

DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Phone Number: (303) 606-2300	<div style="text-align: center; padding: 20px;"> <input type="checkbox"/> <b>COURT USE ONLY</b> <input type="checkbox"/> </div>
ZACHARY LANGSTON; MAGNUM SHOOTING CENTER OF COLORADO SPRINGS, LLC; COLORADO STATE SHOOTING ASSOCIATION; FIREARMS POLICY COALITION, INC.; SECOND AMENDMENT FOUNDATION; and NATIONAL RIFLE ASSOCIATION OF AMERICA,  <div style="text-align: center;">Plaintiffs,</div>  v.  HEIDI HUMPHREYS, in her official capacity as the Executive Director of the Department of Revenue; MICHAEL J. ALLEN, in his official capacity as the District Attorney of the County of El Paso,  <div style="text-align: center;">Defendants.</div>	
Bryan E. Schmid, #41873 Senior County Attorney Nathan J. Whitney, #39002 First Assistant County Attorney Office of the County Attorney of El Paso County, Colorado 200 S. Cascade Ave. Colorado Springs, CO 80903 (719) 520-6485, Fax (719) 520-6487 <a href="mailto:BryanSchmid@elpasoco.com">BryanSchmid@elpasoco.com</a> <a href="mailto:NathanWhitney@elpasoco.com">NathanWhitney@elpasoco.com</a>	<div style="text-align: center; padding: 10px;"> <b>DEFENDANT MICHAEL J. ALLEN’S MOTION TO DISMISS PURSUANT TO              C.R.C.P. 12(b)(1) AND 12(b)(5)</b> </div>

Defendant, Michael Allen, by and through the Office of the County Attorney of El Paso County, Colorado, moves to dismiss Plaintiffs’ claims asserted against him pursuant to C.R.C.P. 12(b)(1) and 12(b)(5). Plaintiffs lack standing to bring this lawsuit and their Complaint fails to state a claim against Defendant Michael Allen in his official capacity as the District Attorney for

the 4th Judicial District for the State of Colorado.<sup>1</sup> (hereinafter “DA Allen”) upon which relief can be granted. In support thereof, DA Allen states as follows:

### **CERTIFICATION OF CONFERRAL**

Pursuant to C.R.C.P. 121, Section 1-15(8), on May 28, 2025, counsel conferred with Plaintiffs via email as to the filing of this motion. Plaintiffs object to the Motion and the relief requested herein.

### **INTRODUCTION**

Plaintiffs bring suit to present a constitutional challenge to Colorado’s Proposition KK, codified as the “Crime Victim and Survivor Services Funding and Mental Health Security Act” (“the ACT”), C.R.S. §§ 39-37-101 *et seq.*, which imposes a 6.5% excise tax on the retail sales of firearms and ammunition for the express purpose of “plac[ing] a reasonable state surtax on firearm and ammunition industry members that profit from the sale of firearms and ammunition in order to generate sustained revenue for programs that are designed to remediate the devastating impacts of these products on families and communities across this state.” C.R.S. § 39-37-102. Plaintiffs assert that the ACT’s 6.5% excise tax on firearms and ammunition infringes upon their rights under the Second Amendment<sup>2</sup> because it implicates conduct protected by the Second Amendment’s plain text—acquiring firearms and ammunition—by impermissibly singling out the constitutional right for special taxation. Complaint, p. 9, ¶¶ 45-46.

---

<sup>1</sup> Plaintiffs’ Complaint misidentifies Defendant Michael J. Allen as the District Attorney of the County of El Paso.

<sup>2</sup> Plaintiffs’ constitutional challenge to the ACT is predicated solely on the alleged violation of their rights under the Second Amendment to the United States Constitution. *See* Complaint, p. 8 (“Claim for Relief, Count 1: Unconstitutional Taxation – Violation of U.S. Const. amend. II – The Right to Keep and Bear Arms”). No issue was raised under Colorado’s constitution.

Provisions of the ACT make it: (1) “unlawful for any person to engage in the business of an ammunition vendor, a firearms dealer, or a firearms manufacturer in this state without first having registered as a vendor with the executive director”<sup>3</sup> (§ 39-37-107(1)(a)); (2) a petty offense punishable in accord with C.R.S. § 18-1.3-503 for any vendor who makes retail sales subject to the excise tax without first registering with the executive director (§ 39-37-107(3)(a)); (3) “unlawful for any vendor to willfully make any false or fraudulent return or false statement on any return or to willfully evade the payment of the tax, or any part of the tax” (§ 39-37-111); and a felony offense, punishable in accord with § 18-1.3-401, for any vendor who willfully violates any provision of Part 1 of the ACT (§ 39-37-111 and § 39-21-118). Plaintiffs assert that in his official capacity,<sup>4</sup> DA Allen is charged with prosecuting the criminal penalties imposed by the ACT.<sup>5</sup>

Plaintiffs seek relief from this Court in the form of a “declaratory judgment stating that Colorado’s 6.5% excise tax on firearms and ammunition, C.R.S. §§ 39-37-101 *et seq.*, violates the right to keep and bear arms secured by the Second Amendment to the United States Constitution” and “a permanent injunction enjoining Defendants from enforcing C.R.S. § 39-37-104, and associated provisions” of the ACT.

---

<sup>3</sup> C.R.S. § 39-37-103(5) identifies the “executive director” as the executive director of the department of revenue.

<sup>4</sup> A claim against District Attorney Allen in his official capacity should be understood as a claim against the Office of District Attorney for the 4th Judicial District of Colorado. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (noting that the government entity is “the real party in interest” in an official capacity suit).

<sup>5</sup> Plaintiffs’ assertion regarding DA Allen’s responsibility for prosecuting the criminal penalties is found in the Complaint’s “The Parties” section. DA Allen notes that other than the passing reference to him as a party to this action, the Complaint makes no other mention of him by name or position, or of the District Attorney’s Office. The Complaint also fails to assert the existence of a statute, regulation, ordinance, directive, order, or the like that places the onus on DA Allen or his office for defending against Plaintiffs’ constitutional challenge to the excise tax, the ACT itself, or the application of the ACT to the respective Plaintiffs.

DA Allen takes no position on whether the ACT represents an unconstitutional taxation or whether it infringes Plaintiffs' rights under the Second Amendment. Rather, DA Allen seeks an Order dismissing any claim against the District Attorney's Office, if any be found within the Complaint, because Plaintiffs lack standing to bring any claims against him or his office absent a justiciable controversy. DA Allen also asserts that Plaintiffs' Complaint should be dismissed as Plaintiffs fail to state a claim upon which relief can be granted.

### **ARGUMENT**

#### **I. Plaintiffs' Complaint against DA Allen Must Be Dismissed as Plaintiffs Lack Standing to Bring a Claim for Unconstitutional Taxation Against Him**

"In order for a court to have jurisdiction over a dispute, the plaintiff must have standing to bring the case. Standing is a threshold issue that must be satisfied in order to decide a case on the merits." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). To establish standing, a plaintiff must satisfy two criteria: "First, the plaintiff must have suffered an injury-in-fact, and second, this harm must have been to a legally protected interest." *Id.* at 855. The first prong of the standing test requires "a concrete adverseness which sharpens the presentation of issues that parties argue to the courts." *Id.* at 856 (quoting *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000)). "Standing is conveyed by neither the remote possibility of a future injury nor an injury that is overly indirect and incidental to the defendant's action." *Ainscough*, 90 P.3d at 856 (quotation and citation omitted). "The injury may be tangible, such as physical damage or economic harm; however, it may also be intangible, such as aesthetic issues or the deprivation of civil liberties." *Id.*

When the injury at issue stems from the deprivation of a federal constitutional right, Colorado courts have looked to federal constitutional cases for guidance in developing their rules on standing. *See Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 669 (Colo. 1982). Similar to

Colorado's injury-in-fact requirements, the federal injury-in-fact standard requires "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Here, Plaintiffs assert no tangible or intangible claim against DA Allen or his Office for any deprivation of their right to keep and bear arms under the U.S. Constitution's Second Amendment, or Article II, § 13 of Colorado's Constitution. Neither does Plaintiffs' "Count 1 for Unconstitutional Taxation" under the U.S. Constitution's Second Amendment contain any claims directed at DA Allen or his Office. In fact, Plaintiffs' Complaint fails to make a single allegation showing they suffered an injury-in-fact at the hands of or through any action by DA Allen or his Office. This is the antithesis of a concrete adverseness showing a direct injury resulting from his or his Office's actions; or a concrete and particularized, actual or imminent injury not based on conjecture or hypotheticals. *See Ainscough*, 90 P.3d at 855; *Lujan*, 504 U.S. at 560.

Plaintiffs' reasoning for naming DA Allen or his Office as a Defendant is far from apparent from the Complaint. As such, DA Allen can only speculate that he was named since he is charged with *prosecuting* the criminal penalties imposed by the ACT which occur within the Fourth Judicial District. Since the ACT requires overt actions by a Plaintiff (i.e., making retail sales subject to the excise tax without first registering with the executive director or willfully making a false or fraudulent return or false statement on a return or willfully evading the payment of the tax), and the Complaint fails to plead any such overt actions by the Plaintiffs or any intent by the Plaintiffs to violate the ACT, prosecution of the criminal penalties imposed by the ACT are neither actual nor imminent. Plaintiffs thus lack the requisite injury in fact applicable to any claim against DA Allen or his Office. Absent the requisite injury in fact, Plaintiffs lack standing and this Court lacks jurisdiction over DA Allen or his Office. *League of Women Voters of Greeley, Weld Cnty., Inc. v.*

*Bd. of Cnty. Comm'rs of Cnty. of Weld*, 563 P.3d 1192, 1197 (Colo. 2025) (“Standing is a jurisdictional requirement.”); *Ainscough*, 90 P.3d at 855 (“In order for a court to have jurisdiction over a dispute, the plaintiff must have standing to bring the case. Standing is a threshold issue that must be satisfied in order to decide a case on the merits.”).

Plaintiffs seek relief from this Court in the form of a “declaratory judgment stating that Colorado’s 6.5% excise tax on firearms and ammunition, C.R.S. §§ 39-37-101 *et seq.*, violates the right to keep and bear arms secured by the Second Amendment to the United States Constitution.” Complaint, p. 9, ¶ 1. The declaratory judgment sought by Plaintiffs is inapplicable to DA Allen or his Office as it is the executive director alone who is charged with the administration and enforcement of the tax levied pursuant to part 1 of the ACT. C.R.S. § 39-37-106(1). Plaintiffs plead no statutory, regulatory, or other authority providing DA Allen with enforcement authority over the tax levied pursuant to part 1 of the ACT.

Plaintiffs also seek “a permanent injunction enjoining Defendants from enforcing C.R.S. § 39-37-104, and associated provisions established by Proposition KK, including collection of the 6.5% excise tax, the record-keeping and inspection requirements, and imposition of the civil and criminal penalties for failing to remit the tax.” Complaint, p. 9, ¶ 2. The permanent injunction sought by Plaintiffs is inapplicable to DA Allen and his Office as the executive director alone is charged with administration and enforcement of C.R.S. § 39-37-104 and associated provisions established by Proposition KK. Plaintiffs plead no statutory, regulatory or other authority providing DA Allen with enforcement authority over C.R.S. § 39-37-104 and associated provisions established by Proposition KK.

## **II. Plaintiffs' Complaint Must Be Dismissed Pursuant to C.R.C.P. 12(b)(5) Because it Fails to State a Claim upon which Relief Can Be Granted**

A C.R.C.P. 12(b)(5) motion to dismiss tests the formal sufficiency of a plaintiff's complaint. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001). To survive a motion to dismiss, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." C.R.C.P. 8(a)(2). A complaint that contains only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Nor will it do if it "tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). Thus, conclusory allegations are "not entitled to the assumption of truth" and are not considered. *Ashcroft*, 556 U.S. at 679. Instead, a court looks to whether the complaint includes "enough factual matter (taken as true) to suggest that" the plaintiff is entitled to relief. *Twombly*, 550 U.S. at 556.

Plaintiffs' failure to allege sufficient facts "to state a claim for relief that is plausible on its face" mandates that their claim(s) against DA Allen be dismissed pursuant to C.R.C.P. 12(b)(5) for failure to state a claim. *See Id.* at 570; *Iqbal*, 556 U.S. at 679. To survive a Rule 12(b)(5) motion to dismiss, Plaintiffs must "nudge [their] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Even where a plaintiff has plead some facts "consistent with" finding liability, this is insufficient unless the complaint gives "the court reason to be believe th[ese] plaintiff[s] ha[ve] a reasonable likelihood of mustering factual support for *these* claims" against *these* defendants. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir., 2007) (emphasis in original) "Thus, in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if

assumed to be true, plausibly suggest the defendant is liable.” *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

In the case at bar, Plaintiffs fail to include any well-pleaded facts supporting their unconstitutional taxation claim against DA Allen. Instead, Plaintiffs posit the conclusory statement that “[a]n actual and judicially cognizable controversy exists between Plaintiffs and Defendants regarding whether Defendants’ administration of the 6.5% excise tax on the sale of firearms, firearm precursor parts, and ammunition violates the Second Amendment to the United States Constitution.” Complaint, p. 9, ¶ 47. Conspicuously absent from Plaintiffs’ Complaint are any factual allegations, assertions, or statements plausibly showing that DA Allen or his Office took any action to bring about the imposition of Proposition KK’s excise tax, or that he or his Office infringed in any way upon Plaintiffs’ Second Amendment right to keep and bear arms. Thus, Plaintiffs’ Complaint for unconstitutional taxation against DA Allen or his Office must be dismissed pursuant to C.R.C. P. 12(b)(5) for failure to state a claim upon which relief can be granted. *See Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 679.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs’ Complaint against DA Allen and his Office must be dismissed. DA Allen respectfully asks the Court to enter an order dismissing Plaintiffs’ Complaint with prejudice and awarding DA Allen’s reasonable costs and attorneys’ fees as permitted by law.



Respectfully submitted this 30th day of May 2025.

OFFICE OF THE COUNTY ATTORNEY  
OF EL PASO COUNTY, COLORADO

BY: /s/ Bryan E. Schmid  
Bryan E. Schmid #41873  
Senior County Attorney  
Nathan J. Whitney, #39002  
First Assistant County Attorney  
200 S. Cascade Ave.  
Colorado Springs, CO 80903  
(719) 520-6485  
[BryanSchmid@elpasoco.com](mailto:BryanSchmid@elpasoco.com)  
[NathanWhitney@elpasoco.com](mailto:NathanWhitney@elpasoco.com)

*Attorneys for Defendant Michael J. Allen*

## **CERTIFICATE OF SERVICE**

I hereby certify that on May 30, 2025, a true copy of the foregoing **DEFENDANT MICHAEL J. ALLEN'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) AND 12(b)(5)** was e-filed with the Court and served via ICCES or email by upon all parties and counsel of record:

Julian R. Ellis, Jr.  
FIRST & FOURTEENTH, PLLC  
2 N. Cascade Ave., Suite 1430  
Colorado Springs, CO 80903

Michael Franciso  
FIRST & FOURTEENTH, PLLC  
800 Connecticut Ave. NW, Suite 300  
Washington, D.C. 20006  
*Attorneys for Plaintiffs*

Emily B. Buckley  
Phillip Takhar  
Abigail Armstrong  
Colorado Attorney General's Office  
1300 Broadway, 6<sup>th</sup> Floor  
Denver, CO 80203  
[Emily.buckley@coag.gov](mailto:Emily.buckley@coag.gov)  
[phillip.takhar@coag.gov](mailto:phillip.takhar@coag.gov)  
[abigail.armstrong@coag.gov](mailto:abigail.armstrong@coag.gov)  
*Attorneys for Defendant Heidi  
Humphreys*

***Via email:***

Athanasia Livas  
William Bergstrom  
Peter Patterson  
David Thompson  
COOPER & KIRK, PLLC  
1523 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
[alivas@cooperkirk.com](mailto:alivas@cooperkirk.com)  
[wbergstrom@cooperkirk.com](mailto:wbergstrom@cooperkirk.com)  
[ppatterson@cooperkirk.com](mailto:ppatterson@cooperkirk.com)  
[dthompson@cooperkirk.com](mailto:dthompson@cooperkirk.com)  
*Attorneys for Plaintiffs- Pending Pro  
Hac Vice Admission*

*/s/ B. Peyton*  
Paralegal

DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Phone Number: (303) 606-2300	<div style="text-align: center;"> <input type="checkbox"/> <b>COURT USE ONLY</b> <input type="checkbox"/> </div>
ZACHARY LANGSTON; MAGNUM SHOOTING CENTER OF COLORADO SPRINGS, LLC; COLORADO STATE SHOOTING ASSOCIATION; FIREARMS POLICY COALITION, INC.; SECOND AMENDMENT FOUNDATION; and NATIONAL RIFLE ASSOCIATION OF AMERICA,  <div style="text-align: center;">Plaintiffs,</div>  v.  HEIDI HUMPHREYS, in her official capacity as the Executive Director of the Department of Revenue; MICHAEL J. ALLEN, in his official capacity as the District Attorney of the County of El Paso,  <div style="text-align: center;">Defendants.</div>	
<div style="text-align: center;"> <b>ORDER GRANTING DEFENDANT MICHAEL J. ALLEN'S MOTION TO DISMISS          PURSUANT TO C.R.C.P. 12(b)(1) AND 12(b)(5)</b> </div>	

THIS MATTER having come before the Court on the Defendant's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) and the Court, having reviewed the same and being fully advised in the premises, ORDERS the following: Defendant's Motion is GRANTED. For the reasons set forth in Defendant's Motion to Dismiss, the Court adopts and incorporates the arguments set forth in the motion and dismisses Defendant Michael J. Allen from this matter with prejudice.

DONE and ORDERED this \_\_\_\_ day of \_\_\_\_ 2025.

BY THE COURT:

\_\_\_\_\_  
 Honorable Andrew Patrick McCallin  
 District Court Judge