

Defendant Michael Allen, the District Attorney for the 4th Judicial District, is a proper defendant in this action because Colorado law empowers him to bring criminal charges for violations of Proposition KK's excise tax on firearms and ammunition. The Complaint alleges that the excise tax infringes Plaintiffs' legally protected right to keep and bear arms under the Second Amendment to the U.S. Constitution. If Plaintiffs succeed in obtaining the declaratory and injunctive relief they seek, Defendant Allen will be enjoined from enforcing Proposition KK's excise tax against them, providing redress for the constitutional injury they have alleged. Accordingly, Plaintiffs have standing to bring their claims against Defendant Allen, who is a proper defendant in this case. Defendant Allen's motion to dismiss should be denied.

FACTUAL BACKGROUND

Colorado's Proposition KK imposes a 6.5% excise tax on the retail sale of "any firearm, firearm precursor part, or ammunition." C.R.S. § 39-37-104(1). This tax infringes the Second Amendment rights of Plaintiffs, who are an individual, a business, and three organizations acting on behalf of their members.

Among the Plaintiffs in this case is Magnum Shooting Center, a licensed firearms dealer that sells firearms and ammunition directly to its Colorado customers. Proposition KK requires Magnum Shooting Center to register as a firearms and ammunition vendor with the Executive Director of Colorado's Department of Revenue, collect the 6.5% excise tax on applicable customer purchases, keep adequate records related to that tax, and remit the collected tax to the Department of Revenue. *Id.* §§ 39-37-107(1)(a), 39-37-107(3)(a), 39-37-108(1).

As detailed in Plaintiffs' Complaint, failure to comply with these requirements is a criminal offense. *See* Compl. ¶¶ 33–35. For example, it is a petty offense to make retail sales subject to the

excise tax without registering with the Executive Director. C.R.S. § 39-37-107(3)(a). And a willful violation of Proposition KK’s requirements is a more serious crime, *see id.* § 39-37-111, with offense categories ranging from misdemeanor to class 5 felony, *see id.* § 39-21-118.

Another Plaintiff in this case is Zachary Langston, a law-abiding citizen and Colorado resident who frequently purchases ammunition from Colorado retailers, including Magnum Shooting Center, and who has purchased and intends to purchase firearms in the future from these retailers. Compl. ¶¶ 12–15.

Defendant Allen is District Attorney of the 4th Judicial District, which includes El Paso County, where Magnum Shooting Center is located. *See* Compl. ¶¶ 16, 23; Def. Allen’s Mot. to Dismiss at 2 n.1 (“MTD”); *About Us*, COLO’S. 4TH JUD. DIST. ATT’Y’S OFF., <https://perma.cc/H77M-KX9C>. As district attorney, it is Defendant Allen’s duty to “appear in behalf of the state and the several counties of his or her district ... [i]n all indictments, actions, and proceedings.” C.R.S. § 20-1-102. Defendant Allen therefore is charged with enforcing criminal penalties against firearms dealers in El Paso County, such as Magnum Shooting Center, if those dealers violate Proposition KK’s criminal prohibitions.

LEGAL STANDARD

To satisfy the requirements of standing, a “plaintiff must establish that (1) he suffered an *injury in fact*, and (2) his injury was to a *legally protected interest*.” *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). An injury in fact requires “concrete adverseness” between the parties. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004) (quoting *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo.

2000)). And to locate a legally protected right, a court looks “not to the policy being challenged, but to the right that it is alleged to have injured.” *Id.* at 857.

Plaintiffs agree that Colorado courts look to “federal constitutional cases for guidance in developing ... standing rules” when federal constitutional rights are asserted. *Conrad v. City & County of Denver*, 656 P.2d 662, 669 (Colo. 1982); *see* MTD at 4. Federal standing requires that a plaintiff show “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical,” as well as “a causal connection between the injury and the conduct complained of” that “will be redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up). “It is well-established that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision.” *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007). “[I]t is not necessary that [a plaintiff] first expose themselves to actual arrest or prosecution to be entitled to challenge a statute that they claim deters the exercise of their constitutional rights.” *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 109–10 (10th Cir. 2024) (cleaned up).

ARGUMENT

District Attorney Allen is a proper defendant in this matter, and Plaintiffs have standing to bring their claims against him. As explained above, the standing analysis looks to whether the plaintiff has alleged an injury in fact and whether that injury is to a legally protected interest. Here, Plaintiffs meet both requirements.

The second part of the standing analysis is straightforward: the interest asserted here, the Second Amendment right to keep and bear arms, is a legally protected one. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). Defendant Allen does not contend otherwise.

What Defendant Allen contests is whether Plaintiffs have alleged an injury in fact to their legally protected interest. They have done so. Specifically, Plaintiffs have alleged that Proposition KK injures them in fact by imposing a tax on the sale of firearms and ammunition. That tax infringes upon the right to keep and bear arms. Plaintiff Magnum Shooting Center is subject to the tax because it is required to register as a vendor, collect the tax on qualified purchases, keep adequate records of taxes collected, and remit taxes collected to the Department of Revenue. Plaintiff Langston is subject to the tax when he purchases firearms and ammunition from Colorado retailers, including Magnum Shooting Center, who pass the cost of the tax to him.

Plaintiffs also satisfy the requirements of causation and redressability with regard to Defendant Allen because he is an official charged with enforcing Proposition KK. As detailed above, Magnum Shooting Center would be subject to criminal prosecution by Defendant Allen were it not to comply with Proposition KK. Defendant Allen does not deny this in his motion. MTD at 5 (acknowledging that Defendant Allen “is charged with *prosecuting* the criminal penalties imposed by the ACT which occur within the Fourth Judicial District”). That is why Plaintiffs have brought this suit seeking, among other things, declaratory and injunctive relief barring Defendant Allen from enforcing Proposition KK. *See* Compl., Prayer for Relief ¶¶ 1–2. “It is well-established that ... the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision.” *Bronson*, 500 F.3d at 1110. That is precisely the type of authority that Defendant Allen possesses under the challenged law.

Defendant Allen claims that Plaintiffs lack standing because the Executive Director of the Department of Revenue “alone is charged with administration and enforcement of C.R.S. § 39-37-104 and associated provisions established by Proposition KK,” but that is not true. As shown, and as Defendant Allen’s own motion acknowledges, he is charged with responsibility for bringing criminal charges for violations of Proposition KK. It is irrelevant that the Executive Director (who is also a Defendant) is *also* charged with certain enforcement responsibilities, because an injunction against Defendant Allen would nonetheless redress a critical part of Plaintiffs’ injuries by insulating Magnum Shooting Center from criminal prosecution for violating Proposition KK. In other words, relief against the Executive Director alone would not remediate all of Plaintiffs’ harm because Magnum Shooting Center would still risk criminal prosecution if it stopped complying with Proposition KK on the basis of a victory in this case if that victory did not also bind Defendant Allen from enforcing the Proposition’s criminal prohibitions. That is sufficient to show redressability for standing purposes. “The Supreme Court has rejected interpretations of the rule that demand complete redressability, stressing that a plaintiff need show only that a favorable decision would redress ‘an injury,’ not ‘every injury.’” *Consumer Data Indus. Ass’n v. King*, 678 F.3d 898, 902 (10th Cir. 2012) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)).

Defendant Allen also claims that Plaintiffs lack standing because “the Complaint fails to plead any ... overt actions by the Plaintiffs or any intent by the Plaintiffs to violate” Proposition KK, but a plaintiff is not required to “first expose themselves to actual arrest or prosecution to be entitled to challenge a statute that they claim deters the exercise of their constitutional rights.” *Rocky Mountain Gun Owners*, 121 F.4th at 109–10 (cleaned up); *see also Bronson*, 500 F.3d at 1107 (“[A] plaintiff need not risk actual prosecution before challenging an allegedly

unconstitutional criminal statute.”). Plaintiffs need only show “both (1) an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the challenged statute, and (2) that there exists a credible threat of prosecution thereunder.” *Rocky Mountain Gun Owners*, 121 F.4th at 110 (cleaned up).

Plaintiffs have adequately alleged both parts of that standard. The excise tax infringes constitutionally-protected Second Amendment rights, and the threat of prosecution is credible—specifically, the Executive Director is collecting the excise tax and neither the Executive Director nor Defendant Allen have disclaimed any intent to enforce the law. In light of this threat, Magnum Shooting Center is complying with the law. *See, e.g.*, Compl. ¶¶ 30–36 (explaining Magnum Shooting Center’s plans to comply with the requirements of Proposition KK and the potential consequences for failing to do so). This is sufficient to establish an injury in fact. Magnum would not comply with Proposition KK if Defendants were enjoined from enforcing it—that is the whole point of a pre-enforcement challenge. *Cf. Rocky Mountain Gun Owners*, 121 F.4th at 110 (holding that plaintiff “has sufficiently articulated a concrete plan to engage in conduct that has the potential to violate” the challenged statute because he has a “present plan to purchase a firearm that he soon will be precluded from effectuating” once the challenged law takes effect (internal quotation marks omitted)). And (as relevant here), Defendant Allen has not in any way disclaimed an intent to prosecute violations of Proposition KK. *See Chiles v. Salazar*, 116 F.4th 1178, 1198–99 (10th Cir. 2024) (“[T]he state’s staunch refusal to disavow prosecution has heavy weight where there is nothing, not even their word, to prevent prosecutors from bringing criminal charges.”), *certiorari* pending on other grounds, 145 S. Ct. 1328 (2025); *Wilson v. Stocker*, 819 F.2d 943, 946–47 (10th Cir. 1987) (“[T]he Supreme Court has often found a case or controversy between a plaintiff

challenging the constitutionality of a statute and an enforcement official who has made no attempt to prosecute the plaintiff under the law at issue.”).

Defendant Allen challenges the wording of the declaratory judgment and permanent injunction that Plaintiffs seek, but that argument is also misplaced. If Plaintiffs prevail and receive the declaratory and injunctive relief they seek, then Defendant Allen will be bound not to enforce Proposition KK against them, and the constitutional infringement they allege—the imposition of the unconstitutional excise tax—will be redressed. Magnum Shooting Center will be able to sell firearms and ammunition without complying with Proposition KK and without fear of criminal prosecution, and accordingly individuals such as Plaintiff Langston will be able to purchase firearms and ammunition from Magnum Shooting Center without paying the added cost caused by the excise tax. It is sufficient for standing purposes that the declaratory and injunctive relief, when applied to Defendant Allen, will redress at least some of Plaintiffs’ alleged injuries. *Consumer Data Indus. Ass’n*, 678 F.3d at 902 (redressability requires “only that a favorable decision would redress ‘an injury,’ not ‘every injury’” (quoting *Larson*, 456 U.S. at 243 n.15)).

Lastly, Defendant Allen claims that he should be dismissed from this case because Plaintiffs “fail[] to allege sufficient facts” to state a claim for relief against him, but that is incorrect for the reasons just described. MTD at 7. The Complaint details the provisions of Proposition KK and the ways in which that law infringes Plaintiffs’ Second Amendment rights. Compl. ¶¶ 1–9, 24–40. It also specifically alleges the role that Defendant Allen plays in enforcing Proposition KK’s unconstitutional excise tax. *Id.* ¶ 23. Those facts are sufficient to state Plaintiffs’ injury and causally connect that injury to Defendant’s enforcement power. *Bronson*, 500 F.3d at 1110 (holding that a proper defendant is one who “possess[es] authority to enforce the complained-of provision”).

Defendant Allen argues that the Complaint does not make any allegations “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.” MTD at 8. The first part of this argument is irrelevant—what matters is not who *brings about* a challenged law, but rather who *enforces* it, as it is relief against the enforcer of a law that remedies the injury caused by its enforcement. The second part of this argument is incorrect. As just explained, the Complaint alleges that Defendant Allen is infringing upon Plaintiffs’ Second Amendment rights through the duty—which he has not disclaimed—to enforce the criminal provisions of Proposition KK.

CONCLUSION

For the foregoing reasons, Defendant Allen’s motion to dismiss should be denied.

Dated: June 19, 2025

Respectfully submitted,

/s/Julian R. Ellis, Jr.
Julian R. Ellis, Jr., #47571
FIRST & FOURTEENTH, PLLC
2 N. Cascade Avenue, Suite 1430
Colorado Springs, CO 80903
(303) 719-4937
julian@first-fourteenth.com

Michael Franciso, #39111
FIRST & FOURTEENTH, PLLC
800 Connecticut Ave. NW, Suite 300
Washington, D.C. 20006

David H. Thompson*
Peter A. Patterson*
Athanasia O. Livas*
William V. Bergstrom*
COOPER & KIRK, PLLC

1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Attorneys for Plaintiffs

**Pending Pro Hac Vice Admission*

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2025, a true copy of the foregoing **PLAINTIFF ZACHARY LANGSTON'S OPPOSITION TO 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 Colorado Courts E-Filing upon all parties and counsel of record:

Emily B. Buckley
Phillip Takhar
Abigail Armstrong
Colorado Attorney General's Office
1300 Broadway, 6th Floor
Denver, CO 80203
Emily.buckley@coag.gov
phillip.takhar@coag.gov
abigail.armstrong@coag.gov
Attorneys for Defendant Heidi Humphreys

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
NathanWhitney@elpasoco.com
Attorneys for Defendant Michael J. Allen

/s/Kelly Callendar
Kelly Callendar