DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Phone Number: (303) 606-2300	
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, Plaintiffs, 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, Defendants.	**□ COURT USE ONLY □** Case No.: 2025CV031185 Division: 269
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DEFENDANT MICHAEL J. ALLEN'S REPLY TO 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)

Defendant, Michael J. Allen, by and through the Office of the County Attorney of El Paso County, Colorado, hereby replies to 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) ("Response") and as grounds in support thereof states as follows:

1. <u>Plaintiff Zachary Langston Lacks Standing to Bring a Pre-Enforcement Challenge to the Constitutionality of C.R.S. § 39-37-101 *et seq.* Against Defendant DA Allen</u>.

Plaintiff Zachary Langston is the only Plaintiff who filed a Response to Defendant Michael J. Allen's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and 12(b)(5) ("MJA MTD"). The title of the Response is the only indication within the Response as to who filed the Respond or on whose behalf it was filed. The title lists Mr. Zachary Langston alone. Mr. Langston lacks standing to respond to the MJA MTD on behalf of any other Plaintiff in this case. As such, any argument presented on behalf of another Plaintiff on an issue which is inapplicable to Mr. Langston, must be struck and not considered.

Mr. Langston's Response contains argument on behalf of Magnum Shooting Center ("Magnum") responding to DA Allen's claim in the MJA MTD that Magnum lacks standing to bring a pre-enforcement challenge to the constitutionality of the criminal penalty provisions of the "Crime Victim and Survivor Services Funding and Mental Health Security Act", C.R.S. §§ 39-37-101 *et seq.,* ("the ACT"). The criminal penalty provisions of the ACT are inapplicable to Mr. Langston for the reasons set forth below. Therefore, the portion of the Response that argues Magnum's position regarding those provisions must be struck and not considered.

The provisions within the ACT which impose criminal penalties for violations of the ACT are not enforceable against Mr. Langston as he is not a "vendor" as that term is defined within the ACT.[1] The provisions of the ACT imposing criminal penalties, §§ 39-37-107(3)(a) and 39-37-111,

[1] The ACT states: "'Vendor" means a person doing business in this state as an ammunition vendor, firearms dealer, or a firearms manufacturer or any combination thereof." C.R.S. § 39-37-103(18). The Complaint describes Mr. Langston as a purchaser and user of firearms and ammunition. Compl., p. 3, ¶13.

both explicitly state that their provisions are enforceable only against vendors. *Id.* Accordingly, as the criminal penalties are not enforceable against Mr. Langston, he lacks standing to challenge either of those provisions. *See* Response, p. 4 quoting *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007) ("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 [against the named Plaintiff]."*).[2]

Within his Complaint Mr. Langston asserts that "Defendant Michael J. Allen is the District Attorney of the County of El Paso. In this capacity, he is charged with prosecuting the criminal penalties imposed by Proposition KK."[3] Compl., p. 5, ¶23. That is the only basis provided by Mr. Langston for naming DA Allen as a Defendant in his constitutional challenge of the ACT. *See* MJA MTD, p. 3, fn. 5 for additional argument on the subject. As the Response was filed only by Mr. Langston and Mr. Langston clearly lacks standing to bring this action against DA Allen, this Court must not consider Mr. Langston's Response when making its determination as to DA Allen's Motion to Dismiss and must grant said Motion to Dismiss as to Mr. Langston and Plaintiffs CSSA, FPC, SAF and NRA.

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[2] Plaintiffs' Complaint does not allege that Plaintiffs Colorado State Shooting Association ("CSSA"), Firearms Policy Coalition, Inc. ("FPC"), Second Amendment Foundation ("SAF") or the National Rifle Association of America ("NRA") are vendors as defined in § 39-037-103(18) and therefore, the same standing arguments apply equally to each of them.

[3] Plaintiffs, throughout their Complaint, and Mr. Langston throughout his Response, continually conflate Proposition KK with the ACT. Proposition KK plays no role in this case because, as its name implies, Proposition KK was merely a ballot question posed to the Colorado electorate regarding whether the General Assembly shall enact a law containing the *proposed* measures of Proposition KK. It is the ACT, not the Proposition, that imposes the 6.5% excise tax and requires its payment; it the ACT, not the Proposition, which requires the Director to administer and enforce the tax; and it is the ACT, not the Proposition that imposes criminal penalties for certain violations of the ACT.

2. <u>Plaintiff Magnum Shooting Center Lacks Standing to Bring a Pre-Enforcement Challenge to the Constitutionality of the ACT Against Defendant DA Allen</u>.

Assuming *arguendo*, this Court accepts the Response as having been filed on behalf of Magnum, the MJA MTD must be granted as Magnum also lacks standing to bring a pre-enforcement challenge to the constitutionality of the ACT against DA Allen. Magnum is a "vendor" as that term is defined in § 39-37-103(18) and is, therefore, subject to the imposition of the criminal penalties specified in §39-37-107(3)(a) and 39-37-118. *See* Compl., p. 3, ¶9; p. 7, ¶¶33-35. As such, Magnum posits that it has standing to bring its challenge of the ACT against DA Allen because of his perceived role in "enforcing" the ACT and Magnum having met both the "injury in fact" and "legally protected interest" of the standing analysis. *See* Response, p. 3-4. Magnum is wrong.

Magnum asserts that it has met the "legally protected interest" prong of the standing analysis because DA Allen does not dispute that the Second Amendment right to keep and bear arms is a legally protected one. While Magnum is correct in its assertion that DA Allen does not dispute the legally protected right of the Second Amendment, the legally protected interest prong goes farther than the mere existence of a right and specifies that an invasion of the legally protected interest must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). DA Allen reasserts his argument from the MJA MTD (page 5), that Magnum and the other Plaintiffs failed to meet the "concrete and particularized" and "actual or imminent" requirements for the legally protected interest prong and therefore they lack standing to bring the present action against DA Allen.

Magnum also asserts that it has met the injury in fact prong because it has "alleged that Proposition KK[4] injures them in fact by imposing a tax on the sale of firearms and ammunition

[4] *See fn. 3.*

[and] [t]hat tax infringes upon their right to keep and bear arms." Response, p. 5. While this injury in fact argument may be applicable to Defendant Humphries as the Executive Director of the Colorado Department of Revenue (hereinafter, the "Director"), it is inapplicable to DA Allen as he played no role in the creation, imposition, execution or administration of the levied excise tax. Magnum has admitted as much. *See* Response, p. 5 ("[DA Allen] 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*." (*Emphasis* added)); MJA MTD, p. 3, fn. 5.

Magnum reiterates its *ipse dixit* that DA Allen possesses the authority to enforce "the complained-of provision." Response, p. 4 citing *Bronson*, 500 F.3d at 1110 ("…*the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision."* (*Emphasis* added)). Here, the "complained of provision" is the ACT's imposition of the 6.5% excise tax and whether the administration of the tax is violative of the Second Amendment as an unconstitutional taxation. *See Compl*. p. 9, Count 1: Unconstitutional Taxation, ¶47 ("An 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 [which] violates the Second Amendment to the United States Constitution."); Compl., p. 1, ¶1 ("Plaintiffs challenge Colorado's Proposition KK, an unconstitutional tax on the exercise of fundamental constitutional rights."); Compl., p. 2, Introduction, ¶4 ("Colorado's excise tax is unconstitutional … The tax on the exercise of Second Amendment rights implicates conduct protected by the Second Amendment's plain text by adding to the cost of acquiring a firearm."). Magnum's complaint regarding the imposition of the 6.5% excise tax is properly addressed to the Director and not DA Allen as the ACT does not give DA Allen any authority to impose or "administ[er] the 6.5% excised tax;" that authority rests solely

with the Director as mandated by C.R.S. § 39-37-106(1) ("The executive director shall administer and enforce the tax levied pursuant to this part 1….).

Magnum continues its attempt to salvage its claim against DA Allen with a pair of specious arguments: (1) that the Director alone is not charged with the enforcement of 39-37-104 and associated provisions because DA Allen is "charged with responsibility for bringing criminal charges for violations of Proposition KK"; and (2) that "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 [*sic*]." Response, p. 6.

a. *The Director Alone Possesses the Authority to Enforce the ACT*.

The ACT provides that "the executive director shall administer and **enforce** the tax levied pursuant to this part 1[5] in accordance with the provisions of article 21 of this title 39."[6] C.R.S. § 39-37-106(1) (**Emphasis** added). Magnum does not dispute that the Director alone is responsible for the administration of the tax. Instead, it extracts the term "enforce" from the statute and argues

[5] The intent of this statute is to give the Director the authority to administer and enforce **all** provisions of part 1 of the ACT, were it the General Assembly's intent to exclude certain provisions of the ACT from the authority of the Director, it would have said so. Additionally, if the General Assembly intended for the Director to share the administration and enforcement of Part 1 of the ACT with others, it would have said so.

[6] C.R.S. § 39-21-112 provides: "It is the duty of the executive director to administer the provisions of this article 21, and the executive director has the power to adopt, amend, or rescind such rules not inconsistent with the provisions of this article 21, the statutory provisions listed in section 39-21-102…." *See also Huber v. Colorado Mining Ass'n,* 264 P.3d 884, 890 (Colo., 2011) ("The Department is the agency generally assigned the duty of administering and enforcing tax laws that have statewide effect. Under section 39–21–112, the Department has a ministerial, non-discretionary duty to administer taxing statutes in accordance with the directives of the General Assembly.").

that both the Director and DA Allen have the authority to "enforce" the provisions of the ACT. Magnum focuses on the term "enforce" because under the causation prong of the standing analysis the "authority to enforce" is the threshold requirement. *Bronson*, 500 F.3d at 1110 ("…*the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision."*). Absent the "authority to enforce" by DA Allen, Magnum lacks standing to bring an action against him and DA Allen's MTD must be granted. *Id.*

The primary definition of "enforce" as it pertains to this case is "[t]o give force or effect to [a law]; to compel obedience to [a law]." *U.S. v. Martinez*, 812 F.3d 1200, 1202 (10th Cir., 2015) quoting *Black's Law Dictionary* 645 (10th ed. 2014) (bracketed content added by the *Martinez* Court). The ACT and § 39-21-112 clearly assigns the responsibility for giving force or effect to part 1 of the ACT, including the provisions regarding the criminal penalties for violating the ACT, to the Director in order to compel obedience with the ACT (i.e., "Any vendor who willfully violates any provision of this part 1 shall be punished as provided in section 39-21-118." § 39-37-111). By statute, it is the Director, not the District Attorney, who determines how the ACT is administered and enforced. *Id.* It is the District Attorneys, not the Director, who determine how and whether to prosecute violators of the ACT "in accordance with the provisions of article 21 of this title 39."[7]

b. *Relief against the Director Alone would Remediate All of Magnum's Harm*.

[7] *See e.g. Gansz v. People*, 888 P.2d 256, 257–58 (Colo.,1995) ("The Colorado Constitution establishes the office of district attorney and vests in the office the right to file an information on behalf of the People of the State of Colorado and the discretion to determine the charges that will be filed. The decision to charge "is the heart of the prosecution function. The broad discretion given to a prosecutor in deciding whether to bring charges ... requires that the greatest effort be made to see that this power is used fairly and uniformly." (Citations omitted.)); *Piñon v. Ulibarri*, 2006 WL 8443201, at *12 (D.N.M., 2006) citing United States v. Lovasco, 431 U.S. 783, 794 (1977) ("a prosecutor is not obliged to present all charges which the evidence might support and may exercise discretion to decline to prosecute…").

Magnum asserts that "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 [*sic*]." Response, p. 6. Again, Magnum is wrong.

Magnum seeks two specific forms of relief in this case:

> 1. 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.
>
> 2. 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.

Compl. p. 9, Prayer for Relief, ¶¶ 1-2.

"Victory" for Magnum means this Court will issue a declaratory judgment that the ACT is an unconstitutional taxation, by virtue of the 6.5% excise tax it imposes on the sale of firearms and ammunition, and that as such, it violates the Second Amendment's right of the citizenship to keep and bear arms. Compl, p. 8-9, ¶¶41-47; p. 9, Prayer for Relief, ¶1.

If Magnum is victorious and the ACT, by virtue of its 6.5% excise tax, is declared unconstitutional, then the Director's enforcement of the excise tax is also unconstitutional. If the Director's enforcement of the excise tax is unconstitutional, then any criminal penalties assessed against the person or entity that willfully violates the unconstitutional provisions regarding the tax levy are likewise unconstitutional. If the criminal penalties are unconstitutional then DA Allen's role in prosecuting the violators of the ACT is moot. It is impossible to imagine Magnum objecting to such an outcome. Thus, victory by Magnum against the Director alone would foreclose DA

Allen from "enforcing the Proposition's criminal prohibitions" and an injunction to bind DA Allen from prosecuting Magnum would be wholly unnecessary.

c. Magnum Fails to Present a Justiciable Pre-Enforcement Challenge to the ACT as Against DA Allen.

Magnum argues that it has presented a justiciable pre-enforcement challenge to the ACT as it has shown both "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the challenged statute, and [ ] that there exists a credible threat of prosecution thereunder." Response, p. 7 citing *Rocky Mountain Gun Owners v. Polis,* 121 F.4th 96, 109-110 (10th Cir. 2024). Magnum's reliance on *Rocky Mountain Gun Owners* is misplaced. *Rocky Mountain Gun Owners* decimates Magnum's claim because Magnum fails to "present 'concrete plans to engage in conduct that ha[s] [the] potential to violate' the challenged statute." *Id.,* 121 F.4th at 110 quoting *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 551 (10th Cir. 2016).

Here, Magnum, for the first time in its Response to the MJA MTD, states that "Magnum would not comply with Proposition KK if Defendants were enjoined from enforcing it." Response, p. 7.[8] "Speculative plans or vague intentions to *potentially* violate the challenged statute are insufficient." *Id. citing Lujan*, 504 U.S. at 564 ("'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."). Magnum's bare allegation of an intent not to comply with the ACT falls short of establishing the requisite concrete plan to engage in a course of conduct arguably affected with a constitutional interest but proscribed by the ACT.

[8] A review of the Complaint in this case reveals only Magnum's intention to comply with the provisions of Proposition KK (more accurately the ACT). *See* Compl., ¶¶ 17 and 30-36. There is no statement of intention by Magnum to not comply.

Absent a concrete plan, Magnum has failed to successful meet the "legally protected interest" prong of the standing analysis. Consequently, Magnum has no standing to bring its action against DA Allen and the MJA MTD must be granted. *See Lujan*, 504 U.S. at 560.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the MTD itself, Plaintiffs' Complaint against DA Allen and his Office must be dismissed.

WHEREFORE, DA Allen respectfully requests this Court enter an order dismissing Plaintiffs' Complaint with prejudice, together with DA Allen's reasonable costs and attorneys' fees as permitted by law, and such other and further relief the Court deems just and proper.

Respectfully submitted this 26th day of June 2025.

OFFICE OF THE COUNTY ATTORNEY
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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2025, a true copy of the foregoing **DEFENDANT MICHAEL J. ALLEN'S REPLY TO 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 ICCES or email by upon all parties and counsel of record:

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