COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Colorado Judicial Center 2 East 14th Avenue, 4th Floor Denver, Colorado 80203 Trial court, City and County of Denver, Colorado, The Honorable John W. Madden IV, Trial court Judge, Case Number 2013CV33879 Appellants: Rocky Mountain Gun Owners, a Colorado nonprofit corporation, National Association for Gun Rights, Inc., a Virginia non-profit corporation, John A. Sternberg, and DV-S, LLC, a Colorado limited liability company d/b/a Alpine Arms Appellee: John W. Hickenlooper, in his official capacity as Governor of the State of Colorado	▲ COURT USE ONLY ▲
ATTORNEY FOR APPELLANTS Barry K. Arrington, #16,486 Arrington Law Office 3801 East Florida Avenue, Suite 830 Denver, Colorado 80210 Phone Number: (303) 205-7870 FAX Number: (303) 463-0410 E-mail: barry@arringtonpc.com	Case Number: 2014CA002178
APPELLANTS' REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

/s/ Barry K. Arrington

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Barry K. Arrington

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A. The "Reasonable Exercise" Test Cannot be Applied to a Fundamental Right

After *McDonald v. Chicago*, 561 U.S. 742 (2010), there can be no question that the right to keep and bear arms is a fundamental right. Yet the Governor insists that any old regulation can burden that right so long as the regulation is "reasonable." Gov. Brief, 15. To be fair, the Governor is merely arguing for the Court to apply the test announced by the Supreme Court in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994), where the Court stated:

> We turn next to the question of whether the ordinance is constitutional under the analysis outlined above. An act is within the state's police power if it is **reasonably related to a legitimate governmental interest** such as the public health, safety, or welfare.

Id., 874 P.2d at 331 (emphasis added).

Compare that passage to the court's analysis of a challenge to a road improvement project in *Town of Dillon v. Yacht Club Condominiums Home Owners Association*, 325 P.3d 1032 (2014):

> Municipalities also have the express power to improve and regulate the use of streets, to build and repair sewers and drains, and to regulate traffic within municipal boundaries . . . In the police power context, we have consistently evaluated the reasonableness of an ordinance by examining the relationship between the provisions of the ordinance and the government interest or objective to be achieved. Although we have used

> various phrases to describe this relationship, they essentially equate to rational basis review. Where, as here, an ordinance does not implicate a fundamental right, the due process clause requires only that the ordinance bear a rational relationship to a legitimate government interest . . . In short, we evaluate the 'reasonableness' of an ordinance by looking to whether there is **a reasonable relationship between the ordinance and a legitimate government objective**. . . . Even in cases where we have struck down legislation as an abuse of police power, we have done so not because the provisions were burdensome or oppressive, but because we concluded that there was no rational relationship between the provisions of the legislation and the government objectives sought to be achieved.

Id., 325 P.3d 1032 (internal quotations and citations omitted; emphasis added).

In *Robertson* the court held that a law burdening the right to keep and bear arms "is within the state's police power if it is reasonably related to a legitimate governmental interest such as the public health, safety, or welfare." In *Town of Dillon* the court held that a law providing for the improvement of streets is within the town's police power if "there is a reasonable relationship between the ordinance and a legitimate government objective." The tests are identical, and as the *Town of Dillon* court held, the reasonableness test "essentially equate[s] to rational basis review." *Supra*. Of course, "rational basis" is the absolute lowest form of constitutional review. *Riddle v. Mondragon*, 83 F.3d 1197, 1207 (10th Cir. 1996).

In summary, in *Robertson* the Supreme Court held that a law burdening the right to keep and bear arms is reviewed under a standard that

is equivalent to a rational basis standard of review, the lowest form of constitutional review.

In *McDonald* the United States Supreme Court held that the right to keep and bear arms is a fundamental right. And in *Town of Dillon*, the Colorado Supreme Court held that the rational basis test is wholly inappropriate for review of a law that implicates a fundamental right. *Supra*. It follows ineluctably that the standard of review announced in *Robertson* is no longer good law. The standard for evaluating a burden on a fundamental constitutional right simply cannot be the same standard for evaluating a challenge to a road improvement project.

B. The Governor Admits that the Colorado Constitution's Protection of the Right to Keep and Bear Arms is Broader than the Second Amendment

Appellants are gratified that the Governor has finally admitted for the first time in this ligation what should have been obvious all along – that Colo. Const., Art. II, § 13 protects the right to keep and bear arms to a greater degree than even the Second Amendment to the United States Constitution. Appellants are disappointed, however, by the Governor's attempt to limit the extent of that protection merely to the scope of substantive rights protected. As discussed in detail above, the fact that the right to keep and bear arms is now recognized as a fundamental right means,

if nothing else, that the standard applied in *Robertson* (which "essentially equate[s] to rational basis review" per *Town of Dillon*) is no longer tenable.

The Governor apparently sees no inconsistency in first admitting that the Colorado Constitution "protects a broader class of rights than the Second Amendment" and then urging that gun control state statutes receive review under the lowest possible standard of review.[1]

C. The Governor's Analysis of *McDonald* Makes no Sense

The governor asserts that since *McDonald* is a Second Amendment case, it has "no precedential relevance for the Colorado Constitution." Gov. Brief, 19. This makes no sense. Under the Supremacy Clause of the United States Constitution, the Second Amendment is the supreme law of the land insofar as the right to keep and bear arms is concerned. States are free to protect the right to a greater extent that the Second Amendment, but they may not protect it to a lesser extent. The Second Amendment sets a floor but not a ceiling. *See* William Swindler, *Minimum Standards of*

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[1] Anomalously, as discussed below, the Governor would have the Court adopt the federal analytical framework designed to protect a lesser right (the Second Amendment), and apply it to a greater right (Colo. Const., Art. II, § 13). Nevertheless, because the state constitution protects the right to a greater extent, if anything, the standard of review required by the state constitution is more exacting than the judge empowering two-step standard announced by some federal courts in the wake of *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Constitutional Justice: Federal Floor and State Ceiling, 49 Mo.L.Rev. 1 (1984). This is relevant to Colo. Const., Art. II, § 13 at least to the following extent: This Court has three choices: (1) it can hold that the state provision protects the right to a lesser degree than the Second Amendment and is therefore a dead letter; (2) it can hold that the state provision protects the right to the same degree as the Second Amendment and is therefore irrelevant; or (3) it can hold that state provision protects the right to a greater degree than the Second Amendment and extend the implications of that status to this case. For the reasons explained at length in their Opening Brief, Appellants urge the Court to adopt the third approach.

D. The Governor's Attempt to Cherry Pick Federal Precedent Should be Rejected

The Governor raises an issue in his brief for the first time in this litigation when he urges the Court to adopt the two-step analytical framework invented by some federal courts in the wake of *Heller*.[2] Gov. Brief, 9. However, as noted above, the Governor continues to insist that the Court should also apply a "reasonableness" test. The Governor

[2] This is ironic, since the Governor repeatedly faults Appellants for daring to make even a passing reference to *Heller* or *McDonald*, claiming federal cases have no application. *See* Gov. Brief, 19 (Appellant "overlooks the fact that *McDonald* was decided under the Second Amendment, and thus had no precedential relevance for the Colorado Constitution"). Yet when it suits him he argues for importing federal law wholesale.

awkwardly attempts to shoehorn the "two step" approach into his "reasonable regulation" analysis by making the former a first step to the latter. Gov. Brief, 8. The two step approach is, however, a completely different analytical framework from the "reasonable regulation" framework the Governor otherwise embraces, and Appellants object to the Governor's attempt to cherry pick from different tests from different courts applied to different rights in order to come up with a mishmash hybrid standard that gives the maximum possible support to his position.

It is true that some federal courts have adopted the two step approach (but this is by no means universal as the Governor seems to imply[3]). In step one a court determines whether a statute burdens conduct within the scope of the Second Amendment. *See, e.g., U.S. v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012). If it does not burden such conduct the analysis stops. *Id*. If the statute does burden protected conduct, the court moves to step two, which contains three subparts. First, the court looks at whether the activity being infringed is "core" or non-"core" Second Amendment activity. *U.S. v. Marzzarella*, 614 F.3d 85, 92 (3rd Cir. 2010). Second, the court evaluates how severe a burden the statute places on that conduct. *Jackson v. City &*

[3] *See, e.g., Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244 at 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

County of San Francisco, 746 F.3d 953, 964 (9th Cir. 2014). Third, based on those two determinations, the court chooses a form of "heightened scrutiny," applying either intermediate scrutiny or strict scrutiny. *Id*.

As to step one, the Governor suggests that magazine capacity limits and background checks requirements do not even burden conduct within the scope of the Colorado Constitution. Gov. Brief 11. The Governor's suggestion is, of course, absurd, as discussed in more detail in Sections H, I and J below.

Turning to step two of the two-step analysis, rather than attempting to apply it to this case, the Governor urges the Court to ignore it — arguing that the Colorado Supreme Court in *Robertson* has already established for all cases that the level of review shall be the "reasonable exercise" test. Gov. Brief, 10, 14. Of course, the federal "two step" test calls for a form of "heightened scrutiny," while the Governor characterizes *Robertson* as applying "a low level of scrutiny."[4] According to the Governor, it does not matter how "core" the conduct at issue is, or how severe the burden is on that conduct. Under the Governor's view, step two has already been resolved by *Robertson* in favor of what he characterizes as a low level

[4] Rec., 39. Indeed it does; as noted above, it applies the lowest level of scrutiny known to constitutional law.

reasonableness review. In reality, then, the Governor does not wish to see the two step approach adopted, but only that portion of the test which suits him. The Governor has suggested that this Court adopt the federal two-step — but only employ step one. Either the Governor wants the two-step approach from the federal courts, or he wants the *Robertson* approach. The approaches cannot be reconciled, and the Governor cannot pick and choose from both tests for his own convenience.

E. The Federal Two Step Approach Should Be Rejected in Favor of the *Heller* Test

1. Introduction

As noted above, Appellants urge the Court to reject the Governor's attempt to import a modified two-step approach into Colorado law. This does not mean they are advocating for the actual two-step approach adopted by some federal courts, because that approach conflicts with the Supreme Court's rulings in *Heller* and *McDonald v. City of Chicago,* 561 U.S. 742 (2010); conflicts with the unambiguous text of the federal Second Amendment; and has recently been subjected to withering criticism by the author of the *Heller* opinion himself (as discussed in Section F, infra).

The Second Amendment states that "the right of the People to keep and bear arms shall not be infringed."[5] The two-step approach used by the federal courts, however, permits the burdening and/or infringement of a right that shall not be infringed, so long as the government meets a certain standard (almost always intermediate scrutiny).[6] But if a court determines that a law "infringes" the Second Amendment — a right that "shall not be infringed" — what more is there to decide?

2. The Text, History, and Tradition Test of *Heller* is the Appropriate Test

If the Governor wants this Court to adopt a federal test designed to protect Second Amendment rights and apply it to the Colorado right to keep and bear arms, then it should ignore decisions by lower courts, and employ the United States Supreme Court's actual test in *Heller*. In *Heller*, the

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[5] The Colorado Constitution goes even further, saying that the right "shall not be called into question."

[6] Indeed, various federal courts have flagrantly contradicted the unambiguous text of the Second Amendment by sanctioning statutory infringement of that right. *See, e.g., Peruta v. San Diego*, 678 F. Supp. 2d 1046, 1055 (S.D. Cal. 2010) (the state undoubtedly infringes plaintiff's right, but for such infringement to pass constitutional muster, the state must at the very least demonstrate that it is necessary); *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 789 (D. Md. 2014) (after assuming the law infringes on the Second Amendment, ruling that its infringement could be justified under intermediate scrutiny); *Silvester v. Harris*, 2013 U.S. Dist. LEXIS 172946 at *8-9 (E.D. Cal. Dec. 6, 2013) (conceding that the statute placed a burden and/or infringement on the right to keep and bear arms but then continuing its analysis).

Supreme Court stated that the Second Amendment was to be interpreted in black and white, not in the shades of gray that were typical of the lower courts' "judge empowering 'interest balancing'" tests. *Heller* at 634. Conspicuously absent from both *Heller* and *McDonald* is a single word about what level of scrutiny to apply in these cases. In dissent, Judge Breyer urged balancing tests be used, and certain federal courts have followed his dissent, while disregarding the Court's actual opinion. In *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), Judge Kavanaugh explained that, "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Id*. at 1271. This approach is particularly apt in this case, because Appellants have laid out the text, history, and tradition of the Colorado right to keep and bear arms in great detail. *See* Complaint (Rec., 20-21); Response to Motion to Dismiss (Rec., 77-6); and Opening Brief, pp. 10-14). In summary, the Colorado Constitution states that the right to keep and bear arms "shall not be called into question," and since the two statutes at issue in this matter do in fact call that right into question, the analysis should end and the statutes should be invalidated.

F. If the Court Declines to Adopt the *Heller* Test, it Should Adopt Strict Scrutiny

The Governor asserts that Appellants have urged strict scrutiny. That is not quite accurate. Appellants argued below that the Supreme Court would **"[a]t the very least** . . . acknowledge the "fundamental" status of the right, and in that regard the supreme court has long held that regulations that burden "fundamental" rights should be subjected to strict scrutiny." Rec. 83 (emphasis added). Thus, even if this Court were to reject the *Heller* "text, history, and tradition" test for Colorado, then, yes, it should apply strict scrutiny.

Even strict scrutiny, however, requires use of only step one of the federal test: if the law infringes rights within the scope of the constitutional protection, then apply strict scrutiny. There is no need, as with the federal two-step approach, for judges to first weigh the "core"-ness of the right at issue, and the severity of the burden on that right, before finally selecting a level of scrutiny to apply. These additional tests are simply additional judicially-manufactured layers which give federal judges more ways to minimize Second Amendment rights before balancing them away in favor of vague (and almost always factually unsubstantiated) notions of public safety.

Indeed, while many federal courts claim that *Heller* "declined" to enunciate a standard of review, in reality the Supreme Court "declined" only

to adopt a judge-empowering standard of review because the Second Amendment contained its own standard of review — i..e, "shall not be infringed."[7] While the direction taken by some of the lower federal courts has been criticized by Second Amendment commentators, just last month, two of the Justices who joined in the *Heller* opinion — including the author of that opinion — took the unusual step of criticizing this approach. In their dissent from denial of *certiorari* in an arms case, Justices Thomas and Scalia explained that the two step approach "is in serious tension with *Heller*." *Jackson v. San Francisco*, 576 U.S. ___, at *3 (June 8, 2015) (Thomas, J. and Scalia, J, dissenting). They noted that "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it." *Id*. at 1. They "reiterate[d] that courts may **not** engage in this sort of judicial

[7] During oral argument, Chief Justice Roberts criticized the various tests being proposed for evaluating the constitutionality of firearms laws under the Second Amendment: "these various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to . . . [T]hese standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up. But I don't know why when we are starting afresh, we would try to articulate a whole standard . . ." *District of Columbia v. Heller Oral Argument* (Mar. 18, 2008), p. 44, ll. 5-23.

assessment as to the severity of a burden imposed on core Second Amendment rights." *Id*. at 5 (emphasis added).

G. "Reasonableness" is an Inherently Factual Issue

Even if this Court were to apply the *Robertson* reasonableness test, it should nevertheless reverse and remand to the district court for development of a factual record on that issue. "Reasonableness" is not, as the Governor suggests, a strictly legal issue. Gov. Brief, 22. The Governor erects a straw man when he says "[It] would run counter to well-established precedent to hold that the constitutionality of a law is anything but a legal question." *Id*., 23. Of course that statement is true. But as *Robertson* itself made clear, that legal determination is made within a factual context, not a factual vacuum.

The Governor asks the Court to ignore its own recent precedent in *Students for Concealed Carry on Campus, LLC v. The Regents of the University of Colorado*, 280 P.3d 18 (Colo.App. 2010), that specifically states that the reasonableness issue is a partially factual inquiry. Instead of ignoring that precedent, this Court should recognizes its applicability to this very case. To cite only one of many examples of factual disputes concerning critical issues, the Governor asserts as a fact that magazines exist with "design features specifically intended to increase magazine capacity . .

." Rec. 45. Appellants assert as a fact that no such magazines exist. The resolution of that factual dispute is critical to the resolution of the constitutional issue. If the Governor is correct, then HB 1224 applies only to a limited subset of magazines. If Appellants are correct, HB 1224 bans no magazines and is therefore a nullity. Either way, this factual dispute simply cannot be resolved on a motion to dismiss. Whether the Governor or the Appellants are correct as a factual matter cannot be resolved as a matter of law. Ironically, the Governor tacitly admits this when he attempts to import the factual record from *Colorado Outfitters v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014), to support his legal arguments in this case. *See* Gov. Brief, 31.

H. Magazines are Arms

The Governor claims that the term "arms" in the Second Amendment and the Colorado Constitution applies only to firearms, and he says that "firearms" is in turn limited to pistols, revolvers, rifles, and shotguns. Gov. Brief, 12. The Governor claims magazines are merely "accessories." *Id*. To say that magazines can be banned because they are not "arms" is like saying that printer cartridges can be banned because they are not part of a "press." No court has adopted this extreme position. Even the concurring opinion cited by the Governor does not state that magazines (an integral part

of a firearm) do not count as arms. *Trinen v. City and County of Denver*, 53 P.3d 754, 761 (Colo.App. 2002) (Roy, J. concurring in part and dissenting in part). Moreover, that opinion is suspect generally because the entire analysis is premised on the erroneous assertion that the right to keep and bear arms is "not a fundamental one." *Id*.

Courts that have actually ruled on this precise question have come to the opposite conclusion. *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) ("our case law supports the conclusion that there must also be some corollary . . . right to possess the magazines necessary to render those firearms operable").

I. The Colorado Constitution Protects a Private Right to Acquire Arms

The trial court asserted that "the Colorado Constitution does not provide a private right to sell and transfer weapons." Rec., 162. This position is so extreme that the Governor did not attempt to defend it. Indeed, the Seventh Circuit has made it clear that "[t]he right to possess firearms for protection implies a corresponding right to **acquire** and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (emphasis added).

J. The Rights Implicated by the Magazine Restriction are "Core" Rights

Even the federal district court in the Colorado Sheriffs case on which the Governor elsewhere relies determined that "[b]ecause §18-12-302 affects the use of firearms that are both widespread and commonly used for self-defense, the Court concludes that . . . the statute burdens the core right protected by the Second Amendment." *Colorado Outfitters v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014).

K. The Governor Ignores the Essence of Appellants' Challenge to the Statutory Definition of Banned Magazines

The Governor's brief obscures the essence of Appellants' challenge to the portion of HB 1224 which outlaws magazines that are "designed to be readily converted to accept, more than fifteen rounds of ammunition." In demonstrating the definitional flaw of the statute, Appellants alleged in their Complaint, *inter alia*: "The magazines for most handguns, for many rifles, and for some shotguns are detachable box magazines. The very large majority of detachable box magazines contain a removable floor plate." Rec., 22. "The fact that a magazine floorplate can be removed 'inherently creates the possibility' that the magazine can be extended." *Id*.

HB 1224 is "susceptible" of being read in two ways — all or nothing. No magazine is "designed" to hold more rounds than it holds. Thus, if the

word "designed" is given effect, the statute would apply to nothing and would be meaningless. Opening Brief at 30, 32. Alternatively, if the word "designed" is excised from the statute, it would encompass almost all modern box magazines, since "nearly every magazine can be readily converted" in such a manner. *Id*. at 29. Thus, the statute either applies to virtually all modern magazines or it applies to none whatsoever. *Id*. at 32-33. If applied to nearly all magazines, the Governor has admitted the statute "would likely violate the Second Amendment." Rec., 46. Applied to no magazines, the statute is nonsensical and a nullity. *Id*. at 32.

The district court erred when it addressed only one of these alternative interpretations, deciding that HB 1224 "cannot effect a ban on all" magazines with removable floorplates since "a magazine that is designed to be readily converted is not the same as one with a design that is subject to being readily converted." Rec, 162-3. The district court (and the Governor) completely skipped over Appellants' contention that, accepting such an interpretation, no magazine is "designed" with the specific intent that it be converted, and the unavoidable consequence that HB 1224 applies to no magazines.

The Governor believes that Appellants' entire claim has been put to rest by two Technical Guidance letters carefully crafted by the Governors'

own lawyer (i.e., the Attorney General) to defeat constitutional challenges. That is not the case. The Governor's position is simple – look to my lawyer's Technical Guidance letters.[8] Appellants have no idea what the technical guidance means when it refers to "design features to increase magazine capacity . . ." The Governor has never identified any magazines that fit this description. It thus becomes apparent that the definition was designed for legal purposes only — to defeat constitutional challenges to the law. Regardless of which interpretation of the statute is used, the question of the practical effect of HB 1224 is a purely factual issue that should not have been dispensed with on a motion to dismiss.

L. The District Court's Failed to Address Appellants' Challenge to the 15-round Magazine Capacity Limit

In addition to banning magazines "designed to be readily converted," HB 1224 also prohibits magazines that hold more than 15 rounds. In their Complaint Appellants brought a challenge to this part of the magazine ban as well. The challenge was fully briefed by both sides in district court, but the district court simply ignored the issue in its ruling. In their Opening Brief, Appellants noted they had "challenged both parts of" the magazine

[8] The Governor also appears to ask the Court to defer to his own signing statement in resolving this issue. Gov. Brief, 36. Appellants naturally request the Court to decline this invitation, because it would be anomalous indeed if a factual issue could be resolved on a party's mere say so.

ban, and noted the district court had addressed only the "designed to be readily converted" issue, while wholly ignoring their challenge to the 15 round limit itself. Opening Brief, 23. The Governor concedes this point, admitting that "the district court did not directly address [the 15 round limit]." Gov. Brief, 41.

The Governor nevertheless argues the district court's non-ruling should be treated as a ruling in his favor and affirmed, because, he says, the complaint was insufficient, and if the district court had ruled on the issue, it would have ruled for him. Gov. Brief, 41-43. The Governor's argument should be rejected, because Appellants' Complaint was perfectly clear in challenging the magazine capacity limit. The Complaint alleged that:

"HB 1224 bans outright all ammunition magazines . . . that hold more than 15 rounds of ammunition." Rec., 17.

"The magazines for most handguns, for many rifles, and for some shotguns are detachable box magazines. The very large majority of detachable box magazines contain removable a floor plate." Rec., 22.

"The fact that a magazine floorplate can be removed 'inherently creates the possibility' that the magazine can be extended." *Id*.

"HB 1224 outlaws an essential component of many common firearms." *Id*.

"the prohibition of magazines greater than 15 rounds, directly and gravely harm[s] the ability of law-abiding citizens to use firearms for lawful purposes, especially self-defense." Rec., 23.

"The effect of HB 1224's various provisions is the widespread ban on functional firearms." *Id*.

The Governor asserts that these factual allegations do not state a claim, but fails to show why they are not sufficient to set out a simple and straightforward allegation of a violation of the Colorado Constitution based on the 15-round limit. Colorado is a notice pleading jurisdiction. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995). Appellants were not required to set out in their Complaint every minute detail supporting their claim. They were merely required to allege sufficient facts to place the Governor on notice of their claims, and they have done so.

M. HB 1229 Unconstitutionally Delegates Governmental Power to Private Citizens

The Governor does not dispute that the background check required of private firearms transferors is legally possible only if an FFL voluntarily provides "access to the state- and federally- administered databases." Gov. Brief, 47. In a surprise concession, the Governor acknowledges that the FFL decision to "choose to conduct, or refuse to conduct, a private background check" depends wholly upon "the FFL's bottom line." *Id*. at

45-46. Indeed, the Governor admits that the FFL decision to conduct the "private background check" is no different from the FFL decision "to lower or charge ancillary fees in order to move inventory or raise profit margins." *Id*. Thus empowered, the FFL is free to make the rules governing access to the government required background check of private firearms transactions according to the FFL's economic needs and wants, unfettered by any government regulation or control. As Appellants pointed out in their Opening Brief, "[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests . . . are adverse to the interests of others in the same business." *Carter v. Carter Coal Co*., 298 U.S. 238, 311 (1936). The Governor hopes to evade this bedrock principle, claiming that the statute does not delegate any legislative power whatsoever, but merely "defines what FFLs who choose to perform background checks must do and how they must do it." Gov. Brief, 45. The Governor misstates Appellants' unconstitutional delegation claim. Appellants contend that the Colorado Assembly unconstitutionally delegated its legislative authority by vesting in the state's FFLs "absolute, unfettered and unreviewable" power before to deciding to perform the necessary background check, not how an FFL facilitates the check after he chooses to do so. Rec., 7

The Governor admits that "[t]he legislative non-delegation doctrine prohibits the General Assembly from delegating authority to an administrative agency without first providing 'sufficient standards to guide the agency's exercise of that power.'" Gov. Brief, 44. But HB 1229 not only fails to provide "sufficient standards" to guide an FFL's choice whether to facilitate a private firearms sale, it provides absolutely no standard whatsoever. Rather, by the Governor's own description of the powers vested by the statute, each Colorado FFL may make whatever rules it desires to maximize its "bottom line." The legislature may not confer upon another body the discretion as to what the law shall be. *People ex rel Dunbar v. Giordano*, 481 P.2d 415, 416 (Colo. 1971). By granting such power to the state's FFLs, the Colorado General Assembly "abdicated" its role, ensconcing the state's FFLs with unreviewable and unaccountable power to make up their own rules to grant or deny access to the background check data required by law to complete a private firearms transaction. As such, HB 1229 violates Article V, § 1 of the Colorado Constitution.

HB 1229 also constitutes an unconstitutional delegation of executive power. The Governor contends that the new role assigned to the State's FFLs is no different from their "authority for retail sales and for private sales that occur at gun shows." Gov. Brief, 46. However, when an FFL makes a

firearms sale, the FFL is only carrying out its side of the bargain, because it is obligated by law to conduct a background check of the purchaser as part of the transaction. With respect to private sales in which the FFL is not a contracting party, however, the FFL has no such legal duty. He acts (or refuses to act) in his unlimited discretion only as a "voluntary intermediary" to administer a law that provides access to a background check before a private sale between two others can be lawfully consummated. He is exercising governmental authority conferred upon him by the Colorado General Assembly. Such conferral of power is, by its nature, executive, and the delegation comes with no limiting standards expressed either by law or by policy, leaving the matter to each FFL's complete and unfettered discretion.

Article IV, § 2 of the Colorado Constitution vests the "supreme executive power" in the Governor, whose duty is to "take care that the laws be faithfully executed." By vesting unlimited, standardless discretion in the state's FFLs to enforce the state's universal background check policy, the Colorado General Assembly has delegated executive power to private businesses, not subject to the Governor's "supreme executive power." Thus, the legislature has vested the executive responsibility to take care that HB

1229 be faithfully executed in private parties, and that violates Article IV, § 2.

N. HB 1229 Denies Appellants Due Process of Law

The Governor faults Appellants' due process challenge for failure to demonstrate that anyone would be "burdened" by any individual FFL's refusal to provide access to the required background check. After all, the Governor argues, "even if gun dealer A decided not to process a background check request, gun dealer B or C could easily process the same request, thus providing the prospective citizens the desired service." Gov. Brief, 50. But there is nothing in the law that guarantees that B or C (or even D through Z) will not also, like A, decline. What then?

The district court denied Appellants an opportunity to make a record on this issue. It resolved this factual question without benefit of any record whatsoever, instead of accepting as true the allegations of the Complaint that no FFL has an incentive to facilitate the sale of a firearm that he does not own, especially since he can charge no more than ten dollars for his service. And further, the cooperating FFL must fill out an ATF Form 4473, subjecting him to all of the rules and regulations that would apply if he were selling a firearm from his own inventory. Rec., 4-5. In short, there is no guarantee that under the new background check regime that a willing and

lawful buyer and a willing and lawful seller may freely enter into a lawful firearms transaction. As pointed out in Appellants' Opening Brief, that is a denial of due process of law under the Colorado Constitution, as stated in *Denver v. Denver Buick, Inc*., 347 P2d 919, 923-24 (1959).

Respectfully submitted this 1st day of July, 2015

/s/ Barry K. Arrington

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Barry K. Arrington

Of Counsel
William J. Olson
Herbert W. Titus
Robert J. Olson
William J. Olson, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070

CERTIFICATE OF SERVICE

The undersigned certifies that on July 1, 2015 he served a true and correct copy of the foregoing via ICCES on:

David C. Blake, Esq.
Michael Francisco, Esq.
Matthew D. Grove, Esq.
Office of the Colorado Attorney General
1300 Broadway, 6th Floor
Denver, Colorado 80203

/s/ Barry K. Arrington

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Barry K. Arrington