

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. **13-cv-**_____ - ____

TATTERED COVER, INC., a Colorado corporation doing business as
Tattered Cover Book Store in Denver and Highlands Ranch,
Colorado;
BACK COUNTRY BOOKS, INC., a Colorado corporation doing business
as Boulder Book Store in Boulder, Colorado;
THOMAS G. MULLIGAN, doing business as Magpies Newsstand in
Durango, Colorado,
NEWSSTAND SOLUTIONS, LLC, a Colorado limited liability company
doing business as Book Train, in Glenwood Springs, Colorado, and
Woody's Newsstand, in Greeley, Colorado;
MOUNTAIN STATES NEWS DISTRIBUTORS, INC., doing business as
Magwest, Inc. and operating Al's Newsstand in Fort Collins,
Colorado;
AMERICAN BOOKSELLERS FOUNDATION FOR FREE
EXPRESSION, a Delaware not-for-profit corporation, and,
MOUNTAINS AND PLAINS INDEPENDENT BOOKSELLERS
ASSOCIATION, a Colorado nonprofit corporation,
Plaintiffs,

v.

BARBARA BROHL, in her official capacity as Executive Director of
Colorado Department of Revenue;
JOHN HICKENLOOPER, in his official capacity as Governor of the State
of Colorado;
JOHN SUTHERS, in his official capacity as Attorney General of the State of
Colorado; and,
PETE WEIR, MITCHELL R. MORRISSEY, FRANK RUYBALID, DAN
MAY, BRUCE BROWN, TODD RISBERG, DAN
HOTSENPILLER, CLIFF REIDEL, SHERY CALOIA, JEFF
CHOSTNER, THOM LeDOUX, DAVID MAHONEE, ROBERT
E. WATSON, BRETT BARKEY, JENNIFER SWANSON, JIM
BULLOCK, DAVE YOUNG, GEORGE BRAUCHLER,
KENNETH R. BUCK, STAN GARNETT, PETE HAUTZINGER,
and, WILL FURSE, in their official capacities as the District
Attorneys for their respective judicial districts in the State of
Colorado,
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

This is a civil action seeking declaratory and injunctive relief as to the unconstitutionality under the First Amendment to the United States Constitution and Article II, Section 10 of the Colorado Constitution of the recently enacted provision of the Colorado Retail Marijuana Code that criminalizes certain distribution of magazines pertaining to marijuana and marijuana businesses. In particular, Section 12-43.4-202(3)(c)(II), C.R.S., requires that the Executive Director of the Colorado Department of Revenue promulgate regulations no later than July 1, 2013 dictating that “magazines whose primary focus is marijuana or marijuana businesses are only sold in retail marijuana stores or behind the counter in establishments where persons under twenty-one years of age are present.” *See* Colo. H.B. 13-1317, 69th General Assembly, enacted May 28, 2013.

The new statute’s provisions make it a crime for the plaintiff bookstores and newsstands here to distribute magazines “whose primary focus is marijuana or marijuana businesses” unless such magazines are kept “behind the counter” of the plaintiffs’ establishments. Because magazines (as well as other forms of communications) devoted primarily (or even exclusively) to marijuana or marijuana businesses are not within a recognized category of unprotected speech, such as obscenity, defamation, fighting words, incitement, or true threats, the government’s content-based restriction on the plaintiffs’ rights to make available, allow for perusal, distribute, and sell non-commercial truthful information cannot pass constitutional muster. In addition, under Article II, Section 10 of the Colorado Constitution, which has been interpreted as affording even greater protection for the freedom of speech than does the First Amendment, the regulations and associated criminal penalties plainly violate the state Constitution.

Parties

Plaintiffs

1. Tattered Cover, Inc. is a corporation organized under the laws of the State of Colorado, with its principal place of business in Denver, Colorado, operating bookstores under the name Tattered Cover Book Store in Denver and Highlands Ranch, Colorado. The Tattered Cover stores have for many years displayed, distributed, and sold magazines, and many other kinds of publications, that concern marijuana and marijuana businesses. Persons under the age of twenty-one are commonly present in the Tattered Cover stores.

2. Back Country Books, Inc. is a corporation organized under the laws of the State of Colorado, with its principal place of business in Boulder, Colorado, doing business as Boulder Book Store. The Boulder Book Store has for many years displayed, distributed, and sold magazines, and many other kinds of publications, that concern marijuana and marijuana businesses. Persons under the age of twenty-one are commonly present in the Boulder Book Store.

3. Thomas G. Mulligan is the proprietor of Magpies Newsstand in Durango, Colorado. Magpies Newsstand has for many years displayed, distributed, and sold magazines, and many other kinds of publications, that concern marijuana and marijuana businesses. Persons under the age of twenty-one are commonly present in Magpies Newsstand.

4. Newsstand Solutions, LLC, is a limited liability company organized under the laws of the State of Colorado, doing business in Glenwood Springs, Colorado under the name Book Train and in Greeley, Colorado under the name Woody's Newsstand. Both of these establishments have for many years displayed, distributed, and sold magazines, and many other

kinds of publications, that concern marijuana and marijuana businesses. Persons under the age of twenty-one are commonly present in these establishments.

5. Mountain States News Distributors, Inc. is a corporation organized under the laws of the State of Colorado and doing business as Magwest, Inc., with its principal place of business in Fort Collins, Colorado. Magwest, Inc. operates Al's Newsstand in Fort Collins, Colorado. Al's Newsstand has for many years displayed, distributed, and sold magazines, and many other kinds of publications, that concern marijuana and marijuana businesses. Persons under the age of twenty-one are commonly present in Al's Newsstand.

6. American Booksellers Foundation for Free Expression is a not-for-profit corporation organized under the laws of the State of Delaware, with its principal place of business in New York City, New York. The foundation was organized by the American Booksellers Association in 1990 to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. Most of the 409 members of the foundation are bookstores in the United States, including eleven in Colorado. The foundation sues on its own behalf, on behalf of its Colorado members, and on behalf of those members' customers and readers who patronize their bookstores in search of information concerning marijuana and marijuana businesses.

7. Mountains and Plains Independent Booksellers Association is a nonprofit corporation organized under the laws of the State of Colorado, with its principal place of business in Park City, Utah. The association represents the interests of independent bookstores and their patrons and readers throughout the Mountain states and the Central Plains, including in

Colorado, where it has 57 member bookstores. The association sues on its own behalf, on behalf of its Colorado members, and on behalf of those members' customers and readers who patronize their bookstores in search of information concerning marijuana and marijuana businesses.

Defendants

8. Barbara Brohl serves at the pleasure of the Governor of the State of Colorado as the executive director of the Colorado Department of Revenue, and in that capacity she serves as the chief administrative officer of the State Licensing Authority under the Colorado Retail Marijuana Code, §§ 12-43.3-201(1) & (2), 12-43.4-103(1) & (24), 12-34.4-201, C.R.S., charged with administrative authority over the regulation of retail marijuana in Colorado. She is named in this action solely in her official capacity.

9. John Hickenlooper currently holds the office of Governor of the State of Colorado. He is named in this action solely in his official capacity

10. John Suthers currently holds the office of Attorney General of the State of Colorado. He is named in this action solely in his official capacity, as the chief law enforcement officer of the State of Colorado, with supervisory authority over the District Attorneys of the state.

11. Pete Weir currently holds the office of District Attorney for the First Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Gilpin and Jefferson Counties. He is named in this action solely in his official capacity.

12. Mitchell R. Morrissey currently holds the office of District Attorney for the Second Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado

on behalf of the People of Colorado in the City and County of Denver. He is named in this action solely in his official capacity.

13. Frank Ruybalid currently holds the office of District Attorney for the Third Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Huerfano and Las Animas Counties. He is named in this action solely in his official capacity.

14. Dan May currently holds the office of District Attorney for the Fourth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in El Paso and Teller Counties. He is named in this action solely in his official capacity.

15. Bruce Brown currently holds the office of District Attorney for the Fifth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Clear Creek, Eagle, Lake, and Summit Counties. He is named in this action solely in his official capacity.

16. Todd Risberg currently holds the office of District Attorney for the Sixth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Archuleta, La Plata, and San Juan Counties. He is named in this action solely in his official capacity.

17. Dan Hotsenpiller currently holds the office of District Attorney for the Seventh Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Delta, Gunnison, Hinsdale, Montrose, Ouray, and San Miguel Counties. He is named in this action solely in his official capacity.

18. Cliff Reidel currently holds the office of District Attorney for the Eighth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Jackson and Larimer Counties. He is named in this action solely in his official capacity.

19. Sherry Caloia currently holds the office of District Attorney for the Ninth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Garfield, Pitkin and Rio Blanco Counties. She is named in this action solely in her official capacity.

20. Jeff Chostner currently holds the office of District Attorney for the Tenth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Pueblo County. He is named in this action solely in his official capacity.

21. Thom LeDoux currently holds the office of District Attorney for the Eleventh Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Chaffee, Custer, Fremont and Park Counties. He is named in this action solely in his official capacity.

22. David Mahonee currently holds the office of District Attorney for the Twelfth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Alamosa, Conejos, Costilla, Mineral, Rio Grande, and Saguache Counties. He is named in this action solely in his official capacity.

23. Robert E. Watson currently holds the office of District Attorney for the Thirteenth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on

behalf of the People of Colorado in Kit Carson, Logan, Morgan, Phillips, Sedgwick, Washington, and Yuma Counties. He is named in this action solely in his official capacity.

24. Brett Barkey currently holds the office of District Attorney for the Fourteenth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Grand, Moffat, and Routt Counties. He is named in this action solely in his official capacity.

25. Jennifer Swanson currently holds the office of District Attorney for the Fifteenth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Baca, Cheyenne, Kiowa, and Prowers Counties. She is named in this action solely in her official capacity.

26. Jim Bullock currently holds the office of District Attorney for the Sixteenth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Bent, Crowley, and Otero Counties. He is named in this action solely in his official capacity.

27. Dave Young currently holds the office of District Attorney for the Seventeenth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Adams County and the City & County of Broomfield. He is named in this action solely in his official capacity.

28. George Brauchler currently holds the office of District Attorney for the Eighteenth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Arapahoe, Douglas, Elbert, and Lincoln Counties. He is named in this action solely in his official capacity.

29. Kenneth R. Buck currently holds the office of District Attorney for the Nineteenth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Weld County. He is named in this action solely in his official capacity.

30. Stan Garnett currently holds the office of District Attorney for the Twentieth Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Boulder County. He is named in this action solely in his official capacity.

31. Pete Hautzinger currently holds the office of District Attorney for the Twenty-first Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Mesa County. He is named in this action solely in his official capacity.

32. Will Furse currently holds the office of District Attorney for the Twenty-second Judicial District of Colorado, responsible for enforcing the laws of the State of Colorado on behalf of the People of Colorado in Dolores and Montezuma Counties. He is named in this action solely in his official capacity.

Jurisdiction and Venue

33. This Court has jurisdiction over the Plaintiffs' federal constitutional claims pursuant to 28 U.S.C. §§ 1331 and 1343(3) because the Plaintiffs' claims arise under the First and Fourteenth Amendments to the United States Constitution. This Court has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, to address the Plaintiffs' claims arising under the Colorado Constitution.

34. This action seeks remedies under 42 U.S.C. §§ 1983 and 1988(b), 28 U.S.C. §§ 2201 and 2202, Fed. R. Civ. P. 65(a), and directly under Article II, section 10 of the Colorado Constitution.

35. Venue is proper in this District under 28 U.S.C. § 1391(b) as all of the Defendants reside in this District and all of the events giving rise to the Plaintiffs' claims have occurred in this District.

Factual Allegations

I. Passage of Amendment 64 to the Colorado Constitution

36. On November 6, 2012, voters in Colorado approved a ballot initiative known as Amendment 64, which added Article XVIII, Section 16 to the Colorado Constitution, legalizing under state law the personal possession and use of small amounts of marijuana.

37. In particular, Amendment 64 provides a state constitutional right to persons over the age of 21 to possess, use, display, purchase and transport up to one ounce of marijuana and to possess, grow, process and transport up to six marijuana plants. (Persons under the age of 21 continue to be permitted under prior law to obtain medical marijuana under the provisions of Amendment 20, which was passed by Colorado voters in November 2000, and its implementation in the Colorado Medical Marijuana Code, §§ 12-43.3-101 et seq., C.R.S.) Amendment 64 explicitly directs the Colorado Department of Revenue to adopt regulations to implement the provisions of the constitutional amendment no later than July 1, 2013. Nothing in Amendment 64 addresses, in any way, the right to publish, distribute, display, sell, and read publications about marijuana. Nothing in Amendment 64 purports to limit, or in any way affect, rights to freedom of speech protected by Article II, Section 10 of the Colorado Constitution.

38. Amendment 64 was proclaimed as an amendment to the Colorado Constitution on December 10, 2012.

39. Concurrently with his proclamation of the constitutional amendment, on December 10, 2012, Governor Hickenlooper also appointed the Amendment 64 Implementation Task Force to recommend legislative action in response to the new constitutional provision.

40. The task force released its report to the Governor and the Colorado General Assembly on March 13, 2012.

II. Enactment of the Colorado Retail Marijuana Code

41. The Colorado General Assembly took up the question of retail marijuana regulation in April 2013, through House Bill 13-1317, which includes various amendments to the already enacted Colorado Medical Marijuana Code, §§ 12-43.3-101, *et seq.*, C.R.S., and enacts the entirely new Colorado Retail Marijuana Code, §§ 12-43.4-101, *et seq.*, C.R.S.

42. Under the provisions of the Colorado Retail Marijuana Code, the executive director of the Colorado Department of Revenue is deemed to be the state's chief administrative officer for the regulation of retail marijuana in the form of the "State Licensing Authority." *See* §§ 12-43.3-201(1) & (2), 12-43.4-103(1) & (24), 12-34.4-201, C.R.S...

43. The Colorado Retail Marijuana Code dictates that the State Licensing Authority must promulgate administrative regulations pertaining to retail marijuana no later than July 1, 2013. *See* § 12-43.4-202(2)(b), C.R.S.

44. In connection with such regulations, the Colorado Retail Marijuana Code mandates that the State Licensing Authority promulgate regulations that, among other topics, must require "magazines whose primary focus is marijuana or marijuana businesses are only sold

in retail marijuana stores or behind the counter in establishments where persons under twenty-one years of age are present.” § 12-43.4-202(3)(c)(II), C.R.S. No such provisions were contemplated, in any way, by Amendment 64.

45. The Colorado Retail Marijuana Code includes no definition or other guidance as to what constitutes either a “magazine” or a “primary focus” on marijuana or marijuana businesses or what constitutes “behind the counter.” The code does define a “retail marijuana store” to be a facility licensed by the State Licensing Authority to distribute retail marijuana (as opposed to medical marijuana).

III. Effect of Magazine Restrictions on Plaintiffs

46. Under the Colorado Retail Marijuana Code, it is a crime – punishable as a Class 2 misdemeanor – for any person to engage in any act declared by the Code to be unlawful. *See* § 12-43.4-901(6), C.R.S.

47. As a result, the plaintiff bookstores and newsstands face potential prosecution for any display or sale of a magazine whose “primary focus” is marijuana or marijuana businesses unless such magazines are distributed only from “behind the counter” of the plaintiffs’ establishments.

48. Each of the plaintiff bookstores and newsstands have for many years displayed publications, including publications that may be deemed “magazines” under the Colorado Retail Marijuana Code, that are about marijuana, marijuana cultivation, marijuana use, and other topics related to marijuana, and they have done so on their magazine racks and shelves available to the customers who patronize their establishments, as well as in other locations throughout their stores.

49. In each of the plaintiff bookstores and newsstands, a substantial number of customers (both those 21 years of age and above, and those below the age of 21) often peruse, without actually buying, such magazines, reading the content of such magazines while in the store.

50. None of the plaintiff bookstores and newsstands has ever previously maintained a requirement that magazines concerning marijuana-related topics may only be sold from “behind the counter.”

51. The Plaintiffs anticipate that some number of bookstore and newsstand patrons who previously perused and read such magazines when they were freely available on the stores’ regular shelves and racks will not do so if the publications are kept behind the stores’ counters. In addition, the Plaintiffs reasonably anticipate that an appreciable number of patrons will be unaware that a store stocks a marijuana-related magazine if it must be “sold” behind the stores’ counters.

52. The statutory term “magazines whose primary focus is marijuana and marijuana businesses” is uncertain and vague. What makes a publication a “magazine?” What distinguishes a magazine from a newspaper, flyer, pamphlet, or book? What makes a particular subject the “primary focus” of a publication? Because of that vagueness, Plaintiffs cannot ascertain which publications are subject to the statute’s requirements. Similarly, the term “sold ... behind the counter” is uncertain and vague. May “the magazines” be displayed behind the counter so that they are visible from in front of the counter, or must they be hidden? If a person asks to peruse one of the magazines being sold “behind the counter,” before deciding whether or

not to purchase it, may her or she be given the opportunity to do so—or does that process, which would bring the magazine “in front of” the counter, violate the Code?

FIRST CLAIM FOR RELIEF

42 U.S.C. § 1983

(Violation of First and Fourteenth Amendments to Constitution of the United States)

53. The foregoing paragraphs are incorporated herein by reference as if set forth in full.

54. The provisions of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code have the legal effect of restricting core political speech, and other forms of protected speech, as well as the rights of the Plaintiffs’ patrons to receive such speech, thereby depriving the Plaintiffs and their patrons under color of state law of their rights, privileges and immunities secured to them by the Constitution and laws of the United States, thereby entitling them to relief under 42 U.S.C. § 1983.

55. The requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code constitute content-based government regulation of protected speech.

56. The requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code do not serve a compelling government interest.

57. The requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code are not narrowly tailored.

58. The requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code are overbroad.

59. Plaintiffs have no adequate remedy at law to redress fully the Defendants’ deprivation of the rights secured to them by the Constitution and laws of the United States.

60. Unless the Court enters injunctive relief barring the Defendants from enforcing the requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code, the Plaintiffs will suffer irreparable harm.

SECOND CLAIM FOR RELIEF
Article II, Section 10 of the Colorado Constitution

61. The foregoing paragraphs are incorporated herein by reference as if set forth in full.

62. The requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana will deprive the Plaintiffs of the free speech rights secured to them by Article II, Section 10 of the Colorado Constitution.

63. Plaintiffs have no adequate remedy at law to redress fully the deprivation of these rights secured to them by Article II, Section 10 of the Colorado Constitution.

64. Unless the Court enters injunctive relief barring Defendants from implementing this deprivation of the Plaintiffs' rights, the Plaintiffs will continue to suffer irreparable harm.

THIRD CLAIM FOR RELIEF
42 U.S.C. § 1983
(Violation of Fifth and Fourteenth Amendments to Constitution of the United States)

65. The foregoing paragraphs are incorporated herein by reference as if set forth in full.

66. The provisions of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code are vague and fail to give the Plaintiffs clear notice of the conduct made unlawful thereby, thus depriving the Plaintiffs under color of state law of the due process of law

secured to them by the Constitution and laws of the United States, thereby entitling them to relief under 42 U.S.C. § 1983.

67. Plaintiffs have no adequate remedy at law to redress fully the Defendants' deprivation of the rights secured to them by the Constitution and laws of the United States.

68. Unless the Court enters injunctive relief barring the Defendants from enforcing the requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code, the Plaintiffs will suffer irreparable harm.

Prayer for Relief

WHEREFORE, the Plaintiffs pray that this Court take jurisdiction over this matter and enter Judgment in their favor, and against the Defendants, as follows:

- a. Declaring that the requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code are unconstitutional on their face, in violation of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.
- b. Declaring that the requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code are unconstitutional on their face, in violation of Article II, Section 10 of the Colorado Constitution.
- c. Enjoining Defendants Hickenlooper and Brohl, and any person or representative acting in concert with such Defendants or pursuant to a delegation of authority from them, from promulgating any administrative regulations to enforce the requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code.

- d. Enjoining Defendant Suthers and the District Attorney defendants, and any person or representative in concert with those defendants or pursuant to a delegation of authority from those defendants, from enforcing the requirements of Section 12-43.4-202(3)(c)(II), C.R.S., of the Colorado Retail Marijuana Code, including, without limitation, any criminal prosecutions under Section 12-43.4-901(6), C.R.S.
- e. Awarding the Plaintiffs a reasonable attorney's fee and their costs incurred in connection with this action, pursuant to 42 U.S.C. § 1988(b) and all other applicable law; and
- f. Granting the Plaintiffs such further and different relief as the Court may deem just and proper.

Respectfully submitted this 3rd day of June, 2013

By: /s Christopher P. Beall

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