

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
LAW AND MOTION HEARING

1 Proceedings before the HONORABLE MARCIA S. KRIEGER,
2 Judge, United States District Court for the District of
3 Colorado, commencing at 3:06 p.m., on the 19th day of December,
4 2013, in Courtroom A901, United States Courthouse, Denver,
5 Colorado.

6
7 **APPEARANCES**

8 PETER J. KRUMHOLZ, Attorney at Law, Hale Westfall,
9 LLP, 1600 Stout Street, Suite 500, Denver, Colorado, 80202,
10 appearing for the Plaintiffs.

11 DOUGLAS ABBOTT, Attorney at Law, Holland & Hart, LLP,
12 555 17th Street, Suite 3200, Denver, Colorado, 80202, appearing
13 for the Plaintiffs.

14 JONATHON MICHAEL WATSON, Attorney at Law, Sherman &
15 Howard, 633 17th Street, Suite 3000, Denver, Colorado, 80202,
16 appearing for the Plaintiffs.

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

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

23 MATTHEW DAVID GROVE, MOLLY ALLEN MOATS, JOHN TIEN YAU
24 LEE, KATHLEEN L. SPALDING, and STEPHANIE LINDQUIST SCOVILLE,
25 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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THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
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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. This is encaptioned, Colorado Outfitters
4 Association, et al. v. John W. Hickenlooper.

5 Could I have entries of appearance, please.

6 *MR. KRUMHOLZ:* Good afternoon, Your Honor. Peter
7 Krumholz on behalf of David Bayne, Dylan Harrell, Colorado Farm
8 Bureau, Colorado Outfitters Association, Colorado Youth
9 Outdoors, Outdoor Buddies, Inc., and Women for Concealed Carry.

10 *THE COURT:* Good afternoon. Welcome.

11 *MR. KOPEL:* Good afternoon, Your Honor. David Kopel
12 on behalf of David Strumillo and 55 individual law enforcement
13 officers in their personal capacities, who happen to be
14 sheriffs.

15 *THE COURT:* Good afternoon and welcome.

16 *MR. KOPEL:* Thank you.

17 *MR. WATSON:* Good afternoon, Judge. Jonathon Watson
18 on behalf of the federally licensed firearms dealers.

19 *THE COURT:* Good afternoon and welcome.

20 *MR. ABBOTT:* Doug Abbott on behalf of Magpul and the
21 National Shooting Sports Foundation.

22 *THE COURT:* Good afternoon and welcome.

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

1 *THE COURT:* Good afternoon and welcome.

2 *MR. GROVE:* Matthew Grove, Your Honor. With me at
3 counsel table are Molly Moats, John Lee, Kathleen Spalding,
4 Stephanie Scoville on behalf of the Governor.

5 *THE COURT:* Good afternoon and welcome.

6 I set this matter down on the law and motion calendar
7 at the time that Docket No. 97, motion for extension of time to
8 file dispositive motions, was filed; and there has been a lot
9 of activity since the filing of that particular motion. In
10 particular, there has been filed a motion for joinder and for
11 leave to file a Third Amended Complaint, briefing with regard
12 to that in response, briefing in reply. And the reply suggests
13 that the plaintiffs -- actually, that the clients of Mr. Kopel
14 seek to join and that -- I guess all the plaintiffs seek to
15 amend the Complaint with yet another version of an Amended
16 Complaint, what I would call a Fourth Amended Complaint.

17 Do I correctly understand where we are as far as
18 posture on that particular motion?

19 *MR. KOPEL:* Well -- Your Honor, the motion for joinder
20 and then the filing of exhibits, a proposed Third Amended
21 Complaint, and then of yesterday, replacing that with the
22 Fourth Amended Complaint was filed by me on behalf of my
23 clients. We have -- that is our filing. And the other parties
24 in the case may wish to state their own positions on that, but
25 that was a filing by me on behalf of my clients.

1 *THE COURT:* All right. Raises an interesting
2 procedural question.

3 *MR. KOPEL:* It does, Your Honor.

4 *THE COURT:* Ordinarily, when there is a circumstance
5 such as this, a motion for joinder is not the preferred
6 mechanism. It is a motion to intervene. But here, it doesn't
7 make any difference whether it's a motion to intervene or a
8 motion to join. I understand that your clients wish to
9 participate in this litigation to assert individual claims and
10 that you would like to be able to have those claims reflected
11 in a form of Complaint which is and has been tendered as the
12 Fourth Amended Complaint.

13 Is that correct?

14 *MR. KOPEL:* Exactly, Your Honor.

15 *THE COURT:* All right. Thank you.

16 Then let me hear from those parties who wish to
17 address that motion. The reply, essentially, becomes a new
18 motion. I've not heard from the defendants with regard to
19 that -- I should say the defendant.

20 *MR. GROVE:* One defendant, many attorneys.

21 *THE COURT:* That's it. You had me confused.

22 *MR. GROVE:* Matthew Grove, Your Honor, on behalf of
23 the Governor.

24 Mr. Kopel and I have had a couple of discussions over
25 the last couple of days, and that's what resulted in his filing

1 what has been now been termed the Fourth Amended Complaint.
2 Many of the arguments that we've raised in our response to the
3 proposed Third Amended Complaint, which is Docket No. 112, is
4 our response, apply to the Fourth Amended Complaint as well.

5 There are some additional concerns that I'd like to
6 raise. Let me just start off by saying, the Governor opposes,
7 as we did the Third Amended Complaint, the acceptance of the
8 Fourth Amended Complaint and the sheriffs' motion for joinder
9 and to amend the Fourth Amended Complaint.

10 There are a number of reasons for this. The primary
11 one is that we don't believe that under Rule 16 the plaintiffs
12 have shown good cause to amend. And under Rule 15, which is
13 the second step of the analysis, we don't believe that -- well,
14 we believe that an amendment at this point would be futile,
15 particularly with respect to House Bill 1224, which is the
16 large-capacity magazine restriction.

17 There are questions in addition with respect to 1229,
18 which is the universal background check provision, as to
19 whether the plaintiffs' Complaint, Fourth Amended Complaint,
20 states adequate allegations in order to nudge it across the
21 line from plausible under the *Twombly* and *Iqbal* test. And so
22 that's something that -- again, this has all moved very
23 quickly, as Your Honor knows, that we're still processing. But
24 at this point, that's our position. Most of it is laid out in
25 the response to the proposed Third Amended Complaint.

1 *THE COURT:* Anything else you'd like me to consider?

2 *MR. GROVE:* Not with respect to our opposition. If
3 the Court has -- there are some other issues that I think we
4 should probably discuss today, but we can move on from that.

5 *THE COURT:* I'm just concerned with this motion at
6 this juncture.

7 *MR. GROVE:* Nothing else with respect to this motion.

8 *THE COURT:* All right. Thank you.

9 Any of the other plaintiffs want to address this?

10 *MR. KRUMHOLZ:* Your Honor, on behalf of David --

11 *THE COURT:* Would you go to the lectern, please.

12 *MR. KRUMHOLZ:* Thank you, Judge.

13 With respect to David Bayne, Dylan Harrell, and the
14 nonprofit plaintiffs, we do not oppose Mr. Kopel's motion.

15 *THE COURT:* Thank you.

16 *MR. FABIAN:* Neither is there an objection from
17 Colorado State Shooting Association or family -- Hamilton
18 Family Enterprises.

19 *THE COURT:* Thank you.

20 *MR. ABBOTT:* Plaintiff Magpul does not object to the
21 motion. Plaintiff Shooting Sports Foundation takes no
22 position.

23 *THE COURT:* Thank you.

24 *MR. WATSON:* The plaintiff federally licensed firearms
25 dealers take no position on the motion either.

1 *THE COURT:* Thank you.

2 Is there any further argument you'd like to make,
3 Mr. Kopel, on behalf of your clients?

4 *MR. KOPEL:* Yes, Your Honor.

5 Your Honor, granting the Fourth Amended Complaint
6 would promote judicial economy in two important ways. First of
7 all, it would prevent the -- would obviate the need for the
8 filing of an entirely new Complaint by these 55 individuals,
9 which would, of course, result in another case and a whole
10 other situation starting up. Having their concerns resolved in
11 this single case, in which they have been participating for
12 over half a year, would, therefore, be substantially
13 instructive to judicial economy.

14 The Fourth Amended Complaint would also move this
15 particular case forward. The claims that are brought forward
16 in the Fourth Amended Complaint are the same kind of individual
17 rights of individual firearms owners that have been at issue in
18 this case all along and on which extensive discovery and
19 briefing has taken place.

20 As was stated in the December 11 initial motion for
21 leave to file the Amended Complaint, there will be no new
22 witnesses in this case. The six sheriffs who were proposed as
23 witnesses were deposed extensively already. They were deposed
24 quite extensively, not only about their official capacity
25 issues, but also about their individual capacity issues, based

1 on the understanding that the lawyers on both sides had at the
2 time. So as Exhibit A shows, they have been asked all about
3 their particular individual firearms they personally own,
4 particular magazines they personally own, how much they go
5 hunting, how far they go target shooting. Really, the full
6 scope of their individual gun ownership was up for deposition
7 and has been deposed. Accordingly, no new discovery is
8 necessary in this case.

9 We -- in the Fourth Amended Complaint, pleaded as
10 concisely as possible to address all of defendant's express
11 concerns about the Third Amended Complaint raising new issues,
12 we don't believe that that Third Amended Complaint raised
13 anything new. As the citations in the Complaint itself to the
14 discovery showed, these are all issues that have already been
15 on the table. But we certainly don't need the third -- we
16 don't need any new complaint to continue to bring those issues
17 forward. Those are well established by the Second Amended
18 Complaint back of July 1.

19 The Governor's response filed yesterday said that he
20 would support a simple amendment which simply brought the
21 sheriffs into the case as ordinary individuals with individual
22 rights. We have done everything that was asked by him to do
23 so, to take out everything he objected to in the Third Amended
24 Complaint and radically reduce the content for what is left in
25 the Fourth Amended Complaint. We've done that conscientiously,

1 in the spirit of expedition and cooperation. And we believe
2 that the Governor's offer in his filing yesterday, that a
3 simple amendment would be supported should be accepted by this
4 court.

5 *THE COURT:* Thank you.

6 *MR. KOPEL:* Thank you, Your Honor.

7 *THE COURT:* Docket No. 104, the motion for joinder and
8 leave to file an Amended Complaint, has by its -- by the
9 briefing become a motion for joinder and leave to file a Fourth
10 Amended Complaint.

11 Let me start with an observation that evolution of the
12 parties' positions during the course of briefing is not the
13 best way to frame up an issue for determination. Our local
14 rule requiring conference between the parties expects and
15 anticipates that all of the conversation between the parties
16 will occur before any pleading is filed, and that way it is
17 clear what the issues are to be addressed at the time of the
18 hearing or ruling on the motion.

19 So I urge you, counsel, in the future, please do not
20 attempt to satisfy your Rule 7.1 required disclosure by simply
21 saying, we talked to the other side. Complete your
22 conversation. Review the other parties' pleadings so that
23 there is a clear framework for what will be determined here in
24 the courtroom.

25 As to the amended motion, I grant it in part, and I

1 deny it in part.

2 I recognize that from the plaintiffs' perspective,
3 there is value to having many people who hold important
4 positions of public office being named as plaintiffs in this
5 case. It attracts attention to their claims, and it helps
6 shape the public debate. But from a legal perspective, those
7 things are irrelevant. The symbolic figure of Lady Justice
8 wears a blindfold to avoid consideration of who the parties are
9 and how many of them agree with a particular perspective.
10 Instead of the court of public opinion, this is a court where
11 the determination will be made on the evidence and the law, not
12 who participates in the lawsuit.

13 Simply because a person holds public office or has
14 firmly held views on a matter does not entitle them to
15 participate in a lawsuit. In order to have legal standing,
16 they must have a right that they are about to lose. In a case
17 like this, a case that seeks to prospectively prevent the
18 application of a criminal statute, that usually means they are
19 likely to be subject to criminal prosecution in the future. It
20 can also mean that they are likely to lose some other
21 recognized right or property interest by enforcement of the
22 law. Thus, what is necessary here is for a plaintiff to
23 establish that he or she is under a real and immediate threat
24 of being injured in the future.

25 With regard to the statute prohibiting large-capacity

1 magazines, there is an exception to enforcement against
2 individuals who are employees of a department or an agency of
3 this state; and that covers all of the sheriffs so long as they
4 are sheriffs. There are, however, 11 individuals who state
5 that they will be retiring from law enforcement within roughly
6 the next year. These individuals are Mr. John Cooke, Mr. Ken
7 Putnam, Mr. James Faull, Mr. Larry Kuntz, Mr. Fred Jobe,
8 Mr. Donald Krueger, Mr. Stan Hilkey, Mr. Dave Strong, Mr. Peter
9 Gonzalez, Ms. Sue Kurtz, and Mr. Douglas Darr.

10 Their ability to participate in this lawsuit arises
11 from a potential loss that could arise from enforcement against
12 them after they cease to fall within the exception to the
13 statute.

14 Now, truly, it is January of 2015 that is the earliest
15 time period at which it appears from this Complaint that they
16 would fall victim, potentially, to such a law; but I find that
17 to be imminent enough to allow them to participate in this
18 action.

19 As to the other sheriffs, their joinder in this action
20 and their motion to amend must be denied, because it is futile.
21 They do not have current standing. There has been no showing
22 with regard to the large-capacity magazine statute that they
23 are likely to lose a right or property interest or be subject
24 to prosecution.

25 And as to the statute requiring background checks, the

1 Amended Complaint offers only a singular paragraph that in
2 substance attempts to address standing. It says that the
3 sheriffs as a group wish to sell, buy, give, and loan handguns
4 to or from anyone, including their families. Such allegation
5 is too summary, too unspecific, too general, to indicate which
6 individuals might have standing due to a real and immediate
7 threat of being injured by enforcement of that statute.

8 As a consequence, I find that there was good cause to
9 bring both motions, that arising from my determination on the
10 motion to dismiss, but that no standing -- no facts sufficient
11 to establish standing of most of the sheriffs has been offered.
12 And, therefore, any amendment to the Complaint and any joinder
13 in the lawsuit is denied.

14 As to the 11 individuals that I have named, they may
15 join this lawsuit as plaintiffs, and the Complaint may be
16 amended to add the paragraphs that specifically deal with them.
17 They are paragraphs 107, 112, 123, 124, 130, 131, 136, 140,
18 147, 157, and 160. A conclusory statement may be added with
19 regard to each claim that is asserted, indicating which of
20 these individuals assert -- joins in a particular claim. No
21 new claims may be asserted; no new attachments to the Complaint
22 may be submitted. The case will be framed as it currently is,
23 subject to the ruling that I made with regard to the motion to
24 dismiss.

25 Any need for clarification or further explanation?

1 *MR. KOPEL:* If I could, Your Honor, just to follow
2 your instructions. Would the case, then, be recaptioned with
3 the 11 individuals in the order in which they currently appear?

4 *THE COURT:* They may be added to the caption with
5 their individual names.

6 *MR. KOPEL:* Okay, Your Honor. Thank you.

7 *THE COURT:* No titles.

8 *MR. KOPEL:* Those have been out in all of our filings.

9 *THE COURT:* Indeed, it is because these are individual
10 claims and they are premised upon these individuals no longer
11 being sheriffs. There is no need to refer to their status as
12 sheriffs at this point.

13 *MR. KOPEL:* Certainly, Your Honor. And just to follow
14 your instructions: So, for example, paragraph 112 is a little
15 bit of biographical information about a particular plaintiff.
16 Do you want that to stay as it is in the proposed --

17 *THE COURT:* You can include that.

18 *MR. KOPEL:* So we would include the biographical
19 paragraphs of those particular individuals and likewise include
20 the paragraphs which addressed 1224, not the addresses which
21 address 1229 in the -- to comply with your order; would that be
22 correct?

23 *THE COURT:* No. Mr. Kopel, in the Complaint, you have
24 now an -- 11 new plaintiffs. They're not bringing any new
25 claims. They may join in any of the claims that are asserted.

1 *MR. KOPEL:* I see, Your Honor. So the -- if I may
2 restate what I understand -- and please correct me, because,
3 obviously, I was wrong the first time. The new Complaint
4 should have the biographical information about these particular
5 people.

6 *THE COURT:* It shouldn't, but you can put it in there.

7 *MR. KOPEL:* It can be in there, to state their names.
8 And then nothing -- and then it would simply state which of the
9 other Complaint -- the other issues raised elsewhere in the
10 Complaint by other individuals some or all of these particular
11 11 join in?

12 *THE COURT:* Most often in a Complaint, each claim for
13 relief, one, two, three, four, has a statement that immediately
14 follows after the identification of the claim that says which
15 parties bring that claim.

16 *MR. KOPEL:* Okay.

17 *THE COURT:* Your Complaint here doesn't do that. I'm
18 allowing you to say with regard to each of those claims what
19 parties bring the claim.

20 *MR. KOPEL:* Thank you, Your Honor. And so in that --
21 the new Complaint, for example, on the first claim -- first
22 claim for relief involving magazines, we would state each of
23 those 11 individuals, and we would also state the other
24 plaintiffs who also bring that particular claim; is that
25 correct?

1 *THE COURT:* To the extent that all the plaintiffs are
2 asserting that claim, you can say "all plaintiffs assert that
3 claim."

4 *MR. KOPEL:* Okay. Thank you, Your Honor.

5 *THE COURT:* Okay.

6 Yes, sir.

7 *MR. GROVE:* While we're here, Your Honor, your order
8 raises some questions on discovery for us.

9 *THE COURT:* Okay.

10 *MR. GROVE:* And I'm not sure how attuned the Court is
11 to the history of how we've done discovery, so let me kind of
12 sketch it out for you.

13 With respect to the sheriffs, what the parties agreed
14 to do, with Magistrate Judge Watanabe's blessing, was identify
15 a small pool of sheriffs. We didn't want all 55 of them coming
16 in and testifying, because it would be repetitive, who would
17 then -- that we would depose, and they would offer testimony at
18 trial or affidavits in support of or against summary judgment
19 motions. You've knocked out five of those six who we had
20 deposed, and I --

21 *THE COURT:* That doesn't prevent them from testifying.

22 *MR. GROVE:* That's -- that's fair, Your Honor. I can
23 understand that. However, we haven't had an opportunity to
24 depose them because of an agreement we had. What I wanted to
25 request is that we have an opportunity to confer with Mr. Kopel

1 to see which of those sheriffs may in fact be testifying. It
2 may be all eleven, I don't know, it may be two or three, and
3 then for us to have an opportunity for us to take depositions
4 as we have before.

5 *THE COURT:* Of the 11, you've taken depositions of how
6 many?

7 *MR. GROVE:* One.

8 *THE COURT:* I'm sorry?

9 *MR. GROVE:* One.

10 *THE COURT:* Okay. Mr. Kopel, are you going to be
11 calling different witnesses than you previously identified to
12 the defendant?

13 *MR. KOPEL:* If I could ask a question, Your Honor,
14 that would help provide the answer to that.

15 Of the six who were deposed, as my Brother Grove has
16 indicated, one of them is in this set of eleven. All of the 55
17 are members of the Colorado State Shooting Association, one of
18 the plaintiffs in the case. So of those five who were deposed
19 but are not on this list, would it be permissible for them to
20 testify in this case as individuals who belong to the state
21 shooting association?

22 *THE COURT:* Mr. Kopel, witnesses are witnesses. They
23 don't need to be parties.

24 *MR. KOPEL:* I appreciate the clarification -- thank
25 you, Your Honor. I want to make sure --

1 *THE COURT:* So the question is, are you going to be
2 calling different witnesses than you've previously disclosed to
3 the defense?

4 *MR. KOPEL:* And the answer to that is no, Your Honor.

5 *THE COURT:* Okay.

6 *MR. KOPEL:* Your Honor, if I may raise one other
7 issue.

8 Since the -- there are two other -- two others on
9 this -- in this group for whom there is a date certain for
10 retirement. It was not stated in the pleadings, but I would
11 inform you that Terry Maketa will be retiring in January, 2015,
12 and Grayson Robinson will be retiring on January 31, 2014.

13 *THE COURT:* Mr. Kopel, it's too late.

14 *MR. KOPEL:* I thought --

15 *THE COURT:* And this is redundant.

16 *MR. KOPEL:* Certainly, Your Honor.

17 *THE COURT:* The inclusion of these plaintiffs does not
18 change the issues or the evidence that's going to be presented.

19 *MR. KOPEL:* I accept that, Your Honor. Thank you.

20 *THE COURT:* All right.

21 Okay. It sounds like that the defense, you're not
22 going to have any different witnesses. I'm assuming that means
23 you don't need any further discovery.

24 *MR. GROVE:* That resolves our concern, Your Honor.

25 *THE COURT:* Okay. Now, there was mention made about

1 the filing of dispositive motions. And part of this -- the
2 reason I set this hearing down is to determine whether or not
3 there should be any dispositive motions.

4 There is a belief in civil litigation that dispositive
5 motions should be filed in every lawsuit. My experience is
6 that only 15 percent of the time -- and that's a national
7 average -- does it matter. So in order to move things most
8 expeditiously, you can bypass filing dispositive motions unless
9 there is going to really be something decided here and it would
10 shorten a trial. I would suggest to you that you do that and
11 move the matter to trial, if there is going to be a trial, as
12 soon as we can.

13 So I'd like to hear from each side as to how any
14 summary adjudication under Rule 56 would streamline or avoid a
15 trial, what claims or issues should be tried, and whether there
16 should be any separate trial under Rule 42(b) of any claims or
17 issues.

18 Who would like to start on this one?

19 *MR. KRUMHOLZ:* Your Honor, on behalf of the
20 plaintiffs, I'm happy to start the discussion as to those
21 issues that you've raised.

22 The plaintiffs' position, Your Honor, is that summary
23 judgment will not resolve any of the claims, much less most of
24 them. And so we believe that it makes the most sense to
25 proceed to trial, proceed to putting together a final pretrial

1 order on which we can then base trial briefs for Your Honor's
2 consideration prior to the trial. So we don't -- as to your
3 second question, we don't believe there is any issue that is
4 appropriate for summary judgment in this case.

5 *THE COURT:* How about for bifurcation?

6 *MR. KRUMHOLZ:* As for bifurcation, Your Honor, I'm not
7 sure which of the claims you had in mind. My guess was the ADA
8 claim.

9 *THE COURT:* Correct.

10 *MR. KRUMHOLZ:* With respect to that, Your Honor, Rule
11 42(b) is directed at achieving efficiency. And we will have
12 the same witnesses with respect to the ADA claims as we would
13 have -- some of the same witnesses that we would have in the
14 ADA claims as we'll have in our Second Amendment claims. So
15 because of that overlap, there is no efficiency to be gained,
16 Your Honor, from the bifurcation.

17 *THE COURT:* All right. Thank you.

18 For the State.

19 *MR. GROVE:* What I'm about to say may not surprise
20 you, Your Honor.

21 We think that all the claims are ripe and appropriate
22 for summary judgment in this case. And I can sketch out why,
23 if you'd like.

24 *THE COURT:* Please.

25 *MR. GROVE:* Legal issues predominate this. And the

1 course of discovery in this case has demonstrated that
2 virtually all of the operative facts are not in dispute. There
3 are some things at the margins that are certainly in question.
4 But even more important than that, whether or not a summary
5 judgment motion ended up being granted on all the claims,
6 what's very important in this case is that we are sketching out
7 the structure of the Second Amendment. And this is not
8 something that has -- that the Tenth Circuit, any court in the
9 Tenth Circuit has really had an opportunity to do at this level
10 of detail. So there are very important legal questions that
11 should be considered in the context of a summary judgment
12 motion that are based on almost totally undisputed facts, for
13 example.

14 *THE COURT:* They have to be wholly undisputed. Not
15 almost wholly; wholly undisputed facts.

16 *MR. GROVE:* Let me clarify that. Wholly undisputed
17 material facts.

18 *THE COURT:* Okay.

19 *MR. GROVE:* For example, what does "common use" mean?
20 One of the plaintiffs' theories, as I understand it, is that a
21 magazine is an arm that is protected by the Second Amendment.
22 That's another question. And, B, that it's in common use,
23 *Heller* says that you can't do anything to restrict it. If the
24 plaintiffs are correct on that claim, we probably lose,
25 frankly.

1 *THE COURT:* How would that speed the trial ultimately?

2 *MR. GROVE:* It would streamline the format of the
3 trial, because it would -- getting a ruling on what that means
4 would allow the parties to tailor the evidence that they
5 presented at trial and address those questions directly.

6 *THE COURT:* Let's use that as an example. What
7 evidence would be excluded if there were a determination as to
8 whether or not a magazine was an arm?

9 *MR. GROVE:* Well, if the determination is that a
10 magazine is not an arm, then summary judgment is appropriate,
11 and there wouldn't be a trial to begin with.

12 *THE COURT:* But if the answer goes to the contrary,
13 how does that speed the determination at trial?

14 *MR. GROVE:* I agree that it probably wouldn't in this
15 case. We're not going to present any evidence that I can think
16 of off the top of my head -- although, don't hold me to that.

17 *THE COURT:* Okay.

18 *MR. GROVE:* -- that a magazine isn't an arm. I think
19 that is primarily the legal argument. But at the same time,
20 our goal is to have the Court address that in a summary
21 judgment motion and consider it. Argument A in our summary
22 judgment motion is likely to be, a magazine is not an arm;
23 therefore, House Bill 1224 does not impinge on conduct that
24 falls within the scope of the Second Amendment's guarantee.

25 *THE COURT:* All right. I'm not inclined to have

1 dispositive motions, because all of that briefing can be done
2 in the context of pretrial preparation for trial. So unless
3 you can show me that there is some issue that can be determined
4 that will ultimately streamline a trial, I'm happy to entertain
5 all of your legal arguments in the context of the trial.

6 *MR. GROVE:* When Your Honor says "streamline," what
7 exactly do you mean by that? I'd like to tailor what I'm
8 saying to what you're saying.

9 *THE COURT:* Cuts out evidence, narrows the issues,
10 remembering that any determination on a motion for summary
11 judgment is purely interlocutory and can be reconsidered at
12 the time of trial.

13 *MR. GROVE:* At a minimum, we think that if we're going
14 to push forward and go to trial, that the ADA claim and 1229
15 should be severed.

16 There are also --

17 *THE COURT:* Tell me why you think they should be
18 severed.

19 *MR. GROVE:* Well, the first -- the threshold question
20 under all of these, and 1224 is included here, is -- are
21 standing, ripeness, justiciability. With respect to the ADA,
22 the first question that the question the Court has to ask and
23 answer is, can the ADA apply to the statute? Is the statute a
24 service program or activity of the state of Colorado? And
25 under Tenth Circuit precedent, *Elwell v. Oklahoma Board of*

1 *Regents*, our position is going to be that it is not.

2 With respect to 1229, the threshold question is, is
3 there a private right to sell or transfer a firearm to another
4 individual without going through a federally licensed firearms
5 dealer?

6 *THE COURT:* May I inquire as to why that issue was not
7 brought up in the motion to dismiss?

8 *MR. GROVE:* We would have loved to have raised it in a
9 motion to dismiss, Your Honor. The pressure -- the time
10 pressure did not allow us to do it. Our position is that it's
11 still appropriate for summary judgment.

12 *THE COURT:* All right. Is there any other issue that
13 you think might impact a trial, either by bifurcation or by
14 summary determination?

15 *MR. GROVE:* The standard of review that the Court
16 applies, assuming that any of the activities or conduct that
17 are implicated by the plaintiffs' complaint, is a very
18 important issue and, again, will guide the course of the
19 evidence at the time. So we plan to advocate -- this is
20 something that is wide open in the Tenth Circuit -- that if the
21 burden on the plaintiffs that they have alleged is not
22 substantial, that rational basis applies. And that it's the
23 plaintiffs' burden to get across that line and demonstrate that
24 there is a substantial burden in order for anything higher than
25 rational basis -- anything more strict than rational basis

1 would apply.

2 Summary judgment briefing would give us an opportunity
3 to argue that and, again, would provide guidance to the parties
4 as to who bears the burden at trial and how that burden might
5 be carried.

6 *THE COURT:* Anything else?

7 *MR. GROVE:* There is also the question of experts and
8 who -- who will testify at trial, who will be necessary to
9 testify at trial. The -- the standard that the Court ends up
10 applying, decides is appropriate, may influence which experts
11 are eventually called, which expert opinions are proffered by
12 those experts.

13 And I think that's all I've got.

14 *THE COURT:* Okay. Let me hear from the plaintiffs
15 with regard to that.

16 *MR. KRUMHOLZ:* Thank you, Your Honor. There were a
17 couple of points Mr. Grove made that I wanted to respond to.

18 Number one, the suggestion that we could somehow
19 streamline the case by arriving at summary judgment as to prong
20 1, that is whether or not 16-plus magazines are protected under
21 the Second Amendment, the problem with that, Your Honor, is
22 there is tremendous overlap in the evidence between the proof
23 as to prong 1 and the proof as to prong 2. And that's
24 especially so depending on -- depending on the level of
25 scrutiny that this court chooses to apply.

1 If you apply level of scrutiny that requires some sort
2 of balancing, well, then, that balancing process is going to
3 require some evidence that folds back onto the question of what
4 the -- what the nature of the burden is on the plaintiffs and
5 their Second Amendment rights.

6 I believe that's all I have for now, Your Honor.

7 *THE COURT:* Okay. Thank you. I remain unpersuaded
8 that dispositive motions will significantly streamline trial in
9 this matter. I'm also unpersuaded that a determination as
10 requested by the defendant as to the standard of scrutiny can
11 be made in a vacuum. It ultimately is a legal question, but it
12 depends upon how severe the burden is on what are determined to
13 be core Second Amendment rights. And the severity of the
14 burden and the identification of core Second Amendment rights
15 may be impacted by the presentation of evidence. And so while
16 it ultimately is a legal determination, it is a determination
17 arguably based upon factual evidence.

18 As to the ADA issue, my initial thought was that that
19 could be bifurcated. I'm persuaded by the plaintiffs'
20 representation that some of the same evidence that they would
21 use with regard to the other claims would apply to the ADA.
22 Obviously, the ADA claim has different standards.

23 Were this a jury trial, there might be some argument
24 for a presentation after some framing up of issues through
25 dispositive motions. But where you're going to be presenting

1 both the evidence and the argument to the Court, it makes very
2 little difference whether it is in the form of a dispositive
3 motion or it is at trial.

4 So in deference to the need to have this matter
5 determined as promptly as possible in order to conserve the
6 resources of the parties and resolve the issues as
7 expeditiously as we can, I'm inclined to just have a trial.
8 And I will set a deadline for the filing of a proposed final
9 pretrial order today.

10 When will you be ready to file your proposed final
11 pretrial order?

12 *MR. GROVE:* Your Honor, if I could just throw this out
13 there. We haven't conferred with them. Would it be possible
14 just to set a trial date and work backward from that? I'm not
15 sure if that's how you do things.

16 *THE COURT:* Well, I can do them in a number of
17 different ways. It's a little hard to set a trial date until
18 you know how much time it's going to take to try the case. Do
19 you feel like you know that today?

20 *MR. GROVE:* I know that we had discussed originally in
21 the scheduling order that ten days was contemplated. I don't
22 know if that has changed.

23 *THE COURT:* Here is how I usually do it: A trial day
24 is generally six hours in the courtroom, so six hours for
25 presentation of evidence and argument and objections and

1 rulings. I usually look at the number of witnesses that are
2 going to be called and the amount of time that you all think
3 it's going to take to examine those witnesses, and I figure out
4 how many days we need based on that.

5 Now, maybe you've done that in your calculation of ten
6 days. But let me assure you that if you tell me ten days,
7 that's what you get, but no more.

8 *MR. GROVE:* Speaking for the defendant, Your Honor,
9 I'd be very surprised if we exceeded our five-day allotment.

10 *THE COURT:* Okay.

11 *MR. KRUMHOLZ:* Your Honor, if I understand your court
12 procedure with respect to pretrial orders, it is not a small
13 undertaking. So we would propose that a deadline for a
14 pretrial order be sometime in the middle of January, which
15 would give us sufficient time between now and then to do the
16 things that we need to do to put together that pretrial order,
17 on which then you can base your determination of when the trial
18 will be, and we can make our determination how long we think
19 it's going to take.

20 *THE COURT:* So do I understand you to say,
21 essentially, you don't agree with the ten-day trial?

22 *MR. KRUMHOLZ:* No, I don't -- Your Honor, I think the
23 plaintiffs agree that at the moment, ten days still sounds like
24 an appropriate amount of time.

25 But as -- the pretrial order process is designed to

1 help us -- aid us in that, in making that determination. And
2 so standing here now, on December 19, ten days sounds
3 appropriate to the plaintiffs. Based on the work we do in
4 putting together the pretrial order, we may have a different
5 view. I don't foresee that, but it's possible.

6 *THE COURT:* Well, if you agree that ten days is the
7 amount of time you need for trial, I'll go ahead and set a
8 trial today.

9 *MR. KRUMHOLZ:* We would not be opposed to that.
10 Thanks, Judge.

11 *THE COURT:* Okay. When are you going to be ready to
12 go to trial?

13 *MR. GROVE:* I assume next October is probably off the
14 table at this point.

15 *THE COURT:* Pretty much. I'm thinking February or
16 March.

17 *MR. GROVE:* Certainly, the later, the better for us.
18 One issue that would need to be resolved is 702 motions.

19 *THE COURT:* We can address that in a minute.

20 *MR. GROVE:* Okay. So -- as late as you could possibly
21 set it is fine with us, Your Honor.

22 *THE COURT:* Okay. My objective here is to comply with
23 rule one, not to set the trial as late as possible, but to set
24 a trial as soon as you can be ready.

25 *MR. GROVE:* And I think that March, Your Honor -- it

1 probably compatible with that. But this is a major
2 undertaking.

3 *THE COURT:* All trials are major undertakings. I
4 understand that, but I have every confidence that you will have
5 adequate time to do what you need to do.

6 *MR. GROVE:* I appreciate your faith in us, Your Honor.

7 *MR. KRUMHOLZ:* Your Honor, February and/or March would
8 be fine with us.

9 *THE COURT:* All right. We'll set the trial, then, to
10 begin on March 31 and to run until April 11.

11 Trial will begin at 8:30 a.m. on Monday morning, the
12 31st. It will run all of the days that week. It will continue
13 on April 7th through the entirety of that week -- I should say,
14 the time allotted for it. It will not extend beyond the 11th.
15 You'll each have 30 hours in which to make your presentation.
16 That includes all of your examination, cross-examination,
17 redirect examination, it includes all of your objections or
18 your responses to objections, your opening arguments, your
19 closing arguments. You can allocate your time however you
20 want. Rulings that I make will be divided 50/50, so that the
21 time is spent equally by each side. And Ms. Glover will keep
22 track of this on a chess clock, so you can ask her at any point
23 in time where your time is.

24 We'll set the time for filing the final pretrial order
25 at January 31, 2014. And only in the event that that final

1 pretrial order indicates that the amount of time that's
2 currently set for trial is inappropriate will the amount of
3 trial time be changed.

4 We'll set January 15, 2014, as the date for the filing
5 of any joint 702 motions. That actually is later than the
6 deadline that you originally had with regard to the pretrial
7 scheduling order.

8 *MR. GROVE:* Your Honor, may I just follow up on the
9 702 question quickly?

10 *THE COURT:* Uh-huh.

11 *MR. GROVE:* We had discussed -- Mr. Colin is not here
12 today. I had discussed the possibility, given this is a bench
13 trial -- I know that Your Honor typically holds an evidentiary
14 hearing on 702s before the trial. And what we had discussed
15 was filing the joint 702 motions as contemplated by the Court
16 and just folding that into -- folding that into the trial
17 itself.

18 *THE COURT:* I think that makes good sense. But I
19 would like to have the joint 702 motion so I know where your
20 areas of disagreement are.

21 *MR. GROVE:* Absolutely.

22 *THE COURT:* And it's important that they be joint.

23 *MR. GROVE:* We'll --

24 *THE COURT:* Otherwise it doesn't work real well, when
25 everybody is guessing what the other folks' opinion is going to

1 be.

2 I urge you to think about those opinions and not use a
3 comprehensive scatter-shot approach under Rule 702. In other
4 words, if the methodology is a reliable methodology, please
5 don't challenge it. If someone has adequate experience,
6 training, expertise, et cetera, please don't challenge that.

7 If you're looking at sufficiency and facts -- of the
8 facts and data, remember that the Tenth Circuit uses a
9 quantitative measure, not a qualitative measure. So it's not,
10 what did you look at? It's whether you looked at enough.

11 Any other matters that we should address, anticipating
12 trial?

13 Then we'll set a pretrial conference date -- yes, sir.

14 *MR. GROVE:* Do you expect an Answer to the Fourth
15 Amended Complaint, and when?

16 *THE COURT:* I haven't set a date for when it's going
17 to be filed. And given the slight amendment that's going to
18 occur, I'm going to set a very tight Answer date and before
19 your final pretrial order is submitted, because that, of
20 course, will take the place of all of the previous pleadings.

21 So we'll set --

22 Mr. Kopel, when do you plan on the earliest date that
23 you can file the Fourth Amended Complaint?

24 *MR. KOPEL:* Your Honor, I believe we could file the
25 Amended Complaint, consistent with your instructions, on

1 Monday, if that would be all right.

2 *THE COURT:* On the 23rd?

3 *MR. KOPEL:* Yes.

4 *THE COURT:* Okay.

5 *MR. KOPEL:* And I have one question on captioning. It
6 was discussed today as being the Fourth Amended Complaint, but
7 since the Third Amended Complaint never really made it across
8 the finish line, should I call this the third or the fourth?

9 *THE COURT:* The fourth.

10 *MR. KOPEL:* Thank you, Your Honor.

11 *THE COURT:* Thank you.

12 Can you file an Answer by the 3rd of January?

13 *MR. GROVE:* Yes, Your Honor.

14 *THE COURT:* Okay. That will be our date for our
15 Answer on this.

16 Let me do a couple of cleanup rulings here.

17 We have the motion for extension of time to file
18 dispositive motions at Docket No. 97. It is denied for the
19 reasons that have been expressed during the hearing.

20 Docket No. 105, an unopposed motion for leave to
21 restrict, this was a motion seeking restricted access to
22 certain exhibits that were attached to the Third Amended
23 Complaint. Since the Third Amended Complaint is essentially
24 withdrawn and those exhibits will not be considered, I'm going
25 to deny the motion for leave to restrict but leave the exhibits

1 under restriction.

2 I don't think there are any other pending motions.
3 Have I overlooked any?

4 Then we need to set a final pretrial conference. We
5 can set that for February 20 at 3 o'clock p.m. Will that work
6 for everybody?

7 *MR. GROVE:* That's fine for the Government, Your
8 Honor.

9 *MR. KOPEL:* Your Honor, I teach at Denver University
10 Law School at that particular time; but my students, I'm sure,
11 would appreciate a day off.

12 *THE COURT:* You can bring them into the courtroom, and
13 they can watch what is going on.

14 *MR. KOPEL:* Thank you, Your Honor.

15 *MR. GROVE:* There is -- that just triggered something
16 in my mind, Your Honor.

17 In your trial preparation memo, there is an indication
18 that the final pretrial conference, that the defendant needs to
19 appear in person. This is an official capacity suit. Would a
20 representative of the Governor's office be here be sufficient,
21 or would you like Governor Hickenlooper here in person?

22 *THE COURT:* The reason that that is there is because
23 oftentimes the parties have little idea what happens in a real
24 trial. Their experience has been watching things on TV, in the
25 movies; and real trials are different than what we see in the

1 media. And one of the things that I try to do at the final
2 pretrial conference is help the parties have realistic
3 expectations as to what is going to happen at trial. This
4 isn't one of those cases. And as a consequence, I don't
5 believe any parties need to be here for the final pretrial
6 conference.

7 *MR. GROVE:* Thank you, Your Honor.

8 *THE COURT:* You're welcome.

9 Anything else that we need to deal with today?

10 *MR. GROVE:* Nothing from the Governor, Your Honor.

11 *THE COURT:* Thank you. How about for the plaintiffs?

12 *MR. KRUMHOLZ:* No, Your Honor.

13 *THE COURT:* All right. Then I will look forward to
14 seeing you in February, and we'll have this matter at trial by
15 the end of March.

16 We'll stand in recess. I wish you all happy holidays.

17 (Recess at 4:07 p.m.)

18 REPORTER'S CERTIFICATE

19

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

22 Dated at Denver, Colorado, this 30th day of September,
23 2014.

24 s/Therese Lindblom

25

Therese Lindblom, CSR, RMR, CRR