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 ▲
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APPELLANTS' OPENING BRIEF	

TABLE OF CONTENTS

Page

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES **Page**

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it failed to recognize that the Colorado Constitution protects the right to keep and bear arms to a greater extent than the United States constitution?

2. Did the trial court err when it failed to apply the proper standard of constitutional review to the challenged statutes?

3. Did the trial court err when it failed to allow plaintiffs to develop a factual record regarding the reasonableness of the challenged statutes?

4. Did the trial court err in its application of the *Robertson* standard of review to the challenged statutes?

5. Was the trial court's interpretation of the phrase "designed to be readily converted" erroneous?

6. Did the trial court err when it upheld the constitutionality of the "continuous possession" provision of HB 1224?

7. Did the trial court err when it held that HB 1229 does not unconstitutionally delegate executive or legislative powers?

8. Did the trial court err when it held that HB 1229 does not deny plaintiffs due process of law?

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, Disposition in Trial Court

In 2013, the Colorado General Assembly enacted certain gun control legislation in House Bills 13-1224 ("HB 1224") and 13-1229 ("HB 1229"). On September 4, 2013 plaintiffs brought this action challenging the constitutionality of HB 1224 and HB 1229 under the Colorado Constitution. Rec., 3.[1] No claims were brought under the United States Constitution. On November 4, 2013 defendant moved to dismiss the complaint pursuant to C.R.C.P. 12(b)(1) for lack of standing and C.R.C.P. 12(b)(5) for failure to state a claim upon which relief can be granted. Rec., 25. On September 25, 2014 the trial court entered its order denying for the most part defendant's Rule 12(b)(1) motion and granting his Rule 12(b)(5) motion. Rec., 155.

II. Facts Relevant to Issues Presented for Review

The complaint alleges the following facts, which for purposes of the Court's review of the trial court's ruling granting defendant's Rule 12(b)(5) motion, must be taken as true:

[1] References to the record are to the page of the pdf file containing the record.

A. HB 1229

In 2013 the Colorado General Assembly enacted HB 1229, which became effective July 1, 2013. Rec., 16. With certain limited exceptions, HB 1229 makes the transfer of a firearm between private individuals unlawful unless the Colorado Bureau of Investigation ("CBI") first conducts a background check and approves the transfer. Rec., 16-17. HB 1229 does not, however, permit either a transferor or a transferee to obtain a CBI background check. Rec., 17. Rather, HB 1229 requires the transferor to locate a federal firearms licensee ("FFL") and persuade the FFL to obtain the CBI background check, complying with all federal and state laws and using the same procedure as if the proposed transfer were of a firearm sold out of the FFL's own firearms inventory. *Id*. The FFL is permitted to charge the transferor a fee, but that fee may not exceed $10.00. *Id*.

No FFL is required by law to comply with a transfer request. *Id*. Rather, HB 1229 leaves it to FFLs' absolute, unfettered and unreviewable discretion to deny all or some of such requests. *Id*. There are a number of reasons that an FFL would not grant such requests, including, but not limited to, the following:

(a) The $10 cap does not reflect the value of the service requested, the going rate for which is currently $25 or even $50. *Id*

(b) The FFL has a financial interest in selling a firearm from his own inventory on which he would make a healthy profit rather than assisting a private sale for a token fee. Thus, HB 1229 creates a financial conflict of interest between the private individuals who desire to transfer firearms and the FFLs upon whom they must depend to obtain a background check. *Id*

(c) HB 1229 imposes upon FFLs the same compliance requirements (such as completion of the ATF Form 4473) as if the transfer were of a firearm from their own inventory. Each time an FFL completes a Form 4473 he risks committing record keeping errors that could expose him to criminal prosecution under federal law. FFLs have no sufficient incentive to risk substantial criminal penalties in exchange for a token fee. *Id*

(d) FFLs will be disinclined to perform the service if either the transferor or the transferee is not known to the FFL. *Id*

Without the services of a private FFL, a legal transfer of a firearm between private parties would be impossible and, if attempted, would expose the transferor and the transferee to criminal and civil liability. *Id.*

Additionally, there is nothing in HB 1229 that would prohibit an FFL from arbitrarily denying the background check. *Id.* Under the statute an

FFL has complete discretion to grant or to deny such assistance. *Id.* Moreover, an FFL may set whatever non-monetary terms he wishes to complete the check. *Id.* For example, he may choose to provide assistance only to transferors who are regular customers, or he may require parties to buy items from his own inventory as a condition of performing the check. *Id.*

Therefore, under the statutory scheme, private firearms transferors and transferees must depend absolutely on the good graces of a nongovernment third party in order to make a lawful firearms transfer, and if they fail find an FFL who will cooperate, they are subject to criminal liability and punishment. *Id.* Yet that nongovernment third party has complete and unfettered discretion to deny any request for a background check. *Id.*

B. HB 1224

In 2013 the Colorado General Assembly enacted HB 1224, which became effective July 1, 2013. Rec., 17. HB 1224 outlaws magazines that hold more than 15 rounds of ammunition, all tubular shotgun magazines that hold more than 28 inches of shells, and all non-tubular shotgun magazines that hold more than 8 shells. Rec., 21. Additionally, the chief sponsor of HB 1224 and Governor Hickenlooper have publicly confirmed that HB 1224 bans all magazines with removable floor plates, even if they do not violate

the limits, arguing that they can be "readily converted to accept" additional rounds of ammunition. *Id.*

The magazines for most handguns, for many rifles, and for some shotguns are detachable box magazines. Rec., 22. The very large majority of detachable box magazines contain a removable floor plate. *Id.* The fact that a magazine floor plate can be removed creates the inherent possibility that the magazine can be extended through commercially available extension products or readily fabricated extensions, such that nearly every magazine can be readily converted to exceed the capacity limits set by HB 1224. *Id.*

Some rifles have fixed box magazines, which are permanently attached to the rifle. *Id.* However, some of these also have removable floor plates. *Id.* The possibility that the fixed magazine's floorplate can be removed means that the rifle itself is banned by HB 1224, since it cannot be separated from, or used without, the fixed magazine. *Id.*

Instead of a box magazine, some rifles have fixed tube magazines, which lie underneath the rifle barrel. Many tube magazines have removable end caps for cleaning, to which extenders can be added. *Id.* A ban on certain types of fixed magazines is necessarily a ban on the rifles to which they are affixed. *Id.*

HB 1224 allows the possession of grandfathered magazines only if two separate requirements are satisfied. First, they must have been owned on July 1, 2013. Second, the owner must maintain "continuous possession" of the magazine. *Id*. The requirement for "continuous possession" makes it impossible for firearms to be used or shared in ordinary and innocent ways, such as a gun owner loaning his or her firearm with the magazine to a spouse, family member, or friend, or entrusting it to a gunsmith for repair. *Id*. The plain meaning of the requirement of "continuous possession" prohibits the grandfathered owner from ever allowing anyone to hold or use his firearm if the firearm is in a functional state (with a magazine inserted). *Id*.

Additionally, by outlawing most box and tube magazines, HB 1224 outlaws an essential component of many common firearms. Rec., 22-23. An overwhelming percentage of handguns and a substantial number of rifles currently manufactured in the United States are semi-automatic, which means that most of them store their ammunition in detachable box magazines. Rec., 23. Rifles which use box or tube magazines are not limited to semi-automatics, but also include pump action, bolt action, and many lever action rifles. *Id*.

In summary, the effect of HB 1224's various provisions is the widespread ban on functional firearms. *Id*. The prohibition of so many box and tube magazines of any size, and the prohibition of magazines greater than 15 rounds, directly and gravely harm the ability of law-abiding citizens to use firearms for lawful purposes, especially self-defense. *Id*. Thus, HB 1224 amounts to a ban on having a functional, operating unit for most handguns and a very large fraction of rifles in patent violation of Article II, Section 13 of the Colorado Constitution. *Id*.

C. History and Traditions of the State of Colorado

Colorado was part of the old west. Rec., 20. As such it has a strong libertarian history stretching back over 150 years insofar as firearms are concerned. *Id*. Thus, the history and traditions of the state support the conclusion that the state constitution protects a broader class of rights than the Second Amendment. *Id*.

SUMMARY OF THE ARGUMENT

Plaintiffs argue that the right to keep and bear arms is a fundamental right and that the Colorado Constitution protects that right to a greater extent than the United States Constitution. Accordingly, plaintiffs argue the trial court erred when it failed to apply a strict scrutiny standard of review to the challenged statutes. Plaintiffs argue that even if the *Robertson*

"reasonableness" standard remains applicable, the trial court erred both procedurally by failing to allow plaintiffs to develop a factual record by which the reasonableness issue can be reviewed, as well as substantively by interpreting *Robertson* to require an extremely deferential review of the challenged statutes. Plaintiffs argue that the trial court erred in its specific application of the *Robertson* standard to HB 1224 and HB 1229.

Plaintiffs argue that the trial court misconstrued the plain meaning of the phrase "designed to be readily converted" in HB 1224 and also the "continuous possession" requirement of the grandfather clause in that statute. Finally, plaintiffs argue that HB 1229 constitutes an unlawful delegation of executive and legislative power and denies plaintiffs due process of law.

ARGUMENT

A. Procedural Standard of Review

Defendant moved to dismiss the complaint pursuant to C.R.C.P. 12(b)(5) for failure to state a claim, and the trial court granted his motion. Dismissal of a complaint pursuant to Rule 12(b)(5) is a disfavored remedy to be granted very rarely and only under the most extraordinary of circumstances. In *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095

(Colo. 1995), the Supreme Court summarized the rules governing review of such a motion:

> **We view with disfavor a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim and uphold a trial court's grant of such a motion only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief**. We . . . accept all averments of material fact contained in the complaint as true. C.R.C.P. 12(b)(5) motions are rarely granted under our notice pleadings. Under our standard of review, allegations in the complaint must be viewed in the light most favorable to the plaintiff. Also, it is fundamental that, in passing upon a motion to dismiss a complaint, the court can consider only matters stated therein and must not go beyond the confines of the pleading . . . Such a complaint should not be dismissed on motion for failure to state a claim so long as the pleader is entitled to some relief upon any theory of the law.

Id., 908 P.2d at 1098 (emphasis added; internal citations and quotation marks omitted).

B. Substantive Standard of Review – Strict Scrutiny

(1) Article II, Section 13 of the Colorado Constitution Provides Greater Protections to Colorado Citizens' Right to Keep and Bear Arms then Does the Second Amendment

On numerous occasions the Colorado Supreme Court has held that various provisions of the Colorado constitution provide greater protection to civil liberties than their federal counterparts. *See Bock v. Westminster Mall Co*., 819 P.2d 55, 59 (Colo. 1991) (free expression); *People v. Ford*, 773 P.2d 1059 (Colo. 1989) (same); *Parrish v. Lamm*, 758 P.2d 1356, 1365 (Colo. 1988) (same); *People v. Seven Thirty-Five East Colfax, Inc*., 697 P.2d

348, 356 (Colo. 1985) (same); *People v. Berger*, 185 Colo. 85, 521 P.2d 1244 (1974) (same); *In Re Hearings Concerning Canon 35*, 132 Colo. 591, 296 P.2d 465 (1956) (same); *Cooper v. People*, 13 Colo. 337, 22 P. 790 (1889) (same); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) (searches and seizures); *People v. Oates*, 698 P.2d 811, 818 (Colo. 1985) (same); *People v. Corr*, 682 P.2d 20, 27 (Colo. 1984) (same); *People v. Sporleder*, 666 P.2d 135, 139-40 (Colo. 1983) (same); and *Charnes v. DiGiacomo*, 200 Colo. 94, 98-100, 612 P.2d 1117, 1119-21 (1980) (same).

In determining whether the state constitution provides greater protection to a civil right than the federal constitution, the Court must look to the history and traditions of the people of Colorado as well as the specific text of the provision in question. *Bock v. Westminster Mall Co*., *supra*. This analysis would lead to the conclusion that the state constitution's protection of the right to keep and bear arms is broader than its federal counterpart.

For purposes of determining the first part of the two-part *Bock* inquiry (history and traditions), the facts alleged in the complaint must be taken as true: Colorado was part of the old west; the state has a strong libertarian history stretching back over 150 years insofar as firearms are concerned; and

the history and traditions of the state support the conclusion that the state constitution protects a broader class of rights than the Second Amendment.

Turning to the textual issue, Article II, Section 13 of the Colorado Constitution states in pertinent part: "The right of no person to keep and bear arms in defense of his home, person and property . . . shall be called in question . . ." A *Bock* analysis leads to the conclusion that this provision provides greater protection to the right to keep and bear arms than does the federal Second Amendment. First, the text provides a much more specific, and therefore greater protection to the right to keep and bear arms. The text of the state provision extends to defense of home, person and property. The Second Amendment focuses on the necessity of a militia. By enumerating broader areas of significance the state provision protects a broader class of rights. Moreover, the Second Amendment states that the right to bear arms "shall not be infringed." Article II, Section 13 goes much further. It states that the right shall not even be called into question, much less infringed. Thus, the text of the state provision manifestly has a far broader scope than the text of the federal provision.

The reservation about concealed carry of firearms does not change this conclusion. The state free speech clause contains a similar reservation about the "abuse" of the freedom of speech. Despite this reservation, the

Colorado Supreme Court has held that the state free speech clause provides greater rights than the First Amendment. *Bock v. Westminster Mall Co.*, *supra*., *cf., Diversified Management v. Denver Post*, 653 P.2d 1103, 1111 (Colo. 1982) (Erickson, J. dissenting) (majority's holding that Colorado Constitution provides broader protection ignores abuse restriction).

Accordingly, both the text of the Colorado Constitution and the history and traditions of its people support the conclusion that Article II, Section 13 provides greater protections to the right to keep and bear arms than the Second Amendment to the United States constitution. It should be no surprise, therefore, that the Colorado Supreme court has **already** extended the reach of the state constitution beyond that of the Second Amendment. In *People v. Ford*, 193 Colo. 459, 568 P.2d 26, 28 (1977), the court held that a flat prohibition on the right of certain felons to possess firearms was subject to the guarantee of Article II, section 13, and held that the constitution required recognition of an affirmative defense to the statute if a defendant shows that his purpose in possessing weapons was the defense of his home, person or property. Compare that holding to *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the United States Supreme Court stated that there was nothing in its opinion that cast doubt on

prohibiting the possession of firearms by felons. *Id*., 554 U.S. at 626, 627 n. 26.

The Colorado Supreme Court has also extended the protections of the state constitution to unnaturalized foreign born residents. *People v. Nakamura,* 99 Colo. 262, 62 P.2d 246 (1936). In contrast, the *Heller* court announced that the right to keep and bear arms guaranteed by the Second Amendment belongs only to Americans, i.e., "all members of the political community." *Id*. at 580-81., *cf. U.S. v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012) (no right for illegal alien to possess firearm).

The trial court erred when it failed to address the issue of the reach of the state constitution, which was clearly before it. Further, the trial court erred when it applied a lower level of scrutiny than even that which is required under the Second Amendment, far less the more exacting level of scrutiny required by the Colorado Constitution.

(2) *McDonald v. Chicago* Changed Everything

The trial court erred when it applied the standard of review set forth in the Colorado Supreme Court's 1994 decision in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994). Rec., 160. In *Robertson* the court specifically deferred ruling on the issue of whether the right to keep and bear arms is a fundamental right. *Id*., 874 P.2d at 328 ("this case does

not require us to determine whether that right is fundamental"). The *Robertson* court could defer the fundamental right question, because in 1994 when that case was decided the United States Supreme Court had not yet held that the right to keep and bear arms is a fundamental right that must be applied to the states through the Fourteenth Amendment. In 2010 that changed. In *McDonald v. Chicago*, 561 U.S. 742, 778 (2010), the Supreme Court held that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty."

(3) Restrictions on "Fundamental Rights" are Reviewed Under the Strict Scrutiny Standard

The right to keep and bear arms is a fundamental right. The cases are legion stating that when a fundamental right is affected, the applicable standard of review is "strict scrutiny," and the state has the burden of establishing that the act is necessarily related to a compelling governmental interest. *See, e.g., Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 786 (Colo. 1985) (strict scrutiny applied); *Board of County Comm'rs v. Flickinger*, 687 P.2d 975, 982 n.9 (Colo. 1984) (same); *People v. Young*, 859 P.2d 814, 818 (Colo. 1993) (same); *Austin v. Litvak*, 682 P.2d 41, 49 (Colo. 1984) (same).

When it comes to other fundamental rights, the Colorado Supreme Court has uniformly applied the strict scrutiny standard. *Ferguson v. People*, 824 P.2d 803, 807 (Colo. 1992) (right to privacy); *People in re J.M.*,

768 P.2d 219, 221 (Colo. 1989) (right to freedom of movement); *People v. Becker*, 759 P.2d 26, 29 (Colo. 1988) (right to free speech and assembly); *Evans v. Romer*, 882 P.2d 1335, 1339 (1994), *aff'd*, 517 U.S. 620 (1996) (right to participate equally in the political process); *Comm. for Better Health Care for All Colo. Citizens v. Meyer*, 830 P.2d 884, 893 (Colo. 1992) (right of initiative); *Chesser v. Buchanan*, 568 P.2d 39, 41 (Colo. 1977) (right to vote); *In re A.W.*, 637 P.2d 366, 368-69 (Colo. 1981) (right to procreate); *Augustin v. Barnes*, 626 P.2d 625, 630 (Colo. 1981) (right to avoid disclosure of personal matters); *Jeffrey v. Colorado State Dep't of Social Services*, 599 P.2d 874, 879 (Colo. 1979) (right to travel); *see also, In re Marriage of McSoud*, 131 P.3d 1208, 1216 (Colo.App. 2006) (parental rights).

It seems, therefore, that the designation of a right as "fundamental" is tantamount to requiring strict scrutiny of any law that impinges on that right. This is especially the case given the fact that unlike some of the other rights discussed in the cases cited above, the right to keep and bear arms is specifically enumerated in the Colorado Constitution.

There is no principled reason to give the fundamental right to keep and bear arms less respect than that given to these other fundamental rights. We rightly disdain the Orwellian notion that "all animals are equal, but some

animals are more equal than others."[2] Is not the idea that the fundamental right to keep and bear arms should be accorded less dignity than other fundamental rights equally Orwellian? Is it not saying "some fundamental rights are more fundamental than others"? Where is the dividing line between fundamental rights that are protected by the strict scrutiny standard and those that are not? Is that line defined by the policy preferences of whatever court happens to be deciding the case? If that were the case, the reviewing court would have ceased to exercise its legitimate role of interpreting the constitution, and instead would have placed itself in an illegitimate anti-democratic policy-making role.

Far from reviewing HB 1224 and HB 1229 under a heightened level of scrutiny, the trial court went so far as to give a nod to the notion that perhaps the very lowest standard of judicial review (rational basis) might be applicable. Rec., 161. In any event, the trial court erred when it failed to recognize the fundamental nature of the right to keep and bear arms and the concomitant heightened scrutiny required when reviewing statutes that impinge on that right. Therefore, this case should be remanded to the trial court with instructions to apply the proper heightened level of scrutiny.

[2] George Orwell, *Animal Farm* (1946), p 112

C. The Trial Court's *Robertson* Analysis was Both Procedurally and Substantively Flawed

(1) "Reasonableness" is a Factual Issue that Cannot Be Decided on a Motion to Dismiss

The trial court determined that the challenged statutes were reasonable exercises of the state's police power. Rec., 162-3. Even if the *Robertson* standard remains applicable, however, the trial court's analysis was both procedurally and substantively flawed. First, the trial court erred when it refused to allow plaintiffs to develop a factual record, because "reasonableness" is an inherently factual inquiry that cannot be decided on a motion to dismiss. In *Students for Concealed Carry on Campus, LLC v. The Regents of the University of Colorado*, 280 P.3d 18, 27-28 (Colo.App. 2010), this Court held that whether challenged gun control legislation is a reasonable exercise of the state's police power is a mixed factual and legal question. The Court specifically cited passages in *Robertson* in which the Supreme Court relied on a fully developed factual record to support its decision. *Id*. Because a *Robertson* "reasonableness" analysis is fact intensive, resolution of a challenge should be based on a fully developed factual record, and the trial court erred when it dismissed plaintiffs' complaint without giving them an opportunity to develop such a record.

(2) The Trial Court Failed Properly to Apply Even the *Robertson* Standard of Review

Substantively, the trial court erred when it adopted an interpretation of the state's constitutional right to keep and bear arms that was highly deferential to the legislative exercise of its police power. In *Robertson* the court held that the question in each case is whether the law at issue constitutes a reasonable exercise of the state's police power in pursuit of a legitimate governmental interest. *Id*., 874 P.2d at 329, 331. Thus, in *Robertson*, it was for the court to decide based on a fully developed factual record whether the Denver assault weapon ban was reasonably related to legitimate health and safety needs of the community, or whether that ban unreasonably and illegitimately interfered with the use of firearms in the protection of home, person and property. In *Robertson*, after reviewing the record the court concluded that the unique characteristics of assault weapons coupled with the prevalent use of such weapons for criminal purposes posed a substantial threat to the health and safety of the citizens of Denver. *Id*., 874 P.2d at 332. Because the ordinance applied to only a narrow class of weapons, the court found that carving out a small category of arms did not significantly interfere with the full exercise of the people's right to bear arms in self-defense. *Id*., 874 P.2d at 333.

In contrast with the Denver ordinance, the *Robertson* court reaffirmed an earlier decision which struck down a Lakewood municipal ordinance proscribing the possession or use of any deadly weapon except in one's home. *Id*., 874 P.2d at 328. The court explained:

> In voiding the ordinance as overbroad, we observed that it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police power be reasonably classified as unlawful and thus, subject to criminal sanctions.

Id.

This text makes it clear that the *Robertson* standard does not give the legislature a virtually unlimited license to prohibit conduct that cannot reasonably be considered unlawful, such as the private sale of a firearm. Thus, the trial court erred when it interpreted *Robertson* to require a standard of review that is extremely deferential to government regulations that restrict the right to keep and bear arms. Far from a deferential standard of review, even *Robertson* requires heightened scrutiny in this situation.

D. HB 1229 Violates Article II, Section 13 of the Colorado Constitution Even Under a *Robertson* Analysis

Taking the allegations of the complaint as true, and applying even the *Robertson* analysis, this Court should find that the complaint does in fact state a claim upon which relief can be granted. The right to transfer a firearm is within the scope of the right to keep and bear arms. Implicit in the

meaning of the phrase "keep and bear arms" is the right to acquire arms for the purpose of keeping and bearing them. *Heller v. District of Columbia*, 670 F.3d 1244, 1255 (D.C. Cir 2011) (explaining that at the core of the right to keep and bear arms is the right of "a person lawfully to **acquire** and keep a firearm . . .") (emphasis added). Indeed, it is unclear how anyone would "keep" something if he had no power to receive that thing in the first place. The right to "keep" would certainly contemplate a right to manufacture, but it would also extend to a right to receive a thing made by others by sale or gift. And a right to receive would imply in another the power to transfer. Without protecting the right of a transferor to convey a firearm, a transferee of that firearm would be prohibited from exercising his right to "keep," and therefore "bear," arms in self-defense.

Surely, therefore, the state may not enact an outright prohibition on transfers of firearms from one citizen to another, because subsumed within the right to keep and bear arms is the right to transfer arms to another. Indeed, the right to transfer should be considered within the core of the right to keep and bear arms, because it is furthers the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." c*f.*, *Heller*, 554 U.S. at 635. Accordingly, HB 1229 clearly burdens the right to keep and bear arms.

The complaint alleges that HB 1229 makes the right to transfer a firearm subject to the absolute, unfettered and unreviewable discretion of third party FFLs who have substantial disincentives to cooperate with private firearms transferors, and this creates an unreasonable burden on plaintiffs' right to transfer firearms. Rec., 17. Such an unreasonable burden on the right to keep and bear arms violates Article II, Section 13 of the Colorado Constitution.

In light of the fundamental nature of the right to keep and bear arms protected by the Colorado Constitution, the trial court's holding concerning HB 1229 is inexplicable. The trial court held:

> even if no licensed gun dealers were willing to perform background checks for private transfers, Article II, § 13, of **the Colorado Constitution does not provide a private right to sell and transfer weapons** . . . [A]ssuming the worst case scenario that the practical effect of the new law will be to preclude all private sales and transfers because no licensed gun dealers will submit requests to the NICS, individuals would still be able to purchase and sell firearms through public sales, and the Colorado Constitution does not guarantee the ability to purchase or sell a weapon by means of a specific type of transaction such as a private sale.

Rec., 162 (emphasis added).

Surely the trial court has gone too far. Is the trial court adopting the view that even with personal property that is constitutionally protected, all sources of supply of a good could be banned so long as one source remains

available? This cannot possibly be the law. *See Mance v Holder*, 2015 U.S.Dist.LEXIS 16679 (N.D.TX. Feb. 11, 2015) at *9-*10, *21-*23. ("Restricting the distribution channels of legal goods protected by the Constitution to a small fraction of the total number of possible retail outlets requires a compelling interest that is narrowly tailored.") (citations omitted).

Perhaps the trial court's error would be more apparent if its analysis were transferred to the fundamental right of a free press. In this context the trial court's reasoning is equivalent to saying that a person has a right to a free press but no right to buy printing equipment and paper except from a government regulated and approved supplier. The right to keep and bear arms is substantially diminished if there is no vibrant private market for arms and necessary components of arms such as magazines. HB 1229 unreasonably suppresses that market and therefore violates Article II, Section 13 of the Colorado Constitution.

E. HB 1224 Violates Article II, Section 13 of the Colorado Constitution Even Under a *Robertson* Analysis

(1) The 15 Round Magazine Limit is an Unlawful Ban on Firearms in Common Use

HB 1224 prohibits magazines that either (i) can hold more than 15 rounds of ammunition, or (ii) are "designed to be readily converted" to hold more than 15 rounds. Plaintiffs challenged both parts of the definition as a

patent violation of the Colorado Constitution. However, the trial court addressed only plaintiffs' challenge to the "readily converted" magazine portion of the statute, discussed in section E(2), *infra*, while ignoring plaintiffs' challenge to the 15 round limit itself.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court found that handguns banned by the District of Columbia (including semi-automatic handguns designed for use with standard capacity magazines ranging up to 17[3] and now 19[4] rounds) are "in common use" by Americans "for lawful purposes." *Id.*, 554 U.S. at 619-26. As such, the Court held that a flat ban on possession of a handgun was unconstitutional — irrespective of how compelling the government thought its interest in doing so might be. *Id.*, 554 U.S. at 634-35. Like the handguns banned by the government in *Heller*, Colorado's "large capacity" magazine "ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose" of self-defense. *Id.*, 554 U.S. at 628. Paraphrasing *Heller*, "[i]t is no answer to say ... that it is permissible to ban the possession of [large capacity magazines] so long as the possession of other [magazines] is allowed." *Id.*, 554 U.S. at 629.

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[3] http://us.glock.com/products/model/g17gen4

[4] http://www.springfield-armory.com/products/xdm-competition-series-9mm/

Although the trial court did not address plaintiffs' argument that the Colorado Constitution protects the right to bear arms to a **greater** degree than the United States Constitution, the court never held that the Colorado Constitution provides **less** protection than the federal one. There is no reason to believe that the Colorado constitution provides lesser protection to magazines that have been "in common use" by Coloradans for many years.[5] "The police power of a state cannot transcend the fundamental law, and cannot be exercised in such manner as to work a practical abrogation of its provisions." *People v. Nakamura*, 62 P.2d 246, 247 (1936).

It is no answer to assert, as the trial court does, Rec., 161, that certain arms can be disfavored because they have been used by criminals. Various semi-automatic handguns which were protected in *Heller* no doubt are widely favored by criminals, just as they are favored by everyone else, including law-abiding citizens, the police, and the military.

Finally, it bears repeating that the record in this case is utterly devoid of any factual evidence that a ban on 15 round magazines has any effect

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[5] The Bureau of Alcohol, Tobacco, Firearms and Explosives report on "Firearms Commerce in the United States: Annual Statistical Update, 2012" reports that of all handguns manufactured in 2010, "pistols" outnumbered "revolvers" (defined as having a rotating cylinder) by over four to one: 2,258,450 to 559,917. http://www.atf.gov/files/publications/firearms/050412-firearms-commerce-in-the-us-annual-statistical-update-2012.pdf

whatsoever on public safety. If it does not, the legislature's ban on such magazines is simply arbitrary, and an arbitrary ban is, by definition, unreasonable under the *Robertson* standard.

(2) The Trial Court Erred in Its Interpretation of "Designed to Be Readily Converted"

(a) The Trial Court Ignored Plaintiffs' Factual Allegations, Finding Its Own Set of Facts Without a Hearing

The second prong of the definition of a high-capacity magazine — "designed to be readily converted to accept . . . more than fifteen rounds of ammunition" — presents a technical issue of firearms and magazine design on which expert testimony would be essential. Plaintiffs alleged, and would have introduced expert testimony to demonstrate, that: (i) most handguns and many rifles are designed to use magazines with removable floor plates; (ii) the design of those magazines inherently allows them to be readily converted to hold more than 15 rounds.[6] Rec., 22-23. Therefore, these magazines would appear to meet the second definition of a high capacity magazine. Unlike state statutes which simply limit magazine capacity to 15

[6] Plaintiffs understanding of this statute is the same as that initially espoused by Governor Hickenlooper and by the chief proponent of HB 1224. Rec., 24. Governor Hickenlooper has since attempted to recant entirely his support of HB 1224 after the widespread public backlash he received. *See* L. Bartels, Gov. Hickenlooper's attempt to charm Colorado sheriffs backfires, *The Denver Post*, June 16, 2014, http://goo.gl/5JYlyj.

rounds and therefore ban only magazines exceeding that capacity, HB 1224 has the effect of banning in Colorado virtually all magazines sold today in America and rendering most weapons completely or largely inoperable. Rec., 21-22.

The trial court characterized plaintiffs' allegations concerning the proper "interpretation of the word 'design'" as being "without merit." Rec., 163. Instead, the trial judge speculated about the "design history" of a firearm. [7] Without a factual record, the trial court assumed that it knew (and could apparently take judicial notice of) what an investigation into that history would show, concluding "[t]he fact that extensions may be bought or built which take advantage of the removable floor plate to extend the magazine capacity does not alter [the] purpose for which the floor plate was designed." Rec., 163.

The trial court appeared to rule that the only magazines that would be banned under the second prong of the definition would be those "designed [by the manufacturer] to be readily converted." At a hearing, plaintiffs would have put on expert testimony to show that there is no box magazine

[7] In *Robertson* the Colorado Supreme Court struck down as being "unconstitutionally vague" one of the definitions of an "assault weapon" which required speculation about a firearm's "design history" to know if a weapon was "originally designed to accept magazines with a capacity of twenty-one (21) or more rounds."

currently manufactured which meets the court's test, which was originally the government's test, which the court appears to have accepted. The government described such banned magazines as one "whose objective features demonstrate that it has been designed for quick and ready expansion." Rec., 45. The trial court stated as fact that there are such magazines, Rec., 163, even though neither defendant nor the trial court has provided a single example of any magazine that would be encompassed by their interpretation of the statute.

The trial court continued to make its own unsubstantiated factual findings, asserting that "**even if** all firearm magazines were considered to be designed to be readily convertible . . . such magazines could still be permanently altered so as not to accept more than fifteen rounds . . ." Rec., 163 (emphasis added). Again, the court engaged in rank speculation about a factual matter. In truth, without any hearing, the court had no basis to determine some firearm magazines can be "permanently altered" and others cannot. The trial judge's statement has neither support in this factual record, nor basis in law — and, indeed, flirts with fiction. These are the types of judicial mistakes that occur when a factual dispute is resolved on a motion to dismiss.

Had there been a hearing, plaintiffs would have demonstrated there are numerous companies that manufacture magazine extensions that increase the capacity of a magazine which can be installed by anyone in seconds, based on the design of those magazines.[8] Defendant admits that, under plaintiffs' understanding of the second prong of the statute, the effect would be to ban a large percentage of modern firearms and "**would likely violate** the Second Amendment," Rec., 46 (emphasis added). Despite the government's warning, the trial court found no problem with an expansive reading of the staute, stating that "[u]nder even the Plaintiffs' worst case scenario [the statute] cannot effect a ban on **all** firearms." Rec., 162 (emphasis added).

(b) The Attorney General's Technical Guidance Letters Do Not Control

Attempting to counter challenges brought by the plaintiffs in *Colorado Outfitters*,[9] the Colorado Attorney General issued two "technical guidance" letters (Rec., 52 and 54; dated May 16, 2013 and July 10, 2013). The letters claim that the statute applies only to magazines with removable baseplates "whose function is . . . **specifically** to increase the capacity."[10]

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[8] http://tinyurl.com/qdu2cbo

[9] *Colorado Outfitters Assn. v. Hickenlooper*, 24 F.Supp.3d 1050 (D. Colo. 2014).

[10] Rec., 55 (emphasis added).

The trial court accepted this narrow construction. Rec., 163. Magazine manufacturers are no doubt aware that a floorplate can be readily removed and a magazine extension added, but that does not mean they ever designed a magazine "specifically" for that purpose. Under the Attorney General's technical guidance letters **no magazines** would fall under the second prong of the statutory text.

In any event, no case should be decided based on what are essentially defense counsel's self-serving pronouncements (the Attorney General represents the defendant). First, based on a review of the Attorney General's website, these two technical guidance letters appear to be the only such technical guidance ever issued.[11] Second, although requested by the Governor, they were not denominated as "opinions," and thus do not fall within the Attorney General's authority to give "his opinion in writing upon all questions of law submitted to him by the general assembly," etc. C.R.S. § 24-31-101. Third, absent a command from the Governor, the Attorney General has no authority to prosecute criminal actions or regulate their prosecution, that authority residing exclusively with the district attorneys. "Colorado . . . has neither identified nor required the attorney

[11] http://www.coloradoattorneygeneral.gov/search_all/%2522technical%2Bguidance%2522.

general to serve as the 'people's elected chief law officer,' as some states have." *Tooley v. Trial Court*, 549 P.2d 774, 777 (Colo. 1976). Thus, any "technical guidance" from the Attorney General would neither have the force of law nor place any limitations on the prosecutorial discretion of district attorneys, leaving Coloradans at risk of prosecution for owning most magazines. *Id*. Fourth, as these letters expressly state, they are not binding on any court. Fifth, these letters are not even binding on the Attorney General who wrote them, as revealed by the fact that the first letter dated May 16, 2013 was revised less than two months later on July 10, 2013. The letters would certainly not be binding on the present (nor any subsequent) attorney general.

Even if this Court believes these technical guidance letters were properly considered by the trial court, however, they would still not provide a basis for upholding the second "design" definition. Indeed, in these letters, the Attorney General all but concedes that, under his reading of the law, this portion of the statute borders on being a nullity. With his lawyer, the Attorney General, taking such a position, the Governor should have no objection to the Court of Appeals striking the words "or that is designed to be readily converted to accept" from HB 1224, as they have no application and would only have the effect of misinforming Coloradans as to what

behavior constitutes a "Class 2 misdemeanor," resulting in an impermissible chill on lawful behavior. *See, e.g.*, *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring); *cf Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 946 (N.D. Ill. 2014) (ordinance had impermissible chilling effect on exercise of Second Amendment rights).

(c) The Trial Court's Reading Renders the Prohibition a Dead Letter

It is axiomatic that "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." *See* A. Scalia and B. Garner, *Reading Law: The Interpretation of Legal Texts*, at 247-51. The lower court's reading of "designed to be readily converted" accomplished that objective, but the court's interpretation renders the prohibition a nullity, because it makes the provision inapplicable to any magazine. No statute should be read in such a way that it has no application. *See* C.R.S. § 2-4-201(1)(b) (entire statute intended to be effective); *People v. Morales*, 298 P.3d 1000, 1011 (Colo.App. 2012) (statutory constructions that render statutory provisions a nullity must be avoided).

In short, there is no rule of construction that can save section C.R.S. § 18-12-301(2)(a)(I). It is either – as plaintiffs contend – so broad as to apply to all box magazines rendering inoperative most semi-automatic handguns and rifles, or it is – as the trial court's reading would have it –

essentially meaningless because it bans nothing. The statute must be struck down as either being a nullity or a gross infringement on the right to keep and bear arms.

Disagreeing with the majority only as to whether Denver, rather than the state of Colorado, had the power to enact the "assault weapon" ordinance in question, Justice Erickson explained in *Robertson* that prior decisions of the Colorado Supreme Court:

> establish that in the context of regulating firearms '**legitimacy**' has a specific meaning: firearms regulation is not a legitimate exercise of the state's police power if it **prohibits or abrogates legal activity** or **unduly infringes on an individual's right to bear arms**. If this narrow definition of legitimacy is not recognized, almost any law regulating firearms could be justified as a reasonable exercise of the state's police power . . .

Robertson, 874 P.2d at 348 (Erickson, J. Dissenting) (emphasis added).

As demonstrated here, the magazine restrictions in this case are unmistakably an unreasonable exercise of the power of the state to protect the public safety and general welfare.

F. The "Continuous Possession" Provision is Unconstitutional

HB 1224 requires that, in order for a large-capacity magazine owned prior to the ban to continue to be lawfully possessed under the "grandfather" provision, the owner must "maintain[] continuous possession" of the magazine. *Id*., section 1. Plaintiffs alleged that this provision requires

actual or physical control of the magazine exclusively by the owner, and that the owner could not loan it to another, give it to an agent for repair, or even briefly hand it to another shooter at the firing range. Rec., 22.

The trial court noted that the requirement indeed required "actual or physical control," but argued that "such control **does not have to be exclusive**." Rec., 163 (emphasis added). The trial court addressed certain situations identified by plaintiff, determining that a magazine could be "temporarily handle[d] ... in the owner's presence." Rec., 163. The trial court never addressed plaintiffs' examples, such as temporarily loaning the magazine to another, or giving it to a gunsmith for repair. The trial court cited *People v. Martinez*, 780 P.2d 560, 561 (Colo. 1989), which interpreted the word "possession" in a different context as not requiring exclusive control. However, the statute in *Martinez* prohibited "possession," while the statute here requires it, and the statute in *Martinez* prohibited only "possession" while the statute here requires "continuous possession." *Martinez* not only does not control, it does not apply.

The trial court's analysis disregards the word "continuous" in the statute and, in doing so, violates "the cardinal principle of statutory construction that courts must give effect, if possible, to every clause and

word of a statute." *Williams v. Taylor*, 529 U.S. 362 (2000).[12] Giving effect to all words, "continuous" is defined as "uninterrupted; unbroken."[13] Thus, "continuous possession" requires "possession" over time unbroken by another's possession which breaks the continuity — just as plaintiffs alleged.

The Attorney General's first technical guidance letter states that an owner can "temporar[ily] transfer" a magazine to another so long as the owner "remains in the **continual physical presence** of the temporary transferee . . ."[14] Even under the Attorney General's interpretation, an owner of a grandfathered magazine permanently would lose the statute's protection the moment "continual physical presence" is broken. The effect would be that the owner would never be able to allow anyone else, even members of his own family, near the magazine, for fear that if someone so much as picked it up while he was away, the magazine would forever lose its grandfathered status and instantly make both him and the third party guilty of a Class 2 misdemeanor.

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[12] *See also Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) ("every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.").

[13] *Black's Law Dictionary*, West Publishing Co. (1968), p. 392. The reasons that such letters are not controlling is set out in section (E)(2)(b), *supra*.

[14] Rec., 55 (emphasis added).

The second technical guidance letter is even stricter, requiring "having or holding property in one's power or the exercise of dominion over property, that is uninterrupted in time, sequence, substance or extent."[15] Thus, the statute's grandfathering is voided any time a third party temporarily acquires possession of a magazine, even if he later returns it to its owner. The standard of the grandfather clause could be satisfied only by a hermit.

Now that the trial court has confirmed the Attorney General's position that grandfathered status would be virtually impossible to maintain, H B 1224 is revealed to be a taking of private property without compensation — not for all Coloradans at once, but on a rolling basis as physical possession is lost, violating two additional provisions of the Colorado constitution. *See* Colo. Const., Art. II, § 15 ("Private property shall not be taken or damaged, for public or private use, without just compensation."); Article II, § 25 ("No person shall be deprived of life, liberty or property, without due process of law.")

Moreover, without the grandfather clause, HB 1224 would have resulted in a massive confiscation of tens of thousands of magazines worth millions of dollars from tens of thousands of Coloradans. If the grandfather

[15] Rec., 52.

clause is determined to be unconstitutional, the entire magazine ban should be struck as it could never "be presumed the legislature would have enacted the valid provisions without the void one." C.R.S. § 2-4-204 (2014). "The test for severability is whether valid provisions of the statute are so essentially and inseparably connected with or dependent upon the void provision that it cannot be presumed that the legislature would have enacted the valid provisions without the void one." *Mesa Verde Co. v. Montezuma County Bd. of Equalization*, 1994 Colo. LEXIS 869, *47-48 (1994).

G. HB 1229 Unconstitutionally Delegates Executive and Legislative Licensure Powers to Non-Government Agents

In addressing the plaintiffs' claims that HB 1229 unconstitutionally delegated both executive and legislative powers to private licensed gun dealers, the court below mistakenly likened the CBI background check to an ordinary commercial transaction for goods and services. Rec., 155. Specifically, the court analogized the sale of a firearm to the sale of a prescription drug, likening the role of a medical doctor in prescribing a drug to a licensed firearms dealer's handling of the paperwork necessary to obtain the Colorado criminal background check. Just as a medical doctor is not required to sign a prescription form, the court observed, neither would a licensed dealer be required to sign an ATF Form 4473. *Id.*

Entirely overlooked by the court below is that a physician's authorization for a pharmacist's sale of a prescription drug is part of a private commercial transaction for which the pharmacist is paid an amount determined by the contracting parties, whereas the licensed firearms dealer's conduct of the National Instant Criminal Background Check ("NICS") criminal background check is a public safety measure for which the licensed dealer is paid a government-set fee. A licensed gun dealer is empowered by HB 1229 to exercise a government function, whereas the physician writes a prescription as part of the private practice of medicine. Moreover, although the State imposes no requirement on an FFL to perform the NICS check, state law regulates and imposes a duty on physicians to treat patients properly, including prescribing necessary medications.

Not only did the court below make a mistaken analogy, but also it ignored an exact parallel between the FFLs role in facilitating the criminal background check required by the Brady Act as applied to sales from its own inventory, and the background check required by Colorado law for a non-FFL firearms transaction. In the former case, "the federal gun law makes the [FFL] '[t]he **principal agent of federal enforcement**' . . . possessing access to the expansive NICS database [to] [e]nsure that, in the course of sales or other dispositions . . . weapons [are not] obtained by individuals whose

possession of them would be contrary to the **public interest**.'" *Abramski v. United States*, __ U.S. __, 134 S.Ct. 2259, 2273 (2014) (emphasis added). More specifically, the FFL serves as the "principal agent of federal enforcement" through the NICS check "keeping firearms out of the hands of criminals" and through the federal law "record keeping provisions[,] aid[ing] law enforcement in the investigation of crime." *Id.* By extending the FFLs authority to conduct a CBI check and to preserve the same records as required for private firearms transfers, the Colorado legislature has made the FFL its "principal agent of **State** enforcement" to keep firearms out of the hands of criminals and to aid in law enforcement.

Not only is the licensed dealer performing a government function allegedly for the public good, he is empowered by statute to exercise certain executive powers, most notably the executive power to initiate the CBI background check. As "[e]xecutive agencies and officers charged with a duty to enforce criminal laws . . . have broad discretion . . . to investigate and determine who shall be prosecuted,"[16] so the FFLs, in the enforcement of the law requiring background checks in third party firearms sales, have broad discretion to investigate the backgrounds of both sides of a private

[16] *Rocky Mountain Animal Defense v. Colorado Division of Wildlife*, 100 P.3d 508, 517 (Colo. 2004).

firearms transaction and the unreviewable discretion to determine, without standards or supervision, which private sales shall be processed by the CBI and which shall not. In essence, the legislature has conferred upon the state's FFLs the unreviewable power to deny a license to engage in a private firearms sales transaction.

To be sure, the FFLs executive licensing power ends there. As the court below pointed out the FFL does not "perform the actual background check, . . . determine whether receipt of the firearm by the transferee is legal, [or] issue the identification number required by the Brady Act." Rec., 160. But the FFL has the executive power and duty to "confirm the identity of the transferee," without which the firearms transaction could not move forward. *Id.* True, as well, the FFL does not have the power to "monitor compliance with the background check requirement, [nor to] enforce penalties for disobedience." *Id*. According to the theory of court below, the FFL does not exercise executive power because he is only an "intermediate agent[] . . . administering **part** of the law." *Id*. (emphasis added). However, if that were the test of whether an officer is vested with executive power, then even the Governor would not have executive power since he cannot possibly administer every jot and tittle of the law. *See, e.g., Colorado v. Pena*, 911 P.2d 48, 55 (Colo. 1996).

As for the unconstitutional delegation of legislative powers, the court below faults the plaintiffs' argument on the ground that FFLs "cannot set a policy or rule to be followed by other dealers." Rec., 160. Even if that is the case, the legislature has nevertheless delegated to FFLs the power to make rules governing whether to facilitate particular private firearms transactions. And by conferring such power upon the State's FFLs without any "statutory requirements," the Colorado Assembly has crowned those FFLs with licensing power, thereby turning them into legislators, freed to make up their own rules. See P. Hamburger, *Is Administrative Law Unlawful*? at 103. As the U.S. Supreme Court ruled in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), "[t]he question whether such a delegation of legislative power is permitted by the Constitution is **not** answered by the argument that it should be assumed that [the one to whom the power is delegated] will act for what he believes to be the public good." *Id.*, 293 U.S. at 420 (emphasis added). To the contrary, the legislature "manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." *Id.*, 293 U.S. at 421.

Finally, where the delegation of legislative power is to a private group, the U. S. Supreme Court has been adamant in its opposition: "This 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). Not only are the private economic interest of the FFLs in conflict with the interests of the independent seller and buyer, but the FFLs "can act entirely in private, without hearings or other administrative process," wholly unaccountable to any higher authority and, thus, free to "protect themselves and hold down the weak." *See* P. Hamburger, *Is Administrative Law, Unlawful?*, pp. 398-99 (Univ. of Chi. Press:2014). As Professor Hamburger has astutely observed:

> [T]his sort of delegation revives the medieval distribution of economic control to guild-like bodies. Like its medieval predecessor, it allows powerful economic forces, acting with government authority, to bind both themselves and others at the cost of freedom and constitutional choices of the people. It thus returns to the preconstitutional world in which the government's relinquishment of its powers enables the prevailing forces in each industry to become the real rulers in their fiefdoms.

Id. at 398-99.

H. HB 1229 Denies Plaintiffs' Rights to Liberty and Property Without Due Process of Law in Violation of Article II, Section 25 of the Colorado Constitution

The trial court found plaintiffs' due process claim against HB 1229 wanting for the sole reason that "under the theory set forth in *Vinnola,*[17] . . . there is no violation of due process or equal protection." Rec., 159. Although plaintiffs' due process claim cited *Vinnola,* neither the complaint nor plaintiffs' response to defendant's motion to dismiss rested solely on *Vinnola's* holding as interpreted in subsequent cases, as the trial court appears to have assumed. Rec., 159-60. Rather, as revealed by the factual allegations in support of their due process claim (Rec., 18), and the arguments submitted in their response (Rec., 71-73), plaintiffs' reliance upon *Vinnola* rested upon the principle that the "unfettered discretion" conferred upon the FFLs, to grant or deny to a willing seller and a willing buyer of a constitutionally protected firearm access to the governments' CBI system, violated due process of law.

There is no question that under Colorado law any denial of the right of a willing buyer and a willing seller to engage in a business transaction involving a constitutionally protected firearm is "'completely out of harmony with the American constitutional concept of fundamental freedoms

[17] *People v. Vinnola*, 494 P.2d 826 (Colo. 1972).

and liberties, under which the individual has the right to engage in a lawful business which is harmless in itself and useful to the community, unhampered by unreasonable and arbitrary governmental interference or regulation.'" *See Denver v. Denver Buick, Inc.*, 347 P.2d 919, 923 (Colo. 1959). Thus, as the Colorado Supreme Court long ago established, "[a]ny legislative action which takes away any of the essential attributes of property, or imposes unreasonable restrictions thereon, violates the due process clause of the Constitutions of the United States and the State of Colorado." *Id.*, 347 P.2d at 924.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request the Court to reverse the trial court's decision to dismiss this action for failure to state a claim and to remand the case for further proceedings.

Respectfully submitted this 12th day of March, 2015

/s/ Barry K. Arrington

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Opening 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).

Choose one:

☒It contains 9,420 words.

☐It does not exceed 30 pages.

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

☒For the party raising the issue:

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. Arrignton

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Barry K. Arrington

CERTIFICATE OF SERVICE

The undersigned certifies that on March 12, 2015 he served a true and correct copy via ICCES on:

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