Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Colorado Court of Appeals: 2009CA1230, Honorable Hawthorne, Taubman and Sternberg, Judges District Court, El Paso County: 2008CV6492, Honorable G. David Miller, District Judge	▲**COURT USE ONLY**▲
Petitioners The Regents of the University of Colorado, et al. **v.** **Respondents** Students for Concealed Carry on Campus, LLC, a Texas Limited Liability Company; Martha Altman; Eric Mote; and John Davis	Case Number: 2010SC344
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BRIEF OF THE COUNTY SHERIFFS OF COLORADO AND THE INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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 C.A.R. 28(g). It contains 6,043 words.

Amici agree with appellee's statements concerning the standard of review and preservation for appeal. No record citations are included.

COUNTY SHERIFFS OF COLORADO
INDEPENDENCE INSTITUTE
By:

_____
David B. Kopel

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INTERESTS OF *AMICI CURIAE*

County Sheriffs of Colorado

The County Sheriffs of Colorado ("CSOC") is a nonprofit, nonpartisan professional organization consisting of Colorado's Sheriffs and over 6,000 of their deputies, other employees, and friends of law enforcement. The County Sheriffs are responsible for administering the Concealed Carry Act, which is a statewide implementation of the policies adopted by Larimer County Sheriff Jim Alderdan. The Sheriffs' law enforcement responsibilities include the state university and college campus within their respective counties. This brief is filed on behalf of Colorado's 62 elected Sheriffs.

Independence Institute

Founded in 1985, the Independence Institute is a nonpartisan, nonprofit public policy research organization dedicated to providing information to concerned citizens, government officials, and public opinion leaders.

Independence Institute staff have written or co-authored scores of law review and other scholarly articles on the gun issue, and several books, including the first law school textbook on the subject, and the first university textbook on the subject: NICHOLAS J. JOHNSON, DAVID B. KOPEL, MICHAEL P. O'SHEA & GEORGE

MOSCARY, FIREARMS REGULATION, RIGHTS, AND RESPONSIBILITIES (Aspen Pub., forthcoming); ANDREW MCCLURG, DAVID B. KOPEL & BRANNON P. DENNING, GUN CONTROL AND GUN RIGHTS (NYU Press, 2002). The Independence Institute's amicus briefs in *District of Columbia v. Heller* and *McDonald v. Chicago* were cited in the opinions of Justices Alito, Stevens, and Breyer (under the name of lead amicus International Law Enforcement Educators & Trainers Association).

SUMMARY OF THE ARGUMENT

The legislative decision to apply the Concealed Carry Act to state institutions of higher education is eminently supported by empirical evidence, including practical experience and scholarly research. Nationally, several mass murder attacks on schools or other public places have been stopped because citizens with lawful firearms were able to intervene long before uniformed law enforcement arrived on the scene; the Regents' prohibition policy is highly dangerous because it ensures that, unlike almost everywhere else in Colorado, there is no possibility that victims would have the tools necessary to save lives.

From the viewpoint of Colorado's Sheriffs, enforcing Colorado's statewide firearms statutes on college campuses (which is all that Plaintiffs are asking for) would pose no difficulty to law enforcement.

This Court should recognize the right to arms in section 13 of the Bill of Rights, and the right of self-defense in section 3, as fundamental. The Court should also pay heed to the Constitution's declaration that both of these rights are "natural, essential, and unalienable."

The Regents' insistence that they be exempt from statewide laws, unless a statute specifically names them, is inapplicable to statewide civil rights legislation, and the Concealed Carry Act is explicitly such legislation.

The Regents' complete prohibition is irrational because it is based on prejudice, and, astonishingly, on explicitly-declared hostility to constitutional rights. Licensed carry, in compliance with state law, is no threat to academic freedom.

The best definition of "reasonableness" in the context of the right to arms was provided by the Fifth Circuit, in *United States v. Emerson*.

Possession of firearms in automobiles is constitutionally and legislatively protected, and should be allowed pursuant to the standards that the General Assembly has enacted for automobiles on campus.

Pursuant to the Doctrine of Constitutional Avoidance, this Court should resolve any statutory ambiguity in Plaintiffs' favor, and thus avoid having to rule on constitutional issues.

ARGUMENT

I. Real-world Conditions

Regents and their amici attempt to entice this Court into re-litigating an empirical issue which has been conclusively settled by the legislature. Namely:

- If an adult citizen submits to a 10-point fingerprint background check, which shows that the citizen has a clean record, C.R.S. § 18-12-203(1). and
- If the sheriff retains discretion to deny even applicants with a clean record "if the sheriff has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others," C.R.S. § 18-12-203(2).
- If the citizen receives safety training of a type specified by the legislature, C.R.S. § 18-12-203(1)(h) and
- If that citizen is so scrupulously law-abiding that she is willing to pay over a hundred dollars in fees and processing costs to get permission to do something which is by its very nature is secret and difficult to detect, C.R.S. § 18-12-205(2)(d),
- Then is that citizen a dangerous threat to public safety?

The conclusive answer of the legislature, in enacting the Concealed Carry Act, is that such good citizens are no threat to anyone except violent predators.

These good citizens, licensed by the legislatively-determined process to carry a handgun for lawful protection throughout the state of Colorado, do not suddenly turn into unstable sociopaths when they set foot on the campuses of the University of Colorado.

Quite significantly, ever since the 2003 enactment of the Concealed Carry Act (CCA), licensed carry has been taking place at the Colorado State University campuses. Since the Court of Appeals decision in the instant case, last April, licensed carry has been taking place at the other state college campuses. *See*, *e.g.*, Brittany Anas, *Guns OK'd at Colorado community colleges, including Longmont's Front Range*, BOULDER DAILY CAMERA, May 13, 2010, 2010 WLNR 9991196 (all Colorado community colleges, effective immediately).

The amici in this brief are the Sheriffs responsible for protecting those campuses. The Sheriffs are not aware of *any* incident since 2003 involving firearms misuse on a Colorado state campus by a person with a licensed carry permit. Notably, neither Regents nor their amici have cited any such incident.

This entirely pacific state of affairs is consistent with the experience of our neighbor state, Utah, where licensed carry is allowed at every state college and university campus. Again, there have been *zero* incidents of firearms misuse by any licensee on a Utah campus. *See* David B. Kopel, *Pretend "Gun-free" School Zones: A Deadly Legal Fiction.* 42 CONN. L. REV. 515, 527-31 (2009), cited in

Students for Concealed Carry on Campus v. Regents of University of Colorado, — P.3d —, 2010 WL 1492308, *7 (Colo. App. 2010).

The Concealed Carry Act was modeled on the policies which had been created by Larimer County Sheriff Jim Alderdan, who is a member of CSOC. He was closely involved in the drafting of the Act. After the CCA became law, Colorado State University promptly began allowing licensees on campus, in response to Sheriff Alderdan's instructions about the meaning of the CCA.

The County Sheriffs of Colorado lobbied for the enactment of the CCA because it met their twin objectives of better protecting public safety and civil rights. Regents and their amici (or the lobbying arms of their amici) all lobbied against the CCA. The legislature rejected a proposed amendment to exempt state institutions of higher education. Legislative intent is unmistakable. The Court of Appeals decision comports with the intent of CSOC as well.

A. Empirical Evidence

As discussed above, the best evidence of empirical results can be found at the state higher education campuses in Colorado and Utah where licensed carry has taken place for years. None of the dystopian warnings from groups such as Regents' amici have come true. There have been no problems.

As the Court of Appeals recognized, judicial redetermination of the Legislature's fact-based decision would be inappropriate. Yet the Brady Center brief presents a listing of social science studies, all of them to the effect that Americans are so unstable, crime-prone, and incompetent that they should not own guns.

Many of the cherry-picked articles are contrary to the main line of criminological research. Comprehensive surveys of the scholarly literature have repeatedly failed to find support for the sort of policies favored by the Brady Center. The most recent two such surveys were conducted by the National Research Council and by the Centers for Disease Control. NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2005); Task Force on Community Preventive Service, Centers for Disease Control, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, 52 MORBIDITY AND MORTALITY WEEKLY REPORT 11 (OCT. 3, 2003).

These 2005 results are essentially the same as those from a comprehensive analysis in a project created by the President Carter's National Institute of Justice in 1978. Of the three eminent co-authors, one later was elected president of the American Sociology Association (Peter Rossi), and another won the Hindelang Prize, for writing the book that made the most important contribution to criminology in a three-year period (Kathleen Daly). JAMES WRIGHT, PETER ROSSI

& KATHLEEN DALY, UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA (1983).

The National Institute of Justice funded a follow-up study by two of the authors, which interviewed felony prisoners in 11 prisons in 10 states. JAMES WRIGHT & PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS (expanded ed. 1994). The survey found that gun control laws had little or no effect upon criminals obtaining firearms, and that most criminals avoided attacking victims who might be armed.

Even if the Brady Center's fear-mongering about gun owners in general were correct, the Brady brief is notably silent on the particular set of gun owners who are the primary subject of this litigation. In contrast to gun owners in general, concealed handgun licensees in particular must be over the age of 21, must pass a 10-point fingerprint-based based background check, and must have received safety training. And again, even if applicants have a clean record, they may be denied "if the sheriff has a reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others." C.R.S. § 18-12-203(2).

In several states with laws similar to the Concealed Carry Act, a state agency produces annual reports of all criminal justice incidents involving concealed handgun permitees. While the details of how the data are reported vary among the

states, the reports unanimously show that almost all permitees are highly law-abiding. In particular:

- Minnesota. One handgun crime (broadly defined, such as driving while under the influence if a handgun is in the car) per 1,423 permitees.
- Michigan. 161 charges of misdeeds involving handguns (including duplicate charges for one event, and charges which did not result in a conviction) in 2007 and 2008 out of an approximate Michigan population of 190,000 permitees.
- Ohio. 142,732 permanent licenses issued since 2004, and 637 revocations for any reason, including moving out of state.
- Louisiana: Permitee gun misuse rate of less than 1 in 1,000.
- Texas: Concealed handgun licensees are 79% less likely to be convicted of crimes than the non-licensee population.[1] Only 2/10 of 1% of licensees ever convicted of a violent crime or firearms regulation crime.

[1] Some Brady Center publications nevertheless assert that concealed handgun licensees are extremely dangerous people. Upon closer examination, these assertions tend of depend on errors such as classifying as gun crimes acts that were determined by law enforcement to be lawful self-defense, or claiming that a particular criminal had a carry permit when in fact he did not, or listing crimes in which the gun carry permit was irrelevant (e.g., possession of drugs in the criminal's own home). See Kopel, 42 CONN. L. REV., at 569-72.

- Florida: The data show a rate of 27 firearms crimes per 100,000 licensed Florida residents.

Kopel, 42 CONN. L. REV. at 564-69.

In Colorado, similar data are collected and maintained at the county level by each and every sheriff. The Colorado Sheriffs' data are consistent with the data detailed above: carry permitees are highly law-abiding; permit revocations are rare; revocations for firearms offenses are rarer still, and even those usually involve a regulatory offense rather than an act of violence.

It is true, by the way, that many carry permitees drink alcohol from time to time. Colorado law always forbids carrying a firearm while under the influence of liquor or of a controlled substance. C.R.S. § 18-12-106(d). There have been a small number of permit revocations for carry permit violations for violating this law. The overwhelming number of permitees obey this law, as they obey the other firearms laws.

At campuses such as Colorado State University, the situation is exactly the same. Persons under 21, who are by law not allowed to drink, are not allowed to apply for carry permits. Persons over 21 who have permits have been obeying the law about alcohol restrictions while carrying. Stereotyped generalizations about university students and drinking cannot erase the actual record of exemplary

behavior of Colorado permitees, including college seniors and graduate students, in the 21-29 age bracket.

As to whether laws like the Concealed Carry Act produce a statistically significant reduction in criminal violence, criminologists remain divided. Of course the exercise of a constitutional right is not dependent on proof that it produces statistically significant benefits. (See Part II.A for discussion of the explicit constitutional basis of the Concealed Carry Act.)

The Brady brief seriously mischaracterizes a 2003 article by John Donohue. According to the Brady brief, Donohue found that concealed handgun licensing "laws are associated with uniform *increases* in crime." John J. Donohue, *The Impact of Concealed-Carry Laws*, *in* EVALUATING GUN POLICY (Jens Ludwig & Philip J. Cook eds. 2003), *quoted in* Brady br., at 11. What the Brady brief omits is that Donohue is describing the "result" of a methodology which he has just explained to be defective. In the very next paragraph, Donohue explains why more rigorous data analysis "undermines" and "weakens" this result. *Id.* at 290. Donohue's article concludes that because of problems in the data, and the relatively small effects of concealed handgun laws compared to national crime trends, "it is hard to make strong claims about the likely impact of passing a shall-issue law." *Id.* at 325.

Another article by Donohue, notably uncited by the Brady brief, collected additional data and reported that there were no statistically significant effects in any direction. Ian Ayres & John J. Donohue, III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN L. REV. 1193 (2003).[2]

Surprisingly, one article with the Brady brief cites for the proposition that licensed carry increases crime did not even study licensed carry. Mark Duggan, *More Guns More Crime,* 109 J. POL. ECON. 1086 (2001), cited in Brady br. at 11.

Rather than studying concealed handgun laws, the article studied the circulation of *Guns & Ammo* magazine. The article said that it found higher circulation for the magazine (which was used a proxy for gun ownership rates) to be associated with higher crime rates. However, the study failed to consider the circulation policy of *Guns & Ammo* during the study period. At the time, the magazine was attempting to meet certain circulation numbers, which it had guaranteed to advertisers, by giving away 5 to 20 percent of its circulation to doctors' and dentists offices'. The

[2] Donohue's most recent article concludes: "Finally, despite our belief that the NRC's [National Research Center's] analysis was imperfect in certain ways, we agree with the committee's cautious final judgment on the effects of RTC [Right to Carry] laws: ―with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." Abhay Aneja, John J. Donohue, III, & Alex Zhang, "The Impact of Right-to-Carry Laws and the NRC Report: Lessons for the Empirical Evaluation of Law and Policy," paper presented at 5th Annual Conference on Empirical Legal Studies, Johns Hopkins University, June 29, 2010 (available at http://ssrn.com/abstract=1632599 (parentheticals added).

publisher deliberately chose to concentrate its free magazine program in counties which were believed to have increasing crime rates. *See* Florenz Plassmann & John Lott, Jr., *More Readers of Gun Magazines, But Not More Crimes*, Soc. Sci. Research Network (July 2, 2002) (available at http://ssrn.com/abstract=320107).

More recently, a study which reviewed the entire literature on the subject of concealed carry, and which added additional years and variables to the Ayers-Donohue analysis, found that the only statistically significant long-term effect is a reduction in assault. Carlisle E. Moody & Thomas B. Marvell, *The Debate on Shall-Issue Laws*, 5 ECON J. WATCH 269, 288 (2008).

Settling the academic debate between Ayers/Donohue (no statistically significant effects) versus Moody/Marvell (reduced assaults) is of course beyond the duties of this Court. There is easily sufficient evidence to support the legislature's rational determination that licensed carry is helpful to public safety. After all, even saving a few lives, and stopping or deterring dozens of rapes, robberies, or assaults is a result which, while perhaps not "statistically significant," is of the greatest significance to the victims whose lives are saved, or who are otherwise saved from violent felony attack.

B. Schools

"No court requires any evidentiary proffer to recognize that campus and classroom shootings are an unfortunately frequent occurrence in American society." (Open. Br., at 53). This is true. And defendants' policy heightens the danger.

The people who have perpetrated mass murders at schools have not been people with concealed handgun licenses. Undeterred by the laws against homicide, they were certainly not deterred by the fact that their gun carrying on the way to the homicide also violated the law. The 1994 policy does nothing to keep them off campus.

Instead, the 1994 policy ensures that the killers would have a longer time to slaughter defenseless victims, before law enforcement arrive. No court requires any evidentiary proffer to recognize that a mass murder at the New Life Church, in Colorado Springs, was thwarted in December 2008 by a church volunteer who was carrying her handgun precisely because she had been so authorized by the Concealed Carry Act. Kopel, 42 CONN. L. REV. at 545-46.

A school shooting was stopped in Pearl, Mississippi (1997) because the Vice-Principal of the junior high school ran to his car to retrieve his handgun. The killer at Appalachian School of Law (2002) was apprehended in part by two law students who retrieved handguns from their automobiles. An armed attack on a high school

dance in Edinboro, Pennsylvania (1997), was ended by a restaurateur who used his shotgun. *Id.* at 544-45.

There is no guarantee that immediate armed resistance would also stop a mass killer. In a school context, it does seem to have worked whenever it has been used.

The County Sheriffs of Colorado believe that victims who are waiting for law enforcement to arrive have the right to fight for their lives while they wait, and that public safety will be enhanced if they do.

C. Enforcing Firearms Laws on Campus

Courts sometimes give deference to a university decision which "lies primarily within the expertise of the university." For example, the U.S. Supreme Court applied "deferential strict scrutiny" to find that the University of Michigan's law school admissions policy was constitutional, but the undergraduate admissions policy was unconstitutional. *See*, *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Gratz v. Bollinger*, 539 US 244 (2003).

In contrast, the university has no expertise in firearms safety. The County Sheriffs of Colorado do have such expertise.

In this regard, we particularly call the Court's attention to the following mistake in the Brady brief: "If the policy were struck down, law enforcement can expect to encounter many more guns, and it will be far more difficult to determine who is

'lawful' and who is not, both as a practical matter and a legal one." Brady br., at 18.

Please allow law enforcement to speak for itself. Every day in Colorado, the deputies of Colorado's Sheriffs distinguish lawful gun carriers from unlawful ones. Concealed carry is lawful with a permit, and it is unlawful without a permit. If a deputy discerns that someone is carrying concealed, then the deputy can ask the person to produce his concealed carry permit. Every permitee must carry the permit whenever the gun is carried. If the person has a permit, he is lawful. Without a permit, he is unlawful.

As for the other factual situation in this case, possession in automobiles, the situation on a college campus is equally straightforward. The *only* plaintiffs in this case are adults who have been issued concealed handgun permits. Pursuant to state statute, a permitee may possess a loaded firearms in an automobile while driving through a college campus, and may leave the firearm locked in a parked car. C.R.S. § 18-12-105.5. Again, the factual inquiry by a law enforcement officer is extremely simple: if the person has a permit, the gun is lawful; if not the gun is unlawful. Sheriffs of Colorado and their deputies know how to enforce this law, and they are trained to make factual and legal determinations of vastly greater complexity every day.

II. Appropriate Legal Standards

A. The Colorado Constitution

This Court previously declined to decide whether the word "fundamental" should be used in connection with Article II, section 13 of the state Constitution. *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994). Later, a three-judge panel asserted that the right was not "fundamental." *Trinen v. City & County of Denver*, 53 P.3d 754 (Colo. App. 2002). The General Assembly responded by enacting legislation, signed by the Governor, affirming that the right is indeed fundamental. C.R.S. § 29-11.7-101(1) (enacted 2003). The United States Supreme Court came to the same conclusion about the similar right in the United States Constitution. *McDonald v. Chicago*, 561 U.S. —, 130 S.Ct. 3020 (2010). Since the Colorado Supreme Court has never asserted that it has the power to impose the personal values hierarchies of individual judges, and to disregard the expression of the People—speaking through both the political branches of government—that a right *is* fundamental, the time has come for this Court to acknowledge that section 13 guarantees a fundamental right.

The Constitution itself tells us the words that must apply to all the Bill of Rights, and especially to section 13: "natural, essential, and inalienable." COLO. CONST. art. II, § 3.

The primary purpose of government is protection of these inalienable rights. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men"). That is why the Colorado Constitution declares the Bill of Rights even before describing how the government will be organized.[3]

Like sections 1 and 2 of the Colorado Bill of Rights, which affirm the sovereignty of the people and their right to change the government as they see fit, section 3 articulates a principle which controls every law in Colorado. The state Constitution, and every law enacted thereunder, must always be interpreted to safeguard the "natural, essential, and inalienable" rights of Coloradoans in "defending their lives" and "seeking and obtaining their safety." COLO. CONST. art. II, § 3.

Quite significantly, the Concealed Carry Act was explicitly enacted to safeguard the "constitutional right of self-protection." C.R.S. § 18-12-201(1)(e). The Act is a direct legislative protection of an "essential" right.

One of the Act's specifically-declared means of protecting the constitutional right is "ensuring that the laws controlling the use of the permit are consistent throughout the state." *Id.* Regents' theory would thwart the constitutionally-

[3] The only Article preceding the Bill of Rights is the definition of the geographic boundaries of the state. COLO. CONST., art. I.

required consistency, for Regents assert that they can change policy from campus to campus and from time to time upon their own whim. "Limitlessly changeable" is not consistent with "consistency."

Thus, if this Court did find any ambiguity in the Concealed Carry Act, the Constitution and the Act itself show that such ambiguity must be resolved in favor of the right of self-defense.

Regents acknowledge that their proposed "Mother may I?" rule for legislation affecting the University of Colorado does not apply when the General Assembly enacts a comprehensive law to protect civil rights. (Open. Br., at 37). As detailed in Part II.A., the Concealed Carry Act is precisely such a law. The Attorney General's opinion, unfortunately, failed to address, or even notice, the legislature's explicit purpose of protecting constitutional rights, and therefore erred in its analysis. *See* Formal Op. 03-03, WL 21770953 (Colo.A.G.).

B. Academic Freedom

Established in 1876, the University of Colorado did not forbid the possession of firearms on campus. That policy remained for nearly a century, until 1970. At that time, the entire nation was suffering from campus riots and violence, some of it instigated by terrorist organizations such as the Black Panthers and the Weather Underground. At Colorado State University, while a student strike against the

Vietnam War was in progress, the Old Main building, the centerpiece of the university, was destroyed by arson. One or more arsonists also attempted to burn down the ROTC firing range. Colorado State University, "The '60s and early '70s: Activism makes for turbulent times at Colorado State," University History (available at http://www.colostate.edu/features/history-11.aspx).

A few weeks after the CSU arson, the first significant firearms restrictions were adopted in 1970 by the University of Colorado Regents.[4] That same Board of Regents also "hired two former FBI agents to root out Communists on campus." A.J Mills & J.C Helms Hatfield, From Imperialism to Globalization: Internationalization and the Management Text - A Review of Selected US Texts. Paper presented at the 6th APROS (Asian-Pacific Researchers in Organization Studies) International Colloquium, Cuernavaca, Mexico, December 11-14, 1995, at 12.[5]

[4] The 1994 Regents' policy states that the 1970 policy was adopted on May 26, 1970, Board of Regents, Policy 14.I: Weapons Control, Mar. 17, 1994.

[5] Available at http://smu-ca.academia.edu/AlbertMills/Papers/162089/Mills_A.J._and_Helms_Hatfield_J.C._1995_From_Imperialism_to_Globalization_Internationalization_and_the_Management_Text_-_A_Review_of_Selected_US_Texts._Paper_presented_at_the_6th_APROS_Asian-Pacific_Researchers_in_Organization_Studies_International_Colloquium_Cuernavaca_Mexico_December_11-14.

It is proper for a university—and for every other government institution—to forbid the presence of armed mobs or other armed violent criminals.

The 1994 policy, however, goes far beyond the bounds of reasonableness. First, the policy asserts that firearms possession on campus "in fact" interferes with academic freedom. Board of Regents, Policy 14.I: Weapons Control, Mar. 17, 1994.

Yet neither Regents nor their amici have pointed to a licensee actually interfering with academic freedom. To the contrary, the experience of seven years at Colorado State University, and at every Utah campus, shows that licensed carry does not impinge academic freedom.

For nearly a century at the University of Colorado, adults exercised lawful firearms rights. Academic freedom thrived most of the time, and when it did not, the reasons had nothing to do with guns.

Firearms in the wrong hands do threaten academic freedom, but such threats were not the fault of law-abiding citizens who had been issued permits by law enforcement.

C. Declared Prejudice against Constitutional Rights

Policy 14:I asserts that the presence of firearms "threatens the tranquility of the educational environment and contributes in an offensive manner to an

unacceptable climate of violence." *Id.* Astonishingly, the policy declares that all firearms will be banned because "the university educational mission should attempt to teach and model those values which are held to be important to the nation as a whole." *Id.*

Thus, the 1994 policy is one of the very rare cases in which an entity formally declares that it is acting because of animus against the exercise of constitutional rights. Simply put, the right to possess and carry firearms is guaranteed by the Constitutions of the United States and of the State of Colorado. In truth, the "values which are held to be important" are those which the People have enshrined in our federal and state constitutions. The Regents may personally detest those values, but they cannot turn their animus into a prohibition of the exercise and expression of those rights and values—any more than Regents who detested religion could prohibit religious exercise on campus, or Regents who detested the press could prohibit newspapers on campus.

When a city zoning ordinance was based on prejudice, and the Court examined the city's justifications, and found them poorly-related to the city's asserted objectives, the Court found the ordinance to be irrational. *Cleburne v. Cleburne Living Center*, 472 U.S. 432 (1985). Prejudice that mentally retarded people, or concealed handgun licensees, are especially dangerous and so must be zoned off from the rest of the population is unsupported by the facts and is irrational.

Likewise a law based on "animus" (such as the belief that it is "offensive" to exercise an essential right) is irrational. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

The instant case is much clearer than *Romer*. There, animus had to be inferred from examination of the terms of the law. And of course the hundreds of thousands of citizens who voted for the initiative at issue in *Romer* did not all necessarily have common motives. In contrast, the Regents in Policy 14:I have formally declared that they are offended by firearms, and they believe in "values" opposite to the values of the federal and state Constitutions.

The rational basis test requires that the action in question be based on a "legitimate" government interest. When an entity proudly declares that it is acting out of hostility to constitutional rights, the government action is *per se* illegitimate, and therefore fails the rational basis test.

D. The Standard of Review

The rights at issue in this case must be accorded a more protective standard of review than merely the rational basis. Otherwise, the enactment of the sections 3 and 13 of the Bill of Rights would be nullified for all practical purposes. There is a reason why self-defense and firearms are in the Bill of Rights, while pool halls and dry cleaners are not. The former are "natural, essential, and inalienable," and so

they singled out for elevated status, and with every branch of government obligated to give them strong protection.

Marbury v. Madison stands for the proposition that courts must not enforce a statute which is contrary to the text of the Constitution. *Marbury v. Madison*, 5 U.S. 137 (1803) (statute expanded the Supreme Court's jurisdiction beyond what the text of Article III authorized). *Marbury* certainly does not stand for the proposition that courts may nullify the text of the Constitution itself. Yet that is precisely what defendants seek with request for a rational basis test—which would give the constitutional right to arms the same protection (virtually none) as if it had never been placed in Colorado's Bill of Rights. That Constitution states that the right "shall not be called into question." The Framers who wrote and the People who adopted the Constitution did not adopt a fundamental charter which said that "the right may be called into question whenever there is a rational basis for doing so." COLO. CONST. art. II § 13.

Notably, Article II, section 13 closely tracks the language of the Fourteenth Amendment, which had been enacted only eight years earlier. That Amendment provides that "The validity of the public debt of the United States, authorized by law. . .shall not be questioned." U.S. CONST., amend. XIV, § 4. Quite obviously the Amendment forbids repudiation of federal government debt; it does not allow

repudiation (or partial repudiation) whenever someone can imagine a "rational" basis.

Pursuant to the Questions Presented by this Court, the alternative to rational basis is "reasonableness." Accordingly, the formula for reasonableness in the context of section 13 must be defined with particular strength. After all, even the regulation of whether barbers in various jurisdictions can work on Sunday "must be reasonable and not arbitrary and must be based on substantial differences" having a reasonable relation to public purpose to be achieved. *Dunbar v. Hoffman*, 468 P.2d 742, 744 (Colo. 1970). Similarly, a regulation of filled milk was void because it lacked "a real and substantial relation to the public health, safety, morals and welfare." *People v. Instawhip Denver, Inc.*, 490 P.2d 940, 943 (Colo. 1971).

Again, firearms and self-defense could not possibly be accorded a *lower* standard of review than barbers and filled milk, or even an equal standard. Barbers and filled milk are not enumerated in the Constitution, whereas self-defense and arms are.

The correct definition of "reasonableness" in the context of the constitutional right to arms, is supplied by the Fifth Circuit's *United States v. Emerson*. *Emerson* is particularly appropriate for guidance because it is one of only two Circuit Court

cases to conduct an in-depth examination of the legal history of the right to arms.[6] As *Emerson* explained, firearms regulations are allowed if they are "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). The *Emerson* test of "reasonable" controls which are "narrowly tailored" meshes well with the Colorado Supreme Court's teaching in *Lakewood v. Pillow* that firearms restrictions may not "sweep unnecessarily broadly" or "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Lakewood v. Pillow*¸ 501 P.2d 744, 745-46, 180 Colo. 20, 23-24 (Colo. 1972) (citing, *inter alia*, U.S. Supreme Court First Amendment cases).

[6] The other case to conduct such an inquiry was *Silvera v. Lockyer*, which is useless as precedent, because it came to the incorrect conclusion that the Second Amendment protects no individual right at all, a position rejected by all nine Justices of the Supreme Court. *See Silvera v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (Second Amendment is "collective" right, not an individual right); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (majority holds that Second Amendment guarantees an individual right); *id*., at 636 (Stevens, J., dissenting) ("the Second Amendment protects an individual right," but not as broad as the right recognized by the majority).

E. Automobiles

Carrying firearms in automobiles for lawful protection is part of the right of self-defense in section 3, and the right to arms in section 13. Accordingly, the right has never been prohibited by the state legislature, but instead has been the object of affirmative protection to halt local infringements of that right. C.R.S. § 18-12-105.6 (enacted in 2000, and strengthened in 2003).

Even at K-12 schools in Colorado, possession of firearms in automobiles is allowed, under conditions defined by the General Assembly. C.R.S. § 18-12-105.5. It would be irrational to believe that either the Colorado Constitution or Colorado's statutory system of firearms regulation create a system by which firearms rights are *more* restricted at a university than at a kindergarten.

III. THE DOCTRINE OF CONSTUTIONAL AVOIDANCE

As detailed in Part II of this brief, a ruling against Plaintiffs on the statutory interpretation issue would necessarily require this Court to make further rulings on constitutional issues. The Doctrine of Constitutional Avoidance instructs courts to avoid needlessly deciding constitutional issues; an ambiguous statute should be read in such a way as to avoid constitutional issues. *See, e.g. Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("When deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its

choice. If one of them would raise a multitude of constitutional problems, the other should prevail...."); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (Supreme Court presumes that state statutes will be construed by state courts so as to avoid constitutional questions presented).

This Court has a solid record of adhering to the Doctrine of Constitutional Avoidance. *See, e.g. Catholic Health Initiatives Colorado v. City of Pueblo, Dept. of Finance*, 207 P.3d 812, 822 (Colo. 2009) ("By adopting this plain language interpretation of the "charitable organization" definition, we avoid a potential constitutional conflict..."; both majority and dissent aim for a construction to avoid First Amendment religion issues); *State Dept. of Labor and Employment v. Esser*, 30 P.3d 189, 194 (Colo. 2001) (If alternative constructions of a statute, one constitutional and the other unconstitutional, may apply to the case under review, appellate court chooses the one that renders statute constitutional or avoids constitutional issue.); *Adams County School Dist. No. 50 v. Heimer*, 919 P.2d 786, 790-92 (Colo. 1996) (statute for appellate court review of teacher dismissal reviewed so as to avoid constitutional separation of powers issues); *id*. at 797 (Scott, J. concurring in part, dissenting in part); *Perry Park Water & Sanitation Dist. v. Cordillera Corp.*, 818 P.2d 728 (Colo. 1991) (state statute and water district resolution construed so as to avoid constitutional due process issues).

A reading of the Concealed Carry Act as preemptive will protect this Court from unnecessarily intruding onto public policy debates, and inappropriately deciding a series of constitutional issues when a much more straightforward statutory solution is available.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted this 24th day of January, 2011.

COUNTY SHERIFFS OF COLORADO
INDEPENDENCE INSTITUTE
By:

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David B. Kopel

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2011, a true and correct copy of the foregoing was filed by hand with this Court and served via United States mail, first class postage prepaid, to the following addressees:

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