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On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2017CA1502 District Court, City and County of Denver Case No. 2013CV33879	
Petitioners: ROCKY MOUNTAIN GUN OWNERS, a Colorado nonprofit corporation; NATIONAL ASSOCIATION FOR GUN RIGHTS, INC., a Virginia non-profit corporation; and JOHN A. STERNBERG v. **Respondent:** JARED S. POLIS, in his official capacity as Governor of the State of Colorado	**▲COURT USE ONLY▲**
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AMICUS BRIEF OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF RESPONDENT JARED S. POLIS

AMICUS CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Colorado Appellate Rules 29 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 29(d).

[✓] It contains 4,715 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colorado Appellate Rules 29 and 32.

MORRISON & FOERSTER LLP

s/ Nicole K. Serfoss

Morrison & Foerster LLP
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Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") respectfully files this amicus brief in support of the position of Respondent, Jared S. Polis, in his official capacity as Governor of the State of Colorado.

IDENTITY AND INTEREST OF AMICUS CURIAE

Giffords Law Center is a national nonprofit organization dedicated to reducing gun violence. The organization was founded in 1993 after a gun massacre at a San Francisco law firm, and was renamed Giffords Law Center after joining forces with the gun safety organization led by former Congresswoman Gabrielle Giffords. Giffords Law Center has provided legal expertise in support of effective gun safety laws and other violence-prevention policies for over two decades. The organization has provided informed analysis of social science research and constitutional law as an amicus in many pivotal firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), among others.

Giffords Law Center has a special interest in participating as an amicus in this case because it involves a challenge to Colorado public safety legislation likely and intended to reduce the number of lives lost to gun violence.

SUMMARY OF THE ARGUMENT

The Court of Appeals did not err in applying the reasonable exercise test set forth in *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994). The

reasonable exercise test is the well-established test for evaluating state constitutional challenges to gun laws, not only in Colorado but in dozens of jurisdictions. Nothing in *Heller* or *McDonald* requires Colorado to abandon its long-held interpretation of its own state constitution. Colorado should join numerous other states in affirming that, post-*McDonald*, the reasonable exercise test remains the proper standard of review in assessing challenges to gun laws under state constitutional provisions concerning the right to keep and bear arms.

Under the *Robertson* reasonable exercise test, House Bill 13-1224 ("HB 1224")—which restricts the capacity of ammunition magazines to no more than 15 rounds—survives. Yet even if this Court were to abandon Colorado's tradition and precedent in favor of the two-step test federal courts have applied in Second Amendment challenges to large capacity magazine ("LCM") bans, HB 1224 would survive. Federal appellate courts around the country have unanimously upheld LCM bans similar to—and even more restrictive than—the one at issue here. This Court should do the same.

ARGUMENT

I. The "Reasonable Exercise" Standard of Review Established in *Robertson* Is Not Rational Basis Review.

For over two decades, Colorado courts have applied the "reasonable exercise" test established in *Robertson* when reviewing claimed violations of the

Colorado right to keep and bear arms. This test holds that "the state may regulate the exercise of [the right to keep and bear arms] under its inherent police power so long as the exercise of that power is reasonable." *Robertson*, 874 P.2d at 328. A regulation "is within the state's police power if it is reasonably related to a legitimate governmental interest such as the public health, safety, or welfare." *Id.* at 331 (citations omitted). The reasonable exercise test differs from rational basis review because it is a mixed question of fact and law, and asks whether the ordinance "impose[s] such an onerous restriction on the right to bear arms as to constitute an unreasonable or illegitimate exercise of the state's police power." *Id.* at 333; *see also Students for Concealed Carry on Campus, LLC v. Regents, Univ. of Colo.*, 280 P.3d 18, 28-29 (Colo. App. 2010) ("*Students*") ("whether challenged legislation is a reasonable exercise of the state's police power is a mixed factual and legal question"), *aff'd*, 271 P.3d 496 (Colo. 2012).

In contrast, the rational basis test is a question of law alone. *Schutz v. Thorne*, 415 F.3d 1128, 1136 (10th Cir. 2005) ("Under rational basis review, a 'legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'") (citation omitted). Rational basis review asks only whether the challenged regulation bears a "rational relationship" to a "legitimate governmental purpose." *See, e.g.*, *Heller*

v. Doe, 509 U.S. 312, 320 (1993). On rational basis review, the stated legislative purpose for a statute bears "a strong presumption of validity… and those attacking the rationality of the legislative classification have the burden to 'negate every conceivable basis which might support it.'" *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993) (internal citations omitted); *see also Pace Membership Warehouse, Div. of K-Mart Corp., v. Axelson*, 938 P.2d 504, 507 (Colo. 1997) ("A statute can only be stricken under the rational basis standard if there exists no reasonably conceivable set of facts to establish a rational relationship between the statute and a legitimate governmental purpose").

In *Students*, the Colorado Court of Appeals carefully considered *Robertson*'s reasonable exercise test and concluded: "Rational basis review and the reasonable exercise test are distinguishable. The reasonable exercise test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare." 280 P.3d at 28 (internal quotations and citations omitted). The Court of Appeals explained that the *Robertson* court was "well aware that the rational basis test existed," *id.* at 26, but avoided "either rational basis or strict scrutiny review." *Id.* at 28. Instead, the *Robertson* court

adopted a test without the extremely deferential presumptions that attach to the rational basis test. *Id.* at 28-29.

Other jurisdictions also recognize that the reasonable exercise test is distinct from the rational basis test. *See, e.g.*, *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003) ("[W]e find the correct test to be whether or not the restriction. . .is a reasonable exercise of the State's inherent police powers. Such a test should not be mistaken for the rational basis test."); *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1223 (N.H. 2007) (reasonable exercise test differs from rational basis test).

The sole Colorado decision suggesting otherwise was wrongly decided. In *Trinen v. City and County of Denver*, 53 P.3d 754 (Colo. App. 2002), the Court of Appeals stated that "by requiring that restrictions on the right be only reasonable, rather than necessary," the *Robertson* court "essentially applied the rational basis test." *Id.* at 757. This understates the court's scrutiny in *Robertson*. Under rational basis, the court could have disposed of the challenge with "any conceivable rationale." *Students*, 280 P.3d at 28. Instead, the court cited an array of factual evidence in finding that the ordinance (which banned the sale or possession of assault weapons in Denver) was "reasonably related" to a government interest in public safety. *Robertson*, 874 P.2d at 332-33. This

included evidence that assault weapons were often and increasingly used for criminal purposes; that assault weapons with features like folding stocks were difficult for law enforcement to detect; and that the ordinance only prohibited a "narrow class of weapons," such that "there [were] literally hundreds of alternative ways in which citizens may exercise the right to bear arms in self-defense." *Id*. at 333. The scrutiny applied in *Robertson* far exceeded rational basis review.

Moreover, *Trinen* incorrectly assumed that the *Robertson* court applied the rational basis test because it "implicitly" found that the right to keep and bear arms was "not a fundamental right." *Trinen*, 53 P.3d at 757. But in fact, *Robertson* explicitly stated that "this case does not require us to determine whether that right is fundamental." *Robertson*, 874 P.2d at 328. It did not need to decide this because the reasonable exercise analysis is appropriate even in challenges implicating fundamental rights. As the *Robertson* court noted, other states that had recognized the right to keep and bear arms as fundamental have applied a reasonable exercise test. *Id.* at 330 (citing *Arnold v. Cleveland*, 616 N.E.2d 163 (Ohio 1993) (finding the right to armed self-defense is a fundamental right subject to the reasonable exercise of the state's police power) and *Rabbitt v. Leonard*, 413 A.2d 489 (Conn. Super. Ct. 1979) (same)).

In sum, as articulated by *Students*, the reasonable exercise test is distinct from rational basis review. It is a mixed question of law and fact; it lacks the presumptions that attach to traditional rational basis review; and it requires a stronger showing regarding the validity of a regulation burdening the right to keep and bear arms than is required under rational basis review. Its use remains as appropriate today as it has been for the last quarter century.

II. The Court of Appeals Did Not Err in Applying the *Robertson* Reasonable Exercise Standard After the United States Supreme Court's Decision in *McDonald*.

Prior to the United States Supreme Court's ruling in *McDonald*, every state to consider the standard of review for challenges under state constitutional right to keep and bear arm provisions—42 states in total—applied the reasonable regulation standard. *See* Adam Winkler, *The Reasonable Right to Bear Arms*, 17 Stan. L. & Pol'y Rev. 597, 598 (2006) (noting that "the uniform application of a deferential 'reasonable regulation' standard" to laws affecting the right to keep and bear arms is "the most prominent feature of state law in this area.").

Since *McDonald* was decided nearly 10 years ago, many state courts (across every region of the country) have continued to apply a reasonable regulation standard to challenges under state constitutional rights to keep and bear arms. *See, e.g.*, *State v. Jorgenson*, 312 P.3d 960, 964 (Wash. 2013) (post-*McDonald*,

concluding that the "firearm rights guaranteed by the Washington Constitution are subject to reasonable regulation pursuant to the State's police power"); *Hertz v. Bennett*, 751 S.E.2d 90, 96 (Ga. 2013) (post-*McDonald*, rejecting state constitutional challenge to licensing regulation and noting "the recognized authority of the State to enact reasonable regulations under its general police power") (citation omitted); *State v. Christian*, 307 P.3d 429, 437-38 (Or. 2013) (post-*McDonald*, rejecting challenge under state right to keep and bear arms provision and noting legislature's authority to enact reasonable regulations to promote public safety); *People v. Schwartz*, No. 291313, 2010 WL 4137453, at *4 (Mich. Ct. App. Oct. 21, 2010) (post-*McDonald,* applying reasonableness test and explaining "[t]he recent decisions by the Supreme Court of the United States do not implicate the proper interpretation and scope of this state's guarantee of the right to bear arms"); *State v. Flowers*, 808 N.W.2d 743, 2011 WL 6156961, at *1, *4 (Wis. Ct. App. Dec. 13, 2011) (post-*McDonald,* noting that "nothing in *Heller*…has the effect of overruling our supreme court's decision" and that the proper question is whether "the statute is a reasonable exercise of police power") (citation omitted); *State v. Fernandez*, 808 S.E.2d 362, 366 (N.C. Ct. App. 2017) (post-*McDonald*, noting that a regulation of the right to keep and bear arms must

"be at least 'reasonable and not prohibitive, and must bear a fair relation to the preservation of public peace and safety.'") (citation omitted).

These cases are instructive and underscore why Colorado similarly can and should continue to apply the reasonable exercise standard. In *State v. Jorgenson*, for example, the Washington Supreme Court found that "the state and federal rights to bear arms have different contours and mandate separate interpretation," noting as factors the textual differences between the state and federal constitutional provisions,[1] Washington's constitutional history, and firearm ownership's position as an area of state interest and concern. 312 P.3d at 963-64. The *Jorgenson* court went on to note that it had long held that the firearm rights guaranteed by the Washington Constitution were subject to reasonable regulation pursuant to the State's police power and that "*Heller* and *McDonald* left this police power largely intact." *Id.* at 964.

Heller and *McDonald* in no way limited Colorado's right to interpret its own constitution. *See generally Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."). As the Michigan Court of Appeals

[1] The Colorado Supreme Court has previously noted that Washington's constitutional right to keep and bear arms is "closely analogous" to the right guaranteed under the Colorado Constitution. *Robertson*, 874 P.2d at 327, n.6.

explained, *Heller* and *McDonald* "do not implicate the proper interpretation and scope of this state's guarantee of the right to bear arms; the courts of this state are free to interpret our own constitution without regard to the interpretation of analogous provisions of the United States Constitution." *People v. Schwartz*, 2010 WL 4137453, at *4 (citation omitted); *see also Rocky Mountain Gun Owners v. Hickenlooper*, 371 P.3d 768, 773 (Colo. App. 2016) ("*RMGO I*") (the construction and application of the Colorado constitution are "matters peculiarly within the province of the Colorado Supreme Court.").

And, as the Washington Supreme Court noted in *Jorgenson*, firearm regulations are a matter of state interest and concern. 312 P.3d at 964-65. They implicate the State's core role of protecting its citizens. *See generally* Winkler, *supra,* at 597 (quoting *People v. Blue*, 544 P.2d 385, 390-91 (Colo. 1975)) ("the legislative power to regulate arms is an inherent part of the 'police power'—or, as the Colorado Supreme Court characterized it, the 'state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people.'"). In adopting the reasonable exercise test in *Robertson*, the Colorado Supreme Court carefully considered its long-established precedent that "[t]he right to bear arms is not absolute, and it can be restricted by the state's valid exercise of its police

power." *Robertson*, 874 P.2d at 329 (citing *People v. Garcia*, 595 P.2d 228, 230 (Colo. 1979)). Nothing about *Heller* or *McDonald* requires Colorado to abandon its long-held interpretation of its own constitution.

Even if the U.S. Supreme Court *could* dictate to this Court what test to apply in interpreting the Colorado Constitution (and, of course, it cannot), inferring that it mandated any particular methodology here would be particularly inappropriate because neither *Heller* nor *McDonald* mandated a specific test even for Second Amendment challenges under the federal constitution. "*Heller* is not authority for imposition of a particular [] test because '[t]he Court resolved the Second Amendment challenge in *Heller* without specifying any doctrinal 'test' for resolving future claims'… *Heller* does not mandate a different test from the *Cole* reasonableness test." *State v. Brown*, No. 2011AP2049-CR, 2012 WL 1290692, at *6 (Wis. Ct. App. Apr. 17, 2012) (citation omitted). The *Heller* court specifically acknowledged that it was declining to establish "a level of scrutiny for evaluating Second Amendment restrictions," explaining that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field." *Heller*, 554 U.S. at 634-35.

In line with the well-reasoned decisions of other states post-*McDonald*, this Court should affirm that challenges under the state constitutional right to keep and bear arms continue to be evaluated under a reasonable exercise test.

III. HB 1224 Does Not Violate the Right to Keep and Bear Arms as Set Forth in Article II, Section 13 of the Colorado Constitution.

i. HB 1224 Is Constitutional Under Colorado's Well-Established Reasonable Exercise Test.

The Colorado General Assembly passed HB 1224 in the wake of two mass shootings that collectively took the lives of twenty-five people and injured dozens more. *Rocky Mountain Gun Owners v. Hickenlooper*, No. 17CA1502, 2018 WL 5074555, at *1 (Colo. App. Oct. 18, 2018) ("*RMGO II*"). In both instances, the shooters used LCMs that allowed them to fire rapidly for a sustained period of time, without having to pause to reload. *Rocky Mountain Gun Owners v. Hickenlooper*, No. 2013CV33879, 2017 WL 4169712, at *2 (Colo. Dist. Ct. July 28, 2017) ("*RMGO Dist. Ct.*"). With LCMs, the shooters hit more victims with more bullets. *Id.* The legislature responded by passing HB 1224, which limits the sale, possession, and transfer of LCMs for firearms subject to some exceptions. *See* C.R.S. §§ 18-12-301, *et seq*. The legislature's aim in passing HB 1224 was to "reduce the number of victims in mass shootings by limiting the number of rounds that can be fired before the shooter has to reload." *See RMGO Dist. Ct.*, 2017 WL

4169712, at *12; *see also id.* at *6-7 (discussing at length the legislative history behind C.R.S. §§ 18-12-301, *et seq*.).

In *RMGO II*, the Court of Appeals correctly applied the reasonable exercise test and affirmed the district court's finding that HB 1224 is constitutional. First, in assessing the legislative purpose underlying HB 1224, the Court of Appeals deferred to the district court's factual findings and concluded that the purpose of the LCM ban is to reduce the lethality of mass shootings, which "reasonably furthers a legitimate governmental interest in public health and safety." *RMGO II*, 2018 WL 5074555, at *4. The Court of Appeals also agreed with the district court's conclusion that the LCM ban is reasonably related to the legislation's stated purpose of reducing the lethality of mass shootings. *Id.* The Court of Appeals gave credence to the district court's factual findings that LCMs are used in nearly 50% of mass shootings; that mass shootings have become more frequent in recent decades; that all mass shootings in Colorado over the last 50 years involved LCMs; and that, when LCMs are used in mass shootings, 40% more victims die, more than twice as many victims are shot, and the number of gunshot wounds per victim increases substantially. *Id.* at *4-5. Finally, the Court of Appeals correctly affirmed the district court's conclusion that the LCM ban is

directed toward the specific problem of mass shootings—a conclusion supported by the plain text of the statute and legislative history. *Id.* at *4-6.

Petitioner fails to assert a single meritorious argument as to why this Court should find that HB 1224 fails the reasonable exercise test, and the arguments Petitioner does make have been soundly rejected by other courts.[2] This Court should affirm the lower court's decision.

ii. HB 1224 Also Passes Constitutional Muster Under the Consensus Framework for Resolving Second Amendment Challenges.

As explained, *supra*, the *Robertson* reasonable exercise test is the correct test for Colorado courts to apply when assessing whether a statute complies with the Colorado right to keep and bear arms. Yet even if this Court chose to apply a new standard in light of developments in the Second Amendment doctrine evolving in the federal courts, the LCM ban would still survive.

Since *Heller* and *McDonald*, all of the federal courts of appeal to have adopted a specific framework for Second Amendment claims—including the First,

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[2] Just this June, a Vermont court upheld a statute banning LCMs—a statute similar to Colorado's HB 1224—and did so under both the reasonableness test and intermediate scrutiny. *See State of Vermont v. Misch*, No. 173-2-19 Bncr, slip op. (Vt. Sup. Ct. June 28, 2019). The Vermont court reasoned that the LCM ban is constitutional under the reasonableness test because it "advances the people's public-safety interest in a modest and reasonable way while respecting the right to bear arms" and "[t]he balance struck does not contravene" the state constitution. *State of Vermont*, slip op. at 6.

Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits—have adopted a two-step approach in which the second step involves heightened scrutiny.[3] Under this two-step approach, a court first asks whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017). "If the answer is no, then the challenged law is valid." *Id.* (citation and internal quotation marks omitted). If, however, the law does impose a burden on conduct protected by the Second Amendment, the court then determines the appropriate level of scrutiny based on whether and how severely a particular law burdens the core Second Amendment right. *Worman v. Healey*, 922 F.3d 26, 38 (1st Cir. 2019).

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[3] *Gould v. Morgan,* 907 F.3d 659, 672 (1st Cir. 2018*)*; *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010); *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011); *Nat'l Rifle Ass'n v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc); *Baer v. Lynch*, 636 F. App'x 695, 698 (7th Cir. 2016); *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1252-53 (D.C. Cir. 2011) (applying intermediate scrutiny to prohibition on assault weapons and large capacity ammunition magazines); *see also Woollard v. Gallagher*, 712 F.3d 865, 876-78 (4th Cir. 2013) (applying intermediate scrutiny to laws concerning weapons outside of the home, but noting that strict scrutiny may apply to restrictions on the "core right of self-defense in the home") (quotations and citation omitted).

Since *Heller*, federal appellate courts have held or assumed at step one of the framework that LCM bans do implicate the Second Amendment but determined at step two that intermediate scrutiny is the appropriate standard—and that LCM bans survive such scrutiny. *See, e.g.*, *Worman*, 922 F.3d at 38 (upholding Massachusetts's LCM ban); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (upholding New York's and Connecticut's LCM bans); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106 (3d Cir. 2018) (upholding New Jersey's LCM ban); *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (affirming denial of preliminary injunction regarding city's LCM ban); *Heller II*, 670 F.3d 1264 (upholding the District of Columbia's LCM ban); *see also Kolbe v. Hogan*, 849 F.3d 114, 137-38 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017) (upholding Maryland's LCM ban, finding that LCMs fall outside the protection of the Second Amendment and, in any event, that the ban was constitutional under intermediate scrutiny); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) (upholding local ordinance prohibiting LCMs without expressly applying intermediate scrutiny).

For example, in upholding Massachusetts's LCM ban, the First Circuit found that intermediate scrutiny was appropriate because the ban "does not heavily burden the core right of self-defense in the home." *Worman*, 922 F.3d at

37. Then, applying intermediate scrutiny, the court found that (i) Massachusetts "indubitably has compelling governmental interests in both public safety and crime prevention," as "few interests are more central to a state government than protecting the safety and well-being of its citizens"; and (ii) the fit between those interests and the act at issue was reasonable. *Id.* at 39 (internal quotations and citations omitted). The First Circuit noted that its view "comports with the unanimous weight of circuit-court authority analyzing Second Amendment challenges to similar laws." *Id.* at 39.

Here, in *RMGO II*, the Court of Appeals concluded that the regulation of LCMs does not burden a person's right to use arms in self-defense. *RMGO II*, 2018 WL 5074555, at *6. This could end the inquiry under the federal two-step approach. *See Kolbe*, 849 F.3d at 133, 137. But even if the inquiry continued to step two, HB 1224 should be upheld under intermediate scrutiny, just as it was by the district court below. The court found that an LCM restriction is "directly and substantially related to the fundamentally important governmental interest of protecting and preserving lives." *RMGO Dist. Ct.*, 2017 WL 4169712, at *12. While noting that the intermediate scrutiny analysis "should be unnecessary," it wrote:

> [T]he 15 round limit does not hinder the use of arms in defense of persons, homes, or property. The evidence presented

> established that the need to fire more than 15 rounds of ammunition without reloading does not arise in such situations, but that the ability to fire a high number of rounds without reloading serves to increase both the number of people who will be shot and the number of people who will be killed in mass shootings. The number of mass shootings has increased dramatically in recent years and is likely to continue to increase. Based on these facts, the effort to restrict LCMs is directly and substantially related to the fundamentally important governmental interest of protecting and preserving lives.

Id.

Thus, even if this Court replaces Colorado's long-held reasonableness test with the test federal courts use for Second Amendment challenges to LCM restrictions, HB 1224 would unquestionably survive.[4]

iii. This Court Should Not Adopt Petitioner's Proposed "Common Use" Test.

Petitioner urges this Court to adopt what it calls a "common use" test (that it claims derives from *Heller*) to analyze regulations that impact the Colorado Constitution's right to keep and bear arms. (*See* Pet. Opening Br. at 36-37.) This argument is a red herring. The *Heller* decision never mentioned a "common use"

[4] It is notable that Petitioner did not challenge HB 1224 under the Second Amendment. Had Petitioner thought that it could prevail on a Second Amendment claim, it presumably would have brought one. *See generally Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050 (D. Colo. 2014) (rejecting Second Amendment challenge to C.R.S. § 18-12-302), *vacated on standing grounds by Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016).

test; this is a creative repackaging of the language used by the *Heller* court to describe the Second Amendment's scope. *Heller,* 554 U.S. at 624. The Court wrote that the Second Amendment applies only to the types of weapons "in common use at the time for lawful purposes like self-defense." *See id.* at 625 ("the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes") (citation and internal quotation marks omitted). Petitioner argues that the "common use" test asks three questions, which if answered affirmatively, render the challenged regulation unconstitutional. (*See* Pet. Br. at 37 (quoting *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019) ("Is the firearm hardware commonly owned?"; "Is the hardware commonly owned by law-abiding citizens?"; "Is the hardware owned by those citizens for lawful purposes?").) Petitioner's proposed "common use" test has no support outside of that provided by a single California trial judge in a case that is currently on appeal. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019).

Instead, as explained by the federal district court in *Colorado Outfitters Association v. Hickenlooper* (vacated on standing grounds), federal courts have interpreted the common use language in *Heller* as a factor in the first part of the two-step analysis in Second Amendment challenges—not as a test itself. 24 F. Supp. 3d at 1065 ("[A] court must make a threshold determination of whether the

challenged law burdens conduct falling within the Second Amendment's protection. As part of this determination, the Court may consider . . . [among other things] whether the affected firearms are currently in 'common use'."). If the court determines that the regulation implicates a firearm that is in "common use," the court then "must determine what level of constitutional scrutiny to apply" to analyze the challenged regulation. *Id.* at 1066.

Federal appellate courts agree that the common use question is merely one factor relevant to the first part of the two-step test. *See New York State Rifle & Pistol Ass'n*, 804 F.3d at 254-55 (first considering "whether the challenged legislation impinges upon conduct protected by the Second Amendment" including "the sorts of weapons that are [] in common use," and then applying intermediate scrutiny) (citation and internal quotation marks omitted); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) (same); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010) (same); *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (same); *Heller II*, 670 F.3d at 1260-64 (same).

Accordingly, even if this Court were to apply the federal Second Amendment framework, and even if the Court were to determine that LCMs are in "common use" and that the LCM ban under HB 1224 burdened conduct protected

by the state constitution, the federal two-step standard would lead the court to apply intermediate scrutiny, under which HB 1224 survives.

CONCLUSION

For these reasons, the Court should affirm the decision of the Colorado Court of Appeals.

Dated: August 12, 2019

Respectfully submitted,

/s/ Nicole K. Serfoss

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2019, I served via Colorado Courts Efiling System a true and correct copy of the foregoing AMICUS BRIEF OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF RESPONDENT JARED S. POLIS properly addressed to the following:

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