1993 WL 13038212 (Colo.) (Appellate Brief)
Supreme Court of Colorado.

Lawrence M. ROBERTSON, Jr., M.D.; Sharon Deatherage; Jeffrey Hecht; and David Jewell d/b/a Scotties Guns & Militaria, Plaintiffs-Appellees,
State of Colorado ex rel. Gale A. Norton, Plaintiff-Intervenor-Appellee,
v.
THE CITY AND COUNTY OF DENVER; Ari Zavaras, Chief of Police of the City and County of Denver; and Manuel Martinez, Manager of Safety and Ex-Officio Sheriff of the City and County of Denver, Defendants-Appellants.

No. 93SA91.
September 21, 1993.

Appeal from the District Court, City and County of Denver, 90CV603

Brief of Appellee State of Colorado

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*1 STATEMENT OF THE ISSUES AND STATEMENT OF THE CASE

Plaintiff-Intervenor-Appellee the State of Colorado ex rel. Gale A. Norton ("Colorado") files this brief in support of the lower court's decision that Denver ordinance § 38-130 is unconstitutional Colorado's brief adopts and incorporates by reference the statement of issues and statement of the case in plaintiffs' brief.

SUMMARY OF ARGUMENT

The ordinance which the lower court found unconstitutional was based on the factual premise that so-called "assault weapons" fire faster, have a larger ammunition capacity, and are more frequently used in crime than other firearms. All of these premises are demonstrably false, and the ordinance accordingly lacks a rational basis in fact.

Many provisions of the ordinance are void for vagueness, and were properly declared so by the trial court.

The ordinance is preempted by one state law which was directly intended to preempt such ordinances, and by other state laws, including those which authorize the purchase and possession of firearms without restrictions as to model.

INTRODUCTION

One evening, a gang brawl broke out in the street next to the northwest Denver home of a young woman named Sharon Deatherage. A police car happened upon the scene, and then sped away, never to return. The young woman, who lived alone, decided that the Denver city government (a defendant in the case at bar) could not be relied upon to protect her life. Because of an injury to her wrist, she was unable to use a handgun. At the suggestion of a firearms ***2** instructor, she bought an M-l carbine, which is a relatively small, low-powered semiautomatic rifle, and which has been commercially available for nearly half a century. (Deposition, Colo, ex. 60, at 3, 5-8.) [1]

[1] The ordinance outlawed by name "The Plainfield Machine Company Carbine," which is one company's version of the M-1 carbine. Denver Ord. § 38-130(h)(1)u. The ordinance also outlaws, in vague, amorphous language, guns which are similar to the listed guns. § 38-130(h)(4)&(5). At a transcribed public meeting with firearms dealers, the author of the Denver ordinance was unable to provide any explanation for why the particular M-1 carbine was on the banned list. (Dec. 18, 1989 meeting transcript., at 21-22, Colo. ex. 22.) Ms. Deatherage, who is not an expert in firearms design, is unsure as to whether her particular M-1 is banned or not. In any case, her M-1 was illegal because she had attached a 30 round magazine to it, in the understandable expectation that her gun might one day have to be used against several attacking gang members. (Deposition, ex. 60).

Is the young woman a menace to society because she chose a reliable, accurate, firearm for protection? May the young woman and tens of thousands of other Denver residents be turned into criminals because they possess high-quality firearms with cosmetic features that offend a misguided sensibility of what a "sporting" weapon should look like? In an atmosphere of exaggeration and disinformation, can ordinary firearms which are cosmetically incorrect be falsely relabeled as "assault weapons"? These questions are, quite literally, questions of life or death for Colorado residents such as this young woman, who look to this Court to defend their right to possess high-quality firearms to defend their lives and homes.

ARGUMENT

I. LACKING A REAL AND SUBSTANTIAL BASIS, THE ORDINANCE IS VOID

The right to keep and bear arms is plainly a fundamental Constitutional right. The right is explicitly guaranteed by Article II, section 13 of the Colorado Constitution, and is implicitly ***3** guaranteed by Article II, section 3's right to self-defense. As this Court recognized in *Lakewood v. Pillow* and its progeny, the proper judicial approach for analyzing infringements on the right to keep and bear arms is to apply the fundamental rights analysis. 180 Colo. 20, 501 P.2d 744 (1972)

But even if the right to arms were not fundament, the ordinance would fail the rational basis test. Hence, even if the ordinance were to be tested by defendants' "reasonableness" standard, the ordinance would still be unconstitutional.

A. The "Real and Substantial Relationship" Test

When no fundamental right is involved, the standard for equal protection review is "whether the statutory classification has some rational basis in fact and is reasonably related to a legitimate government interest." *People v. Czemerynski*, 786 P.2d 1100, 1111 (Colo. 1990); *Dunbar v. Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970) (classification "must be reasonable and not arbitrary and must be based on substantial differences" having a reasonable relation to public purpose to be achieved). The rational basis test "is not a toothless one." *Mathews v. De Castro*, 429 U.S. 181, 185 (1976); *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

Colorado courts have traditionally applied the rational basis test carefully, to guard the rights of the people to be subject only to laws that are genuinely rational. *See People v. Instawhip*, 176 Colo. 396, 400, 490 P.2d 940, 943 (1971) (voiding regulation of dairy products because of lack of "a real and substantial relation to the public health, safety, morals and welfare") *citing Love v. Bell*, 171 Colo. 27, 465 P.2d 118 (1970).

Significantly, the Court may not accept one of defendants' rationales or findings of fact ***4** if the finding or rationale is wrong. For example, in *City of Colorado Springs v. Grueskin*, 161 Colo. 281, 422 P.2d 384 (1967), a city imposed a number of safety restrictions on delivery of gasoline. There was no suggestion that the fundamental rights test should be used; and the city Fire Chief testified as to the safety advantages of the restrictions. Nevertheless, challengers of the ordinance provided expert testimony that convinced the trial court that the restrictions did not effectively promote public safety. This Court upheld the trial court, struck the ordinance (notwithstanding the Fire Chiefs arguments about fire safety), and reaffirmed the long-standing test regarding the exercise of police powers: If a restriction upon the use of property is to be upheld as a valid exercise of the police power, it must bear "a fair relation to the public health, safety, morals, or welfare," and have "a definite tendency to promote the same." In determining the validity of restraints upon freedom imposed by statute or ordinance, "The determination we are called upon to make is whether the ordinance has a real and substantial relation to the accomplishment of those objectives which form the basis of police regulation." 161 Colo. 281, 422 P.2d 384, 388 (1967). [2]

2 *See also Englewood v. Apostolic Christian Church*, 146 Colo. 374, 378, 362 P.2d 172, 174 (1961) ("It is well established" that whether a law bears a reasonable connection to its purpose "is a question of determination for the judiciary.") Englewood's holding that churches are exempt from permissive zoning ordinances was overruled in *Colorado Springs v. Blanche*, 761 P.2d 212 (Colo. 1988).

Thus, whatever the approach of courts in some other states, an ordinance cannot pass Constitutional muster merely because its proponents can invent some basis for the ordinance. Colorado courts must conduct their own inquiry into that basis.

The ordinance at bar is void under Article II, § 25 because its provisions do not have a ***5** "real and substantial relation to the accomplishment" of the ordinance's stated objectives, as an examination of the "findings" in the legislative intent of the ordinance will demonstrate.

The ordinance begins with the following "findings" of "fact":
(a) Legislative intent. The Denver City Council hereby finds and declares that the use of assault weapons poses a threat to the health, safety, and security of all citizens of the City and County of Denver. Further, the Council finds that assault weapons are capable both of a rapid rate of fire as well as of a capacity to fire an inordinately large number of rounds without reloading, and are designed primarily for military or anti-personnel use.

The Denver City Council finds that law enforcement agencies report increased used of assault weapons for criminal activities. This has resulted in a record number of related homicides and injuries to citizens and law enforcement officers. Denver R.M.C., § 38-130(a).

As will be detailed below, virtually every "finding" in subsection (a) is false-indeed, so false that no reasonable person who was aware of the evidence could consider the statements true. The asserted characteristics of the banned firearms are simply wrong, and the claims about criminal use are contradicted by unanimous government statistics in the record. It is as if the city council had enacted a beer prohibition by first claiming that beer grows on trees, that a single sip always causes instant physical addiction, and that beer is more dangerous than other alcohol because it is stored in glass containers. The very premises of the ordinance being wholly irrational, the ordinance fails the rational basis test.

Defendants have labored mightily to convince this Court that the ordinance affects a small, unique, and highly dangerous class of weapons. Defendants are wrong; the ordinance simply outlaws firearms which, although they may have a threatening military appearance, are functionally similar to other firearms. The now-invalid ordinance was an irrational triumph of appearance over reality, and no neutral fact-finder could conclude otherwise.

***6** Indeed, even the name "assault weapon" is misapplied to the guns in question. "Assault rifle" is a military term of art used to refer to certain battlefield machine guns. Defense Intelligence Agency, Small Arms Identification and Operation Guide--Eurasian Communist Countries, 105 (1980)(attached to Colo. ex. 1). "Assault weapon" is simply a slogan invented by gun control advocates to apply to guns which look like military machine guns, but which do not function like them.

B. The Ordinance's Premise Regarding Rate of Fire Lacks "A Real and Substantial" Basis.

The ordinance had "found" that "assault weapons are capable of a rapid rate of fire." The district court found this premise to be false: "The court finds that all semiautomatics can fire no more rapidly than the shooter can repeatedly squeeze the trigger. Therefore, the ban on semiautomatics based on 'rate of fire,' without more, is unsupportable." (Order at 6.) This judicial finding was well supported by evidence in the record. [3]

[3] Indeed, many guns which are not banned as so-called "assault weapons" have an equal or greater rate of fire. For example, the Winchester Model 12 pump action shotgun can fire six "OO buckshot" shells, each shell containing 12.33 caliber pellets, in three seconds. Each of the pellets is larger than the bullet fired by a civilian look-alike of a Kalashnikov rifle. In other words, the Winchester Model 12 pump action shotgun can in three seconds unleash 72 separate projectiles, each single one capable of causing injury or death. The Remington Model 1100 shotgun, which fires semiautomatically and is not banned, can unleash the same 72 projectiles in 2.5 seconds. In contrast, a semiautomatic gun which looks like a Kalashnikov rifle would take at least fifteen seconds to shoot that many rounds without aiming, and a minute or more to shoot and aim; the Kalashnikov look-alike rounds would be slightly smaller than the pellets from the Winchester or Remington. *See* Note, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 Am. J. Crim. L. 143, 149 (1990); Farnam aff., at ¶¶ 7-8, Colo. ex. 28 (police combat instructor's statement that most pump action guns have rate of fire similar to semiautomatics; a gun's cyclic rate has little to do with its lethality, since a person who fires without aiming will almost never hit a target); Phillips aff., at 2, Colo. ex. 29 (statement of combat instructor who supervised rate of fire studies for U.S. Navy that at close range, a bolt-action gun cycles only one tenth of a second slower than a semiautomatic; at longer ranges, the cyclic rate is the same for both types of guns); Ex. 37 (videotape comparing rate of fire and destructive capability of Kalashnikov rifle to traditional shotguns and rifles), Ex. 38 (videotape comparing rate of fire of an automatic, a military-style semiautomatic, and a traditional looking semiautomatic).

***7** The amicus brief of the Coalition to Prevent Handgun Violence acknowledges the correctness of the court's statement, but then claims that certain "military-style" features make so-called "assault weapons" more suitable for rapid fire than are other semi-automatics. (CPHV at 20.) The same issue had been raised below, and Colorado had demonstrated that the so-called "military" features such as a pistol grip on a rifle did not allow a person to shoot any faster, but did allow the shooting to be more accurate-thus enhancing the gun's utility for defense, and enhancing public safety by reducing the risk of stray shots. Colo. tr. br. at 40-43; Colo. tr. br. at 31-33. [4]

[4] The major purpose of a pistol grip is to stabilize the firearm while firing from the shoulder. By holding the pistol grip, the shooter keeps the barrel from rising after the first shot, and thereby stays on target for a follow-up shot. Again, the defensive application is obvious, as is the public safety advantage in preventing stray shots.
Moreover, with a pistol grip, a rifle could be held with one hand while the other hand dials 911 or opens a door. *Assault Weapons*, at 46 (1st ed.), Colo. ex. 32. The application in a home defense situation is obvious since victims of a burglary will not always have time to draw their gun to the shoulder, and may not even be in a position to take a shot from the shoulder.
The briefs of defendants and the CPHV raise a variety of other claims about the allegedly pernicious characteristics of so-called "assault weapons." Defs. br. at 18-22; CPHV br. at 13-21. Although space does permit a full reply, it should be noted that each of defendants' claims had been raised below, and debunked below by Colorado. See Colo. tr. rep.br. at 23-26. For example, defendants claim that so-called semi-automatic "assault weapons" can be easily converted to full automatic. Defs. br. at 21. As Colorado had explained in detail below, the Bureau of Alcohol, Tobacco and Firearms has stated that no gun currently on the market can be easily converted. BATF experts quoted in *New York Times*, Colo. ex. 44. Further, mere possession of a conversion kit requires the same federal license as does owning a machine gun. ATF Ruling 81-4, Colo. ex. 57. Notably, even though the court below found a "compelling state interest" regarding part of the ordinance, the lower court did not cite any of the allegedly pernicious characteristics as a justification for the compelling state interest.

***8** While the CPHV uses the catch-phrase "spray-fire," the CPHV ignores Colorado's uncontroverted evidence that a semiautomatic firearm, unlike a machine gun, cannot "spray fire," since the shooter must squeeze the trigger for each shot, and as a practical matter, it is impossible to fire more than one shot per second. [5]

[5] See materials cited in footnote 3.

Most importantly, defendants and the CPHV assert that difference between a good semi-automatic and a bad one is that the good guns "are designed to be fired from the shoulder and depend upon the accuracy of a precisely-aimed

bullet," whereas the bad guns banned in Denver "can be rapidly fired one-handed while still keeping the assault weapon on target." (CPHV br. at 13; Defs. br. at 19). Accepting *arguendo* defendants' and CPHV's technical description of the guns, Article II, section 13 of the Colorado Constitution was not written so that persons with what the CPHV calls "semi-automatic hunting rifles" could sneak up on animals and kill them with "a precisely-aimed shot" from half a mile away. The right to arms was guaranteed so that persons would be able to use firearms in defense of "home, person, and property." Because criminals sometimes attack in groups of two or more, and because even lone criminals may not be stopped with a single bullet, the ability to fire successive accurate shots at one or more attackers is essential for defense of self and others. Thus, defendants' complaint that the banned guns "do not move off target as much after each shot" simply proves that the guns are superior, safer firearms for defense against criminal attack. (Defs, br. at 19.) And because criminals are rarely polite enough to stand still while a victim brings the gun to the shoulder for a single ***9** "precisely-aimed shot," the right to bear arms for personal defense is nowhere limited to guns that must always be fired from the shoulder. Accordingly, even under a "reasonableness" test, firearms which can accurately stay on target, and which can be deployed rapidly against criminal attack, are clearly at the core of Colorado's Constitutional right to keep and bear arms. [6]

[6] To accept the Denver/ CPHV's theory that only guns which can be fired from the shoulder are "legitimate" would be to authorize a complete prohibition on handguns, a prohibition which the court below specifically noted would be unconstitutional. (Order at 11).

And in any case, the Denver/CPHV's argument is irrelevant, because the ordinance nowhere included a generic definition that includes guns with features such a pistol grip or a muzzle brake. [7] Nothing in the language of the ordinance, or the full record of legislative intent supplied by defendants even mentions these allegedly military features. Denver Ord. § 38-130; defs. ex. B (transcript of public hearing & city council discussion). Defendants only began discussing the so-called "military features" after defendants had been sued. Indeed, subsection (b)(1) of the ordinance, which the CPHV claims is a "precatory" description of so-called "assault weapons," describes an entirely different set of characteristics. § 38-130(b)(1).

[7] It is true that some of the guns listed by name in subsection (h) have some of the features identified in the CPHV's brief. But the guns are hardly on that list because of anything to do with their function. As defendants admitted, the list was simply copied verbatim (down to the typographic errors) from a California list. Defs. ans. to interrogatories, at 5, Colo. ex. 2. And as Colorado demonstrated without contradiction, the California list was created by people who were looking at a picture book of guns, rather than by actual analysis of particular firearms' rate of fire or other functional capabilities. State of Florida, Commission on Assault Weapons, *Report* (May 18, 1990), summary of March 18, 1990 meeting, at 3, Colo. ex. 46. Further, as Colorado demonstrated without contradiction, there are many guns on the list which have few if any of the so-called "military features," while there many other non-banned guns which have many of the "military features." Colo. tr. br. at 78-92; Colo, tr. rep. br. at 44-64. Thus, the list of guns in subsection (h), to the extent it has any independent meaning, is void as irrational.

***10 C. The Ordinance's "Findings" Regarding Ammunition Capacity Lack a Real and Substantial Basis**

A second stated basis of the ordinance was that so-called "assault weapons" have "a capacity to fire an inordinately large number of rounds without reloading." The lower court also found this basis to be plainly false: "The firing capacity is dictated by the magazine size and not the weapon. Therefore, the ordinance's ban on assault weapons, without regards to the magazine size, would not be narrowly tailored to serve a compelling governmental interest." (Order at 9). Indeed, the ban would not even be rational.

As the court recognized, most semiautomatic firearms (both banned and nonbanned) store their ammunition in detachable boxes or tubes called "magazines." How many rounds a gun can fire without reloading depends on the size of magazine (an interchangeable, removable part that can be purchased separately). Thus, ammunition capacity has nothing to do with the gun itself; the magazine, not the gun, is the variable. Any gun that accepts detachable magazines can accept a magazine of any size. "*Assault Rifle Legislation*," 17 Amer. J. Crim. L. at 149; Gary Kleck, *Point Blank: Guns and Violence in America* 79 (1992), Colo. ex. 67. Accordingly, the banned guns had no more ability to use large-capacity magazines than many non-banned semi-automatics.

And notably, none of the shotguns which the ordinance purported to ban by name can accept 21 round magazines. Unlike the rifles and handguns, the shotguns have a fixed, unchangeable ammunition capacity of 12 shots, 8 shots, 3 shots, or just a single shot. See Colo, tr. br. at 44-45, 92.

It is also true, as the district court recognized, that a semi-automatic to which a large- ***11** capacity magazine is actually attached is functionally different from a semi-automatic to which a smaller magazine is attached. But changing a magazine takes only about a second and a half. A person simply hits the magazine release button; the empty magazine falls to the ground; and a new magazine is inserted. The ease with which a person can replace one 15-round magazine with a second 15-round magazine means that there is not "a real and substantial relation" between the ordinance and any limitation of firepower. Accordingly, the entire magazine prohibition, as well as the court's validation of the ban on semi-automatics with large capacity magazines, is not "reasonably related" to a legitimate government interest.

D. The Ban on "Anti-Personnel" Weapons is Unconstitutional

The third stated basis of the ordinance was found by the court to be true, but to be unconstitutional. The ordinance had claimed that the banned guns are "designed primarily for military or anti-personnel [sic] use." The court correctly observed that "the Colorado Constitution specifically provides for antipersonnel use of arms for the protection of home, person or property. The fact that these weapons were originally designed for 'antipersonnel and military use', in and of itself, does not make them more susceptible to restriction than any other weapon." (Order at 6). [8]

[8] Moreover, none of the guns, despite their sometimes threatening *appearance*, are "military guns," because none of the guns are used by any military force anywhere in the world, as defendants admitted. See Defs. answers to interrogatories, at 2, Colo. ex. 2.

Thus, the disquisitions on the briefs of defendants and their amici about why the guns in question are allegedly not "particularly suitable" for "sporting purposes" are completely ***12** irrelevant. See 18 U.S.C.S. § 925(d)(3)(BATF test for gun importability). The Colorado Constitution does not care whether a gun is "particularly suitable" for having fun. [9]

[9] The misplaced emphasis on sports pervades the CPHV's brief. For example, the CPHV complains that folding stocks on shotgun provide "concealability and mobility, but they are not required for hunting game." (CPHV br. at 21.) The Colorado Constitution does not care what is "required for hunting game." The Constitution cares about home defense; and a gun with a folding stock is easier to maneuver (especially in a confined setting such as a home) and harder for an attacker to take away. Maneuverability and retainability can make the difference between life and death in a confined setting such as home under attack by a burglar; and it is the homes of Denverites who are being hunted by criminals where the bearing of arms is most favored by the Colorado Constitution.

Significantly, the very references which amicus CPHV cites for the theory that the banned guns are not appropriate for sports also explain why the banned guns are often the very best firearms for defensive purposes. CPHV cites the Bureau of Alcohol, Tobacco and Firearms report on sporting imports, and the first and second editions of Jack Lewis, *The Gun*

Digest Book of Assault Weapons (1986 and 1989). CPHV br. at 14-16. These sources, while sometimes supportive of CPHV's (irrelevant) sports discussion, demonstrate that the banned guns are quite useful for personal and civil defense-and are often the safest, best guns for protection.

Among the guns recommended for the personal defense in the BATF Report are the H&K 91, the H&K 94, and the Fabrique Nationale semiautomatic. Virtually all of the guns evaluated by the BATF were described as highly suited for survival-type situations, thus indicating that they are particularly well suited for use "in aid of the civil power when thereto legally summoned," which is a protected purpose for gun ownership under the Colorado Constitution. *See* ATF Report, "Evaluation of Specific Firearms," Defs. tr. ex. D.

Similarly, of the listed "assault weapons" evaluated by firearms expert Jack Lewis, ***13** virtually every one was praised for its utility in survival, law enforcement, or other civil defense type situations, thus making them especially suitable for use "in aid of the civil power." [10] The guns were also touted for day-to-day home defense (another Constitutionally protected purpose of gun ownership), in part because of their reliability, in part because of their simplicity and ruggedness (meaning that persons who are not expert in gun care can maintain the firearms safely), in part because of their low recoil (making them easier for persons without great upper body strength to control), and in part because of their intimidating appearance, which could convince an attacker to flee or surrender without a fight. For example, according to Lewis, the Steyr AUG-SA has "excellent bio-engineering," a superior and innovative safety, is easy to maneuver for self-defense, and hard for an attacker to take away. Its barrel is so well made that no amount of target practice will wear it out. The gun never needs cleaning, even if dropped in mud or snow. *Assault Weapons*, at 46-49 (1st ed.), Colo. ex. 32. The SIG SG-551 SP carbine works "like a fine Swiss watch" and does not have "any notable recoil." Its "fast second shot" is "perfectly suitable" for police and civilian defensive roles. *Assault Weapons*, at 201-13 (2d ed.), Colo. ex. 33. The M11 pistol finds its "best role as a home defense weapon," in part because its intimidating appearance would force "most burglars and intruders to consider instant surrender." *Assault Weapons*, at 71 (2d ed.), Colo. ex. 33. [11]

10 Although the CPHV cites Lewis, they omit the fact that Lewis, in accord with the Department of Defense, considers only automatics to be true "assault weapons." *Assault Weapons*, at 5 (2d ed.), Colo. ex. 33.

11 Technically the Steyr AUG-SA and the M11 are not banned by the ordinance, but defendants insist that they are banned because the semiautomatic Steyr-AUG-SA and the semi-automatic M11 was what they had in mind when they outlawed the automatic Steyr-AUG and MAC 11. *See* Johnson aff., Colo. ex. 1; Colo. rep. br. at 59-60..

***14** The utility of the banned firearms for lawful defense was illustrated by the ordinance itself. Subsection (e)(1) allowed possession of the banned guns by government agencies, including the Denver Police Department. Police officers were allowed to retain any so-called "assault weapons" that they personally owned, without even registering them.

The police exemption highlighted the irrationality of the ordinance's assertion that the banned firearms have "a greater rate of fire or firing capacity than reasonably necessary... for protection activities." § 38-130(b)(1). The only reason for police to possess firearms is for protection activities. It is irrational to ban firearms under the grounds that they are not suitable for protection, and to simultaneously allow the police to use them. Unlike police officers, ordinary citizens cannot make a radio call for backup that will bring a swarm of police officers within seconds. The lives of ordinary citizens are just as valuable as the lives of police officers, and ordinary citizens are just as entitled to use the best firearms available for protection. [12]

12 In the lower court, defendants made no effort to defend the rationality of the police exemption. Such an exemption could not be defended on the grounds that the guns can only used by persons with special training; for the sponsor of the ordinance had actually complained that the guns were "very easy to use." Cathy Reynolds, "Headlines" (newsletter), Colo. ex. 16. Even assuming *arguendo* that special training were necessary, a complete prohibition would not be narrowly tailored; all that would be necessary would be a requirement that persons pass a training class equivalent to that required of the police.

E. The Banned Guns are not Commonly Used in Crime, and There is No Evidence that they Could so Become

A fourth stated basis of the ordinance was that "law enforcement agencies report increased use of assault weapons for criminal activities. This has resulted in a record number of related homicides and injuries to citizens and law enforcement officers." Defendants take up ***15** this cudgel again on appeal, by re-citing their trial exhibits. Defs. br. at 17-18.

Significantly, every item that defendants introduced in evidence to claim that the banned guns were the "weapon of choice" of criminals was refuted below by Colorado. Colo. tr. br. at 24-26; Colo. tr. rep. br. at 11-22. For example, defendants reprint the City Council testimony of former Denver Chief of Police An Zavaras: "assault weapons are becoming the weapons of choice for drug traffickers and other criminals." (Defs. br. at 17). Like virtually everything else defendants introduced at trial regarding the criminal use of so-called "assault weapons," the "evidence" was simply an *ipse dixit* with no factual support. As Colorado's evidence in the lower court demonstrated, *all* of the statistical evidence reported by government agencies showed that so-called "assault weapons" are used in only about 1% of gun crime. [13]

13 The sole item of statistical evidence about semiautomatic firearms submitted by defendants is a reference to an article about gun traces written by two Cox newspapers reporters. Defs. ex. H. The article overlooked the fact that the small percentage of seized crime guns which the federal Bureau of Alcohol, Tobacco and Firearms is asked to trace are not a representative sample of crime guns as a whole. The Cox misinterpretation of BATF data was challenged by the Congressional Research Service, which wrote:

the firearms selected for tracing do not constitute a random sample and cannot be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe. As a result, data from the tracing system may not be appropriate for drawing inferences such as which makes or models of firearms are used for illicit purposes.

K. Bea, *CRS Report for Congress - "Assault Weapons": Military Style Semiautomatic Firearms Facts and Issues*, (Washington, D.C.: Congressional Research Service, Library of Congress, May 13, 1992)(rev. ed. June 4, 1992), at CRS-65. Other evidence presented by Colorado to the lower court provided further proof that the Cox newspaper claims were wildly divergent from actual police gun seizures, even in the cities with the worst drug crime problems. Dr. P. Blackman aff., ¶ 11, Colo. 3; Prof. G. Kleck, *Point Blank* 74-76 (1991), Colo. ex. 67.

If the Cox articles were considered reliable, then they would prove that the ordinance is not narrowly tailored. Over 90% of the Cox "assault weapon" traces involved only 10 models of firearms (Defs. rep. br., ex. H, at 1 [May 21 story, col. 3]). Thus, defendants' ban on a host of other guns, including most centerfire semiautomatic rifles, is not "narrowly tailored."

***16** For example, to investigate former Chief Zavaras' claim that "assault weapons" are the "weapon of choice" of criminals, Colorado used the discovery process to inventory every single firearm in Denver police custody as of March 1991. Of the 232 shotguns currently held by the police, *not a single one* was covered by the ordinance. Of the 282 rifles in the police inventory, nine were covered by the ordinance (3.2%). Of the 1,248 handguns in the police inventory, a mere eight were so-called "assault pistols" covered by the ordinance. (0.6%). Colo. ex. 65. Even the low percentage of "assault weapons" was artificially inflated by police weapons retention policies initiated at the request of the City Attorney. Stipulation, Colo. ex. 66. And of the 14 banned guns in defendants' custody, only one had been used in a crime of violence. Half had been seized from persons who were never charged with any offense. Colo. ex. 64. [14]

14 Also clearly unpersuasive was former Chief Zavaras' testimony: "In a tragedy very close to use [sic] we had two senseless deaths and we had three other people wounded, two of which were law enforcement officers." (Defs. br. at 17). As Colorado demonstrated below, the incident to which Mr. Zavaras was referring, a 1989 crime spree perpetrated by Eugene Thompson, did not involve a semi-automatic firearm at all. *Denver Post* article, Colo. ex. 39 (Thompson used a stolen automatic machine-gun).

Notably, while defendants and their amici fill their briefs with overheated rhetoric about Denver's "summer of violence," they fail to point out even one crime perpetrated this summer in Denver with one of the banned guns, let alone to show that the banned guns have been frequently used in crime this summer.

The Denver data about the very rare use of so-called "assault weapons" in crime is consistent with *all* the data from other jurisdictions, including areas with very severe crime problems, such as Chicago, Florida, Los Angeles, Miami, New York City, Oakland, San Diego, ***17** San Francisco, and Washington, D.C., and is also consistent FBI national crime statistics. G. Kleck, *Point Blank* 73-76, 80-8, Colo. ex. 67; Blackman aff., Colo. ex. 3, ¶¶ 6-13 and attachments to aff.; 17 Am. J. Crim. L. at 151-52.

Apparently unpersuaded by defendants' claim that so-called "assault weapons" were currently a significant portion of gun crime, the lower court itself supplied an alternative rational basis for the ordinance: "the mere fact that assault weapons are used in a small percentage of crime does not negate a need for the legislation...A governmental legislative body need not wait until the use of assault weapons becomes common place in the commission of crimes before it can restrict the possession or sale of assault weapons." (Order at 7).

Since the future is unknowable, the court's concerns about future criminal use of the guns is at least more plausible than defendants' plainly erroneous claims that the guns are currently the "weapon of choice" of criminals. Nevertheless, for the ordinance to pass a rational basis test, there must be at least credible evidence that the guns in question are increasingly used in crime. Yet, as was demonstrated without contradiction in the lower court, semiautomatics are more than a century old, and large capacity magazines are older than the Colorado Constitution. Plaintiffs' tr. br. at 36-38; Colo, exs. 6, 8, 14. If semiautomatics and large capacity magazines, after a century of availability, remain rarely used in crime, it is not rational to ban them based on the theory that they might one day become crime guns. [15] After all, any gun *could* become a crime ***18** gun in the future, but the possibility hardly means that a City Council can ban any gun which it wrongly considers to be a criminal "weapon of choice."

15 That the guns are rarely used in crime should not be surprising; rifles and shotguns are difficult to conceal, and the banned handguns were (for handguns) quite large.
While evidence that the banned guns are frequently used in crime might support banning the guns under a "reasonableness" analysis (if there were also evidence that a ban would be effective, and that no control short of prohibition would work), such evidence would be insufficient to ban the guns under the fundamental rights/compelling state interest test. After all, handguns are already commonly used in crime, and the lower court conceded that a ban on all handguns "is not reasonable." (Order at 11). Or as this Court explained:
[N]o matter how necessary to law enforcement a legislative act may be, if it materially infringes upon personal liberties guaranteed by the constitution, then that legislation must fail. Grim as it may be, if effective law enforcement must be dependent upon unconstitutional statutes, then the choice of the way ahead is for the people to act or fail to act under the amendatory processes of the constitution.
Arnold v. City and County of Denver, 171 Colo. 1, 464 P.2d 515, 517-18 (1970) (vagrancy ordinance stricken, although city argued "forcefully and quite compellingly" that ordinance was necessary to fight crime).

> Similarly, a showing that non-obscene erotic literature causes rape does not justify censorship, nor would a showing that belief in Satanism leads to criminal conduct justify the suppression of a Satanic religion.

Consider, for example, the big-game hunting rifles of which defendants appear to approve. The rifles are extremely powerful, and capable of being used at very long distances. The rifles are, after all, designed to kill animals such as an 800 pound elk with a single shot at a distance of 1/3 of a mile or more. Accordingly, the big-game rifles would be well-suited for assassinations. Suppose that defendants' successors ban these big-game rifles by calling them "assassination weapons." And suppose the State of Colorado again sued defendants over an unconstitutional gun prohibition, and introduced extensive evidence that big-game rifles (a/k/a "assassination weapons") are used in only about 1% of assassinations, and that there is no persuasive evidence of a trend towards increased use. Surely this Court would not uphold the "assassination weapon" prohibition merely based on defendants' self-inflicted and unfounded fear that big-game rifles at some point could become frequently used in assassinations.

Lacking rational premises, the ordinance is void, even under defendants' theory that the ***19** explicit Constitutional right of Coloradans to keep and bear arms deserves no more protection than does the operation of pool halls or the possession of drug paraphernalia.

II. THE ORDINANCE IS UNCONSTITUTIONALLY VAGUE

The District Court declared several provisions of the ordinance to be unconstitutionally vague. (Order at 16-18.) Defendants claim that only one of the court's determinations is erroneous: that the definition of "assault pistol" is vague. Defs. br. at 25. Accordingly, defendants thereby concede the accuracy of. the court's declaration that other provisions are vague, and waive any appeal regarding other language. *See Denver U.S. Nat'l Bank v. People ex rel. Dunbar*, 29 Colo. App. 93, 480 P.2d 849 (1970)(issue raised on appeal by amicus but not by party would not be considered by the court). [16]

16 Although amicus CPHV challenges the court's determinations regarding other vague provisions, defendants did not incorporate the amicus brief into their own brief by reference.

Amicus Denver District Attorney and amicus CPHV both argue that no provision of the ordinance should be found vague unless the provision is "impermissibly vague in all its applications." (CPHV br. at 23; D.A. br. at 19-20). Both briefs rely on the U.S. Supreme Court's *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982), a case whose methodology was adopted by this Court in *Parish v. Lamm*, 758 P.2d 1356, 1366 (Colo. 1988). *Parish* and *Flipside* set up a four-part test for determining what type of vagueness standard a court should apply. The CPHV and DA, while quoting *Flipside*, do not discuss the *Flipside* test. In fact every element in the test militates against them. As this Court explained:
The level of scrutiny that a court must use in reviewing a vagueness challenge depends ***20** on the nature of the enactment. [*Flipside* citation omitted.] The nature of the enactment, in turn depends on four factors. Those factors are:

(1) whether the statute is an economic regulation;

(2) whether the statute imposes criminal penalties;

(3) whether the statute contains a scienter requirement; and

(4) whether the statue threatens to inhibit the exercise of constitutionally protected rights.

758 P.2d at 1366. In regards to the test as applied to the instant case: (1) the ordinance was not an economic regulation; (2) the ordinance imposed criminal penalties, including a jail term of at least 10 days, and not more than 180 days. Ord. § 38-130(j); (3) the ordinance had no scienter requirement. The subsections defining illegal conduct and the penalty subsection made no mention of a culpable mental state. Ord. § 38-130(e),(h),(i) & (j); (4) the fourth element of the test is "[p]erhaps the most important factor" and asks "whether the statute threatens to inhibit the exercise of constitutionally protected rights. If it does, a more strict test applies; if it does not, then a less strict test applies." *Parish*, ii The ordinance forbade the possession of many firearms by law-abiding persons, and even forbade the use of registered firearms in self-defense. (Order at 11-12.) Prohibiting law-abiding persons from possessing certain guns and using them defensively is obviously an infringement on the right to arms. Even if, as appellants argue, the infringement is only minor, and hence passes appellants' emaciated version of the reasonable basis test, the prohibition is still an inhibition on the exercise of Constitutional rights.

Because all four elements of the *Parrish*/*Flipside* test suggest that the strict test for vagueness review applies, it is perfectly proper for plaintiffs and Colorado to raise facial challenges to vague provisions. *Id.* Contrary to what the District Attorney claims, plaintiffs and Colorado need not show that the ordinance "is impermissibly vague in all its applications." (D.A. br. at 20.) The District Attorney's quotation from *Flipside* omits the first part of the ***21** sentence: "assuming the enactment implicates no constitutionally protected conduct." *Flipside*, 455 U.S. at 495-96. *See also Colorado Dog Fanciers v. Denver*, 820 P.2d 644, 651 (Colo. 1991) (if fundamental rights were implicated, plaintiffs would be allowed to raised a facial vagueness challenge without needing to show that ordinance is vague in all its applications).

A. Definition of so-called "Assault Pistols"

The ordinance had outlawed possession of:

> c. All semiautomatic pistols that are modifications of rifles having the same make, caliber and action design but a shorter barrel and no rear stock or modifications of automatic weapons originally designed to accept magazines with a capacity of twenty-one (21) or more rounds.

The District Court found §38-130(b)(1)c overly vague because:
A person of common intelligence has no reasonable basis for determining if a particular pistol was originally based on a rifle design or based on the design of an automatic weapon....Persons attempting to comply with this section must also learn not only what guns their pistol was designed from, but also learn the design history of the ancestor guns to determine if it was automatic weapon "originally designed to accept magazines with a capacity of twenty-one (21) or more rounds" or if it has "the same" action design. These characteristics cannot be readily obtained by a person of common intelligence. (Order at 17.)

Defendants' only argument borders on the frivolous: "The annual *Gun Digest* and other publications provide all the information needed by owners to determine if a pistol is an assault pistol." (Def. or. at 26.) As the District Court pointed out, the ordinance "does not incorporate a source where a person can readily ascertain those pistols which are legal and those pistols which are illegal." (Order at 18.) And besides, *Gun Digest* does not include information about the design history of guns; *Gun Digest* simply describes particular models of guns, without detailing the design history of ancestors of the particular guns. *See Gun Digest*, Colo. exs. 30 ***22** & 31.

Nor do the other two books cited by defendants in their briefs (but, like *Gun Digest*, not referenced in the law itself [17]) provide guidance to an ordinary person attempting to understand defendants' interpretation of subsection (b)(1)c. In the

lower court, defendants listed the "Iver Johnson Model 3000 Enforcer" as one of the guns they interpreted by be banned by subsection (b)(1)c. (Defs. tr. rep. br., at 32.) Yet the gun is not even discussed in either of those two books. Colo. exs. 30-31. The Iver Johnson gun is pictured in *Gun Digest 1991*, but the brief description in *Gun Digest* contains nothing at all about the gun's history. *Gun Digest 1991*, at 270.

17 *Contrast Colorado Dog Fanciers v. Denver*, 820 P.2d 644, n.8 (Colo. 1991)(ordinance explicitly cited particular reference books to be used in determining definition of "pit bull," and stated that copies of books were available in the office of the city clerk and recorder.)

Subsection (b)(1)c makes design history the defining criteria for an illegal pistol, but the ordinance included no source whereby an ordinary person could discover design history; even the sources which defendants cite on appeal do not provide the design history information necessary for an ordinary person to understand the boundaries of the subsection.

B. Definition of Characteristics of so-called "Assault Weapons"

The District Court also found several other provisions to be unconstitutionally vague. Of §38-130(b)(1), the court wrote: "The ordinance refers to weapons which may have 'a shorter length than recreational firearms.' Citizens must therefore guess what length a 'recreational firearm' possesses." (Order at 16.)

***23** The same provision refers to weapons with "a greater rate of fire or firing capacity than reasonably necessary for legitimate sport, recreational or protection activities." This provision was stricken because: "The Court finds that the phrase 'a greater rate of fire' has no meaningful definition, since all semiautomatics have the same rate of fire." (Order at 16.)

The court's resolution of these two issues was squarely within Supreme Court precedent regarding vagueness. For example, in *People in the Interest of C.M.*, the Supreme Court struck down a law against loitering "about" school grounds, because the term "about" (unlike a specific distance) could not be interpreted "with any degree of certainty." 630 P.2d 593, 595-96 (Colo. 1981). Likewise, in a case involving regulation of charity proceeds, the Court found the terms "primarily benefit" and "primarily for the benefit" to be void for vagueness. Charitable collections had to be "primarily for the benefit" of the stated recipient, but it was impossible to tell if the law was satisfied if the recipient received 50% of the collections, or 51%, or simply a plurality. *People v. French*, 762 P.2d 1369, 1371 (Colo. 1988).

Tn regard to another provision of § 38-130(b)(1), the court erred in finding the clause "reasonably necessary for legitimate sports..." not to be vague. (Order at 16). Notably, the court did not contend that the phrase "reasonably necessary for legitimate sports" had any independently ascertainable meaning. After all, what is "reasonably necessary," and what are "legitimate sports," are (like beauty) in the eye of the beholder. Failure to specify what makes a sport legitimate creates a vagueness error similar to an obscenity statute's reference to any "accredited theater, museum, library, school or institution of higher learning." Since there is no formal mechanism for accrediting theaters, museums, or libraries, the meaning of "accredited" would necessarily vary from one enforcement official to another. Therefore, the ***24** term "accredited" was void for vagueness. *People v. Seven Thirty-Five East Colfax*, Inc., 697 P.2d 348, 357 (Colo. 1985). *See also Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975) (In conjunction with statute against harassing a person by mail or phone, the "phrase 'without any legitimate purpose'...injects a vagueness" that cannot withstand Constitutional scrutiny.) *Cf. Smith v. Gougen*, 415 U.S. 566, 578 (1974) (law against "contemptuous treatment" of the flag void because "[w]hat is contemptuous to one man may be a work of art to another.")

The lower court resolved the problem regarding "reasonably necessary for legitimate sports" by in essence reading the phrase out of the ordinance. The court held that guns which were, by operation of other elements of the definition section, outlawed, were considered by the City Council to be not "reasonably necessary for legitimate sports." (Order at 16). Accordingly, as the trial court interpreted the phrase, the ordinance calling the gun not "reasonably necessary for legitimate sports" was simply an extra bit of invective from the City Council, with no force of law. The court's conclusion, however, is untenable. The "legitimate sports" phrase is one item in a definitional list of characteristics of so-called "assault weapons." It is not plausible to suggest that all the items in the (b)(1) list were intended to have legal consequence, except for the "legitimate sports" phrase, which was intended as just a non-binding pejorative.

Perhaps recognizing the inconsistency in the lower court's approach, amicus CPHV argues that all of subsection (b)(1) is merely "precatory" and of no legal consequence. CPHV br. at 24-25. CPHV does not argue that the phrases in (b)(1) are not vague; the argument is only that the phrases have no legal force, and hence their vagueness is irrelevant.

But if the definition of "assault weapon" in (b)(1) were merely "precatory," the language logically would have been placed in the legislative findings section of the ordinance, rather than ***25** in the definition section. Moreover, subsection (b)(1) did have legal effect, since the subsection was, at the least, be necessary to refer to the "assault weapon" characteristics in (b)(1) to determine which firearms are "patterned after" other so-called "assault weapons" pursuant to § 38-130(h)(4) and (h)(5). In addition, as Colorado demonstrated without contradiction to the trial court, Denver has used section (b)(1) to justify gun confiscation that would not be authorized by any other part of the ordinance. Colo. tr. rep. br. at 27-28; Colo. ex. 65.

C. Production Date of Exempted Firearms

Another vague portion of the ordinance was § 38-130(c). That section exempts weapons "in production" before 1898 *and* weapons "in production" before 1954. The court found that this subsection should be interpreted to exempt all semiautomatics produced prior to 1954. (Order at 18.) Defendants do not contest this finding. The provision illustrates the carelessness with which the ordinance was drafted.

D. Listing by Name of Certain Firearms

Subsections 38-130(h)(1),(2), and (3) attempt to list a number of specific semiautomatic firearms by name. Many of the firearms listed in §38-130(h) are not semiautomatics or do not exist. Indeed, over half of the list is defective, in that it fails to name actual semi-automatic firearms. *See* Colo. tr. br. at 81-92; Colo. tr. rep. br. at 48-67. [18] The court found that the listed ***26** firearms were not unlawful *per se*, but only unlawful to the extent that they fit within the generic definitions of "assault weapon" in section (b)(1). Thus, the vagueness of the listed guns' names became a moot issue. (Order at 19-20.) Should this Court interpret the listed firearms to be unlawful, then it will become necessary to address this vagueness issue either in this Court or on remand.

18 The very first "assault weapon" listed in the ordinance is "Avtomat Kalashnikov," which translates from Russian as "automatic or machine gun." "Avtomat . . . 1. any automatic device . . . 4. submachine gun." K. Katzner, *English-Russian/Russian-English Dictionary* 418 (NY 1984). Yet defendants claim that all the listings are of semiautomatics. Defs. Answers to Interrogatories, at 2, Colo. ex. 2; Public hearing tr., at 2, defs. ex. B. Thus, the very first item is in error because it describes a machinegun ("Avtomat Kalashnikovs"). All semiautomatic rifles with cosmetic similarities to this machinegun have dissimilar names. *See United States v. Williams*, 872 F.2d 773, 774 (6th Cir. 1988) ("AKS semi-automatic sport rifles"); Colo. tr. br. at 81-83; Colo. tr. rep. br. at 50-51, 67-69.

E. Prohibition on Guns which are "Slight Modifications" of or "Patterned After" Listed Firearms

Having attempted (with only partial success) to list real semiautomatic firearms, the ordinance then attempted to outlaw firearms in some way similar to the listed guns. The ordinance did so with two clauses, one of which the court found to be vague.

Section 38-130(h)(5) banned possession of:

> Firearms which have been redesigned from, renamed, renumbered or patterned after one of the listed firearms in subdivisions (1), (2), (3) or those described in subdivision (4) regardless of the company of production or distribution or the country of origin or any firearm which has been manufactured or sold by another company under a licensing agreement to manufacture or sell the identical or nearly identical firearms as those listed in subdivision (1), (2), (3) or those described in subdivision (4) regardless of the company of production or distribution or the country of origin.

The court found §38-130(h)(5) unconstitutionally vague, because it "requires a person to have knowledge beyond that normally possessed by persons of common intelligence concerning the design history and licensing agreements between companies." (Order at 21.) Indeed, ***27** licensing agreements between companies are often closely guarded secrets that not even an expert would know, as Colorado demonstrated at trial without contradiction. Colo. ex. 1, at 8-9. [19] And design-intent is knowable only to the extent the designer discloses it.

19 Compounding the problem of vagueness was defendants' "interpretation" that one way a gun could qualify under (h)(5) if its magazine was interchangeable with the magazine of a listed firearm. Defs. Answers to Interrogatories, at 5-6, Colo. ex. 2. But as Colorado demonstrated without contradiction at trial, guns with entirely different design histories (and licensing agreements) may accept the same magazine. Colo. ex. 27.

The CPHV brief claims "It is clear that this 'copy' language was primarily aimed at manufacturers and distributors of firearms," whom CPHV claims would know which guns fit under (h)(5). CPHV br. at 29. Contrary to CPHV's claim, (h)(5) applies to everyone, not just to gun dealers. The ordinance makes it a crime "to carry, store, or otherwise possess" any of the firearms covered by (h)(5). Ord. 38-130(h). A provision applicable only to gun dealers would have criminalized only retail or wholesale sales by a licensed gun dealer. In contrast, (h)(5) is as fully enforceable against everyone who lives in or passes through Denver as is any other section.

Moreover, a vague ordinance cannot be saved simply because there might be one class of persons for whom the ordinance would not be vague. When the U.S. Supreme Court struck down a vague law making it illegal to be a "gang" member or "gangster," the Court was not interested in whether the particular defendants before the Court really were gangsters who were well aware that the law applied to them:

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it....It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.... No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

***28** *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Even if (h)(5) did apply only to gun dealers, persons who are licensed to sell firearms at retail have no special knowledge of trade agreements among gun manufacturers, or the thoughts of gun designers. As one of Colorado's witnesses, a former employee of the Bureau of Alcohol, Tobacco and Firearms had explained (without contradiction):

> Design history may be known only to the designer. Frequently a manufacturer will manufacture and rename or renumber a copy of another firm's firearm, but will not disclose this to the general public or admit same for fear of litigation related to a patent law and trade secrets. Further, it would be impossible for a member of the general public, or even an expert, to know whether a firearm has been manufactured or sold by another company under a licensing agreement to manufacture or sell such firearms or a nearly identical firearm. Licensing agreements may be business secrets, and in any event are not generally known to the firearms owning public. Many such agreements are made in foreign countries between foreign concerns.

Johnson aff., at 8-9, Colo. ex. 1.

Compounding the problems caused by the impossibility of ordinary persons or even gun experts learning the actual information about how a gun has been designed, the word "redesign" is itself vague. *Webster's New Collegiate Dictionary* (1965) defines "redesign" as "to revise in appearance, function, or content."

Nothing in the Denver ordinance provided any guidance for the scope of "redesigned." If a new gun looks almost exactly like one of the banned guns, but is entirely different internally, is the new gun a "redesign"? What if a new gun used the exact same barrel, trigger mechanism, and pistol grip as a banned gun, but also used an entirely different receiver and slide? How is anyone to know, except to depend on defendants' unbounded enforcement discretion? How are gun dealers, who wish to sell a broad variety of firearms, to know what guns defendants consider lawful or unlawful? It is not fair to ask gun buyers or gun dealers to ***29** proceed at their peril, unable to determine whether a gun is legal or illegal until defendants bring a criminal case against them.

The CPHV's only response is to claim "It cannot be seriously argued" that a person who sells guns will not know if the gun falls into the (h)(5) definition. CPHV's unsubstantiated assertion is not in itself a serious argument. And in any case, (h)(5) applied to everyone, not just to gun dealers, and no court has the authority to rewrite (h)(5) so as to narrow its application.

Having found subsection (h)(5) void for vagueness, the court erroneously rejected a vagueness challenge to subsection (h)(4). (Order at 22.) Subsection 38-130(h)(4) outlawed "other models by the same manufacturer that are identical to firearms listed [by name]...except for slight modifications or enhancements...." [20] Like the voided (h)(5), subsection (h)(4), required a person to know the design history of a firearm. To understand whether a gun is covered by (h)(4), a potential firearms possessor must be intimately familiar with the firearms listed by name in (h)(1), (h)(2), and (h)(3), and must know that a second firearm is a modification or enhancement of the first. Because it is unreasonable to require a person contemplating a firearms acquisition to know the design history of a particular gun, and also to know the design history of possible ancestors of the guns, subsection (h)(4) should be stricken as void for vagueness, just as was subsection (h)(5).

[20] Subsection (h)(4), because it was predicated on the specific guns listed in subsections (h)(1), (h)(2), and (h)(3) lost any meaningful force of law when the district court construed (h)(1), (h)(2), and (h)(3) to simply list examples of guns which could fit the generic definitions of (b)(1).

Consider a 21 year old woman who purchases her first rifle and later moves to Denver. She has not seen samples of the rifles listed in the ordinance and is not a student of the esoteric ***30** history of design developments in firearms models. She only sees the model name engraved on the receiver of her rifle. As a person of ordinary intelligence, she is not required to have had long experience in firearms culture, and she is not legally bound to intuit the edicts of Denver's assault weapons expert, if one exists. She is only required to have read the listings in the City's ordinance, and to compare those designations with her rifle, which has no such inscription. Certainly this ordinance would violate her right to due process.

Moreover, what is the legal meaning of "slight"? How would a gun dealer or a target shooter know in advance what a police officer, judge, or jury may consider "slight"? Dictionary definitions are themselves ambiguous and vague. [21]

[21] *Webster's Seventh New Collegiate Dictionary* 819 (1965) states:
slight . . . la: having a slim or delicate build: not stout or massive in body b: lacking in strength or substance: FLIMSY, FRAIL c: deficient in weight, solidity, or importance: TRIVIAL 2: small of its kind or in amount: SCANTY, MEAGER....
"Enhance" is defined in part as "to make greater (as in value, desirability, or attractiveness). ..." *Webster's*, *supra*, at 275. A value, desirable, or attractive to whom? This is the language of subjectivity and aesthetics, except that here, a crime, instead of beauty, exists or does not exist based on the eye of the beholder. No reasonable person can know before the verdict the meaning of "enhancement."

The term "modification" is defined in part as "the making of a limited change in something...." *Webster's Seventh New Collegiate Dictionary* 544 (1965). How would one know if a "limited change" has been made, or if there is a great change? *See Sierra Club v. Marsh*, 907 F.2d 210, 212 (1st Cir. 1990) ("The accepted lexigraphic definitions of the verb 'modify' are vague and, to some extent, internally inconsistent." Use of "modify" in federal injunction statute was not vague, because Congress "used the verb as a term of art."); *Von Amberg v. Board of Governors*, 1988 Del. Ch. LEXIS 49 (No. 894, April 13, 1988) (term ***31** "exterior modification" in a housing covenant is vague); *Jacinto v. Egan*, 120 R.I. 907, 391 A.2d 1173 (1978) ("the rather vague restrictions of a 'no addition or modification' clause"). [22]

[22] The difficulty in determining which guns that defendants consider to be "slight modifications" of other guns is compounded by defendants' inconsistent attitude towards the Bureau of Alcohol, Tobacco and Firearms report on gun imports. Consider a person who behaves as defendants expect all gun owners to: the person studies the list of guns in subsections (h)(1), (h)(2), and (h)(3) of the ordinance, and also studies the vague list of "assault weapon" characteristics in subsection (b)(1). The person even studies the briefs in the instant case. Examining the trial briefs of defendants and the appellate amicus brief of the CPHV, the person discovers that the BATF report is the definitive guide to the clear distinction between so-called "assault weapons" and "sporting" firearms. (Defs. tr. br. at 15-19; CPHV br. at 14-15). Since the BATF has authority over all imported guns, the person reasonably concludes that an imported gun which BATF has determined to be "particularly suitable for sporting purposes" is not an "assault weapon." Accordingly, the person concludes with some confidence that guns which have been approved by BATF may lawfully be possessed in Denver.
After the import ban was finalized in the summer of 1989, a number of companies, including Heckler & Koch, Springfield Armory, and Galil remanufactured their guns to make them importable. For example, the banned H&K 91 rifle was manufactured into the SAR-8 by replacing the pistol grip with a thumbhole stock, and by removing the muzzle brake and bayonet lug. In all other respects, the SAR-8 is the same as the H&K 91. The banned SAR-48 underwent a similar transformation into the specifically approved SAR-4800.

The BATF has determined that the SAR-8 and SAR-4800 may be imported because they are "particularly suitable for or readily adaptable to sporting purposes." Galil has also been given specific approval to import remanufactured versions of banned guns. *See* William Dailey aff. (Springfield Armory attorney), Colo. ex. 19; Advertisement for new Galil Sporter, Colo. ex. 18; BATF approval of SAR-4800, Colo. ex. 18.

Would these guns have been legal in Denver under the ordinance? On the one hand, the new guns which BATF approved for import are internally the same as the old guns for which BATF had denied importation permits. And relatively minor changes in the guns, such as changing the stock and removing a muzzle brake could be seen as only "slight modifications or enhancements," thus making the guns illegal under subsection (h)(4).

On the other hand, it is precisely those external features, such as pistol grips and muzzle brakes, which defendants and their amici insist make the difference between bad "assault weapons" and good "sporting weapons." Defs. br. at 19-22; CPHV br. at 14-15. And defendants and amici insist that BATF has drawn a clear line between "assault weapons" and "sporting weapons." Defs. tr. br. at 15-19; CPHV br. at 14-15. Thus, the new guns which do not have the pernicious pistol grips and muzzle brakes would seem to be legal under the ordinance.

Can anyone really tell for sure if the new guns would be legal or not? Can there be any doubt that enforcement of the ordinance against persons who possess or sell new guns such as the SAR-8 will depend on the whim of individual police officers or prosecutors? Because subsection (h)(4) does not clearly distinguish the legal from the illegal, it is void for vagueness.

***32** In finding "slight modifications or enhancements" not to be vague, the court (Order 22) cited *People v. Vigil*, 758 P.2d 670 (Colo. 1988), which involved the phrase " 'slight repair, replacement, or adjustment' of a weapon to make it operational." That case is inapposite here. *Vigil* involved a shotgun lacking a firing pin, but which would be operational if a nail were inserted, which could be done in two seconds. *Id.* at 672. The Court held that it was for the trier of fact to determine whether the item fit within the definition of a "short shotgun." The language quoted by the District Court here about "slight repair" was from a Massachusetts opinion cited in *Vigil* (at 673), and was not contained in a statute. Further, in *Vigil*, unlike here, an objective standard existed-making something operational.

As this Court observed in *Colorado Dog Fanciers*: "Although due process does not require 'impossible standards' of clarity...this is not a case where further precision in the statutory language is either impossible or impractical. "820 P.2d at 648, citing *Kolender v. Lawson* 461 U.S. 352, 361 (1983). The City is fully capable of defining what it wishes to ban, as the State had done in firearms regulations--e.g., barrel length, automatic firing capacity, and other terms easily capable of common description or other known meaning. Indeed, the City could even ban guns according to the cosmetic features it really seems to have in mind, such as black plastic stocks, secure hand grips, or barrels threaded for attachments which reduce recoil and which enhance accuracy.

F. Magazine Prohibition

***33** Section 38-130(i) prohibited a magazine which could hold over twenty rounds or "may be modified" to do so. A magazine is a rectangular or curved box or tube containing a spring which pushes the cartridges into the firearm. If part of the spring is snipped off, the magazine contains more internal space for holding cartridges. The magazine also contains a spacer called the "follower," which separates the cartridges and the spring. Any of the following modifications, or a combination thereof, could increase a magazine's ammunition capacity: shortening the follower, removing part of the spring leg(s), replacing a conventional spring with a constant force spring, or removing the baseplate. Accordingly, an 18 or 20 round magazine (very common sizes) could be modified to hold 21 rounds. Thus, 18 and 20 round magazines are apparently illegal. (Aff. of magazine designer M. Chestnut, Colo. ex. 27.)

As Colorado pointed out to the lower court, the problem with vagueness regarding magazine modifications is heightened when the magazine modification language is contrasted to the firearms modification language. The ban on firearms designed after banned firearms applies only to firearms with "*slight* modifications." § 38-130(h)(4). In contrast, two paragraphs later, the magazine ban is applied to magazines that "may be modified" to become illegal. In light of the

ordinance's choice not to use the "slight" modification language, it might well be that even magazines that would require substantial reworking to hold more than 21 rounds are illegal.

The court sought to save the magazine prohibition from vagueness by reading it to mean only a "slight modification." (Order at 23) Yet no such language appears in the ordinance. Moreover, a person of ordinary intelligence would have no way of knowing whether a magazine "may be modified" in the unlawful manner. Hence, the "may be modified" provision of the magazine prohibition is unconstitutionally vague.

*34 III. THE ORDINANCE IS PREEMPTED BY STATE FIREARMS LAWS

The ordinance banned transfer and possession of firearms which the legislature has permitted and authorized to be transferred and possessed. The ordinance is preempted by state law, because the ordinance directly conflicts with particular provisions of Colorado law.

The legislature has seen fit to classify only three types of firearms as "dangerous weapons": a machine gun, short shotgun, or short rifle. C.R.S., §18-12-102(1), (3). "It shall be an affirmative defense to the charge of possessing a dangerous weapon...that said person has a valid permit and license for possession of such weapon." Thus, the legislature has decided that only three types of firearms are sufficiently dangerous to require a permit and license. [23] The availability of a permit or license precludes a local ordinance which bans such firearms.

23 As interpreted by authorities in Colorado, the permit or license is the federally issued registration form. *See* 26 U.S.C. §5841. C.R.S., § 18-12-105(1) makes it an offense to carry a firearm concealed on or about one's person, or to possess a firearm without legal authority in the general assembly or the grounds or buildings of a school (except for school purposes, in a vehicle in the parking lot, or for lawful hunting). It is an affirmative defense if a person is in his own dwelling or place of business, carries the firearm for lawful protection while traveling, or has a written permit. C.R.S., § 18-12-105(2). County sheriffs may issue permits to carry concealed weapons after a background check. §§ 18-12-105.1, 30-10-523. State law specifies that carry permit "shall be effective in all areas of the state." C.R.S § 18-12-105.1(1). Yet despite the explicit state statutory command about the statewide effectiveness of permits, the Denver ordinance made it a crime of a person with such a statewide permit to carry one of the banned handguns for ***35** protection when passing through Denver. Ord. § 38-130(e). [24]

24 The ordinance did allow "transportation of any assault weapon through the city by a non resident." [§ 38-130(e)(3)]. But this limited exception for "transportation...through the city" does not encompass the carry permit holder's authorization to carry the gun within the city for protection.

The sale and purchase of firearms is also specifically authorized. Retail sales of pistols, revolvers, and firearms with barrels under 12" may take place subject to recordkeeping requirements. C.R.S.,§ 12-26-101 & 102. Colorado residents may purchase rifles and shotguns in contiguous states, and residents of such states may purchase rifles and shotguns in Colorado. C.R.S. §§ 12-27-101 & 102.

Since the state authorizes the licensed possession of machine guns, it is plain that localities may not forbid the possession of machine guns by a person who has a license recognized by the state. *A fortiori*, localities may not forbid possession of a semiautomatic firearm, for which the state has determined that no license is necessary. By analogy, if the legislature

allowed the possession of fortified wine by persons who possessed a license, localities would not be allowed to prohibit the possession of ordinary wine.

The legislature has written, "It is declared by the general assembly that *it is lawful* for a resident of this state, otherwise qualified, *to purchase or receive delivery of a rifle or shotgun* in a state contiguous to this state, subject to the following restrictions and requirements." C.R.S., § 12-27-102 [25] Here, the legislature has explicitly authorized the purchase and ownership ***36** of rifles and shotguns (with no restriction for particular models or types). By forbidding the purchase and possession of some rifles and shotguns, the Denver ordinance forbade what the state statute had allowed: purchase and possession of all types of rifles and shotguns.

25 The reference to persons who are "otherwise qualified" keeps the ordinance consistent with federal and state laws banning possession of all types of firearms by persons convicted of violent felonies. The recognition that certain *persons* may be unqualified by law to possess firearms of any type does not authorize localities to outlaw particular types of firearms to qualified persons.
One condition of the transfers authorized by the main clause of the statute is that: "(a) The sale must fully comply with the legal conditions of sale in both such contiguous states." This phrase again asserts the primacy of *state* (not local) control over the conditions of gun sales.

And most significantly, the state legislature itself has dealt with the "assault weapon" issue. In its 1990 session, the legislature refused to enact legislation criminalizing the possession of such weapons by law-abiding persons. However, it added the following statutory aggravating factors for purposes of determining whether a defendant should be sentenced to death or life imprisonment, C.R.S., § 16-11-103(6)(f.5):

> The defendant committed the offense by use of an assault weapon. For the purpose of this paragraph (f.5), "assault weapon" means any machine gun as defined in section 18-12-101(1)(g), C.R.S., or semiautomatic center fire firearm that is equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition. [26]

26 In addition, C.R.S., § 16-11-309(8) further addresses "assault weapons" by adding a mandatory five years to the sentence for any crime of violence perpetrated with an "assault weapon."

Senator Ray Powers, the chief sponsor of the bill that became C.R.S. 16-11-103(6)(f.5), furnished an affidavit, Colo. ex. 41, at 2. Senator Powers explained that first of all, his penalty enhancement bill was intended to preempt laws such as Denver's. Secondly, as Senator Powers points out, Colorado's entire scheme of gun control is designed to control crime by punishing criminals severely, and by ensuring that criminals are opposed by a powerfully-armed citizenry:
6. At the time I introduced my death penalty enhancement, the Senate was considering ***37** a bill that would outlaw "assault weapons." The gun ban bill (S. 248) and my criminal punishment bill (S. 249) were both introduced on April 7, 1989, and both sent to the Senate Judiciary Committee. Denver City Councilwoman Cathy Reynolds testified before the Senate, and threatened that if the legislature did not enact a gun ban, she would push her own gun ban in Denver.

7. I introduced my own bill for the direct purpose of stopping the infringement of the right of law abiding citizens to keep and bear any firearms they choose. The bill was meant to focus gun control efforts on criminal misuses of guns. . . .

9. My bill was consistent with the long-standing philosophy of the legislature that the proper approach to gun control is to severely punish gun crime. My enhanced penalty bill comported with other statutes providing for enhanced sentencing for use of a gun in a crime. My bill was also consistent with the long-standing philosophy of the legislature that crime

is best controlled if criminals must fear a well-armed citizenry, and if citizens can choose any firearm they find most appropriate for self-defense, no matter how powerful. . . .

Senator Powers further pointed out the following provisions of C.R.S. which encourage widespread and frequent lawful use of armed force against criminals: C.R.S., § 18-1-704 (authorizing use of physical force, including deadly force, against criminals); and C.R.S., § 18-1-704.5 (deadly force authorized against intruders because "the citizens of Colorado have a right to expect absolute safety in their homes.") (Colo. ex. 41, at 2-3.)

Senator Powers notes that his bill passed the legislature by wide margins, but that the "assault weapon" prohibition bill was rejected by the Senate Judiciary Committee, the first committee to hear it. *Id.* at 4. In 1989, the House of Representatives rejected by a wide margin a bill to outlaw magazines holding over 30 rounds. *Id.*

Accordingly, it is very clearly the strong public policy of the state of Colorado that criminals, not firearms, are responsible for crime. It is also clear public policy that the state of Colorado protects the widespread defensive use of armed force as a major component of the state's crime-control policy.

***38** In direct contravention of the Colorado public policy, the ordinance banned possession, and hence use in self-defense, of numerous firearms. Even persons who owned these firearms on the date the ordinance passed and then registered them, were not allowed to use them for protection. § 38-130(e)(3); Order at 11-12. At trial, Colorado and the plaintiffs demonstrated without contradiction that the banned guns were often the very best self-defense; (Colo. tr. br. at 32-36; Plaintiffs' tr. br. at 23-28; Plaintiffs' tr. rep. br. at 29-32). Defendants lamely replied that since inferior firearms were still available, crime victims could use the inferior guns instead. (Defs. tr. rep. br. at 20-26.) Defendants' theory (and the ordinance based on the theory) are directly contradictory to Colorado's public policy of encouraging citizens to use firearms for protection, and in doing so to use firearms which increase the odds that, at the citizen's moment of greatest peril, the citizen will have the best tools available to defend her life.

The District Court erroneously concluded that the ordinance is not preempted. (Order 25-27.) That court determined that the regulation of weapons is a matter of mixed local and state concern. *Id.* at 26. The court found that "the ordinance is not in conflict with any state statute." *Id.* at 27. The court specifically referred only to C.R.S., § 16-11-103(b)(f.5), which severely punishes assault weapon use in violent crime, and conceded that "the legislative trend is to prohibit the use of weapons in criminal activities...." *Id.* The court's decision was erroneous, because the court failed to consider the preemptive intent of § 16-11-103(b)(f.5), as well as the implications of C.R.S. § 12-27-102 (legislative authorization of rifle and shotgun purchases without restriction as to type), and of § 18-12-102 (automatics may be possessed with a license; *a fortiori*, semiautomatics may not be prohibited), and of the overall program of state policy to encourage armed defense.

***39** ?? upon the inherent nature of the activity and the impact or effect which it may have or may not have upon areas outside of the municipality." The ordinance here clearly affects firearms owners who may be visiting in or travelling through Denver, and persons who wish to buy, sell, or trade firearms at sporting goods stores and at gun shows. Such out-of-town persons are also in violation if they use a banned gun at a Denver indoor target range, or in lawful self-defense. [27]

27 Subsection (e)(3) of the ordinance contained an exemption for "The transportation of any assault weapon through the city by a nonresident who is in legal possession of an assault weapon..." Accordingly, non-residents could carry a so-called "assault

weapon" through the city, but could not under any circumstances use it within city limits, or even sell it to a resident of a different county.

As is obvious, the Colorado statutes authorize and permit the purchase, possession, open carrying, and transportation of rifles, shotguns, and pistols, including those banned by the Denver ordinance. The courts of other states have found that in similar situations state statutes comprehensively regulating and permitting firearms preempts inconsistent local ordinances. [28]

28 *Schneck v. City of Philadelphia*, 383 A.2d 227 (Pa. Cmwlth. 1978) (ordinance requiring police permit for firearm purchase preempted because state law made no such requirement); *Schwanda v. Bonney*, 418 A.2d 163, 166 (Me. 1980)("the need for uniform application of the concealed weapons law precludes local regulation resulting in such in consistencies."); *Doe v. City and County of San Francisco*, 136 Cal.App.3d 509, 186 Cal.Rptr. 380, 385 (1982) (where state law does not require permit for firearm, it preempts ordinance which requires registration of existing handguns and prohibits new handguns); *Dwyer v. Farrell*, 193 Conn. 7, 475 A.2d 257 (1984) (preemption found because "by placing these restrictions on the sale of handguns, the ordinance effectively prohibits what the state statutes clearly permit."); *Montgomery County v. Atlantic Guns, Inc.*, 302 Md. 540, 489 A.2d 1114 (1985)(ordinance restricting ammunition sales preempted); *Duff v. Northampton*, 532 A.2d 500 (Pa. Cmwlth. 1987) (state game law permitting firearm discharge preempted ordinance restricting discharge); and *Cherry v. Municipality of Metropolitan Seattle*, 57 Wash. App. 164, 787 P.2d 73 (1990) (ordinance prohibiting firearms possession preempted).
Notably, the "assault weapon" ban in Fulton County, Georgia, has been found to be preempted by that state's general statutes regulating firearms-even though nothing in the Georgia Code explicitly preempted local ordinances. *Coleman v. Chafin*, Civil No. D-67151 (Sup.Ct., Fulton County, Ga., July 31, 1989) (Colo. ex. 9.)

*40 CONCLUSION

This Court should hold that the Denver ordinance is unconstitutional.

Appendix not available.

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