COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203	
Appeal from: District Court County: City and County of Denver District Court Judge: The Hon. John W. Madden District Court Case Number: 2013CV33879	
In the Case of: Rocky Mountain Gun Owners, a Colorado nonprofit corporation, National Association for Gun Rights, Inc., a Virginia non-profit corporation, and John A. Sternberg, **Plaintiffs-Appellants** v. John W. Hickenlooper, in his official capacity as Governor of the State of Colorado, **Defendant-Appellee**	**▲ COURT USE ONLY ▲**
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	Court of Appeals' Case Number: 2017CA1502
BRIEF OF AMICI CURIAE COLORADO LAW ENFORCEMENT FIREARMS INSTRUCTORS ASSOCIATION; SHERIFFS CHAD DAY, SHANNON K. BYERLY, STEVE REAMS, AND SAM ZORDEL; AND THE INDEPENDENCE INSTITUTE IN SUPPORT OF APPELLANTS	

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 4,744 words.

INDEPENDENCE INSTITUTE

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

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INTEREST OF AMICI CURIAE

Colorado Law Enforcement Firearms Instructors Association is the professional association of trainers who instruct law enforcement in firearms use. Chad Day (Yuma County), Steve Reams (Weld), Shannon Byerly (Custer), 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 nine 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

Sheriffs and deputies possess standard capacity magazines—up to 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. Fewer defensive shots 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.

Although the sponsor of the prohibition bill repeatedly claimed that the banned magazines are solely for mass murder, this is false: law enforcement and law-abiding citizens choose such magazines because they enable individual victims to credibly deter a group of attackers.

The reasonableness standard of *Lakewood v. Pillow* and *Robertson v. Denver* allows for the 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.

ARGUMENT

I. 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 20 rounds for handguns and 30 rounds for rifles, are typically included by firearms manufacturers as a default component of a pistol or rifle. 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.[1] This brief addresses only the constitutionality of prohibition of standard magazines.

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[1] 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 Constitution 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. This is prudent, because law enforcement arms are selected with care. Sheriffs choose their duty arms for only one purpose: the defense of innocents. Sheriffs' arms are certainly 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 the 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."

The most important reason why citizens do and should copy sheriffs' firearm and magazine selections is to ensure that citizens 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. It cannot be that the Constitution only protects arms that are frequently used in defensive shootings. The bizarre result would be that the safer the state became, the fewer rights people would have, because fewer arms would be used in self-defense.

The vast majority of Colorado law enforcement officers will 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 often carry magazines with more than 15 rounds because reserve capacity provides credible deterrence. Even law enforcement officers hit their assailants at only a rate of about 20 to 40 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),[2] ("Between 1998 and 2006, the average hit rate [for NYPD] was 18 percent for gunfights….[T]he average hit rate in situations in which fire was not returned was 30 percent.").

Unlike in the movies, a single hit usually does not immediately stop an assailant. *See*, *e.g.*, John Eligon, *One Bullet Can Kill, but Sometimes 20 Don't, Survivors Show*, N.Y. TIMES, Apr. 3, 2008 ("80 percent of targets on the body would not be fatal blows"). Accordingly, a handgun with a 16- or 17-round magazine is a more credible deterrent than one with a 10-

[2] https://www.rand.org/pubs/monographs/MG717.html.

round magazine—especially for a victim menaced by multiple criminals, or by a criminal under the influence of drugs.[3]

Reserve capacity is even more important for citizens than for law enforcement. It is quite challenging for a citizen under imminent attack to extract a cell phone and dial 911. Usually, the only magazine that a citizen will have is the one in her firearm. In contrast, law enforcement 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 his or her duty belt. Law enforcement 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.

Further, violent confrontations are inherently unpredictable. If a victim sees one assailant, she does not know if a second assailant may be hiding 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

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

reserve, she will fire more 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 opponent(s) will be disabled or dissuaded. Thus, 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 suppression fire. With suppression fire, the defender is not expecting to hit the attacker, but is instead shooting 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 acknowledged the utility of defensive suppression fire. TR 5/4/17, p 157:5–18 (Klarevas). For example, in the 1966 massacre at the University of Texas, the criminal shooting from a tower was stopped after he came under suppression fire from both citizens and police. Mark

Lisheron, *A Killer's Conscience*, AUSTIN AMERICAN-STATESMAN, Dec. 9, 2001.[4]

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.

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 they [police batons] are not so dangerous or unusual as to fall outside the purview of the second amendment." *State v. DeCiccio*, 315 Conn. 79, 132–33 (2014).[5] The Court unanimously held that batons could be regulated but not prohibited. *Id.* at 150.

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[4] http://www.mystatesman.com/news/special-reports/killer-conscience/DDDRT3b6LEqda3DYpycSPO/.

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

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 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.

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

The Colorado Constitution enumerates two separate purposes for the right to arms. The right exists not only for defense of home, person, and

property, but also for "aid of the civil power, when thereto legally summoned." COLO. CONST., art. II, § 13. The magazine ban substantially interferes with this latter purpose.

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 comatitus*, 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 state 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, at least 17 county Sheriffs' Offices have organized posses composed of citizen volunteers.[6] These posse members are trained

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[6] 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.

by the Sheriff's Office and required to follow regulations promulgated by the sheriff. Posses perform a wide range of duties based on the sheriff's determination. For posse members who carry firearms, they are almost always required to pass the same qualification as full-time deputies, and they have usually been given firearms training by the Sheriff's Office. 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) ("a potential juror revealed that she was related to 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"). Posse aid has included securing small towns to prevent looting during the September 2013 floods, clearing burglarized buildings, and 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 during a preliminary hearing recess. A large Hinsdale County posse in 1994 blocked the escape of a pair of 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 that receives regular training, members of a posse should have firearms similar to, and compatible with, the firearms of the officers whom they are assisting. Citizens who voluntarily risk their lives to hunt for cop killers or serial killers should be able to carry standard arms that give them a fighting chance against fugitives who have proved their eagerness to kill and 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*, WASHINGTON POST, Jan. 13, 2017; Samantha Schmidt, *A 'Good Samaritan' saw a deputy being attacked by a Florida man so he fatally shot the assailant*, WASHINGTON POST, Nov. 16, 2016. The best guns and magazines for these citizen rescuers are the same guns and magazines that law enforcement carries.

II. 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*, 874 P.2d 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.[7] These sweeping characterizations were never challenged by any legislator who voted in favor of the bill.

[7] Although the legislative transcripts were not admitted, the trial court took judicial notice of them. Final Ruling, CF, p 2.

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). This broad exemption is not confined to military sales. A regulatory regime may be invalid if it is "pierced by exemptions and inconsistencies." *See 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.

Defendant and Plaintiffs stipulated that there are millions of magazines in Colorado with a capacity greater than 15 rounds. 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.

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 may sometimes be *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 III, 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 existing tensions between the police and public. Every day, citizens see officers bearing common handguns along with their standard magazines. According to the rationale of HB1224, citizens are supposed to think that those magazines are being carried for "one purpose and that is to kill large numbers of people quickly." It should not be surprising if citizens think that killing large numbers of people quickly is legislatively approved, as long as the killers are law enforcement officers (or buyers in other states).

These days, even well-justified law enforcement use of force often leads to great controversy. Community fear and alienation about justified force will be worsened by the spread of HB1224's cynical view: that law enforcement officers carry weapons of war made for mass killing. Which is correct: "Deputy X shot the suspect with a common handgun and magazine" or "Deputy X shot the suspect with a weapon whose only purpose is mass killing"?

HB1224 adopts a vision of military policing from above, employing weapons of war. This is the opposite of the American system of policing by consent. Law enforcement officers are part of their community. Sheriffs are elected by the voters of their county. COLO. CONST., art. XIV, §8. Yet HB1224 treats them as abnormal—armed like soldiers in any army of occupation. The view of peace officers as militarized mass killers creates division and fear. It makes citizens less willing to cooperate with law enforcement. Another consequence has been ambush attacks on law enforcement officers.

III. Prohibition, rather than regulation, sweeps unnecessarily broadly

"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 DeCiccio*, 315 Conn. at 145 ("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).

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. Such persons have undergone fingerprinting, a background check that takes up to 90 days, and have passed an in-person safety training class. They must apply in person at the Sheriff's Office. A Sheriff has discretion to veto the application even for some persons who pass the background check and training. C.R.S. §§18-12-202, 205, 206, 208. The gun misuse rate of permit holders in Colorado is very low, and they are far more law-abiding than the general Colorado population.[8]

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[8] Colorado data are reported annually to the legislature. C.R.S. §18-12-206(4). The reports are available on the website of County Sheriffs of Colorado, https://coloradosheriffs.org/resources/chp-reports/. In 2012–16, there were 219,187 permits (including new permits and renewals in the five-year permit cycle). There were 1,680 permit revocations in this period, including 1,041 for an arrest. Contrast this with the arrests of 204,162 Colorado adults in 2016 alone. FBI, CRIME IN THE UNITED STATES 2016, table 22, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-22.

Handguns are about one-third of the gun supply, and yet "are the overwhelmingly favorite weapon of armed criminals." *District of Columbia v. Heller*, 554 U.S. 570, 682 (2008) (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. As detailed above, even Defendant acknowledges their legitimate use.

IV. The data at trial do not support the trial court's assertions about the benefits of prohibition.

A. Gun homicide has increased in Colorado.

HB1224 was not enacted for the purpose of reducing the gun homicide rate. Final Ruling, CF, p 18. Indeed, the gun homicide rate has subsequently risen 25 percent in Colorado, reversing a long-term decline.

Such a regulatory system would have excluded the Columbine killers, who were under 21, and who even at a young age had 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 in-person training, and the in-person visit to a Sheriff's Office, that are necessary for a concealed handgun permit.

TR 5/5/17 p 116:18–24.[9] *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).

B. Gun jams should not be conflated with magazine changes.

When a criminal's gun jams, it creates a long pause that allows victims to act. Here are the usual steps to clear a gun jam in a semiautomatic firearm:

1. Remove the magazine.

2. Find what is causing the jam.

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[9] At trial, Defendant's expert Jeffery Zax insisted that the 25% increase shows that the magazine ban is working, because the Colorado homicide rate is still lower than certain prior periods he selected, namely 1977–93, 1994–2004, and 2005–2012. TR 5/5/17, pp 112:8–14, 119–120. All of Zax's analysis failed to include a control variable for overall long-term crime trends. TR 5/5/17, pp 147–157. Professor Zax has no professional publications regarding firearms. TR 5/5/17, pp 105:4–106:6; 102:1–2.

3. Fix what is causing the jam. This may involve multiple steps.

4. Insert a magazine.

Changing a magazine involves only two of these steps (numbers 1 and 4). Necessarily, changing a magazine is faster than clearing a jam. Sometimes much faster, depending on the jam.

Defendant's argument for the benefit of HB1224 is that when a magazine is being changed, people will have an opportunity to flee or fight back. 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).[10]

Several incidents listed by the trial court did not involve magazine changes; they were situations in which the criminal's gun malfunctioned and jammed. *See* Final Ruling, CF, pp. 4–5.

Yet it had been stipulated that the Aurora criminal's rifle jammed. *See* EX (trial), p 505 ¶31. When HB1224 was presented to the House

[10] http://journals.sagepub.com/doi/full/10.1177/1525107116674926.

Judiciary Committee, the sponsor accurately stated that Aurora, Tucson, and Newtown involved gun jams. Legislative Transcript, pp 6:25–7:1 (Aurora; "And when the gun jammed, when it happened to James Holmes"); 7:8 (Tucson; "His gun jammed too"), 7:20–21 (Newtown; "In his case also his gun jammed and he wasn't able to reload."); *see also* Office of the State's Attorney, *Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School* 22 (Nov. 25, 2013) (Connecticut State Police, Emergency Services Unit "report described the weapon as appearing to have jammed.").[11]

No-one knows when a gun will jam, but a mass shooter 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; HB1224 only implicates the latter.

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[11] https://cbsnewyork.files.wordpress.com/2013/11/sandy_hook_final_report.pdf.

C. Defendant's statistical claims about magazines are based on unreliable, biased methodology.

Defendant offered, and the trial court accepted, statistics claiming that fatalities are higher when mass shooters use a magazine over 15 rounds. Final Ruling, CF, p 4.

The methodology was not reliable. In crimes where the criminal(s) had more than one firearm, Defendant's experts attributed *all* of the fatalities or woundings to the gun(s) with the "large" magazine, and no fatalities or woundings to any of the other guns. TR 5/2/17 p 203:10–11 (Webster, "LCM-involved incidents," rather than wounds or deaths actually inflicted by an LCM); TR 5/4/17, pp 182:10–184:1 (Klarevas).

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 ethnicity, 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 claims 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 the trial court's findings about greater

dangers of magazines over 15 rounds are based on this plainly erroneous methodology.

On cross-examination, Defendant's expert Klarevas admitted that his assumption was contrary to the reality of the Columbine High School murders. TR 5/4/17, p 177:20–25; *see also* EX (trial), p 506 (stipulation that of the 13 victims at Columbine, 4 or 5 were killed with Tec-9 handgun with 28+ round magazines).

Klarevas defended his "broad assumption" by saying that it was the "common methodology." TR 5/4/17, pp 182:10–184:1. But in Colorado, "speculative testimony that would be unreliable… is opinion testimony that has no analytically sound basis." *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007). There is no analytically sound basis to attribute *all* harms of multi-gun crimes to only one type of the guns that were used.

Klarevas also claimed that the effect of his assumption was "insignificant." This was because, "There's only been four gun massacres that involved multiple firearms where one was not an LCM capable firearm, and those total 13 deaths." *Id.* 183:21–184:1. In other words, there were only four massacres with multiple guns in which none of the

guns could use a detachable magazine. Such guns would be revolvers, shotguns, and some rifles.

Klarevas's response did not address the miscounting problem. 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.[12] Yet Klarevas attributed all 21 deaths to the rifle.

Klarevas's statement about massacres where no gun had a detachable magazine does not address his miscounting of incidents where there *was* a mix of guns. At Aurora, Columbine, and San Ysidro, there were 46 fatalities, all of which Klarevas attributed to LCMs, even though at least

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[12] 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).

22 of the fatalities were caused by guns without an LCM. There is no reason to rely on Klarevas's and Webster's assumptions that in other crimes with a mix of guns, the only injuries were caused by guns with LCMs.

As Plaintiffs' expert Moody explained, the method used by Klarevas and Webster creates an "overestimate," and is inaccurate for estimating the *actual* danger of LCMs. Instead, the method's limited scientific use would be to estimate a "maximum theoretical benefit" of eliminating LCMs. TR 5/1/17, pp 130:5–132:10.

CONCLUSION

The decision of the District Court should be reversed.

RESPECTFULLY SUBMITTED this 22nd day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2018, I electronically filed the foregoing **AMICUS BRIEF OF COLORADO LAW ENFORCEMENT FIREARMS INSTRUCTORS ASSOCIATION; SHERIFFS CHAD DAY, SHANNON K. BYERLY, AND STEVE REAMS; 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:

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