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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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

JOHN B. COOKE, SHERIFF OF WELD COUNTY, COLORADO, et al.,  
Plaintiffs,

vs.

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

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**REPORTER'S TRANSCRIPT**  
MOTION FOR PRELIMINARY INJUNCTION

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Proceedings before the HONORABLE MARCIA S. KRIEGER,  
Judge, United States District Court for the District of  
Colorado, commencing at 9:05 a.m., on the 10th day of July,  
2013, in Courtroom A901, United States Courthouse, Denver,  
Colorado.

THERESE LINDBLOM, Official Reporter  
901 19th Street, Denver, Colorado 80294  
Proceedings Reported by Mechanical Stenography  
Transcription Produced via Computer

**APPEARANCES**

1  
2           DAVID BENJAMIN KOPEL, Attorney at Law, Independence  
3 Institute, 13952 Denver West Parkway, #400, Golden, Colorado,  
4 80401, appearing for the Sheriff Plaintiffs.

5           RICHARD A. WESTFALL, Attorney at Law, Hale Westfall,  
6 LLP, 1445 Market Street, Suite 300, Denver, Colorado, 80202,  
7 appearing for Colorado Outfitters Association, et al.

8           MARC F. COLIN, Attorney at Law, Bruno Colin & Lowe  
9 P.C., 1999 Broadway, Suite 3100, Denver, Colorado, 80202,  
10 appearing for the USA Liberty Arms, et al.

11           ANTHONY JOHN FABIAN, Attorney at Law, Anthony J.  
12 Fabian, P.C., 510 Wilcox Street, #C, Castle Rock, CO 80104,  
13 appearing for Colorado State Shooting Association.

14           DANIEL D. DOMENICO, Solicitor General, Colorado  
15 Attorney General's Office, 1300 Broadway, Denver, Colorado,  
16 80203, appearing for the Defendant.

17           JONATHAN P. FERRO, Assistant Solicitor General,  
18 Colorado Attorney General's Office, 1300 Broadway, Denver,  
19 Colorado, 80203, appearing for the Defendant.

20           KATHLEEN SPALDING and MATTHEW D. GROVE, Assistant  
21 Attorneys General, Colorado Attorney General's Office, 1300  
22 Broadway, Denver, Colorado, 80203, appearing for the Defendant.

23           DAVID C. BLAKE, Deputy Attorney General, Colorado  
24 Attorney General's Office, 1300 Broadway, Denver, Colorado,  
25 80203, appearing for the Defendant.

**P R O C E E D I N G S**

1  
2           *THE COURT:* Court is convened today in Case No.  
3 13-cv-1300, which is encaptioned in abbreviated form as Cooke  
4 v. Hickenlooper.

5           Could I have entries of appearance, please.

6           *MR. WESTFALL:* Good morning, Your Honor. Richard  
7 Westfall of Hale Westfall appearing today on behalf of a group  
8 of the plaintiffs.

9           *THE COURT:* Good morning and welcome.

10          *MR. KOPEL:* Good morning, Your Honor. David Kopel on  
11 behalf of 55 sheriffs and David Strumillo.

12          *THE COURT:* Good morning and welcome.

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

16          *THE COURT:* Good morning and welcome.

17          *MR. COLIN:* Good morning, Your Honor. Marc Colin on  
18 behalf of the nine federally licensed firearms dealer  
19 plaintiffs.

20          *THE COURT:* Good morning, welcome.

21          *MR. DOMENICO:* Good morning, Your Honor. Dan  
22 Domenico, Solicitor General, appearing on behalf of Governor  
23 Hickenlooper. I'm joined by Assistant Attorney General Kit  
24 Spalding, Deputy Attorney General David Blake, Assistant  
25 Attorney General Matt Grove, and Assistant Solicitor General

1 John Fero, all representing the Governor.

2 *THE COURT:* Good morning and welcome.

3 This morning's hearing was set down to address a  
4 motion for preliminary injunction, that motion having been  
5 filed at Docket No. --

6 Ms. Glover, can you help me? I'm looking.

7 *COURTROOM DEPUTY:* I think it's No. 29.

8 *THE COURT:* I think so too. Docket No. 29.

9 Last evening at about 9:30, the parties filed a  
10 proposed stipulated preliminary injunction found at Docket No.  
11 56-1.

12 I've had an opportunity to review the stipulated  
13 preliminary injunction. And while it reflects that the parties  
14 have resolved their dispute for purposes of interpretation of  
15 two portions of one of the statutes that is at issue in this  
16 case, I do not believe this court can enter a preliminary  
17 injunction as requested.

18 That is for several reasons. First of all, I've had  
19 the opportunity to study the briefing that has been submitted.  
20 And in doing so, I reviewed a number of applicable cases, some  
21 cited by the parties, some that I've reviewed upon my own  
22 research. A number of these pertain to standing. And while  
23 the parties here agree that some plaintiff has standing for  
24 purposes of the case, a separate standing requirement is  
25 applicable for a request for prospective injunctive relief with

1 regard to a penal statute.

2 I do not have the factual showing in order to find  
3 standing of any plaintiff for purposes of that relief. And as  
4 a consequence, I cannot determine that there is a case or  
5 controversy that falls within the jurisdiction of this Article  
6 III court. That does not mean that there is not a party that  
7 has standing for purposes of the lawsuit as a whole, only as to  
8 the motion for preliminary injunction.

9 The second problem that I run into is that paragraph 3  
10 of the proposed stipulated preliminary injunction reflects the  
11 parties' agreement that the technical guidance memorandum  
12 prepared for and at the direction of the Governor by the  
13 Attorney General is the official written interpretation of the  
14 applicable statute and that it is binding and has the force of  
15 law. That being the case, there is nothing for this court to  
16 enjoin.

17 Finally, looking at paragraph 4 of the stipulation,  
18 the terms of the stipulation provide that "the Court hereby  
19 issues a preliminary injunction binding the Governor and any of  
20 his officers, agents, servants, employees, attorneys as  
21 follows."

22 To the extent that the subparagraphs reflect the terms  
23 of the technical guidance, it's already the law of the state,  
24 and there is nothing for me to enjoin. To the extent that it  
25 deviates from the technical guidance, I understand the

1 agreement between the parties to be that the Governor will  
2 direct amendment of the technical guidance in accordance with  
3 the parties' agreement.

4           That takes me to the question of counsel as to whether  
5 you would prefer me to deny the motion for preliminary  
6 injunction or whether you would prefer to withdraw it, there  
7 being no pending dispute between the parties as originally  
8 styled in Docket No. 29.

9           What is your pleasure?

10           *MR. WESTFALL:* Your Honor, as of yesterday, we were  
11 prepared to put on our full case. We had our witnesses  
12 prepared and ready to go. We had extensive negotiations. It  
13 went well into the evening last night --

14           *THE COURT:* I gather.

15           *MR. WESTFALL:* -- that reached the stipulation we  
16 presented to the Court. If I understood the Court's questions  
17 correctly, the choices are -- neither one very good from the  
18 plaintiffs' perspective -- either withdrawing or having our  
19 motion denied. I would respectfully request, if I think I  
20 understand where the Court is coming from, to allow us to do  
21 further briefing and submit affidavits. And we would be happy  
22 to do so in very prompt short order.

23           *THE COURT:* Well, I don't understand why that would be  
24 necessary. You've reached an agreement.

25           *MR. WESTFALL:* Because the technical guidance --

1 because there are two specific paragraphs within the proposed  
2 injunction that has been presented to this court that we  
3 believe fill the gap. We were prepared yesterday to present to  
4 the Court that there was still a delta between the technical  
5 guidance and what we believed to be proper injunctive relief to  
6 protect our clients.

7           *THE COURT:* Right. How the statute would be enforced.  
8 And I understand the Governor is now agreeing as to how the  
9 statute will be enforced.

10           *MR. WESTFALL:* It would have to be enforced, based  
11 upon the plaintiffs' perspective, based upon this court  
12 entering the injunction.

13           *THE COURT:* Well, let's walk down that path for just a  
14 minute.

15           Let's assume that I entered this proposed injunction.  
16 Let's assume I had jurisdiction to do it because there was  
17 someone who had standing to request this particular kind of  
18 relief, and let's assume it's issued.

19           How do you see this court enforcing the injunction?

20           *MR. WESTFALL:* The Governor is appearing -- and that's  
21 why I believe that there is the prefatory language that is in  
22 the earlier part of the proposed stipulation. The Governor is  
23 appearing not just as the Governor and as the chief executive,  
24 but represents the embodiment of the state. We have case law  
25 on that that we've already previously presented to this court.

1           As a result of that, the Court is declaring that the  
2 statute, House Bill 1224, as interpreted in the negotiated  
3 language that we agreed to last night, must be construed in the  
4 following manner. That, we believe from plaintiffs'  
5 perspective, gets us to where we need to be. And that if in  
6 fact any local jurisdiction -- I mean, certainly, it's binding  
7 on all state agencies, there is no question about that, the  
8 state patrol.

9           With respect to local jurisdictions -- we've done a  
10 lot of thinking and chewing on that. And we believe to keep  
11 this case streamlined and simple, that that binding  
12 interpretation by the Governor in a stipulated fashion, as an  
13 order entered by this court, would be the interpretation that  
14 every -- even though the technical guidance originally said  
15 it's not binding, that that non-binding quality becomes binding  
16 once this Court exercises its jurisdiction and enters the  
17 injunctive relief.

18           *THE COURT:* What jurisdiction does this court have  
19 over local jurisdictions if they're not already bound by the  
20 Governor?

21           *MR. WESTFALL:* This court -- the jurisdiction would  
22 naturally flow through, we believe, to the local jurisdiction.

23           *THE COURT:* Right. So if the Governor says, this is  
24 how it's going to be enforced, what does an injunction by this  
25 court add to that?

1           *MR. WESTFALL:* If this court doesn't enter the  
2 injunction, then the critical language that we agreed to last  
3 night will not have force of law.

4           *THE COURT:* Well, I understand the Governor to have  
5 agreed to that language, and that means that the Governor is  
6 going to direct enforcement in accordance with these terms.

7           *MR. WESTFALL:* If the Court's -- I'm trying to  
8 understand the Court's concern. If the Court's concern is that  
9 the Court still does not have a proper proffer on the basis to  
10 say that injunctive relief is appropriate to fill this gap  
11 between what the Governor has agreed to and what we've  
12 negotiated last night, we would be happy to submit additional  
13 proffer to this court.

14           *THE COURT:* That's not the problem. We've got two  
15 problems. One is standing, which you haven't yet addressed. I  
16 still do not have a person who falls within the definition of a  
17 person with standing for prospective relief to enjoin  
18 pre-enforcement of a penal statute, number one. Without that,  
19 I can't enter a preliminary injunction, even on the agreement  
20 of the parties, because you can't consent to jurisdiction.

21           Secondly, this particular injunction simply says that  
22 the Governor has agreed that, one, the technical guidance has  
23 the force and effect of law, and, two, that the additional  
24 provisions that you put in here are going to be the guidance  
25 for enforcement. So why do you need the Court to enter an

1 injunction? If that's what the Governor is saying, and that is  
2 what the Governor is going to direct law enforcement officers  
3 to do, why do you need an injunction?

4 *MR. WESTFALL:* See if I can collect my thoughts on the  
5 second point by answering the first point first. And maybe my  
6 co-counsel can help me out here.

7 With respect to standing, two of the people that we  
8 were to have testify today, David Bayne and Elisa Dahlberg,  
9 would have clearly individual standing on both issues presented  
10 on the preliminary injunction, both the design to be readily  
11 converted language and the continuous possession issue. And  
12 I'd be prepared to make a proffer to the Court today or submit  
13 a supplemental briefing to show that those two people alone,  
14 who were prepared to testify today, have standing for the Court  
15 to issue the injunctive relief that is being requested.

16 With respect to the second point, we already have had  
17 an issue in discussion, wanting to make sure that the  
18 Governor's power is the embodiment of the state in defending  
19 against our motion for preliminary injunction and our request  
20 for injunctive relief. The Governor is saying, yes, this is  
21 the proper interpretation. But to have that in fact binding,  
22 which is to be done in a manner to protect the Second Amendment  
23 rights of our plaintiffs and the Fourteenth Amendment rights of  
24 our plaintiffs, that believe that injunctive relief should be  
25 entered to ensure, so that the power of this federal court

1 premised upon the Second Amendment and the Fourteenth Amendment  
2 of the Constitution is saying, these provisions must be  
3 interpreted in the manner in which we agreed to last night.

4           And I think that's a lot more legal and enforceable  
5 than simply the Governor's representation.

6           And co-counsel, Mr. Kopel, would obviously like to  
7 address the Court as well.

8           *THE COURT:* I see.

9           *MR. KOPEL:* Thank you, Your Honor. I think the  
10 difference between the technical guidance being amended to  
11 reflect last night's agreement and an injunction from this  
12 court -- if a person were prosecuted in Denver, arrested by the  
13 Denver Police Department and then prosecuted by the Denver  
14 District Attorney's Office, the function of the technical  
15 guidance under Colorado state law is that that defendant would  
16 have an affirmative defense of mistake of law. That is the  
17 legal effect under the Colorado Revised Statutes of the  
18 technical guidance.

19           In contrast, we believe that an injunction from this  
20 court by enjoining the Governor himself, as Mr. Westfall has  
21 said, as the embodiment of the state law in this case, would  
22 have necessarily a binding effect on the application of that  
23 law, directly on all law enforcement within the state of  
24 Colorado.

25           *THE COURT:* Well, let's walk through the practical

1 effect. Let's use that hypothetical.

2           Someone is arrested in a jurisdiction. And the arrest  
3 is not the significant point; it is the prosecution of a  
4 violation of this law that becomes the operative issue. So the  
5 district attorney in the appropriate -- or county attorney in  
6 the appropriate location brings charges under the statute. The  
7 Governor has issued a technical guidance memorandum consistent  
8 with these terms, or agrees that it should be interpreted  
9 consistent with the terms you've just given me. Why do you  
10 need an injunction? How does an injunction in this case help  
11 that person who has been arrested, who is being prosecuted?

12           *MR. KOPEL:* Because in that case, Your Honor, without  
13 the injunction, the district attorney is free to say, well,  
14 yes, when this case goes forward, the person -- the defendant  
15 can raise the issue of mistake of law so he will maybe get off  
16 in this case, but I, the district attorney, say that the  
17 technical guidance is incorrect and is not the correct  
18 interpretation of the law, although I recognize that immunizes  
19 in this particular case. But going forward, the district  
20 attorney could argue that the technical guidance is wrong, and,  
21 for example, magazines with removable base plates are in fact  
22 banned.

23           *THE COURT:* Sounds like you don't trust the Governor.

24           *MR. KOPEL:* We believe that the district attorney in  
25 this hypothetical is bound by an injunction and may not deviate

1 from that to even initiate the prosecution in the first place,  
2 as opposed to having the option of initiating a prosecution and  
3 then the defendant raises the issue of mistake of law.  
4 Because, of course, mistake of law is a mistake. It's saying,  
5 I was wrong about the law.

6 *THE COURT:* Mr. Kopel, the DA is not a party here in  
7 this lawsuit; and I'm not able to do anything about that  
8 prosecution even if an injunction is issued. So there really  
9 is no difference in an injunction being issued in this case and  
10 relying on the agreement of Governor Hickenlooper in accordance  
11 with the stipulation that you've entered.

12 *MR. KOPEL:* Your Honor, if I could ask one -- on  
13 standing, would I be correct in presuming that your view on the  
14 criminal standing, standing in general for all parties in this  
15 preliminary injunction, is based on following the -- in  
16 accordance with the D.C. Circuit's interpretation of standing?

17 *THE COURT:* I'm guided by Tenth Circuit law.

18 *MR. KOPEL:* Okay.

19 *THE COURT:* And Tenth Circuit law includes a number of  
20 cases which you've not addressed in your briefing. For  
21 instance, *Diaz v. The City and County of Denver*, at 567 F.3d  
22 1169, a Tenth Circuit 2009 case.

23 *MR. KOPEL:* Thank you very much, Your Honor.

24 *THE COURT:* All right. Let me hear from the Solicitor  
25 General.

1           *MR. DOMENICO:* Yes, Your Honor.

2           Our view on standing, I believe, was that there was a  
3 live case or controversy because the plaintiffs had alleged,  
4 including for purposes of the injunction, that they were  
5 engaging or were going to engage in conduct that under their  
6 interpretation of the statute -- or at least under one  
7 interpretation of the statute, their view was, they would be  
8 subject to prosecution. We, I think, viewed that as adequate  
9 to provide the Court with jurisdiction.

10           *THE COURT:* For purposes of the case or purposes of  
11 being --

12           *MR. DOMENICO:* For purposes of prospective -- both --  
13 I mean, the entire case, I believe, is prospective injunctive  
14 relief, whether it's preliminary or permanent injunctive  
15 relief, seeking to invalidate the statute, declare the statute  
16 unconstitutional.

17           The second question I think is, we've been willing  
18 to -- we have suggested previously that the guidance is as  
19 binding on us as anything else is going to be --

20           *THE COURT:* Are there differences between the guidance  
21 and what is contained in the subparagraphs of paragraph 4 in  
22 this --

23           *MR. DOMENICO:* Our view is that they are consistent  
24 with one another. I think you might view it as, the new  
25 paragraph sort of maybe put meat on the bones of the original

1 guidance. We don't view them as inconsistent at all. Our view  
2 is that they're perfectly consistent with what the guidance was  
3 saying. But they do add, I think, some substance to it that  
4 has been important to the plaintiffs.

5 *THE COURT:* And is the Governor prepared or -- to  
6 amend or extend the technical guidance to incorporate this  
7 clarification?

8 *MR. DOMENICO:* I'm not sure we have had the actual  
9 discussion with the Governor, with our client, about that; but  
10 I don't see why we would not be.

11 *THE COURT:* Seems to me, if you have authority to  
12 enter into this, you have authority to commit that the Governor  
13 would stand behind this.

14 *MR. DOMENICO:* I would think we would do that.

15 *THE COURT:* All right.

16 Now, tell me how you think an injunction is necessary  
17 in light of the agreement that the technical guidance will be  
18 enforced in accordance with what you've written down.

19 *MR. DOMENICO:* Well, we only represent the Governor.  
20 We can't -- we can't speak for DAs or police officers. And so  
21 our position -- we did read the *ACLU v. Johnson* case that the  
22 plaintiff cited for the proposition that an injunction, even  
23 against the Governor, would be effectively binding as if --  
24 that's a Tenth Circuit case.

25 *THE COURT:* Uh-huh.

1           *MR. DOMENICO:* Would effectively be the same as if the  
2 DAs themselves were here. So under that case, it seems that  
3 there may be some additional comfort that the plaintiffs would  
4 have from an injunction as opposed to simply the guidance.

5           As far as the state and the law enforcement apparatus  
6 of the state that we represent, I think we are in the same  
7 position. We intend for them to be bound by the guidance. I  
8 mean, the -- there is perhaps a difference between an  
9 affirmative defense and being able to come in and ask you to  
10 hold someone in contempt --

11           *THE COURT:* Who would I be holding in contempt?

12           *MR. DOMENICO:* Well, we don't intend to do anything  
13 contrary to the guidance, so it would I hope not be any state  
14 law enforcement officers. And, again, I don't represent DAs or  
15 police departments.

16           *THE COURT:* I understand you don't represent them.  
17 But I don't have any more authority over them than the Governor  
18 has over them.

19           *MR. DOMENICO:* I agree with that.

20           *THE COURT:* Okay.

21           Anything else you want me to know?

22           *MR. DOMENICO:* No, ma'am.

23           *THE COURT:* Thank you.

24           Anything else anybody else wants me to know?

25           *MR. COLIN:* If I may, Your Honor.

1           *THE COURT:* Sure. Would you go to the lectern.

2           *MR. COLIN:* I will.

3           Your Honor, I suspect that the licensed firearms  
4 dealers have, perhaps, the most obvious prospective standing in  
5 these issues. There are -- they're in the awkward position, a  
6 Hobson's choice, if you will, of being placed in a circumstance  
7 where there is uncertainty regarding a particular statute, and  
8 their choice is to either risk criminal prosecution by selling  
9 items that they are prohibited from selling or losing their  
10 businesses because they stopped selling items because of the  
11 uncertainty of the statute. And so that was one of the areas  
12 in which we were prepared to establish standing, had we  
13 proceeded today.

14           I would ask if we could have, perhaps, a short recess  
15 so that counsel can confer as to the appropriate response to  
16 the Court's question.

17           *THE COURT:* I'm happy to take a recess if you'd like  
18 to confer, and I'm happy to reconvene and take a proffer as to  
19 standing. I don't think that's going to resolve what is before  
20 me today, but I'm happy to do that if you'd like.

21           *MR. COLIN:* Okay.

22           *THE COURT:* It's 9:30 right now, 9:31, according to  
23 the court clock. How long would you like for a recess?

24           *MR. COLIN:* 15 minutes?

25           *THE COURT:* All right. We'll stand in recess for 15

1 minutes.

2 (Recess from 9:31 a.m. to 9:52 a.m.)

3 *THE COURT:* Counsel.

4 *MR. WESTFALL:* Your Honor.

5 We have talked among ourselves, and we hope we have a  
6 proper resolution that would hopefully be consistent with the  
7 Court's concerns.

8 The Attorney General has agreed to redraft the  
9 technical guidance along the lines with the agreement that we  
10 had reached last night. When we have that in hand, we will  
11 jointly file a motion to withdraw the motion for preliminary  
12 injunction.

13 *THE COURT:* I think, actually, the motion that you  
14 filed was entitled that, motion to withdraw the motion for  
15 preliminary injunction. Do you just want me to grant that?

16 *MR. WESTFALL:* We would want -- we would like to  
17 withdraw that motion and refile a slightly modified motion to  
18 withdraw, if that would be acceptable to the Court.

19 *THE COURT:* Sure.

20 Okay. So your current motion is Docket No. 56. It's  
21 a request for withdrawal of the plaintiffs' motion for  
22 preliminary injunction and a stipulated motion for preliminary  
23 injunction. Do you want to withdraw that, right?

24 *MR. WESTFALL:* Yes, Your Honor.

25 *THE COURT:* Okay. Is the Governor in agreement with

1 that?

2 *MR. DOMENICO:* Yes, Your Honor.

3 *THE COURT:* All right. And it sounds like what you  
4 are going to be doing then is filing a motion requesting what?

5 *MR. WESTFALL:* We would be merely asking for a motion  
6 for the Court to grant the motion, the revised motion that we  
7 intend to file.

8 *THE COURT:* What's that motion going to request?

9 *MR. WESTFALL:* The motion is merely going to say,  
10 based upon the revised technical guidance that -- with the  
11 terms that have been modified by the -- by the agreement of the  
12 parties that will be attached to our revised motion to  
13 withdraw, we will merely ask that the Court grant that motion  
14 to withdraw.

15 *THE COURT:* Okay. I understand.

16 I think based on that, we can vacate the hearing today  
17 on Docket No. 29, which is the motion for preliminary  
18 injunction, and Docket 56 is withdrawn.

19 There will be no hearing on the motion for preliminary  
20 injunction, the parties having resolved that matter by  
21 settlement and based upon their representation that the  
22 technical guidance memorandum, one, will govern enforcement of  
23 the statute, and, two, will be amended to cover the terms that  
24 the parties have agreed to.

25 *MR. WESTFALL:* Yes.

