IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-CV-02930-JKL-BNB

COLORADO CRIMINAL DEFENSE BAR, *et al.*,

Plaintiffs,

v.

JOHN HICKENLOOPER, *et al.*,

Defendants.

STATE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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 Gerald Marroney, in his official capacity as Colorado State Court Administrator (collectively, "the State Defendants"), by and through counsel, hereby move to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief may be granted. Because they have Eleventh Amendment immunity from suit in this matter, Defendants Hickenlooper and Marroney additionally request that they be dismissed as defendants pursuant to Fed. R. Civ. P. 12(b)(1).

INTRODUCTION

Plaintiffs, the Colorado Criminal Defense Bar ("the Defense Bar") and Colorado Criminal Justice Reform Coalition ("CCJRC"), seek a declaration that C.R.S. § 16-7-301(4) violates the right to counsel that is guaranteed to certain

criminal defendants by the Sixth Amendment, along with an injunction against future enforcement of the statute.

Amended into its current form in 1992, § 16-7-301(4) applies only to state criminal defendants who have been charged with misdemeanors, petty offenses, and certain traffic offenses, and who make their first appearance without counsel. Following such a defendant's first appearance – during which the court advises him of his Fifth and Sixth Amendment rights, *see* C.R.S. § 16-7-207(1) – the statute requires the prosecutor to "tell the defendant any offer that can be made based on the facts as known by the prosecuting attorney at that time." § 16-7-301(4)(a). The defendant "is under no obligation to talk to the prosecuting attorney," and the prosecutor must repeat the advisement just given by the court: that the defendant has the right to privately retained or court-appointed counsel. *Id.* If he wishes, a defendant may then "engage in further plea discussions about the case" with the prosecutor. *Id.* A defendant who prefers an attorney may wait to do so until retained counsel arrives or court-appointed counsel is assigned. If the Sixth Amendment right is waived and the parties reach a plea agreement, the court must – for the third time – advise the defendant of his right to counsel before accepting his guilty plea. § 16-7-301(4)(a)(I).

Plaintiffs take exception to this procedure, arguing that it violates the Sixth Amendment. Relying on the Supreme Court's holdings in *Rothgery v. Gillespie County,* 554 U.S. 191, 213 (2008), and *Padilla v. Kentucky,* 130 S.Ct. 1473 (2010), Plaintiffs contend that § 16-7-301(4) deprives criminal defendants of the right to counsel after it has attached and at a critical stage of the postattachment proceedings.

As demonstrated below, however, Plaintiffs have failed to state a claim upon which relief may be granted. Moreover, to the extent that the Plaintiffs seek relief against Governor Hickenlooper and Administrator Marroney, the Plaintiffs' claims are barred by the Eleventh Amendment and should be dismissed for want of subject matter jurisdiction.

ARGUMENT

Standard of Review

The legal sufficiency of a complaint is a question of law. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). At its most basic level, a complaint is legally sufficient if it contains "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007), *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Accordingly, "[t]he court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (internal quotation omitted).

Fed. R. Civ. P. 8(a) does not require detailed factual allegations, but it does require more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id., quoting Twombly*, 550 U.S. at 554. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id., quoting*

Twombly, 550 U.S. at 557. Accordingly, Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S.Ct. at 1951. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – that the pleader is entitled to relief." *Id.*, *citing* Fed. R. Civ. P. 8(a)(2).

Here, because Plaintiffs mount a facial challenge to § 16-7-301(4), their complaint contains virtually no assertions of material fact. Accordingly, to determine whether the Plaintiffs have stated a claim upon which relief may be granted, this Court must simply determine whether § 16-7-301(4) violates the Sixth Amendment on its face.

I. Because the complaint fails to even allege, much less demonstrate, that § 16-7-301(4) is unconstitutional in all of its applications, Plaintiffs' facial challenge must fail.

Plaintiffs' Amended Complaint appears to contain sufficient factual allegations to establish organizational standing, at least at this stage of the litigation. But proving standing is not the same thing as stating a cognizable claim for relief. Indeed, a review of the Amended Complaint demonstrates that the Defense Bar and CCJRC are the wrong plaintiffs, raising the wrong type of challenge in a forum court that cannot grant them the relief they seek.

Because it does not rely upon or allege any specific instances in which the challenged statute has abridged the right of an individual criminal defendant in Colorado, Plaintiffs' Amended Complaint raises only a facial challenge to §16-7-301(4). "A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *United States. v. Frandsen,* 212 F.3d 1231,

1235 (11th Cir. 2000). It does not involve an attempt "only to vindicate [a Plaintiff's] own rights, but also those of others who may be adversely affected by the statute." *DA Mortgage, Inc.*, v. *City of Miami Beach,* 486 F.3d 1254, 1262 (11th Cir. 2007). Because a facial challenge seeks such broad relief, it requires a plaintiff to make a correspondingly broad showing of unconstitutionality in order to succeed. *See Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 (2008) ("a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications"), *quoting United States v. Salerno,* 481 U.S. 739, 745 (1987).

To date, the Tenth Circuit has followed a somewhat more lenient approach to facial challenges than the standard articulated by the Supreme Court in *Salerno*. *See Hernandez-Carrera v. Carlson,* 547 F.3d 1237, 1255-56 (10th Cir. 2008) ("While we have left undecided whether a plaintiff making a facial challenge must establish that no set of circumstances exists under which the Act would be valid, it is clear a litigant cannot prevail in a facial challenge to a regulation or statute unless he at least can show that it is invalid in the vast majority of its applications.") (internal quotations and citations omitted). This approach appears to be consistent with the Supreme Court's lingering uncertainty about which standard to apply. *See Washington State Grange,* 552 U.S. at 449 ("While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a 'plainly legitimate sweep.'"), *quoting Washington v. Glucksberg,* 521 U.S. 702, 740 n.7 (1997) (Stevens, J. concurring in judgments); *United States v. Stevens,* 130 S.Ct.

1577, 1587 (2010) (noting difference between standards articulated in *Salerno* and *Glucksberg,* and stating that "[w]hich standard applies in a typical case is a matter of dispute that we need not and do not address").

Accordingly, for their facial challenge to succeed Plaintiffs must at a minimum demonstrate that § 16-7-301(4) is "invalid in the vast majority of its applications." *Carlson*, 547 F.3d at 1256. In other words, they must show that the challenged statute violates the Sixth Amendment in nearly every case to which it applies. But there is a Sixth Amendment right to counsel only in cases that result in some form of incarceration. Indeed, in cases where there is no possibility of imprisonment, there is no right to appointed counsel at all. *See United States v. Reilley,* 948 F.2d 648, 650 (10th Cir. 1991) ("the Supreme Court has limited [the Sixth Amendment right to counsel] so as to exclude prosecutions for petty offenses for which the defendant is not 'sentenced to a term of imprisonment'"), *quoting Scott v. Illinois,* 440 U.S. 367, 373-74 (1979).

Since many of the misdemeanors, petty offenses, and traffic offenses covered by § 16-7-301(4) do not carry the possibility of imprisonment, Plaintiffs' facial challenge cannot succeed. Examples of offenses that are covered by the statute, but for which there is no possibility imprisonment, include:

- Class 2 petty offenses, § 18-1.3-503, C.R.S. (2010) (punishable only by imposition of fine (e.g., failure to report off-road accident causing damage or injury (§ 33-14.5-113); skiing while impaired by alcohol or drugs (§ 33-44-109(9), (12))).

- Class A traffic offenses, § 42-4-1701(3)(a)(I), C.R.S. (2010)[1] (punishable only by imposition of fine; includes dozens of moving violations, (e.g., failure to yield (§ 42-4-704), following too closely (§ 42-4-1008), and possession of open alcoholic beverage container (§ 42-4-1305)).
- Class B traffic offenses, § 42-4-1701(3)(a)(I), C.R.S. (2010) (punishable only by imposition of fine; includes minor traffic offenses (e.g., use of earphones while driving (§ 42-4-1411), jaywalking (§ 42-4-803)).
- Certain misdemeanors and petty offenses for which prosecuting attorney has stated in writing that he will not "seek incarceration as part of the penalty upon conviction of an offenses for which the defendant has been charged." § 16-5-501, C.R.S. (2010). Filing such a statement bars the trial court from sentencing the defendant to incarceration upon conviction; however, the defendant is also ineligible for free state-appointed counsel. *Id.*

It is clear that § 16-7-301(4) cannot violate the Sixth Amendment in cases where the defendant has no constitutional right to appointed counsel to begin with. And while it would be improper at this stage of the litigation to present a statewide analysis of the number and types of cases that fall under § 16-7-301(4), it goes without saying that

[1] Section 42-4-1701(3) was the subject of minor amendments that became effective on January 1, 2011. *See* H.B. 10-1019, 2010 Sess. Laws, ch. 400 pp. 1930-31. The amendments left the presumptive penalties for Class A and B traffic offenses unchanged.

traffic offenses, petty offenses, and cases in which incarceration is not sought make up a sizable proportion of the cases to which the statute applies. The Plaintiffs have certainly not alleged otherwise; indeed, the Amended Complaint fails to even acknowledge that § 16-7-301(4) applies to some charges that are not covered by the Sixth Amendment right to counsel at all. (Doc. 10, ¶¶ 47-52).

Because there is no Sixth Amendment right to counsel in cases that do not involve potential imprisonment, and because § 16-7-301(4) applies to many such cases, Plaintiffs cannot show that the challenged statute is "invalid in the vast majority of its applications." *Carlson,* 547 F.3d at 1256. Nor can the Plaintiffs satisfy the stricter *Salerno* standard, which requires a demonstration that "no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. The Plaintiffs' Amended Complaint – which mounts only a facial challenge to § 16-7-301(4) – accordingly fails to state a claim for which relief may be granted and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

II. Criminal defendants who choose to negotiate with the prosecutor pursuant to § 16-7-301(4) do so only after voluntarily waiving their Sixth Amendment right to counsel for the purposes of the negotiation.

The gravamen of the Plaintiffs' Amended Complaint is that the challenged statute: 1) deprives certain indigent criminal defendants of their Sixth Amendment right to counsel, at 2) a critical stage of the proceeding against them, and 3) after their right to counsel has already attached. The State Defendants do not dispute that the Tenth Circuit has held that plea negotiations are a critical stage of the proceedings, *see Williams v. Jones,* 571 F.3d 1086, 1091 (10th Cir. 2009), *citing Burger v. Kemp,* 483 U.S. 776, 803-04 (1987) (Blackmun, J. dissenting), nor is there any doubt that an

indigent criminal defendant's Sixth Amendment right to counsel has already attached by the time any plea negotiations pursuant to § 16-7-301(4) begin. *Rothgery*, 554 U.S. at 213.

But the first point is the critical one, and it is where the Plaintiffs' argument suffers from serious shortcomings. Plaintiffs simply assume that every indigent criminal defendant who is eligible for appointed counsel desires that the appointment be made. What this argument ignores is the fact that uncounseled plea negotiations held pursuant to the challenged statute are the product of the defendant's *voluntary waiver* of the Sixth Amendment right to counsel.

If imprisonment is a possibility, an indigent criminal defendant is of course entitled to the appointment of counsel to represent him at all critical stages of the proceeding. *See Scott v. Illinois, supra; cf. Gideon v. Wainwright*, 372 U.S. 335 (1963). Colorado has codified this right. *See* C.R.S. § 21-1-103 (duties of state public defender); § 21-2-103 (duties of alternate defense counsel). By statute, the court must advise every defendant of the right to counsel at "[a]t the first appearance of the defendant in court or upon arraignment, whichever is first in time."[2] § 16-7-207(1). The trial court must "inform the defendant and *make sure he understands*" his right to representation as well as the availability of court-appointed counsel (upon application and approval) if he is indigent. § 16-7-207(1)(b), (c) (emphasis added). The trial court's advisement is reinforced by the prosecutor himself before any

[2] This is entirely consistent with *Rothgery*, which held that the right to counsel attaches at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction." 554 U.S. at 213.

uncounseled plea negotiations begin. *See* § 16-7-301(4) (prosecutor must "advise the defendant that the defendant has the right to retain counsel or seek appointment of counsel"). Moreover, these protections continue even after any plea agreement is reached: § 16-7-207(2) prohibits a trial court from accepting a guilty plea unless the court has again advised the defendant of his right to counsel. *See also* Colo. R. Crim. P. 11(b), (5)(a)(2).

The key question, then, is whether a defendant's decision to proceed without counsel after receiving these required advisements will suffice to demonstrate a valid waiver of the right to counsel during any plea negotiations contemplated by § 16-1-307(4). For the purposes of waiver under the Sixth Amendment, the Supreme Court's jurisprudence has acknowledged that the level of detail required by the trial court's advisement coincides with the complexity of the particular critical stage to which it pertains. For example, while a trial court must give a detailed and explicit advisement to a defendant who wishes to represent himself at trial, *see Faretta v. California*, 422 U.S. 806, 835-36 (1974), a simple reiteration of *Miranda* warnings provides satisfactory notice for post-attachment police interrogations. *See Montejo v. Louisiana*, 129 S.Ct. 2079, 2085-86 (2010). Although no courts appear to have opined on the precise advisement required for uncounseled plea negotiations, the general rule is that the scope of the right to counsel – as well as the details of any advisement from which a waiver may be inferred – is defined "by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson v. Illinois*, 487 U.S. 285, 298 (1988). In short, a defendant is generally free to waive the right to

counsel so long as the waiver is a "knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances." *Brady v. United States*, 397 U.S. 742, 748 (1970).

Applying the test adopted in *Patterson*, the Supreme Court has held that the level of advisement that must accompany the *entry* of an uncounseled guilty plea is much closer to a *Miranda* warning than a detailed *Faretta*-type colloquy. *See Iowa v. Tovar*, 541 U.S. 77, 81 (2004) ("The constitutional requirement is satisfied when the trial court informs the accused of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea."). In reaching this conclusion, *Tovar* flatly rejected the suggestion that trial courts must advise *pro se* defendants that waiving the assistance of counsel entails: 1) "the risk that a viable defense will be overlooked"; and 2) the loss of "the opportunity to obtain an independent opinion on whether…it is wise to plead guilty." 541 U.S. at 80 (internal quotations and alterations omitted). Rather than adopting a strict formulaic requirement, *Tovar* thus held that "[t]he information a defendant must possess in order to make an intelligent election…will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.* at 88.

If the advisement required by *Tovar* creates a sufficient basis for the acceptance of an uncounseled guilty plea, the more detailed advisement required by § 16-7-207(1) likewise satisfies Sixth Amendment requirements at the plea negotiation stage. Because engaging in uncounseled plea discussions is a step

removed from actually entering a guilty plea, proceeding without counsel entails very few dangers to the accused. Indeed, no guilty plea can even be entered without the final advisement required by Colorado statutes and criminal rules. While counsel might be able to assist with the negotiation in some situations, most lower-level offenses to which § 16-1-307(4) applies are not complex or difficult to understand. Moreover, *Tovar* explicitly rejected the notion that the trial court must inform the accused of exactly what he is giving up by waiving counsel. 541 U.S. at 80. And what the *pro se* defendant foregoes undoubtedly includes guidance not only as to potential defenses, penalties, and negotiating tactics, but also advice concerning the potential collateral consequences of entering a guilty plea to a particular charge. If *Tovar* allows the accused to *enter* a guilty plea without being explicitly informed that he is foregoing this type of advice, then, *a fortiori*, the Sixth Amendment should allow a criminal defendant to engage in a non-binding discussion of a potential pretrial disposition of the case.

The bottom line is that a criminal defendant who elects to speak to the prosecutor commits himself to nothing more than hearing the prosecutor's offer, which he may reject, accept, or attempt to negotiate as he sees fit. If negotiations are successful, the accused must once again be fully advised of his right to counsel, among other things, before the trial court may accept a guilty plea. Accordingly, although the Sixth Amendment requires the appointment of counsel to any indigent defendant facing the possibility of imprisonment, the multiple advisements required by statute ensure that, in Colorado, an indigent criminal defendant is made fully aware of his right to counsel before he directly engages in plea negotiations with the

prosecutor. An indigent criminal defendant who chooses to proceed in spite of these warnings can only be understood to have voluntarily waived his Sixth Amendment right to counsel with respect to that particular "critical stage" of the proceedings against him.

III. The constitutionality of uncounseled plea negotiations pursuant to the challenged statute can only be considered on a case-by-case basis.

This is not, of course, intended to imply that § 16-1-307(4) is applied to perfection in every misdemeanor case in Colorado, or even that a sufficient advisement is provided in all cases. Mistakes undoubtedly occur from time to time. But the likelihood of occasional errors only highlights further the impropriety of the Plaintiffs' decision to mount a facial challenge in this case. Criminal defendants in Colorado may, based upon an allegation that the conviction was unconstitutionally obtained, seek postconviction relief under the Colorado Rules of Criminal Procedure. Colo. R. Crim. P. 35(c)(2)(I). A review of the record in each particular case, presumably accompanied by the defendant's own testimony, will reveal whether the trial court provided an adequate advisement of the defendant's right to counsel before allowing him to participate in uncounseled plea negotiations. But that review must take the form of an as-applied challenge to § 16-1-307(4), not a facial challenge to the entire statutory scheme.

IV. Defendants Hickenlooper and Marroney are immune under the Eleventh Amendment, and they should therefore be dismissed from the suit.

Assuming *arguendo* that the Court elects not to dismiss the Plaintiffs' entire case pursuant to Rule 12(b)(6), it should, at a minimum, dismiss Defendants Hickenlooper and Marroney pursuant to Rule 12(b)(1) based upon their Eleventh

Amendment immunity. "Under the Eleventh Amendment, states are generally immune from suits brought in federal court by their own citizens, by citizens of other states, by foreign sovereigns, and by Indian tribes." *Chamber of Commerce v. Edmondson,* 594 F.3d 742, 760 (10th Cir. 2010). A narrow exception to this doctrine applies where a plaintiff sues a state officer in his official capacity seeking only prospective relief, and where "the defendant officer has some connection with the enforcement of the act." *Ex Parte Young,* 209 U.S. 123, 157 (1908). The officer named as the defendant "need not have a special connection to the allegedly unconstitutional statute; rather, he need only have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Edmonson*, 594 F.3d at 760.

Attorney General Suthers does have the authority to prosecute certain misdemeanors in the State of Colorado; hence he does not claim Eleventh Amendment immunity. The same is not true, however, for Defendants Hickenlooper and Marroney.

Plaintiffs make a general allegation that Governor Hickenlooper is an appropriate defendant because the Colorado Constitution requires him to "take care that the laws be faithfully executed," and because he is "empowered to require the attorney general" to undertake prosecutions. *Amended Complaint* (Doc. 10), ¶ 153-154, 157 *citing* Colo. Const. art IV, § 2; C.R.S. § 24-31-101(a). In addition, they point out that under state law, the Governor has traditionally been considered a proper defendant in cases where a party seeks to "enjoin or mandate enforcement of a statute, regulation, ordinance, or policy." *Id.*, ¶ 155; *Developmental Pathways* v. *Ritter*, 178

P.3d 524, 530 (Colo. 2008), *quoting Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004). While this may be true as a matter of state law, it has no bearing on whether Governor Hickenlooper is a proper defendant for the purposes of the Eleventh Amendment.

Plaintiffs assert that Administrator Marroney is an appropriate defendant because he is responsible for management and budget of the Colorado courts system, including the office of the Public Defender. *Amended Complaint* (Doc. 10), ¶¶ 180, 184.

Despite these allegations, Plaintiffs have not sufficiently alleged that either the Governor or the Court Administrator has 1) any particular duty to enforce § 16-7-301(4); 2) taken any specific action to ensure that is enforced; or 3) demonstrated a willingness to see that it is enforced. *See Edmonson*, 594 F.3d at 760. In any event, the Court Administrator clearly would have no authority to order prosecutors to comply with the statute. Moreover, as a matter of state law, it is far from clear that any such order issued by the Governor to the Attorney General would have binding effect. *See* C.R.S. § 24-31-101(1)(e) (authorizing retention of outside counsel when "attorney general is unable or has failed or refused to provide legal services to an agency of state government"); *cf. State of Colorado v. ASARCO, Inc.*, 616 F.Supp. 822, 828-29 (D. Colo. 1985) (interpreting executive order directing the Attorney General to litigate as having "authorized" him to proceed in a matter not expressly within his statutory or constitutional powers).

In order to qualify for the *Ex Parte Young* exception, the Eleventh Amendment demands that the plaintiff demonstrate substantially more than the fact that the

Colorado Constitution generally confers authority upon the Governor's office to enforce the state's laws, or that the Court Administrator is charged with administrative oversight of the state's judicial system. *See Finstuen v. Crutcher,* 496 F.3d 1139, 1151 (10th Cir. 2007) ("Under *Ex Parte Young*, the state officer against whom a suit is brought 'must have some connection with the enforcement of the act' that is in continued violation of federal law") *quoting Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 372-73 (2d Cir. 2005). It also requires a showing that both parties have actual authority to enforce the specific law being challenged, and that they have demonstrated a willingness to do so. The Plaintiffs have made no such allegation with respect to Administrator Marroney and have only made a general (and inaccurate) claim regarding the Governor's constitutional duties and ability to implement the challenged statute.

If the Colorado Constitution's general conferral of authority over the state's laws were construed as Plaintiffs urge, the *Ex Parte Young* exception would swallow the rule by allowing any plaintiff who wished to challenge a law in federal court to name the Governor "as a representative of the state…thereby attempting to make the state a party." *Ex Parte Young,* 209 U.S. at 157. This attempt at an end-around of the state's Eleventh Amendment immunity should be rejected. Assuming that the Amended Complaint survives the foregoing motion to dismiss pursuant to Rule 12(b)(6), the Court should nonetheless dismiss Governor Hickenlooper and Administrator Marroney as defendants pursuant to Fed. R. Civ. P. 12(b)(1) because they have immunity from suit under the Eleventh Amendment.

CONCLUSION

Based on the foregoing reasoning and authorities, the State Defendants respectfully requests that this Court dismiss the Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and in the alternative request that the Amended Complaint be dismissed with respect to Defendants Hickenlooper and Marroney pursuant to Fed. R. Civ. P. 12(b)(1).

JOHN W. SUTHERS
Attorney General

s/ Matthew D. Grove
MATTHEW D. GROVE, 34269*
Assistant Attorney General
Public Officials Unit
State Services Section
REBECCA ADAMS JONES, 31044*
Assistant Attorney General
Appellate Division
Criminal Justice Section
Attorneys for Defendant

1525 Sherman Street, 7th Floor
Denver, Colorado 80203
Telephone: 303-866-5264
FAX: 303 866-5671
E-Mail: matthew.grove@state.co.us
rebecca.jones@state.co.us
*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of April, 2011, I electronically filed the within ***STATE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT*** with the Clerk of Court using the CM/ECF system, which will send the notification of such filing to the following:

Scott F. Llewellyn
Colin M. O'Brien
Morrison & Foerster LLP
5200 Republic Plaza
370 Seventeenth Street
Denver, Colorado 80202-5638
sllewellyn@mofo.com
cobrien@mofo.com

Kathryn A. Reilly
Joshua D. Franklin
JACOBS CHASE LLC
1050 17th Street, Suite 1500
Denver, CO 80265
kreilly@jacobschase.com
jfranklin@jacobschase.com
Attorneys for Plaintiffs

Stanley L. Garnett
Christopher C. Zenisek
Lisa K. Michaels
District Attorney's Office for the 20th Judicial District
1777 Sixth Street
Boulder, CO 80302
sgarnett@bouldercounty.org
czenisek@bouldercounty.org
lmichaels@bouldercounty.org
Attorneys for DA Group Defendants

John Barth, Attorney at Law
P.O. Box 409
Hygiene, CO 80533
barthlawoffice@gmail.com
Attorney for Defendant Thibeaux

Jeffrey S. Pagliuca
150 East 10th Avenue
Denver, CO 80203
jpagliuca@hmflaw.com
Attorney for Defendant Wilson

s/Matthew D. Grove