COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Colorado Judicial Center 2 East 14th Avenue, 4th Floor Denver, Colorado 80203 Trial court, City and County of Denver, Colorado, The Honorable John W. Madden IV, Trial court Judge, Case Number 2013CV33879	▲ COURT USE ONLY ▲
Appellants: Rocky Mountain Gun Owners, a Colorado nonprofit corporation, National Association for Gun Rights, Inc., a Virginia non-profit corporation, John A. Sternberg, and DV-S, LLC, a Colorado limited liability company d/b/a Alpine Arms Appellee: John W. Hickenlooper, in his official capacity as Governor of the State of Colorado	Case Number: 2014CA002178
ATTORNEYS FOR AMICUS CURIAE LAW CENTER TO PREVENT GUN VIOLENCE Jonathan K. Baum (pro hac vice admission pending) Mark T. Ciani (pro hac vice admission pending) Katten Muchin Rosenman LLP 525 West Monroe Street, Chicago, IL 60661-3693 Phone Number: (312) 902-5200 FAX Number: (312) 902-1061 E-mail: jonathan.baum@kattenlaw.com E-mail: mark.ciani@kattenlaw.com Martha M. Tierney, #27521 Tierney Paul Lawrence LLP 2401 15th Street, Suite 300, Denver, CO 80202 Phone Number: (303) 595-4747 FAX Number: (303) 595-4750 E-mail: mtierney@tplfirm.com	

BRIEF OF AMICUS CURIAE LAW CENTER TO PREVENT GUN VIOLENCE

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 2,728 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

☐It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☐It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.AR. 32.

By: s/Martha M. Tierney

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INTEREST OF AMICUS CURIAE

Amicus curiae the Law Center to Prevent Gun Violence ("the Law Center") is a non-profit, national law center dedicated to reducing gun violence and the devastating impact it has on communities. The Law Center focuses on providing comprehensive legal expertise to promote smart gun laws. These efforts include tracking all Second Amendment litigation nationwide and providing support to jurisdictions facing legal challenges. As an amicus, the Law Center has provided informed analysis in a variety of firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

The Law Center has a particular interest in this litigation as it was formed in the wake of a mass shooting at a San Francisco law firm in 1993 that involved the use of large capacity ammunition magazines. The shooter in that massacre, which left eight dead and six injured, was armed with two assault weapons and multiple large capacity ammunition magazines, some capable of holding up to 50 rounds of ammunition. In the years since the shooting, the Law Center has worked with local, state, and federal leaders on the enactment and defense of reasonable restrictions on dangerous, military-style devices, such as assault weapons and large capacity ammunition magazines.

ARGUMENT

I.

Background of the Act

On July 20, 2012, a man walked into a showing of *The Dark Knight Rises* at a movie theater in Aurora, Colorado, carrying several firearms, including an assault weapon equipped with a 100-round drum magazine, which he used to fire at the audience. In a matter of minutes, he shot 58 individuals, killing twelve. In the wake of this horrific event, the State of Colorado enacted a law, C.R.S. §§ 18-12-301-303 (the "Act"), banning large capacity magazines ("LCMs").

Specifically, the Act prohibits the sale, possession, or transfer of LCMs, generally defined as a "fixed or detachable magazine, box, drum, feed strip, or similar device capable of accepting . . . more than fifteen rounds of ammunition." C.R.S. § 18-12-301(2)(a)(I). With specific exceptions, the Act also prohibits the manufacture of LCMs within Colorado. C.R.S. § 18-12-302(3)(a). Individuals who possessed LCMs before July 1, 2013 are permitted to continue possessing them, as are firearm manufacturers, firearm dealers, and government officials who carry weapons as part of their official duties. C.R.S. § 18-12-302(2)-(3). Dealers may continue to sell LCMs to firearms retailers for the purpose of sales conducted

outside the state, and may sell to government agencies as well as to out-of-state transferees who may legally possess LCMs. C.R.S. § 18-12-302(3)(a).

State and local governments across the country have adopted laws restricting civilian access to LCMs because of the devastating role they repeatedly play in mass shootings and attacks on peace officers.[1] Congress also enacted a ban on LCMs in 1994, but that law included a sunset provision and was allowed to expire in 2004.

The shooting rampage at the Aurora movie theater is only one of the more recent examples of the enormous public safety threat posed by LCMs. This threat, however, is not new. For example:

- In July 1993, a shooter armed with assault weapons and LCMs killed eight people and injured six others at a law firm in San Francisco.[2]

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[1] *See* Md. Code Ann., Crim. Law §§ 4-301-306 (2013); N.Y. Penal Law §§ 265.02(7)-(8), 265.37; Cal. Penal Code §§ 16150, 30305, 32310 (2015); Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8 (2013); Conn. Gen. Stat. Ann. §§ 53-202a(1)(e), 53-202b(a)(1), 53-202w(b) (West 2013); Mass. Gen. Laws ch. 140, §§ 121-123, 131, 131M (2014); N.J. Stat. Ann. §§ 2C:58-5, 2C:58-12, 2C:58-13 (West 2014); D.C. Code §§ 7-2551.01 – 7-2551.03 (2012); Cook Cnty., Ill., Code of Ordinances §§ 54-211 – 54-213; New York City, N.Y., Admin. Code § 10-301; San Francisco, Cal., Police Code § 619; Sunnyvale, Cal., Municipal Code § 9.44.050.

[2] Karyn Hunt, *Gunman Said to Have List of 50 Names*, Charlotte Observer, July 3, 1993, at 2A. This tragedy led to the formation of *amicus* Law Center to Prevent Gun Violence.

- In April 1999, the gunmen in the Columbine High School massacre killed 15 people and wounded 23 others using assault weapons and LCMs.[3]

- In April 2009, a shooter armed with two semiautomatic pistols, two 30-round LCMs, and two 15-round LCMs killed 13 people and wounded four others in Binghamton, New York.[4]

- In January 2011, a shooter killed six people and wounded 13 others, including Congresswoman Gabrielle Giffords, in a parking lot in Tucson using a LCM holding 31 rounds.[5]

- In December 2012, a gunman killed 26 people and wounded two more at Sandy Hook Elementary School in Newtown, Connecticut. Twenty of the dead were young children. The gunman was armed with a Bushmaster XM-15 assault rifle, two handguns, multiple 30-round magazines, and hundreds of rounds of ammunition.[6]

Criminals disproportionately use LCMs in two categories of crimes: those with multiple victims and those that target law enforcement. On average, shooters

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[3] David Olinger, *Gun Dealer Surrenders Firearms License*, Denver Post, Oct. 14, 1999, at B07.

[4] Citizens Crime Commission of New York City, Mass Shooting Incidents in America (1984-2012), http://www.nycrimecommission.org/mass-shooting-incidents-america.php.

[5] Violence Policy Ctr., Mass Shootings in the United States Involving High Capacity Ammunition Magazines (Jan. 2011), http://www.vpc.org/fact_sht/VPCshootinglist.pdf.

who use assault weapons or LCMs in mass shootings shoot 151% more people, and kill 63% more people than shooters who do not.[7] A review of 62 mass shootings between 1982 and 2012 found that LCMs were recovered in 50% of such incidents.[8]

As demonstrated below, plaintiffs' claim that the Act violates the Colorado Constitution is without merit because legal and historical precedent, as well as implicit admissions from the firearms industry itself, compel the conclusion that LCMs are not "arms" and are therefore not protected at all under the Colorado Constitution. Moreover, even if the prohibited LCMs were "arms," the Act would still satisfy constitutional scrutiny because the Act is a reasonable exercise of the State's police power.

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[6] Susan Candiotti, Greg Botelho and Tom Watkins, *Newtown shooting details revealed in newly released documents*, cnn.com, Mar. 29, 2013, *available at* http://www.cnn.com/2013/03/28/us/connecticut-shooting-documents.

[7] Mayors Against Illegal Guns, Analysis of Recent Mass Shootings (2013), s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/analysis-of-recent-mass-shootings.pdf.

[8] Mark Follman et al., *More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines*, Mother Jones (Feb. 27, 2013), at http://www.motherjones.com/politics/2013/02/assault-weapons-high-capacity-magazines-mass-shootings-feinstein.

II.

The Colorado Constitution Does Not Protect a Right to Possess LCMs Because LCMs Are Not "Arms."

Article II, Section 13 of the Colorado Constitution provides as follows: "The right of no person to keep and bear arms in defense of his home, person and property . . . shall be called in question . . ." The language "to keep and bear arms" emanates from the United States Constitution's Second Amendment. As the Supreme Court articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the right protected under the Second Amendment is "not unlimited" and applies only to "arms." *See id.* at 626.

The *Heller* Court's logic applies with equal force to Article II, Section 13 of the Colorado Constitution, which also expressly applies only to "arms." Plaintiffs' position that the Colorado Constitution offers greater protection to gun owners than the Second Amendment is plainly incorrect. Indeed, the Supreme Court of Colorado has held that Article II, Section 13 "has limiting language dealing with defense of home, person, and property" that is not included in the Second Amendment. *People v. Blue*, 190 Colo. 95, 103 (1975). In fact, unlike courts' treatment of the Second Amendment, the Supreme Court of Colorado has also held that laws infringing on the right protected in the Colorado Constitution are

reviewed under a relaxed standard: "the state may regulate the exercise of th[e] [Article II, Section 13] right under its inherent police power so long as the exercise of that power *is reasonable*." *Robertson v. City & County of Denver*, 874 P.2d 325, 328 (Colo. 1994) (emphasis added). Accordingly, to the extent the two differ in scope at all, the Second Amendment actually offers more robust protection than Article II, Section 13 of the Colorado Constitution. The initial question, therefore, must be whether the Act, which defines LCMs to mean any "fixed or detachable magazine, box, drum, feed strip, or similar device capable of accepting . . . more than fifteen rounds of ammunition" regulates "arms." C.R.S. § 18-12-301(2)(a)(I). If it does not, that ends the constitutional inquiry and the law cannot be held to violate Article II, Section 13.[9]

Because the Colorado Constitution and the Second Amendment both use the words "to keep and bear arms," the *Heller* Court's examination of the word "arms" is particularly instructive. The *Heller* majority undertook to define "arms," looking first to the 1773 edition of Samuel Johnson's dictionary, which defined

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[9] This question was raised below, s*ee* R. Court File, p. # 41-42, 86-88, but was not addressed by the trial court. Contrary to plaintiffs' assertion, R. Court File, p. # 88, this question was neither raised nor reached by the court in *Robertson v. City & County of Denver*, 874 P.2d 325, 328 (Colo. 1994).

"arms" as "weapons of offence, or armour of defence." 554 U.S. at 581 (citing 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). The *Heller* majority also relied on Cunningham's legal dictionary, which illustrated the usage of the term "arms:" "Servants and labourers shall use bows and arrows on Sundays, … and not bear other arms." *Heller*, 554 U.S. at 581 (citing Timothy Cunningham, A New and Complete Law Dictionary (2d ed. 1771)). Notably absent from Cunningham's—and thus *Heller's*—definition of "arms" is the archer's quiver, which holds the ammunition for a bow.

Magazines also hold ammunition, but an LCM is a special type of magazine, acting to enhance the weapon's basic features (in this case, the ability to fire more rounds without reloading); it is neither an "integral" nor necessary component of the vast majority of firearms. While a magazine necessary to supply a firearm with *some* bullets may be considered "integral" to core functionality, a magazine that expands that supply beyond 15 rounds is certainly not.

This notion is grounded in America's historical experience with handguns. Prior to the 1980s, the most common type of handgun was the revolver, which typically holds only six rounds of ammunition in a rotating cylinder. It was only during the 1980s that the firearms industry began mass producing semiautomatic

pistols, which can accept magazines containing significantly more than six rounds, with some even capable of holding up to 100 rounds.[10]

LCMs are detachable "super-quivers" and are simply not arms. Instead, LCMs are most appropriately characterized as firearm accessories. The bows and arrows in the Cunningham legal dictionary example are analogous to guns and ammunition. And, just as quivers (repositories of many arrows) are not "arms," neither are LCMs (repositories of many bullets). Both large capacity quivers and LCMs fit neatly into the category of accessories.

Other historical sources support the conclusion that accessories used along with firearms are separate and distinct from the concept of "arms." In Justice Stevens' *Heller* dissent, he cited The Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2, stating: "The Virginia military law, for example, ordered that 'every one of the said officers … shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for…." *Heller*, 554 U.S. at 650 (Stevens, J., dissenting). This source specifically differentiates between "arms," "ammunition," and "accoutrements." In

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[10] Violence Policy Center, Backgrounder on Glock 19 Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords and Others (Jan.

(continued)

this regard, LCMs are not arms, nor are they ammunition. Indeed, they fall most readily and accurately into the category of accoutrements—i.e., accessories, more akin to today's detachable scopes, silencers, and vests allowing the wearer to carry more magazines on his body. Because accoutrements, particularly those that do not affect the weapon's core functionality, are not "arms," their use falls outside the scope of the Second Amendment and of Article II, Section 13 of the Colorado Constitution.[11]

This "functionality" principle accords with definitions of "firearm accessories" found in state law. The State of Kansas, for example, recently defined "firearms accessories" as "items that are used in conjunction with or mounted upon a firearm but are not essential to the basic function of a firearm, including, but not limited to, telescopic or laser sights, magazines,…collapsible or adjustable stocks and grips, pistol grips, thumbhole stocks, speedloaders, [and] ammunition carries." Kan. Stat. Ann. § 50-1203(b) (emphasis added).

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2011), available at http://www.vpc.org/fact_sht/AZbackgrounder.pdf.

[11] *See also Trinen v. City and County of Denver*, 53 P.3d 754, 761 (Colo. App. 2002) (Roy, J., concurring) (term "arms" in Article II, Section 13 is "limited to firearms").

Indeed, the firearm industry itself categorizes magazines as accessories, not as firearms or guns. A simple search of online firearm retailers shows that businesses intimately involved in the firearm industry classify magazines as accessories. For instance, Mississippi Auto Arms, Inc. organizes its online store by item type, differentiating between items such as "firearms" and "ammunition," offering magazines for sale under an entirely separate category: "accessories."[12] Guns America and Palmetto State Armory similarly categorize magazines as accessories, not firearms.[13] Where the firearm industry itself defines a magazine as an accessory rather than an "arm," it strains credulity to assume otherwise.

Accepting the Law Center's argument will not result in a parade of horrors. LCMs are not ammunition. To use the earlier analogy, they are super-quivers, holding many arrows. As mere accessories designed to hold extra-large amounts of ammunition, LCMs are not integral to the functionality of the vast majority of firearms. As the federal district court sitting in Colorado held after a bench trial,

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[12] *See id.* at http://www.mississippiautoarms.com/sort-by-item-magazines-c-169_177.html.

[13] *See* Guns America, available at http://www.gunsamerica.com/BrowseSpecificCategory/Parent/Non-Guns/ViewAll.htm; Palmetto State Armory, available at http://palmettostatearmory.com/index.php/accessories.html.

most firearms are completely operable without LCMs, and function perfectly well with standard capacity magazines holding 15 or fewer rounds. *See Colorado Outfitters Assoc. v. Hickenlooper*, 24 F. Supp. 3d 1050, 1069 (D. Colo. 2014) ("[T]his statute does not prevent the people of Colorado from possessing semiautomatic weapons for self-defense, or from using those weapons as they are designed to function. The only limitation imposed is how frequently they must reload their weapons."). Indeed, that court further noted that "semiautomatic weapons that use large-capacity-magazines will also accept compliant magazines" and "compliant magazines can be obtained from manufacturers of large-capacity-magazines." *Id.* Thus, by drawing a principled distinction between LCMs (accessories unnecessary to a firearm's core functionality as historically understood) and compliant magazines (which may compromise core functionality), there is no "slippery slope" that would result in the legislature's unfettered ability to ban ammunition or magazines.

The Law Center is not contending here that the right to bear arms does not extend to ammunition, nor that magazines integral to the functionality of firearms are not "arms." Rather, the Law Center's point is that magazines that can hold dangerously large amounts of ammunition are not arms. The Ninth Circuit Court of Appeals observed that without the ability to obtain ammunition "the right to

bear arms would be meaningless" by "mak[ing] it impossible to use firearms for their core purpose." *Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (citation omitted). The same cannot be said of LCMs. A prohibition on LCMs does not make "meaningless" the right to bear arms because prohibiting LCMs has no impact whatsoever on the core functionality of semiautomatic firearms. As the state emphasized in its Motion to Dismiss, "[u]nder Colorado law, detachable large-capacity ammunition magazines can be switched out with other detachable magazines that are of lower capacity but that can still feed ammunition into a firearm. Although plaintiffs may prefer to equip their firearms with magazines that hold large numbers of rounds, they do not and cannot allege that their firearms would be rendered inoperable or ineffective with magazines that comply with Colorado law." R. Court File, p. # 42

For the reasons stated above, LCMs are not "arms," and fall outside the scope of Article II, Section 13 of the Colorado Constitution For this reason, the challenged statute prohibiting LCMs should be upheld in its entirety.

III.

The Act Passes Constitutional Muster Because It Is a Reasonable Exercise of the State's Police Power

Even if LCMs are "arms" under the Colorado Constitution, the Act withstands this constitutional challenge. As discussed earlier, the Supreme Court of Colorado has held that "the state may regulate the exercise of th[e] [Article II, Section 13] right under its inherent police power so long as the exercise of that power *is reasonable*." *Robertson*, 874 P.2d at 328 (emphasis added).

Here, the Act is undoubtedly a reasonable exercise of the State's police power. In *Robertson*, the Supreme Court of Colorado addressed a similar prohibition on LCMs – there, a ban on LCMs with the ability to contain more than 20 rounds of ammunition – and held that the regulation did not violate Colorado's Constitution. After concluding that the ban at issue was related to the State's interest in protecting its citizens' "public health, safety, [and] welfare", the Court also held that the regulation was reasonable because "there are literally hundreds of alternative ways in which citizens may exercise the right to bear arms in self-defense." *Id.* at 331, 333. While the Act's prohibition is marginally more restrictive – banning LCMs with the capacity to hold more than 15 rounds (as opposed to 20) – the *Robertson* Court's reasoning applies with equal force here.

Moreover, as the Governor explained in his motion to dismiss in the trial court, federal courts, applying the more rigorous "intermediate scrutiny" standard of review, have upheld more restrictive regulations banning LCMs with a capacity to hold more than *ten* rounds of ammunition. *See* R. Court File, p. # 43.

Accordingly, even if LCMs are "arms" under Article II, Section 13 of the Colorado Constitution, the Act would pass constitutional muster under both the *Robertson* standard of review and the more rigorous federal standard of review. For these reasons, the trial court's ruling should be affirmed.

CONCLUSION

This Court should affirm the holding of the trial court.

Respectfully submitted this 10th day of June, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2015 a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE LAW CENTER TO PREVENT GUN VIOLENCE** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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