

<p>COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203</p>	
<p>Appeal from: District Court County: City and County of Denver District Court Judge: The Honorable John W. Madden District Court Case Number: 2013CV33879</p>	
<p>Plaintiffs-Appellants: Rocky Mountain Gun Owners, a Colorado nonprofit corporation, National Association for Gun Rights, Inc., a Virginia non-profit corporation, and John A. Sternberg,</p> <p>v.</p> <p>Defendant-Appellee: John W. Hickenlooper, in his official capacity as Governor of the State of Colorado.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">BRIEF OF AMICI CURIAE SECOND AMENDMENT FOUNDATION AND MILLENNIAL POLICY CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL</p>	

CERTIFICATE OF COMPLIANCE

This brief complies with Colorado Appellate Rules 28, 29, and 32, including all requirements set forth in those rules. I acknowledge that the brief may be stricken if it does not so comply.

Specifically, the undersigned certifies that:

1. The amicus brief complies with the applicable word limit set forth in Rule 29(d), in that it contains 4,729 words, excluding the parts of the brief excluded by Rule 28(g)(1).
2. The amicus brief complies with the content and form requirements set forth in Rule 29(c).

/s/ Joseph G.S. Greenlee
Joseph G.S. Greenlee

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INTEREST OF AMICI CURIAE

Second Amendment Foundation (“SAF”) is a nonprofit foundation dedicated to protecting the right to keep and bear arms through educational and legal action programs. SAF has over 650,000 members, in every State of the Union, including Colorado.

Millennial Policy Center (“MPC”) is a research and educational center whose mission is to develop and promote policy solutions that advance freedom and opportunity for the Millennial Generation. To secure liberty for younger and future generations, MPC has a keen interest in the long-term viability of the constitutionally-protected right to keep and bear arms.

SUMMARY OF ARGUMENT

When Colorado ratified its Constitution, its right to arms became the strongest of any state in the country. Settlers in the pre-statehood territory 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; the right enshrined in the Constitution reflects their history and traditions.

Colorado's right to arms provision is broader than the right codified in the Second Amendment of the United States Constitution, as the latter has been interpreted to this point. Wherever the rights differ, it is the Colorado right that provides broader protection. Moreover, the protection it provides is greater in force.

The lack of arms restrictions in Colorado's founding era reflects the broad right Colorado's Founders intended. No arm was ever banned in the nineteenth century. Thus, C.R.S. § 18-12-302 is stricter than any arms regulation the Founders ever knew.

Furthermore, repeating arms capable of firing more than 15 shots predate the Colorado Constitution by over three centuries. Colorado's Founders were intimately familiar with such arms. Detachable magazines predate the Constitution as well.

Colorado's Founders experienced mass-killings committed with firearms. But they depended on firearms for self-preservation. In creating the Constitution, Colorado's Founders made clear that the right of self-defense was paramount.

ARGUMENT

The Supreme Court of Colorado has demonstrated that the scope of a constitutional right's protections depends on the constitutional text and tradition. *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991). The text of COLO. CONST. art. II, § 13, and the tradition in nineteenth-century Colorado, both require 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.¹ 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."² 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

¹ 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."

² See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006).

(1990). Consequently, most federal Circuit Courts to decide the issue have held that the Second Amendment excludes illegal aliens.³

By contrast, in *People v. Nakamura*, the Supreme Court of Colorado struck down 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). The 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.

³ The Fifth and Eighth Circuits have 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 Tenth Circuit did not decide the issue, concluding that the federal ban on illegal aliens withstands intermediate scrutiny regardless. *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012).

Id. at 264–65.

Moreover, in *People v. Ford*, the Supreme Court of Colorado 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 embrace 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 down a handgun ban that extends to the home, “where the need for defense of self, family, and property is most acute”), by expressly identifying these protected activities, Colorado’s Founders precluded any misinterpretation that would leave the activities unsecured.

Self-defense has been essential throughout Colorado history, especially pre-statehood. In 1859, it was reported that “[a]ll carried deadly weapons [in Colorado], to protect themselves from the lawless.”⁴ In 1860, a Boston journalist reported that in Denver, “fully half the citizens wore sixshooters.”⁵ A newcomer in 1864 complained: “I do not enjoy living in 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.”⁶

This made sense. In addition to violent criminals, nineteenth-century Coloradans also 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 extremely dangerous; simple trips for supplies sometimes ended in grisly murders.

While an extensive history of the conflicts between the Indians and settlers is too lengthy to include here, just a few examples of the many

⁴ 1 FRANK HALL, HISTORY OF THE STATE OF COLORADO 207 (1889).

⁵ ALBERT RICHARDSON, BEYOND THE MISSISSIPPI 305 (1867).

⁶ STEPHEN J. LEONARD & THOMAS J. NOEL, DENVER: MINING CAMP TO METROPOLIS 27 (1990).

attacks on the Coloradans who would later draft and vote on the Constitution illustrate the concerns that were fresh in mind in 1876.

The 1860s represented an especially problematic period between Colorado's Indian tribes and white settlers. As Governor John 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."⁷

"On June 11, 1864, the young 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."⁸ "The scalped and horribly mangled bodies were brought into the city [of

⁷ REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1863, at 121 (1864).

⁸ David B. Kopel, *The Right to Arms in Nineteenth Century Colorado*, U. Denver Legal Studies Research Paper No. 17-14, at 42 (forthcoming 2018). Available at SSRN: <https://ssrn.com/abstract=2952704>.

Denver],” and “created great alarm and uneasiness among our settlers and the people on the route.”⁹

“In January through February [of 1865], large and coordinated war parties of Cheyenne, Arapaho, and Sioux ravaged the South Platte Trail. 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.”¹⁰

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.”¹¹

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.”¹²

⁹ REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1864, at 227 (1865).

¹⁰ Kopel, *supra* note 8, at 46.

¹¹ Augusta Hauck Block, *Lower Boulder and St. Vrain Valley Home Guards and Fort Junction*, 16 THE COLORADO MAGAZINE 186, 189 (Sept. 1939).

¹² STAN HOIG, THE SAND CREEK MASSACRE 23 (1961).

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.”¹³ When the wagon boss refused, the Indians “attacked the wagons and killed all the whites but one man who escaped down the bank into the river.”¹⁴

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

¹³ 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).

¹⁴ *Id.* at 17.

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.¹⁵

A report from 1864 explains: “the Indians have had the advantage of securing large amounts of plunder from freight trains; they have stolen 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.”¹⁶

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”¹⁷ on the South Platte Trail. The same could reasonably be said about every major route

¹⁵ REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1864, *supra* note 9, at 254.

¹⁶ *Id.* at 221-22.

¹⁷ NELL BROWN PROPST, *SOUTH PLATTE TRAIL: STORY OF COLORADO'S FORGOTTEN PEOPLE* 60 (2d ed. 1989).

in the territory. Supply trains were halted, “and starvation threatened.”¹⁸

“Cut off, the Colorado mining camps were almost starving.”¹⁹

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

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, like

¹⁸ RAY C. COLTON, *THE CIVIL WAR IN THE WESTERN TERRITORIES: ARIZONA, COLORADO, NEW MEXICO, AND UTAH* 156 (1984).

¹⁹ T.R. FEHRENBACH, *COMANCHES: THE HISTORY OF A PEOPLE* 460 (1974).

the Second Amendment does, Colorado's Founders again eliminated the possibility of 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, many Indian tribes in Colorado united and nearly forced the settlers out of the territory.

The Founders' dependence on the militia helps to inform the intended breadth of the right they included in the Constitution. After these experiences, Colorado's Founders were not eager to relinquish their ability to defend themselves.

Governor 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."²⁰ "To a pioneer people," Gilpin

²⁰ COUNCIL JOURNAL OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF COLORADO, FIRST SESSION 6 (Thos. Gibson ed., 1862).

declared, “the vigorous action of [the militia and the judiciary] constitutes the bulwark of their liberties.”²¹

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 1862.²² On March 26-28, 1862, Coloradans thwarted the Confederate invasion at the Battle of Glorieta Pass—known as “the Gettysburg of the West.”²³ A Confederate soldier later wrote, “Had it not been for the devils from Pike’s Peak, this country would have been ours.”²⁴

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

²¹ *Id.* at 7.

²² COLTON, *supra* note 18, at 40–41.

²³ DUANE A. SMITH, *THE BIRTH OF COLORADO: A CIVIL WAR PERSPECTIVE* 26 (1989).

²⁴ OVANDO HOLLISTER, *COLORADO VOLUNTEERS IN NEW MEXICO 262–65* (Richard Harwell ed. 1962) (1863).

When Colorado's Governor requested federal troops, he was told, "We have none to spare, you must protect yourselves."²⁵

Although communication lines and supply trains were cutoff, and starvation lurked throughout the territory, the militia was able to defend the territory until federal troops became available. This required a desperate plea from acting Governor Elbert, who requested "5,000 federal troops, or else the whites would have to leave Colorado."²⁶

The federal troops were able "to deter major attacks."²⁷ And the militia was able to defend the South Platte Trail to allow commerce to resume.²⁸ Soon, the Cheyenne, Arapaho, Apache, Comanche, and Kiowa tribes all signed treaties, minimizing, although not eliminating, major conflicts.²⁹

²⁵ HALL, *supra* note 4, at 328.

²⁶ COLTON, *supra* note 18, at 159.

²⁷ Kopel, *supra* note 8, at 46.

²⁸ *Id.*

²⁹ *Id.* at 47.

2. Posse Comitatus

Colorado sheriffs may summon citizens within their county to serve in the posse comitatus.³⁰ 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 precisely 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 personally utilized the posse comitatus power when he served 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

³⁰ See generally David B. 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).

robbery.”³¹ “The next year, Sheriff Barela raised a thirty-man posse to deal with Comanche, Kiowa, and Cheyenne raids in to the Dry Cimarron region southeast of Trinidad.”³²

D. “shall be called in question”

The Colorado 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, the Colorado right provides greater protection. The definition of “question” is “to subject to analysis.”³³ The definition of “infringe” is “to encroach upon in a way that violates law or the rights of another.”³⁴ 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

³¹ Kopel, *supra* note 8, at 81.

³² *Id.*

³³ Merriam-Webster’s Collegiate Dictionary, 10th Ed. at 958.

³⁴ *Id.* at 600.

without being infringed, but a right cannot be infringed without being questioned. Colorado's Founders were certainly aware of the strong protection provided in the Second Amendment, but they opted for even stronger wording. This is another way in which Colorado's right is broader than the Second Amendment.

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 (“Like most rights, the right secured by the Second Amendment is not unlimited ... 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.”); *Peruta v. Cty. of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc) (“We hold that the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.”).

As the District Court explained, the Kentucky Court of Appeals held that its state constitution protected concealed carry in 1822. *CF*, p 529. Consequently, in 1849, the legislature adopted a new constitutional provision “authorizing the legislature to ‘pass laws to prevent persons from carrying concealed arms.’” *Peruta*, 824 F.3d at 936 (quoting KY. CONST. art. XIII, § 25). The legislature passed such a law in 1854. *Id.* Kentucky’s experience takes nothing away from the fact that Colorado’s right was the strongest in the country at the time of its enactment in 1876.

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 1530.³⁵ The first known repeater capable of firing more than 15 shots was invented around 1580.³⁶

In 1777, the Continental Congress ordered one hundred rifles from Joseph Belton,³⁷ who had informed the Congress that he could make rifles that “discharge sixteen, or twenty [rounds], in sixteen, ten, or five seconds.”³⁸ 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 “He discharged Sixteen Balls loaded at one time.”³⁹ Ultimately, the deal

³⁵ M.L. BROWN, FIREARMS IN COLONIAL AMERICA: THE IMPACT ON HISTORY AND TECHNOLOGY, 1492-1792, at 50 (1980).

³⁶ LEWIS WINANT, FIREARMS CURIOSA 168–70 (2009); *16-Shot Wheel Lock*, AMERICA’S 1ST FREEDOM, May 10, 2014, <http://bit.ly/2tngSDD>.

³⁷ 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 324 (1907).

³⁸ 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)).

³⁹ PAPERS OF THE CONTINENTAL CONGRESS, COMPILED 1774-1789, *supra* note 38, at 139 (available at: https://upload.wikimedia.org/wikipedia/commons/9/9c/Petitions_Address

fell through when Belton demanded what the Congress deemed “an extraordinary allowance.”⁴⁰

In the decades prior to the Colorado Convention, the arms that would come 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.⁴¹

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.’”⁴²

[_to_Congress%2C_1775-89_A_-_B_%28Vol_1%29_Page_139_enhanced.jpg](#).

⁴⁰ JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 37, at 361.

⁴¹ HAROLD F. WILLIAMSON, WINCHESTER: THE GUN THAT WON THE WEST 26–27 (1952).

⁴² R.L. WILSON, WINCHESTER: AN AMERICAN LEGEND 11-12 (1991).

“[F]ueled by the Civil War market, the first Henrys were in the field by mid-1862.”⁴³

The Winchester M1866 was introduced in 1866. “One of the most popular of all Winchester arms, the 1866 was widely used in opening the West and, in company with the Model 1873, is the most deserving of Winchesters to claim the legend ‘The Gun That Won the West.’”⁴⁴ “Although the international sales for the 1866 were substantial, the 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.”⁴⁵

The M1866 was touted as holding “eighteen charges, which can be fired in nine seconds.”⁴⁶ “The Indians labeled these guns the ‘many-shots’

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 35.

⁴⁶ LOUIS A. GARAVAGLIA & CHARLES G. WORMAN, FIREARMS OF THE AMERICAN WEST 1866–1894, at 128 (1985).

or ‘heap-firing.’”⁴⁷ In 1876, Indians used the M1866 and 1861 Henry rifles in their victory at the Battle of Little Bighorn, commonly known as “Custer’s Last Stand.” Consequently, “besides being outnumbered, Custer’s men were generally outgunned.”⁴⁸

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 1875.⁴⁹ Cody emphasized its usefulness “for general hunting, or Indian fighting,” Cody used it to stop a charging bear, putting “more lead in him than he could comfortably digest.”⁵⁰ Many configurations of the M1873 included magazines of greater than 15 rounds.⁵¹

⁴⁷ WILSON, *supra* note 42, at 32.

⁴⁸ *Id.*

⁴⁹ *Id.* at 55.

⁵⁰ *Id.*

⁵¹ NORM FLAYDERMAN, *FLAYDERMAN’S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES* 307-09 (9th ed. 2007).

The Evans Repeating Rifle was also introduced in 1873. It held 34 rounds.⁵²

Handguns using detachable magazines were introduced in 1862.⁵³ Moreover, handguns capable of firing multiple shots have existed in America since Plymouth Colony. Some of the first pilgrims owned blunderbusses, which could fire roughly 20 projectiles simultaneously.⁵⁴ Roughly 150 years later, the British confiscated 38 blunderbusses from Bostonians after the Battle of Lexington.⁵⁵

In the 1830s, the popular pepperbox handguns were introduced. These pistols had multiple barrels—some as many as 24—that could fire sequentially.⁵⁶ Pin-fire revolvers, capable of firing up to twenty-one

⁵² DWIGHT DEMERITT, *MAINE MADE GUNS & THEIR MAKERS* 293–95 (rev. ed. 1997); FLAYDERMAN, *supra* note 51, at 694.

⁵³ WINANT, *supra* note 36, at 244-45.

⁵⁴ *See* WILLIAM ELLIOT GRIFFIS, *YOUNG PEOPLE'S HISTORY OF THE PILGRIMS* 297 (1920).

⁵⁵ 1 DAVID RAMSAY, *THE HISTORY OF THE AMERICAN REVOLUTION* 245 (1811).

⁵⁶ JACK DUNLAP, *AMERICAN BRITISH & CONTINENTAL PEPPERBOX FIREARMS* 148-49, 167 (1964).

consecutive rounds, entered the market in the 1850s.⁵⁷ In 1866, the 20-round Josselyn belt-fed chain pistol was introduced. Other chain pistols had greater capacities.⁵⁸

The first functional semi-automatic firearm was the Mannlicher Model 85 rifle, invented in 1885.⁵⁹ Mannlicher introduced new models in 1891, 1893, and 1895.⁶⁰ Additionally, numerous semi-automatic handguns utilizing detachable magazines were introduced before the turn of the century: including the Mauser C96,⁶¹ Bergmann Simplex,⁶² Borchardt C-93,⁶³ Borchardt M1894,⁶⁴ Fabrique Nationale M1899,⁶⁵

⁵⁷ WINANT, *supra* note 36, at 67-70; JIM SUPICA ET AL., TREASURES OF THE NRA NATIONAL FIREARMS MUSEUM 48-49 (2013).

⁵⁸ WINANT, *supra* note 36, at 204, 206.

⁵⁹ U.S. NAVY SEAL SNIPER TRAINING PROGRAM 87 (2011).

⁶⁰ JOHN WALTER, RIFLES OF THE WORLD 568-69 (3rd ed. 2006).

⁶¹ MARTIN DOUGHERTY, SMALL ARMS VISUAL ENCYCLOPEDIA 84 (2011).

⁶² *Id.* at 85.

⁶³ Leonardo M. Antaris, *In the Beginning: Semi-Automatic Pistols of the 19th Century*, AMERICAN RIFLEMAN, Jan. 4, 2018.

⁶⁴ *Springfield Armory Museum – Collection Record*, REDISCOV.COM, available at: [HTTP://WW2.REDISCOV.COM/SPRING/VFPCGI.EXE?IDCFI
LE=/SPRING/DETAILS.IDC,SPECIFIC=9707,DATABASE=OBJECTS](http://ww2.rediscov.com/spring/vfpcgi.exe?idcfile=/spring/details.idc,specific=9707,database=objects).

⁶⁵ Antaris, *supra* note 63.

Mannlicher M1896 and M1897,⁶⁶ Luger M1898 and M1899,⁶⁷ Roth-Theodorovic M1895, M1897, and M1898,⁶⁸ and the Schwarzlose M1898.⁶⁹

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

In dismissing the significance of the lack of nineteenth-century restrictions, the District Court said: “While there were no restrictions on magazine capacity in the late 1800’s, the concept is nonsensical—semiautomatic weapons with detachable magazines did not exist.” CF, p 529. As demonstrated above, this is not true.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

B. Nineteenth-Century Mass-Shootings

The District Court further trivialized the significance of the lack of nineteenth-century restrictions by stating:

the present phenomenon of mass shootings in which dozens of innocent people are shot and killed by an assailant who can fire dozens or hundreds of rounds of ammunition as quickly as he can pull a trigger and without reloading would not even have been imagined when Colorado became a state.

Id. In truth, mass-killings committed with firearms were not uncommon in territorial days. Many examples are provided above.

What is more, the Sand Creek Massacre was one of the most atrocious mass-killings ever committed on American soil. On November 29, 1964, “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.”⁷⁰

Mass-shootings were not limited to Colorado. For instance, two particularly grisly massacres in neighboring states occurred within days

⁷⁰ 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>.

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 4.⁷¹ The Indians then shot Hennessey's men, and tied Hennessey to his wagon “and set it afire burning him alive.”⁷² Days later, in Kansas, a group of Cheyennes ambushed a surveyor and his party (which included children) and mutilated their bodies, in what became known as the Short Massacre.⁷³ 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 extraordinarily 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.

⁷¹ 13 THE WORLD TO-DAY: A MONTHLY RECORD OF HUMAN PROGRESS 681 (1907).

⁷² LAURENCE E. HANNA, THE LIFE AND WRITINGS OF LAURENCE E. HANNA 182 (2016).

⁷³ 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>.

CONCLUSION

The District Court's decision should be reversed.

Respectfully submitted this 22nd day of January 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2018, a true and correct copy of the foregoing was served on the following:

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