SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: August 12, 2019 12:36 PM FILING ID: 7CD316AAEF4DC CASE NUMBER: 2018SC817
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2017CA1502	
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. JARED S. POLIS, in his official capacity as Governor of the State of Colorado Respondent	▲ **COURT USE ONLY** ▲
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BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

CERTIFICATE OF COMPLIANCE

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

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

☒ It contains 3,845 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 C.A.R. 29 and C.A.R. 32.

COLORADO MUNICIPAL LEAGUE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Codes

Rules

Constitutional Provisions

ISSUES ON APPEAL

This brief of *amicus curiae* Colorado Municipal League will address only two of the four issues for which review has been granted, namely the two issues addressing the standard of review under which this case will be determined, and under which potentially all future challenges to state and municipal firearms laws under Art. II, § 13 of the Colorado Constitution will be determined:

1. Whether this court should address and resolve the conflict between *Students for Concealed Carry on Campus, LLC v. Regents of the University of Colorado*, 280 P.3d 18 (Colo. App. 2010) and *Trinen v. City and County of Denver*, 53 P.3d 754 (Colo. App. 2002) surrounding the meaning of the "reasonableness" standard of review established in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994).
2. Whether the court of appeals erred in applying the *Robertson* reasonableness standard after the United States Supreme Court's decision in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010).

COMES NOW the Colorado Municipal League ("League") by its undersigned attorneys and, pursuant to Rule 29, C.A.R., submits this brief as *amicus curiae* in support of the position of Respondent Jared S. Polis in his official capacity as Governor of the State of Colorado ("Governor").

INTERESTS OF THE LEAGUE

The League is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado (comprising 99 percent of the total incorporated state population), including all 102 home rule municipalities organized under Article XX of the Colorado Constitution, 168 of the 170 statutory municipalities, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. The League has been appearing as an *amicus* before the Colorado Court of Appeals and the Colorado Supreme Court for decades in appeals where a significant decision affecting Colorado municipalities is possible.

As acknowledged in Petitioners' Opening Brief at p. 33, evidence in the record of this case confirms that, along with the state, municipalities in Colorado have commonly regulated firearms since statehood. ("Dr. Cornell . . . looked at state laws and over 60 local ordinances enacted from 1876 to 1900. Cornell, TR, 5/3/17, 126:1-4 and 128:12-14.") Indeed, some of the most important precedents in

Colorado on the subject of firearms regulation derive from challenges to ordinances adopted by municipalities. Therefore, municipalities throughout Colorado have an obvious and ongoing interest in the standard of review that governs challenges to firearms laws and regulations under the Colorado Constitution. The League as *amicus curiae* will provide the Court with a statewide municipal perspective on two of the issues presented in this case, and will ensure that the interests of municipalities are considered by the Court prior to any change to the standard of review for constitutional challenges to firearms laws in Colorado.

STATEMENT OF THE CASE

The League adopts and incorporates by reference the statement of the case as stated in the Answer Brief of the Respondent.

SUMMARY OF ARGUMENT

The League supports the Governor in his principal argument that the U.S. Supreme Court decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) interpreting the Second Amendment should have no effect on how Colorado courts interpret Article II, §13 of the Colorado Constitution. However, if this Court determines that its own precedents should be reevaluated in light of the more recent interpretations of the

Second Amendment in federal courts, this Court should conclude that the standard of review set forth in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994) and *City of Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972), is consistent with the reasoning in *Heller* and *McDonald*. Therefore, *Robertson* need not be overturned.

If the Court chooses to use the instant case as an opportunity to overrule *Trinen v. City and County of Denver*, 53 P.3d 754 (Colo. App. 2002), insofar as the court of appeals misinterpreted *Robertson* as adopting a "rational basis" standard of review for all challenges to firearms laws, so be it. However, in so doing, this Court should make a distinction for laws and ordinances that regulate aspects of firearms possession or use which do *not* enjoy any constitutional protection whatsoever, such as laws prohibiting or regulating the carrying of concealed weapons. Such laws should remain subject to a rational basis standard of review.

If the Court adopts a new form of heightened or intermediate standard of review for future challenges to state and municipal firearms laws, it should do so mindful of the common types of municipal firearms laws that may be challenged under the new standard. Like the U.S. Supreme Court, this Court should emphasize that the new standard of review is not intended to imperil longstanding, conventional regulations of firearms that have heretofore been adopted and enforced in the interest of public safety.

ARGUMENT

I. How federal courts may choose to construe the Second Amendment should have no effect on the manner in which Colorado courts may choose to interpret Art. II, §13, of the Colorado Constitution.

The League supports the Governor in his principal argument that the manner in which federal courts may choose to define the right to keep and bear arms under the Second Amendment should have no effect on the manner in which a state court may interpret a counterpart provision of its own state constitution. Accordingly, the holdings in *Heller* and *McDonald* do not require a reevaluation of this Court's precedent at all, for the reasons set forth in the Governor's brief.

However, the remainder of this brief is offered for the Court's consideration in the event the Court rejects this threshold argument and decides to reevaluate the standard of review applicable to this case and future challenges to state and local firearms laws arising under Art. II, §13, Colo. Const.

II. The heightened standard of review for challenges to firearms laws arising under Art. II, §13 is consistent with Heller and McDonald and need not be altered at this time.

The most obvious historical import of the U.S. Supreme Court's decisions in *Heller* and *McDonald* was that the Court finally interpreted the Second Amendment to confer an individual right to keep and bear arms. However, when

these decisions were rendered in 2008 and 2010, Colorado municipalities treated them as something of a non-event. There was no rush by Colorado municipalities to modify or repeal their firearms ordinances in the wake of these decisions for the following reasons.

First, no municipality in Colorado has an ordinance restricting the possession of handguns in homes that even remotely resembled the District of Columbia and Chicago ordinances struck down in *Heller* and *McDonald*. Any such ordinance would have been a clear violation of the Colorado Constitution under prior state decisional law.

Second, the Colorado Constitution already expressly granted to each individual citizen a right to keep and bear arms "in defense of his home, person and property," as set forth in Art. II, §13. Particularly since this Court's 1972 decision in *Pillow v. Lakewood,* municipalities understood that, different from most police power regulations, any ordinance regulating firearms must avoid constitutional overreach. *Pillow v. Lakewood* set this standard:

> A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

501 P.2d at 745–46 (citations omitted.) In their Petition for Writ of Certiorari at p. 16, RMGO conceded that the foregoing principle articulated in *City of Lakewood v. Pillow* was "not unlike the *Heller* standard." In other words, the protections afforded to the individual right to bear arms under the Colorado Constitution already matched Second Amendment protections newly articulated in *Heller*.

Third, the Supreme Court in *Heller* and *McDonald* did *not* hold that Second Amendment rights are tantamount to First Amendment rights, in the sense that some firearms regulations would be subject to strict scrutiny and would be upheld only if supported by a compelling state interest. Instead, some standard of "heightened scrutiny" will apply in cases testing Second Amendment challenges to state and local gun laws. However, the Supreme Court stopped short of explaining the contours of what "heightened scrutiny" really means in practice. Does it mean "intermediate scrutiny" in the same sense as this term is applied in some Equal Protection and First Amendment cases? Or does it mean something else? Since the Colorado Supreme Court had already established a heightened standard of review for challenges to firearms regulations in a series of decisions including *Pillow* and *Robertson*, it was logical for municipalities to assume that state courts would continue to apply this standard when interpreting the Colorado Constitution.

In *Heller* the Supreme Court held that the municipal ordinance struck down in that case would violate the Second Amendment under any standard of review, even "rational basis." 554 U.S. at 628–29. However, the Court went on to suggest in a footnote that "rational basis" will never be the proper standard for reviewing laws restricting individual rights secured by the Second Amendment. "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." 554 U.S. at 628, n. 27. Since the Colorado Supreme Court has never applied the "rational basis" standard to challenges arising under Art. II, §13 of the Colorado Constitution, this aspect of *Heller* did not conflict with any Colorado precedent (other than *Trinen*, as discussed *infra*.)

Also in *Heller*, the Supreme Court expressly rejected a standard of review that would involve an "interest-balancing" approach, in which the government's interest in regulating firearms would be weighed against the individual's right to keep and bear arms. 554 U.S. at 634–35. Again, however, since the Colorado Supreme Court has never employed a balancing test to evaluate challenges to firearms laws arising under Art. II, §13, this aspect of *Heller* did not conflict with any Colorado precedent.

It is fair to note that in the *McDonald* decision, when the Supreme Court extended its holding in *Heller* to the states under the Fourteenth Amendment, the Court began to characterize the Second Amendment as granting "fundamental rights." In contrast, this Court expressly refused to recognize Art. II, §13 as creating "fundamental rights" in *Robertson*. However, this Court went on to make the following observation when summarizing the way other state supreme courts have interpreted their own constitutions:

> Of all the cases cited above, only *Arnold v. Cleveland,* 67 Ohio St.3d 35, 616 N.E.2d 163 (1993) and *Rabbitt v. Leonard*, 413 A.2d 489 (Conn. Super. Ct. 1979) reach a holding on the question of the status of the right to bear arms. Indeed these are the *only* cases we are aware of that determine whether the individual right to bear arms in self-defense is a fundamental right. Both of those cases conclude the right is fundamental but nevertheless is subject to the reasonable exercise of the state's police power.

874 P.2d at 330 (emphasis in original.) In other words, this Court apparently assumed that the "reasonable relationship" standard articulated in *Robertson* could coexist with the notion that citizens may enjoy a "fundamental right" to keep and bear arms under a state constitution. Nothing in *Heller* or *McDonald* conflicts with this assumption, again because the Supreme Court refused to define precisely what the heightened standard of review would be for future challenges to state and municipal firearms laws.

Finally, Colorado municipalities did not view *Heller* and *McDonald* as marking a sea change in the way we think about constitutional limitations on

government authority to regulate firearms because of the disclaimers made by the Court in each case, particularly the following summation in *McDonald*:

> It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.' 554 U.S. at 626. We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

561 U.S. at 786. As explained in Part IV of this brief, Colorado municipalities enforce a wide variety of "longstanding regulatory measures" related to firearms in the interest of protecting public health and safety. Just as the Colorado courts have upheld such regulations in the past (as long as the regulations do not go too far), the U.S. Supreme Court has signaled it intends to do so as well.

In summary, nothing about *Heller* or *McDonald* requires this Court to overturn the "reasonably related" standard of review set forth in *Robertson*. The *Robertson* decision, read in combination with other Colorado Supreme Court precedents, such as *City of Lakewood v. Pillow*, already establishes a heightened standard of review for alleged violations of Colo. Const., Art. II, §13. This heightened standard is consistent with the pronouncements of the U.S. Supreme

Court on the manner in which the personal right to keep and bear arms may be regulated.

III. Neither the Second Amendment nor the Colorado Constitution protects the right to carry concealed weapons.

The League agrees with the Attorney General that the Court of Appeals decision in *Trinen* is an "outlier," insofar as the panel in that case misconstrued *Robertson* as adopting a rational basis standard of review for challenges to firearms laws under Art. II, §13. However, if this Court now overrules *Trinen* on the standard of review issue, the Court should make the following important distinction.

Trinen involved a challenge to two distinct subsections of the Denver Revised Municipal Code, one restricting the concealed carrying of firearms, and the other restricting the open carrying of firearms. 53 P.2d at 756. If the case had dealt solely with Denver's concealed carry ordinance, then the Court of Appeals would have been correct in assuming that a rational basis standard applied to the ordinance, but for reasons totally unrelated to *Robertson*.

Individuals do not have a right to carry concealed weapons under either the Colorado Constitution or the Second Amendment. COLO. CONST. art. II, §13 expressly provides, "nothing herein contained shall be construed to justify the practice of carrying concealed weapons." Similarly, the U.S. Supreme Court acknowledged in *Heller,* "Like most rights, the right secured by the Second

Amendment is not unlimited. . . . For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626. The Tenth Circuit agrees that the Second Amendment does not guarantee a right to carry a concealed firearm. *Peterson v. Martinez*, 707 F.3d 1197, 1209–13 (10th Cir. 2013) (rejecting the claim of an out-of-state resident that he had a Second Amendment right to apply for a concealed carry permit under Colorado statutes.)

In sum, since individuals do not have a constitutional right to carry a concealed firearm in the first place, then any state or municipal law regulating concealed carry would appropriately be reviewed under a rational basis standard, not some heightened or intermediate standard, regardless of whether *Trinen* is overruled for other reasons in the instant case.

IV. Overruling Robertson or otherwise changing the standard of review for challenges to firearms laws under Art. II, §13 may affect a wide variety of municipal firearms regulations

To the best of the League's knowledge, only three Colorado municipalities (Denver, Boulder and Vail[1]) directly regulate high-capacity magazines, and obviously these three have the most direct stake in the outcome of this case. However, if the decision in this case results in a change to the standard of review

applicable to any state constitutional challenge to any state or municipal firearms law or policy, the Court should be aware of the more common types of municipal laws that may be affected by the change. A few examples:

Complete prohibition of firearms in certain city facilities. Colorado municipalities have taken a variety of approaches to banning firearms in certain sensitive locations owned or controlled by the municipality. For example, in Aurora and Steamboat Springs firearms are banned in any city facility where the prohibition is posted.[2] In Estes Park, guns are prohibited at the conference center, fairgrounds, and senior centers, among other locations.[3] Perhaps one of the most common locations restrictions in municipalities are prohibitions against the possession of guns in parks, open space and recreation centers. Examples include ordinances in Louisville, Silverthorne and Thornton.[4] Taking cues from *Heller*, the Tenth Circuit upheld the authority of the government to enforce location-specific bans on all firearms, applying an intermediate scrutiny standard to the case. *Bonidy v. U.S. Postal Service*, 790 F.3d 1121 (10th Cir. 2015) (upholding federal statute prohibiting firearms in post office buildings and grounds in a dispute arising out of Avon, Colorado.)

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[1] BOULDER, COLO. MUNI. CODE § 2-4-47; DENVER, COLO. REV. MUNI. CODE § 38-130; VAIL, COLO. MUNI. CODE § 6-3H-1, *et seq*.
[2] AURORA, COLO. MUNI. CODE § 94-154; STEAMBOAT SPRINGS, COLO. MUNI. CODE § 10-167.
[3] ESTES PARK, COLO. MUNI. CODE § 9-40-010.
[4] LOUISVILLE, COLO. MUNI. CODE § 4.04.010; SILVERTHORNE, COLO. MUNI. CODE § 2-4-47; THORNTON, COLO. MUNI. CODE § 38-241.

Restrictions on "open carry" of firearms. There is no statewide law prohibiting the open carrying of firearms in public in Colorado. This is understandable, given the fact that openly carrying firearms in rural and agricultural areas of the state, as well as during hunting season anywhere in the state where hunting is allowed, is utterly unremarkable. However, in more urbanized areas of the state, the open carrying of any type of firearm could tend to cause alarm and create a perception of threat or danger amongst members of the general public.[5] Colorado municipalities take two distinct approaches to open carry ordinances. Since 2003, state statutes have allowed municipalities to regulate or ban open carry, but only in specific locations where signs are posted. C.R.S.§29-11.7-104. Acting on this authority, some municipalities have adopted location-specific bans, with examples including Crested Butte and Cripple Creek.[6] But other cities may choose to exercise their home rule authority to generally prohibit the open carrying of firearms in public throughout the city, subject to certain affirmative defenses.[7] This was one of the ordinances upheld originally in *Trinen*. Denver's authority to continue to restrict the open carrying of firearms was later upheld by the Denver District Court in a decision that was ultimately affirmed by this court on a 3-3 tie. *State v. City & Cty. of Denver*, 139 P.3d 635 (Colo. 2006).

[5] For an illustration of the way an openly carried firearm in an urban setting can trigger a concerned call to the police, see: *Sandberg v. Englewood,* 727 Fed.Appx. 950 (D. Colo. 2018).
[6] CRESTED BUTTE, COLO. MUNI. CODE § 10-8-20; CRIPPLE CREEK, COLO. MUNI. CODE § 10-9-60.

Restrictions on concealed carry of firearms. Some municipalities enforce within their municipal courts ordinances that broadly prohibit the concealed carrying in public of any dangerous or deadly weapons without a permit. These ordinances are essentially counterparts to the state criminal law on the same subject. C.R.S. §18-12-105. As explained in Part III of this brief, regardless of whether nor not this court decides to change the standard of review for challenges to other types of firearms regulations, restrictions on the carrying of concealed firearms should remain subject to a rational basis standard of review.

The League would, however, point out one major historical irony in regard to concealed carry. Notwithstanding the disfavor for concealed weapons expressed by Colo. Const. Art. II, Sec. 13, permits for the concealed carrying of firearms have become the societal norm in modern Colorado, as has statewide standardization of how individual citizens may qualify to carry concealed weapons. In other words, carrying a concealed handgun with a permit is the principal way in which a citizen exercises his or her rights under Art. II, §13 to bear arms in public for self-defense. This standardization of the right to bear a concealed handguns in Colorado has taken several forms: (1) A standard "shall-issue" system for issuance of concealed handgun permits adopted in 2003, entitling[8] all qualifying adults to

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[7] DENVER, COLO. REV. MUNI. CODE § 38-117 (b).

[8] *See Seguna v. Makata,* 181 P.3d 399 (Colo. App. 2008); *Copley v. Robinson,* 224 P.3d 431 (Colo. App. 2009).

obtain such a permit as codified in C.R.S. §§18-12-201, *et seq.*; (2) A standard statewide understanding of where a person with a concealed handgun permit may take his or her handgun, as discussed by this Court in *Regents of the University of Colorado v. Students for Concealed Carry on Campus*, 271 P.3d 496 (Colo. 2012); and (3) uniform state laws for carrying concealed firearms in motor vehicles, with or without a permit, codified at C.R.S. §18-12-105.6.

Since 2003, no Colorado municipality has challenged the statewide applicability and the preemptive effect of these laws, perhaps recognizing that Art. II, §13 as interpreted by *City of Lakewood v. Pillow* guarantees Colorado citizens a right to move about in public while carrying a firearm for self-defense. A regulated system of concealed carry is certainly preferable to a wide-open libertarian system of open carry. If this court overrules the standard of review set forth in either *Trinen* or *Robertson,* future plaintiffs may claim a right to carry openly all sorts of firearms in public as a basic constitutional right. Municipalities would likely argue that Colorado's current system of concealed handgun permitting adequately protects the rights of individual citizens to bear arms in public for self-defense.

Restrictions on municipal employees bringing firearms to work. Like private employers, municipalities commonly prohibit their employees from

bringing dangerous or deadly weapons into the workplace.[9] But just as government employers are more susceptible to First Amendment claims from their employees than are private employers, any restriction on the right of employees to bear arms for personal self-defense in the workplace is more likely to prompt a constitutional claim from a public employee. Thus, any change to the standard of review for claims arising under Art. II, §13 that will make it harder for municipal employers to control firearms in the workplace will cause serious concern to municipalities.

In summation, Colorado municipalities have regulated firearms in a wide variety of ways since the Nineteenth Century and continue to do so today. Municipalities have tailored their ordinances and other firearms policies to respect Colorado citizens' basic rights to bear arms for self-defense under Colo. Const. Art. II, §13. Any change to the standard of review under this state constitutional provision may negatively affect the authority of municipalities to keep and enforce their longstanding firearms regulations.

CONCLUSION

For the reasons set forth in this Brief, the League respectfully urges this Court to maintain the existing standard of review for assessing the constitutionality of restrictions on the right to keep and bear arms under Art. II, §13 of the Colorado

[9] Examples include: City & Cty. of Denver, Exec. Order No. 112; City of Englewood, Administrative Policy Manual, Sec. 3.3, Workplace Violence Prohibited; City of Gunnison, Personnel Polices, Sec. 1.1, Anti-Violence Policy.

Constitution, as this standard is set forth in *Robertson*, *Pillow v. Lakewood*, and other related precedents of this Court. To the extent the Court reconsiders and changes the standard of review, the League urges the Court to hold that restrictions on the concealed carrying of firearms remain subject to a rational basis standard of review.

Respectfully submitted this 12th day of August, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2019, the foregoing document was filed with the court via Colorado Courts E-Filing. True and accurate copies of the same were served on the following via Colorado Courts

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