SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2017CA1502; Denver District Court, 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**▲ Case No. 2018SC0817
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GOVERNOR POLIS'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g).

It contains 9,211 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

> Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled.

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

/s/ Eric R. Olson

ERIC R. OLSON, 36414*
Solicitor General

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INTRODUCTION

Mass shootings have powerfully impacted Colorado. At Columbine High School in 1999 and again in the Aurora theater shooting in 2012, the shooter used a large capacity magazine (LCM). To reduce the firepower available to mass shooters and protect law enforcement officers, in 2013 Colorado enacted a firearm safety law that, relevant here, limited the capacity of newly-acquired detachable magazines to 15 rounds of ammunition. Petitioners challenge this law, House Bill 13-1224[1], solely under article II, § 13 of the Colorado Constitution.

The factual record in this case demonstrates that Colorado's LCM restriction meets constitutional standards. The trial court found that limiting magazines to 15 rounds does not appreciably impact Coloradans ability to defend themselves but can decrease the lethality of mass shootings by reducing the number of people who will be shot during a mass shooting and the number of times those people will be shot. Because the record below demonstrates that this law provides real public safety benefits and does not sweep constitutionally protected

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[1]Codified at § 18-12-301 et seq., C.R.S. (2018).

activities within its reach, the State respectfully requests that this Court affirm.

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STATEMENT OF THE CASE

The State does not dispute Petitioners' statement of the issues presented or their statement of the case.

SUMMARY OF ARGUMENT

Petitioners challenge the LCM ban solely under the Colorado Constitution's right to bear arms provision, article II, § 13. The Court need not, and should not, turn to federal constitutional law to resolve this state constitutional issue.

Colorado's long-standing approach for analyzing whether a law violates the state right to bear arms—the reasonable exercise standard in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994)—remains good law after *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The court of appeals therefore correctly relied on *Robertson* in finding the LCM ban constitutional.

Though the Court should not apply the federal constitutional test in this state constitutional challenge, the LCM ban—like nearly every

LCM ban challenged throughout the country—satisfies the federal intermediate scrutiny test as well. And there is no basis to impose the special strict scrutiny test that looks to customary use proposed by Petitioners. That test draws no support from Colorado law.

This Court should resolve the conflict between *Students for Concealed Carry v. Regents*, 280 P.3d 18 (Colo. App. 2010) and *Trinen v. City and County of Denver*, 53 P.3d 754 (Colo. App. 2002) by clarifying that *Trinen* is not good law and that *Robertson* requires more than rational basis scrutiny.

The findings from the trial demonstrate that the LCM ban easily satisfies article II, § 13. The LCM ban creates real and meaningful public safety improvements by reducing the scope and severity of mass shootings like Columbine and Aurora, making these tragedies less likely to recur.

The trial court found that the LCM ban does not diminish the ability of Coloradans to defend themselves. Trial testimony from several witnesses indicated that neither citizens nor law enforcement face self-defense situations where they use anywhere close to 15 rounds. Nor

does the LCM ban limit in any meaningful way the type of firearms Coloradans may purchase.

Finally, the court of appeals found that the LCM ban does not cover magazines with removable baseplates that can be altered with third-party equipment to hold more than 15 rounds. The plain meaning of the statute, the trial court's findings of fact, and the official written interpretations by the Attorney General all support this interpretation.

ARGUMENT

I. The court of appeals did not err in assessing HB 13-1224 using the Robertson reasonable exercise standard.

Standard of Review and Preservation: Petitioners' statement of the standard of review is incomplete. Although the State agrees that questions of constitutional interpretation are reviewed *de novo*, the trial court below supported its constitutional interpretation with detailed findings of fact following a five-day bench trial. Those findings of fact are reviewed under the deferential clear error standard. *In re Marriage of de Koning*, 364 P.3d 494, 496 (Colo. 2016).

HB 13-1224 is presumed constitutional. *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo. 2006). Petitioners must prove its

unconstitutionality beyond a reasonable doubt, and for a facial challenge, as here, must demonstrate "no conceivable set of circumstances" under which it can be constitutionally applied. *Id.*

The State agrees this issue was properly preserved for appeal.

A. Colorado defines its own constitution and the standard for reviewing article II, § 13 challenges.

The court of appeals did not err in applying the reasonableness standard of review established in *Robertson* after *McDonald*. *McDonald*'s incorporation of the Second Amendment to the states defines neither the meaning of a state constitution—an independent source of law of a separate sovereign—nor the tests that states must employ when evaluating challenges under their state constitutions. *McDonald* established that the Second Amendment, like many other provisions in the Bill of Rights, is fully enforceable against the states via the Due Process Clause of the Fourteenth Amendment. 561 U.S. at 765. People may now challenge state law on Second Amendment grounds and, of course, the United States Supreme Court is the ultimate arbiter of what the Second Amendment means. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 8–9 (1995). Indeed, other plaintiffs

brought a Second Amendment challenge to HB 13-1224 in a federal lawsuit. *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016) (finding challengers did not have standing).

But that respect for the federal constitution does not require a state to conform its independent source of liberties to the federal constitution. State constitutions "remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics." *State v. Kennedy*, 666 P.2d 1316, 1323 (Or. 1983); *see also* Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 173–190 (2018). State and federal constitutions are "not parts of one legal building; each is its own structure. Their shapes may be different, as may their parts. Each may shield rights that the other does not. The ceiling of one may be lower than the floor of the other." *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998).

As a result, Colorado's state constitution need not set the very same limits or use the same test to assess a statute's constitutionality.

See People v. McKnight, 2019 CO 36, ¶ 38 (adopting different test under Colorado Constitution); *People v. Dist. Court*, 834 P.2d 181, 193 (Colo. 1992) (recognizing "our freedom to interpret our state constitutional provisions" differently than the Supreme Court's interpretations of the federal constitution); *People v. Young*, 814 P.2d 834, 842 (Colo. 1991) (emphasizing "our responsibility to engage in an independent analysis of state constitutional principles in resolving a state constitutional question"). Indeed, the "right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand." Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 179 (1984).

Colorado provides greater protections for some individual rights than the federal constitution. *See, e.g., Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1053–54 (Colo. 2002). And Colorado need not adopt the same test currently used by federal courts. *See Lujan v. Colo.*

State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982) (rejecting federal constitutional test for use in state constitutional challenge).

This Court's ability to define the test used to assess challenges under the *state* right to bear arms comes not just from Colorado's independent sovereign authority, but also from differences in the text of the two constitutional provisions.

In Colorado, "[t]he 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." Colo. Const. art. II, § 13.

This language departs from the text of the Second Amendment: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people keep and bear Arms, shall not be infringed."

In part because of this difference in language, Colorado extends the right to more people. *Compare People v. Nakamura*, 62 P.2d 246, 247 (Colo. 1936) (holding that article II, § 13 protects non-citizens), *with*

United States v. Carpio-Leon, 701 F.3d 974, 979 (4th Cir. 2012) (holding illegal aliens not protected by the Second Amendment and collecting cases reaching both results).

In the years following *McDonald*, other states have taken a wide variety of approaches when analyzing the right to bear arms in state constitutions. Some states continue to use a reasonableness standard. *See, e.g.*, *State v. Jorgenson*, 312 P.3d 960, 964 (Wash. 2013). Some amended their constitutions to specify the level of scrutiny that should be applied to state constitutional challenges. Mo. Const. art. I, § 23 (requiring strict scrutiny). Some followed the analysis in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and applied intermediate scrutiny to state constitutional challenges. *See, e.g.*, *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 666–67 (Del. 2014). And many states' highest courts have not had occasion to revisit the applicable level of scrutiny under state law post-*Heller*.

Some of these courts have held that the recent Second Amendment decisions do not bind them. *Jorgenson*, 312 P.3d at 964 (reading "the [state] Constitution's provisions independently of the

Second Amendment"); *People v. Schwartz*, No. 291313, 2010 WL 4137453, at *4 (Mich. Ct. App. Oct. 21, 2010) ("The 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; 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.").

This wide variety of approaches illustrates the role of the states in our federal system. The Supreme Court has often described states as "laboratories" to devise solutions to difficult contemporary problems. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). And particularly with state constitutional issues, "[i]t is fundamental that state courts be left free and unfettered by [the Supreme Court] in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.* 309 U.S. 551, 557 (1940).

Our constitution is an independent source of individual rights. On the right to bear arms, Colorado's constitution has a different text and scope than the Second Amendment. Colorado—and ultimately, this

Court—define our state constitution and the standard for reviewing challenges under it.

B. Colorado should continue *Robertson*'s reasonable exercise test.

When it comes to the right to bear arms, for the last 25 years, Colorado examines "whether the law at issue constitutes a reasonable exercise of the state's police power." *Robertson*, 874 P.2d at 329. *Robertson*'s "reasonable exercise" test assesses whether a restriction "is reasonably related to a legitimate governmental interest such as the public health, safety, or welfare." *Id.* at 331. This test aims to separate those restrictions that are so arbitrary or severe as to amount to a denial of the right from those restrictions that may burden the right but nonetheless leave open ample means to exercise the core of the right. *See Students*, 280 P.3d at 26, 28.

Two principles provide the foundation for Colorado's test. *First*, the core of the right to bear arms in Colorado is the right of self-defense. Article II, § 13 describes the right as one "to keep and bear arms in defense of his home, person and property." Colorado courts, therefore, focus on whether a firearms regulation sufficiently permits Coloradans

to exercise self-defense. *See Robertson,* 874 P.2d at 328–29 (tracing Colorado's line of cases). *Second*, the right to bear arms in Colorado is subject to reasonable regulation to protect public safety. *Id.* at 329. The Colorado Constitution does not grant "an absolute right to bear arms under all situations." *People v. Blue*, 544 P.2d 385, 391 (Colo. 1975).

The reasonable exercise test embraces these two principles by concentrating on whether a law imposes such an onerous restriction on the right to bear arms that it amounts to an illegitimate exercise of the police power. *Robertson*, 874 P.2d at 333; *Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972) (holding that regulation of the right to bear arms "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms").

Although *Robertson* fleshed out this test in the context of a challenge to a local assault weapons ban, which included a ban on LCMs, 874 P.2d at 326, state courts have long employed essentially the same analysis in a variety of situations covering who may bear arms and where and when they may bear them. *See, e.g., Nakamura*, 62 P.2d at 247 (striking down law barring non-citizens from owning arms);

Pillow, 501 P.2d at 745 (striking down law barring possession of weapons outside the home).

Contrary to Petitioners' argument, the reasonable exercise test differs from the rational basis test. Rational basis review asks "only whether it is conceivable that the governmental regulation bears a rational relationship to an end of government which is not constitutionally prohibited." *Students,* 280 P.3d at 27. The test does not consider the burden of compliance on the complaining party. *Town of Dillon v. Yacht Club Condo. Home Owners Ass'n*, 2014 CO 37, ¶ 24, 27–28. The reasonable exercise test, on the other hand, is far more robust, examining whether it is "an onerous restriction" on the right to bear arms or "significantly interfere[s]" with that right. *Robertson,* 874 P.3d at 333.

Other than *Trinen*, discussed below, no Colorado court has adopted the "deferential presumptions" that traditionally attach to rational basis review when the right to bear arms is at issue. *Students,* 280 P.3d at 28. And the State has never advocated that HB 13-1224 should be evaluated using mere rational basis review.

Rather, the Court should continue *Robertson*'s reasonable exercise test. The test has served Colorado well for decades and efficiently applies to a wide variety of facts and circumstances. And an independent standard grounded in state law has the added advantage of autonomy, separate and apart from the shifting landscape of federal law. As discussed below, the United States Supreme Court has not yet fully defined the contours of the Second Amendment or detailed the test to evaluate restrictions on the federal right. Colorado need not—and should not—vary its standard with evolving federal law when deciding cases, like this one, brought only under the state constitution.

C. If this Court does not reaffirm the reasonable exercise test, it should adopt the test currently used by most federal courts.

Alternatively, this Court should adopt the two-tier analysis that most federal courts have now coalesced around since *McDonald*. A reviewing court first determines whether the law burdens conduct falling within the scope of the Second Amendment and, if it does, applies an appropriate level of scrutiny. *See, e.g., United States v. Reese,* 627 F.3d 792, 800–01 (10th Cir. 2010).

Because nine states and many municipalities have LCM restrictions, several federal courts have applied this two-step framework to laws like Colorado's, providing useful guidance. Except for one outlier, which is currently on appeal[2]—*Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019)—federal courts have overwhelmingly found that LCM restrictions pass muster under the Second Amendment. *Worman v. Healey*, 922 F.3d 26, 41 (1st Cir. 2019); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney General*, 910 F.3d 106, 122–24 (3d Cir. 2018) ("*N.J. Rifle*"); *Kolbe v. Hogan*, 849 F.3d 114, 146 (4th Cir. 2017); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015) ("*NYSRPA*"); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 419 (7th Cir. 2015); *Fyock v. City of Sunnyvale*, 779 F.3d 991,1001 (9th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011) ("*Heller II*"). In each of these cases, the LCM ban prohibited magazines larger than ten rounds, much more restrictive than Colorado's law. *See, e.g.*, *Worman*, 922 F.3d at 31. These federal decisions illustrate the application of the two-step federal

[2] *See* Ninth Circuit Case No. 19-55376.

approach and highlight the strikingly similar factual records in other cases.

The first step of the federal inquiry assesses whether a challenged regulation burdens conduct falling within the scope of the Second Amendment's guarantee. *NYSRPA*, 804 F.3d at 254. If it does not, then the inquiry is complete. *Id*. This step is grounded in *Heller*'s oft-repeated premise that, "the Second Amendment is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. The Second Amendment does not protect "weapons not typically possessed by law-abiding citizens for lawful purposes," or "dangerous and unusual weapons." *Id*. at 625, 627. Most federal circuits assessing LCM bans have assumed without deciding that LCMs enjoy some degree of protection under the Second Amendment, rendering the first step satisfied. *See, e.g., Worman*, 922 F.3d at 30.

At the second step, the rigor of judicial review "turns on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right." *Id.* at 36.

Courts have recognized that magazine limits do not disarm citizens or ban an entire class of weapons. Rather, a wide variety of weapons, including handguns, remain available; nearly all semi-automatic weapons operate fully with lower capacity magazines; and citizens may use multiple magazines. *See, e.g., NYSRPA*, 804 F.3d at 260. Federal courts also have emphasized a lack of evidence that LCMs are either necessary or widely used for defensive purposes. *See, e.g., Worman*, 922 F.3d at 37. As a result, most federal courts have concluded that LCM bans do not severely burden the core of the Second Amendment right. *See, e.g., id.*

The second step of the inquiry then proceeds to apply the appropriate level of scrutiny. Most federal courts apply familiar principles of intermediate scrutiny, asking whether there is "a substantial relationship or reasonable 'fit'" between the challenged law and a significant or important governmental interest. *Heller II*, 670 F.3d at 1263. This does not require a showing that the regulation was the least restrictive alternative available to the government. *See, e.g., N.J. Rifle*, 910 F.3d at 119.

Evaluating LCM bans, federal courts have overwhelmingly concluded that a state's interest in public safety is not just significant, it is compelling, and that that a ban substantially furthers the state's interest. *See, e.g., NYSRPA*, 804 F.3d at 261. In assessing the "fit" of LCM bans, courts recognize the "unique dangers" posed by LCMs, noting that they permit a shooter to fire large numbers of rounds quickly without reloading. *Worman*, 922 F.3d at 39. This feature results in large numbers of casualties and injuries in mass shootings. *See id*. Nearly every court has credited evidence that LCMs have been "the weapons of choice" in the deadliest mass shootings in our nation, *id*. at 39, and that they are frequently used to murder law enforcement officers. *Kolbe*, 849 F.3d at 126–27.

When applying intermediate scrutiny, federal circuits have afforded substantial deference to the judgments of legislatures, recognizing that legislatures are better equipped than the judiciary to make policy judgments about the risks posed by particular firearms. *See, e.g., NYSRPA*, 804 F.3d at 261.

If the Court does not continue *Robertson*'s reasonable exercise test, it should adopt the federal two-step analysis.

D. This Court should not adopt the strict standard advocated by Petitioners.

1. HB 13-1224 does not warrant heightened scrutiny, either in the form of strict scrutiny or a common use test.

Petitioners urge the Court to assess HB 13-1224 using strict scrutiny. But as the factual record demonstrates, Colorado's LCM ban does not strike near the heart of the right to bear arms. Because it does not impact the core of the right, the highest level of scrutiny is not warranted. *See, e.g., N.J. Rifle*, 910 F.3d at 117 ("[i]f the core Second Amendment right is burdened, then strict scrutiny applies; otherwise, intermediate scrutiny applies").

Petitioners and their amici urge this Court to declare that the right to bear arms in Colorado is fundamental. But courts decide constitutional questions only when the need is "clear and inescapable." *People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985). This Court has repeatedly found no need to apply any label to the nature of the right to bear arms in Colorado. *Robertson*, 874 P.3d at 331.

Similarly, because Petitioners challenge HB 13-1224 only under the state constitution, a comparison of the state and federal rights is not necessary. The questions presented in this case are narrow. To decide them, the Court need not fully resolve all possible questions about the meaning and scope of article II, § 13.

But even if the Court were to recognize at a high level that the right to bear arms in Colorado is fundamental, it does not follow that strict scrutiny is required. Strict scrutiny does not adhere any time a fundamental constitutional right is implicated. *See MacGuire v. Houston*, 717 P.2d 948, 952–54 (Colo. 1986) (finding law affected the fundamental right of association under federal and state constitutions, but that the injury to the right was "not of such character and magnitude to require strict scrutiny."); *see also* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 Const. Comment. 227, 229, 239 (2006)) ("[T]he old adage about laws infringing fundamental rights being subject to strict scrutiny remains a favorite of scholars, judges, and law students. And it is flatly wrong.").

Petitioners urge a particular form of heightened scrutiny, advocating a "common use" test, which would declare any arm constitutional if commonly owned. Op. Br. 36. But nothing in the text of article II, § 13 suggests that this is an appropriate test for the right described in Colorado's constitution. Nor does a simple common use test account for the two main principles underlying the application of article II § 13—self-defense and the State's protection of public safety. And a test based solely on common use does not square with this Court's description of heightened scrutiny, which typically asks whether a statute is narrowly tailored to meet a compelling state interest. *Robertson*, 874 P.2d at 335.

In support of their common use test, Petitioners cite a single district court case, *Duncan*, 366 F. Supp. 3d at 1142. But *Duncan* is a clear outlier and on appeal. And other courts have rejected the logic of a simple common use test. *Kolbe*, 849 F.3d at 141 (rejecting argument that constitutionality depends on the popularity of a weapon, not its dangerousness).

Because HB 13-1224 does not impinge on the core of Colorado's right to bear arms, this Court should reject both strict scrutiny and a common use test.

2. Colorado's history and traditions do not compel a different result.

In advocating for the highest level of scrutiny, Petitioners focus heavily on their telling of Colorado's history and traditions. Op. Br. 32–35. But courts have never defined the scope of Colorado's right to bear arms based on the State's history of firearms usage or regulation or by looking to the intent of the state constitution's framers. *See, e.g.*, *Robertson*, 874 P.2d 325; *Pillow*, 501 P.2d 744. Instead, as the courts below found, this case should turn on the facts about LCMs rather than a historical analysis.

Should this Court consider the history and traditions of Colorado, the record in this case provides considerable detail, including expert testimony, on the history of Colorado's regulation of firearms.[3] Contrary

[3] The trial court's adoption of this testimony in its extensive factual findings is entitled to deference under the clear error standard. *In re Marriage of de Koning*, 364 P.3d at 496. These facts were tested through

to Petitioners' claim of "a wealth of evidence" that Colorado's framers intended to protect the right to bear arms to a greater extent than the federal constitution or other states, Op. Br. 32, evidence from the time of Colorado's founding is limited and sheds no light on what Colorado's framers thought article II, § 13 meant. TR 05/02/17, p 152:1–13; 05/03/17, p 108:11–23. In fact, the records of the constitutional debates and the address to the people urging them to adopt the constitution contain no reference whatsoever to the right to bear arms. TR 05/02/17, p 152:10–13; 05/03/17, pp 108:24–109:10.

Petitioners emphasize testimony at trial that at the time of Colorado's founding, neither state nor local laws restricted the type of arms that Coloradans could possess. But the trial court's findings of fact establish a more complete view. Contrary to the popular myths of a lawless West, Colorado's founders "sought to implement the rule of law and bring the West into conformity with the practices from the Midwest and East that were familiar to them." CF, p 528. Early mining

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discovery and rigorous cross-examination, unlike Petitioners' and their amici's untested assertions from secondary sources.

communities "utilized a robust approach to what would now be called the police power." CF, p 529. And after statehood, "regulation at both the state and local level of issues related to firearms was common." *Id.* Public safety ordinances regulated concealed carry, firearm storage, gunpowder storage, public discharge, and a few municipalities even adopted general prohibitions on public carry. *Id.* "Some towns in Colorado had regulations related to firearms that were among some of the most restrictive in the country at the time." *Id.*[4]

Although Petitioners and their amici assert that large capacity firearms and even LCMs have been available for many years, evidence at trial established only that some repeating rifles were available – although not commonly available – in Colorado when article II, § 13 was

[4] These findings are consistent with undisputed testimony about the ideology of Colorado's framers. The framers were Reconstruction-Era Republicans who believed in using the regulatory authority of the State to address the issues of the day. TR 05/03/17, pp 89:2-4, 92:25-94:14, 96:9-100:10, 107:20-108:10. The constitution they drafted reflected this ideology, using the police power to tackle a wide range of public health and safety issues. TR 05/02/17, pp 159:3-161:14; 05/03/17, pp 114:10-118:10. Even Petitioners' expert historian conceded that regulation of the right to bear arms would not run afoul of the framers' intent. TR 05/02/17, p 168:16-19.

drafted. TR 05/02/17, pp 141:7–143:25. Petitioners did not establish the prevalence of such rifles at the time, TR 05/02/17, pp 146:14–17, 147:10–13, 148:6–9, 149:13–20, that arms capable of firing 20 or 30 rounds without reloading were common in Colorado in 1876, TR 05/02/17, pp 144:23–145:1, or that Colorado's framers confronted arms or magazines comparable to those regulated by HB 13-1224, TR 05/02/17, pp 144:23–1, 145:21–146:5, 147:3–9, 147:14–148:5. Overall, the record establishes that the problems confronting Colorado's framers were quite different than those presented to the General Assembly in 2013, illustrating the difficulties in making "cross-historical comparisons." TR 05/03/17, pp 209:18–210:9.

The available historical evidence supports the conclusion that Colorado's framers intended that the State could exercise its police power reasonably to address pressing social problems. The trial court, therefore, correctly concluded that "the evidence presented does not establish that Coloradans of the time had some heightened interest in ensuring access to a virtually unlimited range of firearms." CF, p 540.

II. This Court should resolve the conflict between Students and Trinen.

Standard of Review and Preservation: The standard of review is the same as stated above, page 4. The State agrees this issue was preserved.

Trinen mischaracterized *Robertson* as "essentially apply[ing] the rational basis test." 53 P.3d at 757. This incorrect characterization of the reasonable exercise test made *Trinen* an outlier when it was decided more than 15 years ago, and it remains so today. Later divisions of the court of appeals rejected *Trinen*'s view, instead recognizing that *Robertson* requires a more robust analysis. *See, e.g., People v. Cisneros*, 356 P.3d 877, 887–88 (Colo. App. 2014); *Students*, 280 P.3d at 26. No published decision in Colorado has followed *Trinen* to apply a rational basis test in a challenge brought under article II, § 13. As the Court addresses the continuing viability of *Robertson*'s reasonable exercise test, it should clarify that *Trinen* does not accurately apply *Robertson*.

III. Under any standard the Court may employ, Colorado's LCM ban satisfies article II, section 13.

Standard of Review and Preservation: the standard of review is the same as stated above, page 4. The State agrees this issue was preserved.

A. Colorado's LCM ban is a reasonable exercise of the State's police power.

The trial court's factual findings conclusively demonstrated that HB 13-1224 meets *Robertson*'s reasonable exercise test. Notably, Petitioners do not argue that the evidence presented at trial fails to meet this standard.

1. Public safety is a "compelling" governmental interest.

Petitioners have not contested that the State's interest in public safety is a "very significant" or "compelling" one. *Robertson*, 874 P.2d at 332. The trial court found that "[t]here is no question but that the purpose of [HB 13-1224] is to reduce the number of people who are killed or shot in mass shootings." CF, p 569.

The evidence at trial supported the legislature's stated concern with the frequency and lethality of mass shootings. The trial court found that "[t]he number of mass shooting events in this country has dramatically increased in the last decade," CF, p 522, and there were

twice as many "gun massacres"—mass shootings involving six or more fatalities—between 2007 and 2016 as there were between 1997 and 2006. TR 05/04/17, p 106:2–4. The most recent decade is also the deadliest on record, TR 05/04/17, pp 107:24–108:7; EX, p 10, with almost triple the number of deaths from the prior decade. CF, p 522.[5]

The General Assembly also considered the use of LCMs against police officers. TR 02/12/13 Part 1, p 341:11–24; TR 02/12/13 Part 2, p 938:7–14. The State's expert, Dr. Webster, testified that LCMs are disproportionately represented in violence against law enforcement, as 31% to 41% of law enforcement deaths by firearm in the line of duty involve an assault weapon or other weapon equipped with an LCM. TR 05/02/17, pp 207:24–208:24.

The General Assembly's concerns with public safety amply satisfy the requirement that HB 13–1224 be directed at a legitimate government interest.

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[5] Unfortunately, even more gun massacres have occurred since trial: the Las Vegas shooting killed 58 people; the Sutherland Springs, Texas shooting killed 26 people; the Parkland, Florida school shooting killed 17 people; the El Paso, Texas shooting killed 22 people; and the Dayton, Ohio shooting killed 9 people.

2. Limiting magazine capacity is reasonably related to ensuring public safety.

The challenged legislation must also be reasonably related to a legitimate governmental interest. *Robertson,* 874 P.2d at 332. Here, the evidence presented at trial confirmed the General Assembly's decision to tackle the problem of mass shootings by regulating magazine capacity.

a. LCMs play a deadly role in mass shootings.

The State's evidence demonstrated that LCMs play a deadly role in mass shootings.

The two mass shootings in Colorado—Columbine and Aurora—both involved LCMs. CF, p 523.Mass shooters using LCMs kill 40% more people than those who do not use LCMs.[6] CF, p 522; *see also* TR 05/01/17, p 191:2–24. Evidence showed that LCMs act as "force

[6] Petitioners contest the validity of the State's evidence because the data on mass shootings cannot correlate specific deaths with the use of an LCM. Op. Br. 40. It was undisputed, however, that the State's experts' methodology is commonly used in academic studies and is the same methodology employed by Petitioners' expert. TR 05/04/17, pp 101:1-9; 183:3-8.

multipliers" in mass shootings because they permit rapid, sustained rates of fire and increase the risk of a victim being hit by multiple shots. TR 05/04/17, pp 109:19–23, 112:12–21. In Aurora, for example, a gunman with a 100-round drum magazine fired 65 rounds in 40 seconds, a rate of 1.6 bullets per second. TR 05/04/17, p 114:2–7. Rapid, sustained fire reduces the opportunity to run, hide, or fight, and increases the likelihood that a victim will be struck by more than one round—a critical contributor to fatality rates given that victims who suffer more than one bullet wound are 60% more likely to die than those who are shot only once. CF, pp 522–23.

As force multipliers, LCMs also drastically increase the number of wounded and leave them with graver wounds. Two to three times as many people are wounded when an LCM is used in a mass shooting. CF, p 522; *see also* TR 05/02/17, pp 202:8–203:4. Higher capacity firearms also tend to inflict more wounds per victim. TR 05/02/17, pp 212:23–213:2. A patient suffering multiple gunshot wounds is more likely to be disabled than a patient suffering a single wound. TR 05/04/17, pp 46:3–10; 56:1–57:11. Gunshot wounds carry a higher risk of

death or disability than other types of trauma and are particularly lethal to children. TR 05/04/17, pp 44:23–45:5, 47:23–48:7.

Petitioners claim that despite this connection between LCMs and deaths and injuries in mass shootings, the statistical likelihood that any Coloradan will be involved in a mass shooting remains so low that mass shootings cannot justify HB 13-1224's impact on the right to bear arms. Op. Br. 41–43. This Court, however, already rejected that argument in *Robertson*. There, plaintiffs argued that an assault weapons ban was unreasonable because it impacted only one-half of one percent of all privately-owned weapons in the county. This Court found,

> [w]hile these statistics support the inference that a ban on assault weapons is unlikely to have a dramatic effect on crime, this fact is irrelevant for constitutional purposes. A statute is not invalid under the Constitution because it might have gone farther than it did and reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

Robertson, 874 P.2d at 333. Federal courts similarly reject this same argument, finding that it does not sufficiently credit "the significant increase in the frequency and lethality of [mass shootings]." *N.J. Rifle*, 910 F.3d at 121.

b. LCM bans are effective by reducing both the scope and severity of mass shootings.

The trial court also determined that the remedy chosen by the General Assembly is an effective one: "[t]he effect of limiting the capacity of magazines is generally that it reduces the number of people who will be shot during a mass shooting, and potentially reduces the number of times those people will be shot." CF, p 526. Here, the trial court found that mass shootings in states without LCM restrictions have occurred at three times the rate in states that have banned LCMs. CF, p 525. Another expert found an overall lull in the frequency of mass shootings between 1994 and 2004—the decade that the federal ban on assault weapons and LCMs was in effect. TR 05/02/17, pp 205:13–206:8; EX, p 14.

The trial court also found that an LCM ban may also save lives once a mass shooting starts. "One of the most important dynamics both in ending a mass shooting and in reducing the number of people who are wounded and killed is the pause created by a shooter's need to stop and reload or replace a magazine. During such pauses, potential victims

take life saving measures, including hiding, running, or attacking the shooter." CF, p 523. Pauses in shooting permitted victims to escape when a gunman stopped to reload in the Sandy Hook and San Bernadino school shootings, the Aurora theater shooting, and the Fort Hood, Texas shooting. CF, p 523. In Sandy Hook in particular, nine first grade children survived by pushing past the gunman while he was reloading. CF, pp 523–24. Numerous victims ran from the Aurora theater while the gunman was attempting to eject his 100-round drum magazine. CF, p 523. Pauses in shooting likewise enabled citizens to confront and subdue the gunman in the Long Island Railroad shooting and the Tucson shooting involving Congresswoman Gabrielle Giffords. CF, p 524.

Roger Salzgeber, who tackled the shooter when he paused to reload during the Tuscon shooting that killed 6 and injured 13, testified at trial. TR 05/03/17, pp 11:6–13:12. Salzgeber testified that the gunman used an LCM, and that if the gunman had been limited to 15 rounds, he would have had to reload three times to shoot the same

number of bullets and would have killed fewer people. TR 05/03/17, pp 13:6–19:2.

c. The LCM ban does not diminish the ability of Coloradans to defend themselves.

As discussed above, self-defense forms the basis of the right protected in article II, § 13. But just because a weapon may be used for self-defense does not itself render possession of that weapon constitutional. *Robertson*, 874 P.2d at 331. The trial court correctly recognized that "the ability to fire more than 15 rounds without replacing a magazine is not required for purposes of legitimate self-defense, and a prohibition on LCMs does not diminish people's ability to defend their homes, selves, and property." CF, p 525.[7]

Evidence at trial supported this conclusion. Two law enforcement chiefs with nearly 80 years of combined experience were unaware of any incident where citizens fired more than two or three rounds in self-

[7] The legislature carefully considered self-defense needs when debating the LCM ban. The legislation initially proposed a ban on magazines greater than 10 rounds, but the General Assembly adjusted the limit to 15 rounds to account for defensive uses. CF pp 531-32; *Rocky Mountain Gun Owners v. Hickenlooper,* 2018 COA 149, ¶ 34 (*"RMGO II").*

defense. TR 05/03/17, pp 28:4–15; 30:1–11; 44:9–25. The State's expert, Dr. Jeffrey Zax, examined data compiled by 54 Colorado sheriffs of reported home invasions. TR 05/05/17, pp 13:11–12; 58:8–59:6. In 327 incidents over a decade, not one involved a citizen discharging large numbers of rounds in self-defense. TR 05/05/17, p 60:1–4. Zax also found that even police officers, who face situations requiring armed defense more often, almost never discharged the number of rounds requiring an LCM. TR 05/05/17, pp 57:7–58:7.

Petitioners contend that the trial court failed to recognize the potential defensive advantages of LCMs based on largely hypothetical questions put to the State's expert.[8] But the trial court, who observed the evidence, correctly disagreed.

In its application, HB 13-1224 has not prevented Petitioners—or any Coloradan— from using firearms for self-defense. The parties

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[8] Petitioners contend that the State's expert, Klarevas, testified that LCMs were as useful in home-defense situations as they were for mass shooters. Op. Br. 44. Klarevas's actual testimony, however, was highly skeptical of the hypothetical advantages of using a LCM for self-defense, where the aim is to deter an attacker (in contrast to the mass shooter's aim of shooting as many people as possible). TR 05/04/17, pp 146:14-147:25.

stipulated that thousands of models of firearms and many models of magazines remained available "for lawful purchase and use for home defense in Colorado." EX, p 502, ¶ 7. With very few exceptions, firearms available before HB 13-1224 work with magazines holding 15 rounds or less, including semi-automatic pistols, compact and sub-compact handguns, and AR-15 platform rifles. *Id.* at ¶¶7, 11, 17, 22. With few exceptions, magazines with capacities of 15 or fewer rounds are manufactured for these weapons and available for purchase in Colorado. *Id.* at ¶¶ 11, 17, 22, 23.

Based on the State's evidence and the parties' stipulations, the lower courts properly concluded that "a reduction in magazine capacity to a maximum of 15 rounds does not restrict the use of firearms in defense of home, person, or property." CF, p 537; *see also RMGO II*, ¶ 35.

Based on the substantial—and largely unrebutted—evidence at trial, both the trial court and the court of appeals correctly concluded that the LCM ban directly serves the State's legitimate public safety

interests and is constitutional under the reasonable exercise test. CF, p 543; *RMGO II,* ¶¶ 21–25.

B. HB 13-1224 satisfies intermediate scrutiny.

Intermediate scrutiny assesses whether a statute is substantially related to an important governmental interest. *Mayo v. Nat'l Farmers Union Prop. & Cas. Co.*, 833 P.2d 54, 57 (Colo. 1992). The record in this case amply satisfies that test, and the trial court specifically found that the evidence satisfies that standard. CF, p 582.

For the reasons stated above, the State's interest in public safety, health, and welfare is a compelling interest. *See* CF, 543 (crediting "the fundamentally important governmental interest of protecting and preserving lives.").

The same facts establishing that HB 13-1224 is a reasonable exercise of police power also demonstrate that the legislation substantially relates to the State's objective. As a result, the State showed, and the trial court found, that the LCM ban was "directly and substantially related to the fundamentally important governmental interest of protecting and preserving lives." CF, p 543.

IV. The court of appeals' interpretation of HB 13-1224 is consistent with both the plain meaning and purpose of the statute.

Standard of Review and Preservation: The standard of review is the same as stated above, page 4. The State agrees this issue was preserved.

Petitioners claim that the interpretation below is unconstitutional because, by covering magazines that are "designed to be readily converted to accept" more than 15 rounds, § 18-12-301(2)(a)(I), the law "bans the overwhelming majority of detachable magazines." Op. Br. 13. Petitioners argue that because magazines with removable baseplates can be altered with capacity-adding equipment, HB 13-1224 bans all magazines that feature a removable baseplate. Petitioners' interpretation is not supported by the facts or the law.

A. The lower courts correctly construed HB 13-1224's "design" language.

The trial court interpreted "designed to be readily converted to accept," to cover only those magazines where the manufacturer "specifically designed" the magazine to accept increased capacity. CF, p 566. A "significant difference" exists, the trial court explained, between

something that is "*able to be* readily converted" and something that is "specifically *designed to be* so converted." CF, p 576. The court of appeals agreed with the trial court's construction. It defined "designed" as "done, performed, or made with purpose and intent." *RMGO II*, ¶ 31. The division concluded that the General Assembly did not intend HB 13-1224 to "regulate all magazines with removable base pads," but rather only those where the manufacturer deliberately designs the magazine for the purpose of converting it to accept increased capacity. *RMGO II*, ¶ 32

This Court should affirm this statutory interpretation. Giving words their plain and ordinary meaning, "designed to be readily converted" requires more than showing that the magazine is *capable* of being converted. To satisfy the statutory language, this Court's precedent on the definition of "design" requires that the manufacturer "conceive or plan out in [his or her] mind" a magazine that holds 15 or fewer rounds when sold but is nonetheless intended for conversion to

accept more than 15 rounds.[9] *Swieckowski v. City of Ft. Collins*, 934 P.2d 1380, 1386 (Colo. 1997) (defining "design"); *see also Estate of Grant v. State*, 181 P.3d 1202, 1205 (Colo. App. 2008) (adopting same definition). The trial court made detailed fact findings with substantial record support that manufacturers generally do *not* design their magazines with this purpose in mind.

Including this intent component in the definition of "design" is consistent with both the court of appeals' dictionary definition, *RMGO II*, ¶ 31, and other commonly used dictionary definitions. *See City & Cty. of Denver v. Dennis*, 418 P.3d 489, 497 (Colo. 2018) (court may use dictionary to determine plain and ordinary meaning). "Design" is also defined, for example, as:

- "to plan or have in mind as a purpose";
- "to devise or propose for a specific function";

[9] Notably, other states' LCM bans lack similar narrowing language but have been upheld as constitutional. *See, e.g.*, *NYSRPA*, 804 F.3d at 266-67 (upholding New York and Connecticut bans on magazines that "can be readily restored or converted to accept" more than 10 rounds).

- "to create, plan, or calculate for serving a predetermined end," including to "prepare or lay out deliberately"; and
- "to plan or produce with special intentional adaptation to a specific end."

Webster's Third Int'l Dictionary 611 (2002). Under these definitions, a magazine that is merely capable of being converted to accept increased capacity, without any evidence of its designers' intent, does not meet the requirements of HB 13-1224.

Although the statute is not ambiguous, to the extent any doubt remains over the scope of HB 13-1224's magazine ban, the legislative history supports the lower courts' interpretation. Senator Hodge stated the statute was meant to outlaw magazines that hold 15 rounds or less but "are *designed* to stack together like Lego's to make much larger, higher capacity magazines." Op. Br. 23; TR 02/12/13 Part 2, p 157:9–12 (emphasis added). Contrary to Petitioners' claim, this legislative history supports the State. It demonstrates that the legislature was focused on the rare situation where a manufacturer deliberately designs a compliant magazine with the intent that, once sold at retail, it will be

converted by the customer to accept more than 15 rounds. The legislature was not focused on magazines that are incidentally capable of being converted to accept higher capacity.

Petitioners resist this construction by arguing that the lower courts' interpretation improperly converts HB 13-1224 into a specific intent crime—a result allegedly not intended by the legislature. Op. Br. 22–23. This Court need not resolve the question of whether HB 13-1224 is a specific or general intent crime to affirm. The precise level of culpable intent that is needed to support a conviction under HB 13-1224 can await a future case that presents an actual criminal prosecution with a fully-developed factual record.

If this Court is inclined to address the issue, however, it should reject Petitioners' argument that the legislature necessarily uses certain words—such as "specifically"—to denote a specific intent crime. Op. Br. 22. Although such words may be typical when defining specific intent crimes, they are not required. *See People v. Hickman*, 988 P.2d 628, 644–45 (Colo. 1999) (stating "[e]ven though the legislature deleted the word 'intentionally' from the statute, the statute nonetheless

requires intentional conduct"). For example, if a statute uses certain terms—such as "retribution" or "retaliation"—it by definition requires intentional conduct. *Id.* at 645. The same reasoning applies here to the word "designed" in HB 13-1224. A manufacturer cannot "design" a product without consciously having a predetermined end in mind. Thus, the Court should reject Petitioners' argument that the legislature declined to classify HB 13-1224 as a specific intent crime.

B. The trial court's findings of fact on the design and availability of magazines with removable baseplates have substantial record support.

The trial court found that the statute does not operate as a *de facto* ban on all magazines with a removable baseplate. To the contrary, it concluded that the statutory language, "designed to be readily converted to accept" more than 15 rounds, only bans the much narrower category of magazines that, though "technically compliant," are "specifically designed to be converted into non-compliant ones." CF, p 571–2.

The trial court found that the primary purpose of magazines featuring a removable baseplate is to "facilitate cleaning, maintenance,

and repair" of the magazine; the ability of non-manufacturers to sell aftermarket components that can increase the magazine capacity is a "mere byproduct" of the design. CF, p 566. Substantial record evidence supports each of the trial court's findings.

1. Magazines with removable baseplates remain widely available.

Substantial evidence revealed that magazines with removable baseplates remain widely available after HB 13-1224's effective date. The parties stipulated that "after July 1, 2013 many models and variants of magazines designed to hold 15 or fewer rounds remain available for lawful purchase and use for home defense in Colorado." EX, p 502, ¶ 7. Petitioners' expert, Mark Passameneck, admitted that he purchased the allegedly illegal magazines that he used for his in-court demonstration at retail, TR 05/01/17, p 259:21–25, and that "[h]undreds" of retail locations likely continue to sell such magazines throughout Colorado. TR 05/02/17, pp 41:22–42:4.

The parties also agreed that while 41 criminal prosecutions have been brought under HB 13-1224 since its effective date, not a single

person has been prosecuted for possessing a magazine with a removable baseplate that holds less than 15 rounds. EX, p 505, ¶ 29.

2. Magazines are designed with removable baseplates for reasons unrelated to increased capacity.

Substantial record evidence also supported the trial court's findings that magazines with removable baseplates are designed for specific reasons unrelated to increased capacity. Passameneck testified, for example, that magazines with removable baseplates are designed by manufacturers to facilitate cleaning, maintenance, and replacement of internal parts. TR 05/02/17, p 46:9–21; 05/01/17, pp 268:21–269:19. Removable baseplates also enable:

- "tuning" or altering the magazine so that it feeds different types of ammunition into the weapon. TR 05/01/17, pp 269:22–270:15;
- ergonomic alterations. TR 05/01/17, p 270:16–22;
- weight preferences. TR 05/01/17, pp 270:23–271:2; and

- shape preferences, including permitting police officers to utilize a shorter magazine that is more comfortable when sitting in a patrol car. TR 05/01/17, pp 271:3–24.

In addition to this evidence regarding the firearm's end *user*, evidence regarding *manufacturers* also supports the trial court's factual finding. Passameneck was asked whether had ever heard of anyone requesting that a manufacturer design a magazine "the only purpose of which is to be convertible into high capacity?" Passameneck responded, "I don't think I've ever heard that term, no." TR 05/02/17, pp 15:22–16:2.

Passameneck also testified that a person wishing to increase his or her magazine limit beyond 15 rounds must purchase an "aftermarket" magazine extension, which is generally not available from firearm manufacturers. TR 05/02/17, p 43:19–44:12.This evidence strongly supports the trial court's finding that manufacturers do not design their magazines with the specific goal of facilitating extended capacity.

This same evidence regarding aftermarket extensions also refutes Petitioners' argument that the lower courts' interpretation renders the statutory language a "practical nullity." Op. Br. 24. Although the evidence established that such extensions are not generally sold by firearm manufacturers, TR 05/02/17, p 44:1–4, it is not difficult to imagine a scenario where a manufacturer sells *both* a compliant magazine and an extension kit together as a package. If that occurred, it would provide strong evidence that the manufacturer designed its magazine for the specific purpose of permitting the customer to convert the magazine to high capacity. Such proof, if it existed, may well satisfy HB 13-1224's elements.

3. The trial court's adverse credibility determinations against Petitioners' expert are supported by the record.

Petitioners argue that the evidence at trial "overwhelming[ly] support[s]" their position that firearm designers specifically intend magazines with removable baseplates to serve multiple purposes, including allowing for expanded capacity. Op. Br. 16. In Petitioners'

view, no evidence supports the trial court's finding that expandable capacity is a "mere byproduct" of the design. *Id.*

But the trial court, as the finder of fact at the bench trial, may "accept or reject all *or part* of any witness' testimony." *Pueblo Bancorporation v. Lindoe, Inc.*, 37 P.3d 492, 496 (Colo. App. 2001) (emphasis added). The trial court rightly rejected Passameneck's testimony suggesting that firearm designers specifically intend removable baseplates to facilitate increased capacity. CF, p 566. The trial court found that Passameneck was not credible in part because he owns a company that makes aftermarket components designed to increase magazine capacity. *Id.* His ownership of an aftermarket components company, the trial court concluded, rendered him "interest[ed]" and "bias[ed]" in the outcome of the trial. *Id.*

When coupled with the leading nature of the questions and Passameneck's demeanor during his testimony, the trial court correctly accorded "little weight" to his opinion that manufacturers design removable baseplates with the specific intent to increase magazine capacity. CF, pp 565–66. The trial court's determinations on weight and

credibility cannot be disturbed absent clear error. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383 (Colo. 1994). No such error exists here.

Petitioners contend that no evidence supports the trial court's "mere byproduct" finding. Op. Br. 17. But this "mere byproduct" finding is a reasonable inference that the fact finder could draw after hearing lengthy testimony on the multiple intended uses of removable baseplates. It was not necessary for the trial court to receive direct evidence that expanded capacity is a byproduct of the other intended uses. *See Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.*, 739 P.2d 239, 245 (Colo. 1987) (holding "trial court may draw reasonable inferences from the evidence").

More importantly, Petitioners' position that the State bore some kind of evidentiary burden is incorrect. Like other statutes, HB 13-1224 enjoys a strong presumption of constitutionality; *Petitioners* bore the burden to prove its unconstitutionality beyond a reasonable doubt. *Danielson*, 139 P.3d at 691.

C. Any ambiguity in the statute is resolved by the Attorney General's Technical Guidance letters.

As part of his signing statement, Governor Hickenlooper urged that HB 13-1224 "be construed narrowly to ensure compliance" with constitutional requirements and asked the Attorney General to issue technical guidance to assist with its proper interpretation. EX, p 5. The Attorney General issued two Technical Guidance letters, which concluded that "a magazine that accepts fifteen or fewer rounds is not a 'large capacity magazine' simply because it includes a removable baseplate which may be replaced with one that allows the magazine to accept additional rounds." CF, pp 52–56.

Under Colorado law, these Technical Guidance letters have binding effect. Colorado criminal code permits Coloradans to rely on "[a]n official written interpretation . . . issued by a public servant . . . legally charged . . . with the responsibility of . . . enforcing, or interpreting a statute." § 18-1-504(2)(c), C.R.S. (2018). The Attorney General may, in appropriate circumstances, prosecute violations of the LCM ban and must "give his or her opinion . . . upon all questions of law submitted to the attorney general . . . by the governor," § 24-31-

101(1)(a) & (b), C.R.S. (2018) and therefore meets the requirements of the criminal code to issue an "official written interpretation."

The Attorney General has made clear in an official written interpretation that removable baseplates do not make an otherwise complaint magazine noncompliant. This interpretation resolves any ambiguity.

D. The doctrine of constitutional avoidance requires that HB 13-1224 be interpreted in a manner that preserves its constitutionality.

Finally, the court of appeals should be affirmed because HB 13-1224 can be interpreted in a manner that avoids any constitutional infirmities. The doctrine of constitutional avoidance teaches that "courts have a duty to interpret a statute in a constitutional manner where the statute is susceptible to a constitutional construction." *People v. Montour*, 157 P.3d 489, 503–04 (Colo. 2007). When evaluating a statute that is subject to several interpretations, the Court must select the one that best "satisfies constitutional requirements if such construction is reasonably consistent with legislative intent." *See People v. R.M.D.,* 829 P.2d 852, 853 (Colo. 1992).

Petitioners' preferred interpretation of HB 13-1224 would require the Court to seek out a constitutional confrontation, rather than sidestep one. Doing so would run counter to the fundamental principle of constitutional avoidance. Indeed, as the Technical Guidance demonstrates, interpreting HB 13–1224 in a manner that does not pose constitutional difficulties is a straightforward exercise. As this Court's precedent confirms, "designed" is susceptible to well-founded interpretations that stop far short of banning all magazines with a removable baseplate.

CONCLUSION

Elected representatives passed a valid law to address a pressing issue—the reduction of fatalities in mass shootings. Petitioners failed to prove beyond a reasonable doubt that HB 13-1224 is facially unconstitutional in all its applications. As such, this Court should affirm.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI upon all parties herein by Colorado Courts E-filing (CCE) this 12th day of August, 2019 addressed as follows:

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