

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p>	
<p>Certiorari to the Court of Appeals, 2017CA1502 District Court, Denver County, 2013CV33879</p>	
<p>National Association for Gun Rights, Inc., a Virginia nonprofit corporation; Rocky Mountain Gun Owners, a Colorado nonprofit corporation; and John A. Sternberg,  <i>Petitioners,</i>  v.  Jared S. Polis, in his official capacity as Governor of the State of Colorado,  <i>Respondent.</i></p>	
<p>Attorney for Amici Curiae: Joseph Greenlee, #48023 Firearms Policy Coalition 1215 K Street, 17<sup>th</sup> Floor Sacramento, CA 95814 Phone: (916) 378-5785 Fax: (916) 520-3891 Email: jgr@fpchq.org</p>	<p>Supreme Court Case No: 2018SC817</p>
<p align="center"><b>BRIEF OF AMICI CURIAE FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, SECOND AMENDMENT FOUNDATION, AND MILLENNIAL POLICY CENTER IN SUPPORT OF PETITIONERS AND REVERSAL</b></p>	

## CERTIFICATE OF COMPLIANCE

This brief complies with C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all requirements set forth in those rules. Specifically, the undersigned certifies that:

1. The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d), in that it contains 4,744 words, excluding the parts of the brief excluded by C.A.R. 28(g)(1).
2. The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that the brief may be stricken if it does not so comply.

*/s/ Joseph G.S. Greenlee*  
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## INTEREST OF AMICI CURIAE

**Firearms Policy Coalition, Inc.** is a nonprofit membership organization that works to defend constitutional rights and promote individual liberty, including the right to keep and bear arms, through direct and grassroots advocacy, legal efforts, outreach, and education.

**Firearms Policy Foundation** is a nonprofit membership organization that serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on constitutional rights and the People's rights, privileges, and immunities deeply rooted in the Nation's history and tradition, including the fundamental right to keep and bear arms.

**Second Amendment Foundation** is a non-profit foundation dedicated to protecting the right to arms through educational and legal action programs. SAF has over 650,000 members, in every State of the Union.

**Millennial Policy Center** is a research and educational center whose mission is to develop and promote policy solutions that advance freedom and opportunity for the Millennial Generation.



## SUMMARY OF ARGUMENT

This Court has emphasized that “[i]n construing our constitution, our primary task is to give effect to the framers' intent.” *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1238 (Colo. 2003). This involves examining “the plain meaning” of the provision and ensuring that it is supported by “custom [and] history.” *Id.*

When Colorado ratified the Constitution, its right to arms was the strongest of any state in the country. Its broad guarantees reflected the history and traditions of the settlers in the pre-statehood territory who had to rely on themselves for protection from a myriad of dangers, including violent crime by other settlers and conquests by Indian tribes and the Confederate army.

Colorado’s right to arms provision is stronger than the right codified in the Second Amendment of the United States Constitution, as the latter has been interpreted thus far. Wherever the rights differ, Colorado’s right provides greater protections.

Colorado thus had few arms restrictions in its founding era. No arm was banned in nineteenth-century Colorado—making C.R.S. § 18-12-302 stricter than any arms regulation Colorado’s Founders ever experienced.

Repeating arms capable of firing more than 15 shots predate Colorado’s Constitution by over three centuries. Colorado’s Founders were intimately familiar with such arms. At the time of ratification many of the most popular firearms in the state and country fired more than 15 rounds. Detachable magazines predate Colorado’s Constitution as well, and became common soon after.

Colorado’s Founders experienced the horrors of mass-killings committed with firearms. But they depended on firearms for self-preservation, and in creating the Constitution, they made clear that the right of self-defense was paramount. A 15-round magazine limit violates the right they enshrined.

## ARGUMENT

This Court has stated that “[i]n construing our constitution, our primary task is to give effect to the framers' intent.” *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1238 (Colo. 2003). “To ascertain this intent, we begin with the plain meaning” of the provision, then ensure that it is supported by “custom [and] history.” *Id.* Here, such an analysis proves that the framers’ intended COLO. CONST. art. II, § 13 to protect a broad liberty of armed defense.

### I. CONSTITUTIONAL TEXT

COLO. CONST. art. II, § 13 states:

The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.

This guarantee has not changed since 1876.

#### A. “The right of no person”

The broad scope of the right is immediately evidenced by its application to all persons. Rather than limiting the right to “citizens” or even “the people,” Colorado’s right protects everyone.

Missouri's constitution—which included the strongest arms provision until Colorado's—limited the right to citizens.<sup>1</sup> Colorado copied Missouri nearly word-for-word but expanded the right to protect every “person” rather than just every “citizen.”

Many states, and the United States Constitution, protect the right of “the people.” See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006). While broader than “citizens,” a protection of “the people” is still not as broad as Colorado's protection of all persons. The United States Supreme Court has determined that “the people” “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

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<sup>1</sup> MO. CONST. of 1875, art. II, § 17: “the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.”

Consequently, federal Circuit Courts unanimously agree that the Second Amendment allows for a complete firearms prohibition on illegal aliens.<sup>2</sup>

In contrast, in *People v. Nakamura*, this Court struck a law making it “unlawful for any unnaturalized foreign-born resident, within this state, to either own or be possessed of a shotgun or rifle of any make, or a pistol or firearm of any kind.” 99 Colo. 262, 263 (1936). This Court held:

The state ... cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article 2 of the Constitution, to bear arms in defense of home, person, and property. The guaranty thus extended is meaningless if any person is denied the right to possess arms for such protection. Under this constitutional guaranty, there is no distinction between unnaturalized foreign-born residents and citizens.

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<sup>2</sup> The Fifth and Eighth Circuits held that illegal aliens are not protected by the Second Amendment. *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011); *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011). The Seventh Circuit held that the Second Amendment protects illegal aliens with substantial connections to the United States, but that they can be prohibited from possessing arms because they are not law-abiding, difficult to track, and have an interest in eluding law enforcement. *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015). The Ninth and Tenth Circuits did not decide whether illegal aliens are protected, concluding that the federal ban on illegal aliens withstands intermediate scrutiny regardless. *United States v. Torres*, 911 F.3d 1253 (9th Cir. 2019); *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012).

*Id.* at 264–65.

Then, in *People v. Ford*, this Court held that a felon “who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property thereby raises an affirmative defense.” 193 Colo. 459, 462 (1977). The Second Amendment is apparently more limited. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons”).

**B. “in defense of his home, person and property”**

Colorado continued to ensure a broad right by expressly protecting the use of arms “in defense of [] home, person and property.” While the Second Amendment provides similar protection, *see Heller*, 554 U.S. at 628 (striking a handgun ban that extended to the home, “where the need for defense of self, family, and property is most acute”), by expressly identifying these activities, Colorado’s Founders precluded any misinterpretation that could leave the activities unprotected.

Self-defense has been essential throughout Colorado’s history, including pre-statehood. In 1859, it was reported that “[a]ll carried

deadly weapons [in Colorado], to protect themselves from the lawless.”<sup>3</sup> In 1860, a Boston journalist reported that in Denver, “fully half the citizens wore sixshooters.”<sup>4</sup> A newcomer in 1864 described the Colorado territory as “a country where every man you meet, thinks it is safe to carry a loaded pistol. The practice is universal in all parts of Colorado.”<sup>5</sup>

In addition to violent criminals, nineteenth-century Coloradans had to worry about ambushes by Indians. The territorial days leading up to statehood were particularly perilous. Settlers’ homes were randomly raided, and their families killed. Ranchers were sniped at while working in their fields. And traveling of any kind was dangerous; simple trips for supplies sometimes ended in grisly murders.

Just a few examples of the many attacks on the Coloradans who would later draft and vote on the Constitution illustrate the concerns that were fresh in mind in 1876.

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<sup>3</sup> 1 Frank Hall, *HISTORY OF THE STATE OF COLORADO* 207 (1889).

<sup>4</sup> Albert Richardson, *BEYOND THE MISSISSIPPI* 305 (1867).

<sup>5</sup> Stephen Leonard & Thomas Noel, *DENVER: MINING CAMP TO METROPOLIS* 27 (1990).

The 1860s represented an especially problematic period between Colorado's Indian tribes and white settlers. Governor Evans reported, "The frequent depredations on the white settlements, upon travellers ... and upon the stock and stations of the United States mail-stage lines, by various bands of the several Indian tribes ... kept the ... public in constant apprehension."<sup>6</sup>

"On June 11, 1864, the Hungate family, who had a ranch near the future town of Elizabeth near Denver, was attacked, raped, murdered, and brutally mutilated, including the small children."<sup>7</sup> "The scalped and horribly mangled bodies were brought into the city [of Denver]," and "created great alarm and uneasiness among our settlers and the people on the route."<sup>8</sup>

"In January through February [of 1865], large and coordinated war parties of Cheyenne, Arapaho, and Sioux ravaged the South Platte Trail.

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<sup>6</sup> REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1863, at 121 (1864).

<sup>7</sup> David Kopel, *The Right to Arms in Nineteenth Century Colorado*, 95 Denver U.L. Rev. 329, 382 (2018).

<sup>8</sup> REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1864, at 227 (1865).



Most surviving whites in the area fled, and almost every building along the trail was burned to the ground. Two hundred miles of settlements were wiped out.”<sup>9</sup>

When ranchers were harvesting hay in 1868, Indians “began to be very active and sniped off white people here and there. This caused all homesteaders to keep their guns primed and ready for the cap.”<sup>10</sup>

Travelers were generally in the gravest danger. Especially starting in 1863, when “the Comanches and Kiowas [began] striking with vengeance along the Santa Fe road.”<sup>11</sup>

In January 1863, between Fort Lyon, Colorado and Fort Larned, Kansas, “a band of almost famished Indians” approached nine wagons “imploring the wagon boss to give them something to eat and drink.”<sup>12</sup> When the wagon boss refused, the Indians “attacked the wagons and

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<sup>9</sup> Kopel, *supra* note 7, at 46.

<sup>10</sup> Augusta Hauck Block, *Lower Boulder and St. Vrain Valley Home Guards and Fort Junction*, 16 THE COLORADO MAGAZINE 186, 189 (Sept. 1939).

<sup>11</sup> Stan Hoig, THE SAND CREEK MASSACRE 23 (1961).

<sup>12</sup> William Henry Ryus, THE SECOND WILLIAM PENN: A TRUE ACCOUNT OF INCIDENTS THAT HAPPENED ALONG THE OLD SANTA FE TRAIL IN THE SIXTIES 16 (1913).

killed all the whites but one man who escaped down the bank into the river.”<sup>13</sup>

Even that brutal massacre paled in comparison to the coordinated attacks on the transportation lines “between the Little Blue River” in Nebraska and “eighty miles east of Denver” on August 10, 1864:

The first assault was made at Ewbank Station. ...A family, ten in number, living at this station, was massacred and scalped, and one of the females, beside having suffered the latter inhuman barbarity, was pinned to the earth by a stake thrust through her person, in a most revolting manner. At Liberty Farm one man was killed, two at Pawnee Station, two near Oak Grove, and also a young lady; at Plum Creek ... nine persons were murdered ... and two women and four children captured; ten miles east of Fort Cottonwood four men were killed... from Fort Kearney to the vicinity of Denver City, trains conveying merchandise were attacked by Indians and destroyed, while many persons, employed in conducting them, were barbarously murdered.<sup>14</sup>

A report from 1864 explains: “the Indians have had the advantage of securing large amounts of plunder from freight trains; they have stolen

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<sup>13</sup> *Id.* at 17.

<sup>14</sup> REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1864, *supra* note 8, at 254.

immense numbers of horses, mules, and cattle; they have taken a number of women and children prisoners; they have murdered in cold blood a large number of defenceless citizens, and killed and wounded a number of soldiers.”<sup>15</sup>

It was said that starting in 1864, “[f]or the next four years it would not be safe to travel in groups of less than fifty to one hundred”<sup>16</sup> on the South Platte Trail. The same could be said about every major route in the territory. Supply trains were halted, “and starvation threatened.”<sup>17</sup> “Cut off, the Colorado mining camps were almost starving.”<sup>18</sup>

The settlers were not faultless in the long and bloody conflict with the Indians, but it is indisputable that many law-abiding Coloradans lived in constant fear of attack by Indians in the period leading up to the Colorado Convention, and armed themselves accordingly.

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<sup>15</sup> *Id.* at 221-22.

<sup>16</sup> Nell Brown Propst, *SOUTH PLATTE TRAIL: STORY OF COLORADO’S FORGOTTEN PEOPLE* 60 (2d ed. 1989).

<sup>17</sup> Ray Colton, *THE CIVIL WAR IN THE WESTERN TERRITORIES: ARIZONA, COLORADO, NEW MEXICO, AND UTAH* 156 (1984).

<sup>18</sup> T.R. Fehrenbach, *COMANCHES: THE HISTORY OF A PEOPLE* 460 (1974).

### **C. “in aid of the civil power when thereto legally summoned”**

Colorado’s right includes the use of arms “in aid of the civil power.” This is particularly reflective of the challenges of the territorial days, when Coloradans often had to provide their own collective security.

In the nineteenth century, the civil power in Colorado was aided primarily by the militia and the posse comitatus. By protecting the use of arms “in aid of the civil power” rather than focusing on the militia—as the Second Amendment does—Colorado’s Founders again protected against a more limited interpretation than they intended.

#### **1. Militia**

The settlers were nearly conquered twice in the 1860s. The first serious threat was a conquest by the Confederate Army. Almost immediately thereafter, several Indian tribes united and nearly forced the settlers out of the territory.

Governor William Gilpin addressed the first legislative session assembly of the Colorado territory on September 10, 1861. Gilpin

explained that “[t]he citizen must also be a soldier, and armed.”<sup>19</sup> “To a pioneer people,” Gilpin declared, “the vigorous action of [the militia and the judiciary] constitutes the bulwark of their liberties.”<sup>20</sup>

A territorial militia was established, and within a year it prevented the territory from being conquered by the Confederate Army.

The Confederates, especially interested in Colorado’s gold mines, intended to invade Colorado via New Mexico in 1862.<sup>21</sup> On March 26-28, 1862, Coloradans thwarted the Confederate invasion at the Battle of Glorieta Pass—known as “the Gettysburg of the West.”<sup>22</sup> A Confederate soldier wrote, “Had it not been for the devils from Pike’s Peak, this country would have been ours.”<sup>23</sup>

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<sup>19</sup> COUNCIL JOURNAL OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF COLORADO, FIRST SESSION 6 (Thos. Gibson ed., 1862).

<sup>20</sup> *Id.* at 7.

<sup>21</sup> Colton, *supra* note 17, at 40–41.

<sup>22</sup> Duane Smith, THE BIRTH OF COLORADO: A CIVIL WAR PERSPECTIVE 26 (1989).

<sup>23</sup> Ovando Hollister, COLORADO VOLUNTEERS IN NEW MEXICO 262–65 (Richard Harwell ed. 1962) (1863).

A year later, when the Colorado War between the settlers and various Indian tribes began, the militia saved the settlers again.

Governor Evans requested federal troops but was told, “We have none to spare, you must protect yourselves.”<sup>24</sup>

Communication lines and supply trains were cut off, and starvation lurked throughout the region. But the militia was able to defend the territory until federal troops became available—which required a desperate plea from acting Governor Elbert, who requested “5,000 federal troops, or else the whites would have to leave Colorado.”<sup>25</sup>

The federal troops were able “to deter major attacks.”<sup>26</sup> And the militia was able to defend the South Platte Trail so commerce could resume.<sup>27</sup> Ultimately, the Cheyenne, Arapaho, Apache, Comanche, and Kiowa tribes all signed treaties, minimizing, although not eliminating, major conflicts.<sup>28</sup>

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<sup>24</sup> Hall, *supra* note 3, at 328.

<sup>25</sup> Colton, *supra* note 17, at 159.

<sup>26</sup> Kopel, *supra* note 7, at 46.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 47.

## 2. Posse Comitatus

Colorado sheriffs may summon citizens within their county to serve in the posse comitatus.<sup>29</sup> Posse service is part of a citizen’s duty to “aid [] the civil power when thereto legally summoned.” Therefore, Colorado’s Founders anticipated that Coloradans would be sufficiently armed to aid their county sheriffs.

The most suitable arms for defense against violent criminals are the arms sheriffs and deputies use—since these arms are carefully selected for that purpose. These arms are typically semi-automatic firearms with manufacturer-supplied magazines of up to 20 rounds for handguns and 30 rounds for rifles.

A delegate to the Colorado Convention, Casimiro Barela, had utilized the posse comitatus power as the Las Animas County Sheriff. In 1873, Barela “summoned a *posse* that pursued and captured a fugitive who was wanted on charges of murder and robbery.”<sup>30</sup> “The next year, Sheriff

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<sup>29</sup> See generally 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 (2015).

<sup>30</sup> Kopel, *supra* note 7, at 81.

Barela raised a thirty-man *posse* to deal with Comanche, Kiowa, and Cheyenne raids in the Dry Cimarron region southeast of Trinidad.”<sup>31</sup>

**D. “shall be called in question”**

Colorado’s Constitution states that “[t]he right of no person ... shall be called in question.” This provides even greater protection than the Second Amendment’s command that the right “shall not be infringed.” The phrases may seem selfsame, but by definition, Colorado’s right provides greater protection. The definition of “question” is “to subject to analysis.”<sup>32</sup> The definition of “infringe” is “to encroach upon in a way that violates law or the rights of another.”<sup>33</sup> A regulation must necessarily be “subject to analysis” to determine whether it “encroach[es] upon in a way that violates law or the rights of another.” But a regulation must not necessarily “encroach upon in a way that violates law or the rights of another” to be “subject to analysis.” Thus, a right can be questioned

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<sup>31</sup> *Id.*

<sup>32</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, 10th Ed. at 958.

<sup>33</sup> *Id.* at 600.



without being infringed, but a right cannot be infringed without being questioned.

In a case cited approvingly by the United States Supreme Court, *Heller*, 554 U.S. at 629, the Supreme Court of Alabama explored the implications of the particular phrase, “shall not be questioned”:

we are strongly inclined to believe, that the inhibition to question the right, was regarded as more potent than a mere affirmative declaration, intended to secure it to the citizen; and that while the one amounted to a denial of the right to legislate on the subject, the other would tolerate legislation to any extent which did not actually or in its consequences destroy the right to bear arms.

*State v. Reid*, 1 Ala. 612, 619 (1840).

Colorado’s Founders were certainly aware of the strong protection provided by the Second Amendment, but they opted for even stronger wording—wording that the Supreme Court of Alabama interpreted as precluding any legislation that burdened the right.

**E. “nothing herein contained shall be construed to justify the practice of carrying concealed weapons”**

Because Colorado’s right provides such broad protections, it was necessary to identify what gun control is constitutional. Prohibitions on

concealed carry have been accepted under Colorado’s Constitution, as well as many other state constitutions and the Second Amendment. *See Heller*, 554 U.S. at 626 (“the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”); *Peterson v. Martinez*, 707 F.3d 1197, 1212 (10th Cir. 2013) (“the concealed carrying of firearms falls outside the scope of the Second Amendment’s guarantee”).

## II. NINETEENTH-CENTURY TRADITION

### A. Nineteenth-Century Arms

Repeating arms (i.e., arms capable of firing multiple times without reloading) have existed for half a millennium—more than three centuries prior to the Colorado Convention. The first known repeaters date between 1490 and 1530.<sup>34</sup> The first known repeater capable of firing more than 15 shots was invented around 1580.<sup>35</sup>

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<sup>34</sup> M.L. Brown, FIREARMS IN COLONIAL AMERICA: THE IMPACT ON HISTORY AND TECHNOLOGY, 1492-1792, at 50 (1980).

<sup>35</sup> Lewis Winant, FIREARMS CURIOSA 168–70 (2009); *16-Shot Wheel Lock*, AMERICA’S 1ST FREEDOM, May 10, 2014, <http://bit.ly/2tngSDD>.

In 1777, the Continental Congress ordered one hundred rifles from Joseph Belton,<sup>36</sup> who had informed the Congress that his rifles could “discharge sixteen, or twenty [rounds], in sixteen, ten, or five seconds.”<sup>37</sup> Belton demonstrated one such rifle before leading military officers (including General Horatio Gates and Major General Benedict Arnold) and scientists (including David Rittenhouse), who verified that “[h]e discharged Sixteen Balls loaded at one time.”<sup>38</sup> Ultimately, the deal fell through when Belton demanded what the Congress deemed “an extraordinary allowance.”<sup>39</sup>

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<sup>36</sup> 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 324 (1907).

<sup>37</sup> Joseph Belton, letter to the Continental Congress, Apr. 11, 1777, *in* PAPERS OF THE CONTINENTAL CONGRESS, COMPILED 1774-1789, vol. 1 A-B, at 123 (available at: [https://en.wikisource.org/wiki/Correspondence\\_between\\_John\\_Belton\\_and\\_the\\_Continental\\_Congress#/media/File:Memorials\\_Addressed\\_to\\_Congress\\_A\\_-\\_B\\_\(Vol\\_1\)\\_Page\\_123\\_enhanced.jpg](https://en.wikisource.org/wiki/Correspondence_between_John_Belton_and_the_Continental_Congress#/media/File:Memorials_Addressed_to_Congress_A_-_B_(Vol_1)_Page_123_enhanced.jpg)).

<sup>38</sup> PAPERS OF THE CONTINENTAL CONGRESS, COMPILED 1774-1789, *supra* note 37, at 139 (available at: [https://upload.wikimedia.org/wikipedia/commons/9/9c/Petitions\\_Address\\_to\\_Congress%2C\\_1775-89\\_A\\_-\\_B\\_%28Vol\\_1%29\\_Page\\_139\\_enhanced.jpg](https://upload.wikimedia.org/wikipedia/commons/9/9c/Petitions_Address_to_Congress%2C_1775-89_A_-_B_%28Vol_1%29_Page_139_enhanced.jpg)).

<sup>39</sup> JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 36, at 361.

In the decades prior to the Colorado Convention, the arms that came to define nineteenth-century Colorado and the American West were introduced.

First came the 30-shot Volcanic Rifle, advertised as capable of being loaded then fired 30 times within a minute.<sup>40</sup>

Then came the 16-shot Henry Rifle in 1861. Tested at the Washington Navy Yard in 1862, “187 shots were fired in three minutes and thirty-six seconds (not counting reloading time), and one full fifteen-shot magazine was fired in only 10.8 seconds ... hits were made from as far away as 348 feet, at an 18-inch-square target. ...The report noted, ‘It is manifest from the above experiment that this gun may be fired with great rapidity.’”<sup>41</sup> “[F]ueled by the Civil War market, the first Henrys were in the field by mid-1862.”<sup>42</sup>

The Winchester M1866 was introduced in 1866. “One of the most popular of all Winchester arms, the 1866 was widely used in opening the

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<sup>40</sup> Harold Williamson, *WINCHESTER: THE GUN THAT WON THE WEST* 26–27 (1952).

<sup>41</sup> R.L. Wilson, *WINCHESTER: AN AMERICAN LEGEND* 11-12 (1991).

<sup>42</sup> *Id.* at 11.

West and, in company with the Model 1873, is the most deserving of Winchesters to claim the legend ‘The Gun That Won the West.’<sup>43</sup> “[T]he major market for the guns was North America, and the prime sales were in the West. Among the agents were such renowned frontier emporiums as Freund & Brother, with stores in Salt Lake City, Cheyenne, and Laramie ... [and] John P. Lower of Denver.”<sup>44</sup>

The M1866 was touted as holding “eighteen charges, which can be fired in nine seconds.”<sup>45</sup> “The Indians labeled these guns the ‘many-shots’ or ‘heap-firing.’”<sup>46</sup> In 1876, Indians used the M1866 and 1861 Henry rifles in their victory at the Battle of Little Bighorn, known as “Custer’s Last Stand.” Consequently, “besides being outnumbered, Custer’s men were generally outgunned.”<sup>47</sup>

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<sup>43</sup> *Id.* at 22.

<sup>44</sup> *Id.* at 35.

<sup>45</sup> Louis Garavaglia & Charles Worman, FIREARMS OF THE AMERICAN WEST 1866–1894, at 128 (1985).

<sup>46</sup> Wilson, *supra* note 41, at 32.

<sup>47</sup> *Id.*

The Winchester M1873, introduced in 1873, is known as “The Gun That Won the West.” “Easily one of the most treasured endorsements of the 1873 was from Colonel William F. ‘Buffalo Bill’ Cody” in 1875.<sup>48</sup> Cody emphasized its usefulness “for general hunting, or Indian fighting,” and used it to stop a charging bear, putting “more lead in him than he could comfortably digest.”<sup>49</sup> Magazine capacity for the M1873 ranged from 6 to 25.<sup>50</sup>

The Evans Repeating Rifle was also introduced in 1873. It held 34 rounds.<sup>51</sup>

Handguns using detachable magazines were introduced in 1862.<sup>52</sup> Moreover, handguns capable of firing multiple shots have existed in America since Plymouth Colony. Some of the first pilgrims owned

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<sup>48</sup> *Id.* at 55.

<sup>49</sup> *Id.*

<sup>50</sup> Arthur Pirkle, WINCHESTER LEVER ACTION REPEATING FIREARMS: THE MODELS OF 1866, 1873 & 1876, at 107 (2010).

<sup>51</sup> Dwight Demeritt, MAINE MADE GUNS & THEIR MAKERS 293–95 (rev. ed. 1997).

<sup>52</sup> Winant, *supra* note 35, at 244-45.

blunderbusses, which could fire roughly 20 projectiles simultaneously.<sup>53</sup> Roughly 150 years later, the British confiscated 38 blunderbusses from Bostonians after the Battle of Lexington.<sup>54</sup>

In the 1830s, the popular pepperbox handguns were introduced. These pistols had multiple barrels—some as many as 24—that could fire sequentially.<sup>55</sup> Pin-fire revolvers, capable of firing up to twenty-one consecutive rounds, entered the market in the 1850s.<sup>56</sup> In 1866, the 20-round Josselyn belt-fed chain pistol was introduced. Other chain pistols had greater capacities.<sup>57</sup>

The first functional semi-automatic firearm was the Mannlicher Model 85 rifle, invented in 1885.<sup>58</sup> Mannlicher introduced new models in

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<sup>53</sup> See William Elliot Griffis, *YOUNG PEOPLE’S HISTORY OF THE PILGRIMS* 297 (1920).

<sup>54</sup> 1 David Ramsay, *THE HISTORY OF THE AMERICAN REVOLUTION* 245 (1811).

<sup>55</sup> Jack Dunlap, *AMERICAN BRITISH & CONTINENTAL PEPPERBOX FIREARMS* 148-49, 167 (1964).

<sup>56</sup> Winant, *supra* note 35, at 67-70; Jim Supica et al., *TREASURES OF THE NRA NATIONAL FIREARMS MUSEUM* 48-49 (2013).

<sup>57</sup> Winant, *supra* note 35, at 204, 206.

<sup>58</sup> U.S. NAVY SEAL SNIPER TRAINING PROGRAM 87 (2011).

1891, 1893, and 1895.<sup>59</sup> Additionally, numerous semi-automatic handguns utilizing detachable magazines were introduced before the turn of the century: including the Mauser C96,<sup>60</sup> Bergmann Simplex,<sup>61</sup> Borchardt C-93,<sup>62</sup> Borchardt M1894,<sup>63</sup> Fabrique Nationale M1899,<sup>64</sup> Mannlicher M1896 and M1897,<sup>65</sup> Luger M1898 and M1899,<sup>66</sup> Roth-Theodorovic M1895, M1897, and M1898,<sup>67</sup> and the Schwarzlose M1898.<sup>68</sup>

Thus, by the late nineteenth century, semi-automatic firearms and detachable magazines were in use, and repeating arms that could rapidly

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<sup>59</sup> John Walter, RIFLES OF THE WORLD 568-69 (3rd ed. 2006).

<sup>60</sup> Martin Dougherty, SMALL ARMS VISUAL ENCYCLOPEDIA 84 (2011).

<sup>61</sup> *Id.* at 85.

<sup>62</sup> Leonardo Antaris, *In the Beginning: Semi-Automatic Pistols of the 19<sup>th</sup> Century*, AMERICAN RIFLEMAN, Jan. 4, 2018.

<sup>63</sup> *Springfield Armory Museum – Collection Record*, REDISCOV.COM, available at: [HTTP://WW2.REDISCOV.COM/SPRING/VFPCGI.EXE?IDCFIle=/SPRING/DETAILS.IDC,SPECIFIC=9707,DATABASE=OBJECTS](http://ww2.rediscover.com/spring/vfpcgi.exe?idcfile=/spring/details.idc,specific=9707,database=objects).

<sup>64</sup> Antaris, *supra* note 62.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*



fire more than 15 rounds had been extremely popular for decades. Yet, as Defendant’s expert historian, Dr. Saul Cornell, testified, not a single arm was banned in nineteenth-century Colorado. TR 05/03/17, pp 202:17–204:20.

The court below found it insignificant that these arms were both popular and unregulated: “that various guns with capacities greater than fifteen rounds . . . were in existence before the Colorado Constitution was written . . . does not affect our analysis.” *Rocky Mountain Gun Owners v. Hickenlooper*, 2018 COA 149 ¶ 42 n.7. That such commonly owned weapons were entirely unregulated speaks directly to Colorado’s “custom [and] history,” which helps determine “the framers’ intent.” *People ex rel. Salazar*, 79 P.3d at 1238. *See also Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1063 (Colo. 2002) (prohibiting a city from seizing a bookstore’s purchase record where “Colorado's long tradition of protecting expressive freedoms cautions against” it).

## **B. Nineteenth Century Mass-Shootings**

Mass-killings committed with firearms were not uncommon in territorial days. Many examples are provided above. Additionally, the

Sand Creek Massacre was among the most atrocious mass-killings ever committed in American history. On November 29, 1864, “Col. John Chivington led some 700 cavalry troops in an unprovoked attack on peaceful Cheyenne and Arapaho villagers at Sand Creek in Colorado. They murdered nearly 200 women, children and older men.”<sup>69</sup>

Mass-shootings were not limited to Colorado. For instance, two particularly grisly massacres in neighboring states occurred within days of each other in 1874. In Oklahoma, Pat Hennessey’s wagon train was ambushed by Cheyennes. Hennessey’s group held them off for three days—until they ran out of ammunition on July 4.<sup>70</sup> The Indians then shot Hennessey’s men, and tied Hennessey to his wagon “and set it afire burning him alive.”<sup>71</sup> Days later, in Kansas, a group of Cheyennes

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<sup>69</sup> Ned Blackhawk, *Remember the Sand Creek Massacre*, N.Y. TIMES, Nov. 27, 2014, <https://www.nytimes.com/2014/11/28/opinion/remember-the-sand-creek-massacre.html>.

<sup>70</sup> 13 THE WORLD TO-DAY: A MONTHLY RECORD OF HUMAN PROGRESS 681 (1907).

<sup>71</sup> Laurence Hanna, *THE LIFE AND WRITINGS OF LAURENCE E. HANNA* 182 (2016).

ambushed a surveyor and his party (which included children) and mutilated their bodies, in what became known as the Short Massacre.<sup>72</sup>

Based on their own experiences and their neighbors', Colorado's Founders understood firearms could be used for mass-killings. Nevertheless, Colorado's Founders included an exceptionally strong right to arms in the Constitution. This was a clear affirmation that the right to use arms "in defense of [] home, person and property, or in aid of the civil power" was of paramount importance.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted this 3<sup>rd</sup> day of June 2019.

*/s/ Joseph G.S. Greenlee*  
Joseph G.S. Greenlee, #48023

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<sup>72</sup> F.C. Montgomery, *United States Surveyors Massacred by Indians*, KANSAS HISTORICAL SOCIETY, May 1932, <https://www.kshs.org/p/kansas-historical-quarterly-united-states-surveyors-massacred-by-indians/12546>.

## CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2019, a true and correct copy of the foregoing was served on the following:

Colorado Supreme Court  
(via ICCES)

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