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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.

REPORTER'S TRANSCRIPT
MOTION FOR PRELIMINARY INJUNCTION

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.

