

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	
<p>On Certiorari to the Colorado Court of Appeals Court of Appeals Case Number: 17CA1502</p>	
<p>In the Case of:</p> <p>Rocky Mountain Gun Owners, a Colorado nonprofit corporation; National Association for Gun Rights, Inc. a Virginia nonprofit corporation; and John A. Sternberg, Petitioners</p> <p>v.</p> <p>Jared W. Polis, in his official capacity as Governor of the State of Colorado, Respondent</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorney for Amici Curiae: David B. Kopel, Atty. Reg. No. 15872 INDEPENDENCE INSTITUTE 727 East 16th Ave. Denver, CO 80203 Telephone: (303) 279-6536 Email: david@i2i.org</p>	<p>Case Number: 18SC817</p>
<p>BRIEF OF AMICI CURIAE COLORADO LAW ENFORCEMENT FIREARMS INSTRUCTORS ASSOCIATION; SHERIFFS SHANNON BYERLY, TODD COMBS, ALLEN COOPER, GARTH CROWTHER, BILL ELDER, THOMAS ELLIOTT, KC HUME, MATT LEWIS, DAVE MARTIN, ANTHONY MAZZOLA, DON MCDONALD, TOM MCGRAW, JASON MIKESELL, TIM NORTON, BRETT POWELL, STEVE REAMS, RICHARD REIGENBORN, DANNY SANCHEZ, BRENT SCHROETLIN, CASEY SHERIDAN, AARON SHIPLETT, JEFF SHRADER, JUSTIN SMITH, TONY SPURLOCK, JOHN STIVERS, RICK VALDEZ, JAMES VAN BEEK, GARRETT WIGGINS, DON WILSON, AND SAM ZORDEL; AND THE INDEPENDENCE INSTITUTE IN SUPPORT OF APPELLANTS</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the requirements of C.A.R. 28, 29, and 32. Specifically, I certify that this Amicus Brief (including headings and footnotes but excluding the caption, table of contents, table of authorities, signature blocks, and certificate of service) contains 4,741 words. Accordingly, this amicus brief does not exceed one-half the 9,500 word limit of the principal brief.

INDEPENDENCE INSTITUTE

By: *S/David B. Kopel*
David B. Kopel

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE..... II

TABLE OF CONTENTS.....III

TABLE OF AUTHORITIES V

INTEREST OF AMICI CURIAE.....1

SUMMARY OF ARGUMENT2

ARGUMENT2

 I. Any standard of review other than nullification of the constitutional text resolves this case.....2

 II. Coloradans should follow the good example of law enforcement for the safest and best defensive arms.6

 A. The banned magazines include those that law enforcement chooses for defense of “home, person, and property.”7

 B. The arms of ordinary law enforcement officers are the best arms for defense of “home, person, and property.”8

 C. The typical law enforcement officer test.....11

 D. Typical law enforcement arms are the type best suited for use “in aid of the civil power when thereto legally summoned.”12

 III. The magazine ban’s animus is not a legitimate government interest, and it endangers law enforcement.....15

 A. The text of HB1224 demonstrates that the premise of HB1224 is false. 15

 B. Defendant’s stipulations demonstrate that the premise of HB1224 is false.16

 C. The law enforcement exception demonstrates that the premise of HB1224 is false.....17

 D. HB1224 endangers law enforcement.18

 IV. The data below do not support prohibition19

CONCLUSION23
CERTIFICATE OF SERVICE24

TABLE OF AUTHORITIES

Supreme Court Cases

<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	3, 6
<i>Greater New Orleans Broadcasting Ass’n v. United States</i> , 527 U.S. 173 (1999).....	16

Constitutions and Statutes

C.R.S. §§18-12-202, 205, 206, 208	5
C.R.S. §§18-12-301 -303 (HB1224).....	7, 16, 17, 19
C.R.S. §18-12-206(4).....	5
C.R.S. §25-3.5-103(11).....	13
C.R.S. §28-4-115(2).....	13
C.R.S. §30-10-506	13
C.R.S. §30-10-516	13
C.R.S. §8-40-202(1)(a)(I)(A).....	13
COLO. CONST., art. II, §13.....	3, 11, 12
COLO. CONST., art. XIV, §8	18
U.S. Const. amend. XIV, §4	4

Colorado Supreme Court Cases

<i>City of Lakewood v. Pillow</i> , 180 Colo. 20, 501 P.2d 744 (1972)	2, 4
<i>In re Interrogatories Propounded by the Senate</i> , 168 Colo. 563, 452 P.2d 382 (1969)	3
<i>People ex rel. Carlson v. City Council of City & County of Denver</i> , 60 Colo. 370, 153 P. 690 (1915).....	3
<i>People v. Nakamura</i> , 62 P.2d 246, 99 Colo. 262 (1936).....	6
<i>People v. Ramirez</i> , 155 P.3d 371 (Colo. 2007).....	21
<i>Robertson v. City & Cty. of Denver</i> , 874 P.2d 325 (Colo. 1994)	2, 7, 15
<i>Town of Dillon v. Yacht Club Condominiums Home Owners Ass’n</i> , 2014 CO 37....	4
<i>Van Kleeck v. Ramer</i> , 62 Colo. 4, 156 P. 1108 (1916).....	3

Colorado Court of Appeals Cases

<i>People v. Goodpaster</i> , 742 P.2d 965 (Colo. App. 1987).....	14
<i>People v. Sandoval</i> , 2016 COA 14	12
<i>Rocky Mountain Gun Owners v. Hickenlooper</i> , 2018 CO 149 (“RMGO”)... 3, 4, 12, 20	

Other Cases

<i>Duncan v. Becerra</i> , 366 F.Supp.3d 1131 (S.D. Cal. 2019)	23
Order Re: Preliminary/Proof Evident Hearing, <i>People v. Holmes</i> , no. 12CR1522, at 15 (D. Arapahoe, Colo. Jan. 10, 2013)	22
<i>People ex rel. Williams Engineering & Contracting Co. v. Metz</i> , 193 N.Y. 149, 85 N.E. 1070 (1908).....	3
<i>People v. Yanna</i> , 297 Mich. App. 137, 824 N.W.2d 241 (2012)	11
<i>State v. DeCiccio</i> , 315 Conn. 79 (2014)	4, 11

Other Authorities

County Sheriffs of Colorado, CHP Reports.....	5
FBI, CRIME IN THE UNITED STATES 2017	5
Flaccus, Gillian & Nicholas Riccardi, <i>Shooting suspect gun club membership rejected</i> , A.P., July 22, 2012.....	5
Guarino, Ben, <i>Armed civilian kills suspect, saving life of Ariz. trooper ‘ambushed’ on highway, police say</i> , WASHINGTON POST, Jan. 13, 2017	15
Kleck, Gary, <i>Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages</i> , 17 JUST. RES. & POL. 28 (2016).....	20
Kopel, David, <i>The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement</i> , 104 J. CRIM. L. & CRIMINOL. 671 (2015)	13, 14
Kopel, David, <i>The Second Amendment in the Nineteenth Century</i> , 1998 BYU L. REV. 1359.....	11
Koper, Christopher & Jeffrey Roth, <i>The Impact of the 1994 Assault Weapons Ban on Gun Violence Outcomes</i> , 17 J. QUANTITATIVE CRIMINOL. 33 (2001).....	22

Lisheron, Mark, *A Killer’s Conscience*, AUSTIN AMERICAN-STATESMAN, Dec. 9, 200110

Off-duty officer shrugs off 'heroic' label, DESERET NEWS, Feb. 14, 200711

Rostker, Bernard D., et al., Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process (2008).....8

Schmidt, Samantha, *A ‘Good Samaritan’ saw a deputy being attacked by a Florida man so he fatally shot the assailant*, WASHINGTON POST, Nov. 16, 2016.....15

INTEREST OF AMICI CURIAE

Colorado Law Enforcement Firearms Instructors Association is the professional association of trainers who instruct law enforcement in firearms use. Sheriffs Shannon Byerly (Custer), Todd Combs (Yuma), Allen Cooper (Fremont), Garth Crowther (Conejos), Bill Elder (El Paso), Thomas Elliott (Phillips), KC Hume (Moffat), Matt Lewis (Mesa), Dave Martin (Morgan), Anthony Mazzola (Rio Blanco), Don McDonald (Rio Grande), Tom McGraw (Park), Jason Mikesell (Teller), Tim Norton (Elbert), Brett Powell (Logan), Steve Reams (Weld), Richard Reigenborn (Adams), Danny Sanchez (Costilla), Brent Schroetlin (Grand), Casey Sheridan (Kiowa), Aaron Shiplett (Baca), Jeff Shrader (Jefferson), Justin Smith (Larimer), Tony Spurlock (Douglas), John Stivers (Washington), Rick Valdez (Archuleta), James Van Beek (Eagle), Garrett Wiggins (Routt), Don Wilson (Dolores), and Sam Zordel (Prowers) are Sheriffs of their respective counties.

Independence Institute is a 501(c)(3) educational organization; its arms law scholarship has been cited by the highest courts of eleven States, and by the U.S. Supreme Court in *Heller* and *McDonald*. As detailed in the Motion for Leave to file, all amici have long-standing expertise and experience involving arms, arms laws, and public safety. They wish to inform the Court about defensive gun use, and other effects of the magazine ban.

SUMMARY OF ARGUMENT

A reasonableness standard allows for regulation of standard magazines, but not prohibition. Prohibition is based on the false premises that standard magazines have no legitimate uses, and that their elimination has no effect on lawful self-defense.

Sheriffs and deputies possess standard capacity magazines—up to about 20 rounds for handguns, and 30 rounds for rifles—for the same reason that law-abiding citizens should: they are best for lawful defense of self and others. When defenders have less reserve ammunition, they fire fewer shots. This increases the danger that the criminal(s) will injure the victim.

The Connecticut Supreme Court and the Michigan Court of Appeals have held that the types of arms typically possessed by ordinary law enforcement officers are among those protected by the right to arms.

The statistics cited by the court below in support of the ban are clearly erroneous, relying on data that classifies homicides perpetrated with small magazines as if standard magazines had been used.

ARGUMENT

I. Any standard of review other than nullification of the constitutional text resolves this case.

A rational basis standard would nullify the constitutional text. Federally, “If all that was required to overcome the right to keep and bear arms was a rational basis,

the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.” *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

“The presumption is, that the people in exercising their supreme power, did not do a vain act, but effected a definite purpose.” *In re Interrogatories Propounded by the Senate*, 168 Colo. 563, 566 (1969) (quoting *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 85 N.E. 1070 (N.Y. 1908)); *Van Kleeck v. Ramer*, 62 Colo. 4, 27 (1916) (same); *People ex rel. Carlson v. City Council of City & County of Denver*, 60 Colo. 370, 381 (1915) (same).

This case does not require a means-ends balancing test. It is undisputed that magazines over 15 rounds were in common use in Colorado in 1876. *See* Second Amendment Foundation amicus brief. The Court of Appeals brushed off this fact with a reference to “the Gatling gun.” *Rocky Mountain Gun Owners v. Hickenlooper*, 2018 COA 149 ¶42 n.7 (“*RMGO*”). In fact, Gatling guns (like machine guns in general) were not in common use in Colorado in 1876, and never became so thereafter—whereas standard magazines over 15 rounds always have been.

Banning the very arms that were typically owned by Coloradoans when they ratified the Constitution contradicts the text: the right “shall not be called in question.” Colorado’s text paralleled the recently-enacted Fourteenth Amendment:

the validity of the public debt of the United States “shall not be questioned.” U.S. Const. amend. XIV, §4. By the text, repudiation of the public debt is impermissible—and so is a ban on literally millions of arms that have been common from Territorial days to the present.

If means-end balancing were to be employed, review of the statute’s reasonableness would necessarily consider whether there are less burdensome alternatives to prohibition for law-abiding citizens. As this Court put it: “A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *City of Lakewood v. Pillow*, 180 Colo. 20, 23 (1972); *see also State v. DeCiccio*, 315 Conn. 79, 145 (2014) (“three interrelated concepts must be considered: the factual premises that prompted the legislative enactment, the logical connection between the remedy and those factual premises, and the breadth of the remedy chosen.”) (brackets omitted).

The court below refused to consider less burdensome alternatives. *RMGO* ¶16 (citing *Town of Dillon v. Yacht Club Condominiums Home Owners Ass’n.*, 2014 CO 37). The *Dillon* case, though, was decided under rational basis because it did not

involve an enumerated right. *Dillon*, ¶27 (“they essentially equate to rational basis review”).

Instead of banning standard magazines, the General Assembly could have regulated them. For example, magazines over 15 rounds could have been restricted to persons who hold a Colorado Concealed Handgun Permit. Applicants must apply in person at the Sheriff’s Office, be fingerprinted, undergo a background check of up to 90 days, and pass an in-person safety training class. A Sheriff has discretion to veto applications even for persons who pass all the requisites. C.R.S. §§18-12-202, 205, 206, 208. Permittees are far more law-abiding than the general Colorado population.¹

¹ Colorado data are reported annually to the legislature. C.R.S. §18-12- 206(4). They are available via County Sheriffs of Colorado, <https://coloradosheriffs.org/resources/chp-reports/>. In 2013–17, there were 233,918 permits (including new permits and renewals in the five-year permit cycle). There were 1,627 permit revocations, including 1,128 for arrest. (Excluding revocations for permit-holder no longer residing in the county.) Contrast this with the arrests of 234,409 Colorado adults in 2017 alone. FBI, CRIME IN THE UNITED STATES 2017, table 69, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-69>. Annually about 5% of the Colorado adult population is arrested, compared to only 1/10th of 1% of CHP holders.

The regulatory system would have excluded the Columbine killers, who were under 21, and who had already been convicted of burglary. The Aurora criminal was so obviously deranged that he could not even schedule an appointment at gun club. Gillian Flaccus & Nicholas Riccardi, *Shooting suspect gun club membership rejected*, A.P., July 22, 2012. It is doubtful he could have made it through the necessary in-person training and in-person visit to a Sheriff’s Office.

Handguns “are the overwhelmingly favorite weapon of armed criminals.” *Heller*, at 682 (Breyer, J., dissenting). Even so, handguns may be regulated, not prohibited, because handguns have legitimate uses, including self-defense. HB1224 is prohibitory because it assumes that standard magazines have no legitimate uses. Legitimate uses are described in Part II, while Part III describes the bill’s harm to law enforcement—facts to consider in any sort of means-ends test.

II. Coloradans should follow the good example of law enforcement for the safest and best defensive arms.

Standard magazines, which generally have capacities of up to about 20 rounds for handguns or 30 for rifles, are typically included by firearms manufacturers as a default component. They are commonly carried by law enforcement officers as sidearms or in patrol vehicles. Genuinely “large capacity” magazines—such as 50 or 100 rounds—exist almost exclusively as aftermarket items and are not commonly possessed for self-defense by law enforcement officers or citizens.² This brief addresses only the constitutionality of prohibition of standard magazines.

² This brief uses “citizens” in the sense that law enforcement agencies do—to refer respectfully to all persons who are not law enforcement officers. Of course the Colorado right to arms is not limited only to citizens. *People v. Nakamura*, 99 Colo. 262 (1936).

A. The banned magazines include those that law enforcement chooses for defense of “home, person, and property.”

A legislative body may “not impose such an onerous restriction on the right to bear arms as to constitute an unreasonable or illegitimate exercise of the state’s police power.” *Robertson v. City & Cty. of Denver*, 874 P.2d 325, 333 (Colo. 1994).

Citizens have always looked to local law enforcement for guidance in choosing defensive arms, because law enforcement arms are selected with care. Sheriffs choose their duty arms for only one purpose: the defense of innocents. Sheriffs’ arms are not selected for mass killing. Instead, sheriffs’ arms are best for defense of self and others, including against multiple attackers.

HB1224 takes direct aim at many of the most common arms preferred by citizens and law enforcement: full-sized 9mm handguns. While compact or subcompact 9mm handguns have small magazines, the standard magazine for a full-size 9mm is frequently 16–20 rounds, as in the Glock 17, and many similar handguns from other manufacturers. EX (trial), pp 502–03 ¶17 (stipulation).

Although larger calibers (such as .45) are available, many officers and citizens prefer 9mm because its recoil is easier to control, and because its ergonomics make it a good fit, including for many females.

B. The arms of ordinary law enforcement officers are the best arms for defense of “home, person, and property.”

Citizens do and should copy sheriffs’ firearm and magazine selections so they will have reliable, sturdy arms for defense of self and others. These arms will be powerful enough for defense against violent criminals, *and* these arms will be appropriate for use in civil society, because sheriffs’ arms are *not* mass-killing military arms.

Neither citizens nor law enforcement frequently fire more than 15 shots in self-defense. Indeed, the vast majority of Colorado law enforcement officers never fire one defensive shot in their careers. This does not mean that officers should not carry firearms. To the contrary, a firearm, like a fire extinguisher, is a tool for rare emergencies, and in emergencies, essential to survival.

Law enforcement officers choose standard magazines because reserve capacity provides credible deterrence. Even police hit assailants at only a rate of about 20 to 30 percent. *See, e.g.*, Bernard Rostker et al., Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process 14 (2008),³ (“Between 1998 and 2006, the average hit rate [for NYPD] was 18 percent for

³ <https://www.rand.org/pubs/monographs/MG717.html>.

gunfights....[T]he average hit rate in situations in which fire was not returned was 30 percent.”).

Incapacitating an assailant often requires multiple hits. Accordingly, a handgun with a 16- or 17-round magazine is a more credible deterrent than one with a 10-round magazine—especially for a victim menaced by multiple criminals or a criminal powered by drugs.⁴

Reserve capacity is even more important for citizens. It may be impossible for a citizen under attack to extract a cell phone and dial 911. Usually, the only magazine the citizen will have is the one in her firearm. In contrast, officers usually wear small always-ready radios on their shoulders, to immediately summon assistance. Unlike the typical citizen, the typical officer will have several back-up magazines ready on a belt. Officers can sometimes call for back-up before taking on a situation, but the citizen never has the option, because the criminals decide the time and place for attack.

Persons with physical disabilities of mobility are impacted even more severely by the ban, because they cannot retreat or take cover to change a magazine.

⁴ The available substitutes for standard magazines are usually 10 rounds. EX (trial), p 504 ¶22 (stipulation).

Violent confrontations are inherently unpredictable. If a victim sees one assailant, she does not know if a second assailant is unseen nearby. As officers are taught, “If you see one, there’s two. If you see two, there’s three.” When a defender knows that she has a greater reserve, she is more likely to fire sufficient shots, because she knows she will have sufficient ammunition to deal with a possible second or third attacker. Obviously, the more shots an individual fires, the greater the possibility that the attacker(s) will be disabled or dissuaded. Reducing a victim’s ammunition capacity reduces the chance that the victim will disable the attacker(s). Consequently, the risk that the victim will be injured or killed is increased.

Law enforcement and citizens also prefer standard magazines for cover fire (sometimes called “suppression fire”). With cover fire, the defender shoots carefully to keep the attacker pinned down. This stops the attacker from being able to target potential victims and allows victims an opportunity to escape. Defendant’s expert so acknowledged. TR 5/4/17, p 157:5–18 (Klarevas). For example, at the University of Texas in 1966, the criminal shooting from a tower was pinned down by return fire from citizens and police. Mark Lisher, *A Killer’s Conscience*, AUSTIN AMERICAN-STATESMAN, Dec. 9, 2001.⁵

⁵<http://www.mystatesman.com/news/special-reports/killer-conscience/DDDRT3b6LEqda3DYpzcSPO/>. Similarly, at Trolley Square, Salt Lake

Because blanket prohibitions affect all law-abiding citizens, but (at best) only some criminals, the magazine ban increases the risk of injury for victims and reduces it for attackers. That is the opposite of the Colorado Constitution's guarantee.

C. The typical law enforcement officer test.

One factor in the reasonableness of an arms law is what arms are used by typical law enforcement officers. For example, the Connecticut Supreme Court contrasted blackjacks, which were “used primarily for illegitimate purposes,” with “expandable metal police batons.” “[W]idespread acceptance...within the law enforcement community also supports the conclusion that [police batons] are not so dangerous or unusual as to fall outside the purview of the second amendment.” *DeCiccio*, 315 Conn. at 132–33.⁶ The Court unanimously held that batons could be regulated but not prohibited. *Id.* at 150.

The Michigan Court of Appeals likewise looked to law enforcement use and struck a prohibition on stun guns. *People v. Yanna*, 297 Mich. App. 137, 145–46 (2012) (“Hundreds of thousands of Tasers and stun guns have been sold to private

City, in 2007, an off-duty officer kept the shooter pinned down until a SWAT team arrived. It took 15 hits until the criminal collapsed. *See Off-duty officer shrugs off 'heroic' label*, DESERET NEWS, Feb. 14, 2007.

⁶ Citing, inter alia, David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1534.

citizens, with many more in use by law enforcement officers.”). *Cf. People v. Sandoval*, 2016 COA 14, ¶25 (short shotguns used mainly for crime, and therefore may be banned).

The typical law-enforcement-officer test looks to *typical* law enforcement officers. It does not extend to machine guns or concussion grenades, which are possessed only by special units for tasks that ordinary citizens would not have to undertake—such as taking down a meth lab or serving a high-risk warrant by “dynamic entry” into a building. Instead, the test recognizes that ordinary law enforcement officers, like ordinary citizens, may be unexpectedly and suddenly attacked by criminals.

D. Typical law enforcement arms are the type best suited for use “in aid of the civil power when thereto legally summoned.”

The Colorado Constitution contains a single right to possess and carry arms, for which the Constitution states two related purposes: defense of “home, person, and property,” and “in aid of the civil power when thereto legally summoned.” COLO. CONST., art. II, §13. The lower court refused to consider how the magazine ban harms “aid of the civil power,” because the Court said that only amici, and not plaintiffs, had raised the argument. *RMGO* ¶37 n.6. However, plaintiffs’ argument that magazine ban violates section 13 encompasses the section as a whole. Indeed, the standard magazines suited for defense of home, person, and property, are exactly

the magazines best suited for aid of the civil power (a power whose purpose is defense of home, person, and property). Since officers cannot be everywhere all the time, the citizenry's armed deterrence of violent crime or justifiable use of armed force to thwart violent criminal attacks necessarily aids the civil power, including by maintaining the security of home, person, or property.

In Colorado, sheriffs “may call to their aid such person of their county as they may deem necessary.” C.R.S. §30-10-516. This is the *posse comitatus*, as recognized in state statutes. *See* C.R.S. §8-40-202(1)(a)(I)(A) (“all persons called to serve upon any posse in pursuance of the provisions of section 30-10-516” are an “employee” for workmen’s compensation); §25-3.5-103(11) (“rescue unit” includes “law enforcement posses”); §28-4-115(2) (militiamen in active service exempt from “posse comitatus and jury duty”); *see also* §30-10-506 (“Persons may also be deputized by the sheriff or undersheriff in writing to do particular acts.”).

Today in Colorado, many county Sheriffs’ Offices have organized posses of citizen volunteers.⁷ The posses are trained by the Sheriff’s Office, and governed by regulations promulgated by the sheriff. If armed, they are usually required to provide

⁷ The counties include Adams (460,000 population), Larimer (310,000), Weld (264,000), and Mesa (148,000). David Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOL. 671, 810 n.269 (2015).

their own guns and magazines and to pass the same qualification as deputies. Kopel, *Posse Comitatus*, at 817–21.

A posse might be summoned to quell a disturbance involving a few people. *See People v. Goodpaster*, 742 P.2d 965, 967 (Colo. App. 1987) (“two members of the Baca County Sheriff's Posse who had been earlier called to duty to assist regular law enforcement officers in quelling the disturbance involving the defendants”). Posses have secured small towns to prevent looting during the September 2013 floods, cleared burglarized buildings, and assisted manhunts for escaped criminals. Kopel, *Posse Comitatus*, at 815–17.

Most famously, large Colorado volunteer posses thwarted the escape of serial killer Ted Bundy after he escaped from the Pitkin County Courthouse. A large Hinsdale County posse in 1994 blocked the escape of two criminals on a nationwide spree, who had murdered County Sheriff Roger Coursey. *Id.* at 812–15.

Whether in an *ad hoc* manhunt or in a continuing posse with regular training, members of a posse should have arms similar to, and compatible with, the arms of the officers whom they are assisting. Citizens who voluntarily risk their lives to pursue cop killers or serial killers should have standard arms that give them a fighting chance against murderers who will avoid capture at all costs.

Outside the posse context, law-abiding citizens sometimes come to the aid of law-enforcement officers who are being attacked. *E.g.*, Ben Guarino, *Armed civilian kills suspect, saving life of Ariz. trooper ‘ambushed’ on highway, police say*, WASH. POST, Jan. 13, 2017; Samantha Schmidt, *A ‘Good Samaritan’ saw a deputy being attacked by a Florida man so he fatally shot the assailant*, WASH. POST, Nov. 16, 2016. The best guns and magazines for these citizen rescuers are the same guns and magazines that law enforcement carries.

III. The magazine ban’s animus is not a legitimate government interest, and it endangers law enforcement.

An exercise of the police power must be “reasonably related to a legitimate governmental interest.” *Robertson*, at 331. Animus is not a legitimate government interest.

A. The text of HB1224 demonstrates that the premise of HB1224 is false.

The prime sponsor of HB1224 was insistent: “High-capacity magazines have one purpose. That purpose is to kill, steal and destroy. Highcapacity magazines were designed to have one purpose and that is to kill large numbers of people quickly.” Legislative Transcript, p 288:14–18. She repeated this claim three times. *Id.* at 5:22–24; 258:19–21; 291:14–15 (“no purpose in our community. They’re used for war.”).

The same point was repeated by the lead sponsor in the Senate. *Id.* at 399:13–15.⁸ These sweeping characterizations were never challenged by any legislator who voted for the bill.

The text of HB1224 contradicts the rationale that standard magazines are made for mass killing. The statute allows Colorado manufacturers to produce and export such magazines to other states. C.R.S. §18-12-302(3)(a)(III) & (V), (3)(c). The broad exemption is not confined to military sales. A regulatory regime may be invalid if it is “pierced by exemptions and inconsistencies.” *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 190 (1999).

B. Defendant’s stipulations demonstrate that the premise of HB1224 is false.

As Defendant and Plaintiffs stipulated, that there are millions of magazines in Colorado with a capacity greater than 15. EX (trial), p 503 ¶13. They further stipulated:

prior to the effective date of HB 1224, semi-automatic firearms equipped with detachable box magazines with a capacity greater than 15 rounds were frequently used in Colorado for multiple lawful purposes, including recreational target shooting, competition shooting, collecting, hunting, and were kept for home defense and defense outside the home.

⁸ The district court took judicial notice of the legislative transcripts. Final Ruling, CF, p 2.

Id. ¶21. Stipulated by Defendant to be “frequently used for multiple lawful purposes,” standard magazines do *not* “have one purpose and that is to kill large numbers of people quickly.”

C. The law enforcement exception demonstrates that the premise of HB1224 is false.

If standard magazines had “one purpose....to kill, steal and destroy... one purpose and that is to kill large numbers of people quickly”—no law enforcement officer would, or should, possess one. Peace officers do not wage war.

Law enforcement officers carry firearms and magazines for only “one purpose”: the lawful defense of self and others. Rather than trying “to kill large numbers of people quickly,” officers are trained to minimize the use of deadly force.

HB1224’s law enforcement exception demonstrates that standard magazines in the right hands enhance public safety, and that such magazines are sometimes necessary to the lawful defense of self and others.

Of course law enforcement officers undergo background checks before being hired, and receive training. As discussed in Part I, a statute requiring strict background checks and training might, unlike HB1224’s blanket prohibition, be constitutional.

D. HB1224 endangers law enforcement.

HB1224 casts implicit aspersions on law enforcement and threatens to exacerbate tensions between the police and public. Every day, citizens see officers bearing common handguns with standard magazines. Supposedly, those magazines have “one purpose and that is to kill large numbers of people quickly.”

These days, even well-justified law enforcement use of force often leads to great controversy. Community fear and alienation about justified force are worsened by the claim that law enforcement officers carry weapons of war for mass killing. Which is correct: “Deputy X shot the suspects with a common handgun and magazine” or “Deputy X shot the suspects with a weapon whose only purpose is mass killing”?

HB1224 envisions policing from above, employing weapons of war. This is the opposite of policing by consent. Law enforcement officers, including elected sheriffs, are part of their community. COLO. CONST., art. XIV, §8. In the *Peelian principles* of law enforcement, “[T]he police are the public and the public are the police, the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of

community welfare and existence.”⁹ Yet HB1224 treats police like soldiers occupying army. Viewing peace officers as militarized mass killers creates division and hatred, makes the public less willing to cooperate with law enforcement, and has led to attacks on officers.

IV. **The data below do not support prohibition.**

HB1224 was not enacted to reduce the gun homicide rate. Final Ruling, CF, p 18. Indeed, the gun homicide rate has risen 25 percent in Colorado since 2013, reversing a long-term decline. TR 5/5/17 p 116:18–24.¹⁰ Cf. TR 5/1/17, pp 78:2–81:7 (expert Moody; no statically significant effect from Colorado ban or 1994–2004 federal ban); *id.* at 88:21–89:25, 106:2–9; 112:9–15 (other state magazine bans had no statistically significant effect on homicide, gun homicide, or mass shooting fatalities); 121:1–15 (Virginia Firearms Clearinghouse data showed that the 1994–2004 federal magazine ban had no statistical effect on homicides, gun homicides, or gun crime).

⁹ Available at https://en.wikipedia.org/wiki/Peelian_principles.

¹⁰ Defendant’s expert Jeffery Zax insisted that the 25% increase shows that the magazine ban is working, because the rate is still lower than certain prior periods he selected. TR 5/5/17, pp 112:8–14, 119–120. Zax failed to include a control variable for long-term crime trends. TR 5/5/17, pp 147–157. He has no professional publications regarding firearms. TR 5/5/17, pp 105:4–106:6; 102:1–2.

The sole rationale for the ban is mass shootings. Yet a study of 1994–2013 found that bystander intervention during a magazine change happened at most once. Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages*, 17 JUST. RES. & POL. 28 (2016).¹¹

At the Aurora Theater, Tucson, and Newtown, lives were saved when the criminal’s gun jammed. But gun jams are not comparable to magazine changes. Clearing a jam takes much longer than switching a magazine. No one knows when a gun will jam, but a criminal can anticipate and prepare for magazine changes. The random benefits of long pauses from gun jams are distinct from the very short pauses from magazine switches.¹²

The court of appeals repeated the district court finding that fatalities are higher when mass shooters use a magazine over 15 rounds. *RMGO* at ¶25. The methodology was clearly erroneous. In crimes where the criminal(s) had more than one firearm, Defendant’s experts attributed *all* of the injuries to the gun(s) with the “large” magazine, and none to any others. TR 5/2/17 p 203:10–11 (Webster, “LCM-

¹¹ <http://journals.sagepub.com/doi/full/10.1177/1525107116674926>.

¹² Cites of gun jams in the above crimes, plus the mechanics of clearing jams versus changing magazines are in CLEFIA’s amicus brief below, at 21-23.

involved incidents,” rather than injuries inflicted by an LCM); TR 5/4/17, pp 182:10–184:1 (Klarevas).¹³

Imagine a study comparing the crime rates of two different ethnic groups in gangs. One four-member gang is all from the same group, AAAA. Another gang is all from the other group, BBBB. The third gang is mixed, AABB. For this third, mixed gang, an expert attributes all of the gang’s crime to B people, and none to A people. Thus, the expert produces data claiming that B people are much more dangerous than A people.

The methodology is certain to overstate the danger of B and understate the danger of A. All of findings below about greater dangers of magazines over 15 rounds are based on this clear error. It is “speculative testimony that would be unreliable... opinion testimony that has no analytically sound basis.” *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007). There is no rational basis to attribute *all* harms of multi-gun crimes to only one type of firearm.

Defendant’s expert Klarevas admitted that his assumption was contradicted by the Columbine crimes. TR 5/4/17, p 177:20–25; *see also* EX (trial), p 506

¹³ Although “LCM” is a misleading epithet for standard magazines, this brief use “LCM” in Part IV for consistency with quoted material.

(stipulation that of the 13 victims at Columbine, 4 or 5 were killed with Tec-9 handgun with 28+ round magazines).

Consider San Ysidro, California, in 1984. Eleven or more people were murdered with a shotgun, and 10 or fewer were murdered with a rifle that had magazines over 15 rounds. Christopher Koper & Jeffrey Roth, *The Impact of the 1994 Assault Weapons Ban on Gun Violence Outcomes*, 17 J. QUANTITATIVE CRIMINOL. 33, 42 (2001) (“at least half” of the casualties were inflicted by shotgun). At San Ysidro, the criminal used a shotgun without an LCM, and a rifle with an LCM.¹⁴ Yet Klarevas attributed all 21 deaths to the rifle.

At Aurora, Columbine, and San Ysidro, there were 46 fatalities, all of which Klarevas attributed to LCMs, even though at least 22 were caused by smaller magazines. There is no reason to rely on the Klarevas-Webster assumptions that in other mixed crimes, the only injuries were caused by LCMs.

As Plaintiffs’ expert Moody explained, the Klarevas-Webster methodology creates an “overestimate,” and is inaccurate for estimating the actual danger of

¹⁴ Similarly, at the Aurora Theater, 3 victims were killed with a shotgun (no LCM), and 9 were killed with a rifle (using a non-standard 100 round drum). *People v. Holmes*, no. 12CR1522, Order Re: Preliminary/Proof Evident Hearing, at 15 (D. Arapahoe, Colo., Jan. 10, 2013).

LCMs. TR 5/1/17, pp 130:5–132:10. *See also Duncan v. Becerra*, 366 F.Supp.3d 1131, 1175 (S.D. Cal. 2019) (Webster’s “foundational data is vaporous”).

CONCLUSION

The decision below should be reversed.

RESPECTFULLY SUBMITTED this 3rd day of June, 2019.

By: *S/David B. Kopel*

David B. Kopel, #15872

Attorney for Amici Curiae

Pursuant to C.R.C.P. 121 §1-26(9), a printed copy of this electronically-filed document with original signatures is being maintained at the Independence Institute and is available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2019, I electronically filed the foregoing **AMICUS BRIEF OF COLORADO LAW ENFORCEMENT FIREARMS INSTRUCTORS ASSOCIATION; SHERIFFS SHANNON BYERLY, TODD COMBS, ALLEN COOPER, GARTH CROWTHER, BILL ELDER, THOMAS ELLIOTT, KC HUME, MATT LEWIS, DAVE MARTIN, ANTHONY MAZZOLA, DON MCDONALD, TOM MCGRAW, JASON MIKESELL, TIM NORTON, BRETT POWELL, STEVE REAMS, RICHARD REIGENBORN, DANNY SANCHEZ, BRENT SCHROETLIN, CASEY SHERIDAN, AARON SHIPLETT, JEFF SHRADER, JUSTIN SMITH, TONY SPURLOCK, JOHN STIVERS, RICK VALDEZ, JAMES VAN BEEK, GARRETT WIGGINS, DON WILSON, AND SAM ZORDEL; AND THE INDEPENDENCE INSTITUTE IN SUPPORT OF APPELLANT** and the related **MOTION FOR LEAVE TO FILE** with the Clerk of the Court using ICCES, which will send electronic notification of such filing to the following:

Attorneys for Defendant-Appellee:
Eric R. Olson, Esq.
Kathleen L. Spalding, Esq.
Stephanie Lindquist Scoville, Esq.
Office of the Colorado Attorney General
Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203

Attorney for Plaintiffs-Appellants:
Barry K. Arrington, Esq.
Arrington Law Office
3801 East Florida Avenue, Suite 830
Denver, Colorado 80210

*S/*David B. Kopel
David B. Kopel