THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-CV-1300-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 STATE 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,
STAN HILKEY,
DAVE STONG,
PETER GONZALEZ,
SUE KURTZ,
DOUGLAS N. DARR,

Plaintiffs,

vs.

JOHN W. HICKENLOOPER, GOVERNOR OF THE STATE OF COLORADO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO COURT - DAY NINE

Proceedings before the HONORABLE MARCIA S. KRIEGER, Judge, United States District Court for the District of Colorado, continuing at 9:08 a.m., on the 10th day of April, 2014, in Courtroom A901, United States Courthouse, Denver, Colorado.

APPEARANCES

RICHARD A. WESTFALL and PETER J. KRUMHOLZ, Attorneys at Law, Hale Westfall, LLP, 1600 Stout Street, Suite 500, Denver, Colorado, 80202, appearing for the Plaintiffs.

DOUGLAS ABBOTT, Attorney at Law, Holland & Hart, LLP, 555 17th Street, Suite 3200, Denver, Colorado, 80202, appearing for the Plaintiffs.

MARC F. COLIN, Attorney at Law, Bruno, Colin & Lowe P.C., 1999 Broadway, Suite 3100, Denver, Colorado, 80202, appearing for the Plaintiffs.

ANTHONY JOHN FABIAN, Attorney at Law, 510 Wilcox Street, Castle Rock, Colorado, 80104, appearing for the Plaintiffs.

DAVID BENJAMIN KOPEL, Attorney at Law, Independence Institute, 727 East 16th Avenue, Denver, Colorado, 80203, appearing for the Plaintiffs.

MATTHEW DAVID GROVE, LEEANN MORRILL, KATHLEEN L. SPALDING, and STEPHANIE LINDQUIST SCOVILLE, Assistant Attorneys General, Colorado Attorney General's Office, Ralph L. Carr Colorado Judicial Center, 1300 Broadway, Denver, Colorado, 80203, appearing for the Defendant.

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P R O C E E D I N G S

THE COURT: We're convened in Case No. 13-cv-1300. This is our ninth day of trial.

Could I have entries of appearance for today's proceedings.

MR. COLIN: Good morning, Your Honor. Mark Colin appearing on behalf of the federally licensed firearms dealer plaintiffs.

THE COURT: Good morning.

MR. WESTFALL: Good morning, Your Honor. Richard Westfall appearing on behalf of Colorado State Shooting -- excuse me. David Bayne; Dylan Harrell; Outdoor Buddies, Inc.; Colorado Outfitters Association; Colorado Farm Bureau; Women for Concealed Carry; and Colorado Youth Outdoors.

THE COURT: Good morning. Welcome. You look like you're feeling a little better.

MR. WESTFALL: I am, Your Honor. Thank you very much for noticing.

MR. KOPEL: Good morning, Your Honor. David Kopel on behalf of David Strumillo, John B. Cooke, Ken Putnam, James Faull, Larry Kuntz, Fred Jobe, Donald Kroger, Stan Hilkey, Dave Stong, Peter Gonzalez, Sue Kurtz, and Douglas N. Darr.

THE COURT: Good morning.

MR. ABBOTT: Good morning, Your Honor. Doug Abbott on behalf of Magpul Industries and the National Shooting Sports

Foundation.

THE COURT: Good morning.

MR. FABIAN: Good morning, Your Honor. Anthony Fabian on behalf of Colorado State Shooting Association and Hamilton Family Enterprises.

THE COURT: Good morning.

MR. GROVE: Good morning. Matthew Grove, LeeAnn Morrill, Stephanie Scoville, and Kathleen Spalding on behalf of the defendants.

THE COURT: Good morning.

Are you all ready to proceed?

MR. COLIN: Plaintiffs are ready, Your Honor.

THE COURT: I understand you're going to call one last rebuttal witness; is that right?

MR. KOPEL: Yes, Your Honor. But before that, we were hoping we could wrap up what we began yesterday, which was the admission of the legislative history exhibits.

THE COURT: I thought we finished that yesterday.

MR. KOPEL: Ms. Scoville pointed out that -- these are 141 through 147. There were some printing errors on 141. If I could now distribute the complete and corrected --

THE COURT: Why don't you just substitute the copy for the one that had the printing errors?

MR. KOPEL: I believe -- perhaps I'm -- I'm misunderstanding what happened. I thought they hadn't been

admitted. If they have been all admitted, we're set.

THE COURT: I am confused.

MS. SCOVILLE: They had not yet been admitted. When they were raised yesterday, the State had not had a chance to review them. So we have no objection to their being admitted.

THE COURT: All right.

MR. GROVE: I have one quick housekeeping matter, Your Honor. We were looking through exhibits just to make sure that everything matched up with what we had hoped to get in. Exhibit 49, which was the audiotape, we were thinking in order for the clarity of the record, it should actually be in. So we'd like -- we'd like to move to admit that if possible.

THE COURT: Any objection?

MR. ABBOTT: No objection, Your Honor.

THE COURT: All right. It's received.

(Exhibit 49 admitted.)

Ms. Glover, do you have a record of all of the legislative history documents?

COURTROOM DEPUTY: I do.

THE COURT: All right. And they're all admitted.

COURTROOM DEPUTY: Yes, 141 through 147 would now be admitted. So 49 we're admitting also?

THE COURT: Exactly.

COURTROOM DEPUTY: Thank you.

(Exhibits 141-147 admitted.)

MS. MORRILL: Your Honor, one matter related to plaintiffs' rebuttal witness, Mr. Shain. The State would like to make a motion to exclude his testimony. I don't know if you want us to do that before he is brought in or --

THE COURT: Sure.

MS. MORRILL: Thank you.

THE COURT: This would be the time.

MS. MORRILL: Thank you.

Your Honor, last night we requested and received an offer of proof from plaintiffs regarding the subject of Mr. Shain's rebuttal testimony. Mr. Fabian represented to us that Mr. Shain will testify as to whether the slides of Glock pistols sometimes stick in the open position as a result of a malfunction. This is purported to be in rebuttal to Mr. Salzgerber's testimony about his observations of the slide in the Tucson shooter's Glock 19 being in the locked-back position at the time he tackled the shooter.

This is clearly based on Mr. Shain's expertise as an armorer, as a gunsmith, his knowledge of products -- firearms malfunctions in connection with products liability cases that he's worked on, and for other cases. And at no time was any opinion related to firearms malfunction disclosed to the defendant during the course of discovery.

Additionally, Mr. Salzgerber was deposed by Mr. Westfall in this case on November 6, 2013, before the

discovery cutoff deadline occurred. And in the five months since the deposition date, the plaintiffs simply have not identified any opinion for Mr. Shain on firearms malfunctions.

THE COURT: Can you all stipulate that on occasion the slides on Glock pistols stick?

MS. MORRILL: We don't know, is the problem. And I think one of the --

THE COURT: Well, I'm going to be really honest with you. Every pistol I've ever handled occasionally malfunctions or jams or sticks. So the question here is whether you can stipulate to that fact.

MS. MORRILL: We could stipulate to the possibility that it's possible for the slide on a Glock 19 pistol to jam and, you know, stick back.

THE COURT: To stick back?

MS. MORRILL: Yeah.

THE COURT: All right. Is that the purpose of this testimony?

MR. FABIAN: That is, Your Honor. We're happy to make that stipulation.

THE COURT: Okay. Then I don't think we need to call the witness.

MS. MORRILL: That's fine, Your Honor.

THE COURT: Okay. Thank you.

Then I think that concludes the presentation of the

evidence on both sides. Has all of the evidence been submitted, all of the documentary evidence been provided to Ms. Glover?

MR. COLIN: We believe so.

THE COURT: For the defense?

MR. GROVE: Yes, Your Honor.

THE COURT: Okay. Then let's go to closing arguments.

CLOSING ARGUMENT

MR. COLIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. COLIN: Your Honor, the first step of a two-pronged analysis under *Heller*, *Reese*, and Patterson requires the Court to determine whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantees. The conduct at issue here is the right to keep and bear magazines with a capacity of more than 15 rounds.

The evidence is unrebutted that magazines are an essential component of a firearm. Mr. Shain established that magazines are an essential component of a firearm from the mechanical functioning perspective. Mr. Ayoob, Mr. Fuchs, Mr. Cerar, and others established that magazines are an essential component for an operable firearm from the operational perspective. And defendant has provided no evidence to the contrary with regard to magazines as an

essential component of an operable firearm.

Stipulation 20 establishes that semiautomatic pistols and rifles cannot function as designed without a magazine. It is also stipulated that 16-plus magazines are and have been in common use. In stipulations 3 and 10, specifically, quote, the number of lawfully owned semiautomatic firearms that utilize a detachable box magazine with a capacity of greater than 15 rounds is in the tens of millions. Stipulations 25, 17 and others go to the same point.

It's also stipulated that these firearms equipped with detachable box magazines with a capacity of more than 15 rounds are used by law-abiding citizens for multiple lawful purposes, including recreational target shooting, competitive shooting, collection, hunting, and perhaps most importantly, are kept for home defense and defense outside the home. This is not in dispute.

Hence, magazines are arms protected by the Second Amendment, just as ammunition is entitled to Second Amendment protection. As stated by the Court in *United States v. Pruess* and in *Ezell*, magazines needed for training, practice to maintain proficiency are also protected.

There is much evidence here on the use of magazines with a capacity of more than 16 rounds for target shooting.

The Second Amendment provides a right to keep and bear arms, unlike machine guns, which are unusual firearms not

commonly possessed. A magazine with a capacity of 16 rounds or more has been commonly possessed by law-abiding citizens for well over a century. The question to be asked, as the court indicated in *Heller* and more recently the Ninth Circuit in *Peruta*, does the law harmonize with the historical traditions associated with Second Amendment guarantees?

We heard from Mr. Shain that firearms manufacturers have been trying to address the dangers associated with the delays associated with reloading since the late 1700s.

Mr. Cerar said he hadn't heard of any civilians engaging in defensive gun uses requiring more than 15 rounds in his vast research, by watching TV, networking with his friends, other firearms people, and reviewing a daily blog authored by a sergeant who is retired from NYPD.

Similarly, Mr. Fuchs claims he had never heard of such an event either. Although, what research he did to determine this is still unclear.

As *Peruta* and *Heller* make clear, however, the scope of the inquiry isn't limited to the last ten years or twenty years or fifty years or one hundred years. In fact, the scope of the inquiry is more directed to the circumstances that existed historically when the Second Amendment was adopted by the States. Then, as now, citizens kept and bore arms which they determined were the most effective for their personal protection.

This is true whether we're talking about settlers who were fighting off attacks by robbers, Indians, with the ubiquitous Winchester lever-action rifle; shop owners, fending off mobsters who were toting Tommy guns in the '20s; or citizens defending themselves against gang members in present day.

The undisputed fact is that citizens and manufacturers of firearms have been producing, keeping, and bearing firearms and associated ammunition that were designed to provide more readily available rounds without the need to reload for self-defense for more than 200 years.

Hence, a regulation which renders magazines with a capacity of 16 or more rounds illegal imposes a burden on the Second Amendment rights.

Plaintiffs have met the first step in the *Heller/Reese*/Patterson analysis adopted by most circuits in the wake of *Heller* and *McDonald*. Having established that a burden on Second Amendment rights exists, the burden to justify this burden moves to the defense. And this burden is not a minor burden; it's a significant burden, Your Honor.

Three of the most popular firearms sold by the licensed firearms dealers and previously purchased by law-abiding citizens of Colorado have been rendered unobtainable.

As the evidence showed, the law also deprives

able-bodied and disabled law-abiding citizens of both the choice of the arm with which they are most comfortable for defensive purposes and the ability to defend themselves against heavily armed or multiple attackers. This is not a speculative need, as the evidence showed. Indeed, in the legislative history -- and I cite to 13-1224, February 12, house committee hearing starting at page 77. Witness Charles Roblis was attacked by three men. And I quote from the legislative history, "I fired 13 rounds in defense of my life in a magazine and pistol that had 16 rounds." A victim need not fire all 16 rounds, as claimed by Mr. Cerar and Mr. Fuchs, to use a firearm in self-defense.

As the evidence showed and Mr. Fuchs testified, it's prudent to have additional rounds available in the event that unforeseen circumstances occur.

Dr. Zax reported that incidents of home invasions in which attackers utilized firearms were rare and that incidents in which defensive gun uses by homeowners succeeded in fending off attackers by use of a firearm were similarly rare. Mr. Zax then concludes as a result that citizens really don't need these magazines and associated firearms for home defense.

Of course, that wasn't Dr. Moore's experience. Lightning struck for Dr. Moore when he was required to engage in a defensive gun use to protect his own life. Another notable fact mentioned by Dr. Moore is that at the Newark, New

Jersey trauma center, multiple gunshot wounds have increased from 10 percent of gunshot wound patients in 2000 to 23 percent in 2011. This is significant because it undermines the core of the defendant's argument.

The problem is that New Jersey has had a magazine ban since 1990, prohibiting magazines with a capacity of greater than 15 rounds. Thus, if gunshot wounds increased by 13 percent over a ten-year period, when a magazine capacity limit precisely the same as that here in Colorado existed, it shows that such a magazine capacity limit does not achieve the public interest for which it is purported.

If the Second Amendment relied for justification on the frequency of home invasions involving armed intruders or armed victims, *Heller* would have permitted a comprehensive gun ban.

As noted in our trial brief, the *Heller* court did not think that Second Amendment rights depended on speculation of social scientists. Instead, the *Heller* court reaffirmed the constitutional right of law-abiding citizens to keep and bear arms as the core right of self-protection, regardless of the number of occasions where home defense required a defensive gun use.

The defendant's argument is that a law-abiding citizens -- pardon me, a law-abiding citizen will only rarely need to defend themselves in their homes; hence, laws which

adversely affect that ability to defend hearth and home are acceptable. And that simply isn't the case, as the Supreme Court held in *Heller*. Your Honor, plaintiffs have met the first prong of the *Reese/*Patterson*/Heller* analysis, the challenged legislation imposes a burden on conduct falling within the Second Amendment's guarantees.

Moving on to the second prong. It's defendant's burden now to show that the public interest is served by the challenged legislation. And defendant argues that the magazine capacity limitation serves this public interest by quoting, "limiting magazine capacity to 15 rounds, the legislation provides victims of mass shooting situations with an opportunity to escape or overcome a shooter because reloading requires those intent upon mass murders to pause briefly while performing a magazine exchange, thereby giving potential victims a chance to intervene or flee."

Problematic to this argument is that there is absolutely no evidence to support this contention. The incidents cited by defendant's witnesses don't support this claim. Defendants cited four examples of such incidents in their opening statement. They mentioned the Aurora theater shooting, the Newtown shooting, the Columbine shooting, and the New Life Church incident.

As the evidence showed, however, the Aurora theater shooting, the Columbine shooting, and the Newtown shooting did

not involve incidents in which magazine exchanges provided potential victims an opportunity to flee or intervene. And there was no evidence presented by the defense on the New Life Church incident.

Mr. Fuchs. Mr. Fuchs provided initially 47 examples of incidents in which he claimed that a magazine exchange allowed victims of an attempted mass murder to flee or intervene. After his second deposition on this issue in which his knowledge regarding the facts of these incidents was explored, this list was reduced to the six incidents he testified to at trial, the Long Island railroad incident, North Carolina shooting, the Penn State shooting, the Aurora theater shooting, the Sandy Hook shooting, and the Giffords shooting.

We've already established that the evidence does not support a contention that the Aurora theater shooting involved a magazine exchange. The Long Island railroad shooting, the North Carolina shooting -- I'm sorry, the Penn State shooting, which didn't involve a mass murder. It involved a woman armed with a Mauser. We don't know whether she was trying to reload or not. The Long Island railroad shooting, the evidence is in conflict. The North Carolina shooting cited by the defendants is an incident where a suspect had been shot three times, his shin bone had been broken by the third shot. He collapsed to the ground before individuals intervened.

The Sandy Hook shooting is particularly problematic,

since Mr. Fuchs -- Chief Fuchs was offered as an expert specifically based upon his involvement in the Sandy Hook incident, which as we heard, was picking up four teachers and making sure that the kids got reunited with their parents in the parking lot of the school.

I question whether Mr. Fuchs' expertise based upon such an experience is legitimate. But, nonetheless, what we now know is that contrary to his original testimony in which he stated that Sandy Hook represented an event in which a mass murderer was -- well, whether magazine reload by a mass murderer allowed the children to flee, what we now know is that both investigative reports prepared by the state's attorney and the state's department of public safety resulted in a determination that the shooter's firearm had malfunctioned and that he was not effecting a reload when the incident occurred.

Thus, five of the six incidents proffered by the state to support their contention that reloads save lives are false.

The last incident proffered by the defendant was the Giffords incident. This was the only arguable incident in which a magazine exchange actually provided potential victims the opportunity to flee or intervene. And we heard from Mr. Salzgeber that he was certain that the shooter was engaging in a reload because his observation of the pistol indicated that the pistol was in lock-back, which he interpreted to mean, based upon his experience, with a

certainty, that the firearm was out of ammunition. And we now know based upon the stipulation this morning that this isn't the case either.

As a result, there is an absence of any evidence of public benefit served by the magazine limitation at issue. Defendants can't establish a close fit, as required by *Ezell*, between the magazine limitation and the public safety interest it purportedly was designed to serve.

Your Honor, I'm not a mathematician, I'm not an economist, and perhaps in my dotage, I have difficulty following some of this social science evidence. But I would propose to you, Your Honor, that the social science evidence that we have heard from multiple experts is a wash. Everybody challenges the opinions of everybody else. Everybody challenges the statistics of everybody else. The basis upon which these challenges are rendered is questionable from all sides. If social science is a wash, and the social science data notwithstanding, it's clear from the evidence that the circumstances for which this legislation was purportedly adopted, mass shootings, are rare, just as defensive gun uses are rare, involving rounds -- more than 15 rounds being fired in an incident.

Mass shooting events in which potential victims are able to flee or intervene during a magazine exchange are at best a very small subset of these already rare incidents. And

I would argue that there has been no evidence presented of any incident in which potential victims were able to flee or intervene during a magazine exchange thus far in this trial.

Your Honor, here is a significant point I think in my review of *Heller* and *Peruta*. If *Heller* and *Peruta* -- and if the defendant is correct, as stated on page 6 of defendant's trial brief at the bottom of the page, that *Heller* and *Peruta* render any laws that, quote, prevent lawful self-defense with a handgun unconstitutional, plaintiffs would argue that a magazine limitation which forces a defensive shooter to reload during an attack prevents lawful self-defense during the time needed to reload and is, thus, unconstitutional.

The *Heller* court acknowledged that the purpose of firearm use for lawful self-defense is confrontation. The *Heller* court found unconstitutional legislation which prevented, quote, the possession of immediately operable firearms -- immediately operable firearms -- which make it impossible for citizens to use them for the core lawful purpose of self-defense.

The magazine limitation at issue here renders a firearm inoperable when the low-capacity magazine runs dry and during the time period required for reloading based upon this artificial 15-round-capacity limit.

Mr. Shain, Mr. Ayoob, Mr. Cerar, Mr. Fuchs all agree, a citizen is rendered temporarily defenseless and unable to use

the firearm for the core purpose of self-defense while in the process of reloading.

If under *Heller* II the availability of a wide variety of firearms that were unaffected by the legislation is a key element for the Court's consideration, here, every semiautomatic firearm possessed by FFLs and the citizens of the state of Colorado is impacted by the legislation, because the statute limits magazine capacity as to all semiautomatic firearms, not a small segment. And every citizen who is forced to carry a lower-capacity magazine is, thus, forced to reload more often and, thus, rendered unable to defend themselves during the magazine exchanges that are required by the lower-capacity magazine limitation.

Your Honor, Mr. Ayoob and Mr. Shain both testified as, again, did Mr. Cerar and Mr. Fuchs about the mechanical functioning of a semiautomatic firearm and that most semiautomatic firearms are rendered inoperable for self-defense during the time needed for a magazine exchange, thus "preventing" the core protection of self-defense.

Shain testified that this problem is recognized not in the last ten years or the last twenty years, but in 1856, when LeMat developed a two-barreled revolver, one barrel with a nine-shot cylinder and the second with a single-shot capability, such that there was always at least one round available to fire in self-defense while reloading. This has

been a common issue for which magazine manufacturers have attempted to address for the last century and a half.

Under *Reese* part 2, as under any other form of heightened scrutiny, the government bears the burden of showing that Section 18-12-301 through 303 promote public safety. It was defendant's burden to establish that the public interest that is served by this magazine limitation was significant, and it did not meet this burden. In fact, it hasn't met its burden to show any public interest in 18-12-301 to 303.

As noted previously, the social science evidence was, at best, a wash. And it's the defendant's only other evidence to support its contention that magazine limitations serve the public interest because they compel a mass murderer to reload more often, thereby giving victims an opportunity to flee or intervene, ultimately not a single incident in which this occurred has been proffered by the defense.

Ayoob's testimony regarding the burdens imposed by the magazine capacity limitation on the disabled, infirm, aged or handicapped was also unrebutted. The evidence established that individuals with upper body disabilities are placed at a significant disadvantage by the magazine capacity limitation because they're forced to reload more often. And for a disabled, aged, or infirm individual, reloading is more difficult and more time consuming, and, as a result, exposes them to the risk of death more often.

As already discussed, the time needed to reload may mean the difference between life and death in a defensive gun use by either an able-bodied or a handicapped person.

Your Honor, certainly a more significant burden between life and death can't be imagined.

Similarly, a disabled individual with lower body disabilities is also substantially disadvantaged by the magazine limitation, because they are unable to move to cover and concealment during a reload. Hence, the evidence showed, they must engage in suppression fire. Limiting the rounds available for a handicapped, wheelchair-bound individual to engage in suppression fire during a defensive gun use places that individual who is restricted to a wheelchair at the risk of death.

As Mr. Fuchs said, when you're out of bullets, you are vulnerable. Your gun is converted to an ashtray that you can throw at the suspect.

There is no evidence that any plaintiff here that has been burdened by 18-12-302 is anything other than a law-abiding citizen, unlike in *Reese* and -- pardon the pronunciation -- Huitron-Guizar.

The foundation for defendant's argument that lower-capacity magazines save lives is because it provides potential victims of mass murderers the opportunity to flee or intervene also rests on the premise that mass murderers who

have no regard for the rights of the people who they are shooting and who have no regard for the laws that prohibit assault with deadly weapons are nonetheless going to follow a magazine capacity limitation.

Mr. Zax's opinions ignore the subset to whom the law is directed. It's the criminals or the mentally ill who engage in these mass murder events. The foundational premise that these mass murderers or mentally ill individuals will follow a magazine capacity limitation, which will then serve the public interest by requiring more reloads is flawed.

Because the defendant has presented no credible evidence on social benefit and there is an abundance of unrebutted evidence on social detriment, the defendant did not meet its burden to show that 18-12-302 provides any public benefit under any level of scrutiny.

As noted in *Ezell*, under circumstances where "the law burdens law-abiding responsible citizens, a more rigorous showing is required to justify that burden." And here, there has been no showing whatsoever.

Here, the statute doesn't prohibit magazine possession by a narrow class of persons; but, rather, applies to every law-abiding citizen, resident, or visitor to the state of Colorado.

There must be a close fit between the challenged law and the actual public interest it serves, and no such fit

exists here because the law serves no public interest. There has been no evidence at all that limiting the capacity of magazines or -- to 15 or less will have any impact on lives saved.

Notably, Your Honor, the legislature made no effort to assess whether the magazine regulation in fact would advance the public benefit.

Your Honor, the defendant's limited to the legislative record for the reasons cited in our trial brief. And as a result, if the defendant's evidence which was not presented to the General Assembly is excluded, there is, essentially, no evidence whatsoever in support of the defendant's claims.

I want to move on to a different aspect of 1224. The magazine limitation not -- is not the only burden imposed by 18-12-301 to 303. The statute also requires in-person background checks between the transferor and the transferee for routine temporary loans of more than 72 hours and imposes additional liability by making the transferor jointly and severally liable for damages caused by the transferee's use.

Once again, the defendant did not present any credible evidence that there is a public interest served by this aspect of the legislation. However, the evidence showed that this legislation imposes a significant burden on organizations like Colorado Youth Outdoors, Anschutz Guest Ranch, Hamilton Family Shooting Center, Outdoor Buddies, a number of outfitters, all

of whom have described the burdens imposed by the requirement of in-person background checks for private transfers.

THE COURT: Counsel, I'm going to interrupt for a moment.

MR. COLIN: Sure.

THE COURT: Have you addressed the issue of whether organizations such as Colorado Youth Outdoors, Anschutz Guest Ranch, Hamilton Family Shooting Center, Outdoor Buddies, or other entities have Second Amendment rights?

MR. COLIN: I have not at this point. Mr. Westfall is going to address that in his segment of the argument, Your Honor.

THE COURT: Thank you.

MR. COLIN: Your Honor, in addition to these organizations, the law also imposes the burden on the licensed firearm dealers. And this goes to the same point that was addressed in our standing arguments with regard to corporate standing that had been previously presented in our trial brief and upon which Mr. Westfall will speak in greater detail.

However, Your Honor, to address the burden itself on the licensed firearms dealers, private transfer background checks must be performed, essentially, for free by these FFLs. Not only are they compelled to perform services with no remuneration, they are also required by the statute to assume the risks of errors associated with the process. Those risks

can be administrative, they can lose their FFL license, criminal, or civil.

THE COURT: So what constitutional right is being impacted here?

MR. COLIN: With regard --

THE COURT: With regard to the FFLs?

MR. COLIN: It's to establish that the FFL has suffered an injury in fact, Your Honor. The constitutional right is the right to possess and, arguably, provide to citizens of the state of Colorado and their right to possess lawfully firearms that they have decided are the best firearm for their personal use in self-defense.

THE COURT: So the FFLs don't have a constitutional right at issue here. What you're claiming here is they have some derivative standing to assert on behalf -- to assert a loss of some sort by citizens of Colorado?

MR. COLIN: That's correct. And, Your Honor, we cited a couple of cases in our standing response -- the response to the motion to dismiss based on standing which addressed the issue of derivative standing based upon assertion of customer rights or member rights.

THE COURT: But performance of these duties without compensation doesn't necessarily impact the citizens of Colorado.

MR. COLIN: Well, it does because it chills -- it

does, because the FFLs, because they aren't being compensated, aren't performing those private transfer background checks.

THE COURT: What evidence in the record is there that the number of FFLs has diminished since the statute became effective?

MR. COLIN: There is no evidence in the record that the number of FFLs has diminished. However, there is significant evidence in the record that the number of private transfer background checks that have been performed by FFLs has been significantly reduced. And, certainly, there is evidence that -- I'm getting out of my list here a little bit. But there was evidence that there were 684 private transfer background checks performed in the past nine months in the state of Colorado. With regard to those private transfer background checks, those fell into three categories: Interstate checks, intrastate checks, and private transfers in which there was no sale associated with the transaction. So of those 684, a significant portion of those 684 went to interstate or intrastate transfers. Thus, we have a universe of less than 684 private transfer background checks performed in the state of Colorado in the last nine months.

THE COURT: And do we have -- is there any evidence in the record that explains why this occurred?

MR. COLIN: Well, I believe it can be inferred in the record. Certainly, the testimony has been that large stores

like Cabela's refuse to do private transfer background checks because of the lack of compensation and the risk associated, that FFLs are declining to perform private transfer background checks. The evidence was -- I believe it was from Mr. Brough that customers repeatedly were coming into his store seeking private transfer background checks and reporting that they had been unable to obtain that service elsewhere. I believe Mr. Kopel will also speak more specifically to some of the law associated with this issue, Your Honor.

THE COURT: Thank you.

MR. COLIN: Uh-huh.

18-12-1122 does state, and I quote, a licensed gun dealer may charge a fee for services rendered pursuant to this section, which fee shall not exceed $10.

The statute doesn't say, as defendants contend, that in addition to the $10 fee charged by the state of Colorado, an FFL may charge a fee not to exceed $10. At best, the statute is ambiguous on this issue.

Your Honor, the FFLs have suffered an injury in fact because they have been left with thousands of 15-plus magazines they can't sell. They've also been left with a dead inventory of firearms, which are the most popular firearms that they previously sold, such as the Springfield XDM, because they're now unable to sell them because there are no compatible compliant magazines available for those firearms.

Your Honor, the bottom line here is that this statute serves no public interest whatsoever and imposes a significant burden on the public, and that the evidence is clear that the defendant has not met its burden to show that such public interest exists and outweighs the burdens placed upon the plaintiffs here.

THE COURT: Thank you.

MR. COLIN: Thank you.

MR. WESTFALL: Your Honor, I will direct my attention primarily to 1229.

As previously noted by Mark --

THE COURT: Excuse me. Previously noted by?

MR. WESTFALL: Mr. Colin.

THE COURT: Thank you.

MR. WESTFALL: I'm sorry. As previously noted by Mr. Colin, the *Reese* and *Peterson* cases in the Tenth Circuit control this Court's decision. And applying those cases, as Mr. Colin pointed out, it's very clear with regard to assessing 1229, just as it is with addressing 1224, that it's a two-part test. Our burden is to establish that there -- in the first instance, that 1229 burdens the Second Amendment rights of a large chunk of citizens of Colorado, law-abiding citizens of the state of Colorado.

Once we have done that, the burden will then shift to the defendant to justify the burdens that are placed.

There is one -- while it's set forth in our brief, there is one key citation that I think is critical to the analysis of 1229 and the Second Amendment rights at issue. And that is contained in *Ezell*, and it's at 651 F.3d at 704. And the key sentence here that we believe is completely apposite to the analysis that the Court should use regarding 1229 is as follows: "The right to" -- and this is a quote. "The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use." And I want to underscore the use of the word "acquired," because that is -- gets to the core of why 1229 imposes significant burdens on law-abiding citizens in the state of Colorado.

In this case, plaintiffs have far more than met their burden to show that 1229 substantially burdens the right to acquire firearms in this state.

The background check -- universal FFL background check requirement that is applied to every temporary transfer exceeding 72 hours, except in a handful of very limited situations, which the Court heard extensive testimony on, goes much, much too far.

And as I start walking through this, I think I can anticipate the question that will be posed, because I'm going to -- the first organization that we mentioned that we presented testimony on was Colorado Youth Outdoors. And Mr. Hewson testified not only about the impact on Colorado

Youth Outdoors, but, 4-H, Pheasants Forever, Parks and Wildlife, and other organizations. And the question, Your Honor, that you posed to Mr. Colin was in fact, do these organizations have Second Amendment rights? And the answer to that question is, I think, contained in two parts.

Number one, it's my understanding that the gun ranges that were plaintiffs in *Ezell* were certainly recognized to have standing in their own right as being part of teaching proficiency in firearms.

THE COURT: I'm going to interrupt right there.

MR. WESTFALL: Certainly. Go ahead.

THE COURT: If I read those opinions correctly, one, they were not the only plaintiff. And, two, their rights were not expressly addressed in the opinions. Can you show me where the rights of organizations under the Second Amendment were expressly addressed in any of those opinions?

MR. WESTFALL: It's not just so much their rights as an organization -- in this case, Colorado Youth Outdoors, 4-H -- as an organization itself suffering injury, but it's being a critical component of the right to acquire and the -- right to develop proficiency of the people that are part of their program. And in the case of Colorado Youth Outdoors, Your Honor, it's the parents and the 13-, 14-year olds that take part in that program.

Colorado Youth Outdoors is a gateway to facilitate --

every -- the 300 people a year that participate in their program to for the first time actually touch a firearm, to learn proficiency in its use, to learn how to handle it responsibly and safely. And when -- when the Colorado Youth Outdoors, when 4-H, when Pheasants Forever, when all of these organizations routinely engage in the transfer of firearms to the children and to the parents as part of teaching responsible gun ownership and proficiency, that is -- has to be part of this implicit right of learning and possessing and acquiring a firearm that's recognized under *Heller* and *McDonald* and the Second Amendment.

THE COURT: What I understand you to be saying is that the individuals who participate in those programs may have Second Amendment rights, and that Colorado Outdoors and other entities are asserting representative standing for those individuals. Is that correct?

MR. WESTFALL: That's correct, Your Honor. And there is one other component to this that I want to mention in addition to that, with regards to each of these organizations.

Each of these organizations, as was testified to by Mr. Hewson and also came out of the testimony of Ms. Eichler, that as a result of having to actually obtain a firearm, like -- every time they obtain new firearms or get firearms transferred to them from out of state under existing law, setting aside 1229 -- every time they do that, a person, in the

case of Colorado Youth Outdoors, Mr. Hewson, has to go to the -- to the FFL gun store and put his own personal name on the background check. And as -- there was extensive testimony, both regarding Ms. Eichler, Mr. Hewson, it came out of the testimony, I believe, of Mr. Brough, talking about from the flip side, his experience with Colorado Youth Outdoors, in dealing with Colorado Youth Outdoors under Section (1)(d) of 1229 and the ownership issue, it places a tremendous burden on the Second Amendment rights of Mr. Hewson, and it places a burden on the Second Amendment rights of every staff member who is in fact possessing that firearm and not --

Yes, in one sense, the core is -- we recognize that the core of the Second Amendment, Your Honor, is personal protection under a "bearing" context in public and in a "keeping" context in defense of home and hearth as set forth in *Heller*. But the -- the right has to also include just the right of possession and for purposes of teaching another person.

THE COURT: Well --

MR. WESTFALL: And so when 1229 places a burden on Mr. Hewson, Ms. Eichler, every single staff member of Colorado Youth Outdoors and every single staff member of Pheasants Forever, 4-H, and et cetera, it is burdening the Second Amendment rights of each individual who is keeping or bearing an arm at that time.

THE COURT: All right. What I'm understanding is, your definition of the right to be protected under the Second Amendment is the right, as you say, to acquire.

MR. WESTFALL: Correct.

THE COURT: Well, when we're looking at the burden here, if there is a burden on that Second Amendment right, it's a burden on the acquisition of a firearm. And the only people who are acquiring the firearm here that deal with these organizations are the transferees of the firearm, correct?

MR. WESTFALL: At one point, Your Honor. But then the transferor becomes the transferee when the firearm is returned, and they become the acquirer, Your Honor.

THE COURT: Well, my understanding from the testimony is that for each of these organizations, the transferor loans the firearm to someone else. Did I misunderstand that?

MR. WESTFALL: If it's loaned for more than 72 hours, under 1229, it is transferred. And as we tried to elicit through the discovery responses submitted to the Governor and the line of questioning that I was trying to do with Mr. Colglazier, which I think led to a stipulation, Your Honor, we tried to establish a clarification under 1229 that this loan that exceeded 72 hours in fact -- there would be no need to do yet another background check for a return from the transferee back to the transferor. And, in fact, that clarification was denied, Your Honor.

And under the plain language of 1229, that's one of the most pernicious aspects of this, Your Honor, that every single loan that exceeds 72 hours that does not contain -- that is not done with a background check and does not contain an exception, not only does it violate the statute at that time, but there needs to be an additional background check to be bringing it back to the original transferor.

It is a universal burden, Your Honor, on the right to acquire firearms, because there is constantly going to be, for example, a farmer or a rancher who is going to be transferring a firearm to a hand, and the hand goes out into the field. And particularly in a rural ranch, where they're going to have to go out and have to be gone for a few days, or in Ms. Eichler's case, it's going to be scouts going out even before the hunting season. So, clearly, the while hunting exception doesn't apply. The scout is going to be out more than 72 hours. Even assuming a background check is done, there is still going to be a transfer -- the original transferor, the farmer who owns the firearm originally, the outfitting operation, the farmer, the rancher, Colorado Youth Outdoors, they're going to become the acquirer.

THE COURT: I understand that's what the witnesses fear.

MR. WESTFALL: With regard to Outdoor Buddies, you have unrebutted testimony that there are highly specialized

firearms involving people with disabilities, and every single person with a disability is entitled access to those specialized firearms. And the transfers that are going to take place are almost all -- quite out -- they're three-day hunts, but to deal with the logistics are almost going to exceed 72 hours, Your Honor.

With regards to the testimony of Ms. Dahlberg regarding -- albeit something very general, regarding, you know, the ability to loan a firearm to women who feel that they are in a situation where they need a firearm, the important point here with respect to that testimony is the -- it highlights for the Court the one exception that the General Assembly thought it was putting in to deal with this situation, and that is the exception that deals with a, quote, imminent threat. But it's an imminent threat in the home.

And, Your Honor, when you're considering the evidence and deciding on how to rule on this case, I ask you, Your Honor, to go back and read the plain language of 1229 and read that exception, and make a determination, yourself, Your Honor, as to whether or not that exception can even remotely deal with the myriad of situations where someone would legitimately in a feeling -- in a threatened situation but not imminent, could be tomorrow, it could be anyone -- it could be a spouse, it could be a friend, it's somebody who is concerned, I need a firearm, I feel like I am threatened, I feel like I'm -- I don't know

what is going to happen, but I need a firearm.

And to require in a situation, here, let me loan you a firearm, a few days, a week, a month, whatever it takes that you feel that is appropriate, to require a full FFL background check in that context to loan a firearm to a friend is far too much of a burden to allow that person to acquire a firearm to protect him or herself from what the person clearly perceives to be an individual threat.

With regards to -- and then back, like I say, to farmers and ranchers. Farmers and ranchers, the testimony showed by Mr. Colglazier from the Farm Bureau, farmers and ranchers use firearms as a tool. Virtually all farms and ranches in the state of Colorado have at least a firearm on the premises to deal with a predator, something that is going to threaten their crops, something that is going to threaten their livestock, and for the simply basic core *Heller* requirement -- core principle of home defense.

These farmers and ranchers are in rural Colorado. They do not have gun stores open on weekends that are -- they can just go down the road and get an FFL background check every time they loan a firearm to a hand, to anybody beyond an immediate family member for more than 72 hours.

THE COURT: Well, Mr. Westfall, that was one of the areas that I had some questions about. If I were a farmer, and I had a ranch hand, and I thought that ranch hand was going to

need to use the firearm as part of the performance of that ranch hand's duties, wouldn't I go get a background check for that ranch hand and then simply entrust that particular firearm to the ranch hand? Why would I have to do that every single time I handed the ranch hand the firearm?

MR. WESTFALL: Because 1229 requires it, Your Honor.

THE COURT: Once it's done, isn't that sufficient?

MR. WESTFALL: If it's ever transferred back to the farmer or rancher, it triggers another FFL background check.

THE COURT: What if both of those people have the FFL background checks? I have it for when I got the firearm, the ranch hand had it before the first time I gave the ranch hand that firearm, why isn't that sufficient?

MR. WESTFALL: Because 1229 was written much too strictly, Your Honor. And I will get to the legislative history in a moment.

It was intended that every time there be a transfer exceeding 72 hours, that would trigger a new FFL background check. Because you want to know what, Your Honor? In the scenario you just outlined, the General Assembly wrote 1229 so strictly that they -- they thought, you know what, yes -- if it would just have been anybody on the farm and ranch who is going to use the firearm can go in for one background check and everybody then is allowed to pass the gun back and forth as many times as they want, if they would have had a common sense

interpretation and put that into the plain language of 1229, maybe that would be one thing.

And I understand Your Honor's point, but that's not what 1229 does. Because they wanted the 72-hour -- and I'll get to that in a moment with respect to the 72-hour provision -- they only trusted that this background check could be applicable for a very short period of time. Because, you want to know what, Your Honor? Especially implicit in the way that General Assembly drafted 1229, it was drafted in such -- you know what, Your Honor, you've known Joe Hand on your farm for 25 years. And you know that he's a reliable person. And instead of drafting a law, you know, that Farmer Jones and Joe Hand can go in and have it done one time and then, fine, you're protected. No. You know what? The law essentially presumes that, you know what, Joe Hand may go out and do something that would be a prohibitor in the next four or five days or next week.

And so the law was written with such strictness -- and I want to urge the Court to look at that. That's one of the reasons why this law is so absurd and why it really burdens the Second Amendment rights of all law-abiding citizens, is it was written with such strictness because it assumes that Joe Hand and -- and Farmer Brown are going to have to go in every so often, every few days, every time there is a transfer back. Because you want to know what? Even though they've known each

other for 25 years, somebody could have done something in a few days, so we need a new fresh background check to make sure that that transfer is okay. That's the way, Your Honor, 1229 is written. That's why it's absurd, and that's why it unduly burdens the Second Amendment rights of Colorado citizens, it goes too far.

What is the core -- what are the core burdens that the Second Amendment -- that -- on the Second Amendment rights that 1229 places is because FFLs are simply generally unavailable to do private transfers in Colorado. The only thing that the state has been able to come up with -- and I'll address that in a moment, because it's more of the State's burden, but I'd like to touch upon it here -- is they've come up with a sheet of all the FFL licensees. And they say, hey, these folks are everywhere in the state of Colorado. Including, if you'll recall, Your Honor, the testimony involving Ms. Eichler, where there is cross-examination, and they presented her with an exhibit. And they said, Ms. Eichler, you don't have any issues regarding Fulldraw Outfitters up in Aguilar. You'll see here there are two FFL licensees in Aguilar.

I asked Ms. Eichler on redirect, Ms. Eichler, do you know any of these two people? No. She said their operations have been there for a long time. Are there gun stores in Aguilar? She answered no. And are these folks available to you? Answer is no.

And so I use that as just one example, based upon the way the State tried to show that these FFLs are ubiquitous, just like going down to your 7-Eleven and getting your FFL background check. They are not available, Your Honor. That's the problem. If you're going to come up with a regulatory scheme -- even setting aside, you know, whether background checks are good or are bad, if you're going to require a background check every single time there is going to be a transfer, then they better be readily available. They are not.

They are especially not, as noted by the testimony of Mr. Colglazier on behalf of the Farm Bureau, for the farmers and ranches who live and do their operations in rural Colorado.

As Mr. -- and as Mr. Colin point out, and I won't belabor that, many FFLs are not performing because of the $10 fee and because of the liability to the FFLs. I think he already covered that.

There is one other aspect of 1229 that is also critically important to understanding the burden it places on law-abiding citizens in the state of Colorado. And that is the fact of the way it imposes, even on 72 hours, joint and several liability if there is some, quote, unlawful use. Ms. Eichler testified that unlawful use in a outfitting situation could be something so simple as an improper tag or something along those lines. Certainly, with regard to trespassing, trespassing can happen at anyplace, at any time.

Your Honor's been out in rural Colorado I'm sure at least at some time. You go out to northeastern Colorado, there are just not fences separating property.

THE COURT: Mr. Westfall, let's assume for a minute there is a trespass. What are the damages that arise from a trespass that would be subject to joint and several liability?

MR. WESTFALL: Here is the issue, Your Honor, and this is why sooner or later someone in Colorado is going to be innocently burned and potentially put out of business.

All it requires, if it's a 72-hours unlawful use -- if it's beyond the 72 hours, and there is no background check, there is a 1229 violation.

Yes, it's joint and several liability. Joint and several liability for what? There will have to be, I acknowledge, Your Honor, some other accident.

THE COURT: An event.

MR. WESTFALL: You're talking about an accident involving a firearm.

THE COURT: Right.

MR. WESTFALL: Somebody gets mistakenly shot. Right now, the law is such that it puts a -- essentially, the person who loaned the firearm had -- would be subject to liability only under a negligent entrustment theory. We're -- you know, for example, if I loaned the firearm to Mr. Abbott, and Mr. Abbott commits a -- does something, has an accident with

the firearm, and they go back to me, you know, am I -- I would be liable only in the context of a negligent entrustment. And if I was completely reasonable in the loaning of the firearm, I'm perfectly okay.

What 1229 does is it imposes joint and several liability on me, especially without even the unlawful limitation, if I don't do a background check before loaning Mr. Abbott the firearm --

THE COURT: I understand. It's strict liability if you don't do the background check. The question is, however, how that burdens a Second Amendment right.

MR. WESTFALL: Because it will burden the ability to loan and for Mr. Abbott to acquire a firearm in a situation he should be allowed under the Second Amendment to acquire. And it creates a chill to impose the significant liability, where I'm saying, I'm not loaning -- Mr. Abbott, I understand that you have every right -- we should have -- before 1229, I could have loaned you this firearm for going out and protecting -- you know, you have -- you know, he's a day farmer, and he wants to go out, wants to borrow the firearm for a few days. What it's going to do is it's going to -- once there is one liability established for -- because I think most people don't know about this law.

And sooner or later, there is going to be a, quote, violation. An enterprising plaintiff's lawyer is going to say,

aha, I've got a hook to go to the deep pocket, and the way the hook is, is 1229. And you're going to see a significant drying up of what should be routine loaning and borrowing of firearms in the state of Colorado, which they should be allowed to do under the Second Amendment, because of the chilling effect that was created by the liability that is being imposed on 1229.

THE COURT: So what you're saying is -- if I understand correctly, is that a citizen has a right to -- has a constitutional right to borrow a firearm without going through a background check.

MR. WESTFALL: A citizen in Colorado has a right to acquire a firearm without having that right unduly chilled. I realize I'm borrowing the chilling context from the First Amendment context, but that --

THE COURT: That's fine. We can use the word "chilling." But the chill applies to the transferor, not the transferee, when you're talking about joint and several liability. It's the transferor who says, I don't want to be liable. I don't trust you, Mr. Westfall, with my rifle. I don't trust you, Mr. Westfall, with my revolver; therefore I'm not going to loan it to you. Then I'm looking at the Second Amendment rights of Mr. Westfall and whether or not his right to acquire a firearm is being infringed. And if I say that that's the case, what I'm really saying is, Mr. Westfall, you have a right to acquire a firearm without going through a

background check. Is that what you're arguing?

MR. WESTFALL: I am arguing that the regulatory scheme by 1229 unduly restricts that. I'm -- your question presupposes that there could be a reasonable background check scheme. And I'll touch upon that in the least restrictive alternative section of my comments in a moment.

The point that you're -- I think implicit in the question that you posed to me, Your Honor, is this idea of background check in general. That's not what we are opposing Your Honor. What we are opposing is this background check requirement, because this is too burdensome.

Getting back to my Mr. Abbott example, Your Honor, if -- let's say this is truly a life and death or threatening situation for Mr. Abbott. I'm not particularly -- I know Mr. Abbott, he's been my neighbor, I -- you know, I kind of feel comfortable with him. Without 1229, I'd have no -- if Mr. Abbott approached me and said, you know what, I don't have a handgun. All I've got is a couple of varmint rifles. I -- the folks like Mr. Colglazier's anhydrous ammonia example up in Nebraska, where a guy comes in, and it looks like you've got some person who likely doesn't belong there. This person looks, you know, maybe suspicious, like a meth person, and I -- I'm just concerned. I -- listen, I'm not a big gun person. I have a varmint rifle, you know, to keep coyotes away. I don't have a self-defense weapon. You know, that's Mr. Abbott. He's

not really a gun person. He has a varmint rifle.

He knows I have firearms that I use for self-defense, and I know how to use the firearm for self-defense. He comes to me and says, I would like the ability to borrow from me. And I'm -- if I'm -- let's say I'm a very, very cautious person. I go, you know what, Mr. Abbott, I trust you. I think you're a good guy and everything, but I am way too concerned -- you're talking about defending yourself against a meth head. Those guys have lawyers and what have you. I'm not comfortable loaning you that firearm because I know that it could potentially impose liability on me. I'm just not comfortable doing that.

And know what? We just don't have -- we're up in Holyoke, we're up in, you know, Yuma, we're up in -- somewhere in Springfield. We don't have an FFL gun store that is even remotely close to us that we can go do a background check on. I don't feel comfortable loaning you this firearm. You want to know what? The next day the meth head comes in and attacks his home. That's what we're talking about, Your Honor. That's the absurdity of this law.

Here is the point that I think has to be made: It would be one thing if the State was able to point to any evidence -- I'll kind of start segueing now into the issue of -- you know, of one other aspect of this -- of the State meeting their burden in a moment. But it would be one thing if

the State could point to any evidence that, you want to know what, these kind of private loans, if you will, have been a problem. People have died or people have been shot by access to some of these, you know, temporary loans. They can't point to that, Your Honor. They can't point to any evidence to justify imposing the burden that they're placing.

It has not been a problem. It has not been a problem in Colorado for decades. Yet, they have decided that, you know what, we're going to impose this FFL background check requirement, you know, consequences be darned.

Let me -- I talked about the burdens on private transfers and the right of acquisition. Let me briefly talk on private sales.

The bulk of our case, Your Honor, on 1229 is focusing on private transfers and the grossly unreasonable burden that 1229 places on private transfers. But we also have taken -- have noted in our briefs, noted in the Complaint, and we do have an issue with regards to private sales.

And the private sales issue really boils down, Your Honor, to the least restrictive alternative. And I know there was a lot of back and forth involving Mr. Sloan and Mr. Kopel on this point. But -- and Mr. Colglazier testified about how easy it was for him to get a certificate on the sheet, going to the CBI web page. I know that Mr. Sloan in his testimony tried to belittle that. I know that Mr. Webster in his testimony

tried to belittle that. It wasn't personal enough, it wasn't hands on enough, it wasn't, you know, responsive enough.

There are things that can be done to make a system available both -- either adding databases to the existing CBI system, allowing individual citizens to call CBI and have CBI do the background checks directly. The judicial notice that Mr. Kopel asked Your Honor to take with regards to the federal regulations, we think sifting through all of that, it's very easy for the state of Colorado to craft a much more workable system to allow a much -- some very significant and important and meaningful background check system that would allow private sales to take place that falls well short of having two people have to go in person to an FFL store.

I talked about our burden and the burdens that we believe that 1229 places on the Second Amendment rights of law-abiding citizens. What has the defendant done to justify those burdens on the Second Amendment rights? We'd respectfully submit that with respect to private transfers, the central focus of our case on 1229, the defendant has wholly failed.

Let me briefly touch upon, if I can, for Your Honor, because it's not marked, and I think it may be helpful to Your Honor if you would like -- if you don't find it helpful, I will stop. But I think in a minute or two, I could briefly highlight for you the respective sections of the legislative

history that are contained in volume 2 that may give you a little bit of road map in walking through it when you're reading --

THE COURT: Please tell me what you'd like me to look at, but please don't quote it for the record.

MR. WESTFALL: Okay. I'm basically going to highlight for you the sort of key sections.

THE COURT: Okay.

MR. WESTFALL: At page 477 is the first committee in the House. Page 595 is the appropriations committee. Page 611, second reading on the floor of the House. 669, third reading on the floor of the House. 698, the first committee in the Senate. 795, the second reading on the Senate floor. 864, third reading on the Senate floor. 899, the House rejecting Senate amendments and calling for a conference committee. 910, the conference committee. 936, subsequent House consideration. And 977, subsequent Senate consideration.

Your Honor, when you're -- when you look through the legislative history, you will see virtually nothing, nothing by the supporters of 1229 to justify regulations of private transfers. And except for a few uses of the term "transfers," just thrown in, in the entire transcript, the only real references in the entire legislative history of 1229 relate to private sale.

You will also notice, Your Honor, that throughout the

legislative history, the -- the representatives and senators that were opposed to 1229 pointed out many of the flaws that we brought before the Court -- in both our trial brief and in our trial presentation. For the most part, they were -- these concerns were rebuffed or rejected. And the Court will see that, essentially, as I think I noted previously, the response was, no, we want 1229 to be this strict. We want people to go through pure FFL checks, and we don't really care about the consequences and the collateral damage that that's going to cause, because this is what we want.

The specific amendments that were adopted regarding nieces and nephews, modification of corporate ownership, for reasons that we explored in our testimony don't solve the problem.

Regarding the 72-hour provision, that was added as an amendment. I'd like to bring -- bring the Court's attention to page 777, because there is a very telling statement by the chairwoman of the committee that actually introduced the amendment as explaining what the rationale was for the 72 amendment. This is, again, at page 77 at Exhibit 2.

"I guess" -- "Thank you, Senator Harvey. I guess I really didn't think there was a magic number. But, actually, upon testimony -- and I think that more witness -- that one witness said, is that an individual would have had that time to be able to go themselves and get a firearm to protect

themselves. So that's where the 72 hours is that magic number that you were looking for."

It's not a magic number, Your Honor. There is no factual record to show that there is anything other than it was just a simple, hey, I think this sounds good.

No witness at trial, Your Honor, including Messrs. Webster and Sloan, offered any real substantive testimony regarding private transfers. Again, I call the Court's attention, as you will, to you look at the transcript involving Mr. Webster. While there is some veiled references during his testimony about, hey, essentially, gangbangers getting access through family and friends, at the end of the day, the questions were very carefully worded to sort of skirt the issue from an evidentiary standpoint. And all of the definitive opinions that were offered by Mr. Webster all related to private sales.

With Mr. Sloan, it was just closing a giant loophole. What loophole existed that was being closed? There is no evidence, there is no definition of that.

In short, Your Honor, the evidence will just not justify the burdens 1229 places on private transfers.

Let's look at some of the evidence that was produced -- and I'm about to my end, I'm about to turn it over to Mr. Kopel, Your Honor.

There was a lot going on with regards to the fiscal

note. But the evidence is clear, and it's noted in the legislative history itself, that there was reliance on this idea that the whole idea was to expand greatly the scope of background checks. And that was what was anticipated, and the system was gearing up for that. In fact, the estimate was very clear that during 2013, 2014, there would be 200,000 new background checks that would result based upon the 1229 and the way that it was envisioned to occur. As Your Honor knows, and as the evidence showed at trial, shows that background checks have slightly decreased.

Now, defendant tried to explain that away. Well, it was sort of trending down, and -- Your Honor, they declined at a time when they were to increase by 200,000. This system is system simply not working. The reason the sheriffs --

THE COURT: Mr. Westfall, this is a facial challenge.

MR. WESTFALL: Your Honor, the facial challenge has absolutely nothing to do with this point that I'm making, Your Honor. I think if you look to the *Doe v. Albuquerque* case, I think my brother Kopel will be addressing it in more detail. But if you go to *Doe v. Albuquerque*, it makes it clear that the court, in assessing whether our challenge is facial or as applied or a combination of both -- I submit at this point it's a combination of both -- that what we have -- the Court is required to look at the underlying legal standard itself, which in this case is two-prong standard under *Reese* and *Peterson*.

Your Honor, regarding the relief we seek on 1229, 1229 should be struck down in its entirety. The entire statutory scheme involves universal background checks, except if one of the very narrow exceptions in subsection (6) applies. There is no way for this court to honor legislative intent in any way by only partially invalidating the law. Your Honor, we respectfully request that the Court declare 1229 unconstitutional as violative of the Second Amendment.

Thank you, Your Honor.

THE COURT: Thank you.

MR. KOPEL: Your Honor, I'm wondering if this might be a prudent time to take a mid-morning break.

THE COURT: I don't think so.

CLOSING ARGUMENT

MR. KOPEL: Okay.

Let's start with some of the issues that you've addressed as important.

First of all, the question is, do gun stores have Second Amendment rights in addition to being able to assert the third-party rights of their customers? And the answer is, yes. As the briefing has shown, there is a split in the federal courts on this issue. The Seventh Circuit cases we think are the best reason, not only *Ezell*, but also the *Kole*, K-O-L-E, case from the Northern District of Illinois. And for that matter, the Ninth Circuit case from one of the -- I believe

from Santa Clara, that's cited in the brief also recognizes that gun stores have Second Amendment rights.

And this is appropriate because the reason for -- one of the reasons we have the Second Amendment was because of attempts to interfere with firearms commerce. The way that the political dispute between Great Britain and the United States turned into a shooting war was in part because of the British embargo on the commerce, on the import of arms and gunpowder into the United States in the fall of 1774. And likewise, as was well-known at the time the Second Amendment was written, when the war was going on, the American revolution, in 1777, and at the time thing were looking fairly good for the British, the colonial undersecretary for America -- I'm getting his name here -- the colonial undersecretary for the United States authored a plan called What is Fit to be Done with America, which is what they would do with America after they won the war and made sure there could never be any further resistance. And part of that plan was the elimination of the commerce and manufacture of arms. The Second Amendment was intended to overcome and prevent anything like that from taking place.

If you'd like the cites on that, they're in my published article in the *Charleston Law Review* called "How British Gun Control Precipitated the American Revolution." And there is a shorter and more focused piece on the right of commerce in arms in particular forthcoming in an article I'm

writing for a Harvard -- that is ready to be published for a Harvard Law Review online symposium which will hopefully be up any day now.

And you can also tell that from *Heller* itself.

THE COURT: That's where I'm going to start, Mr. Kopel.

MR. KOPEL: Okay.

THE COURT: I think the historical background, as interesting as it is, has been subsumed in *Heller*.

MR. KOPEL: Exactly. *Heller*'s famous list of permissible gun controls tells us a great deal about the scope of gun rights.

Heller, for example, says that it is constitutional to prohibit gun possession by felons or the mentally ill. That is the yin and the yang of the fact -- the converse, or however -- the obverse. It shows -- because *Heller* needs -- the *Heller* court felt the need to state that exception to the Second Amendment, that shows that the *Heller* court considered the right of gun possession in general to belong to individual Americans, and then they felt the need to cull out the special exception for felons and the mentally ill not have any right to arms.

THE COURT: Mr. Kopel, are you suggesting that in the writing of *Heller*, Justice Scalia and the other members of the Court were enumerating the only exceptions or limitations to

Second Amendment rights?

MR. KOPEL: Absolutely not.

THE COURT: All right.

MR. KOPEL: And I think beyond that, as Your Honor has I think hinted also, the Tenth Circuit's later cases provide an authoritative construction for how to apply *Heller*.

The *Heller* exception for -- that specifically authorizes the prohibition of gun carrying in sensitive places, such as schools and government buildings, was necessary to put in the opinion because the *Heller* court recognized that the right to bear arms includes a general right to carry firearms. And, therefore, the Court wanted to make sure that although there was the right in general to bear, to carry, it also wanted to make clear the limitation, permissible limitation of that particular right, which was the -- that carrying may be prohibited in sensitive places.

And, likewise, the third item -- and this is the one that is relevant for the gun stores -- is the prohibition is the affirmed presumptive legitimacy, presumptive constitutionality, of conditions and qualifications on the commercial sale of firearms. So just as the first two exceptions show that there is a right to own and a right to carry, this third exception also shows there is a right to engage in commerce in firearms and that this right is not violated by conditions and qualifications on the commercial

exercise of the right.

So *Heller* itself points directly to the existence of a Second Amendment right in firearms commerce.

A related question you asked about, Your Honor, was the issue of organizational rights. Not of commercial organizations, but of organizations such as Outdoor Buddies, Colorado Youth Outdoors, Colorado State Shooting Association, and so on.

The structure of our constitutional system is that organizations are people too. This is, after all, why the Fourteenth Amendment, protection of the rights of persons, was correctly applied to corporations in general in a wide variety of contexts, because it is coming together, whether in a formal corporation or informal associations or partnerships or all the myriad varieties of that, that people in practice do exercise their individual rights, because sometimes the exercise of that -- those individual rights necessarily happens -- has to happen in a collective manner.

THE COURT: And the Fourteenth Amendment concerns rights other than Second Amendment rights, in which this has been recognized. There recently was a case addressing First Amendment rights and whether entities have First Amendment rights, *Hobby Lobby*. But I've not been able to find, and perhaps I've overlooked, any case that extends Second Amendment rights to entities.

Can you direct me to something?

MR. KOPEL: Just for a couple of recent ones, which didn't even -- I would say, don't even say it so explicitly because they view it as so obvious that the entity has standing and the right to bring the case.

THE COURT: Standing is not the issue. The question is, whose rights are being infringed? So --

MR. KOPEL: Your Honor -- to this -- I suppose it appears like a case of first impression. Let me -- if I could backtrack some. Since we are with *Heller*, post-*Heller* for the first time, having federal courts actively involved in Second Amendment cases, there are many issues that have -- are still coming up.

And, yes, the argument has been made that, oh, it's an individual right -- which, of course, it is -- and so, therefore, associations where the right is exercised cannot exercise that.

Let me suggest, your Honor, that while that is, at least in the precise context of the Second Amendment, a case for which the question I think you're asking may not have been directly answered in detail by a court, I would suggest, Your Honor, that it is inescapable that they must have -- that associations must have rights. And I would point Your Honor to the First Amendment.

THE COURT: Let me ask you, how do associations carry

and bear arms?

MR. KOPEL: In the same way that associations are a medium for the exercise of the First Amendment rights of conscience.

THE COURT: Well --

MR. KOPEL: An association cannot have a conscience, because it's a group of people. Consciences only exist in the individual mind. And, yet, the First Amendment is -- is absolutely clear that when the people exercise their rights of freedom of thought, freedom of religion, the most personal interior things that can exist, and they come together to do that, they, in a sense, have a collective conscience, or whether you want to put it that way, they exercise their individual consciences collectively.

So if you go to a meeting of the Elizabeth Jones Bible Club, Bible Study Club, in somebody's basement or a meeting of the Catholic Church or everything in between, there is in the one sense just a collection of everybody in there, every individual there with their individual consciences. But they are putting their consciences -- exercising their consciences collectively in a way that amplifies that, that makes it possible for them to further their exercise of their personal consciences. So it is indisputable that the Catholic Church or the neighborhood Bible study club, as associations, as corporations, whatever, have First Amendment rights of their

own, and not just of their members. And the same is true for Outdoor Buddies and all the rest. That is how people come together to exercise their individuals right to keep and bear.

THE COURT: Well, that's the question that I have; and I'm not persuaded by your analysis. And this is why I'm not persuaded: The problem I'm having is this: If we look at everybody here in this courtroom, and we were to say that we were an association, we might be able to craft a document or have someone make a speech on behalf of all of us that would represent a collective view. But how do we collectively hold a firearm, or fire the firearm? That requires dexterity of an individual's hand. Not the action of a group, but, instead, just an individual.

So I'm needing to understand in a practical sense how a Second Amendment right to keep and bear, which is understood to be carrying, a firearm can be fulfilled by a group of people.

MR. KOPEL: And I would suggest, Your Honor, that that kind of literalism is excessive. And we know it from the First Amendment context.

When one goes to communion, there is only -- there is a wafer and wine, and it is consumed by one person at one time. You don't all eat the same wafer at once. But there is also -- besides the activity of an individual engaging in communion, that act is also a collective act of people engaging in

communion, although there is no physical item that one person ingests which is similarly ingested by another person. But it is the nature of the exercise of that right that it is both intensely individual and personal and is engaged in, in a collective manner at the same time.

THE COURT: So tell me how you collectively act to carry and use a firearm.

MR. KOPEL: When you train in firearms together, for example. For example, when you are all on the firing line together and you're being instructed in safety at a Colorado State Shooting Association event. You might not physically -- two people may not physically hold the gun at the same time -- although sometimes they do, as when an instructor may be providing hands-on instruction, standing back and helping one person improve the grip or the stance with a gun. But they can be -- for one thing, they can be sharing the guns.

But, again, it is a collective activity, where their knowledge of how to keep and bear is shared, where they watch each other keep and bear, where they learn from each other, and where the purpose of the organization is to engage in an activity which is a one-at-a-time thing, necessarily. Just as speaking is always a one-at-a-time activity, and just as having conscience is always a one-at-a-time activity. But doing it together in a group is part of that activity as well and is by -- and is protected clearly under the First Amendment. And

I would suggest that by analogy, the same principles apply to the Second Amendment.

THE COURT: Thank you.

MR. KOPEL: I would also point, finally, Your Honor, to one case which you might or might not find persuasive by analogy. But the case of *Boy Scouts of America v. Dale*. In particular, I'd invite your attention to 530 U.S. at 649, where the Court says that the First Amendment protection of express association is not reserved for advocacy groups, and explains that the Boy Scouts' First Amendment associational protection includes when they engage in the activities of camping, archery, fishing, outdoor survival skills. And I'd suggest that that can be first of the First Amendment freedom of right of assembly.

It's rather easier to see how what the Boy Scouts, Colorado Youth Outdoors, Outdoor Buddies, Colorado State Shooting Association, 4-H, and all the rest do with firearms, and, for that matter, with bows and arrows as part of the Second Amendment rights.

THE COURT: I have to say, the plaintiffs here are not challenging this as a violation of First Amendment rights; only Second Amendment rights.

MR. KOPEL: Yes, Your Honor. This is an argument by analogy.

THE COURT: Thank you.

MR. KOPEL: Let me address briefly the Americans With Disabilities Act. And I will not repeat the arguments I made in the -- at halftime, just supplement them briefly.

I think the legal and factual case on disparate impact here is unrebutted. And Ms. Longdon certainly has a right to choose not to own a firearm for self-defense; but her personal choice, which is really the only testimony we've had from defendant on the ADA, does not negate the ADA rights of disabled people who make different personal choices.

Besides showing disparate impact, plaintiffs have also met their burden under the alternative standard of deliberate indifference, for the reasons explicated in our trial brief. And there would have been more examples of that from the legislative history had not defense put some limitations on testimony. And in this regard, the Court at least has the option of considering the Supreme Court's ruling from *Wallace v. Jaffree* in 1985, that the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out.

As Your Honor explained in the *Grider* case, ADA plaintiffs do not even need to prevail on disparate impact or deliberate indifference in order to be entitled to a reasonable -- entitled to a reasonable accommodation. For 18-12-302, we've described the reasonable accommodation in our trial brief. For 18-12-112, the reasonable accommodation is

that Outdoor Buddies be allowed to loan its firearms to disabled persons for the duration of the relevant hunting season.

As detailed in our trial brief, California statute on private sales and loans has this exemption for everyone, not just for disabled persons. And I would suggest that fact is of high relevance to the application of even intermediate scrutiny properly applied as per the details -- taking the intermediate scrutiny standard seriously so that the restrictions on the exercise of fundamental liberties are not broader than is truly necessary.

The Colorado -- and likewise -- the Colorado Department of Parks and Wildlife website announcement as detailed by Mr. Hampton of the department's enforcement policy for what constitutes a hunting trip is inadequate for two reasons, at least under the ADA and perhaps, as well, under intermediate scrutiny for Second Amendment rights in general.

First of all, the department's policy represents the department's instructions to its own employees. An informational announcement of internal policy on the website does not even rise to the level of a technical guidance. Department policy for department employees has no effect, by definition, on the enforcement decisions of city or county local law enforcement agencies or district attorneys. And second, even if the website were a statute, it fails to address

the needs of disabled hunters. They may need to have the gun at home for several days to learn how to use the gun safely and accurately, to practice at a range. And, likewise, when they return home from a hunting trip, it may be several days or more before they can travel to Outdoor Buddies to return the firearm. For example, a blind person cannot just get in the car and drive the gun over to Outdoor Buddies.

And, likewise, another reasonable accommodation or alternative is the 30-day rule that California has, which says that although they regulate -- are a notoriously strict state on gun control laws, you can loan a gun for up to 30 days to someone you know. Mr. Sloan had no reason why 30 days, as opposed to 72 hours, couldn't be the limit to prevent sham -- to prevent genuine permanent transfers under the sham that they were loaned, like, you can borrow my gun for the next 25 years.

I'd suggest that intermediate scrutiny, even loosely and weakly and inappropriately applied, suggests that the 72-hour limit on normal loans is impermissible.

To answer your question -- you asked Mr. Westfall, Is there a right to acquire a firearm without a background check? As he said, we have never argued there is a right to buy a firearm, to permanently become the possessor of a firearm without a background check. Although we have said -- and this is heart of our case on this issue -- there is a right to be able to do so in a reasonable manner that is genuinely

accessible to people.

We do believe there is a right to borrow a firearm under at least some circumstances without a background check. We believe, for example, that the statute as it was -- the bill as it was originally introduced, which didn't even have a 72-hour exemption, that would have criminalized me when I teach firearms safety out of a range, and as part of that process, I hand guns to people -- unloaded guns under my immediate supervision all the time, and one gun may be handled in the course of an hour by ten different people. And under House Bill 1229 as that was originally introduced, that would have required a background check every step of the way. Yes, we believe that is unconstitutional, to require a background check in situations like this.

The 72-hour exemption is a good step towards constitutionality, but not a sufficient step towards constitutionality, because we believe that the borrowing, loaning, temporary transfer of firearms are, as *Peterson* tells us to look at, part of the history and tradition of the use and ownership of firearms in the United States, and they are constitutionally protected. And that a standard that says you have to go to a gun store to loan a firearm to your neighbor for four days is -- fails for the reasons detailed in our trial brief, the Tenth Circuit's guidance -- rules in *Peterson*, *Reese*, and the other -- *Kerr v. Hickenlooper*, and the rest of

the Tenth Circuit precedents.

If I may address the subject of continuous possession. We will not belabor or repeat the -- although we do continue to affirm -- the arguments we made last summer in our brief -- in our briefing about the inadequacy of technical guidance and its inappropriateness to contradict, indeed, the plain language of the statute or the -- the -- the statutory language of the statute.

It's -- as far as we know, this is unprecedented in the history of the state of Colorado that the Attorney General has purported to write something called technical guidance which says that a statute means something very different from what the statute says. But let's put that aside for purposes right now.

Let's imagine that even if 18-12-302 had actually said "dominion and control," even then it would be unconstitutionally vague. The evidence in this case I think shows two poles of the vagueness issue. On the one hand, you have, I believe, Mr. Hamilton's testimony. He runs the Family Shooting Center. And although he has some qualms about technical guidance in general, in practice, he is renting magazines to customers on his business premises. The magazines stay there for several hours. So, Your Honor could certainly say, well, whatever your mental reservations, you seem to feel comfortable enough doing that, and that doesn't appear to be a

violative -- a termination of dominion and control.

At the other end we have Mr. Maketa and his son, with Mr. Maketa's law enforcement exemption soon to expire. And with them, where their magazines are intermixed so, indeed, nobody knows precisely which magazine belongs to which person, and the storage situation goes on for a period of years, I think we're clearly at a situation where the dominion and control standard does become vague and people cannot tell whether their conduct is lawful or not.

And now in between those two poles, there is someplace where dominion and control -- where that line is. But the -- that's the point, we don't know where the line is. Nobody knows where that line is. And that's why the term as a whole is unconstitutionally vague.

In our trial brief, we've explained why we believe that if this case were not about something that was -- under the very standard rules for vagueness, if this were a case about bowling balls rather than about items which are -- in whose protection is enumerated in the Constitution -- there are only two physical items, by the way, which the Constitution specifically declares to be a human right to possess. One is a printing press, and the second are arms.

But if this case were about bowling balls instead, we would suggest that the standard rules of vagueness show why the continuous possession slash -- dominion and control standard is

vague. We'd also suggest that dominion and control as attempting to redefine continuous possession, perhaps to some degree makes continuous possession into a mere superfluous repetition of the standard that the owner has to be the owner. And if that's it, then the statute has been -- the phrase has been interpreted to a nullity and ought to be removed from the statute as having no purpose other than to cause confusion.

As Your Honor explained accurately last summer, courts have sometimes stated that especially protective rules for vagueness apply to all constitutional rights. And courts have also sometimes also declared that this stringent protection in the particular context of the First Amendment.

Your Honor also accurately observed that courts have generally not yet decided whether the especially stringent rules for the First Amendment do or do not apply in a Second Amendment context. So in this case of first impression, plaintiffs suggest that this court can and should hold that First and Second Amendment rights are equally protected by anti-vagueness principles.

The First and Second Amendments are the core provisions of the Bill of Rights' protections of personal autonomy. In contrast to the regulations on government procedures in Amendments 4 through 8 and the broad rule of interpretation which are supplied by Amendments 9 through 10, choosing one's own church or non-church, reading, writing and

publishing, defending one's family and home from violent predators, all of these are the core of the core of personal liberties.

Aristotle, Cicero, Samuel Rutherford, John Lock, Thomas Jefferson, and Oliver Wendell Holmes didn't agree on everything; but they all agree that the right of self-defense is foundational to the rule of law itself. A vague law which chills the exercise of First Amendment rights harms the individual's fundamental right to liberty and intellectual growth. A vague law which chills the exercise of Second Amendment rights harms the right to stay alive in the first place.

Your Honor has discussed the issue of facial versus as-applied challenges, and I'd like to provide the plaintiffs' perspective on this.

The Tenth Circuit stated recently in *United States v. Carel*, C-A-R-E-L, that a party "may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both." Similarly, in *Taylor v. Roswell Independent School District*, decided last year, the Tenth Circuit gave short shrift to the plaintiff's facial challenge to the entirety of a school district's speech policies and then conducted a lengthy analysis of some particular policies as they actually applied to the plaintiff's speech. Our case is both a facial challenge and an as-applied

challenge.

THE COURT: Mr. Kopel, how can that be? You filed this action before the statute became effective. The framing of the issues was made at the time that the Complaint was filed, and there was no application at that time. How can this be an as-applied challenge?

MR. KOPEL: Because it is -- because taking the starting point that a challenge may be both --

THE COURT: And in both of those cases, the action was filed after the statute or regulation was effective; and, therefore, the court could consider it in both veins. But perhaps you could direct me to some case law that says to me that I can consider an action that is filed before an effective date of a statute as being an as-applied challenge.

MR. KOPEL: Your Honor, I'd point you both to *Doe v. Albuquerque* and *Olson v. City of Golden* for the general principle that the facial versus as-applied issue goes to the breadth of the remedy employed by the court, not what must be pleaded in the Complaint.

And I would also point you in particular to paragraph G of our relief requested, which was written so as to encompass the possibility for relief on an as-applied basis.

THE COURT: What evidence have you presented with regard to "as applied"? I did not find in the record any evidence of any enforcement against anyone.

MR. KOPEL: Well, I think you've seen in the record -- as a general matter in constitutional law, a person may complain about the harms they have suffered and present evidence to it even though they have not been, for example, criminally prosecuted. You certainly heard from the nonprofit associations, for example, about how their activities have been curtailed and in some cases eliminated because of the effect -- because of the actual ongoing effect of this -- these statutes.

THE COURT: Well, that was a voluntary decision on their part in compliance with the law as they interpreted it. I did not hear any evidence that anyone directed or enforced this statute against them. Did I overlook something?

MR. KOPEL: No, Your Honor. But that's not -- that is -- I would suggest to you that that is certainly not required for anybody --

THE COURT: Could you direct me to an example of a case where the court looked at an -- an as-applied challenge where there was no enforcement of a particular statute or regulation.

MR. KOPEL: Your Honor, if I may, I will search for what you were looking for and perhaps be able to address your concerns more fully on -- on rebuttal.

We would also ask that the Complaint be amended, as is allowed under the federal rules, to conform to the evidence and to conform to the final pretrial order. And I will --

THE COURT: Well, Mr. Kopel, it automatically complies -- is merged into the final pretrial. So what amendment are you seeking at this point?

MR. KOPEL: Your Honor, if I may, I might defer to -- I might ask my brother Westfall to explain it more fully, because asking my -- my skills on -- on federal trials are nearly equal to Professor Zax's knowledge of defensive gun use.

THE COURT: Please confer.

(Off-the-record discussion between counsel.)

MR. KOPEL: Your Honor, we would point out, first of all, that the -- that the final proposed -- final pretrial order does -- is a post-enforcement -- post-applicability -- post-enactment listing of the claims which the various plaintiffs make about the harms they are then currently suffering. And I would also point out that the -- as the Complaint has been amended and refiled, this includes the Fourth Amended Complaint filed on December 23, which was filed well after the effective dates --

THE COURT: Well, Mr. Kopel, practically speaking, we work from the final pretrial, which expressly states that all claims are merged into it. I approved it, and that's the limitation of the issues to be determined.

MR. KOPEL: Yes, Your Honor. But I think that the point I'm attempting to make is that the fact that the Complaint was originally filed on May 17, and Your Honor views

that as precluding the possibility of a pretrial challenge, is negated or -- must be considered in the context of the fact that the operative Complaint in this case was filed on December 23, which was half a year after the effective dates of the statutes.

THE COURT: Then what as-applied challenge did you make in that Complaint?

MR. KOPEL: That as applied to the particular plaintiffs, these statutes are unconstitutional for the various reasons stated, that we believe they are facially unconstitutional, and because we -- as *Carel* says, we can allege both, and we can do both, and that the pleadings are not the -- do not require the formal statement of facial versus as applied, that the statutes are not only unconstitutional in general, facially, as applied to everyone, but also in particular, as applied to these particular plaintiffs for the reasons we have shown about how they particularly harm the Second Amendment rights of the plaintiffs.

THE COURT: All right. Which of the individual plaintiffs have made a request for individual relief?

MR. KOPEL: Is -- that goes back to paragraph G of the relief requested, which is a broad request for injunctive relief as Your Honor deems fit to provide under the circumstances.

THE COURT: So no individual relief?

MR. KOPEL: I believe that the G includes -- is broad enough to ask for the possibility of both broad and narrow relief for individuals and for everyone.

THE COURT: Thank you.

MR. KOPEL: Turning to the issue of facial challenges in themselves. Defendant relies heavily on a sentence from the 1987 *Salerno* case. While the 200*8 Heller* decision was closely divided, all nine justices were unanimous in recognizing that facial challenges are appropriate in the Second Amendment context without the slightest regard for the court's "no set of circumstances" language that same year in the election law case of *Washington State Grange*.

Indeed, the D.C. handgun prohibition was plainly constitutional as applied to what was likely the vast majority of prosecutions under that ordinance, handgun possession by convicted felons or persons engaged in other crimes.

And it may be noted that *Heller* was written by Justice Scalia, the author of *Salerno*, and he obviously did not view the *Salerno* interpretation favored by defendants as having anything to do with the Second Amendment facial challenge.

If I may make a few remarks on experts. It has been hypothesized that, given enough time, a group of monkeys could eventually type the complete works of Shakespeare. In this case, it has been proven that given enough time, lawyers can make a monkey of any social scientist.

The Court cannot reasonably rely on Dr. Webster's claims which are based on data about gun traces. On the ATF website, every state trace report for every year comes with a conspicuous warning label which you heard and which specifically warns people not to use trace information in the manner that Dr. Webster does.

Dr. Webster's article on Missouri is the only social science in this case that goes -- even attempts to meet the burden that plaintiffs have -- excuse me, that the defendants have under heightened scrutiny on 18-12-112. And this article is, of course, patently unreliable, given 3,600 data errors, which eliminated the credibility of his assertion that a six-month spike in Missouri gun homicides must have been caused by a statutory change which took effect seven months before it.

Dr. Webster's instant and unequivocal assertion on redirect that all of these errors cast no doubt on the validity of his study demonstrates his dedication to his cause, but perhaps his excessive zeal in his certitude as to what the evidence must prove without even having a chance to reexamine the corrected data.

Dr. Kleck's testimony about the cases in which mass murderers are known to have used magazines of 16 or more rounds does stand unrebutted. Although, certainly his count of the total number of his classifications of mass shootings was well rebutted.

The additional incidents uncovered by defendant's research, which impressively exceeded the depth of even the Congressional Research Service, reinforce the point. In virtually none of these additional mass shootings was the perpetrator known to have used a magazine of 16 or more rounds.

Dr. Zax imagines cases in which a perpetrator was stopped before seven people were killed or wounded. Defendants searched diligently for these two and disclosed them as proposed expert testimony of Chief Fuchs, approximately 47 such cases. But upon closer examination, perhaps prompted by Chief Fuchs' second deposition, these incidents disappeared. If there were such cases, the Court would have heard about them from Chief Fuchs.

Dr. Zax enjoyed the advantage of going last. But on cross-examination, his repeated platitude that even addicts respond to changes in costs evaded a lesson from the third week of economics class, that different groups have different demand curves. His assertion that persons who spend months planning a mass murder will not spend an afternoon driving to a neighboring state to acquire the tools they want has no plausibility.

His Virginia report was technically defective and did not even attempt to see if his purported reduction of magazines had any benefit of reducing crime or victim injury. Professor Koper's 2004 study for the Department of Justice found that it

did not.

Moreover, the legislative history of 18-12-302 pays essentially no attention to the use of magazines by ordinary criminals. The focus on magazines is exclusively on magazines in mass shootings. And every one of the examples cited by the proponents during the legislative debates has been shown at trial to be dubious. A law which requires that firearms be built so they malfunction would actually have a closer fit with saving lives in mass shootings than do the examples cited in the legislative history.

Social science is proper in Second Amendment cases when an intermediate scrutiny in situations where the social science really is beyond dispute. For example, in *United States v. Skoien* in the Seventh Circuit, the Court properly recognized the social science that domestic violence misdemeanants are abnormally likely to perpetrate violent crimes.

Regarding Dr. Zax's Virginia study, which took into account of Project Exile, the massive gun -- federal gun law prosecution effort commenced in 1997 by the United States Attorney for the District of Richmond, or the follow-up project -- statewide Virginia Exile Project began in 2001 --

THE COURT: Mr. Kopel.

MR. KOPEL: Yes.

THE COURT: Where in the record is there information

about Project Exile or the effort commenced in 1997 by the United States Attorney for the District of Richmond?

MR. KOPEL: Mr. -- Dr. Zax was cross-examined about Project Exile in 199 -- by Mr. Krumholz.

THE COURT: Right. And what he said was, he didn't know about it, so he didn't consider it. But I don't know about it, and I can't consider it unless there is something in the record. Is there something in the record about it?

MR. KOPEL: No, Your Honor, there is not. I will mildly suggest that items that are commonly known in the news and which are discussed in authoritative newspaper articles may be considered for judicial notice. And Project Exile and Virginia Exile were certainly widely reported in the media at the time.

THE COURT: That might be the case for purposes of scholarly research, but it is not something I can engage in, my own research as to what has been talked about in the press or other studies that have been done. That would be unfair to both of the parties here, because the purpose of a trial is to provide the opportunity to examine the witness and examine the evidence that's presented. And judges are not free to go out and find their own evidence.

MR. KOPEL: Then, Your Honor, let's focus precisely on the reliability of what Dr. Zax has already shown about his care regarding data. And this doesn't require anyone to do

independent analysis of his data regressions and think about heteroscedasticity or advanced econometric concepts.

You heard Dr. Zax testify about what an incompetent boob Professor Kleck was because of Professor Kleck's famous Table No. 2. Professor Kleck cited -- used the 1990 census projection for what the population would be in 1992 and then failed to correct that when the actual interim census report showing the precise population in 1992 came out. And Dr. Zax can tell you from this fact alone that Dr. Kleck is incompetent.

Now, let's look at Dr. Zax's handling of data. Based on the interrogatories from the sheriffs, he created all of these neat charts about the population versus defensive gun uses in various counties. He was plainly unaware that in Lakewood, the typical responder to a burglary will be the Lakewood Police Department and not the Jefferson County Sheriff's Office. And that, of course, Lakewood Police Department and not the Jefferson County Sheriff's Office would have the incident report on that.

He appeared to have no clue that the population of unincorporated Jefferson County is only about -- where the Jefferson County Sheriff's Office would be the typical first responder, is only about a fifth of the population of the county as a whole. Nor does he seem to have any awareness of the fact that in Clear Creek County, a great many of the

burglaries there will be responded to, not by the Clear Creek sheriff, Mr. Krueger, a plaintiff, by the way, but by the Idaho Springs Police Department or the Georgetown Police Department.

Now, what happened when these facts were pointed out to him? Well, when Dr. Webster found out that his data was wrong, you could see he was mortified. Dr. Zax shrugged it off. Didn't have a care in the world. To him, it was a minor error that his population statistics in the charts that he had prepared in September, had around for the better -- for over half a year, were enormously wrong. Not even wrong of 3.4 million versus 1.7, but far wronger than that. Data errors of well over -- far over 100 percent didn't disturb him in the slightest.

For most -- for us non-specialists, econometrics is a black box of equations and formulas, and we can't really assess how well that process operated in the black box. But when you see how casual he was about his data when it was shown to be grossly wrong, his simple population data, you cannot prudently rely on what he put in that black box.

If I may conclude with a thought on the Second Amendment in general.

Some of the defense witnesses asserted that citizen defenders using the standard magazines for their firearms will spray and pray, and they'll hit innocent bystanders. But Dr. Kleck's unrebutted testimony on this point shows that such

scenarios virtually never occur. Mr. Ayoob and Mr. Cerar both testified that persons transitioning from a revolver to a semiautomatic really are sometimes at risk of engaging in spray and pray. But in modern America, as the stipulations show, the vast majority of new handguns are semiautomatic; and so the transition issue is far less relevant than it might have been 20 years ago. And as Professor Kleck has also testified, these scenarios of innocent bystanders being shot by excessive self-defense or incompetent self-defense are virtually unheard of.

Mr. Cerar testified that if a police officer or a citizen doesn't hit the criminal in the first 15 shots, she might as well stop trying. But that isn't the point. One hit does not equal one stop, as Mr. Ayoob's unchallenged testimony explained in detail. And nobody made a monkey out of Mr. Ayoob. Defendants didn't even attempt to cross-examine him.

Moreover, as Dr. Zax, Mr. Ayoob, and other witnesses agree, having reserved ammunition immediately available is extremely important in a confrontation, regardless of how many shots are fired. Reserve ammunition is crucial for the reasons Mr. Ayoob explained and Dr. -- Mr. Zax -- and Dr. Zax implicitly accepts, although he only thinks about guns in criminal hands, in terms of thinking about ammunition effects, it seems. Reserve ammunition is crucial even after the attack

has been at least temporarily turned back.

Defendant argues that the magazine ban will also disadvantage criminals, which might be true to the limited extent they obey it. Although, the criminals that were the entire focus of the legislative history of House Bill 1224 are not going to obey it.

But for criminals in general, rather than mass shooters, reloading is much less difficult, relatively speaking, when one is on the attack, especially since it is criminals who choose the time and the place of the attack. But assume *arguendo* that this will have some effect on some of the most casual and weakly motivated criminals -- because there are different groups with different demand curves. So let's assume Professor Zax is at least right on some of the most weakly motivated criminals, that the bill prevents them from engaging in the cost of driving to another state or using the black market to access a magazine of 16 or more rounds. Let's take that as a given for at least some of them.

Even so, it's a violation of the Second Amendment to infringe the self-defense rights of the law-abiding in the hope of interfering with some criminals. Defendant's legal theory has no stopping point. Nothing in defendant's trial brief or trial evidence offers any reason to justify the 15-round limit, which would not be equally applicable to the ten-round limit first created in California in 2000 or the seven-round limit

enacted in New York state last year, or the five-round limit for long guns that is imposed in New York City.

Should law-abiding citizens be treated like incipient criminals? That's what the D.C. ban did. Criminals misuse handguns. Some people without criminal records might also and do also misuse handguns. Therefore, handguns are banned equally for the criminal and the law-abiding.

Heller teaches and the Tenth Circuit follows that such a blanket prohibition is categorically wrong. *Heller* requires that legislation -- certainly, the Tenth Circuit has assiduously and faithfully followed *Heller*. *Heller* requires that legislation separate the sheep from the goats. The Supreme Court and the Tenth Circuit have distinguished the First Amendment right and the Second Amendment right of the law-abiding from the non-law-abiding. Section 18-12-302 does the opposite. It is facially unconstitutional, and it is unconstitutional as applied to plaintiffs in this case who are exemplary law-abiding citizens who pose no conceivable danger and have shown you their particular interest in possessing and using magazines for legitimate purposes.

If I could briefly conclude with a point about least restrictive alternative in terms of 18-12-112.

A great many states which have background check systems, dealer-based ones, have an exemption for a person who has a concealed carry permit. The concealed carry permit is a

far stronger check than the identity-based check involved in a transaction at a gun store. The concealed carry permit in Colorado is a biometric check. It is based on fingerprints, which are sent to not only the Colorado Bureau of Investigation, but also to the FBI for a biometric fingerprint check. That's one part of the least restrictive alternative, is to exempt from this rule that to borrow a gun for four days, you have to go to a gun store, at least should not apply to people who have a concealed carry permit.

THE COURT: Where would I find that evidence in the record?

MR. KOPEL: You'd find the argument for that in the trial brief.

THE COURT: I'm not concerned about the argument. I still have to limit myself to the evidence that is presented.

MR. KOPEL: You would find the evidence for the nature of Colorado's concealed carry permit in the Colorado state statute itself.

THE COURT: Where would I find the evidence with regard to the least restrictive alternative that you've just suggested?

MR. KOPEL: Well, the -- I think I'm having trouble following the question. The -- which -- the evidence is the statute itself, which, presumably, all of Colorado state statutes are within the scope of judicial notice.

THE COURT: Well, what you've said is, "The concealed carry permit is a far stronger check than the identity-based check involved in the transaction at a gun store. The concealed carry permit in Colorado is a biometric check. It is based on fingerprints which are sent not only to the Colorado Bureau of Investigation, but also to the FBI for a biometric fingerprint check."

Where is the evidence in the record for that?

MR. KOPEL: Thank you, Your Honor. I -- the evidence that the Colorado concealed carry permit is a fingerprint-based check is in the statute itself. And that -- because the statute expressly requires fingerprinting for the check. As to the fingerprints being sent to the FBI, Your Honor is right, that is not in the evidence.

THE COURT: Okay. Thank you.

MR. KOPEL: Although in the evidence -- in the -- one of the federal regulations which I asked you to -- Your Honor to take notice of during Mr. Sloan's cross-examination, is the regulation for access to the National Instant Criminal Background Check System, and that -- which is another part of the background check system. And that, by the way, does specifically show that that system is accessed not only for gun sales, but also for concealed carry permit issuance as well, and is also allowed for other forms of firearms permitting.

A second possible less restrictive alternative is for

people to be able to do an improved version of what Mr. Colglazier did, which is to be able to access Colorado criminal databases, perhaps with a system of identity verification for the person who is doing that access in order to check the CCIC and the PAS for the person's status.

And third, as the regulations which I asked for judicial notice of demonstrate, the Colorado Bureau of Investigation has the legal ability if state statute authorized to perform background checks on private sales without -- with all of the full set of state and federal databases it currently looks at for a transaction that takes place at a dealer, but without requiring that the two individuals walk into a gun store. It can do this -- provide the service for the fee it chooses to charge to compensate itself for the services, for the rancher to sell a firearm to his neighbor without requiring the two of them to travel to the gun store to do that transaction. That is within the ability of the Colorado Bureau of Investigation to do should the legislature so authorize it. And that, too, is among the less restrictive alternatives that are available, in which -- and which we believe, even intermediate scrutiny as properly applied, as *Peruta* teaches requires.

Thank you, Your Honor.

THE COURT: Thank you.

The Court clock is showing about 11:30. And I think

the better course at this juncture is to take a recess and reconvene after the noon hour. We will stand in recess until 1:30 and reconvene at that time. Thank you very much.

(Recess at 11:27 a.m.)

(In open court at 1:32 p.m.)

THE COURT: Have counsel for the plaintiffs completed their initial argument?

MR. COLIN: We have, Your Honor.

THE COURT: Thank you.

Then let me hear from the State.

CLOSING ARGUMENT

MR. GROVE: May it please the Court. I'd like to start off by briefly addressing the issue surrounding post-enactment evidence. Since that was raised in the plaintiffs' trial brief and we haven't yet had an opportunity to respond in writing, I'll put it on the record now.

Plaintiffs rely on a racial classification case from the Federal Circuit Court of Appeals called *Rose Development Corp.*, which is 413 F.3d 1427. They take the position that the Governor is bound by the data and testimony that was presented to the General Assembly at the time that Section 18-12-112 and 302 was enacted.

The crux of their argument is that the government cannot offer post-enactment evidence to support its argument either with respect to the State's interest in the subject

legislation or with respect to its likely effect.

As they put it, quote, the question is whether the General Assembly found a sufficient nexus based on what it considered. The opinion of defense experts in a litigation context based on newly developed analysis or information the legislature never considered cannot answer that question.

The basis for this position appears to be the *Rose* case and also a hard-line interpretation of *Shaw v. Hunt*, which is 517 U.S. 899, in which the Supreme Court said that a legislature making a racial classification must have "a strong basis in evidence for doing so." That language also appeared in *City of Richmond v J.A. Croson Co.*, 488 U.S. 469. Every case in which it has appeared that I've been able to find has involved racial classification.

Plaintiffs suggest that the "strong basis in evidence" language not only precludes the presentation of post-enactment evidence in the racial classification evidence, but they use *Rose* as a springboard to argue that post-enactment evidence can never be considered at all any time that any sort of heightened scrutiny applies. That position is flatly contrary not only to legislative reality, but it's also foreclosed by binding Tenth Circuit precedent. The bottom line is the *Rose* series of cases is a substantial outlyer even in the area of racial classification, which is the only area in which plaintiffs' argument gets any traction at all.

The most thorough recent treatment of this question that I've been able to find is a D.C. District Court decision from 2012 called *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp. 2d 237. The plaintiff in *DynaLantic* made precisely the same argument that our plaintiffs assert, that the "strong basis in evidence" language from *Shaw* means that a court applying strict scrutiny can consider only what was in front of the General Assembly and that any evidence that was not presented to the general assembly is irrelevant and inadmissible.

The *DynaLantic* court surveyed the state of the law on this issue and concluded that, "Nearly every circuit to consider the question post-*Shaw* has held that reviewing courts may also consider post-enactment evidence." In fact, the court cited two Tenth Circuit cases for exactly that proposition, *Adarand Constructors v. Slater*, 228 F.3d 1147 -- this, by the way, is the opinion on remand after the U.S. Supreme Court case of *Adarand Constructors v. Pena* -- and *Concrete Works v. City and County of Denver*, 36 F.3d 1513. Both *Slater* and *Concrete Works* explicitly hold that even in the racial classification context, post-enactment evidence is admissible.

Concrete Works noted that the Supreme Court in *Croson* commented that a municipality must identify the discrimination with some specificity before it may use race-conscious relief. But the court went to hold that, "We do not read *Croson's*

evidentiary requirements as foreclosing the consideration of post-enactment evidence.

Collecting cases, the Court went on to state that, "The strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*."

That should be the end of the argument here. The plaintiffs have, indeed, found a single case that interpreted the "strong basis in evidence" language as prohibiting consideration of post-enactment evidence in the context of a racial classification challenge. But that case is not in the Tenth Circuit, and is in fact directly contradicted by at least two Tenth Circuit cases that address precisely the same question.

Moreover, this isn't a racial classification case. And the plaintiffs offer nothing to support the notion that the reasoning in *Rose* carries over outside of that context. In fact, outside of the racial classification context, I could cite you dozens of cases in which courts happily considered evidence that was not presented to the legislature but was nonetheless used by the government to defend the statute.

Since we're on the topic, Second Amendment cases seem most appropriate. In *NRA v. BATFE*, 700 F.3d 185, the Fifth Circuit was evaluating the constitutionality of a provision of the Federal Gun Control Act of 1968. The opinion explicitly

relied upon studies published as recently as 2009. No court considering the constitutionality of firearms regulations or, for that matter, any type of governmental regulation outside of the racial classification context has considered itself bound by what was in front of the legislature that passed the law.

This is true in other areas as well. Take campaign finance, for example. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, the Supreme Court relied in part on affidavits from state legislators and newspaper articles suggesting the existence of *quid pro quo* corruption before affirming the constitutionality of the contribution limits.

And in *Randall v. Sorrell*, 548 U.S. 230, the court relied on expert testimony from the defense -- that is the state -- about the manner in which Vermont's campaign finance laws interacted with the candidate's ability to successfully mount a campaign. There was no suggestion in either case that any of this extrinsic evidence was first offered to either the Vermont or the Missouri legislature.

THE COURT: Counsel, which of these cases involved a facial challenge brought before the effective date of the legislation?

MR. GROVE: I don't think I could tell you off the top of my head. I can tell you that all of them, to my understanding, involved facial challenges. Certainly, the campaign finance cases did. There was no as applied -- I mean,

the statutes were either constitutional or they weren't in those cases.

In any event, that approach should prevail here, especially where we are not trying to come up with new justifications for the law. All of the rationales that the State has relied on in this case appear in the legislative history. And through the evidence, we are trying to demonstrate the required link between the General Assembly's justifications and its legitimate interest in protecting public safety.

Before wading into the specific facts here, I think it would also be useful to discuss the appropriate analytical framework for Second Amendment challenges. But before we even get there, we need to consider the nature of the constitutional challenges in this case.

As the Court knows, plaintiffs have raised constitutional challenges under the Second Amendment to 18-12-112 and 18-12-302. They've also raised facial vagueness challenges to a certain portion of Section 302. I'll get to that later.

In *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, the Tenth Circuit held, "A litigant cannot prevail on a facial challenge to a regulation or statute unless he at least can show that it is invalid in the vast majority of its applications."

To apply that test here, we need to first determine what exactly is protected by the Second Amendment. That's easy enough. *Heller* and *McDonald* make it clear that the Second Amendment protects the right to personal self-defense as exercised through the possession of operable firearms. That expression of the core rights should guide this court's analysis to the facial challenge. Plaintiffs can only succeed if they are able to show that either statute violates the right to self-defense of a vast majority of Coloradans.

There have been a number of successful facial challenges that have followed this approach under the Second Amendment. *Heller* and *McDonald* are the best examples. Both were facial challenges to handgun bans. Those bans applied more or less across the board and, thereby, deprived virtually every law-abiding citizen of their right to self-defense.

Subsequent circuit court cases have taken a similar approach. In *Ezell*, for example, the restrictive licensing and training requirements apply to every citizen in a manner that prevented them from acquiring and/or maintaining facilities with firearms for the purposes of self-defense. And in *Peruta v. County of San Diego*, the Ninth Circuit invalidated a concealed carry permitting scheme that prohibited virtually everyone from exercising a right to self-defense, at least as that court recognized it.

This case is different because it doesn't involve a

law that regulates or prohibits firearm ownership or the right to carry. Instead, it touches on far more peripheral components of the Second Amendment. Moreover, as I'll discuss in detail shortly, the evidence in this case shows that these laws have no direct impact on the core right to self-defense for anyone, much less a vast majority of Colorado's law-abiding citizens.

That, honestly, should be the end of the inquiry in this case insofar as the plaintiffs' Second Amendment challenges are concerned. Unless they can show that either/or both of the challenged statutes deprive the vast majority of Coloradans of their core right to self-defense, their facial challenge can't prevail.

Plaintiffs, of course, have attempted to move the goalpost for this today by arguing that in fact they are now asserting an as-applied challenge. I don't think it would be appropriate for the Court to consider it at this point. But, actually, what they're arguing highlights some of the problems of -- with the distinction between as-applied and facial challenges as a general matter.

What plaintiffs want you to decide is hypotheticals. We could probably sit around in a room and throw things at the wall and see what sticks. And, surely, with this law, just as with any -- with both of these laws, there are probably some applications at the margins that might be questionable. But

what they've brought is a facial challenge, and what this court has to do when considering a facial challenge is to consider the law by definition on its face.

Whether plaintiffs can come up with problematic interpretations is something that is better saved for the as-applied stage if someone actually is arrested or charged or is faced with an implausibly broad interpretation of the statute.

So let's move to 1224 and the appropriate framework for constitutional challenges. As a general matter, plaintiffs are correct. The Tenth Circuit has adopted the two-step test that has prevailed in the remainder of the circuits. First, the Court has to decide whether the asserted right falls within the scope of the Second Amendment's guarantee; and, then, second, assuming that the first step is satisfied, the Court has to apply some sort of means and scrutiny, as yet to be determined. If the burden on the right is substantial, then the Government must satisfy a commensurate level of scrutiny.

So let's apply that to the facts here. The first question is whether the asserted right falls within the scope of the Second Amendment's guarantee. We've argued that in our trial brief. I'm not going to rehash it here. I think it's primarily a legal argument. What we do know is that the core right is the right to engage in self-defense. There is a guarantee under *Heller* that law-abiding citizens may use arms

in defense of hearth and home.

On that issue, *Heller* said two things of note. First, as I mentioned, the core of the right is defense of hearth and home. But, second, *Heller* stressed that the right is not unlimited. It is not a right to keep or carry any weapon whatsoever in any manner whatsoever and for whatever purpose.

As I've already mentioned, and as I'll discuss in more detail now, plaintiffs have not shown any widespread impact on the ability of all citizens to engage in self-defense. This casts serious doubt on their facial challenge. First, the plaintiffs have stipulated, and the evidence clearly shows, that 18-12-302 in no way is a ban on an entire class of weapons. That's demonstrated by the Bass Pro documents, Exhibit 83, Stipulation No. 11. The stips also rebut any claim -- the stipulations, excuse me, also rebut any claim that firearms can no longer be sold in Colorado. Plaintiffs have offered no numerical estimate of how many guns cannot be sold, although they have identified a few isolated models which may be affected by the law for new acquisition.

In fact, Major Abramson admitted during his examination, he probably listed 15 models of Glocks that could still be sold and were still available. The bottom line is that plaintiffs have thousands of options of handguns and long guns available to them right now.

The law places no restrictions on who may carry them,

where they may be carried, the manner in which they may be carried, or anything else. This makes this case distinguishable from *Heller*, *McDonald*, *Peruta*, *Ezell*, *Moore v. Madigan*, and any other case, although I'm not aware of any, in which a facial challenge has prevailed in the Second Amendment context. Along with that, there is no denial of opportunity to acquire and use a handgun or any other type of gun for the purpose of self-defense.

So if the plaintiffs were able to show that, of course, then I think we'd be facing a case in which the Second Amendment right was destroyed. That's the framework that we proposed to the Court. Under *Peruta* I think it's appropriate. If plaintiffs were able to show that, then I think the case is probably over. I don't think that they've been able to, and let me show you why.

There is no evidence at all in this case that more than 15 rounds have ever been required by a civilian in self-defense of home or on the street. We heard three examples from Mr. Ayoob, and they are not only ancient, unverified, but involve, one, a gun shop owner running to defense of his gun shop from several hundred yards away and unloading a fully automatic machine gun on several people who were trying to break in and steal guns. Two, a jewelry store robbery in which several defenders fired a large number of rounds. It's not specified how many. And, third, a robbery of a Rolex

dealership in which a defender had apparently staged guns around the entire store in order to enable him to counter an attempted break in. That's it, ever, that the plaintiffs have ever shown that a civilian needs large numbers of rounds in self-defense.

THE COURT: Counsel, at this juncture, I want to make sure I understand your position clearly. Do you concede that a magazine is an arm that falls within the scope of the Second Amendment?

MR. GROVE: I think that we can draw a line between a magazine and a large-capacity magazine. I would agree that a magazine in general is part of what is protected by the Second Amendment, because firearms are designed -- at least semiautomatic firearms are designed to function with a magazine. And I agree with the plaintiffs that if we turn that into a one-shot weapon, that it is not functioning as designed, and there are probably mechanical problems that go along with it.

What the stipulations demonstrate in this case, though, is that virtually all firearms will function with a magazine that holds less than 15 rounds -- 15 rounds or less.

THE COURT: And even those firearms that have magazines can function with a single round in the chamber.

MR. GROVE: That's true. I think that what -- my interpretation of *Heller* is that the Court was interested in

ensuring that semiautomatic firearms can be used as they were designed to be used. And so in that case, the Court mentioned I think immediate operability, or something along those lines. And the issue there was long guns, I think, had to be disassembled; and pistols, if they were even able to be owned, had to have a trigger lock. So they could not be used in any sort of immediate fashion.

That's not what the magazine restriction here does in any sense. At most, it means that instead of 30 rounds with your AR-15 before reloading, now you can only fire 15. The magazine and the gun, regardless of the way -- regardless of the size of the magazine, interacts in the same manner that they always do. It's just that there are fewer bullets in one and more bullets in the other.

THE COURT: So you would concede, then, that for semiautomatic weapons, the magazine is part of the operative weapon?

MR. GROVE: Yes, I would concede that.

THE COURT: Okay.

MR. GROVE: Our position is that the -- that there is a break point somewhere that converts the magazine from an arm to not an arm. The issue is, when the magazine is put into the firearm, does the firearm operate as intended? At some point, you know, two, three, four bullets, we might have a problem. We're on a much higher end of the spectrum here, especially

when you compare Colorado's law to the laws of many other states that have adopted similar regulations in the last several years.

THE COURT: Thank you.

MR. GROVE: On that note, we would probably be having a different discussion if there was evidence that a large number of rounds were required on a consistent basis for civilian self-defense. But a wide array of witnesses on both sides unanimously agree that 15 rounds is adequate for self-defense. And, of course, that's leaving out the potential for reloading. These witnesses have a wealth of different experiences and are all in agreement on this point.

Substantially fewer rounds are used in the rare instances -- substantially fewer rounds than 15 are used in the rare instances in which law-abiding citizens have found themselves in situations where they find it necessary to discharge a firearm in self-defense. Which is something that, again, virtually every expert and every lay witness in this case agrees is an extraordinarily rare occurrence.

Mr. Ayoob testified that in the vast majority of defensive gun uses, the mere display of a firearm is sufficient to end the altercation, with the perpetrator either fleeing or submitting -- even submitting to a citizen's arrest. He said, and I quote, "Overwhelmingly in a great majority of the time, when the gun comes out, the fight is over."

As I mentioned, plaintiffs were only able to name three instances since, as far as I know, the beginning of time when civilians were involved in high-volume shootouts with a criminal. This, of course, is consistent with the independent analysis of Dr. Zax of instances of home invasions in the plaintiffs' counties in the last ten years. The State's other witnesses, with many years of law enforcement experience among them, Mr. Cerar, Fuchs, Kramer, Montgomery, all agree that 15 rounds are ample for civilian self-defense.

Even law enforcement officials who have to run to the gunfire rarely fire more than 15 rounds in their official duties. That's what Dr. Zax's and, actually, Mr. Ayoob's analysis of the NYPD discharge data demonstrated.

Of course, to even make that analogy, you have to assume that police and civilians are situated similarly. And I think that there is no doubt, and I think there is agreement on all sides in this case, that police and everyday citizens do not face the same rate of gunfire and do not react to it in the same way.

To run through the other witnesses, Heap, Maketa, Dahlberg, also all have substantial law enforcement experience. None of them could account for a single instance. Now, multiple plaintiffs did assert that they were more comfortable or that they took psychological comfort in knowing that they would have access to a weapon with a large-capacity magazine.

The Second Amendment doesn't protect these subjective concerns. And more to the point, this court only has jurisdiction over controversies that have an actual injury. As far as I know, psychological concerns have yet to be recognized under the Second Amendment at all.

The plaintiffs have also argued -- and this was a fairly new one on me -- that the temporary pause to change magazines by someone attempting to defend themselves amounts to the complete disarmament, the lack of access to an immediately operable firearm that the *Heller* court purported to protect. This argument obviously proves far too much. No firearm has limitless capacity. Every one will have to be reloaded at some point. If we accept plaintiffs' argument, no law could ever regulate magazine size. Also, the law does not restrict the ability of civilians to carry as many magazines as they wish or backup firearms. Thus, there is no deprivation of the right to bear arms. There simply is no Second Amendment right to have unlimited fire power with no pause.

Plaintiffs have also asserted that they can't get -- at least a few of them did, that they can't find lower-capacity magazines for at least some of the firearms they currently own. Some of the more popular that we've heard several times in this case are the Kel-Tec PMR .22, the Springfield XD 9, the Glock 17, I think there were one or two more. But to the extent that this is actually true, this is a market issue more than

anything. The statute doesn't ban the manufacture of compliant magazines. Citizens are free to purchase after-market magazines. And Michael Shain testified that magazines are highly modifiable and customizable as well.

Nor does the Second Amendment protect the right of federally licensed firearms dealers to sell. That's addressed in the briefing, so I'm not going to dwell on the legal argument here. But even if there is a Second Amendment right here, the FFL plaintiffs did not prove their assertions of financial injury, particularly on a statewide scale. What we heard was evidence from two FFL plaintiffs that business has been down compared to last year. While that's unfortunate, it's hardly surprising given the enormous surge in the firearms market that followed the Aurora and Newtown shootings, the presidential election, and legislative debate both in Congress and the Colorado General Assembly about new gun control measures.

As Mr. Spoden and Mr. Sloan testified, background checks were running 75 percent higher during this period. So is it possible that business has dropped off? Sure. Did the two FFL plaintiffs that testified prove it? They did not. Neither could testify that their gross revenue was down in 2013, and they certainly didn't do anything other than offer speculation in support of their assertions of lost business.

If they had actually wanted to prove that this

legislation had adversely affected them, they would have needed to put on some sort of expert testimony that could speak directly to that issue. There is simply too many variables to credit a lay witness's assumption about external influences on their business model.

Along the same lines, there is also a fundamental inconsistency here. Many of the plaintiffs have argued that they are unable to acquire magazines with a smaller capacity, while at the same time, the FFLs, including -- I think Doug Hamilton was another one, sat on the stand and complained that they can't sell lower-capacity magazines at any price. I find those two claims difficult to reconcile with one another.

In addition -- and this is very important -- the parties have already stipulated to two key facts that contradict the plaintiffs' assertions about any inability to acquire Colorado-compliant magazines. Stipulation 27 states in part, "With some exceptions, manufacturers of semiautomatic pistols that have standard magazines that hold more than 15 rounds also manufacture magazines with a capacity of 15 rounds or less. After-market manufacturers also make and sell magazines with a capacity of 15 rounds or less."

In addition, Stipulation 28 says, "Magazines with a capacity of 15 or fewer rounds are available for purchase in Colorado."

These are not plaintiffs' only complaints about

smaller-capacity magazines. Of course, they also claim that they're not reliable, but haven't proved this point either. At best, the testimony was mixed. Ms. Dahlberg says that she's happy with magazines that have a lower capacity as long as they were from the same manufacturers. Andy Logan said that his work just fine. Magpul stipulated that their ten-round magazines are just as reliable as every other product that they make. That's Stipulation No. 45.

Plaintiffs' expert on firearm and magazine design, Mr. Shain, testified extensively about magazines and their design; and he expressed no opinions about the lack of reliability of lower-capacity magazines. That absence of any assertion from the only expert on this topic in this case is significant.

Plaintiffs also presented no testimony that limiters render firearms unreliable. In fact, the Department of Wildlife representative who was here yesterday, Randy Hampton, testified that limiters had been used to reduce firearm -- magazine capacity for hunting since the 1970s and that hunters commonly use limiters in the field. This is not new technology. It's something that has been tested and proven true for decades.

In addition, while we're on the topic of limiters, plaintiffs presented no evidence that magazines cannot be permanently altered to comply with Colorado law. Notably,

their expert on magazine design testified that large-capacity magazines could be permanently limited through the use of sonic epoxy welding. The average person cannot remove a limiter installed with this technique without damaging the magazine. Our interpretation is certainly that that qualifies for a permanent alteration.

Now, the evidence is undisputed that reloading a magazine forces a temporary pause by a shooter, whether offensive or defensive. This pause in a mass shooting situation provides a crucial opportunity for escape or offensive action, or defensive action, for that matter.

Now, this, of course, applies whether the shooter is defending oneself or engaged in a criminal attack on others. The critical difference is that evidence in this case shows that the former, defense of oneself, will not have any impact on defensive gun use because defensive gun use virtually never, if ever, requires many rounds to be shot. Of course, that is clearly not the case with respect to the criminal misuse of firearms.

Dr. Kleck's own analysis, which is Exhibit 44, contained dozens of examples in which criminals fired large numbers of rounds. He further acknowledged during cross that some shootings that wouldn't qualify as mass shootings, even under his analysis, involved 17 or more discharges.

But the State's evidence shows that a pause of any

type has proven a critical window of opportunity in case after case in criminal shootings to allow civilians to flee to safety or to mount a successful attack to disarm the shooter. Evidence from Salzgeber, Mr. Fuchs, Kramer, Cerar, and Dr. Kleck all demonstrated this.

Mr. Colin, of course, discounts many of these incidents. What he neglected to mention is that Dr. Kleck actually admitted during his cross and during his direct that he had analyzed many of the same incidents and had determined them to involve intervention or escape by bystanders or victims when the shooter had paused to reload.

The General Assembly specifically cited the ability of bystanders or potential victims to mount a successful attack or escape as a basis for the legislation. Such a pause can save lives. The evidence on this is undisputed. And we heard it in person from Roger Salzgerber, who tackled the shooter in the Tucson incident when he paused to reload. Lorne Kramer described a similar incident under his watch as a police department -- as a police chief in Colorado Springs.

Generally, I think the plaintiffs acknowledge the pause, though they dispute the cause in many of the instances, but this misses the point. As Mr. Fuchs testified, the effect of the large-capacity magazine limitation is to make pauses mandatory in any shooting scenario. We can't count on a magazine malfunction. We can't count on a firearms jam. We

can't count on an individual dropping his firearm because he runs into a door frame. If magazine capacity is limited, what we can count on is a pause of about 4 seconds every time 15 shots are fired from that gun.

Of course -- and I think this is a very important point that the plaintiffs have completely overlooked. House Bill 1224 isn't just about reducing the magnitude of injuries in mass shooting situations; it's also about reducing the intensity of all armed criminal aggression. Drs. Kleck and Zax agree that firearm capacity is directly and positively correlated with the average number of shots fired, even in everyday gun violence. Dr. Kleck dismissed this as unimportant because the average number of shots fired in self-defense is fairly low.

As Dr. Zax explained, however, the pertinent question is not whether the shooter expends his entire magazine. A shooter with a larger reservoir of ammunition will tend to shoot more bullets than a shooter in a comparable situation who had less. As a consequence, gun violence that involves the use of large-capacity magazines results in more shots fired and more people injured than comparable conflict with smaller-capacity weapons. This holds true whether it's a good guy or a bad guy firing the shots.

And that's an important issue, because it raises the concept of spray and pray. Both Cerar and Ayoob testified at

length about the challenges faced in training a shooter who is transitioning from a lower-capacity revolver to a higher-capacity semiautomatic.

As Ayoob put it, in training he has to put more emphasis in avoiding what he called spray and pray. We've also heard, and I love the term, hose the foes. He trains civilians to shoot as they were using a lower-capacity magazine. The tendency to empty the available magazine -- and these are his words -- has to be trained out of civilians.

Mr. Cerar's experience in the NYPD was similar. He said that it took a few years -- a few years -- for that training to sink in because law enforcement had the same instincts when they were equipped with a firearm that can discharge many rounds at once without being reloaded.

Of course, a person intent on claiming lives can use powerful modern semiautomatics to maintain a high rate of fire. That rate of fire was demonstrated in some detail here by the recording of the Aurora theater 911 call.

And in the mass shooting context, the ability to shoot more is the ability to kill more. Large-capacity magazines have been used to fire enormous numbers of rounds in a short amount of time. Sandy Hook had more than 150 rounds fired in a space of several minutes, I think four. There is a stipulation for Oates -- I'm sorry, there is a stipulation concerning the Aurora theater shooting that 65 rounds were fired from the

100-round drum that was used in that case. And there is testimony from Roger Salzgeber that a 32- or 33-round magazine, I can't remember which, was discharged in the space of 15 seconds in that shooting. Nineteen people were injured -- sorry, six were killed, thirteen were injured.

Dr. Moore testified, of course, to the devastating public health impact of gun violence and the likelihood that an individual who is shot more than once and his chances of survival versus an individual who is shot fewer times.

Dr. Zax testified that House Bill 1224 will make law enforcement safer. Lorne Kramer did the same. That testimony remains unrebutted. And, importantly, Dr. Zax testified, unrebutted, again, that House Bill 1224 will reduce the number of large-capacity magazines in circulation.

Plaintiffs, of course, argue that House Bill 1224, the magazine capacity restriction, is unenforceable, that it will only affect law-abiding citizens. Constitutionality, however, has never been judged on that criteria. In any event, Dr. Zax's testimony demonstrated that they're wrong. Dr. Zax testified and presented data gathered from before, during, and after the federal assault weapons ban and its accompanying large-capacity magazine restriction.

Despite the fact that the federal ban was far less restrictive than Colorado's law, permitting, for example, the additional importation and unrestricted transfer of all

grandfathered large-capacity magazines, Dr. Zax's analysis of the most complete data set available demonstrated that the law had a substantial impact on the use of large-capacity magazines in crime, especially in the later years of the ban. This is precisely what Dr. Kleck testified that he would have expected to see, given the assault weapon ban's generous grandfather position.

Now, plaintiffs have argued that a determined buyer can simply drive perhaps to Jensen Arms' barn that's right across the border. And as Dr. Zax testified, some may do that. On the other hand, Mr. Burrud testified that sales at that location have been very slow. Tim Brough likewise testified that his own Wyoming location just across the border in Cheyenne, again, had a large capacity of large-capacity magazines that aren't selling. This, along with the fact that FFLs have taken LCMs off their shelves, per the allegations in this case, suggest that Dr. Zax is correct.

Plaintiffs also claim that this law is not adequately tailored. But the legislative record contradicts this. In fact, as legislative history shows, this law was originally proposed as a ten-round limitation.

Mr. Colin mentioned the testimony of Charles Roblis in which he said that, "I fired 13 rounds in defense of my life." And in fact, when he made that testimony, when he provided that testimony to the legislature, the version of the bill that was

in front of the legislature had a capacity of -- had a magazine capacity limitation of ten rounds. After hearing that testimony, the legislature -- the committee proposed an amendment and increased the capacity limitation to 15, to accommodate concerns like that.

That is very strong evidence of tailoring.

THE COURT: Counsel, by using the word "tailoring" and "adequately tailored," you suggest that it is the intermediate standard that should be applied here. Will you please address the argument by the plaintiffs that it is a heightened scrutiny standard that should be applied.

MR. GROVE: Let me address that in a couple of parts.

First, we don't concede that any sort of -- well, first of all, let me say that intermediate scrutiny in my view is heightened scrutiny. But second, we don't concede that anything above rational basis should actually apply here. And let me tell you why.

And this is laid out in our trial brief, the way that this is structured. The key here is whether the plaintiffs can show any adverse impact associated with this law on their right to self-defense. Regardless of the portion of the Bill of Rights that you're talking about, the tiered scrutiny analysis from *Carolene Products*, footnote 4, I think -- taking me back to law school -- has always applied. First, rational basis, if there is no showing of a substantial impact on the right, and

then some sort of heightened scrutiny. Usually depending on -- usually depending on the nature of the right that is impacted.

THE COURT: Right. And that's why I'm asking you about this. Not looking at the effect, but looking at the nature of the right. What I heard the plaintiffs argue is that the right to hold and bear arms is akin to the most fundamental rights that we have under the First Amendment and that it should be protected with the same level of scrutiny.

What is your response to that?

MR. GROVE: Again, I think that it depends on the nature of the impact.

So let's compare it to the First Amendment. The First Amendment doesn't say that you can -- that speech is completely unregulable. There are plenty of things at the margin that can be regulated, obscenity, for example. You can't, as they always say, run into a crowded theater and say fire. You can place time, place, and manner restrictions on where somebody can actually speak.

This -- what we have here is most akin, I think, to a time, place, and manner restriction, because it does not prevent anyone from carrying a firearm anywhere. It doesn't prevent what they -- it doesn't restrict what they can carry. In fact, it simply affects the manner in which they can carry it.

THE COURT: So does that mean that you agree with the

plaintiffs that this right, a Second Amendment right, is as fundamental as a First Amendment right?

MR. GROVE: I'm not sure that -- certainly, we agree that the Second Amendment is a fundamental right. But when you put it in an abstract way like that, I think it's very difficult to answer. There is no question that *Heller* and under the Second Amendment, *McDonald*, say that you can't prevent somebody from -- law-abiding citizens, anyway, from having a handgun. And so in that sense, there is no question, I think, that you can't ban somebody from having a handgun, just in the same way that you can't prevent them from engaging in most kinds of legitimate speech.

But when you're talking about activities that are closer to the margins, then I think that those analogies are apt as well. And so as long as we understand that the right that we are discussing in this case is more similar to the peripheral First Amendment rights, just like things that can be regulated in a time, place, and manner restriction, then I would agree with the plaintiffs on that.

THE COURT: Well, there is some regulation of speech, for example, that is regulated based upon its content. Obscenity, for example. There are other regulations that are time, manner, and place restrictions, which are permissible because the scope of the restriction is not broad. It is narrow. It doesn't regulate all of the speech; it just

regulates the time, manner, or place of the speech.

What I'm trying to understand is how you perceive the Second Amendment right to keep and bear firearms and whether the test that is used here -- you would suggest a rational basis test, the lowest-tiered test, the plaintiffs would suggest the highest level of scrutiny -- whether this relates to essentially the essence of the right, like the nature of the speech, or does it relate to the essence of the restriction, the scope of the restriction?

A couple of different concepts going on, and I want to make sure I understand where the parties are on each of them. Have I been clear?

MR. GROVE: Yes. And something that you said -- and I confess that my memory is fading at the end of this long ordeal. Something that you said about time, place, and manner restrictions, I think, run very true. And that is that this law doesn't affect -- doesn't prohibit you from carrying a firearm with you. It just prohibits you from carrying a firearm with a large-capacity magazine with you. The nature of your right is unchanged. You can still carry a firearm for the purposes of self-defense, you can still have one in your home, you can still have multiple magazines to defend yourself with, you can have multiple firearms, for that matter. But it does restrict the number of discharges that you can make without reloading. It doesn't change the nature of the right; it

doesn't impact that at all. Instead, it merely, I guess, limits it in a way that actually doesn't affect anybody's ability to defend themselves.

So I agree it's a fundamental right. I'm not sure if I answered your question, however.

THE COURT: Well, I'm still trying to understand whether you are tying the level of scrutiny to the scope of the restriction or to the nature of the right.

MR. GROVE: I think I understand that better now. I think that the level of the -- the level of scrutiny should be first decided based on what the impact of the restriction is on the core of the right. That's what this trial has been about, as far as I know. And that's why rational basis is an appropriate approach here.

Now, plaintiffs will probably come back and say, well, *Heller* ruled out rational basis. And when you are talking about a law that is actually a ban on something that is used for the core right of self-defense, I agree, there is no doubt about that. If we were in the same situation as *Heller* was, I don't think we would have made it this far. But when you're talking about something that is closer to the periphery of the right, I think there is no doubt that sliding scale test applies.

THE COURT: Okay. But that's what we're getting to the mixing apples and oranges. Your last statement is, this is

at the periphery of the right, as compared to the extent of the restriction. Which is it that drives the level of scrutiny, or is it a combination of both?

MR. GROVE: It's both. Because things that are on the periphery of the right have very little effect, if any, on the right to engage in self-defense.

THE COURT: Okay. So it's your contention, then, that this is both -- the infringement is both at the periphery of the right, and it is not an extensive restriction.

MR. GROVE: Yes. And the reason that it's not an extensive restriction is because it's on the periphery of the right.

By definition, I think, virtually nothing that could be on the periphery of the right would be a substantial restriction on the core right of self-defense.

THE COURT: Have you given me all of the case law that you intend to rely on with regard to the standard to be applied and, particularly, this discussion that we've just been having?

MR. GROVE: I think it's probably all in the trial brief. I mean, I will concede that our position that rational basis should be applied is not something that has been adopted widely at this point.

THE COURT: Right.

MR. GROVE: But it's also something that I don't think has been raised. So I think this court should take a close

look at the way that we have -- at the structure that we've proposed, and reject it if you need to, but we think that it's something that should be considered.

Now, if we move to some sort of heightened scrutiny -- and again --

THE COURT: I know you're calling it a heightened scrutiny. I call it intermediate scrutiny. And that's where we need -- that's where we need to talk about tailoring.

MR. GROVE: That's right. And maybe tailoring is the wrong word for me here. But I did preface it by saying "adequately," and that was a very intentional choice of words.

I do think that there has to be, under intermediate scrutiny -- which, by the way, I think is the standard that has been set by the Tenth Circuit -- some sort of demonstration that the impact of the law will have a beneficial effect. It doesn't need to be narrowly tailored, certainly. That is -- that's strict scrutiny, and no court has applied strict scrutiny at all. The closest has been -- the closest to that has been *Ezell* and maybe *Moore v. Madigan* in the Seventh Circuit. But both of those cases involved what amounted -- and it is discrimination. They involved very intentional establishment of laws that were designed to impede the ability of firearm owners to own weapons.

So, for example, *Ezell* involved a training requirement for firearms owners that had to be exercised at a gun range,

while at the same time banning gun ranges within the city. That sort of trickery is not at all what we have here. This law is not in any way designed to prevent people from owning firearms. It's only designed to enhance public safety by limiting their capacity.

I'd be happy to take any more questions on the magazine capacity limitation. If not, I will move on to 1229.

THE COURT: Please move on.

MR. GROVE: As far as 18-12-112 is concerned, there are a couple of things that I think that we need to make clear. First, there is not a vagueness claim with respect to that statute. There was certainly a lot of testimony about confusion professed by various of the plaintiffs about how a law might apply to themselves or to their organizations. But that's irrelevant to the claim asserted in this case, because there is not a 1229 vagueness claim.

Another thing is that plaintiffs emphasized throughout this trial one thing, and that's that they don't really disagree in principle with the expansion of background checks to cover private transfers. Instead, they seem to disagree more with the way that Colorado's General Assembly chose to implement this policy.

That position, in my view, should bring into play the political question doctrine. Prudential limitations on standing concern whether the complaint raises abstract

questions more properly addressed by the legislative branch. That's exactly what the plaintiffs here are urging the Court to do with respect to the background check provision. This court's job is not to micromanage the policy goals of the Colorado General Assembly and reach in and decide after just a few months of implementation that the precise means that the legislature deemed are appropriate are in fact inadequate. To decide otherwise would raise grave separation of powers concerns.

So let's go back and take the same approach that we did here, as we did in the context of the magazine capacity limitation.

First, I think it's important to compare what was alleged in this case to what was proven. Plaintiffs alleged in their Complaint that it would be impossible -- impossible -- for most Coloradans to comply with 18-12-112 and acquire a background check. At trial, they now contend that it is more difficult for some people to do transfers, including some farmers and some nonprofit agencies. But what is missing here is what is notable, and that is that no one testified that Section 112 either has hampered or would hamper in the future their ability to engage in self-defense. No concrete examples were offered. No plausible scenarios were raised. Again, simply psychological concerns, I may not be able to find someone to loan me a firearm for more than 72 hours in the

event I somehow can't get to a federally licensed firearm dealer.

For example, Ms. Dahlberg testified that she hadn't ever loaned weapons to someone else, either before or after the bill. And she didn't know of any instances in which a woman was prevented from borrowing a weapon for the purposes of self-defense either before or after the law went into effect. Without that showing, plaintiffs haven't shown any impact to their core Second Amendment right. And, again, our position is that their claim should fail at the outset.

To touch, again, on facial -- the nature of this challenge as a facial one, plaintiffs must show that the law is invalid in the vast majority of its applications. Here, they have only shown that a few, not all, persons are even inconvenienced by the private background check requirement. But mere inconvenience isn't the standard. And in fact, plaintiffs recognized that in their Complaint when they alleged that Section 18-12-112 would make firearms transfers impossible for a great number of state residents. Again, that prediction simply hasn't come to pass. Several witnesses testified that they successfully completed private background checks on both sides. No one testified that he or she could not obtain a needed weapon if he or she had to go through a check.

THE COURT: Well, there is a little bit of the difference in the wording here that I want to be sure we've

addressed.

Both sides have referred to the Second Amendment right as being the right to self-defense. Isn't the correct description of the meaning of "to keep and bear firearms for the purpose of self-defense"? And how does that change what we are focused on?

MR. GROVE: I'm actually not sure that I would agree. I think that -- and here is why: I think that *Heller* acknowledged that keeping firearms is one way of ensuring that you have an ability to engage in self-defense. But there are plenty of other -- there are plenty of other weapons, knives, for example, might very well be protected by the Second Amendment. I'm not sure if there are any cases on that yet, but I'm sure that we will see some soon enough. And so I would not restrict it simply to firearms.

And the Second Amendment, as I said, certainly protects the right to possess an immediately operable firearm for the purpose of self-defense; but the core right is the ability to engage in self-defense.

THE COURT: Okay. Well, let's use the same example that I posed to the plaintiffs here. And that is -- or they may have raised in their argument. And that is, the situation where someone wants to borrow a firearm. And we'll assume for purposes of the question that they want to do it with the anticipation that they're going to hold on to it for longer

than 72 hours. We have -- we have the example of -- of a person who has a restraining order against a former spouse, and who is afraid of some kind of action by that spouse, or former spouse, and wants to borrow the firearm.

Does that person have a constitutional right to borrow the firearm in order to -- for the purpose of self-defense under the Second Amendment, which would be impacted, then, by a background check requirement?

MR. GROVE: The first inquiry when you're looking at that situation is whether the person who wants to borrow the firearm is in fact permitted to own or possess a firearm in the first place, and we can't know that unless a background check is performed. And so -- now, to get to the 72-hour point -- and I think this is actually important. As the plaintiffs pointed out -- and this is another example of the way that the legislature took into account many of the concerns. The way that this bill was originally proposed contained no temporary loan exception at all.

And I've got it written down over there. I can get you the page if necessary -- in fact, there it is. Page Bates No. 778. This is the chairwoman of the committee saying, "I'm trying to think about that 72 hours, oh, that there is no perfect time frame. But I think we open it up so much that we would just be able to let anyone borrow it, and I think there has to be a limit. So I think . . . if you don't put any

time onto it, you may not want this amendment or want the bill for sure. But I do think that that's reasonable, 72 hours, because when I was talking to the constituents in my district, they were really talking about weekends where they were hunting and those kind of sporting events, where they wanted to go to a shooting range, they wanted to try out a gun for a short period of time before they purchased it. So that was just trying to put my arms around a period of time that seemed to make sense, and maybe there isn't a perfect time."

Now, that, of course, didn't explicitly refer to the domestic violence situation or the restraining order that Your Honor was just referring to. But where it ties into that is that what the General Assembly was trying to do when creating the 72-hour exception was to provide an individual who is in the circumstance that Your Honor described, for an opportunity to have something that would enable them to defend themselves before they went to an FFL in order to either get a private transfer or before they went to an FFL to in fact purchase a gun at retail.

The purpose of the law, though, is to ensure in the first place that the individual who is borrowing the gun for whatever reason, for an extended period of time, is in fact eligible to possess a firearm under federal law.

THE COURT: So what you're really saying, if I understand correctly, is that this extends the same kind of

infringement that's been recognized in other situations, where someone wants to acquire a firearm purportedly for the purpose of self-defense, and they have to go through a background check. So if I go to the gun show, and I want to acquire a firearm, I have a background check. If I go to Cabela's, and I buy a pistol, I'm going to have a background check.

So what I'm understanding the State to say is that this is an extension of that burden to someone who is going to borrow a firearm, if they are going to borrow it, putting aside the other exceptions, for a period of longer than 72 hours. Do I understand it correctly?

MR. GROVE: With the exception that I wouldn't agree that this is a burden or an infringement. I think that federal law has for three generations now placed restrictions on who can own a firearm and who can possess a firearm. And putting a law into place that is simply designed to effectuate that is not in any way a burden.

THE COURT: Well, actually, courts have recognized it as being a burden and infringement, but they have sustained it as a constitutional burden or infringement in virtually every case that has addressed the issue.

MR. GROVE: I'm okay with that characterization. We just are not in a position to say that we agree that it -- that it is a substantial burden.

THE COURT: I didn't say "substantial"; I just said

"burden." But I want to make sure that we are on the same page with that.

Are we talking about a burden that is similar to the burden that is imposed on me when I go to the gun show and I need to have a background check before I can buy the pistol?

MR. GROVE: I think it is similar. I think what you'll hear from the plaintiffs is that is, however, completely different.

THE COURT: I understand that I'll hear that from them. I want to know where the State is on that, on this issue.

MR. GROVE: Then, yes. The answer is that it's virtually identical to a purchase at retail. I mean, I think the testimony on that was undisputed. You fill out the same form, you pay the same fee -- actually, you don't pay the same fee. But -- you fill out the same form, and it takes the same amount of time.

But that actually brings up another point. If you had a question, I can wait.

THE COURT: No. Go ahead.

MR. GROVE: The fee point is one that is surprisingly hotly contested here. The unrebutted testimony from -- well, I guess -- I suppose it was rebutted, but not credibly so, from Mr. Spoden was there are two separate fees here. One is set by House Bill 1229; the other is set by House Bill 1228. I don't

have the codification for that now. But one is very clear, the 1228 fee is what goes to pay InstaCheck for the services that it provides. The other $10 that is set by House Bill 1229 can go to the federally licensed firearm dealer who runs the check.

So the evidence in this case has shown that the State has a substantial interest in expanding its background check requirement. Plaintiffs concede in their trial brief that there is constitutionally legitimate purpose of preventing possession of firearms by felons and the mentally ill, along with a number of other categories. So, in other words, plaintiffs don't base their claim on a theory that background check are *per se* unconstitutional. And I think that's consistent with the argument here today.

The evidence on the other side about the effect that the expansion of background checks will have on public safety was substantial. As Director Sloan testified, the State has a public safety interest in keeping firearms out of the hands of prohibited individuals. As Dr. Webster explained, checks are important because persons in the prohibited categories are at increased risk for the commission of future crimes. Without checks, risky private transactions happen in a manner of minutes. No-questions-asked sales can easily be started over the internet and completed in very short order. Guns can be traded for money with no record and no checks and no way to determine the source of the gun, if it is eventually used in a

crime.

Keeping prohibited persons from getting guns will decrease gun violence, and background checks -- expanded background checks requirements such as Colorado's will reduce the burden of illegal guns to criminal activity.

Dr. Webster testified about three separate studies that showed a strong association between checks on private transfers and trafficking. Lorne Kramer testified about the considerable concerns that he had as police chief in Colorado Springs with respect to the domestic violence cases and the increasingly violent nature of these claims.

You know, Mr. Westfall was -- I think a very good example when he was talking about Mr. Abbott and how he might loan a gun to him. He said -- I think these are his words, I know Mr. Abbott pretty well, and he lives down the street from me, and I think he's a nice guy. And I'm sure Mr. Abbott is a nice guy. However, I don't know anything about his background. I don't know if he has been -- don't take this personally, please -- adjudicated a mental defective at some point in his life.

MR. ABBOTT: So stipulated.

MR. GROVE: I don't know if he had a run-in with a significant other 30 years ago that made him ineligible to possess a firearm under the Lautenberg Amendment. I don't know if -- if he has renounced his United States citizenship. I

don't know if he was dishonorably discharged from the military. There are a whole host of potential prohibiting factors that -- you know, I can know thy neighbor as much as I possibly can, but there is simply no way that I can know everything about everybody, no matter how close to them I am.

Now, the situation with respect to family is a little bit different. And I think that the statute appropriately exempts nuclear and extended families for that reason. But the bottom line is that the legislature made a policy choice that we should put checks in place to ensure that people who are acquiring firearms for any extended length of time, except with certain exceptions, to ensure that they are in fact not prohibited.

Plaintiffs labeled the background check requirement during their opening and in the briefing in this case as an extreme imposition on their rights. In fact, as I already noted, they alleged in the Fourth Amended Complaint that as a practical matter, it will be impossible for citizens to comply with House Bill 1229. That's not been borne out by the evidence.

Mr. Spoden explained that it takes between four and thirteen minutes plus the time to fill out the form and a max of $20 -- maximum of $20 to get a background check and purchase a firearm. Director Sloan explained that this process is less time consuming and less expensive than many other types of

everyday background checks.

The Colorado Farm Bureau claimed that farmers were too busy to go to an FFL for the checks. But beyond vague assertions of the burden, the Farm Bureau hasn't collected any information from its members about the actual costs of Section 112.

Case in point, in the example offered by Mr. Colglazier, his own family farm, only one employee, the hired hand, would have required a check. And it only happened on one occasion that he could recall that a loan of greater than 72 hours was necessary.

Instead, the plaintiffs -- and I think this has been a theme throughout the case -- willfully misinterpret the law to claim that their activities would be criminalized by the expanded background check requirement. For example, Ms. Eichler testified as to drop camp or bowhunting scenarios that actually fall within the hunting exception, as explained by Mr. Hampton and D.O.W. policy.

Mr. Harrell complained that he would no longer be able to sight-in rifles for his friends. But subsection (6)(f) doesn't require being a gunsmith in order to repair or maintain a rifle. Mr. Harrell also claimed that the Outdoor Buddies loans with specialized equipment would be hampered. But per Mr. Hampton, the Colorado Division of Wildlife has determined that these loans would be covered by various exemptions.

Again, the plaintiffs claim that they can only collect $10, and that must be passed through to the State. Mr. Spoden explained that it is actually 20, and they don't need to give their services away for free. The FFLs also claimed that they have to take on additional risk by taking the firearm into their inventory. But the ATF procedure, 2013-1 -- I can't remember the exhibit number off the top of my head -- and Mr. Spoden's testimony established that that is not accurate either.

Mr. Maketa explained that he holds firearms for his son while his son is away for work, but those temporary transfers would be covered by the family exception. Mr. Maketa also claimed that citizens could not transfer firearms during natural disasters such as floods and fires. Yet he admitted that he would have discretion as sheriff as to whether to enforce the law in extraordinary events and that his office in fact exercised that type of discretion during the Black Forest fire.

The evidence, instead, showed that the exceptions in Section 112 are flexible to permit lawful transfers when necessary.

The Maverick event hosted by Colorado Youth Outdoors is covered by an exemption for shooting competitions, no matter how those might be labeled by Mr. Hewson. And those -- that exception is not required to be less than 72 hours. For use on

corporate property, temporary loans would also be covered by the exception for hunting, target shooting, or loans that are in the owner's continuous presence. The same goes for Outdoor Buddies and their hunting trips. CSSA events are likewise covered by exemptions for target shooting competitions.

On a similar -- a similar demonstration is that Mr. Hamilton and Family Shooting Center have continued to be able to rent firearms to customers, even those with large-capacity magazines. They have not run into any problems. And Colorado Parks and Wildlife found the law flexible enough to permit all the transfers that the hunter education group usually requires and has required in the past.

THE COURT: Now, this particular area gets us into the question of whether entities have rights under the Second Amendment. What's the State's position with regard to that?

MR. GROVE: The Second Amendment protects the right to self-defense. And an entity -- I'm not really sure how an entity engages in self-defense. That is very distinguishable from what Mr. Kopel, I think it was, was discussing with respect to First Amendment rights.

The most apt analogy that I can bring to mind is corporate speech. And Citizens United, of course, is that. When you're talking about something like money, it's clear that a corporation has something that it can spend. It can spend money. And so if speech is money, then it certainly makes

sense -- sorry, if money is speech, it certainly makes sense that a corporation should be able to engage in that, if in fact the First Amendment reaches to cover that.

But when you're talking about something that is corporate, that doesn't have a body, the Second Amendment, it doesn't make any sense to apply to it.

Now, that's not to say that the organizations here might not be able to assert some sort of standing had they made the correct allegations in their Complaint and had they attempted to prove the correct things.

THE COURT: Well, I want to pause at this point, because standing here is not really the issue. Standing is a jurisdictional issue. What I'm talking about is whether they have a right protected by the Second Amendment. Not whether a statute might impact them, not whether there might be some effect, but is there a right, even before we get to the effect, that is protected?

MR. GROVE: Our position is, no.

THE COURT: Thank you.

MR. GROVE: What the plaintiffs' testimony did highlight was the need for this law. Colorado Youth Outdoors permits firearms to leave their property on guided hunting trips. But Colorado Youth Outdoors testified that it didn't know whether the persons that they had loaned firearms were fugitives from justice, had mental health issues, had substance

abuse problems. In fact, CSSA loaned guns for up to two years before Section 112 existed; but they didn't know if the transferee had domestic violence convictions, mental health adjudications, felonies.

The law does provide exemptions, but it doesn't provide exemptions for everything. And that's for the reason that the legislature made the policy decision that some sorts of firearms transfers, whether temporary or not, should be covered by a background check, because they're deemed to be a public safety risk. And that is a policy decision that the legislature made; but it is not a policy decision that should be driven by the plaintiffs' interpretations of 1229 in this case to cover or not cover all sorts of scenarios that they posit may now be problematic.

Plaintiffs' main argument appears to be that the burden of Section 112 outweighs the benefits because citizens are not actually engaging in transfers. They focused heavily on what the numbers suggest, but the evidence really shows that that is sort of a mixed bag.

It's important to remember that the law has been in effect for only nine months. The constitutionality of the statute, particularly in a facial challenge, can't turn on the degree of compliance in the first few months of a new law.

Plaintiffs also point to the fiscal note that accompanied House Bill 1229 when it was in front of the

legislature to point out the fact that the compliance was lower than what the analysts forecast. From this, they argue that the system isn't working and therefore would fail the least-restrictive-means test.

Again, I'm not aware that the least-restrictive-means approach has ever been applied in a Second Amendment context. And even if it were applicable, it would only come into play if strict scrutiny applied. Of course, it's impossible to accurately compare the number of checks done before the law passed with what happened after the law passed because the data in the year leading up to the implementation has been so skewed. Mr. Spoden and Director Sloan both testified that the number of checks prior to implementation were unprecedented, in part due, ironically, to the discussion of this legislation.

Also, the evidence doesn't necessarily show what the plaintiffs claim. Exhibit 24 shows that the number of checks for private transfers were flat, while gun show checks declined during the same period. And the data to date showed that the number of private checks are in fact trending upwards on a month-to-month basis. To date, 182 persons have been denied possession of firearms as a result of private checks. Now, that does include all three categories, person -- interstate transfers, in-person checks, and gun shows. But, nonetheless, at least some people have certainly been denied based on private checks.

And although plaintiffs claim only that a small number of FFLs are doing the checks, the reality is that 635 out of the 1,000 active FFLs have run some sort of private background check in the last nine months. Among those 635 are 7 of the 9 plaintiff FFLs that were originally named as plaintiffs in this case.

As to whether FFLs are actually doing transfers, the testimony is a little bit mixed. Mr. Harrell testified that he had one done. Mr. Hamilton testified that his FFL would do checks. Colorado Farm Bureau didn't know of any members who have not been able to find an FFL for the transfer. Mr. Montgomery has had two checks done. And CBI witnesses testified that they know that people are able to get them.

On the other side of the ledger, Mr. Hewson, Mr. Harrell -- Messrs. Brough and Burrud both testified that they would not do checks, although their reasons for doing so were based, at least in part, on the fact that they believed they couldn't be compensated at all for the time that was associated with submitting the checks.

Plaintiffs also complained that Section 112 is dysfunctional because it imposes joint and several liability during temporary transfers that last less than 72 hours. But this was discussed -- discussed some during Mr. Westfall's argument, tort and agency principles always apply to transfers of this type. It could be negligent entrustment, it could be

something else. The point that the Court made is a good one. There actually has to be an unlawful use of the firearm, exactly -- for joint and several liability to apply under the statute. Now, what unlawful use actually means is something that is yet to be determined. I would posit that it's unlikely -- it's certainly unlikely to include somebody walking across a property line with a firearm in their hand.

On the other end of the spectrum, if you took a gun and borrowed it from somebody and then went and shot somebody else with it intentionally, I think it certainly would apply under those circumstances.

In any event, plaintiffs haven't shown that this provision imposes any substantial burden beyond what negligent entrustment and tort and agency principles would already impose.

Background checks for other types of firearm sales have also been successfully working for a number of years in Colorado. As Mr. Spoden testified, the same $10 fee applies to gun shows as applies to purely private background checks in stores. That system has been in place for 13 years. There have never been complaints about it. There have been tens of thousands of gun show checks that have been performed. It's exactly the same process. It's exactly the same fee.

As Dr. Webster explained, the Colorado system is less onerous than the system of law enforcement issued permits in

other states. And contrary to what plaintiffs said, there was testimony that the 72-hour loan provision is important. Per Director Sloan, we need to limit -- the legislature made the decision to limit the loan period in order to avoid shams.

Now, could the legislature have made that period shorter? Sure. Could they have made it longer, as in California? Yes. But, again, that is the sort of specific policy decision and micromanagement that this court, I would posit, should stay away from.

Plaintiffs also argue that there are less restrictive alternatives out there. They had Mr. Colglazier go on to the CBI website and make sure that he didn't have any felony convictions. Of course, the least restrictive alternative only comes into play to the extent that the Court is using a strict scrutiny analysis. And while this alternative could potentially be less onerous, the undisputed facts are that it wouldn't accomplish the State's objectives either.

As Dr. Webster testified, background check systems are based on accountability. A web interface that requires no identification confirmation has no such accountability, particularly when you don't have law enforcement who you can inherently trust, I would hope, or an FFL whose ATF licensure rides on the accuracy of background check process and compliance with ATF regulations. Webster in fact called the system that would work in the way the plaintiffs suggest

grossly ineffective.

Further, Director Sloan testified that web-based check would not search the databases that are available only for law enforcement purposes, which would include a firearms background check. Most of the factors that would prohibit someone from possessing a firearm simply won't show up on a check that is based on the website and what is currently available under federal law and state law.

If the Court has any questions about 1229, I'd be glad to answer them. Otherwise, I will move on to continuous possession.

THE COURT: I have no further questions.

MR. GROVE: Claim 2 as contained in the Final Pretrial Order described a Second Amendment challenge to the continuous possession requirement of 18-12-302, in that plaintiffs stated that Section 18-12-302 restricts the ability of a lawful owner to loan magazines to other law-abiding citizens for lawful purposes.

I'm not aware of any evidence at all on this claim that was presented during trial. In any event, I think this claim is likely foreclosed by the State's official written interpretation contained in the first and second technical guidance letters.

I will move on from there to vagueness.

I view vagueness -- constitutional vagueness -- and

this is the continuous possession requirement of Section 302 -- as a purely legal question. As we argued in the trial brief, the Court shouldn't reach the merits of this claim at all because it is raised outside of the First Amendment context, and the Tenth Circuit has foreclosed the consideration of facial vagueness challenges outside of the First Amendment context. But assuming that we get there, plaintiffs' factual arguments turn largely on the testimony of Mr. Shain.

Mr. Shain continued with the plaintiffs' theme of misinterpretation, intentional misinterpretation of both the statute itself and the technical guidance issued by the Attorney General. He opined that continuous possession could only mean actual physical possession, meaning that a magazine owner would be required to keep a subject magazine not just within arm's reach, but physically attached to him at all times.

This sort of interpretive approach has it exactly backwards, particularly in a vagueness context. The rules of statutory construction do not encourage courts to interpret statutes in a manner that would provide an excuse to strike them down as unconstitutional. In fact, this court should do just the opposite. If there are questions about vagueness, this court should adopt a narrow interpretation in order to preserve the statute's constitutionality. And an appropriately narrow interpretation of the continuous possession requirement

at issue here demonstrates plainly that the statute has a clearly defined core.

The grandfather clause very obviously prohibits some conduct and plainly allows some other conduct. In other words, even if there are some questions about how the statute might work at the margins, it is not incapable of valid application. A statute challenged for vagueness does not depend on whether the challengers can posit some obscure and difficult application of the legislation that might confuse certain people. In fact, it's doubtful whether any criminal statute could survive such scrutiny.

Here, consistent with the technical guidance and the case law cited in our trial brief, continuous possession should not be considered to be an act. To the contrary, it's a course of conduct. The statute provides more than adequate guidance to survive a facial constitutional challenge.

Finally, I'd like to touch briefly on the ADA. I will not dwell on it since it was the subject of our halftime motion. But I do think it's worth adding just a few points.

Our argument is not that the ADA cannot apply to a state statute. Of course it can. If a statute actively discriminates against people by reason of their disability and the provision of public services or if by its terms it prevents people from accessing services, programs, or activities by virtue of their disability, then the ADA is implicated.

Thus, for example, in *Thompson v. Cooke*, which is cited in the plaintiffs' trial brief, a state statute violated the ADA because it imposed a special fee on disabled people as a condition of accessing state-owned facilities. The fee also specifically violated the ADA implementing regulations.

In *T.E.P. & K.J.C. v. Leavitt*, the Utah case cited in the plaintiffs' trial brief, the challenged statute violated the ADA because it specifically, again, discriminated against HIV-positive individuals with regard to the state-regulated activity of marriage. The provision of a marriage license is, once again, a service, program, or activity of the state. And *Leavitt* in fact actually contains no analysis of the ADA claim in any event. In fact, the state in that case conceded the invalidity of the law and requested that the court enter an injunction against it.

This court's several decisions in *Grider* follow the same mold. As the plaintiffs have previously pointed out, that case involved a challenge to city ordinances in Denver and Aurora. Critically, however, and as the Court's order of March 30, 2012, made explicit, the Grider plaintiffs alleged that the defendants had discriminated against them on the basis of their disabilities insofar as the ordinances "denied plaintiffs of the benefits, services, programs, and activities of the cities.

It's on that last point that we have a complete

failure of proof in this case. Plaintiffs never made a similar allegation and certainly did not prove at trial any connection between either the magazine capacity limitation and the provision of services, programs, or activities by the State.

Plaintiffs nonetheless point to the second clause of Title II. In context, that clause says, "No qualified person 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 subject to discrimination by such entity."

Plaintiffs argue that this last clause is a free-standing bar on any law that might have some impact on a qualified individual with a disability. We've already laid out here why we don't believe that the plaintiffs are qualified -- the disabled plaintiffs are qualified. But in any event, their position is contrary to Tenth Circuit precedent and, for what it's worth, similar cases in both the Seventh and Ninth Circuits.

As we argued in the briefs, the Tenth Circuit's decision in *Elwell v. Oklahoma Board of Regents* is controlling. But the most concise statement of what that second clause means that I've been able to find is from a recent Seventh Circuit case that relies heavily on the Tenth Circuit's decision in *Elwell*. That case is *Brumfield v. City of Chicago*, 735 F.3d 619. At page 627 of that opinion, the court held that, "The

second and most sensible way to read Title II's prohibition against disability-based discrimination is to read it in context and in conjunction with the applicable definition of qualified individual with a disability. Since the only people who can invoke the protection of Title II are those who are eligible to receive or participate in the services, programs, or activities offered by the state and local governments, the statute's prohibition against discrimination is properly read to cover disability discrimination and the outputs of government, their delivery of public services, programs, or activities to eligible recipients."

As I mentioned, there has been a complete failure of proof on this question.

The bottom line is this: The regulations at issue here are constitutionally permissible public safety regulations. They do not substantially burden, even anecdotally, the core Second Amendment rights of any Coloradan. They're justified by the state's compelling interest in ensuring public safety and are adequately tailored to reach that goal without unnecessary interference with the constitutional rights of anyone.

I'd be glad to entertain any questions if the Court has them. Otherwise, I thank you for your time.

THE COURT: I think I have asked my questions along the way.

Rebuttal.

REBUTTAL ARGUMENT

MR. ABBOTT: Thank you, Your Honor. I just want to briefly touch upon the issue about the legislative history. Obviously, I have not had a chance to read their cases. I will read them with interest and trust the Court will do the same.

I just wanted to note -- I wasn't quite sure -- I'm a little surprised to hear all of our cases represented as racial classification cases. Just citing just one, the *Turner Broadcasting System* case, which is a Supreme Court case from 1997, cited in our brief, an intermediate scrutiny case involving whether or not cable companies have to carry local programming. Not a racial classification case. And in that case, the Supreme Court said the question is not whether Congress as an objective matter was correct; rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress.

So I -- again, Your Honor, I'll let you read the cases, and I will read theirs as well, and you'll make your own determination of what they say.

The only other thing I would like to note is, I know there are a number of cases that generally arise in this context that are not about the legislature or the representatives of the legislature attempting to introduce new

evidence, but are, rather, about either the people in our situation attempting to introduce evidence to show why the legislature's reasoning was wrong or the court itself going outside the record to make that same kind of determination. But that's fundamentally different. It's really sort of the flip side of what we're talking about here.

I think that, Your Honor, the -- I think that the problem here is, when you read the legislative history -- and I know that you will. And I would like to point out just a couple of small places I'd like to call your attention to.

But it is -- one can raise a valid question as to why neither in the opening or closing did we really hear anything about what the legislature did. Because I believe that it's -- stripped of all the talk about level of scrutiny and all of that, what Your Honor is doing as the representative of the judicial branch in this case is, you are using the power of judicial review to look at what the legislature did.

THE COURT: No, sir. I am not. My role on this court is to determine whether the statutes are constitutional. I am not evaluating the wisdom of the law, the practicality of the law, the -- whether the law is a good law or a bad law. I am only determining whether it is constitutional. That's it.

MR. ABBOTT: I understand, Your Honor. And I didn't mean to speak quite that broadly. But you are reviewing whether or not there is a basis to determine whether these laws

are constitutional. And I certainly didn't mean to say anything beyond that.

I would simply ask -- Your Honor, I would simply suggest, as a person who has in fact read the entire legislative history, that Your Honor will find that if you read the first day, both in the House and the Senate, when witnesses actually testified, and then the day following -- and on 1224, that is February 12 and the 15th. And then for the Senate, it's March 4 and March 8. That is -- the first day is when all the witnesses testified. The second day is when the principal debate occurred. And I would just suggest, Your Honor, that you will probably find if you read all of the rest, you wouldn't learn 1 percent more, because there is not surprisingly a fair amount of repetition.

I would also suggest one other thing to Your Honor. There are numerous places -- and we quoted just one in our brief. But there are numerous places where various members of the legislature said, you know, where is the data? Where is the data that shows me, if we do this, it will save lives? Where is that data?

And at one place, one of the sponsors of the bill took up that challenge specifically and said, You say we have no data. Let me give you the data. And that is at -- if you'll give me one second here, I will tell you where it's at. It's on March -- February 15. This is in the House hearings. At

pages 97 to 100. And I'm only pointing that out because it is two and a half pages long. And in that two and a half pages, one of the sponsors of the bill takes up the challenge to describe what the data is in support of that bill. And if you read it -- if you read only that, you would say to yourself, this is surely just a summary. Surely, somewhere else in this 1,000 pages there is the detail of all of this. But I will suggest to you that there really is not. And that therein lies the problem.

Therein is the problem. That everything was rather superficial, I think, because what they were -- the reason these bills were passed -- and it's the stated purpose on day one -- is the response to the Aurora theater shooting. That was the motivation. But the motivation for a bill cannot be the whole reason for the bill. It cannot be both the means and the ends for the analysis. But what you will find when you read the legislative history, I will submit to you, is that there is very little more than that motivation.

That's all I have to say, Your Honor. Thank you.

THE COURT: Thank you. And thank you for the direction as to the record.

REBUTTAL ARGUMENT

MR. KOPEL: Your Honor, this morning you had asked about cases where there were as-applied challenges accepted by courts in situations where there had not been any specific

enforcement against the plaintiff.

THE COURT: No, I said before the statute was effective.

MR. KOPEL: Yes. *American Civil Liberties Union v. Alvarez*, Seventh Circuit, 679 F.3d, an opinion by Judge Sykes against an anti-eavesdropping statute. I believe that was a pre-enforcement and as-applied statute -- challenge.

THE COURT: Just so I have the citation correctly, 679 F.3d, what page?

MR. KOPEL: Oh, 583.

THE COURT: Thank you.

MR. KOPEL: *American Charities for Responsible Fundraising Regulation v. Pinellas County*, I believe that was pre-enforcement as well, 221 F.3d 1211, Eleventh Circuit, 2000. That was one of these both cases of facial and as applied. The plaintiffs had received a statement from the county clerk that they -- I believe they had to comply with the ordinance after they asked, Does it apply to us? And the county clerk said yes, and here are the penalties. But there hadn't been any enforcement against them.

THE COURT: So that was before enforcement. But it sounds like whatever the regulation was, was effective; otherwise, the notice wouldn't have been issued.

MR. KOPEL: I apologize for this, Your Honor. I believe it was before the -- the plaintiffs had raised this

issue before the ordinance went into effect for them.

THE COURT: Okay.

MR. KOPEL: But I will also confess, Your Honor, I am not certain about that.

THE COURT: Okay. I'll read them.

MR. KOPEL: Okay. Plaintiff -- defendant had raised the -- on -- in defendant's argument, the fear that, well, if these -- if our challenge to Section 302 is successful, then there can never be any limits on magazines and on and on, there is no upper limit. I would point out, we carefully framed this challenge to attempt to stay strictly within what we could clearly prove under *Heller*'s common use standard. This is a case about 20 rounds for handguns and 30 rounds for rifles, except for the ADA, for which we didn't set any upper limit for that special situation. But for the general public, this is only 20 and 30.

Your Honor had asked --

THE COURT: Where do I find that in the pleadings?

MR. KOPEL: Oh, in -- throughout the Complaints that we've specifically said -- I could get the Complaint, cite to the paragraphs, but that's certainly repeatedly stated in our Complaint, that it's 20 for handguns and 30 for rifles.

THE COURT: Then, could you direct me to the evidence in the record, please, that pertains to the distinction between 15 rounds and 20 rounds, and 15 rounds and 30 rounds.

MR. KOPEL: I think in the stipulations, among other things, is where the parties stipulate on the commonality and common use of these -- the magazines and the sizes I indicated.

THE COURT: Well, I understand that. That's not what I was asking. Let me see if I can ask it in a clearer way.

Where in the record is there evidence that suggests that 20 rounds or 30 rounds is essential for self-defense?

MR. KOPEL: There is no claim that it is essential for self-defense, and we don't believe that is the standard. We believe, certainly, that is the standard that defendants -- defendant has urged in a variety of forms, but we do not believe that essential for self-defense is a Second Amendment standard. If that were the situation, *Heller* would have come out the other way, because, as the opinion says, D.C. allowed people to own rifles and shotguns for self-defense. Well, there was a separate provision on self-defense, but it allowed -- D.C. allowed the ownership of rifles and shotguns. And there is no question that rifles and shotguns can be used for self-defense. Handguns are handy for self-defense, but they are not essential for self-defense.

THE COURT: I don't think we're on the same wavelength. Is there any evidence in the record that correlates 20 rounds or 30 rounds to self-defense?

MR. KOPEL: Yes. The testimony of -- the great majority of our testimony on Monday and Tuesday from plaintiffs

and other witnesses who believe that their particular firearms, whether they're Mr. Heap's 17-round Glock or, I believe, Mr. Harrell's 30-round -- 30 rounds for his AR-15, they believe that those are crucial and by far the best choices for them personally for self-defense in certain situations.

THE COURT: Was there any statistical information that -- statistical evidence that correlates 20 rounds or 30 rounds to self-defense?

MR. KOPEL: By self-defense, do you mean, pulling -- Your Honor, do you mean, how many times people pull the trigger, or do you mean what people choose to use?

THE COURT: Rounds generally mean discharged rounds or potentially discharged rounds.

MR. KOPEL: On potentially discharged rounds, yes, the stipulations take care of that, because they show the widespread choice --

THE COURT: I'm not asking about how widespread this is.

MR. KOPEL: Okay.

THE COURT: I am asking about statistical evidence that correlates 20 rounds or 30 rounds as it affects the ability to engage in self-defense.

MR. KOPEL: No, Your Honor. I think, as Dr. Kleck testified, and everyone else agreed, that data does not exist and has never been gathered by anyone.

THE COURT: Okay.

MR. KOPEL: Mr. Ayoob testified about that issue, but not in a statistical way.

THE COURT: Okay. Thank you.

MR. KOPEL: The question arose during Mr. Grove's argument about whether the First Amendment standards -- sort of a general principle in terms of the vigor of judicial protection should apply to the Second Amendment as well.

I would point Your Honor to the *Valley Forge* case from the Supreme Court in 1982, 454 U.S. 464, which is, one may not create a -- as the Court said, "We know of no principled basis upon which to create a hierarchy of constitutional values." And that actually was a case saying there is special rules for standing in First Amendment situations and -- First Amendment situations, and the Court rejected that and said that the -- all the Bill of Rights -- the sun shines on all of it equally.

THE COURT: But the Supreme Court often applies different standards of review. So let me ask you, as I did the State, on what basis should I determine the standard of review?

MR. KOPEL: The most core basis on which you should determine the standard of review, Your Honor, we'd suggest, is to follow what the Tenth Circuit instructs, including by its favorable citations and discussions of *Marzzarella*, which is you look -- I think in a very broad sense we agree with the State on this -- that you look at how close you are to the core

of the right, and the closer you are, the stricter the standard of review. That's what *Ezell* also does, which is target practice is not quite at defending your home, but it's practice towards it, so there it's not strict scrutiny. And as you get further and further out, the standard goes down, but never disappears.

So, for example, *Marzzarella* itself, it was an obliterated serial number. Do you have a right -- is the Second Amendment violated by having a gun with an obliterated serial number? The Court applied intermediate scrutiny out there. And, of course, that does not in any way limit what guns one may own. It simply means, don't have one that has the serial number removed. And there -- that's the standard we would suggest.

Now, where the facts of these -- this case fit in along that standard is a separate question, which I don't think you were asking.

THE COURT: No. But if you'd like to address it, I'd appreciate it.

MR. KOPEL: Ownership -- taking the point Your Honor expressed on -- with Mr. Grove, viewing the Second Amendment at its core, a right to keep and bear firearms for the purpose of self-defense, we see on the magazines that this is how many people choose as the best method for them to exercise that right. So we are, therefore, similar to the situation in

District of Columbia v. Heller, where many people chose to use handguns rather than rifles or shotguns for self-defense. So I'd suggest on that, we are at the core -- not at the destruction of the right, because even the D.C. handgun ban did not destroy the right to have the gun in the home for self-defense. There was a separate D.C. ordinance that prohibited unlocking one's gun in a self-defense emergency, but that was separately struck down for other reasons in *Heller*, the handgun ban was struck down on its own.

We are, in the magazine ban, we believe at the core of the prohibition of a type of arm which is very widely chosen by the American people for self-defense. And in our view, it is that choice which the Second Amendment itself protects.

On the -- 18-12-112, the acquisition of a firearm in general certainly must be no more than a half step away from the core right of keeping and bearing arms for self-defense. Because unless one can acquire a firearm, it is impossible to use it for that purpose.

There are other situations also described in here where the acquisition by borrowing, for example, may not be necessarily intimately related to lawful self-defense, taking that to be the core of the home.

So, for example, Outdoor Buddies in its program to loan firearms to families so that -- Outdoor Buddies and Colorado Youth Outdoors and their loan programs are focused on

the sporting use of arms rather than on defensive arms. So that is not as close to the core as the situation of the -- Ms. Dahlberg was talking about, about the stalking victim who wants to borrow a gun for a week and does not have the 72 hours available in her life to go down to a gun store and procure a firearm.

So the burdensome -- the standard might vary, in an as-applied context, particularly, depending on the various situations of these different plaintiffs. But certainly acquisition in general is something that is very close to the right. But, again, the fact that something is very close to the right does not forbid all regulation of it. But what it does forbid is, even if we go down to the low level of intermediate scrutiny under *Peruta*, is that --

THE COURT: That's the intermediate level.

MR. KOPEL: Yes, right. And there is some back and forth about least restrictive alternative, or whatever. But I think the practical result is the same, that if we formally apply intermediate scrutiny the way *Peruta* correctly says it should be done, then you don't -- the government act does not burden substantially more of the right than is necessary to achieve the government purpose.

And this is the -- our core problem with 18-12-112, that it does so much more. That the vast world of the loaning of firearms is -- could just as easily have a 30-day rule

rather than a 72-hour rule, and that would take care of all the concerns about sham evasions of background checks on genuine permanent private transfers of -- really, of dominion and control.

And as a practical matter, in the way that Americans do and always have used guns, there is a great difference in the burden of saying, you must go through a government process, and you must travel to a licensed firearms dealer for the act of buying a gun, of permanently acquiring one, versus borrowing a firearm. If one looks at the -- instead of the red -- I think the *Red Violin* movie, which followed the red violin's travels around the world, if we follow -- take a typical gun and follow its career over, say, 100 years before it rusts, that gun may only be sold or permanently transferred once or a few times. But it may be borrowed scores of times in the course of ordinary gun ownership and sharing in American society.

And that's why the burden on short-term loans is so important. It is far more intrusive than is the burden on -- you buy a few guns -- buy two or three guns a year, perhaps, if you're a fairly large consumer of firearms, but the loans can be frequent. That's -- that's the core of our concern. And we would therefore suggest that on the loaning issue, that gets closer to the core than does the sales issue.

And, again, we've -- as defendants recognize, we have

never challenged the concept of background checks on private sales. We do say that this burden, if it is to be a legitimate one on actual sales, must meet some form of means and scrutiny. And, certainly, it would be implausible to argue that the Second Amendment right does not include the right to buy or sell a firearm to one's friends.

And given that it does matter, that this statute actually has moved us backwards in practice. In means and scrutiny, there is a whole variety of tests and techniques that are used on various constitutional issues, but even a rational basis, unless -- if rational basis is taken seriously, then it's not even rational to have an ordinance which has been shown to move away from things. It should have moved us forward 200,000, and we actually moved backwards on this. So that cannot possibly, in our view, satisfy whatever burden applies even down to rational basis, and certainly not anything under even the weakest forms of intermediate scrutiny.

If I could briefly address the -- an issue that Your Honor had talked about with concern this morning is the, is there such a thing as a group right for firearms? And as Your Honor pointed out, normally, only one person at a time can hold a gun, so how can -- although, in contrast, I suppose -- an association of people can hold an opinion jointly at the same time.

If I might suggest as we continue these analogies,

that when petitions are being gathered, only one person can hold the petition form at a time in order to sign it. And, likewise, for any given copy of a book, only one person at a time normally can be reading that book. But both petition gathering groups and book clubs are fairly straightforwardly considered within the First Amendment rights.

Its also might be noted that in the practical operation of our firearms laws, corporations do own firearms. Now, if we're going -- and they can lose their Second Amendment rights as well -- they can lose -- whether they have Second Amendment rights, they can lose their legal ability to possess firearms for criminal convictions, just as natural persons can. That is our federal firearms -- those are our federal firearms statutes.

If a corporation doesn't have Second Amendment rights, then we come to the odd situation that back -- back to our ranchers, which maybe be organized as a corporation, the ranch corporation acquires a firearm. Well, there is nothing -- perhaps there is nothing Second Amendment involved there. But then they give the gun to the ranch hand and say, go out for a week, and go take care of the coyotes that are bothering the cattle and the sheep. They go down to the gun store, an hour away, the ranch hand takes the gun. Now he's got the gun, now he's an individual, so now this gun has a Second Amendment halo around it while he's out for a week protecting the stock from

predators.

He then comes back, returns the gun to the corporation's gun safe. He no longer has custody of it. It's back in the custody of its owner, the corporation. Do we now say the Second Amendment halo has vanished from that gun? It seems implausible to think that the Second Amendment rules for that gun are going to be changing based on whether it is being carried and possessed by a natural person or whether it is in the custody of an association, corporation, or organization. That seems to make things more complicated in terms of understanding what the Second Amendment does.

And, Your Honor, I will -- if I may briefly ask your indulgence. As I took notes on cases involving as-applied challenges, I wrote all of these down as pre-enforcement challenges. But I will also suggest to you that I can't remember them all well enough to be certain that they were -- these cases were filed before the statute went into effect. So if I might indulge you -- your patience one last time in just asking you to consider the possibility of a few other cases which I think -- I think but I'm not certain that are pre-enforcement in terms of when they were filed.

Milavetz, M-I-L-A-V-E-T-Z, 559 U.S. 229; *Holder v. Humanitarian Law Project*, also from the Supreme Court in 2010, citing the *Milavetz* case. I believe -- I think I cited the *Alvarez* case from the Seventh Circuit. The *American Charities*

case from the Eleventh Circuit; *Frazier v. Boomsma*, B-O-O-M-S-M-A, the District of Arizona in 2008; *McGuire v. Reilly*, R-E-I-L-L-Y, 230 F.Supp. 2d 189, District of Massachusetts, 2002; *Doe v. Prosecutor, Marion County*, 566 F.Supp. 2d 862, Southern District of Indiana.

And that is all. And thank you very much, Your Honor.

THE COURT: Thank you.

Does that complete the rebuttal argument for the plaintiffs?

MR. COLIN: It does, Your Honor.

THE COURT: Thank you.

Thank you, counsel, for your presentation, both your argument orally and in writing, the presentation of the evidence. It has been a long two weeks, but it has been very interesting along the way. And I thank you for narrowing the issues, presenting the evidence pertinent to them. I'll take the matter under advisement, and I'll be issuing a written opinion.

We'll stand in recess.

(Recess at 3:34 p.m.)

INDEX

EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
49		1831			
141-147		1831			

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 23rd day of June, 2014.

s/Therese Lindblom

_____

Therese Lindblom,CSR,RMR,CRR