasonable fit between the statute and the public interests it was intended to serve. First, as demonstrated above, the only evidence in the legislative history or adduced at trial related to private sales, not private transfers. Accordingly, Defendant failed to meet his burden under the second step as related to private transfers.

JA.26:5459-5512) (Webster data tables, showing that some begin with Alabama, some begin with Missouri, and that data were transposed between the two, with Missouri data thus being associated with Alabama; Alabama data being associated with Alaska, and so on).

Webster had also studied firearms trace reports from the Bureau of Alcohol, Tobacco, Firearms & Explosives. His use of the traces to draw broad conclusions about the patterns of how criminals acquire guns was contrary to a congressionally-mandated warning that appears on the cover of every ATF trace report: "Law enforcement agencies may request firearms traces for any reason. The firearms selected do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals or any subset of that universe. Law enforcement agencies may request firearms traces for any reason. Firearms are normally traced to the first retail seller, and the sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime." (JA.13:3160-61; Pub. L. No. 113-6, Consolidated and Further Continuing Appropriations Act, 2013, § 514)

Second, HB1229 was premised on closing a supposed loophole in the State's background check system for private sales of firearms. Presumably, HB1229 should result in a large increase in private background checks once private sales and transfers are added. According to evidence cited by the trial court, HB1229 should have resulted in a 67% increase in background checks, just taking actual ***sales*** into account. (Op.39) HB1229's inclusion of an unknown quantity of temporary transfers should have increased background checks by vastly more than 67%. The evidence shows, however, that HB1229 resulted in a decrease in the number of background checks.

Trial exhibit 24 (attached hereto as Exhibit 4) is a monthly breakdown of private background checks in Colorado between July 2012 through December 2013. (JA.14:3022) Exhibit 24 contains two rows: one row of data for gun show private background checks, and another row for non-gun show private background checks. Prior to HB1229, non-gun-show private checks would have included only private interstate sales which (ever since the Gun Control Act of 1968) must be conducted by an FFL. (JA.14:3022, 3029) HB1229 became effective on July 1, 2013, so any resulting increases in private background checks would show up in the months between July 2013 and December 2013.

Exhibit 24, however, shows that there was a net ***decrease*** in the number of private background checks in the six months after the implementation of HB1229. The legislature planned and budgeted that HB1229 would cause 200,000 additional checks (JA.28:5603-04), but instead the number of checks fell. This is the opposite of a constitutional "fit." *Edenfield*, 507 U.S. at 770-71 (a statute may not be sustained if it provides only ineffective support for the government's purpose, and therefore fails to advance the government's interest "in a direct and material way").

The trial court dismissed this evidence, stating that "arguments about whether the statute has been successful are not relevant." (Op.40) However, if a law fails to materially advance its intended purpose, and provides ineffective support for (or in this case, actually harms) the government's purpose, then it cannot be "substantially related" to that purpose. "[P]ost-enactment evidence, if carefully scrutinized for its accuracy, will often prove useful in evaluating the remedial effects or shortcomings" of a constitutionally questionable program. *Concrete Works of Colorado v. City & County of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994); *see also Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1551 (10th Cir. 1991) ("we cannot simply assume that particular means will accomplish certain ends because the legislature presumed they would and enacted them into law"). The trial court's conclusion that HB1229's ineffectiveness is immaterial

would be appropriate in rational basis review, which was rejected in *Heller*. *See* 554 U.S. at 628 n.27.[26]

3. Less burdensome alternatives were available

A CFB witness testified about obtaining a background check without having to go to an FFL. (JA.12:2574-75) Massachusetts is implementing a program in which participants in a private sale can directly contact the state government for authorization, without their having to simultaneously travel to a gun store. Mass. Gen. Laws ch. 140, § 128A. Or, as Plaintiffs' counsel pointed out in closing argument, HB1229 could have provided an exemption for persons who have already passed a much more rigorous background check: the biometric, fingerprint-based check required to obtain a concealed handgun carry permit – which also requires safety training – and a Sheriff's determination that the applicant is not a danger to himself or others. C.R.S. § 18-12-203, -205. Another less burdensome alternative would simply be to adopt California's approach, and allow loans to up

[26] As further evidence that the trial court could have more rigorously examined the fit between HB1229 and its purported objectives, the trial court noted testimony from Daniel Webster that most firearms used in crimes are obtained from a dishonest licensed firearms dealer, a trusted friend or family member. (Op.39) First, as regarding family members, HB1229 contains an exemption for loans and gifts among them. Second, as for the trial court's statement regarding dealers and trusted friends (as well as family members), Webster was referring to permanent transfers via sales, not temporary transfers. (JA.15:3152-53)

to 30 days when the borrower is personally known to the lender. Cal. Penal Code § 27885.

Every alternative would have been far less burdensome, and most of these alternatives would have resulted in a far greater participation by private transferors. The less burdensome alternatives, therefore, were actually superior in advancing the allegedly legitimate governmental objective. The trial court dismissed these less restrictive alternatives, and erred in doing so. (Op.40) "A regulation need not be 'absolutely the least severe that will achieve the desired end,' but if there are obvious and less-burdensome alternatives to the restriction . . . that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 417 n.13 (1993).

C. Conclusion

In sum, the trial court erred both in assessing the burdens HB1229 placed on Colorado citizens' ability to acquire firearms, and in not requiring Defendant to justify these burdens.

V. THE TRIAL COURT ERRED IN HOLDING THAT HB1224 DOES NOT VIOLATE THE SECOND AND FOURTEENTH AMENDMENTS

Plaintiffs adopt and incorporate the arguments contained in the Sheriffs' Opening Brief concerning the unconstitutionality of HB1224. Plaintiffs make the following additional arguments concerning HB1224.

A. The State Failed to Prove that HB1224 Serves a Public Interest

The Defendant failed to establish a compelling state interest (or a significantly important governmental interest) that is advanced by HB1224. This record demonstrates that the purported interests (principally, reducing the number of "large capacity magazines" in mass shootings and forcing magazine changes to effectuate a "critical pause" in such shootings) are based on little more than speculation.

Defendant proffered Douglas Fuchs, a police chief from Connecticut, who opined that HB1224 provides victims in mass shootings with an opportunity to escape or overcome the shooter because of the shooter's need to change magazines.[27]

[27] As an initial matter, his opinion was the subject of a motion to strike on three of the four grounds articulated in FRE 702. The basis for his claimed expertise was his experience with the Sandy Hook shooting and subsequent research into magazine capacity, but his law enforcement responsibility at Sandy Hook turned out to be tangential at best. (JA.16:3489, 3492; JA.17:3542-43). The trial court did

Based upon his conversation with a parent at the Sandy Hook shooting who was told by a child that the suspect was "playing with his gun" when the children fled, Fuchs concluded that the suspect was performing a magazine exchange and the associated "pause" allowed some children to flee. (JA.16:3492-93, 3497-98)

Subsequent separate investigations by the Connecticut State's Attorney and the Connecticut State Police determined that the assailant's weapon had malfunctioned and that the malfunction rather than a magazine exchange, was the reason for the pause. These investigations also determined that the suspect had performed seven magazine exchanges during which no one was able to escape or overcome the shooter. (JA.17:3544-45, 3547-78) Fuchs admitted that he did not know if the pause at Sandy Hook was caused by a magazine exchange or by a malfunction. (JA.16:3498-99, 3501)

Fuchs later modified his opinion to state that a pause ***for whatever reason*** – whether due to a malfunction, a tactical reload or the need for a magazine exchange – benefitted the public. (JA.16:3495-96) The trial court essentially adopted this opinion in its order. (Op.34 (in incidents cited by Defendant, "the pause was created either by the shooter reloading the weapon ***or there being a malfunction of the firearm***")). Not all "pauses" are the same. There is no evidence

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not rule on these objections, which, as discussed below, constituted reversible error.

that the "pause" of changing magazines on a functional firearm lasts as long as the "pause" of restoring a malfunctioning firearm to operability.

Pauses associated with anything other than a magazine exchange are irrelevant to HB1224 because the statute only attempts to create the need for a magazine exchange after expending 15 rounds. Despite claiming that there are "[c]ountless examples" (JA.16:3484), when pressed, Fuchs cited only five other incidents as examples of events which supported his opinion.[28] The evidence, however, showed that ***none*** of these other incidents involved a magazine exchange. (JA.16:3508-09; JA.17:3535-36, 3537, 3539)

Indeed, Defendant's evidence actually proved HB1224 would make law-abiding gun owners less safe in defensive situations. Fuchs and another defense expert, John Cerar, admitted that the pauses associated with compelled magazine exchanges render victims "temporarily defenseless," placing defensive gun users at greater risk. (JA.16:3475, 3486; JA.17:3553, 3555)

B. The FFLs Have Standing

[28] Indeed, approximately one month before trial, Defendant's counsel provided Fuchs with news articles regarding 47 incidents in which Defendant contended that a pause associated with a magazine exchange had enabled potential victims to flee or intervene. (JA.16:3503) At trial, after reading the police reports associated with some of these 47 incidents, Fuchs testified to only five of the 47. (JA.16:3503-04, 3505-06)

The trial court ruled that Plaintiff FFLs lack standing. *See* JA.5:1043-47. At the time trial commenced, Plaintiff FFLs asserted Second Amendment challenges to HB1224's magazine ban and "designed to be readily converted clause," and HB1229's fee-capped requirements on private transfers.

To establish standing, a plaintiff must show that: (1) he or she has suffered an "injury in fact" that is concrete and particularized, and actual or imminent (not merely conjectural or hypothetical); (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 180-81 (2000). Each of these elements has been satisfied. First, the record shows that Plaintiff FFL's have suffered from the continuing injury of lost profits and sales. (JA.13:2627-29, 2681-82, 2704-05, 2708-09, 2711-12, 2714) Economic injury is the paradigmatic form of an injury-in-fact. *E.g.*, *Schrader v. New Mexico*, 361 Fed.Appx. 971, 974 (10th Cir. 2010).

Second, Defendant is the state's chief executive, charged with ensuring that Colorado laws are faithfully executed. *See Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004). Plaintiff FFLs' injuries are traceable to him. *See Sportsmen's Wildlife Defense Fund v. U.S. Dep't of the Interior*, 949 F. Supp. 1510, 1514-15

(D. Colo. 1996) (finding plaintiff's injury is fairly traceable to the Governor and he is a proper party).

Third, the Tenth Circuit has stated that the "requirement of redressability ensures that the injury can likely be ameliorated by a favorable decision." *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1233 (10th Cir. 2010). The trial court found "that the Governor, in his official capacity, possesses sufficient authority to enforce (and control the enforcement of) the complained-of statute." *Id.*

The trial court found that Plaintiff Women for Concealed Carry had established "associational standing" to challenge HB1224, and therefore did not evaluate the standing of the FFL Plaintiffs. (Op.11-13) With respect to HB1229, the trial court found that no individual Plaintiff had standing to challenge its constitutionality (Op.14-15) and expressed doubt, without actually so holding, that the entity Plaintiffs (including the FFL's) had standing to bring a Second Amendment challenge.

However, in *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928 (N.D. Ill. 2014), the court explained that the plaintiff association of firearms retailers had standing (derivative of the standing that a member firearms retailer would have) to raise Second Amendment claims. *Id.* at 931 n.3. Certainly

such "derivative" standing could not exist if the member FFLs as firearms sellers, did not each have standing on their own. In *Ezell v. City of Chicago*, 651 F. 3d 684, 696 (7th Cir. 2011), the Seventh Circuit found that "a supplier of firing range facilities is harmed by the firing range ban and is permitted to act as an advocate of the rights of third parties who seek access to its services." *Id.* at 696.

Here, the trial court, in not allowing firearms sellers such as Jensen Arms and Rocky Mountain Shooter's Supply to be heard, divested them of their right to challenge a statute which adversely affected their own businesses[29] and the second Amendment rights of their customers.

C. HB1224 Is Unconstitutionally Vague

The trial court held that HB1224 is not unconstitutionally vague, in part based on two Technical Guidance letters issued by the Colorado Attorney General, which supposedly clarified confusing aspects of HB1224. The trial court erred in so holding.

"The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and

[29] Precedents involving other constitutional rights show that businesses that provide constitutionally related services have standing in their own right to challenge statutes that injure them. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

discriminatory enforcement." *Kolendar v. Lawson*, 461 U.S. 352, 357-58 (1983). The Technical Guidances do not solve the vagueness problem because they conflict with one another. For example, the first Technical Guidance allows sharing of grandfathered magazines only if the magazine remains in the owner's "continuous physical presence" along with "the expectation that it will be promptly returned." The second Technical Guidance says that "continuous possession" is only lost by the voluntary relinquishment of "dominion and control," allowing leaving a magazine for repair at a repair shop or long-term loaning or storing of magazines with friends or family, when the owner is not present.

Likewise, the first Technical Guidance says that small magazines which are "designed to be readily converted" are illegal based on unspecified characteristics which facilitate conversion. The second Technical Guidance says that ***nothing*** is "designed to be readily converted" unless it actually has been converted. Contrary to the statute, the second Technical Guidance takes the unfounded position that nothing is "designed" for conversion until the conversion has in fact been accomplished. The purported simultaneous validity of both Technical Guidances is

facially vague, and is aggravated by the fact that both contradict the statute they purportedly interpret.[30]

Finally, the trial court's opinion itself demonstrated the vagueness. According to the court, applying dictionary definitions, "An owner who loaned out his or her magazine to another after July 1, 2013, would clearly not have maintained 'possession' of it." (Op.44) Yet the second Technical Guidance says that "'continuous possession' is only lost by a voluntary relinquishment of dominion and control" – that is, surrendering ownership rights ("dominion"). So loans are illegal under the statutory language, as interpreted by the court, and they are legal by the Attorney General's second Technical Guidance, which the trial court said controlled the enforcement. (Op.45-46) Loans are illegal (Op.44, statute and dictionary), and they are legal (Op.45-46, second Technical Guidance). No one knows what the law requires.

[30] The Governor has no law enforcement responsibility with respect to HB1224, as he repeatedly insisted in refusing to respond to discovery. (JA.5:1201) Meanwhile, the State's District Attorneys are not bound by the Attorney General's interpretation. *Davidson v. Sandstrom*, 83 P.3d 648, 656 (Colo. 2004) (district attorneys answer only to the voters of their district); *People ex rel. Tooley v. Dist. Court*, 549 P.2d 774, 777 (Colo. 1976) (the Attorney General is not authorized to prosecute crimes in the absence of a command from the General Assembly or the Governor). As a matter of law, the non-binding and self-contradictory "guidances" cannot solve HB1224's vagueness problem.

VI. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' ADA CLAIM

Title II of the Americans with Disabilities Act requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The remedies include injunctive and declaratory relief. *Id.* § 12133.

Plaintiffs brought ADA Title II claims against HB1224 (because magazine bans disproportionately harm disabled persons' ability to defend themselves) and against HB1229 (because the bill has unnecessarily harmed Outdoor Buddies' program for persons with disabilities). The trial court's denial of Plaintiffs' Title II claim was reversible error.

A. Plaintiffs Have Standing and Are Qualified Individuals with a Disability

To prevail, plaintiffs must prove: (1) they are qualified individuals with a disability; (2) they have been discriminated against by reason of such disabilities; and (3) by a public entity. Items (1) and (3) are not at issue.

Plaintiffs Harrell and Bayne, and many members of Outdoor Buddies, are paraplegics who must use wheelchairs. Parapalegia is within the ADA's definition of a "disability": a "physical or mental impairment that substantially limits one or

more of the major life activities." 42 U.S.C. § 12102(1)(A). Plaintiffs are also "qualified individuals" because they "meet the essential eligibility requirements." 42 U.S.C. § 12131(2). They are law-abiding citizens qualified to possess and use firearms. Likewise, the members of Outdoor Buddies are qualified individuals, because they have been issued the requisite hunting permits, under the hunting programs administered by the Colorado Division of Parks and Wildlife. (JA.11:2255)

Congress expressly gave organizations which provide services to persons with disabilities direct standing to bring Title II claims; they do not need to rely on associational standing based on members with disabilities. 28 C.F.R. § 35.130(g). Thus, Outdoor Buddies itself has Title II standing.

Of course, to have direct standing for a Title II challenge under the ADA, an organization must show that it has suffered some injury. *National Alliance for Mentally Ill v. Board of County Commissioners*, 376 F.3d 1292, 1295-96 (11th Cir. 2004). In the instant case, Outdoor Buddies did so: HB1229 has needlessly harmed Outdoor Buddies' program of loaning specialized firearms to persons with disabilities for use in guided hunting trips. *See* Section IV.A.2, *supra*.

Besides having direct standing, Outdoor Buddies also has associational standing to bring ADA claims, based on their individual members, such as Harrell and Bayne.

B. Title II of the ADA Applies to Statutes and Plaintiffs Have Suffered Title II Discrimination

In closing, Defendant acknowledged that Title II applies to statutes, but argued that it only applies to statutes that expressly discriminate against disabled individuals. (JA.18:3897-3900) The trial court, however, announced a novel rule that Title II ***never*** applies to statutes (Op.49), and erred in doing so.

1. Case law holds that Title II applies to statutes

In *Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222 (10th Cir. 2009), this Court considered on the merits a claim against a facially neutral state statute, on the basis of section 504 of the Rehabilitation Act (and thus, necessarily, also on Title II[31]). The statute in question restricted who may supervise a minor driver with an instruction permit. This Court held that plaintiffs' claim for refusal to grant her

[31] *Barber* had been brought under both the ADA and the Rehabilitation Act. As the Ninth Circuit has explained, Title II extends the anti-discrimination prohibition in section 504 to all actions of state and local governments. *See* 562 F.3d at 1231-32 & n.2*; see also Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1067 (9th Cir. 2010).

preferred reasonable accommodation failed because the State had offered her a different, but also reasonable, accommodation. Likewise, this Court ruled on the merits of a Title II claim challenging municipal zoning ordinances, in *Cinnamon Hills Youth Crisis Center, Inc. v. Saint George City*, 685 F.3d 917 (10th Cir. 2012).

Other circuits which have considered whether ADA Title II applies to statutes have answered in the affirmative. The Second Circuit provided the most detailed explanation, in a decision involving whether there should be a reasonable modification of a facially neutral state statute about retirement eligibility benefits:

> Congress clearly meant Title II to sweep broadly. If all state laws were insulated from Title II's reasonable modification requirement solely because they were state laws, state law [would serve as] an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting Title II. Far from providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, the ADA would be powerless to work any reasonable modification in any requirement imposed by state law, no matter how trivial the requirement and no matter how minimal the costs of doing so.

Mary Jo C. v. New York State & Local Retirement Systems, 707 F.3d 144, 163 (2d Cir. 2013) (internal quotations omitted). In support, the Second Circuit cited this Court's *Barber* decision. *See also Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996); *James v. City of Costa Mesa*, 684 F.3d 825 (9th Cir. 2012).[32]

[32] District courts in the Tenth Circuit also have applied Title II to state statutes. *See Thompson v. Cooke*, 2007 WL 891364 at *5 (D. Colo. Mar. 22, 2007); *T.E.P.&*

2. The trial court's holding that Title II does not apply to statutes was based on a misreading of a recent Tenth Circuit decision

The trial court relied upon *Elwell v. Oklahoma ex rel. Bd. of Regents of University of Oklahoma*, 693 F.3d 1303 (10th Cir. 2012). In that case, a disgruntled employee sued a state university, and attempted to bring the claim under Title II. This Court rejected the claim, holding that Title II covers government "output," but does not cover all internal government operations, nor "everything the public entity does." *Id*. at 1307. *Elwell* does not overrule or disagree with *Cinnamon Hills* or *Barber*.[33] As these cases collectively show, Title I is for state employees, and Title II is for state (or local) laws.

C. In Rejecting Plaintiffs' Disparate Impact Claim, the Trial Court Ignored Evidence that Was Directly on Point

An ADA plaintiff may prove discrimination by proving disparate impact. *Cinnamon Hills*, 685 F.3d at 922. "To prove a case of disparate impact discrimination, the plaintiff must show that 'a specific policy caused a significant

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K.J.C. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993); *Grider v. City & County of Denver*, 2012 WL 1079466 (D. Colo. Mar. 30, 2012) (Krieger, J.).

[33] Notably, in the *Mary Jo C.* decision, which relied upon this Circuit's decision in *Barber*, the Second Circuit clearly did not consider *Barber* to have been overruled by this Court's decision in *Elwell*.

disparate effect on a protected group.'" *Id.* (quoting *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10th Cir. 2007)).

While disparate impact is frequently shown by statistical evidence, it can be shown by "qualitative" evidence as well. *Tsombanidis v. West Haven Fire Dep't.*, 352 F.3d 565, 574, 577 (2d Cir. 2003) (municipal fire code). The rule that statistical evidence is not the only possible evidence for disparate impact is sensible, because "[o]ften, there may be little or no statistical data to measure the impact of a procedure on any 'class' of people with a particular disability compared to people without disabilities." BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 953 (4th ed. 2007).

The record shows that disabled persons are disproportionately victimized by violent crime. According to the U.S. Department of Justice, Bureau of Justice Statistics:

- In 2011, the average annual age-adjusted rate of serious violent victimization for persons with disabilities (22 per 1,000) was more than three times higher than that for persons without disabilities (6 per 1,000).
- The rate of violent victimization for males with disabilities was 42 per 1,000 in 2011, compared to 22 per 1,000 for males without disabilities.
- For females with disabilities, the rate of violent victimization (serious and lesser) was 53 per 1,000 in 2011, compared to 17 per 1,000 for females without disabilities.

(JA.7:1707).

Massad Ayoob, a leading firearms trainer, has trained many individuals with disabilities. Ayoob testified about the problems a disabled shooter encounters having to change magazines in a defensive situation. (JA.11:2292-2313) Forcing a magazine change on a disabled person unquestionably harms that person's ability to defend him or herself.

Plaintiffs Harrell and Bayne explained that in case of a home invasion, they will be unable to retreat to a safe position where they can change a magazine. Thus, the only ammunition they will be able to use in a self-defense emergency is the ammunition in a single magazine. (JA.11:2248-51; JA.12:2587)

In addition to the disparate impacts of HB1224, Harrell, an officer of Outdoor Buddies, explained that HB1229 has threatened Outdoor Buddies' program of loaning specially-adapted firearms to persons with disabilities for guided hunting trips.

Outdoor Buddies' guns have very expensive modifications and are not otherwise readily available for loan or purchase. (JA.11:2239-40) Imposing the in-store processing requirement on transfers between program participants who can ***only*** use a firearm with the modifications precludes disabled hunters from participating in shooting sports.

The trial court ruled alternately that Plaintiffs submitted "anecdotal evidence[, which] in the absence of meaningful statistical analysis comparing the effect of the statute on the Plaintiffs and able-bodied comparators is insufficient to carry the Plaintiffs' burden of demonstrating that the statutes cause any disparate effect." (Op. 48-49) This conclusion is belied by the record, as described above.

D. The Trial Court Failed to Rule on Plaintiffs' Intentional Discrimination Claim

In addition to disparate impact, a plaintiff may pursue intentional discrimination as a ground for relief under Title II. *See, e.g.*, *Wis. Community Servs. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006); *Tsombanidis*, 352 F.3d at 573. Plaintiffs pursued relief from intentional discrimination, which the trial court failed to rule upon.

In the Tenth Circuit, discriminatory intent is present when there is a showing of "deliberate indifference." *Barber*, 562 F.3d at 1228-29 ("[I]ntentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights."). The legislative record, which was made part of the record before the trial court, shows deliberate indifference. At the February 12, 2013, hearing of the House Judiciary Committee, Sammy Myrant testified:

> I am disabled, so I can't put a clip in and out very quickly. I drop them, even when I'm practicing at the range. . . . [t]he man who committed 16 felony counts of rape, child abuse on this child gets out of prison this year. So there are times when we're going to need a magazine of high capacity. He's a member of the Aryan Brotherhood, and he gets out of prison this year. And he has sworn to kidnap her and us, rape her again in front of us, then kill us in front of her.

(JA.19:3978-79). Asked how many rounds he would want for self-defense, he responded "30." (*Id.)* The General Assembly intentionally rejected Myrant's need for an accommodation.

E. Plaintiffs Are Entitled to a Reasonable Modification

Even without proof of intentional or disparate impact discrimination, a separate remedy available for ADA Title II litigants is a "reasonable modification."[34] *Cinnamon Hills*, 685 F.3d at 922-23; *Robertson v Las Animas County Sheriff's Dep't*, 500 F.3d 1185 (10th Cir. 2007); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1188-89 (10th Cir. 2003).

HB1224's exemptions recognize that in certain situations, magazines of more than 15 rounds may be necessary for self-defense. C.R.S. § 18-12-302(3)(b). Based on Ayoob's uncontradicted and unchallenged testimony, persons with upper body or mobility disabilities have a particularly great need for full capacity

[34] "Reasonable modification" is the term of art for Title II; for Title I's employment law, the term of art is "reasonable accommodation." The terms are often used interchangeably.

magazines for self-defense. Accordingly, they are entitled to a reasonable modification.[35]

VII. THE TRIAL COURT ERRED IN CONSIDERING JUSTIFICATIONS THAT WERE NOT INCLUDED IN THE LEGISLATIVE RECORD

Of the 11 witnesses who testified at trial on behalf of Defendant, only one had testified before the legislature at the time that HB1224 and HB1229 were being considered. The testimony of the remaining ten witnesses constituted post hoc evidence not presented to the legislature. The trial court erred in relying upon such evidence, as discussed below and in the *amicus* brief filed by the Attorney General of Utah.

In the context of constitutional challenges involving fundamental rights, the predictive judgments of a legislature are not insulated from review, because a court "must assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622 (1994); *see also Hutchins v. District of Columbia*, 188 F.3d

[35] The trial court did not address the merits of Plaintiffs' request for a reasonable modification. In a footnote, the court asserted that the request had been waived because of failure to include the request in the final pretrial order. (Op.46, n.31) In the final pretrial order, Defendant conceded that Plaintiffs were in fact seeking a reasonable modification. (JA.6:1499) Moreover, Plaintiffs asserted the claim in their Pretrial Brief. (JA.7:1709-11) It was error for the trial court to deem the claim for reasonable modification waived.

531, 567 (D.C. Cir. 1999) ("The Supreme Court has repeatedly demonstrated that . . . it will not tolerate a severe burden on a fundamental right simply because a legislature has concluded that the law is necessary. Rather, the Court has independently examined the evidence before the legislature to determine whether an adequate foundation justified the challenged burdens."). Here, the Colorado legislature could not have drawn a reasonable inference based on evidence it never considered. Thus, this Court cannot assure the reasonableness of inferences by resorting to evidence marshaled by counsel after the fact in response to, and in creative defense of, litigation.

The trial court cited *Concrete Works,* 36 F.3d at 1521, in support of the proposition that it was not limited to the legislative history in determining whether a substantial relation exists between the statute and Colorado's asserted purpose. (Op.33, n.28) The trial court's reliance upon *Concrete Works* was misplaced. That decision states that post-enactment evidence can be considered for the purpose of evaluating whether an affirmative action program complies with *City of Richmond v. Croson,* 488 U.S. 469 (1989). This case says nothing about legislative history in a context such as this where a court is evaluating whether a government satisfies its burden to justify imposition on fundamental rights under a heightened level of scrutiny.

VIII. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO PROVIDE ANY ANALYSIS OF THE PARTIES' *DAUBERT* MOTIONS

While a court of appeals may give a district court latitude in determining how to measure the reliability of the proposed expert testimony and whether it is reliable, in a bench trial, the district court must provide more than just conclusory statements of admissibility or inadmissibility to show that it adequately performed its gatekeeping function. *E.g.*, *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010); *Smith v. Dorchester Real Estate, Inc.*, 732 F.3d 51, 65 (1st Cir. 2013). This Court has not yet expressly adopted this approach, but another circuit applies this standard. *See Barabin v. AstenJohnson, Inc.*, 700 F.3d 428, 433 (9th Cir. 2012).

Here, at the pre-trial conference, the trial court advised the parties for the first time that it would not be ruling on the parties' joint motion[36] to strike experts:

> This is a trial to the bench. I will not be ruling on those 702 motions. I will be taking your objections in mind when I make the final determination on the issues. . . . Since it's a trial to the bench . . . to the extent I agree with an objection, I'll disregard the evidence.

(JA.9:1921)

[36] The trial court's procedures require the parties to assert their objections to the competing experts in a single joint motion. Because the court's procedures contemplate a hearing, argument is not permitted in the motion.

At trial, the Parties Joint Motion to Strike Expert Opinions remained pending. In its final opinion, the court advised that its "findings of fact and conclusions of law set forth herein implicitly adjudicate the Rule 702 motion and the court will not address it separately." (Op.3, n.4) This statement constitutes the entirety of the lower court's Rule 702 analysis.

The trial court's approach effectively precludes this Court from being able to determine "whether the lower court adequately performed its gate keeping function" and applied the *Daubert* and *Kumho Tire* framework, and renders impossible a *de novo* review. This was an abuse of discretion, and warrants a new trial.

CONCLUSION

For the foregoing reasons, the trial court's decision should be reversed or remanded.

Dated this 16th day of January 2015.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument would materially assist this Court in the determination of this appeal. Accordingly, they request oral argument.

FED. R. APP. P. 32(A)(7)(C) CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 13,861 words. I relied on Microsoft Word 2010 to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: s/Peter J. Krumholz

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Opening Brief was served via ECF on the following:

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Virus scan certification: the digital form of this pleading submitted to the Court was scanned for viruses using Symantec Endpoint Protection software, version 12.0.1001.95 (most recent virus definition created on January 16, 2015), and according to the program, the document is virus free.

ECF Submission: undersigned certifies that this ECF submission is an exact duplicate of the seven hard copies delivered to the clerk's officer pursuant to 10th Cir. R. 31.5.

Privacy redactions: privacy redactions were required at pages 870, and 937-38 in volume 4 of the Joint Appendix.

s/Peter Krumholz
Peter Krumholz

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO OUTFITTERS ASSOCIATION, *et al.*,	)	
Appellants,	)	Nos. 14-1290
v.	)	
JOHN W. HICKENLOOPER,	)	
Appellee.	)	

On Appeal from the United States District Court for the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 13-CV-1300-MSK

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 13-cv-01300-MSK-MJW

COLORADO OUTFITTERS ASSOCIATION;
COLORADO FARM BUREAU;
NATIONAL SHOOTING SPORTS FOUNDATION;
MAGPUL INDUSTRIES;
COLORADO YOUTH OUTDOORS;
USA LIBERTY ARMS;
OUTDOOR BUDDIES, INC.;
WOMEN FOR CONCEALED CARRY;
COLORADO STATE SHOOTING ASSOCIATION;
HAMILTON FAMILY ENTERPRISES, INC., d/b/a FAMILY SHOOTING CENTER AT CHERRY CREEK COLORADO PARK;
DAVID STRUMILLO;
DAVID BAYNE;
DYLAN HARRELL;
ROCKY MOUNTAIN SHOOTERS SUPPLY;
2ND AMENDMENT GUNSMITH & SHOOTER SUPPLY, LLC;
BURRUD ARMS INC. D/B/A JENSEN ARMS;
GREEN MOUNTAIN GUNS;
JERRY'S OUTDOOR SPORTS;
SPECIALTY SPORTS & SUPPLY;
GOODS FOR THE WOODS;
JOHN B. COOKE;
KEN PUTNAM;
JAMES FAULL;
LARRY KUNTZ;
FRED JOBE;
DONALD KRUEGER;
DAVE STRONG;
PETER GONZALEZ;
SUE KURTZ; and
DOUGLAS N. DARR,

Plaintiffs,

v.

JOHN W. HICKENLOOPER, Governor of the State of Colorado,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER comes before the Court following a bench trial on the Plaintiffs' claims under the Second and Fourteenth Amendments to the United States Constitution, and under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131 *et seq.* Having considered the evidence presented and the parties' arguments, the Court finds and concludes as follows.

I. Factual Background

In 2013, in the wake of a mass shooting at a movie theater in Aurora, Colorado, the Colorado General Assembly enacted gun control legislation that included two new criminal statutes: (1) C.R.S. § 18-12-302, banning the sale, possession, and transfer of "large-capacity magazines," as that term is statutorily-defined; and (2) C.R.S. § 18-12-112, expanding mandatory background checks to recipients of firearms in some private transfers.

This action was initiated before the statutes became effective. The Plaintiffs — individuals who own guns, associations and organizations of gun owners and advocates, and businesses that manufacture or sell magazines and/or firearms — challenge these statutes and seek to permanently enjoin their enforcement. Many of the Plaintiffs opposed the legislation before the General Assembly, and iterate the arguments they made during the legislative process here. The named Defendant is the Governor of the State of Colorado, sued in his official capacity.[1] Thus, all future references to the Defendant will be to Colorado.[2]

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[1] *See Kentucky v. Graham*, 473 U.S. 166 (1985).

[2] Generally, the Eleventh Amendment to the United States Constitution shelters a state from private suits brought without its consent under the doctrine of sovereign immunity. *Ellis v. Univ. of Kansas Medical Center*, 163 F.3d 1186, 1195 (10th Cir. 1998). However, in *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court recognized a narrow "exception" to states' sovereign immunity to allow private litigants to seek an injunction in federal court against a state

A number of claims were dismissed prior to trial. The issues at trial were: (1) whether § 18-12-302 and § 18-12-112 violate the Second Amendment[3] of the United States Constitution, which guarantees the people's right to "keep and bear arms;" (2) whether the phrase "continuous possession" in the grandfather clause of § 18-12-302 is so vague as to violate the people's right to Due Process under the Fourteenth Amendment of the United States Constitution; and (3) whether the statutes violate Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132.[4]

II. The Scope of this Decision

The issue of gun control is controversial. It is the subject of vigorous and passionate debate in legislatures, the media, and innumerable public and private discussions across the

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official, in order to prohibit the official from enforcing a state statute claimed to violate federal law. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011). The doctrine rests on the premise — or rather, legal fiction — that when a federal court commands a state official to do nothing more than refrain from violating federal law, the official is not the state for sovereign-immunity purposes. *Virginia Office for Protection and Advocacy v. Stewart*, 131 S.Ct. 1632, 1638 (2011). In other words, such a suit is not technically against the state, but rather against an individual who has been "stripped of his official or representative character" because of his unlawful conduct. *Ex parte Young*, 209 U.S. at 159-60. For such exception to apply, the named state official must have a duty to "enforce" the statute in question and have demonstrated a willingness to exercise that duty. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007). Given the duties of the Governor of Colorado to ensure that the laws of Colorado are enforced, Colo. Const. art IV, § 2, the Court finds that the *Ex parte Young* exception applies here.

[3] By inference, the Plaintiffs also invoke the Fourteenth Amendment, which makes the Second Amendment applicable to the states.

[4] Also pending before the Court are the parties' Joint Motion to Strike Expert Opinions Per Fed. R. Evid. 702 **(#118)** and the Defendant's second Motion to Dismiss **(#133)**. The Court's findings of fact and conclusions of law set forth herein implicitly adjudicate the Rule 702 motion, and the Court will not otherwise address it separately. The Court's ruling on the Motion to Dismiss is incorporated into this opinion.

country. The subject triggers both fear[5] and deeply-held societal values that conflict in varying degrees: the desire for physical safety, concerns about government intrusion into matters of individual liberty, the availability of mental health treatment for those disposed to violence, the effectiveness of existing law enforcement protection, and so on. In crafting gun control laws, it is the role of the legislature to carefully examine each of these concerns, to weigh them against each other, and to create social policy in the form of legislation (or, indeed, to elect not to do so).

When the constitutionality of a state law is challenged, however, a court does not engage in the same process. Judicial review of laws for constitutional compliance focuses on only a small sliver of the issues that the legislature considers. A court does not act as a super-legislature to determine the wisdom or workability of legislation. Instead, it determines only whether legislation is constitutionally permissible. A law may be constitutional, but nevertheless foolish, ineffective, or cumbersome to enforce.

The limited role of the court grows out of the separation of powers among the executive, legislative, and judicial branches of government. A legislature, being a body directly elected by the citizenry, is granted the broadest power to act for and by the people. The judiciary acts only as a check on the exercise of that collective power, not by substitution of the personal opinion of a judge as to what he or she believes public policy should be. The judge must only compare the public policy adopted by the legislature against the constitutional minimums that protect individual rights.

Constitutionality is a binary determination: either a law is constitutional, or it is not. This Court will not express a qualitative opinion as to whether a law is "good" or "bad," "wise" or

[5] Mass shootings are particularly frightening because they are unpredictable, occur in places one ordinarily expects to be safe, are horrendously violent, and there is no general consensus as to how to prevent them.

"unwise," "sound policy" or a "hastily-considered overreaction." Similarly, this Court will not assess what alternatives the legislature could have chosen, nor determine whether the enacted laws were the best alternative. Such decisions belong to the people acting through their legislature. Put another way, in determining whether a law is constitutional, this decision does not determine whether either law is "good," only whether it is constitutionally permissible.

III. The Laws at Issue

A. Prohibition of Large-Capacity Magazines

Colorado Revised Statute § 18-12-302(1) makes it a crime for a person to possess or transfer a large-capacity magazine after July 1, 2013. The statute defines a "large-capacity magazine" as including, "a fixed or detachable magazine, box, drum, feed strip, or similar device capable of accepting, or that is designed to be readily converted to accept, more than fifteen rounds of ammunition." C.R.S. § 18-12-301(2)(a)(I). Persons who possessed such magazines on July 1, 2013 may be protected by a so-called "grandfather clause," which states that a person can possess large-capacity magazines if: (1) the magazines were acquired before July 1, 2013, and (2) if the person has maintained (and continues to maintain) "continuous possession" of the magazines. C.R.S. § 18-12-302(2)(a). The statute also contains a handful of specifically-defined exceptions permitting the possession of large-capacity magazines by, among others, certain narrow classes of firearm manufacturers, firearm dealers, and government officials who carry weapons as part of their official duties.

B. Mandatory Background Checks for Private Firearm Transfers

Colorado has long required background checks for those acquiring firearms at gun shows or from firearm dealers.[6] Such background checks must be performed by a licensed gun dealer

[6] *See* C.R.S. § 24-33.5-424 (firearm sales), and C.R.S. § 12-26.1-101 (gun shows).

as defined in C.R.S. § 12-26.1-106(6). Prior to transfer of the firearm, a search must be performed by, and approval obtained from, the Colorado Bureau of Investigation in accordance with C.R.S. § 24-33.5-424.

The 2013 law, Colorado Revised Statute § 18-12-112, expands the background check requirement to certain private transfers of firearms. It makes it a crime for both the person transferring possession (the transferor) and person taking possession of a firearm (the transferee) to transfer possession of the firearm in a private transfer without first obtaining a background check for the transferee. In addition, the statute makes the transferor liable for any injury caused by the transferee's use of the firearm if no background check was obtained. C.R.S. § 18-12-112(5). The process for obtaining the background check is the same as that required for retail sales, but the fee that can be charged by the gun dealer performing the check is limited to ten dollars. C.R.S. § 18-12-112(2)(d). If the firearm is transferred to an entity rather than a living person, then a background check is required for each living person who will possess it. C.R.S. § 18-12-112(1)(b).

The statute specifies certain types of private transfers for which no background check is required, including, among others: (1) gifts or loans between certain specifically-identified family members; (2) temporary transfers, made in the transferee's home, when the transferee reasonably believes that possession is necessary to prevent his or her imminent death or serious bodily injury; (3) temporary transfers of possession at shooting ranges, during target firearm shooting competitions, or while legally hunting, fishing, target shooting, or trapping; and (4) temporary transfers for no longer than seventy-two hours. C.R.S. § 18-12-112(6).

IV. Jurisdiction

The Plaintiffs invoke the Court's jurisdiction under 28 U.S.C. § 1331. Colorado, however, contends that the Court lacks jurisdiction to determine the constitutionality of either statute because no Plaintiff has shown standing to assert such claim.

The Plaintiffs' standing has been a persistent and problematic issue in this case. Colorado filed two motions seeking to dismiss claims on that basis. In ruling on Colorado's first Motion to Dismiss **(#96)**, the Court set out the legal standards that guided its analysis.[7] The Court adopts that explication as if fully set out herein, but expands its reasoning in this ruling, as necessary.

Summarized briefly, for a federal Article III court to have jurisdiction to determine a matter, there must be a "claim or controversy" that is "justiciable." For a claim or controversy to be justiciable, at least one plaintiff must have standing to assert the claim. To have standing, a plaintiff must show that he, she, or it has been or is being injured, that the challenged law causes the injury, and that the lawsuit will provide relief for the injury. *See Lujan v. Defenders of*

[7] Colorado's Second Motion to Dismiss **(#133)**, was filed shortly before trial. It seeks dismissal of the challenge to the constitutionality of C.R.S. § 18-12-302 arguing that no Plaintiff has shown standing. Alternatively, it seeks dismissal of claims by certain Plaintiffs. As to § 18-12-112, it addresses standing in a footnote, "maintaining that [the claims] are not justiciable," but not expressly "re-raising arguments" it previously made in its first Motion to Dismiss. Both this Motion and the Plaintiffs' Response at **(#134)** rely on discovery responses and other documents prepared before trial. The Court has an independent duty to assure that jurisdiction is secure, and therefore this opinion will not necessarily follow the arguments of the parties. *See United States v. Colo. Supreme Court*, 87 F.3d 1161, 1166 (10th Cir. 1996); *PeTA v. Rasmussen*, 298 F3d 1198, 1202 (10th Cir. 2002); *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). In addition, because standing is determined in conjunction with the trial in this matter, the Court limits its consideration to the evidence presented at trial, rather than using the standard for pre-trial consideration of standing issues that indulges "well-pled" allegations and affidavits with the presumption that the facts contained therein will ultimately be proven. *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997).

Wildlife, 504 U.S. 555, 560-61 (1992). The injury must be actual and concrete, rather than anticipated, hypothetical, or speculative.

When a plaintiff seeks to enjoin the enforcement of a criminal statute on grounds that it abridges a constitutional right, it is not necessary for the plaintiff to violate the statute in order to show an injury. Instead, the law recognizes that the mere existence of a criminal statute can prevent or chill a plaintiff's desire to exercise conflicting constitutional rights. *See Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997). Thus, the law deems a plaintiff to suffer a continuing injury sufficient for standing if it can be shown that: (1) the plaintiff genuinely intends to engage in a course of conduct that is constitutionally protected but is proscribed by the challenged statute, and (2) if the plaintiff engaged in such conduct, there exists "a credible threat" that the plaintiff would be prosecuted under the statute. *See Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298-299 (1979); *Dias v. City and County of Denver*, 567 F.3d 1169, 1176-77 (10th Cir. 2009) (citing *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003)). To be "credible," the threat of prosecution must be more than imaginary or speculative. *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Golden v. Zwickler*, 394 U.S. 103 (1969).

Both § 18-12-302 and § 18-12-112 are criminal statutes. No Plaintiff has been charged with violating either statute nor specifically threatened with prosecution. Thus, no Plaintiff has suffered an actual past injury. Instead, the Plaintiffs bring facial challenges to these statutes[8] and seek prospective injunctive relief. For these claims to be justiciable, the evidence at trial must show that at least one Plaintiff intends to engage in a course of constitutionally protected conduct

[8] Challenges to the constitutionality of statutes can take two forms. There can be a challenge as to how the law has actually been applied to a plaintiff (an "as-applied" challenge) or, there can be a challenge based solely on its language and anticipated applications (a "facial" challenge). Here, because the statutes have not been enforced against any Plaintiff, only facial challenges have been asserted.

that would violate the statute and that there is a "credible threat" of prosecution should the Plaintiff do so. *See United States v. Colo. Supreme Court*, 87 F.3d 1161, 1166 (10th Cir. 1996).

A. Standing for Challenges to § 18-12-302

The Plaintiffs challenge this statute on two grounds: (1) that it violates rights protected by the Second (and by inference, the Fourteenth) Amendment to the United States Constitution; and (2) that the "grandfather clause" is so vague that it denies due process under the Fourteenth Amendment to the United States Constitution. For these claims to be justiciable, the evidence must show that at least one Plaintiff[9] either: (1) possesses a large-capacity magazine that he or she acquired after July 1, 2013, in violation of the statute (in other words, not subject to any of the statutory exceptions); (2) intends to acquire a new large-capacity magazine in violation of the statute; or (3) intends to transfer or sell a large-capacity magazine, owned as of July 1, 2013, in violation of the statute. In addition, such Plaintiff must show that there is a "credible threat of prosecution" for such violations.

1. Individual Plaintiffs

The Court turns first to the individual Plaintiffs. At trial, evidence was presented only as to three individual Plaintiffs — David Bayne, Dylan Harrell, and John Cooke. No evidence shows that any of these Plaintiffs meet the requirements of standing discussed above.

Mr. Bayne lived in Thornton, Colorado when this action was initiated, but has since moved to Georgia. He did not testify that he intends to return to Colorado, much less that he

[9] No evidence was presented to demonstrate the standing of the following Plaintiffs: National Shooting Sports Foundation; USA Liberty Arms; 2nd Amendment Gunsmith & Shooter Supply, LLC; Green Mountain Guns; Jerry's Outdoor Sports; specialty Sports & Supply; Goods for the Woods; David Strumillo; Ken Putnam; James Faull; Larry Kuntz; Fred Jobe; Donald Krueger; Dave Strong; Peter Gonzalez; Sue Kurtz; and Douglas N. Darr.

would return with his large-capacity magazines. Thus, there is no evidence that he is likely to be subject to the statute in the future.

Mr. Harrell owns large-capacity magazines that were purchased before July 1, 2013. There is no evidence that suggests that Mr. Harrell's continued possession would not be protected by the grandfather clause, thus he is not currently in violation of the statute or subject to a risk of prosecution. Mr. Harrell did not testify about any intention to acquire additional large-capacity magazines in the future, nor did he express an intention to transfer the large-capacity magazines currently in his possession, nor otherwise testify about future conduct that would place him at risk of prosecution. Accordingly, Mr. Harrell lacks standing to challenge the statute.

Mr. Cooke currently serves as the Sheriff of Weld County and will be retiring in 2015. There was no evidence as to whether he currently possesses large-capacity magazines. His testimony strictly related to a "survey" he conducted of his employees (none of whom are Plaintiffs). Even assuming that Mr. Cooke does possess large-capacity magazines, his current possession is exempted from the prohibition (due to his status as a law enforcement employee), and there was no testimony that, upon his retirement, he intends to transfer such magazines or intends to acquire more in violation of the statute. Thus, on this record, the Court finds that no individual Plaintiff has shown standing to challenge § 18-12-302**.**

2. Plaintiffs that are Entities

The Court then turns to the Plaintiffs that are entities. They fall roughly into two groups: associations of gun enthusiasts/advocates and firearm businesses. The associations are Colorado Youth Outdoors, Women for Concealed Carry, Outdoor Buddies, Colorado State Shooting Association, Colorado Farm Bureau, and Colorado Outfitters Association. The firearm

businesses are Rocky Mountain Shooter Supply and Burrud Arms, Inc. (both licensed firearm dealers), Hamilton Family Enterprises, Inc. (a shooting range operator), and Magpul Industries (a manufactures of magazines).

As to the associational entities, the Court begins by examining whether these entities can assert associational standing on behalf of their members. "Associational standing" is recognized if an organization can establish that: (1) its members would otherwise have standing to sue in their own right; (2) the members' interests that the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010). With regard to the first element, the entity Plaintiffs must show, through specific facts, that at least one of its members would be directly affected by the statute. *See Lujan*, 504 U.S. at 563 (citing *Sierra Club v. Morton*, 405 U.S. 727, 735, 739 (1972), and *Hunt v. Washington Colorado Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

At trial, Elisa Dahlberg, a member of Women for Concealed Carry, testified that Women for Concealed Carry is a nonprofit organization committed to providing information to women who choose to carry a concealed weapon as a form of self-defense. She further testified that she owns two semiautomatic carbine-style rifles and a 9mm semiautomatic handgun, each of which are equipped with a large-capacity magazine. She testified that she uses these firearms for home defense and target shooting, among other things. It appears to be undisputed that Ms. Dahlberg's current possession of large-capacity magazines is permitted by the statute's grandfather clause, and the parties agree that all large-capacity magazines will wear out or become unusable at some

point in time. Considering this, Ms. Dahlberg stated that, due to § 18-12-302, she will be unable to replace her large-capacity magazines once they no longer function.

The question of whether Ms. Dahlberg is suffering a continuing injury is a close one, because it is not clear when Ms. Dahlberg's magazines are likely to need replacement and whether, at that indeterminate point in future, she will desire to replace them with magazines of similar type. Notwithstanding her current interests, with the passage of time, Ms. Dahlberg's desire to carry large-capacity magazines may change.[10] If that happened, this statute would not affect her.

Nevertheless, in an attempt to find standing for some Plaintiff, the Court will assume that, in the absence of evidence as to the age of Ms. Dahlberg's existing large-capacity magazines and the functioning life of those magazines, Ms. Dahlberg may need to replace a large-capacity magazine in the very near future and that she will desire to replace it with another large-capacity magazine. If that were the case, the restrictions of § 18-12-302 would nevertheless prevent her from acquiring and possessing the replacement large-capacity magazine. Thus, the first element necessary for associational standing for Women for Concealed Carry is, arguably, satisfied.

The second element is also satisfied because the interests that Women for Concealed Carry ostensibly seek to protect — providing information to and engaging in advocacy on behalf of women who are interested in carrying concealed weapons for self-defense purposes — are "germane" to the interests that Ms. Dahlberg could assert on her own behalf.

Finally, because this claim is a facial challenge and the relief requested is prospective, it does not require the personal participation of the individual members of Women for Concealed

[10] The inability to predict *when* Ms. Dahlberg may need to replace magazines and *what* her desires might be at that time is illustrative of how speculative a pre-enforcement, facial challenge to a criminal statute can be.

Carry in the lawsuit. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975). Whether the statute violates constitutional standards turns on the statute's plain language and its general operation, not on the particular circumstances for which Ms. Dahlberg or a specific member of Women for Concealed Carry possesses large-capacity magazines. Thus, the personal participation of Women for Concealed Carry's members is not essential.

Accordingly, with the benefit of some generous assumptions, the Court finds that Women for Concealed Carry has associational standing to assert the Second Amendment challenge to § 18-12-302.[11] Accordingly, the Court has jurisdiction to determine these challenges to the statute on their merits. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977); *Colorado of Utah v. Babbitt*, 137 F.3d 1193, 1215 n.36 (10th Cir. 1998).

B. Standing for the Challenge to § 18-12-112

The Plaintiffs assert a single challenge to § 18-12-112: that it violates the Second (and by inference, the Fourteenth) Amendment to the United States Constitution. Following the same analytical pattern used with regard to § 18-12-302, in order for the Court to consider this claim, at least one Plaintiff must establish a continuing injury by showing that he or she intends to engage in conduct protected by the Second Amendment but which violates § 18-12-112, and that if the Plaintiff engaged in such conduct, there is a credible threat that he or she would be prosecuted.

[11] The status of Women For Concealed Carry's standing to assert a vagueness challenge with regard to the "grandfather clause" of § 18-12-302 is a bit more murky, as it is not clear that Ms. Dahlberg's current possession of her grandfathered large-capacity magazines subjects her to a risk of future prosecution, nor that other members of Women For Concealed Carry similarly face such a risk. Nevertheless, for purposes of completeness of the Court's decision, the Court will assume that Women for Concealed Carry has associational standing to pursue this claim as well.

As noted above, § 18-12-112 requires that a background check be performed on the individual transferee(s) who take possession of a firearm through certain private transfers. The statute requires a licensed gun dealer to perform certain actions, retain certain records, and charge no more than ten dollars for the background check. The failure to obtain such a background check exposes both the transferor and transferee to criminal liability.

To establish a continuing injury sufficient to challenge § 18-12-112, the evidence must show either: (1) a Plaintiff intends to transfer or acquire a firearm, through a private sale not otherwise exempt under the statute, without first conducting a background check on the transferee; or (2) a Plaintiff who is a licensed gun dealer intends not to comply with the requirements for conducting the background check or other specified responsibilities. Further, either types of Plaintiff must also show that there is a "credible threat of prosecution" for this conduct.

1. Individual Plaintiffs

The Court begins its analysis of standing with the same three individual Plaintiffs discussed above, finding that none have demonstrated a continuing injury.

Mr. Bayne is not subject to prosecution under § 18-12-112 because he no longer lives in Colorado and does not intend to return.

Mr. Cooke did not provide any testimony with regard to his personal firearms, much less his intention to transfer them to others or to acquire new ones via private transfer, with or without a background check.

Mr. Harrell's circumstances are bit more complicated. He testified that, in the past, he has installed scopes on, or "sighted," firearms for friends and neighbors. On occasion, he kept the firearm for longer than 72 hours. Initially, the Court has some doubt that a person's taking

temporary possession of another person's firearm for the purpose of installing a scope or "sighting" it is within the Second Amendment's protection of an individual right to "keep and bear arms" for the purpose of self-defense. But, assuming (without deciding), that it is, there is no evidence that the transfer to Mr. Harrell is a private transfer requiring a background check. Temporary transfers for up to 72 hours are exempt from the background check requirement, and although there was testimony that Mr. Harrell sometimes retained the firearm for more than 72 hours, it was not clear that he did so out of necessity rather than convenience. Assuming Mr. Harrell could regularly perform the scoping or sighting of the firearm within the 72-hour period and return the weapon, he would suffer no injury from the operation of the statute. In addition, assuming that he kept a firearm for longer than 72 hours with the owner's permission while performing maintenance duties on it, he has not shown any credible threat that he would be prosecuted for not first obtaining a background check. Accordingly, the evidence does not establish Mr. Harrell's standing.

2. Plaintiffs that are Entities

As noted earlier, there are two groups of entity Plaintiffs. With regard to this statute, the Court begins with the firearm businesses — Rocky Mountain Shooter Supply, Burrud Arms, Hamilton Family Enterprises, Inc., and Magpul Industries.

The Court has some doubt that these entities can have standing to bring a Second Amendment challenge. As discussed in greater detail below, rights granted under the Second Amendment are *individual* rights premised upon an inherent natural right of self-defense.

Although businesses such as these might have standing to challenge a statute under some other constitutional theory, it does not appear that they are protected by the Second Amendment.[12]

Assuming, however, that a business entity *could* assert a Second Amendment challenge, the trial record does not show evidence of continuing injury to any of the Plaintiff business entities. Rocky Mountain Shooter Supply and Burrud Arms are licensed firearm dealers. Transfers by these Plaintiffs are not governed by § 18-12-112, and neither of these parties perform private background checks subject to the statute. Hamilton Family Enterprises, Inc. operates a shooting range and lends firearms to those who use the range. It sells firearm accessories including magazines, but does not sell firearms themselves, nor is it a licensed firearm dealer. It appears that the only transfers made by Hamilton Family Enterprises are in the nature of loans that do not exceed 72 hours and are for the purpose of target shooting. Such transfers are expressly exempt from the statute's requirements. According to the parties' stipulated facts, Magpul Industries designs and manufactures high-quality magazines and magazine accessories. There is no evidence that it intends to be a transferor or transferee of a firearm in private sales, nor a licensed firearm dealer subject to § 18-12-112.

Next, the Court looks to the Plaintiff associations: Outdoor Buddies, Colorado Farm Bureau, Colorado Outfitters Association, Women for Concealed Carry, Colorado Youth Outdoors, and Colorado State Shooting Association. Based on the evidence presented, it does not appear that any of these entities can bring a Second Amendment claim based on associational standing.

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[12] *Cf. United States v. Chafin*, 423 Fed.Appx. 342, 344 (4th Cir. 2011) (finding no authority to suggest that the Second Amendment protects a right to sell a firearm); *Mont. Shooting Sports Ass'n v. Holder*, 2010 WL 3926029, *21 (D.Mont. 2010) (recognizing that *Heller* did not extend Second Amendment protection to manufacturers and dealers seeking to sell firearms); *Teixeira v. Cnty. of Alameda*, 2013 WL 4804756, *6 (N.D.Cal. 2013) (same).

Outdoor Buddies is a non-profit organization with over 800 members, a third of whom are disabled. Its mission is to "get disabled individuals active in the outdoors." It lends highly specialized firearms to members for 3-day hunts. Because these transfers are temporary and incident to legal hunting activities, they are exempt under § 18-12-112. The evidence reflects that, sometimes, transferees keep a firearm for a period before or after the hunt, which time might exceed 72 hours. But the record does not clearly establish that this is necessary (as opposed to convenient), or that any member would decline to participate if he or she could not retain the firearm for more than 72 hours beyond the time of a hunt. As a consequence, the record does not reflect that either Outdoor Buddies or its members are at risk of prosecution under § 18-12-112.

The Colorado Farm Bureau (CFB) is a federation with 24,000 members, 5,800 of whom are active farmers and ranchers. Its mission is to promote agriculture and protect agricultural values. Nicholas Colgazier testified as its Director of Public Policy, and Michele Eichler testified as a member. Mr. Colgazier works as an in-house lobbyist who brings pending legislation to the attention of the "board" for development of policy positions. He did so with regard to § 18-12-112, then lobbied against it based on the requests of some members who opposed the background check requirement due to inconvenience and expense. He did not offer testimony as to whether or how many of the CFB members would be transferors (or, arguably, transferees) in transfers subject to the statute, whether any would forego such transfers or intended to ignore the background check requirement, or otherwise testify as to facts demonstrating any "credible threat of prosecution." Ms. Eichler testified that it would be inconvenient to have to obtain a background check in order to transfer a firearm to a ranch or farm hand. She particularly worried that the gun kept in her farm truck (for predator control)

would inadvertently be in the possession of a ranch hand if the family left town for longer than 72 hours. However, she acknowledged that there had never been an occasion when her ranch hand had possession of the gun for longer than 72 hours. The Court finds that the evidence as to potential violations of the statute by CFB members to be speculative. Moreover, even assuming that CFB's members would themselves have standing to challenge the statute, it is not clear that challenging firearms laws is within the scope of CFB's mission of promoting "agricultural values." Finally, the Court finds that CFB has not shown that there is a "credible threat of prosecution" of its members for the conduct described at trial.

Ms. Eichler also testified as a member of Colorado Outfitters, but offered no evidence as to that association's organization, membership, or mission. She testified that she and her husband run an outfitting business that takes between 100-150 clients on hunts each year. In the past, if a client did not have a firearm, the Eichlers would loan the client one of their personal firearms for use during the hunt. Hunts are usually five days, but may last longer if successful. It would appear that the type of transfers described by Ms. Eichler would be exempt under C.R.S. § 18-12-112(6)(e)(III). But in any event, the lack of evidence about Colorado Outfitter's membership or mission requires a conclusion that it has not shown the requirements for associational standing.

Three associations — Women for Concealed Carry, Colorado Youth Outdoors, and Colorado State Shooting Association — each testified (through representatives) that they regularly "loan" firearms to their members for various purposes, sometimes for longer than 72 hours, without conducting background checks. If these associations were individuals, with

clearly established Second Amendment rights,[13] they might have standing to assert a Second Amendment challenge to the statute.[14] However, because they are entities rather than human beings, the question of whether they are protected by the Second Amendment is less than clear. As noted, the Second Amendment protects a fundamental *individual* right, and it is not clear that entities have any rights protected by the Second Amendment. Such questions stretch the outer boundaries of current Second Amendment jurisprudence, and the parties have not specifically addressed these issues.

Thus, although the Court has profound reservations as to whether any Plaintiff has standing to challenge § 18-12-112, in the interests of providing a complete ruling, both for the guidance of the parties and the inevitable review by the Court of Appeals, the Court will assume that Women for Concealed Carry, Colorado Youth Outdoors, or the Colorado State Shooting Association have standing, in their own right, to challenge § 18-12-112 under the Second Amendment.

V. Analysis

A. History and Analytical Framework for Second Amendment Challenges

The Second Amendment to the United States Constitution provides**:**

> A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

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[13] It is not necessarily evident that that the Second Amendment's guarantee of a "right to keep and bear arms" extends to also guarantee the right of an owner of a firearm to lend that weapon to another (or to guarantee the right of a non-owner to borrow a firearm). The parties have not addressed this question, and the Court does not consider it.

[14] The Court rejects the notion that these associations have associational standing to bring claims on behalf of their members who might wish to engage in private transfers without conducting background checks. The testimony by the representatives of these associations focused on the transfer of weapons ostensibly belonging to the associations themselves, not on private transfers that individual members intended to make involving their own, personally-owned weapons.

Until 2008, most courts did not construe the Second Amendment to protect an individual's right to possess and use firearms. Courts were guided by the Supreme Court's decision in *United States v. Miller*, 307 U.S. 174, 179 (1939), which held that a right protected by the Second Amendment required "some reasonable relationship to the preservation or efficiency of a well regulated militia." *See, e.g., United States v. Haney*, 264 F.3d 1161, 1164-66 (10th Cir. 2001); *Gillespie v. Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *but see United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

In 2008, the legal landscape with regard to the Second Amendment shifted. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court considered a District of Columbia ban on the possession of usable handguns. The Court concluded that the Second Amendment "confer[s] an individual right to keep and bear arms." 554 U.S. at 595. To reach that conclusion, it de-linked the Second Amendment's prefatory clause — "a well regulated militia, being necessary to the security of a free state" — from its operative clause — "the right of the people to keep and bear Arms, shall not be infringed" — and explained that although the prefatory clause states the purpose for the right, it does not limit the right to own or use firearms to circumstances of militia service.[15] *Id.* at 577. Instead, the Court identified the core Second Amendment right as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," and defined the right to "keep and bear arms" as the ability to acquire, use, possess, or carry lawful firearms for *the purpose of self-defense*. *See, e.g., id.* at 599 ("self-

[15] This reasoning was extended to state statutes by virtue of the Fourteenth Amendment in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

defense . . . was the *central component* of the right itself") (emphasis in original), at 628 ("the inherent right of self-defense has been central to the Second Amendment right").

As profound as *Heller* is, it does not stand for the proposition that there can be no permissible regulation of firearms or their use. To the contrary, the Court explained that "[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose." *Id.* at 626. And the Court emphasized that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms," among others. *Id.* at 626-27 & n.26.

The Supreme Court did not specify in *Heller* what analytical framework should be used in testing laws challenged under the Second Amendment. This was, in part, because it found that that the ban it was considering (a law effectively prohibiting the possession of functional handguns inside or outside of the home) would fail all recognized tests for constitutionality. *Id.* at 628. Since *Heller*, Second Amendment jurisprudence has continued to evolve, particularly with regard to the analytical standards to be applied. Many Circuit Courts of Appeal, including the Tenth Circuit, have adopted a two-step approach. *See United States v. Reese*, 627 F.3d 792 (10th Cir. 2010);[16] *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013);

[16] The two-step process was also applied in *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012), and in *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013).

Heller v. District of Columbia ("Heller II"), 670 F.3d 1244 (D.C. Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010).

In the two-step approach, a court must make a threshold determination of whether the challenged law burdens conduct falling within the Second Amendment's protection. As part of this determination, the Court may consider whether the challenged law impacts firearms or firearm use, whether the affected firearms are currently in "common use," whether the affected firearms are used for self-defense inside or outside of the home, and whether the restriction is akin to restrictions that were historically imposed and customarily accepted.[17] If the challenged law does not burden a right or conduct protected by the Second Amendment, then the inquiry is over.

If the challenged law burdens conduct protected by the Second Amendment, then a court must determine what level of constitutional scrutiny to apply. Generally, constitutional scrutiny takes one of three forms. *See United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938). The least rigorous and most deferential standard is the "rational basis" test, which is used when a local, commercial, or economic right, rather than a fundamental individual constitutional right, is infringed. *See Armour v. City of Indianapolis, Ind.*, 132 S.Ct. 2073, 2080 (2012). More rigorous

[17] Although this is a threshold determination, some circumstances may require a comparison of the burden imposed to "longstanding prohibitions" that have been generally accepted. These include, but are not limited to: the possession of firearms by felons and the mentally ill; laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings; or laws imposing conditions and qualifications on the commercial sale of arms. *Heller*, 554 U.S. at 625 & 627 n.26; *see also Jackson v. City and Cnty. of San Francisco*, 2014 WL 1193434, *4 (9th Cir. 2014). In *Peterson*, the Tenth Circuit held that the Second Amendment did not confer a right to carry concealed weapons because such bans were long-standing. *Peterson*, 707 F.3d at 1197. In *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), Judge Tymkovich presaged the possibility that reliance on the long-standing restriction exception to categorically exclude certain conduct from protection under the Second Amendment might circumvent constitutional scrutiny of current restrictions.

is "intermediate scrutiny" review, which applies to laws that infringe upon, but do not substantially burden, fundamental individual rights, such as content-neutral restrictions on speech. For a challenged law to satisfy intermediate scrutiny, it must be substantially related to an important governmental interest. *Reese*, 678 F.3d at 802 (citing *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012). Laws that substantially burden fundamental individual rights (*e.g.*, laws embodying racial discrimination or content-based restrictions on speech) are subject to "strict scrutiny." To satisfy strict scrutiny, a law must be narrowly-tailored to further a compelling government interest. *See Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002).

Recognizing that the Second Amendment protects fundamental individual rights, *Heller* instructed that the rational basis test should not be applied,[18] but it gave no instruction as what heightened level of scrutiny — intermediate, strict, or something in between — should apply. In subsequent cases, courts have analogized conduct protected under the Second Amendment to other fundamental individual rights such as those protected by the First Amendment (speech, religion, assembly, and petition).[19] Most courts have concluded that no single standard is applicable to all challenges under the Second Amendment. Rather, the level of scrutiny to be

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[18] *See* 554 U.S. at 628 n.27.

[19] In free-speech cases, the standard of judicial review depends on the nature and degree of governmental burden on the First Amendment Right. For example, content-based regulations and laws that burden political speech are subject to strict scrutiny, whereas "time, place, and manner" regulations need only be "reasonable" and "justified without reference to the content of the regulated speech." *See Ezell*, 651 F.3d at 706-08 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)); *Chovan*, 735 F.3d at 1138. Firearm regulations that leave open alternative channels for self-defense are less likely to severely burden the Second Amendment right than those that do not. *See Jackson*, WL 1193434 at *4; *see also Marzzarella*, 614 F.3d at 97.

applied depends, in part, on the type of restriction being challenged and the severity of its burden on the "core" Second Amendment right. *See, e.g., Marzzarella*, 614 F.3d at 96-97; *Reese*, 627 F.3d at 802; *Ezell*, 651 F.3d at 703; *Chovan*, 735 F.3d at 1138. The Tenth Circuit has joined many other courts in applying intermediate scrutiny to Second Amendment challenges. *See, e.g.*, *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012).[20]

B. Application to § 18-12-302

Under the two-step test, the first question is whether § 18-12-302 impacts a right or conduct protected by the Second Amendment. The Plaintiffs argue that by limiting magazines to 15 rounds or less, this statute impairs an individual's Second Amendment "right of self-defense." Colorado reflexively responds that because people can still defend themselves, no Second Amendment right is impaired.

Both positions are slightly off-base. They reflect a common confusion between the right that is protected by the Second Amendment — that is, "to keep and bear arms" — and the

[20] In *Reese* and *Huitron-Guizar*, the court applied the standard intermediate scrutiny test, and *Reese* expressly declined to impose a strict scrutiny standard. *See Reese*, 627 F.3d at 804 n.4. It appears that the Tenth Circuit relied heavily on a Seventh Circuit line of cases, beginning with *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010). In *Skoien*, the Seventh Circuit determined that another federal gun restriction, 18 U.S.C. § 922(g)(9), was constitutional based upon a "strong showing" that the statute was substantially related to an important government interest. *Id.* at 641. In selecting that test, the Seventh Circuit cited both to a First Amendment case, *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 202-04 (1999), and to a gender-classification equal protection case, *Heckler v. Mathews*, 465 U.S. 728, 744-51 (1984).

Interestingly, some courts that analogize Second Amendment rights to First Amendment rights apply a more rigorous test than that adopted in *Skoien*, *Reese*, and *Huitron-Guizar*. Some have required a showing of a "tight fit" between the means and the ends, meaning that the statute is "narrowly tailored" to achieve the desired objective. *See, e.g., Heller II*, 670 F.3d at 1258 (citing *Bd. of Trustees v. Fox*, 492 U.S. 469 (1989), and *Ward v. Rock Against Racism*, 491 U.S. 781(1989)); *see also Marzzarella*, 614 F.3d at 97-98. Because it falls between the standard intermediate scrutiny and strict scrutiny, one might call it "intermediate scrutiny plus."

purpose of that right — "for defense of self and home." Although *Heller* sometimes uses shorthand phrases such as "a natural right of self-defense," 554 U.S. at 612, or the "inherent right of self- defense," 554 U.S. at 612, it is clear that *Heller* does not extend the boundaries of the Second Amendment to guarantee "self-defense" as a right in and of itself. Nothing in *Heller* can be read to guarantee an individual right to possess whatever firearm he or she subjectively perceives to be necessary or useful for self-defense, nor any firearm for a purpose other than self-defense. To the contrary, the Supreme Court expressly stated that the rights embodied by the Second Amendment have not historically been understood to be "a right to keep and carry any weapon whatsoever." *Id.* at 626. And the Supreme Court conceded that its interpretation of the Second Amendment could authorize the prohibition of civilian possession of certain weapons commonly used in military service, such as "M-16 rifles[21] and the like." *Id.* at 628. *Heller* also acknowledged the historical validity of "prohibitions on carrying concealed weapons." *Id.* at 626. Such comments illustrate that the Supreme Court does not equate the Second Amendment "right to keep and bear arms" to guarantee an individual the "right to use any firearm one chooses for self-defense."

Instead, *Heller* describes the Second Amendment "right to keep and bear arms" rather narrowly: the right to possess those weapons that are "in common use" for "self-defense" purposes. *See id.* at 624-25 ("the Second Amendment's operative clause furthers the purpose announced in its preface" by guaranteeing access to the type of arms "in common use at the time for lawful purposes like self-defense"), at 627 ("the sorts of weapons protected were those in

[21] The M-16 rifle mentioned by the Court is a military version of the AR-15 rifle, a rifle that several witnesses in this case testified that they possess for their own self-defense purposes. If, as *Heller* implies, the M-16 rifle can legally be prohibited without violating the Second Amendment, it seems to follow that other weapons such as the AR-15 may also be prohibited, notwithstanding the fact that some individuals believe that such weapon is important, or even essential, to their self-defense.

common use at the time"). *Heller* concluded that handguns were in common use because they are a "class of arms that is overwhelmingly chosen by American society for that lawful purpose [of self-defense]" and they are "the quintessential self-defense weapon." *Id.* at 628-29. Thus, the Court's first inquiry is whether § 18-12-302 burdens the right of individuals to possess commonly-used weapons, such as handguns, for self-defense.

Section 18-12-302 is interesting in that it does not directly regulate firearms at all; it regulates only the size of a magazine. Simply put, a "magazine" is nothing more than a container that holds multiple rounds of ammunition. Magazines are designed to feed a bullet into the firing chamber of a firearm with each cycle of the action, allowing multiple shots to be fired rapidly, either semi-automatically (that is, with a single shot fired each time the trigger is pulled) or automatically (with shots being fired continually so long as the trigger is held).[22] Here, the Plaintiffs are concerned primarily with semiautomatic firearms. Such firearms can operate without a magazine, but each round must be individually loaded.

The capacity of the magazine determines how frequently a firearm must be reloaded if the shooter wishes to keep firing. For example, a handgun or rifle using a 15-round magazine must be reloaded twice as frequently as one using a 30-round magazine. Because § 18-12-302 regulates only the number of rounds in a magazine, it does not affect whether the semiautomatic

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[22] Certain firearms are not designed to use magazines at all. Single-shot firearms, including bolt-action and muzzle-loading rifles, shotguns, and some handguns, require the user to manually load each new round. Other firearms, such as revolvers, use a cylinder, rather than a magazine, to load each round.

Magazines may be integral to a weapon or, more commonly in modern weapons, detachable. Detachable magazines allow a user to pre-load and carry multiple magazines, making it possible for the user to quickly swap out an empty magazine from the weapon and replace it with a full one. For all practical purposes, the discussion of "magazines" in this case refers to detachable magazines.

firearm can be used, or even whether it can be used in a semiautomatic mode. It only affects how often it must be reloaded.

The parties agree that semiautomatic firearms are numerous and widespread. They stipulate that lawfully owned semiautomatic firearms using a magazine with the capacity of greater than 15 rounds number in the tens of millions, although the exact number subject to regulation in Colorado is unknown. They also agree that semiautomatic firearms are commonly used for multiple lawful purposes, including self-defense. Because § 18-12-302 affects the use of firearms that are both widespread and commonly used for self-defense, the Court concludes that, at the first step of the analysis, the statute burdens the core right protected by the Second Amendment.

The second analytical step requires that the Court to determine the level of constitutional scrutiny to apply. Similar to their prior arguments, the Plaintiffs argue that the Court should apply strict scrutiny because the statute severely restricts a person's "right to self-defense," which the Court understands to be the ability to successfully defend him or herself. Colorado contends that the impact is not severe because, despite the magazine size limitation, people can adequately defend themselves.

As noted, § 18-12-302 bans possession of all magazines capable of holding more than 15 rounds (except for magazines subject to the grandfather clause). Other than those specifically excepted in the statute, this ban applies to every person in Colorado, in every venue, and for every use, including self-defense inside and outside of the home. It impacts a large number of semiautomatic firearms, both handguns and rifles. Viewed in this light, the *scope* of the statute is broad, and it touches the *core* of an individual right guaranteed by Second Amendment — the right to keep and bear (use) firearms for the purpose of self and home defense.

Despite such broad scope, however, the statute's impact on a person's ability to keep and bear (use) firearms for the *purpose* of self-defense is not severe. Unlike the restriction considered in *Heller*, this statute does not ban any firearm nor does it render any firearm useless. Semiautomatic weapons can be used for self-defense in and outside of the home. The parties agree that semiautomatic weapons that use large-capacity magazines will also accept compliant magazines (*i.e.*, 15 rounds or fewer), and that compliant magazines can be obtained from manufacturers of large-capacity magazines. Thus, this statute does not prevent the people of Colorado from possessing semiautomatic weapons for self-defense, or from using those weapons as they are designed to function. The only limitation imposed is how frequently they must reload their weapons.

By requiring users to reload every 15 rounds, the statute impacts both the "offensive" and "defensive" use of semiautomatic weapons. Most of the time when a weapon is used "offensively," it is for unlawful purposes — *i.e.* the mass shooting scenario. (The significance of the statute with regard to offensive firearm use is discussed below. Needless to say, no party here is complaining of the effects of the challenged statute on the offensive use of large-capacity magazines.) The Plaintiffs' primary concern here focuses on the "defensive" use of a firearm — that is, to protect the user or others against an attacker. The effect of magazine size limitations on defensive use of a weapon is important in assessing whether and to what degree a citizen's lawful ability to defend him or herself is compromised.

No evidence presented here suggests that the general ability of a person to defend him or herself is seriously diminished if magazines are limited to 15 rounds. Despite more than 40 years instructing individuals and law enforcement in defensive firearm use, the Plaintiffs' expert witness, Massad Ayoob, identified only three anecdotal instances in which individuals engaging

in defensive use of firearms fired more than 15 rounds, and not all of these successful defensive actions involved semiautomatic weapons.[23] Of the many law enforcement officials called to testify, none were able to identify a single instance in which they were involved where a single civilian fired more than 15 shots in self-defense.[24] (Indeed, the record reflects that many law enforcement agencies, including the Colorado State Patrol, the Federal Bureau of Investigation, and the New York City Police Department equip their officers with 15-round or smaller

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[23] The first incident involved a gun shop owner who lived next door to the shop. One night, carloads of people drove through his storefront to steal guns. In defending his property, the shop owner used a fully automatic M-16 and a fully automatic 9mm submachine gun to fire over 100 rounds. One perpetrator was killed, others were injured, and all were captured and convicted. The second incident involved a man who owned a watch shop in Los Angeles and who had been involved in a series of "gun fights." (Presumably, he had been robbed repeatedly.) The shop owner began keeping multiple pistols hidden in his shop. Mr. Ayoob recalled that at least one of the gun fights "went beyond" 17 or 19 shots before the last of the multiple perpetrators was down or had fled. The third incident involved a Virginia jewelry store that was robbed by "two old gangster type guys." The two brothers who owned the store successfully defended themselves and their property using multiple revolvers (not semiautomatic weapons) that were kept behind the counter. Mr. Ayoob did not specify how many rounds were fired in that incident.

[24] These witnesses include John Cerar, Douglas Fuchs, Lorne Kramer, and Daniel Montgomery. Mr. Cerar spent 26 years with the New York City Police Department, beginning in 1973. Over the course of his career, he was responsible for training NYC police officers in firearms and tactics, and also oversaw the evaluation and testing of firearms, ammunition, armor, and police equipment in order to determine appropriateness of use for the department. He also served on the firearms discharge review board, which reviews all police involved shootings in New York. Mr. Cerar currently serves as a consultant to various police agencies where high profile shootings have taken place.

Mr. Fuchs currently serves as the Chief of Police in Redding, Connecticut. He has served in that role for the past 12 years, following lengthy periods in other police agencies. Throughout his career, Mr. Fuchs has received thousands of hours of training in law, defensive tactics, firearms, and practical skills, such as magazine reloading and tactical reloading.

Mr. Kramer joined the Los Angeles Police Department in 1963 and served there for nearly 28 years. In 1991, he became the Chief of Police in Colorado Springs, Colorado, where he served for 11 years.

Mr. Montgomery began his law enforcement career in 1962 in California. In 1971, he was recruited to the police department in Lakewood, Colorado, where he served for 12 years and attained the rank of captain. In 1982, he became the Chief of Police in Westminster, Colorado, a role in which he served until his retirement in 2007.

magazines.) Anecdotal testimony from the Plaintiff's lay witnesses was corroborative. Although they possessed large-capacity magazines, none had ever had the occasion to fire more than 15 rounds in an instance of self-defense.

There are myriad reasons for this phenomenon. First, the defensive purpose of firearms is often achieved without shots being fired whatsoever. Mr. Avoob testified that, often, merely the defensive display of a firearm is sufficient to defuse the threat. Similarly, when shots are fired in self-defense, the deterrent purpose is often achieved simply by the firing of a round or two, regardless of whether those shots find their target (in other words, a "warning shot," intentional or otherwise, is often sufficient to deter the attacker). In these types of circumstances, a restriction on magazine size in no way diminishes the ability of the firearm user to defend him or herself.

Circumstances in which an attack is halted by a defensively-shooting civilian disabling the attacker are comparatively rare. Even then, the purpose is not to fire as many shots as possible, only as many shots as necessary. The detrimental effect of a limitation on magazine capacity in such situations is very difficult to measure because it is affected by a wide array of external variables: the nature and characteristics of the attacker(s), the competence of the defensive user, environmental circumstances, the timeliness of intervention by others or by law enforcement, etc. For example, a highly-trained firearm user might be able to disable an attacker by firing only a relatively small number of rounds. For these users, the statute poses no impediment to effective self-defense.[25] Adverse environmental circumstances that may be

[25] There is a curious paradox here: the more competent the defensive firearm user, the more likely he or she is to hit her target with fewer shots, and thus, the less likely that user is to need a large-capacity magazine for defensive purposes. By contrast, the less competent or confident the user, the greater the number of rounds the user perceives he or she needs. One wonders how

common in mass shootings — large numbers of bystanders, poor lines of sight, or darkness, for example — or circumstances where a law enforcement response is imminent, may make the firing of large numbers of defensive rounds by a civilian ill-advised. In these instances, the restriction on magazine size again poses no discrete impairment to the ability of effective self-defense.

Even in the relatively rare scenario where the conditions are "ideal" for defensive firing, there is no showing of a severe effect on the defensive shooter. As previously stated, the limitation on the size of magazines merely affects how many rounds can be fired before a reload is necessary. Assuming that the defensive firearm user has fired all 15 rounds in his or her initial magazine, and yet failed to neutralize the threat, the user need simply replace his or her magazine or firearm to resume firing. Admittedly, the defensive user cannot fire during the time it takes to complete a reload or access another weapon, but the length of that period, again, varies greatly with the circumstances, such as the defensive user's preparation and skills. The testimony at trial was that persons skilled in firearms use can replace a magazine in a matter of a few seconds, whereas less skilled users may take longer periods of time. At most, then, the statute's burden on the exercise of self-defense is this: in the relatively rare circumstances in which sustained defensive fire is appropriate, the statute forces a brief pause to reload or access another weapon. The evidence presented does not establish that such circumstances occur frequently, affect very many, or that the pause to reload adversely affects one's success in self-defense.[26] On the record

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these perceptions are affected by exposure to military grade weaponry in news and entertainment.

[26] The Plaintiffs make a secondary argument that magazines with no more than 15 rounds are generally less reliable than large capacity magazines. Although some witnesses testified about their dislike of certain compliant magazines, there was no evidence as to general unreliability of such magazines, particular as compared to large-capacity magazines. Indeed, the

presented, the Court finds that although § 18-12-302 burdens the operation of semiautomatic weapons, the burden is not severe because it does not materially reduce the ability of a person to use a semiautomatic firearm for self-defense, nor does it reduce the effectiveness of self-defensive efforts. As a result, the Court will examine the statute under the intermediate scrutiny test.

For § 18-12-302 to survive intermediate scrutiny, Colorado must prove that its objective in enacting § 18-12-302 was "important" — that is, that that the statute was based on "reasoned analysis," *Concrete Works of Colo., Inc. v. City and Cnty. of Denver*, 321 F.3d 950, 959 (10th Cir. 2003) — and that the provisions of § 18-12-302 are "substantially related" to its stated objective.[27]

According to Colorado, the General Assembly's objective in passing § 18-12-302 was to reduce the number and magnitude of injuries caused by gun violence, specifically in mass shootings. The legislative record reflects that members of the General Assembly were acutely aware of the Aurora Theater shooting in 2012, as well as other mass shootings inside and outside Colorado. The General Assembly considered evidence that mass shootings occur with alarming frequency and often involve use of large-capacity magazines. It considered testimony that when a shooter using a large-capacity magazine intends to kill, the shooter usually fires continuously until he runs out of ammunition, which leads to greater numbers of injuries and deaths. With regard to general gun violence, the General Assembly also considered statistics drawn from several cities that large-capacity magazines were used in 14-26% of all gun crimes and in 31-

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parties stipulated that 10-round magazines produced by Plaintiff Magpul are just as functional and reliable as Magpul's higher-capacity magazines.

[27] The Plaintiffs urge the Court to limit its consideration of the evidence to the legislative history for § 18-12-302. As to a determination of the General Assembly's objective and whether it is important, the Court has done so.

41% of fatal police shootings. This legislative history demonstrates that the General Assembly considered relevant evidence in determining that the use of large-capacity magazines in gun violence poses a serious threat to public safety. To prevent the effects caused by the use of large-capacity magazines is undoubtedly an important governmental purpose.

Even with an important purpose, however, Colorado must prove that the 15-round limitation in § 18-12-302 is substantially related to an anticipated reduction in the number and magnitude of injuries caused by the use of large-capacity magazines. *See Peterson v. Martinez*, 707 F.3d 1197, 1222 (10th Cir. 2013) (Lucero, J., concurring) (citing *Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981) (plurality opinion)). The Court finds that Colorado has demonstrated this relationship.

The evidence[28] shows that large-capacity magazines are frequently used in gun violence and mass shootings, and that often a shooter will shoot continuously until a weapon jams or the shooter runs out of ammunition. Interestingly, most experts agree that the size of a magazine correlates to the number of rounds that are fired in both an offensive and defensive capacity. Dr. Jeffery Zax testified that there is a direct positive correlation between the firearm ammunition capacity and the average number of shots fired during criminal aggression. Mr. Ayoob agreed that this is true in defense, as well. He testified that when training individuals to use high-capacity semiautomatic weapons, his students frequently feel the need to "spray and pray," meaning that they believe that they should fire all of their rounds in the hope that at least one shot will hit the intended target. Mr. Ayoob sees his job as training them not to empty their

[28] In determining whether there is a substantial relation between the statute and the Colorado's asserted purpose, the Court does not limit itself to the legislative history. *See Concrete Works of Colo., Inc. v. City and Cnty. of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994) (citing *Contractors Ass'n v. Philadelphia*, 6 F.3d 990, 1003-04 (3d Cir. 1993)).

magazines, and instead to shoot as if they were using a magazine with fewer rounds. Mr. Cerar testified to having a similar experience in training New York City Police Department Officers.

There is no dispute that when a shooter pauses to reload a weapon or shift to another weapon, there is pause. Mr. Cerar and Mr. Fuchs call this the "critical pause" because it gives potential victims an opportunity to hide, escape, or attack the shooter. This pause also gives law enforcement or other armed individuals an opportunity to act. They point to several shooting incidents, including those that took place at the Aurora theater, at a Safeway in Tucson, Arizona, and at an elementary school in Sandy Hook, Connecticut, when a pause allowed a shooter to be overcome, law enforcement to intercede, or potential victims to flee. In each incident, the pause was created either by the shooter reloading their weapon, or there being a malfunction of their firearm.

Plaintiffs accurately observe that a weapon malfunction or jam can be as effective as mandatory reloading in creating a critical pause. However, one cannot predict whether or when a firearm will malfunction. The limitation on magazine size makes the critical pause mandatory because continued use of the gun requires reloading or switching to another gun.

Plaintiffs also accurately observe that skilled shooters can reload more quickly than can unskilled shooters, which would reduce the duration of the critical pause. That is undoubtedly true, but also largely irrelevant. A pause, of any duration, imposed on the offensive shooter can only be beneficial, allowing some period of time for victims to escape, victims to attack, or law enforcement to intervene. The pause compelled by the limitation on magazines also could temporarily impair a defensive shooter, but beyond acknowledging that fact, there are too many external variables to permit a conclusion that pauses effectively compelled on both sides are necessarily better or worse than having no such pauses on either side. In cases involving skilled

defensive shooters and inexperienced offensive shooters, the pause is necessarily favorable. Where the situation is reversed, it may be that the offensive shooter gains an advantage, or it may be that the asymmetry of the offensive shooter and defensive shooter's goals nevertheless negate some or all of that advantage. The mere fact that the legislature's decision might raise the risk of harm to the public in some circumstances, while clearly diminishing it in others does not defeat the conclusion that the legislature's decision was substantially related to an important governmental interest.

Finally, the Plaintiffs argue that criminals who are intent on committing gun violence will not obey the magazine restriction and will nevertheless unlawfully obtain large-capacity magazines. Hypothetically, this may be true, but the Court declines to speculate about the subjective intentions and means of unspecified criminals involved in unspecified gun violence. The Court accepts the unrebutted opinion of Dr. Zax, who testified that the magazine size restriction will reduce the overall number of large-capacity magazines available in Colorado and his testimony about the effects of federal firearms regulation in Virginia. Thus, although it may be impossible to completely eliminate access to large-capacity magazines, it is reasonable to infer that the restriction will, at a minimum, reduce the ready availability of large-capacity magazines to both criminals and law-abiding citizens.

It is clear from the legislative history that the General Assembly adopted the 15-round restriction in the effort to balance the ability of individuals to lawfully use semiautomatic weapons in self-defense, while limiting the capability of unlawful shooters to fire repeatedly. It considered a more restrictive limit of 12 rounds, but rejected that at the request of citizens and law enforcement officials. Instead, it chose the 15-round limit based on evidence that officers of

the numerous state and federal law enforcement agencies all successfully use magazines with 15 or fewer rounds.

Whether adoption of a fifteen-round magazine limit is a sound public policy or a perfect fit with the General Assembly's objective to improve public safety is not the question before this Court. The fit may not be perfect, but the evidence establishes both an important governmental policy and a substantial relationship between that policy and the restriction of § 18-12-302. The provisions of § 18-12-302 are permissible under the Second Amendment.

C. Application to § 18-12-112

Subject to multiple exceptions, § 18-12-112 extends the mandatory background check required in gun sales by dealers and at gun shows to transferees who take possession of a firearm in a private transfer. Plaintiffs do not argue that requiring background checks for the private sale of firearms is unconstitutional. Rather, they focus their challenge on the effect of the statute on *temporary* transfers, when ownership of the firearm does not change. Essentially, they argue that the Second Amendment protects an individual's right to borrow a firearm for lawful purposes, including for self-defense, and that such right is infringed by the statute's requirements.

First, the Court must determine whether § 18-12-112 impacts conduct protected by the Second Amendment. As repeatedly noted, the Second Amendment guarantees an individual's right to keep and bear arms for the core purpose of defense of self and home. However, it is not at all clear that the Second Amendment prevents the government from restricting the ability of persons to acquire firearms via temporary loans from others. Notably, *Heller* acknowledged the historical permissibility of "laws imposing conditions and qualifications on the commercial sale of arms." 544 U.S. at 626-27. Logically, if the government can lawfully regulate the ability of persons to obtain firearms from commercial dealers, that same power to regulate should extend

to non-commercial transactions, lest the loophole swallow the regulatory purpose. Thus, the Court has grave doubt that a law regulating (as opposed to prohibiting) temporary private transfers of firearms implicates the Second Amendment's guarantee at all.

Nevertheless, the Court will assume that, arguably, the right to "keep and bear" firearms implies some protection of the right to acquire firearms in the first place. *Cf. Ezell*, 651 F.3d at 704. And the Court will assume that, if the acquisition of firearms is protected to some extent, that protection will include acquisition via loan. Thus, if the Court were to conclude that the Second Amendment protects an individual's right to acquire firearms for the purpose of self-defense by temporarily borrowing them, the Court would find that § 18-12-112 impacts that right by requiring a background check before such transfer can occur.[29]

Contrary to the Plaintiffs' position, however, the burden imposed on the right is no more severe than the law already provides with regard to firearm sales. Colorado already requires a background check to be conducted on the buyer in a commercial firearm sale, and thus, the operation of § 18-12-112 does nothing more than impose the same restrictions on acquisition by loan. It does not prevent a person otherwise permitted to obtain a firearm from acquiring one, nor subject that person to any greater burdens than he or she would face if acquiring the weapon commercially. Nothing in the Second Amendment can be read to suggest that a permissible burden on commercial sales of firearms cannot similarly be extended to apply to those acquiring firearms by loan.

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[29] Arguably, however, a Second Amendment right focused on acquisition of a firearm would extend only to the transferee of the firearm. It is difficult to imagine how a firearm owner's Second Amendment rights are impaired by prohibiting him or her from loaning a firearm to another. However, as the preceding discussion concerning standing observes, the Plaintiffs here are the parties intending to *lend* the weapons, not the parties borrowing them. This further highlights the dubious issue of standing in this case.

The Plaintiffs argue that the burden is severe because it will be difficult for individuals to actually obtain the background checks from a federally licensed firearms dealer. They argue that firearm dealers may be unavailable in areas where individuals need background checks, that the checks could take a long time, or that the dealers may be unwilling to perform the checks due to the limit on fees they can charge.

The evidence presented does not entirely support the Plaintiffs' argument. Plaintiffs' witnesses provided anecdotal evidence of experiences they have had where a dealer refused to perform a background check for one reason or another. They also testified as to how it would be inconvenient for them to locate a dealer and obtain a check before the need to execute a transfer. However, there is no evidence that all, or even most, firearms dealers refuse to perform private background checks, or that it would be impossible for many, or most, who would receive a weapon to obtain a background check. Rather, the evidence shows that there are more than 600 firearms dealers in Colorado that are actively performing private checks, and that, currently, it takes an average of less than fifteen minutes for a check to be processed by the Colorado Bureau of Investigation. Although the statute may result in logistical difficulties or inconveniences for some individuals who want to privately borrow a firearm for more than 72 hours, it does not facially infringe their Second Amendment right to do so.[30] In the context of the facial challenge presented here, the Court finds that § 18-12-112 does not severely impact the Second Amendment right. Accordingly, intermediate scrutiny is appropriate.

The Court first looks to Colorado's asserted objective in passing § 18-12-112. Colorado asserts that the objective in passing the statute was to ensure public safety and aid in crime

[30] This is not to say that there may be instances where individuals do not comply with the requirement for a background check and are prosecuted for their noncompliance. Such circumstances can be addressed through an as-applied challenge.

prevention by closing a loophole in the background check statutes applicable to gun sales by dealers and at gun shows. The General Assembly considered evidence that almost 40% of gun purchases are made through private sales, in person or over the internet; 62% of private sellers on the internet agree to sell to buyers who are known not to be able to pass a background check; and 80% of criminals who use guns in crime acquired one through a private sale. The General Assembly also considered evidence that a high percentage of gun crimes are committed by individuals with prior arrests or convictions, which would trigger a denial in a background check, and that closure of the loophole would reduce the number of firearms that are easily passed into the trafficking market and made more accessible for use in crime. The Court finds that the General Assembly used reasoned analysis in concluding that it was necessary and beneficial to require background checks for private transfers of firearms to help prevent crime and improve public safety, both important governmental interests.

The next question is whether the provisions of § 18-12-112 are substantially related to these objectives. Colorado presented evidence showing that private background checks will make it more difficult for prohibited individuals to acquire firearms, reduce the rate of diversion of firearms from legal commerce into the trafficking market, and reduce the firearm homicide rate. Dr. Daniel Webster testified that most firearms used in crime are obtained from a dishonest licensed dealer or from a trusted friend or family member. Ronald Sloan, the Director of the Colorado Bureau of Investigation, testified that background checks on private transfers are denied at a rate as high as, if not higher than, the denial rate of sales at retail or gun shows. Further, Dr. Webster opined that imposition of accountability on law-abiding citizens who are tempted to transfer a firearm to a prohibited individual deters diversion of firearms into the trafficking market. Decreasing diversion ultimately impacts the availability of firearms to

criminals. Dr. Webster also testified that, based on his research and studies, when measures of accountability for private transfers are taken away, the rates of firearm homicide grow substantially. Thus, by imposing such measures, the General Assembly could reasonably expect the rates of criminal gun trafficking and use to decrease.

Plaintiffs argue that the evidence shows that private background checks are not happening at the frequency expected, and thus the public interest is not actually being served. However, for purposes of determining constitutionality — particularly via facial challenge — arguments about whether the statute has been successful are not relevant. Colorado is not required to show that the statute has already achieved success if its rationale for imposing the law is substantially related to an important purpose.

In addition, Plaintiffs argue that the 72-hour exemption to the background check requirement is unreasonable. They contend that there was no basis for limiting the exemption to 72 hours, and that more reasonable options include extending the exemption to thirty days, allowing an exemption for individuals with concealed carry permits, or implementing a system that would not require parties to a transfer to physically go to a firearms dealer.

The Court perceives this argument to be one of preferred policy. The Court's role in this case is to determine whether § 18-12-112 impermissibly burdens protected Second Amendment rights. What the legislature chooses to *exempt* from the statute's requirements is a determination that is left solely to the legislature. The legislature was free to conclude, as it did, that 72 hours would be an adequate period of time to permit transfers without background checks while ensuring that sham loans would not occur beyond that timeframe. Whether or not the legislature's policy decision was wise or warranted is not a question properly presented to this Court.

Accordingly, the Court concludes that § 18-12-112 is constitutionally permissible under the Second Amendment.

VI. Vagueness Challenge

Returning to § 18-12-302, the Court considers the Plaintiffs' challenge to the statute's grandfather clause as being unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. Section 18-12-302(2)(a) provides that a person may possess a large-capacity magazine if he or she: (1) owned the large-capacity magazine on July 1, 2013, and (2) has maintained "continuous possession" of the magazine since that date. The Plaintiffs seek to invalidate the second requirement, arguing that because the phrase "continuous possession" is undefined in the statute, it fails to put the public on notice of prohibited conduct or provide any enforcement standards.

A law runs afoul of the Due Process Clause if it is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citation omitted). The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Dias v. City and Cnty. of Denver*, 567 F.3d 1169, 1179 (10th Cir. 2009) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). This means that a statute can be impermissibly vague for either of two independent reasons: (1) if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) if it authorizes or even encourages arbitrary and discriminatory enforcement. *Ward v. Utah*, 398 F.3d 1239, 1251 (10th Cir. 2005). In this case, the Plaintiffs challenge the statute on both grounds.

In assessing the sufficiency of statutory language, the court is guided by venerated authority that "we can never expect mathematical certainty from our language" and that a statute's terms may be "marked by flexibility and reasonable breadth, rather than meticulous specificity." *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Thus, a statute is not vague if it is clear what the statute as a whole prohibits. *Id.*

As a preliminary matter, Colorado contends that the Court should not reach the merits of this claim. Relying on *United States v. Reed*, 114 F.3d 1067 (10th Cir. 1997), and *United States v. Michel*, 446 F.3d 1122 (10th Cir. 2006), Colorado argues that facial vagueness claims are permitted only when the challenged statute prohibits protected First Amendment activity. The Court rejects that argument, as these cases are not analogous. Both actions sought post-enforcement review of the statute under which the individuals were prosecuted. *See Reed*, 114 F.3d at 1070; *Michel*, 446 F.3d at 1135.

The Tenth Circuit has held that facial vagueness challenges are proper in two circumstances. First, when an individual has been prosecuted under an arguably vague statute, he or she is permitted to facially attack the statute, in addition to bringing an as-applied challenge, if the statute threatens to "chill" constitutionally protected conduct, especially that protected by the First Amendment. *See Dias*, 567 F.3d at 1179-80; *United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1988). The reasoning for permitting a facial challenge in this circumstance is that when a statute is arguably so vague that it can reasonably be interpreted to prohibit constitutionally protected speech, individuals may refrain from speaking rather than risk criminal prosecution. Thus, when an individual *is* prosecuted under the statute, he or she is permitted to bring a facial challenge in order to vindicate the rights of others who may be chilled from speaking at all.

The second circumstance where a facial challenge is appropriate is upon pre-enforcement review of a statute. In a declaratory judgment action where no one has been charged under the challenged statute, the court cannot evaluate the statute as applied. Thus, the only claim to be brought is a facial challenge. In these circumstances, the challenger may facially attack the statute as "vague in all of its applications." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *see also Ward v. Utah*, 398 F.3d 1239, 1251 (10th Cir. 2005). If the statute is vague in all of its applications, then it will necessarily be vague as applied in every case, and the statute is therefore void on its face. *Gaudreau*, 860 F.2d at 361.

As noted, § 18-12-112 has not been enforced against any Plaintiff. This is a declaratory judgment action in which the Plaintiffs seek pre-enforcement review of the statute. Thus, a facial challenge that asserts that the statute is necessarily vague in all of its applications is appropriate. The Supreme Court has cautioned that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 733 (2000).

First, the Plaintiffs argue that a person of ordinary intelligence could not understand whether his or her conduct fell within § 18-12-302(2)(a) because "continuous possession" is not defined. Pointing to hypothetical situations where § 18-12-302(2)(a) may or may not apply, the Plaintiffs argue that "no one knows with any certainty what 'continuous possession' means." The Plaintiffs further argue that the lack of notice is amplified due to the fact that the statute does not contain a scienter requirement.

The Court is unpersuaded. Because the statute fails to provide an explicit definition for "continuous possession," it is possible that the "continuous possession" requirement may not be

clear in every application. However, the existence of close cases does not render the statute unconstitutionally vague. Indeed, "[c]lose cases can be imagined under virtually any statute." *United States v. Williams*, 553 U.S. 285, 306 (2008). What renders a statute vague is the inability to determine what the necessary facts *are* under wholly subjective standards. *Id.* For example, the Supreme Court has struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent." *See, e.g., Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Reno v. ACLU*, 521 U.S. 844, 870-71 & n.35 (1997).

Such is not the case here. The grandfather clause actually is an exception to the law. It does not describe criminal conduct, but instead describes conduct that is not criminal. The two operative words, "possession" and "continuous" are in common usage and have readily defined meanings. *See, e.g.*, Merriam-Webster's Collegiate Dictionary, 10th Ed. at 250 (defining "continuous" as "marked by uninterrupted extension in space, time, or sequence"), at 906 (defining "possession" as "the act of having or taking into control"). Indeed, it is not difficult to conceive of many situations where the statute's application would be clear: an owner who loaned out his or her magazine to another after July 1, 2013 would clearly not have maintained "possession" of it; a person who pawned a magazine after July 1, 2013, only to redeem and reacquire it later might currently have possession of the magazine, but that possession has not been "continuous" since July 1, 2013. Accordingly, the Court finds that despite the lack of a precise statutory definition for "continuous possession," it is clear what conduct the statute as a whole prohibits and permits.

The Plaintiffs also contend that the grandfather clause is unduly vague because it lacks an express scienter requirement. The Tenth Circuit has explained that the presence of a scienter requirement can save an otherwise vague statute by mitigating a law's vagueness and thus

making the law constitutional. *Ward v. Utah*, 398 f.3d 1239, 1252 (10th Cir. 2005). This principle does not imply, however, that every statute lacking a scienter requirement is necessarily vague. *Id.* Because the Court finds that § 18-12-302(2)(a) is not otherwise vague, its lack of an express scienter requirement does not render the statute unconstitutional.

Plaintiffs also argue that the statute does not contain any enforcement standards and therefore permits arbitrary and discriminatory enforcement. Again, the Plaintiffs point out that "continuous possession" is undefined. They argue that, as a result, it will be left open to interpretation by "individual law enforcement officers, prosecutors, judges, and juries." The Court disagrees. "As always, enforcement requires the exercise of some degree of police judgment." *Grayned*, 408 U.S. at 114. The Court finds that the degree of judgment required in enforcing § 18-12-302(2)(a) is not unacceptably delegated to the whim of individual prosecutors. Although there may be edge cases where the application of the clause is debatable, the "continuous possession" requirement as a whole is sufficiently clear that reasonable people can understand what general types of conduct are authorized.

Further, when evaluating a facial challenge to a Colorado law, a federal court must "consider any limiting construction that a Colorado court or enforcement agency has proffered." *Hoffman Estates*, 455 U.S. at 494 n.5; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989). Here, the Attorney General has issued two "technical guidance letters" to the Colorado Department of Public Safety regarding how § 18-12-302(2)(a) should be interpreted and enforced. The letters provide that "continuous possession" shall be interpreted as "having or holding property in one's power or the exercise of dominion over property, that is uninterrupted in time, sequence, substance, or extent." Further, "continuous possession" does not require "literally continuous physical possession" — instead, "continuous possession" is only lost by a

"voluntary relinquishment of dominion and control." The technical guidance acknowledges that "[r]esponsible maintenance, handling, and gun safety practices . . . dictate that [§ 18-12-302(2)(a)] cannot be reasonably construed as barring the temporary transfer of a large-capacity magazine by an individual who remains in the continual presence of the temporary transferee, unless that temporary transfer is otherwise prohibited by law." The Plaintiffs have not provided any evidence demonstrating a reason to believe that § 18-12-302(2)(a) will not be enforced in accordance with the interpretation provided by the Attorney General. The guidance therefore serves to further limit the discretion of law enforcement officers when applying the grandfather clause. In light of the forgoing, the Court finds that the statute does not authorize or encourage arbitrary or discriminatory enforcement. Because the Plaintiffs have failed to sustain their burden of establishing that § 18-12-302(2)(a) is unconstitutionally vague in all applications, the Court finds the statute permissible under the Fourteenth Amendment to the United States Constitution.

VII. Claims under Title II of the ADA

Finally, certain disabled Plaintiffs contend that § 18-12-302 and § 18-12-112 violate 42 U.S.C. § 12132 of the ADA under a disparate impact theory.[31] The Plaintiffs argue that the statutes disproportionately burden disabled individuals in their ability to defend themselves as compared to able-bodied individuals and they are therefore at a greater risk of harm.[32]

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[31] In closing argument, the Plaintiffs' counsel appeared to argue that they were also asserting an ADA claim for denial of a request for reasonable accommodation. However, no claim of reasonable accommodation was presented in the final pretrial order (Docket #119). The Court therefore deems such claim to be waived.

[32] The Court notes that some of the evidence presented with regard to the constitutionality of § 18-12-302 could be construed to suggest that some disabled persons may have greater need for large-capacity magazines for self-defense than more able-bodied persons. Whether there are

Title II of the ADA provides that "[s]ubject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II of the ADA seeks to "remedy a broad, comprehensive concept of discrimination against individuals with disabilities, including disparate impact discrimination." *Chaffin v. Kansas Colorado Fair Bd.*, 348 F.3d 850, 859-60 (10th Cir. 2003) (overruled on other grounds as recognized by *Muscogee (Creek) Nation v. Pruit*, 669 F.3d 1159, 1167 n.4 (10th Cir. 2012)). To prove a case of disparate impact discrimination, a plaintiff must show that "a specific policy caused a significant disparate effect on a protected group." *Cinnamon Hills Youth Crisis Center, Inc. v. Saint George City*, 685 F.3d 917, 922 (10th Cir. 2012). This is generally shown by statistical evidence identifying relevant comparators to the plaintiff group, examining the relative outcomes of the two groups, and establishing a reasonable inference that any disparate effect identified was caused by the challenged policy and not other causal factors. *Id.* (citation omitted).

Colorado argues that the Plaintiffs' claims under the ADA fail as a matter of law because the Plaintiffs have failed to prove how § 18-12-112 and § 18-12-302 deprive disabled individuals of the "services, programs, or activities of a public entity." The Plaintiffs respond that Title II is not limited to a denial of government services, programs, or activities. They argue that the second clause of § 12132, which provides that a qualified individual shall not "be subjected to discrimination by any [public entity]," extends to any and all actions taken by a public entity. Thus, they argue, by simply enacting statutes that disparately impact disabled individuals, Colorado committed discrimination against disabled individuals in violation of Title II.

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more viable claims than those brought here to address that concern is a matter upon which the Court does not speculate.

This issue was addressed by the Tenth Circuit in *Elwell v. Oklahoma*, 693 F.3d 1303 (10th Cir. 2012). In *Elwell*, the issue before the Tenth Circuit was whether a governmental employee could bring a claim of employment discrimination against his public employer under Title II of the ADA (rather than under Title I of the ADA, which specifically addresses employment discrimination). In its analysis, the court acknowledged that § 12132 of Title II has two primary clauses. The first clause prevents a qualified individual from being "excluded from participation in or be[ing] denied the benefits of the services, programs, or activities of a public entity." Thus, the question was whether "employment" could be fairly described as a "service, program, or activity" of a public entity. The court held that it could not, explaining that "an agency's services, programs, and activities refer to the 'outputs' it provides some public constituency." 693 F.3d at 1306. Employment, on the other hand, is an "input" required to make an agency's services, programs, and activities possible. *Id.*

The second clause prevents a qualified individual from being "subjected to discrimination by any [public entity]." The plaintiff in *Elwell* argued that this clause is a "catch-all" that prohibits all discrimination by a public entity, regardless of whether it occurs in a service, program, or activity the entity provides or in some other way or function. The Tenth Circuit disagreed, holding that the second clause also refers to discrimination in the context of government-provided services, programs, and activities. *Id.* at 1308-09. The Tenth Circuit explained that § 12132 must be read in concert with the definition of "qualified individual with a disability," 42 U.S.C. § 12131(2), which states that a "qualified individual with a disability" is an "individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Thus, the first clause of §12132 precludes an agency from baldly "exclud[ing]" or "deny[ing] benefits" to

qualified individuals, while the second clause does additional work by addressing more subtle (though equally inequitable) acts of discrimination, such as by making it disproportionately more difficult for qualified individuals to participate in programs or activities, unfairly disadvantaging them compared to others, or "otherwise discriminating against them in the manner the agency provides its services, programs, and activities." *Id.* at 1308.

The Tenth Circuit in *Elwell* went onto explain what the terms "services," "programs," and "activities" are understood to mean. "Services" are ordinarily understood as acts done by the government for the benefit of another, whereas the term "program" refers to a government's projects or schemes, such as social security or a foreign exchange program. *Id.* at 1306. The term "activity" has a broader meaning, encompassing all outputs the public entity provides to the public it serves. However, the term does "not necessarily rope in everything the entity does." *Id.* at 1307.

Applying the principles of *Elwell* here, the Court finds that the Plaintiffs have failed to prove that § 18-12-112 and § 18-12-302 disproportionately impact disabled individuals with respect to a Colorado "service, program, or activity." The statutes at issue do not create any governmental "output" which disabled persons are less able to access. Rather, the statutes merely embody a criminal prohibition on conduct generally applicable to all persons. Thus, the Plaintiffs' claims fail to establish a violation of Title II of the ADA.

Assuming, however, that the statutes *did* constitute a government service, program, or activity, the Court would nevertheless find that the evidence is insufficient to establish a disparate impact. The Plaintiffs presented significant evidence tending to show that *some* disabled individuals: (1) feel that large-capacity magazines are necessary for their self-defense because they have decreased mobility and/or ability to reload quickly during confrontation, and

(2) wish to borrow firearms, some of which are specifically equipped to aid their disabilities, from various organizations without having to undergo a background check. Such anecdotal evidence, in the absence of meaningful statistical analysis comparing the effect of the statute on the Plaintiffs and able-bodied comparators is insufficient to carry the Plaintiffs' burden of demonstrating that the statutes cause any disparate effect. Accordingly, the Court finds that the Colorado is entitled to judgment in its favor on the Plaintiffs' claims under the ADA.

VIII. Conclusion

For the forgoing reasons, the Court **ORDERS** as follows:

- Colorado's Motion to Dismiss **(#133)** is **DENIED**;
- The parties' Joint Motion to Strike Expert Opinions Per FRE 702 **(#118)** is **GRANTED, in part, and DENIED, in part** consistent with the findings contained herein;
- Colorado Revised Statutes § 18-12-112 and § 18-12-302 are compliant with the provisions of the Second and Fourteenth Amendments to the United States Constitution.
- The Clerk of the Court is directed to enter **JUDGMENT IN FAVOR OF THE DEFENDANT** on all claims and to close this case.

Dated this 26th day of June, 2014.

BY THE COURT:

Marcia S. Krieger

Marcia S. Krieger
Chief United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO OUTFITTERS ASSOCIATION, *et al.*,	)	
Appellants,	)	Nos. 14-1290
v.	)	
JOHN W. HICKENLOOPER,	)	
Appellee.	)	

On Appeal from the United States District Court for the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 13-CV-1300-MSK

EXHIBIT 2

HOUSE BILL 13-1224

BY REPRESENTATIVE(S) Fields, Court, Fischer, Hullinghorst, Labuda, Levy, Melton, Pabon, Rosenthal, Schafer, Williams, Young, Buckner, Ferrandino;
also SENATOR(S) Hodge, Aguilar, Guzman, Heath, Nicholson, Ulibarri, Morse.

CONCERNING PROHIBITING LARGE-CAPACITY AMMUNITION MAGAZINES.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** part 3 to article 12 of title 18 as follows:

PART 3
LARGE-CAPACITY AMMUNITION MAGAZINES

18-12-301. Definitions. AS USED IN THIS PART 3, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "BUREAU" MEANS THE COLORADO BUREAU OF INVESTIGATION CREATED AND EXISTING PURSUANT TO SECTION 24-33.5-401, C.R.S.

(2) (a) "LARGE-CAPACITY MAGAZINE MEANS:

_____
Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(I) A FIXED OR DETACHABLE MAGAZINE, BOX, DRUM, FEED STRIP, OR SIMILAR DEVICE CAPABLE OF ACCEPTING, OR THAT IS DESIGNED TO BE READILY CONVERTED TO ACCEPT, MORE THAN FIFTEEN ROUNDS OF AMMUNITION;

(II) A FIXED, TUBULAR SHOTGUN MAGAZINE THAT HOLDS MORE THAN TWENTY-EIGHT INCHES OF SHOTGUN SHELLS, INCLUDING ANY EXTENSION DEVICE THAT IS ATTACHED TO THE MAGAZINE AND HOLDS ADDITIONAL SHOTGUN SHELLS; OR

(III) A NONTUBULAR, DETACHABLE MAGAZINE, BOX, DRUM, FEED STRIP, OR SIMILAR DEVICE THAT IS CAPABLE OF ACCEPTING MORE THAN EIGHT SHOTGUN SHELLS WHEN COMBINED WITH A FIXED MAGAZINE.

(b) "LARGE-CAPACITY MAGAZINE" DOES NOT MEAN:

(I) A FEEDING DEVICE THAT HAS BEEN PERMANENTLY ALTERED SO THAT IT CANNOT ACCOMMODATE MORE THAN FIFTEEN ROUNDS OF AMMUNITION;

(II) AN ATTACHED TUBULAR DEVICE DESIGNED TO ACCEPT, AND CAPABLE OF OPERATING ONLY WITH, .22 CALIBER RIMFIRE AMMUNITION; OR

(III) A TUBULAR MAGAZINE THAT IS CONTAINED IN A LEVER-ACTION FIREARM.

18-12-302. Large-capacity magazines prohibited - penalties - exceptions. (1) (a) EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, ON AND AFTER JULY 1, 2013, A PERSON WHO SELLS, TRANSFERS, OR POSSESSES A LARGE-CAPACITY MAGAZINE COMMITS A CLASS 2 MISDEMEANOR.

(b) ANY PERSON WHO VIOLATES SUBSECTION (1) OF THIS SECTION AFTER HAVING BEEN CONVICTED OF A PRIOR VIOLATION OF SAID SUBSECTION (1) COMMITS A CLASS 1 MISDEMEANOR.

(c) ANY PERSON WHO VIOLATES SUBSECTION (1) OF THIS SECTION COMMITS A CLASS 6 FELONY IF THE PERSON POSSESSED A LARGE-CAPACITY MAGAZINE DURING THE COMMISSION OF A FELONY OR ANY CRIME OF VIOLENCE, AS DEFINED IN SECTION 18-1.3-406.

(2) (a) A PERSON MAY POSSESS A LARGE-CAPACITY MAGAZINE IF HE OR SHE:

(I) OWNS THE LARGE-CAPACITY MAGAZINE ON THE EFFECTIVE DATE OF THIS SECTION; AND

(II) MAINTAINS CONTINUOUS POSSESSION OF THE LARGE-CAPACITY MAGAZINE.

(b) IF A PERSON WHO IS ALLEGED TO HAVE VIOLATED SUBSECTION (1) OF THIS SECTION ASSERTS THAT HE OR SHE IS PERMITTED TO LEGALLY POSSESS A LARGE-CAPACITY MAGAZINE PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (2), THE PROSECUTION HAS THE BURDEN OF PROOF TO REFUTE THE ASSERTION.

(3) THE OFFENSE DESCRIBED IN SUBSECTION (1) OF THIS SECTION SHALL NOT APPLY TO:

(a) AN ENTITY, OR ANY EMPLOYEE THEREOF ENGAGED IN HIS OR HER EMPLOYMENT DUTIES, THAT MANUFACTURES LARGE-CAPACITY MAGAZINES WITHIN COLORADO EXCLUSIVELY FOR TRANSFER TO, OR ANY LICENSED GUN DEALER, AS DEFINED IN SECTION 12-26.1-106 (6), C.R.S., OR ANY EMPLOYEE THEREOF ENGAGED IN HIS OR HER OFFICIAL EMPLOYMENT DUTIES, THAT SELLS LARGE-CAPACITY MAGAZINES EXCLUSIVELY TO:

(I) A BRANCH OF THE ARMED FORCES OF THE UNITED STATES;

(II) A DEPARTMENT, AGENCY, OR POLITICAL SUBDIVISION OF THE STATE OF COLORADO, OR OF ANY OTHER STATE, OR OF THE UNITED STATES GOVERNMENT;

(III) A FIREARMS RETAILER FOR THE PURPOSE OF FIREARMS SALES CONDUCTED OUTSIDE THE STATE;

(IV) A FOREIGN NATIONAL GOVERNMENT THAT HAS BEEN APPROVED FOR SUCH TRANSFERS BY THE UNITED STATES GOVERNMENT; OR

(V) AN OUT-OF-STATE TRANSFEREE WHO MAY LEGALLY POSSESS A LARGE-CAPACITY MAGAZINE; OR

(b) AN EMPLOYEE OF ANY OF THE FOLLOWING AGENCIES WHO BEARS A FIREARM IN THE COURSE OF HIS OR HER OFFICIAL DUTIES:

(I) A BRANCH OF THE ARMED FORCES OF THE UNITED STATES; OR

(II) A DEPARTMENT, AGENCY, OR POLITICAL SUBDIVISION OF THE STATE OF COLORADO, OR OF ANY OTHER STATE, OR OF THE UNITED STATES GOVERNMENT; OR

(c) A PERSON WHO POSSESSES THE MAGAZINE FOR THE SOLE PURPOSE OF TRANSPORTING THE MAGAZINE TO AN OUT-OF-STATE ENTITY ON BEHALF OF A MANUFACTURER OF LARGE-CAPACITY MAGAZINES WITHIN COLORADO.

18-12-303. Identification markings for large-capacity magazines - rules. (1) A LARGE-CAPACITY MAGAZINE THAT IS MANUFACTURED IN COLORADO ON OR AFTER THE EFFECTIVE DATE OF THIS SECTION MUST INCLUDE A PERMANENT STAMP OR MARKING INDICATING THAT THE LARGE-CAPACITY MAGAZINE WAS MANUFACTURED OR ASSEMBLED AFTER THE EFFECTIVE DATE OF THIS SECTION. THE STAMP OR MARKING MUST BE LEGIBLY AND CONSPICUOUSLY ENGRAVED OR CAST UPON THE OUTER SURFACE OF THE LARGE-CAPACITY MAGAZINE.

(2) THE BUREAU MAY PROMULGATE SUCH RULES AS MAY BE NECESSARY FOR THE IMPLEMENTATION OF THIS SECTION, INCLUDING BUT NOT LIMITED TO RULES REQUIRING A LARGE-CAPACITY MAGAZINE THAT IS MANUFACTURED ON OR AFTER THE EFFECTIVE DATE OF THIS SECTION TO BEAR IDENTIFYING INFORMATION IN ADDITION TO THE IDENTIFYING INFORMATION DESCRIBED IN SUBSECTION (1) OF THIS SECTION.

(3) A PERSON WHO MANUFACTURES A LARGE-CAPACITY MAGAZINE IN COLORADO IN VIOLATION OF SUBSECTION (1) OF THIS SECTION COMMITS A CLASS 2 MISDEMEANOR AND SHALL BE PUNISHED IN ACCORDANCE WITH SECTION 18-1.3-501.

SECTION 2. Effective date. This act takes effect July 1, 2013.

SECTION 3. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Mark Ferrandino SPEAKER OF THE HOUSE OF REPRESENTATIVES	John P. Morse PRESIDENT OF THE SENATE
Marilyn Eddins CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES	Cindi L. Markwell SECRETARY OF THE SENATE

APPROVED_____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO OUTFITTERS ASSOCIATION, *et al.*,	)	
Appellants,	)	Nos. 14-1290
v.	)	
JOHN W. HICKENLOOPER,	)	
Appellee.	)	

On Appeal from the United States District Court for the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 13-CV-1300-MSK

EXHIBIT 3

NOTE: This bill has been prepared for the signatures of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.

An Act

HOUSE BILL 13-1229

BY REPRESENTATIVE(S) Fields and McCann, Buckner, Court, Duran, Exum, Fischer, Foote, Ginal, Hamner, Hullinghorst, Kagan, Labuda, Lee, Levy, McLachlan, Melton, Mitsch Bush, Moreno, Pabon, Pettersen, Rosenthal, Schafer, Williams, Young, Ferrandino, Salazar, Tyler;
also SENATOR(S) Carroll, Aguilar, Giron, Guzman, Heath, Hodge, Hudak, Johnston, Jones, Kerr, Newell, Nicholson, Steadman, Todd, Ulibarri, Morse.

CONCERNING CRIMINAL BACKGROUND CHECKS PERFORMED PURSUANT TO THE TRANSFER OF A FIREARM, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** 18-12-112 as follows:

18-12-112. Private firearms transfers - background check required - penalty - definitions. (1) (a) ON AND AFTER JULY 1, 2013, EXCEPT AS DESCRIBED IN SUBSECTION (6) OF THIS SECTION, BEFORE ANY PERSON WHO IS NOT A LICENSED GUN DEALER, AS DEFINED IN SECTION 12-26.1-106 (6), C.R.S., TRANSFERS OR ATTEMPTS TO TRANSFER POSSESSION OF A FIREARM TO A TRANSFEREE, HE OR SHE SHALL:

_____
Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(I) REQUIRE THAT A BACKGROUND CHECK, IN ACCORDANCE WITH SECTION 24-33.5-424, C.R.S., BE CONDUCTED OF THE PROSPECTIVE TRANSFEREE; AND

(II) OBTAIN APPROVAL OF A TRANSFER FROM THE BUREAU AFTER A BACKGROUND CHECK HAS BEEN REQUESTED BY A LICENSED GUN DEALER, IN ACCORDANCE WITH SECTION 24-33.5-424, C.R.S.

(b) AS USED IN THIS SECTION, UNLESS THE CONTEXT REQUIRES OTHERWISE, "TRANSFEREE" MEANS A PERSON WHO DESIRES TO RECEIVE OR ACQUIRE A FIREARM FROM A TRANSFEROR. IF A TRANSFEREE IS NOT A NATURAL PERSON, THEN EACH NATURAL PERSON WHO IS AUTHORIZED BY THE TRANSFEREE TO POSSESS THE FIREARM AFTER THE TRANSFER SHALL UNDERGO A BACKGROUND CHECK, AS DESCRIBED IN PARAGRAPH (a) OF THIS SUBSECTION (1), BEFORE TAKING POSSESSION OF THE FIREARM.

(2) (a) A PROSPECTIVE FIREARM TRANSFEROR WHO IS NOT A LICENSED GUN DEALER SHALL ARRANGE FOR A LICENSED GUN DEALER TO OBTAIN THE BACKGROUND CHECK REQUIRED BY THIS SECTION.

(b) A LICENSED GUN DEALER WHO OBTAINS A BACKGROUND CHECK ON A PROSPECTIVE TRANSFEREE SHALL RECORD THE TRANSFER, AS PROVIDED IN SECTION 12-26-102, C.R.S., AND RETAIN THE RECORDS, AS PROVIDED IN SECTION 12-26-103, C.R.S., IN THE SAME MANNER AS WHEN CONDUCTING A SALE, RENTAL, OR EXCHANGE AT RETAIL. THE LICENSED GUN DEALER SHALL COMPLY WITH ALL STATE AND FEDERAL LAWS, INCLUDING 18 U.S.C. SEC. 922, AS IF HE OR SHE WERE TRANSFERRING THE FIREARM FROM HIS OR HER INVENTORY TO THE PROSPECTIVE TRANSFEREE.

(c) A LICENSED GUN DEALER WHO OBTAINS A BACKGROUND CHECK FOR A PROSPECTIVE FIREARM TRANSFEROR PURSUANT TO THIS SECTION SHALL PROVIDE THE FIREARM TRANSFEROR AND TRANSFEREE A COPY OF THE RESULTS OF THE BACKGROUND CHECK, INCLUDING THE BUREAU'S APPROVAL OR DISAPPROVAL OF THE TRANSFER.

(d) A LICENSED GUN DEALER MAY CHARGE A FEE FOR SERVICES RENDERED PURSUANT TO THIS SECTION, WHICH FEE SHALL NOT EXCEED TEN DOLLARS.

(3) (a) A PROSPECTIVE FIREARM TRANSFEREE UNDER THIS SECTION SHALL NOT ACCEPT POSSESSION OF THE FIREARM UNLESS THE PROSPECTIVE FIREARM TRANSFEROR HAS OBTAINED APPROVAL OF THE TRANSFER FROM THE BUREAU AFTER A BACKGROUND CHECK HAS BEEN REQUESTED BY A LICENSED GUN DEALER, AS DESCRIBED IN PARAGRAPH (b) OF SUBSECTION (1) OF THIS SECTION.

(b) A PROSPECTIVE FIREARM TRANSFEREE SHALL NOT KNOWINGLY PROVIDE FALSE INFORMATION TO A PROSPECTIVE FIREARM TRANSFEROR OR TO A LICENSED GUN DEALER FOR THE PURPOSE OF ACQUIRING A FIREARM.

(4) IF THE BUREAU APPROVES A TRANSFER OF A FIREARM PURSUANT TO THIS SECTION, THE APPROVAL SHALL BE VALID FOR THIRTY CALENDAR DAYS, DURING WHICH TIME THE TRANSFEROR AND TRANSFEREE MAY COMPLETE THE TRANSFER.

(5) A PERSON WHO TRANSFERS A FIREARM IN VIOLATION OF THE PROVISIONS OF THIS SECTION MAY BE JOINTLY AND SEVERALLY LIABLE FOR ANY CIVIL DAMAGES PROXIMATELY CAUSED BY THE TRANSFEREE'S SUBSEQUENT USE OF THE FIREARM.

(6) THE PROVISIONS OF THIS SECTION DO NOT APPLY TO:

(a) A TRANSFER OF AN ANTIQUE FIREARM, AS DEFINED IN 18 U.S.C. SEC. 921(a) (16), AS AMENDED, OR A CURIO OR RELIC, AS DEFINED IN 27 CFR 478.11, AS AMENDED;

(b) A TRANSFER THAT IS A BONA FIDE GIFT OR LOAN BETWEEN IMMEDIATE FAMILY MEMBERS, WHICH ARE LIMITED TO SPOUSES, PARENTS, CHILDREN, SIBLINGS, GRANDPARENTS, GRANDCHILDREN, NIECES, NEPHEWS, FIRST COUSINS, AUNTS, AND UNCLES;

(c) A TRANSFER THAT OCCURS BY OPERATION OF LAW OR BECAUSE OF THE DEATH OF A PERSON FOR WHOM THE PROSPECTIVE TRANSFEROR IS AN EXECUTOR OR ADMINISTRATOR OF AN ESTATE OR A TRUSTEE OF A TRUST CREATED IN A WILL;

(d) A TRANSFER THAT IS TEMPORARY AND OCCURS WHILE IN THE HOME OF THE UNLICENSED TRANSFEREE IF:

(I) THE UNLICENSED TRANSFEREE IS NOT PROHIBITED FROM POSSESSING FIREARMS; AND

(II) THE UNLICENSED TRANSFEREE REASONABLY BELIEVES THAT POSSESSION OF THE FIREARM IS NECESSARY TO PREVENT IMMINENT DEATH OR SERIOUS BODILY INJURY TO THE UNLICENSED TRANSFEREE;

(e) A TEMPORARY TRANSFER OF POSSESSION WITHOUT TRANSFER OF OWNERSHIP OR A TITLE TO OWNERSHIP, WHICH TRANSFER TAKES PLACE:

(I) AT A SHOOTING RANGE LOCATED IN OR ON PREMISES OWNED OR OCCUPIED BY A DULY INCORPORATED ORGANIZATION ORGANIZED FOR CONSERVATION PURPOSES OR TO FOSTER PROFICIENCY IN FIREARMS;

(II) AT A TARGET FIREARM SHOOTING COMPETITION UNDER THE AUSPICES OF, OR APPROVED BY, A STATE AGENCY OR A NONPROFIT ORGANIZATION; OR

(III) WHILE HUNTING, FISHING, TARGET SHOOTING, OR TRAPPING IF:

(A) THE HUNTING, FISHING, TARGET SHOOTING, OR TRAPPING IS LEGAL IN ALL PLACES WHERE THE UNLICENSED TRANSFEREE POSSESSES THE FIREARM; AND

(B) THE UNLICENSED TRANSFEREE HOLDS ANY LICENSE OR PERMIT THAT IS REQUIRED FOR SUCH HUNTING, FISHING, TARGET SHOOTING, OR TRAPPING;

(f) A TRANSFER OF A FIREARM THAT IS MADE TO FACILITATE THE REPAIR OR MAINTENANCE OF THE FIREARM; EXCEPT THAT THIS PARAGRAPH (f) DOES NOT APPLY UNLESS ALL PARTIES WHO POSSESS THE FIREARM AS A RESULT OF THE TRANSFER MAY LEGALLY POSSESS A FIREARM;

(g) ANY TEMPORARY TRANSFER THAT OCCURS WHILE IN THE CONTINUOUS PRESENCE OF THE OWNER OF THE FIREARM;

(h) A TEMPORARY TRANSFER FOR NOT MORE THAN SEVENTY-TWO HOURS. A PERSON WHO TRANSFERS A FIREARM PURSUANT TO THIS PARAGRAPH (h) MAY BE JOINTLY AND SEVERALLY LIABLE FOR DAMAGES PROXIMATELY CAUSED BY THE TRANSFEREE'S SUBSEQUENT UNLAWFUL USE

OF THE FIREARM; OR

(i) A TRANSFER OF A FIREARM FROM A PERSON SERVING IN THE ARMED FORCES OF THE UNITED STATES WHO WILL BE DEPLOYED OUTSIDE OF THE UNITED STATES WITHIN THE NEXT THIRTY DAYS TO ANY IMMEDIATE FAMILY MEMBER, WHICH IS LIMITED TO A SPOUSE, PARENT, CHILD, SIBLING, GRANDPARENT, GRANDCHILD, NIECE, NEPHEW, FIRST COUSIN, AUNT, AND UNCLE OF THE PERSON.

(7) FOR PURPOSES OF PARAGRAPH (f) OF SUBSECTION (6) OF THIS SECTION:

(a) AN OWNER, MANAGER, OR EMPLOYEE OF A BUSINESS THAT REPAIRS OR MAINTAINS FIREARMS MAY RELY UPON A TRANSFEROR'S STATEMENT THAT HE OR SHE MAY LEGALLY POSSESS A FIREARM UNLESS THE OWNER, MANAGER, OR EMPLOYEE HAS ACTUAL KNOWLEDGE TO THE CONTRARY AND MAY RETURN POSSESSION OF THE FIREARM TO THE TRANSFEROR UPON COMPLETION OF THE REPAIRS OR MAINTENANCE WITHOUT A BACKGROUND CHECK;

(b) UNLESS A TRANSFEROR OF A FIREARM HAS ACTUAL KNOWLEDGE TO THE CONTRARY, THE TRANSFEROR MAY RELY UPON THE STATEMENT OF AN OWNER, MANAGER, OR EMPLOYEE OF A BUSINESS THAT REPAIRS OR MAINTAINS FIREARMS THAT NO OWNER, MANAGER, OR EMPLOYEE OF THE BUSINESS IS PROHIBITED FROM POSSESSING A FIREARM.

(8) NOTHING IN SUBSECTION (6) OF THIS SECTION SHALL BE INTERPRETED TO LIMIT OR OTHERWISE ALTER THE APPLICABILITY OF SECTION 18-12-111 CONCERNING THE UNLAWFUL PURCHASE OR TRANSFER OF FIREARMS.

(9) (a) A PERSON WHO VIOLATES A PROVISION OF THIS SECTION COMMITS A CLASS 1 MISDEMEANOR AND SHALL BE PUNISHED IN ACCORDANCE WITH SECTION 18-1.3-501. THE PERSON SHALL ALSO BE PROHIBITED FROM POSSESSING A FIREARM FOR TWO YEARS, BEGINNING ON THE DATE OF HIS OR HER CONVICTION.

(b) WHEN A PERSON IS CONVICTED OF VIOLATING A PROVISION OF THIS SECTION, THE STATE COURT ADMINISTRATOR SHALL REPORT THE CONVICTION TO THE BUREAU AND TO THE NATIONAL INSTANT CRIMINAL

BACKGROUND CHECK SYSTEM CREATED BY THE FEDERAL "BRADY HANDGUN VIOLENCE PREVENTION ACT" (PUB.L. 103-159), THE RELEVANT PORTION OF WHICH IS CODIFIED AT 18 U.S.C. SEC. 922 (t). THE REPORT SHALL INCLUDE INFORMATION INDICATING THAT THE PERSON IS PROHIBITED FROM POSSESSING A FIREARM FOR TWO YEARS, BEGINNING ON THE DATE OF HIS OR HER CONVICTION.

SECTION 2. In Colorado Revised Statutes, 13-5-142, **amend** (1) introductory portion, (2), (3) introductory portion, (3) (a), and (3) (b) (II); and **add** (1.5) and (4) as follows:

13-5-142. National instant criminal background check system - reporting. (1) ~~Beginning July 1, 2002~~ ON AND AFTER THE EFFECTIVE DATE OF THIS SECTION, the ~~clerk of the court of every judicial district in the~~ state COURT ADMINISTRATOR shall ~~periodically report~~ SEND ELECTRONICALLY the following information to the ~~national instant criminal background check system created by the federal "Brady Handgun Violence Prevention Act" (Pub.L. 103-159), the relevant portion of which is codified at 18 U.S.C. sec. 922 (t)~~ COLORADO BUREAU OF INVESTIGATION CREATED PURSUANT TO SECTION 24-33.5-401, C.R.S., REFERRED TO WITHIN THIS SECTION AS THE "BUREAU":

(1.5) NOT MORE THAN FORTY-EIGHT HOURS AFTER RECEIVING NOTIFICATION OF A PERSON WHO SATISFIES THE DESCRIPTION IN PARAGRAPH (a), (b), OR (c) OF SUBSECTION (1) OF THIS SECTION, THE STATE COURT ADMINISTRATOR SHALL REPORT SUCH FACT TO THE BUREAU.

(2) Any report made by the ~~clerk of the court of every judicial district in the~~ state COURT ADMINISTRATOR pursuant to this section shall describe the reason for the report and indicate that the report is made in accordance with 18 U.S.C. sec. 922 (g) (4).

(3) The ~~clerk of the court of every judicial district in the~~ state COURT ADMINISTRATOR shall take all necessary steps to cancel a record made by ~~that clerk~~ THE STATE COURT ADMINISTRATOR in the national instant criminal background check system if:

(a) The person to whom the record pertains makes a written request to the ~~clerk~~ STATE COURT ADMINISTRATOR; and

(b) No less than three years before the date of the written request:

(II) The period of commitment of the most recent order of commitment or recommitment expired, or ~~the~~ A court entered an order terminating the person's incapacity or discharging the person from commitment in the nature of habeas corpus, if the record in the national instant criminal background check system is based on an order of commitment to the custody of the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse; except that the ~~clerk~~ STATE COURT ADMINISTRATOR shall not cancel any record pertaining to a person with respect to whom two recommitment orders have been entered under section 27-81-112 (7) and (8), C.R.S., or who was discharged from treatment under section 27-81-112 (11), C.R.S., on the grounds that further treatment will not be likely to bring about significant improvement in the person's condition; or

(4) PURSUANT TO SECTION 102 (c) OF THE FEDERAL "NICS IMPROVEMENT AMENDMENTS ACT OF 2007" (PUB.L. 110-180), A COURT, UPON BECOMING AWARE THAT THE BASIS UPON WHICH A RECORD REPORTED BY THE STATE COURT ADMINISTRATOR PURSUANT TO SUBSECTION (1) OF THIS SECTION DOES NOT APPLY OR NO LONGER APPLIES, SHALL:

(a) UPDATE, CORRECT, MODIFY, OR REMOVE THE RECORD FROM ANY DATABASE THAT THE FEDERAL OR STATE GOVERNMENT MAINTAINS AND MAKES AVAILABLE TO THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM, CONSISTENT WITH THE RULES PERTAINING TO THE DATABASE; AND

(b) NOTIFY THE ATTORNEY GENERAL THAT SUCH BASIS DOES NOT APPLY OR NO LONGER APPLIES.

SECTION 3. In Colorado Revised Statutes, **add** 13-5-142.5 as follows:

13-5-142.5. National instant criminal background check system - judicial process for awarding relief from federal prohibitions - legislative declaration. (1) **Legislative declaration.** THE PURPOSE OF THIS SECTION IS TO SET FORTH A JUDICIAL PROCESS WHEREBY A PERSON MAY APPLY OR PETITION FOR RELIEF FROM FEDERAL FIREARMS PROHIBITIONS

IMPOSED PURSUANT TO 18 U.S.C. SEC. 922 (d) (4) AND (g) (4), AS PERMITTED BY THE FEDERAL "NICS IMPROVEMENT AMENDMENTS ACT OF 2007" (PUB.L. 110-180, SEC. 105).

(2) **Eligibility.** A PERSON MAY PETITION FOR RELIEF PURSUANT TO THIS SECTION IF:

(a) (I) HE OR SHE HAS BEEN FOUND TO BE INCAPACITATED BY ORDER OF THE COURT PURSUANT TO PART 3 OF ARTICLE 14 OF TITLE 15, C.R.S.;

(II) HE OR SHE HAS BEEN COMMITTED BY ORDER OF THE COURT TO THE CUSTODY OF THE UNIT IN THE DEPARTMENT OF HUMAN SERVICES THAT ADMINISTERS BEHAVIORAL HEALTH PROGRAMS AND SERVICES, INCLUDING THOSE RELATED TO MENTAL HEALTH AND SUBSTANCE ABUSE, PURSUANT TO SECTION 27-81-112 OR 27-82-108, C.R.S.; OR

(III) THE COURT HAS ENTERED AN ORDER FOR THE PERSON'S INVOLUNTARY CERTIFICATION FOR SHORT-TERM TREATMENT OF MENTAL ILLNESS PURSUANT TO SECTION 27-65-107, C.R.S., FOR EXTENDED CERTIFICATION FOR TREATMENT OF MENTAL ILLNESS PURSUANT TO SECTION 27-65-108, C.R.S., OR FOR LONG-TERM CARE AND TREATMENT OF MENTAL ILLNESS PURSUANT TO SECTION 27-65-109, C.R.S.; AND

(b) HE OR SHE IS A PERSON TO WHOM THE SALE OR TRANSFER OF A FIREARM OR AMMUNITION IS PROHIBITED BY 18 U.S.C. SEC. 922 (d) (4), OR WHO IS PROHIBITED FROM SHIPPING, TRANSPORTING, POSSESSING, OR RECEIVING A FIREARM OR AMMUNITION PURSUANT TO 18 U.S.C. SEC. 922 (g) (4).

(3) **Due process.** IN A COURT PROCEEDING PURSUANT TO THIS SECTION:

(a) THE PETITIONER SHALL HAVE AN OPPORTUNITY TO SUBMIT HIS OR HER OWN EVIDENCE TO THE COURT CONCERNING HIS OR HER PETITION;

(b) THE COURT SHALL REVIEW THE EVIDENCE; AND

(c) THE COURT SHALL CREATE AND THEREAFTER MAINTAIN A RECORD OF THE PROCEEDING.

(4) **Proper record.** IN DETERMINING WHETHER TO GRANT RELIEF TO A PETITIONER PURSUANT TO THIS SECTION, THE COURT SHALL RECEIVE EVIDENCE CONCERNING, AND SHALL CONSIDER:

(a) THE CIRCUMSTANCES REGARDING THE FIREARMS PROHIBITIONS IMPOSED BY 18 U.S.C. SEC. 922 (g) (4);

(b) THE PETITIONER'S RECORD, WHICH MUST INCLUDE, AT A MINIMUM, THE PETITIONER'S MENTAL HEALTH RECORDS AND CRIMINAL HISTORY RECORDS; AND

(c) THE PETITIONER'S REPUTATION, WHICH THE COURT SHALL DEVELOP, AT A MINIMUM, THROUGH CHARACTER WITNESS STATEMENTS, TESTIMONY, OR OTHER CHARACTER EVIDENCE.

(5) **Proper findings.** (a) BEFORE GRANTING RELIEF TO A PETITIONER PURSUANT TO THIS SECTION, THE COURT SHALL ISSUE FINDINGS THAT:

(I) THE PETITIONER IS NOT LIKELY TO ACT IN A MANNER THAT IS DANGEROUS TO PUBLIC SAFETY; AND

(II) GRANTING RELIEF TO THE PETITIONER IS NOT CONTRARY TO THE PUBLIC INTEREST.

(b) (I) IF THE COURT DENIES RELIEF TO A PETITIONER PURSUANT TO THIS SECTION, THE PETITIONER MAY PETITION THE COURT OF APPEALS TO REVIEW THE DENIAL, INCLUDING THE RECORD OF THE DENYING COURT.

(II) A REVIEW OF A DENIAL SHALL BE DE NOVO IN THAT THE COURT OF APPEALS MAY, BUT IS NOT REQUIRED TO, GIVE DEFERENCE TO THE DECISION OF THE DENYING COURT.

(III) IN REVIEWING A DENIAL, THE COURT OF APPEALS HAS DISCRETION, BUT IS NOT REQUIRED, TO RECEIVE ADDITIONAL EVIDENCE NECESSARY TO CONDUCT AN ADEQUATE REVIEW.

SECTION 4. In Colorado Revised Statutes, 13-9-123, **amend** (1) introductory portion, (2), (3) introductory portion, (3) (a), and (3) (b) (II); and **add** (1.5) and (4) as follows:

13-9-123. National instant criminal background check system - reporting. (1) ~~Beginning July 1, 2002~~ ON AND AFTER THE EFFECTIVE DATE OF THIS SECTION, the ~~clerk of the probate court~~ STATE COURT ADMINISTRATOR shall ~~periodically report~~ SEND ELECTRONICALLY the following information to the ~~national instant criminal background check system created by the federal "Brady Handgun Violence Prevention Act", Pub.L. 103-159, the relevant portion of which is codified at 18 U.S.C. sec. 922 (t)~~ COLORADO BUREAU OF INVESTIGATION CREATED PURSUANT TO SECTION 24-33.5-401, C.R.S., REFERRED TO WITHIN THIS SECTION AS THE "BUREAU":

(1.5) NOT MORE THAN FORTY-EIGHT HOURS AFTER RECEIVING NOTIFICATION OF A PERSON WHO SATISFIES THE DESCRIPTION IN PARAGRAPH (a), (b), OR (c) OF SUBSECTION (1) OF THIS SECTION, THE STATE COURT ADMINISTRATOR SHALL REPORT SUCH FACT TO THE BUREAU.

(2) Any report made by the ~~clerk of the probate court~~ STATE COURT ADMINISTRATOR pursuant to this section shall describe the reason for the report and indicate that the report is made in accordance with 18 U.S.C. sec. 922 (g) (4).

(3) The ~~clerk of the probate court~~ STATE COURT ADMINISTRATOR shall take all necessary steps to cancel a record made by ~~that clerk~~ THE STATE COURT ADMINISTRATOR in the national instant criminal background check system if:

(a) The person to whom the record pertains makes a written request to the ~~clerk~~ STATE COURT ADMINISTRATOR; and

(b) No less than three years before the date of the written request:

(II) The period of commitment of the most recent order of commitment or recommitment expired, or the court entered an order terminating the person's incapacity or discharging the person from commitment in the nature of habeas corpus, if the record in the national instant criminal background check system is based on an order of commitment to the custody of the unit in the department of human services that administers behavioral health programs and services, including those related to mental health and substance abuse; except that the ~~clerk~~ STATE COURT ADMINISTRATOR shall not cancel any record pertaining to a person

with respect to whom two recommitment orders have been entered under section 27-81-112 (7) and (8), C.R.S., or who was discharged from treatment under section 27-81-112 (11), C.R.S., on the grounds that further treatment will not be likely to bring about significant improvement in the person's condition; or

(4) PURSUANT TO SECTION 102 (c) OF THE FEDERAL "NICS IMPROVEMENT AMENDMENTS ACT OF 2007" (PUB.L. 110-180), A COURT, UPON BECOMING AWARE THAT THE BASIS UPON WHICH A RECORD REPORTED BY THE STATE COURT ADMINISTRATOR PURSUANT TO SUBSECTION (1) OF THIS SECTION DOES NOT APPLY OR NO LONGER APPLIES, SHALL:

(a) UPDATE, CORRECT, MODIFY, OR REMOVE THE RECORD FROM ANY DATABASE THAT THE FEDERAL OR STATE GOVERNMENT MAINTAINS AND MAKES AVAILABLE TO THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM, CONSISTENT WITH THE RULES PERTAINING TO THE DATABASE; AND

(b) NOTIFY THE ATTORNEY GENERAL THAT SUCH BASIS DOES NOT APPLY OR NO LONGER APPLIES.

SECTION 5. In Colorado Revised Statutes, **add** 13-9-124 as follows:

13-9-124. National instant criminal background check system - judicial process for awarding relief from federal prohibitions - legislative declaration. (1) **Legislative declaration.** THE PURPOSE OF THIS SECTION IS TO SET FORTH A JUDICIAL PROCESS WHEREBY A PERSON MAY APPLY OR PETITION FOR RELIEF FROM FEDERAL FIREARMS PROHIBITIONS IMPOSED PURSUANT TO 18 U.S.C. SEC. 922 (d) (4) AND (g) (4), AS PERMITTED BY THE FEDERAL "NICS IMPROVEMENT AMENDMENTS ACT OF 2007" (PUB.L. 110-180, SEC. 105).

(2) **Eligibility.** A PERSON MAY PETITION FOR RELIEF PURSUANT TO THIS SECTION IF:

(a) (I) HE OR SHE HAS BEEN FOUND TO BE INCAPACITATED BY ORDER OF THE COURT PURSUANT TO PART 3 OF ARTICLE 14 OF TITLE 15, C.R.S.;

(II) HE OR SHE HAS BEEN COMMITTED BY ORDER OF THE COURT TO

THE CUSTODY OF THE UNIT IN THE DEPARTMENT OF HUMAN SERVICES THAT ADMINISTERS BEHAVIORAL HEALTH PROGRAMS AND SERVICES, INCLUDING THOSE RELATED TO MENTAL HEALTH AND SUBSTANCE ABUSE, PURSUANT TO SECTION 27-81-112 OR 27-82-108, C.R.S.; OR

(III) THE COURT HAS ENTERED AN ORDER FOR THE PERSON'S INVOLUNTARY CERTIFICATION FOR SHORT-TERM TREATMENT OF MENTAL ILLNESS PURSUANT TO SECTION 27-65-107, C.R.S., FOR EXTENDED CERTIFICATION FOR TREATMENT OF MENTAL ILLNESS PURSUANT TO SECTION 27-65-108, C.R.S., OR FOR LONG-TERM CARE AND TREATMENT OF MENTAL ILLNESS PURSUANT TO SECTION 27-65-109, C.R.S.; AND

(b) HE OR SHE IS A PERSON TO WHOM THE SALE OR TRANSFER OF A FIREARM OR AMMUNITION IS PROHIBITED BY 18 U.S.C. SEC. 922 (d) (4), OR WHO IS PROHIBITED FROM SHIPPING, TRANSPORTING, POSSESSING, OR RECEIVING A FIREARM OR AMMUNITION PURSUANT TO 18 U.S.C. SEC. 922 (g) (4).

(3) **Due process.** IN A COURT PROCEEDING PURSUANT TO THIS SECTION:

(a) THE PETITIONER SHALL HAVE AN OPPORTUNITY TO SUBMIT HIS OR HER OWN EVIDENCE TO THE COURT CONCERNING HIS OR HER PETITION;

(b) THE COURT SHALL REVIEW THE EVIDENCE; AND

(c) THE COURT SHALL CREATE AND THEREAFTER MAINTAIN A RECORD OF THE PROCEEDING.

(4) **Proper record.** IN DETERMINING WHETHER TO GRANT RELIEF TO A PETITIONER PURSUANT TO THIS SECTION, THE COURT SHALL RECEIVE EVIDENCE CONCERNING, AND SHALL CONSIDER:

(a) THE CIRCUMSTANCES REGARDING THE FIREARMS PROHIBITIONS IMPOSED BY 18 U.S.C. SEC. 922 (g) (4);

(b) THE PETITIONER'S RECORD, WHICH MUST INCLUDE, AT A MINIMUM, THE PETITIONER'S MENTAL HEALTH RECORDS AND CRIMINAL HISTORY RECORDS; AND

(c) THE PETITIONER'S REPUTATION, WHICH THE COURT SHALL DEVELOP, AT A MINIMUM, THROUGH CHARACTER WITNESS STATEMENTS, TESTIMONY, OR OTHER CHARACTER EVIDENCE.

(5) **Proper findings.** (a) BEFORE GRANTING RELIEF TO A PETITIONER PURSUANT TO THIS SECTION, THE COURT SHALL ISSUE FINDINGS THAT:

(I) THE PETITIONER IS NOT LIKELY TO ACT IN A MANNER THAT IS DANGEROUS TO PUBLIC SAFETY; AND

(II) GRANTING RELIEF TO THE PETITIONER IS NOT CONTRARY TO THE PUBLIC INTEREST.

(b) (I) IF THE COURT DENIES RELIEF TO A PETITIONER PURSUANT TO THIS SECTION, THE PETITIONER MAY PETITION THE COURT OF APPEALS TO REVIEW THE DENIAL, INCLUDING THE RECORD OF THE DENYING COURT.

(II) A REVIEW OF A DENIAL SHALL BE DE NOVO IN THAT THE COURT OF APPEALS MAY, BUT IS NOT REQUIRED TO, GIVE DEFERENCE TO THE DECISION OF THE DENYING COURT.

(III) IN REVIEWING A DENIAL, THE COURT OF APPEALS HAS DISCRETION, BUT IS NOT REQUIRED, TO RECEIVE ADDITIONAL EVIDENCE NECESSARY TO CONDUCT AN ADEQUATE REVIEW.

SECTION 6. In Colorado Revised Statutes, 18-12-101, **add** (1) (b.5) as follows:

18-12-101. Definitions - peace officer affirmative defense. (1) As used in this article, unless the context otherwise requires:

(b.5) "BUREAU" MEANS THE COLORADO BUREAU OF INVESTIGATION CREATED IN SECTION 24-33.5-401, C.R.S.

SECTION 7. In Colorado Revised Statutes, 18-12-202, **repeal** (1) as follows:

18-12-202. Definitions. As used in this part 2, unless the context otherwise requires:

(1) ~~"Bureau" means the Colorado bureau of investigation within the department of public safety.~~

SECTION 8. In Colorado Revised Statutes, 18-12-103.5, **amend** (2) as follows:

18-12-103.5. Defaced firearms - contraband - destruction. (2) Defaced firearms ~~which~~ THAT are deemed to be contraband shall be placed in the possession of the ~~Colorado~~ bureau ~~of investigation~~ or of a local law enforcement agency designated by the ~~Colorado~~ bureau ~~of investigation~~ and shall be destroyed or rendered permanently inoperable.

			APPROPRIATION FROM			
ITEM & SUBTOTAL	TOTAL	GENERAL FUND	GENERAL FUND EXEMPT	CASH FUNDS	REAPPROPRIATED FUNDS	FEDERAL FUNDS
$	$	$	$	$	$	$

SECTION 9. Appropriation to the department of public safety for the fiscal year beginning July 1, 2012. In Session Laws of Colorado 2012, section 2 of chapter 305, (HB 12-1335), **amend** Part XVII (1) (A), (5) (D), and the affected totals as amended by section 1 Senate Bill 13-101, as follows:

Section 2. **Appropriation.**

PART XVII
DEPARTMENT OF PUBLIC SAFETY

(1) EXECUTIVE DIRECTOR'S OFFICE					
(A) Administration					
Personal Services	2,269,953			2,269,953[a] (27.7 FTE)	
Health, Life, and Dental	~~9,672,220~~ 9,699,820	~~1,576,210~~ 1,603,810	6,929,526[b]	674,902[c]	491,582(I)
Short-term Disability	~~148,142~~ 148,436	~~27,698~~ 27,992	102,625[b]	12,338[c]	5,481(I)
S.B. 04-257 Amortization	~~2,673,401~~ 2,678,987	~~495,541~~ 501,127	1,856,708[b]	222,071[c]	99,081(I)
S.B. 06-235 Supplemental	~~2,295,550~~ 2,300,550	~~423,817~~ 428,817	1,599,803[b]	186,783[c]	85,147(I)
Shift Differential	320,607	67,963	221,871[b]	30,773[c]	
Workers' Compensation	2,827,657		265,336[b]	2,562,321[a]	
Operating Expenses	151,046			151,046[a]	
Legal Services for 4,524	349,441	78,945	103,404[b]	167,092[a]	
Purchase of Services from	2,504,611	978,611	1,361,675[b]	164,325[a]	
Multiuse Network	1,986,110	1,486,029	337,638[b]	162,443[a]	
Management and	261,189		85,395[d]	175,794[a]	
Payment to Risk	1,177,817	177,192	195,240[d]	805,385[a]	
Vehicle Lease Payments	80,076	22,698	29,437[e]	27,941[f]	

	ITEM & SUBTOTAL	TOTAL	APPROPRIATION FROM GENERAL FUND	GENERAL FUND EXEMPT	CASH FUNDS	REAPPROPRIATED FUNDS	FEDERAL FUNDS
	$	$	$	$	$	$	$
Leased Space	~~1,907,259~~		~~858,230~~		494,386[b]	554,643[f]	
	1,937,259		888,230				
Capitol Complex Leased	1,263,475		16,890		462,435[g]	784,150[h]	
Communication Services	652,003				593,137[g]	49,123[h]	9,743(I)
COFRS Modernization	168,478		52,658		81,603[g]	34,217[h]	
Utilities	87,407				85,907[d]	1,500[i]	
Distributions to Local	50,000				50,000[j]		
	~~30,846,442~~						
	30,914,922						

[a] Of these amounts, $5,347,958 shall be from departmental indirect cost recoveries and $1,110,401 shall be from statewide indirect cost recoveries.

[b] Of these amounts, $12,221,914 shall be from the Highway Users Tax Fund created in Section 43-4-201 (1) (a), C.R.S., and $1,051,058 shall be from various sources of cash funds.

[c] Of these amounts,$323,498 shall be from departmental indirect cost recoveries, $80,440 shall be from other state agencies for dispatch services, $74,361 shall be from the Department of Personnel Capitol Complex leased space rent proceeds, $47,125 shall be from the Judicial Department, $32,358 shall be from the Legislative Department, $16,130 shall be from the Department of Law, and $552,955 shall be from various sources.

[d] These amounts shall be from the Highway Users Tax Fund created in Section 43-4-201 (1) (a), C.R.S.

[e] This amount shall be from various sources of cash funds.

[f] Of these amounts, $544,118 shall be from departmental indirect cost recoveries and $38,466 shall be from Limited Gaming funds appropriated to the Department of Revenue.

[g] Of these amounts, $1,075,163 shall be from the Highway Users Tax Fund created in Section 43-4-201 (1) (a), C.R.S., and $62,012 shall be from various sources of cash funds.

[h] Of these amounts, $826,313 shall be from departmental indirect cost recoveries and $41,177 shall be from various sources of reappropriated funds.

[i] This amount shall be from Limited Gaming funds appropriated to the Department of Revenue.

[j] This amount shall be from the Hazardous Materials Safety Fund created in Section 42-20-107 (1), C.R.S.

		~~32,763,273~~					
		32,831,753					
(5) COLORADO BUREAU OF INVESTIGATION[1]							
(D) State Point of Contact - National Instant Criminal Background Check Program							
Personal Services	~~1,312,023~~		~~1,086,212~~		225,811[a]		
	1,484,477		1,258,666				

	ITEM & SUBTOTAL	TOTAL	APPROPRIATION FROM GENERAL FUND	GENERAL FUND EXEMPT	CASH FUNDS	REAPPROPRIATED FUNDS	FEDERAL FUNDS
	$	$	$	$	$	$	$
			~~(22.0 FTE)~~		(4.4 FTE)		
			(26.0 FTE)				
Operating Expenses	~~361,248~~		~~300,744~~		60,504[a]		
	482,781		422,277				
	~~1,673,271~~						
	1,967,258						
		~~29,019,641~~					
		29,313,628					

[a] These amounts shall be from permit application fees collected pursuant to Section 18-12-205 (2) (b), C.R.S.

TOTALS PART XVII (PUBLIC SAFETY)	~~$273,982,783~~	~~$84,338,122~~		$136,496,137[a]	$25,083,490	$28,065,034[b]
	$274,345,250	$84,700,589				

[a] Of this amount, $105,755,507 is from the Highway Users Tax Fund pursuant to Section 43-4-201 (3) (a) (III) (C), C.R.S.

[b] This amount contains an (I) notation.

SECTION 10. Appropriation. (1) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the general fund not otherwise appropriated, to the department of public safety, for the fiscal year beginning July 1, 2013, the sum of $1,415,932 and 24.7 FTE, or so much thereof as may be necessary, to be allocated for the implementation of this act as follows:

(a) $324,806 for the executive director's office;

(b) $80,000 for the Colorado crime information center; and

(c) $1,011,126 and 24.7 FTE for the state point of contact-national instant criminal background check program.

SECTION 11. Appropriation. (1) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the instant criminal background check cash fund created in section 24-33.5-424 (3.5) (b), Colorado Revised Statutes, not otherwise appropriated, to the department of public safety, for the fiscal year beginning July 1, 2013, the sum of $1,415,932 and 24.7 FTE, or so much thereof as may be necessary, to be allocated for the implementation of this act as follows:

(a) $324,806 for the executive director's office;

(b) $80,000 for the Colorado crime information center; and

(c) $1,011,126 and 24.7 FTE for the state point of contact-national instant criminal background check program.

SECTION 12. Effective date. This act takes effect upon passage; except that section 10 of this act takes effect only if House Bill 13-1228 does not become law, and section 11 of this act takes effect only if House Bill 13-1228 becomes law.

SECTION 13. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Mark Ferrandino SPEAKER OF THE HOUSE OF REPRESENTATIVES	John P. Morse PRESIDENT OF THE SENATE
Marilyn Eddins CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES	Cindi L. Markwell SECRETARY OF THE SENATE

APPROVED_____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO OUTFITTERS ASSOCIATION, *et al.*,	)	
Appellants,	)	Nos. 14-1290
v.	)	
JOHN W. HICKENLOOPER,	)	
Appellee.	)	

On Appeal from the United States District Court for the District of Colorado
The Honorable Chief Judge Marcia S. Krieger
Case No. 13-CV-1300-MSK

EXHIBIT 4

Colorado Bureau of Investigation
Ronald C. Sloan, Director
690 Kipling St., Suite 3000, Denver, Co 80215
Ph: (303) 239-4201 cbi.state.co.us

CBI InstaCheck Unit: Private Firearm Transaction Data as Reported by Colorado FFLs:

July 2012 through December 2013

Month	Jul 2012	Aug 2012	Sep 2012	Oct 2012	Nov 2012	Dec 2012	Jan 2013	Feb 2013	Mar 2013	Apr 2013	May 2013	Jun 2013	Jul 2013	Aug 2013	Sep 2013	Oct 2013	Nov 2013	Dec 2013
Non-Gun Show	506	554	570	680	788	756	806	829	805	644	476	373	342	584	553	651	946	762
Gun Show	291	560	612	650	975	1184	562	1130	827	963	615	930	219	430	262	405	401	644

This statistical report is unique, as the calculation of this data is not assembled on an ongoing basis

CBI-00200