

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-cv-01211-MSK-MEH

JON C. CALDARA, an individual;
BOULDER RIFLE CLUB, INC., a Colorado nonprofit corporation;
GENERAL COMMERCE, LLC, d/b/a Bison Tactical, a Wyoming limited liability company;
and TYLER FAYE, an individual,

Plaintiffs,

v.

CITY OF BOULDER, a Colorado home rule municipality;
JANE S. BRAUTIGAM, City Manager of the City of Boulder, in her official capacity;
GREGORY TESTA, Chief of Police of the City of Boulder, in his official capacity;
SUZANNE JONES, Mayor of the City of Boulder, in her official capacity;
AARON BROCKETT, Mayor Pro Tem of the City of Boulder, in his official capacity;
CYNTHIA A. CARLISLE, Boulder City Council Member, in her official capacity;
LISA MORZEL, Boulder City Council Member, in her official capacity;
MIRABAI KUK NAGLE, Boulder City Council Member, in her official capacity;
SAMUEL P. WEAVER, Boulder City Council Member, in his official capacity;
ROBERT YATES, Boulder City Council Member, in his official capacity;
MARY D. YOUNG, Boulder City Council Member, in her official capacity;
JILL ADLER GRANO, Boulder City Council Member, in her official capacity; and
J. DOES 1-10,

Defendants.

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

Defendants City of Boulder, Jane S. Brautigam, Gregory Testa, Suzanne Jones, Aaron Brockett, Cynthia A. Carlisle, Lisa Morzel, Mirabai Kuk Nagle, Samuel P. Weaver, Robert Yates, Mary D. Young, and Jill Adler Grano ("Defendants"), by and through their attorneys, submit their Response in Opposition to the Motion for Preliminary Injunction filed by Plaintiffs

Jon C. Caldara; Boulder Rifle Club, Inc.; General Commerce, LLC d/b/a Bison Tactical; and Tyler Faye (together, “Plaintiffs”), and state as follows:

I. INTRODUCTION

Plaintiffs’ Motion for Preliminary Injunction (the “Motion”) seeks to halt the enforcement of the City of Boulder’s Ordinance 8245 (the “Ordinance”), which contains new firearms regulations to address public safety concerns arising from the growing mass shooting epidemic. The Ordinance, which was passed in May 2018 by a unanimous Boulder City Council, seeks to lessen the probability that a mass shooting—an event this Court has described as “particularly frightening,” “unpredictable,” and “horrendously violent,” and that occurs in places “one ordinarily expects to be safe”—will happen in Boulder.

Far from criminalizing all firearms, the Ordinance concentrates on three common elements of recent gun violence, in particular mass shootings: (i) assault weapons, (ii) large-capacity magazines, and (iii) those under the age of twenty-one. Regulations on these same aspects of firearms have been overwhelmingly upheld by courts in this Circuit and around the country. The Boulder Ordinance in particular contains a multitude of exceptions and provisions intended to respect the protected rights of gun owners, such as a grandfather clause for existing assault weapons, an exception for firearms being transported through the City of Boulder and, as to the restrictions on gun possession by persons under the age of twenty-one, an exception for those with parental or legal-guardian consent. The regulations were the product of months of deliberation and hearings by the Boulder City Council and are tailored to address public safety concerns.

The Motion seeks a blanket cessation of enforcement of the Ordinance, but it falls far short of establishing entitlement to the extraordinary remedy of an injunction against a public safety law. Indeed, preliminary injunctions must be supported by facts and evidence beyond mere allegations, yet the Motion has no supporting affidavits or exhibits of any kind. Plaintiffs also do not offer any legal analysis as to why they are likely to succeed on any of their twenty-eight claims, instead offering conclusory assertions, such as it is “substantially likely, if not certain,” that the Court will side with Plaintiffs. This is not the “clear and unequivocal” showing needed to support the entry of a preliminary injunction. Accordingly, the Motion should be denied in its entirety.

II. BACKGROUND

A. Ordinance 8245.

On May 15, 2018, the Boulder City Council unanimously passed Ordinance 8245. Ex. A. The Ordinance amends Title 5 of the Boulder Revised Code (B.R.C.), “General Offenses,” to impose several new firearm-related restrictions, three of which are at the center of the present suit.¹

First, the Ordinance prohibits the possession, sale, or transfer of “assault weapons,” defined to include certain semi-automatic center-fire rifles, semi-automatic center-fire pistols, and semi-automatic shotguns having specific military-style features. Ord. §§ 2, 3. The Ordinance contains a number of exceptions to this prohibition, however, including an allowance for individuals to travel through the City, as well as for law enforcement. *See* Ord. § 3. A

¹ Another significant component of the Ordinance is its prohibition on “multi burst trigger activators,” *see* Ord. §§ 2, 7, such as the “bump stocks” used to kill fifty-eight people and injure over 800 in Las Vegas. None of the Plaintiffs raise a claim challenging this provision.

grandfather clause allows individuals who possessed an assault weapon as of June 15, 2018 to apply for a certificate for continued possession of the weapon by December 31, 2018. *See* Ord. § 7. Otherwise, the Ordinance requires individuals to remove the assault weapon from the City, render it permanently inoperable, or surrender it to the Boulder Police by December 31, 2018. *Id.*

The Ordinance also imposes restrictions on “Large-capacity magazines” (“LCMs”) defined as “any ammunition feeding device with a capacity to accept more than 10 rounds,” with four specific exceptions. *See* Ord. § 2 (amending B.R.C. § 5-8-2). Notably, the Ordinance provides that “a pistol magazine designed to fit into a pistol grip” may have a capacity of up to “15 rounds.” *Id.* Like assault weapons, the Ordinance prohibits the possession, sale, or transfer of LCMs. Ord. § 3. LCMs must be removed from the City, rendered permanently inoperable, or surrendered by December 31, 2018. Ord. § 7.

Finally, the Ordinance amends the definition of “minor” to include persons under twenty-one years of age, increased from eighteen years. *See* Ord. § 2. Under existing law, this revision prohibits individuals under the age of twenty-one from possessing a firearm. *See* B.R.C. § 5-8-16 (“Possession - of firearm by minor prohibited”). The law contains numerous exceptions that allow minors to use firearms for multiple purposes—including home self-defense, target shooting, competitive shooting, and hunting—with a parent or legal guardian’s consent. B.R.C. § 5-8-16(c).

B. Procedural History.

Plaintiffs initiated this lawsuit on May 16, 2018, the day after the Ordinance was passed, by filing an unverified Complaint. *See* Compl. (Dkt. No. 1). Nearly a month later, Plaintiffs filed the Motion for Preliminary Injunction. *See* Dkt. No. 14, filed June 12, 2018.

III. ARGUMENT

Plaintiffs are not entitled to the extraordinary relief of a preliminary injunction, having failed to establish any of the four prongs of the test in *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016), and accordingly their Motion should be denied.

A. Legal Standard.

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “In order to receive a preliminary injunction, the plaintiff must establish the following factors: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest.” *Diné Citizens*, 839 F.3d at 1281 (citation omitted).²

“Because a preliminary injunction is an extraordinary remedy, the movant’s right to relief must be clear and unequivocal.” *Id.* (citation omitted). A motion for preliminary injunction must be supported by “[e]vidence that goes beyond the unverified allegations of the pleadings

² The *Diné Citizens* court clarified that a plaintiff must establish each prong of this test, making any modified test that relaxes one of the prongs “impermissible.” *Id.* at 1282. The “serious questions” test cited in the Motion is thus no longer good law. *See id.*

and motion papers.” *Pelletier v. United States*, No. 11-CV-01377-WJM-CBS, 2011 WL 2077828, at *2 (D. Colo. May 25, 2011) (citing 11A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2949 (2d ed. 1995)).

B. Plaintiffs Are Unlikely to Succeed on Any Claim for Relief.

To show a substantial likelihood of success on the merits, Plaintiffs must “present a prima facie case showing a reasonable probability that [they] will ultimately be entitled to the relief sought.” *Salt Lake Tribune Publ’g Co. v. AT&T Corp.*, 320 F.3d 1081, 1100 (10th Cir. 2003) (citations and quotations omitted).

Plaintiffs bring their constitutional claims as facial, rather than as-applied, challenges. “Facial challenges are strong medicine.” *Clark v. City of Shawnee*, 228 F. Supp. 3d 1210, 1224 (D. Kan. 2017), *appeal dismissed*, 706 F. App’x 478 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1267 (2018) (quoting *Ward v. Utah*, 398 F.3d 1239, 1246 (10th Cir. 2005)). Consequently, they “‘are disfavored,’ . . . , and generally fail if any ‘set of circumstances exists under which the [law] would be valid.’” *Id.* (quoting *Peterson v. LaCabe*, 783 F. Supp. 3d 1167, 1173 (D. Colo. 2011)).

Plaintiffs assert a total of twenty-eight claims, which can be grouped into nine categories, as follows:

1. Second Amendment — Assault Weapons and LCMs (Caldara, Boulder Rifle Club, Bison Tactical, Faye).
2. Second Amendment — Age Restriction (Faye).
3. Due Process Clause (Caldara, Boulder Rifle Club, Bison Tactical, Faye).
4. Privileges or Immunities Clause (Caldara, Boulder Rifle Club, Faye).
5. Colorado Constitution — Article 2, sections 3 and 13 (Caldara, Boulder Rifle, Bison Tactical, Faye).

6. Equal Protection (Faye).
7. Takings Clause (Caldara, Boulder Rifle Club, Bison Tactical, Faye).
8. First Amendment Compelled Speech (Caldara, Boulder Rifle Club).
9. Preemption by Colorado State Law.

Plaintiffs are not likely to prevail on any of their claims.

1. Plaintiffs Are Unlikely to Succeed on the Merits of Their Second Amendment Challenges to the Ordinance’s Assault Weapons and Large-Capacity Magazine Restrictions.

Plaintiffs challenge Boulder’s new restrictions on assault weapons and LCMs on Second Amendment grounds. *See* Compl. ¶¶ 176-88, 230-44, 297-310, 345-51, 354-58. Yet, every federal court of appeals to consider such challenges to similar state laws or city ordinances—including this Court in *Colorado Outfitters Association v. Hickenlooper*, 24 F. Supp. 3d 1050, 1067-74 (D. Colo. 2014)—has rejected them. *See* *Kolbe v. Hogan*, 849 F.3d 114, 130-41 (4th Cir. 2017) (en banc) (Maryland), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 247, 252-64 (2d Cir. 2015) (New York and Connecticut), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Friedman v. City of Highland Park*, 784 F.3d 406, 411-12 (7th Cir. 2015) (Illinois home rule city ordinance), *cert. denied*, 136 S. Ct. 447 (2015); *Fyock v. City of Sunnyvale (Fyock II)*, 779 F.3d 991, 1001 (9th Cir. 2015) (California home rule city ordinance); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011) (District of Columbia).³ Plaintiffs’ claims will ultimately be rejected for similar reasons, and they certainly provide no basis for a preliminary injunction.

³ *See also* *Worman v. Healey*, 293 F. Supp. 3d 251, 264-67 (D. Mass. 2018) (Massachusetts assault weapons and LCMs), *appeal docketed*, No. 18-1545 (1st Cir. filed June 19, 2018); *Commonwealth v. Cassidy*, 96 N.E.3d 691, 701-03 (Mass. 2018) (same); *Rupp v. Becerra*, No.

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a. The Tenth Circuit’s Framework for Assessing Second Amendment Claims.

As this Court recognized in *Colorado Outfitters*, 24 F. Supp. 3d at 1065-66, the Tenth Circuit utilizes a “two-step approach” to Second Amendment claims. “First, [the court] ‘ask[s] whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.’” *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013) (quoting *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010)). “If the law does not impose a burden, it is constitutional.” *Id.* Second, if a burden is found to exist, the court then “evaluate[s] the law under some form of means-end scrutiny.” *Id.* (quoting *Reese*, 627 F.3d at 801) (internal quotation marks omitted). The Tenth Circuit and the district courts in the Circuit consistently apply intermediate scrutiny—under which courts assess whether a law is substantially related to an important government objective—at this second step of the analysis. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015); *Reese*, 627 F.3d at 802-04; *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169-70 (10th Cir. 2012); *Colo. Outfitters*, 24 F. Supp. 3d at 1071, 1075. Plaintiffs’ Second Amendment challenges to the Ordinance fail at both steps.

b. Assault Weapons and Large-Capacity Magazines Are Outside the Scope of the Second Amendment.

As the en banc Fourth Circuit explained in *Kolbe v. Hogan*, in cases challenging assault weapons and LCMs “*Heller* . . . presents us with a dispositive and relatively easy inquiry: Are

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17-cv-00746-JLS-JDE, 2018 WL 2138452, at *9-13 (C.D. Cal. May 9, 2018) (California assault weapons); *Wiese v. Becerra*, 263 F. Supp. 3d 986, 990-93, 999 (E.D. Cal. 2017) (California LCMs); *S.F. Veteran Police Officers Ass’n v. City & Cnty. of San Francisco*, 18 F. Supp. 3d 997, 1005-06 (N.D. Cal. 2014) (San Francisco LCMs); *People v. James*, 94 Cal. Rptr. 3d 576, 586 (Cal. Ct. App. 2009), *cert. denied*, 559 U.S. 946 (2010) (California assault weapons). *But see Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1139 (S.D. Cal. 2017) (California LCMs), *appeal docketed*, No. 17-56081 (9th Cir., oral argument May 14, 2018).

the banned assault weapons and large-capacity magazines ‘like’ ‘M-16 rifles,’ i.e., ‘weapons that are most useful in military service,’ and thus outside the ambit of the Second Amendment?” 849 F.3d at 136 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). The Fourth Circuit found that the assault weapons and LCMs prohibited by a Maryland law very similar to the Ordinance “plainly” were—and that it was therefore “compelled by *Heller* to recognize that those weapons and magazines are not constitutionally protected.” *Id.* at 136-37. Applying this same straightforward approach, a federal district court in Massachusetts recently reached the identical conclusion. *See Worman*, 293 F. Supp. 3d at 264-67 (citing *Kolbe*, 849 F.3d at 136).

The same is true here as well. This Court has already recognized the close relationship between the AR-15 assault weapon and “[t]he M-16 rifle mentioned by the Court” in *Heller*. *Colo. Outfitters*, 24 F. Supp. 3d at 1067 n.21. “If, as *Heller* implies, the M-16 rifle can legally be prohibited without violating the Second Amendment, it seems to follow that other weapons such as the AR-15 may also be prohibited, notwithstanding the fact that some individuals believe that such weapon is important, or even essential, to their self-defense.” *Id.* This is the precise reasoning that the *Kolbe* and *Worman* courts used to uphold the assault weapons and LCM bans at issue in both of those cases. *See Kolbe*, 849 F.3d at 136-37; *Worman*, 293 F. Supp. 3d at 264-67. It applies equally here, to demonstrate that plaintiffs are not likely to (and, indeed, cannot) prevail on their Second Amendment challenges to the Ordinance’s assault weapon and LCM regulations.

The City of Boulder’s restrictions on assault weapons and LCMs also do not burden the Second Amendment right because they are “akin to restrictions that were historically imposed and customarily accepted.” *Colo. Outfitters*, 24 F. Supp. 3d at 1065; *see Heller*, 554 U.S. at 626-

27, 635 (noting that such “longstanding” regulations are treated as tradition-based “exceptions” by virtue of their “historical justifications”). As recent scholarship explains, semi-automatic firearms and magazines of heightened capacities have been subject to longstanding regulation, including prohibitions, since the 1920s, shortly after these weapons became widely commercially available. *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 *Law & Contemp. Probs.* 55, 68-71, 81 (2017); *see also Peterson*, 707 F.3d at 1211 (noting that “*Heller* demonstrates that a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding-era analogue” (quoting *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012))); *see also Friedman*, 784 F.3d at 408; *United States v. Skoien*, 614 F.3d 638, 639-41 (7th Cir. 2010) (en banc). And, from at least “the country’s early decades,” there have been “laws restricting or barring certain dangerous or unusual weapons.” Spitzer, *supra*, at 67-68. This “lengthy history,” *Peterson*, 707 F.3d at 1211, strongly suggests that the Ordinance is constitutionally permissible.

The Motion asserts that assault weapons and LCMs are protected under the Second Amendment—and, indeed, that Plaintiffs are likely to succeed on the merits of their challenges to the Ordinance prohibiting and restricting these weapons and magazines—merely because they are purportedly in “common use.” Mot. ¶¶ 15-19. But this so-called “common use” test is not the law. *See Kolbe*, 849 F.3d at 141-42; *Worman*, 293 F. Supp. 3d at 266. Nor, in any event, did Plaintiffs submit any evidentiary support for their assertion of “common use” or explain how this Court is to assess what is, at best, a “difficult” and hopelessly “circular” inquiry. *Kolbe*, 849 F.3d at 135-36, 141-42; *Friedman*, 784 F.3d at 409; *see also* Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 *Harv. J. on Legis.* 279, 288

(2016). It was Plaintiffs’ burden to present such evidence, *see Avitabile v. Beach*, 277 F. Supp. 3d 326, 335-36 (N.D.N.Y. 2017), and the failure to do so dooms the injunction request.

c. Even If the Ordinance Burdens the Second Amendment, It Survives Intermediate Scrutiny.

Even if assault weapons and LCMs were within the scope of the Second Amendment, Plaintiffs’ claims would still fail because intermediate scrutiny, at most, is appropriate, and the challenged Ordinance survives such scrutiny.

(i) Intermediate Scrutiny Applies.

Where a law burdens the Second Amendment, courts assess “the type of restriction being challenged and the severity of the burden on the ‘core’ of the Second Amendment right” to determine the level of scrutiny applicable. *Colo. Outfitters*, 24 F. Supp. 3d at 1066 (citing cases). As noted, the Tenth Circuit and courts in this Circuit consistently apply intermediate scrutiny at this stage of the analysis. *See, e.g., Bonidy*, 790 F.3d at 1126; *Reese*, 627 F.3d at 802-04; *Huitron-Guizar*, 678 F.3d at 1169-70. In *Colorado Outfitters*, this Court applied intermediate scrutiny in assessing, and upholding, the constitutionality of Colorado’s LCM ban. *See* 24 F. Supp. 3d at 1071. Every federal court of appeals to have examined the constitutionality of state and local laws banning the possession of assault weapons or LCMs has applied intermediate scrutiny. *See Kolbe*, 849 F.3d at 138-39; *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 269; *Fyock II*, 779 F.3d at 999; *Heller II*, 670 F.3d at 1263. As in those cases, intermediate scrutiny is the appropriate standard here.

Under intermediate scrutiny, the Court assesses whether a law “is substantially related to an important government objective.” *Reese*, 627 F.3d at 802; *see Colo. Outfitters*, 24 F. Supp. 3d at 1071. Public safety and, in particular, the reduction and prevention of deadly mass

shootings—which are the stated objectives of the Ordinance (Ord., Findings; *id.* § 8)—are “undoubtedly . . . important.” *Colo. Outfitters*, 24 F. Supp. 3d at 1072; *see, e.g., Kolbe*, 849 F.3d at 139; *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 261. Thus, the Court need only assess whether the challenged provisions are substantially related to these interests. *See Colo. Outfitters*, 24 F. Supp. 3d at 1072.

In conducting an intermediate scrutiny analysis, a court’s role is not to determine “whether a law is ‘good’ or ‘bad,’ ‘wise’ or unwise.” *Id.* at 1055. “Such decisions belong to the people acting through their legislature.” *Id.* at 1056; *see also, e.g., Kolbe*, 849 F.3d at 1040. The court’s role, instead, is only to “compare the public policy adopted by the legislature against the constitutional minimums that protect individual rights.” *Colo. Outfitters*, 24 F. Supp. 3d at 1055. And, in the Second Amendment context, the Tenth Circuit has provided that legislative bodies have “considerable flexibility to regulate gun safety.” *Bonidy*, 790 F.3d at 1126; *see also N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 261.

(ii) ***Boulder’s Assault Weapons and LCM Prohibitions Satisfy Intermediate Scrutiny.***

Assault weapons “pose unusual risks.” *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 262; *accord Kolbe*, 849 F.3d at 140. They “tend to result in more numerous wounds, more serious wounds, and more victims,” “are disproportionately used in crime, and particularly in criminal mass shootings,” and “are also disproportionately used to kill law enforcement officers.” *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 262; *accord Kolbe*, 849 F.3d at 140. And the “evidence suggests that large-capacity magazines may pose even greater dangers to crime and violence than assault weapons alone, in part because they are more prevalent and can be and are used . . . in

both assault weapons and non-assault weapons.” *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 263; *accord Kolbe*, 849 F.3d at 140; *see also Colo. Outfitters*, 24 F. Supp. 3d at 1072.

These are the reasons why every court of appeals to consider the question has found that regulations on assault weapons and LCMs satisfy intermediate scrutiny under the Second Amendment. *See Kolbe*, 849 F.3d at 140-41; *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 261, 263-64; *Heller II*, 670 F.3d at 1264; *see also Fyock II*, 779 F.3d at 1001; *see also Colo. Outfitters*, 24 F. Supp. 3d at 1067-74. The same analysis, and same result, should govern here.

d. Bison Tactical Lacks Standing to Assert a Claim under the Second Amendment.

Bison Tactical is unlikely to succeed on a Second Amendment claim for the independent reason it lacks standing to assert such claim. *See Colo. Outfitters Ass’n v. Hickenlooper (Colo. Outfitters II)*, 823 F.3d 537, 544 (10th Cir. 2016).⁴ At least one court in this District has held that corporations do not have standing to assert Second Amendment claims in their own right. *See Leo Combat, LLC v. United States Dep’t of State*, No. 15-CV-02323-NYW, 2016 WL 6436653, at *10 (D. Colo. Aug. 29, 2016). This Court has also expressed “some doubt” as to whether such a right exists. *See Colo. Outfitters I*, 24 F. Supp. 3d at 1064. Even to the extent Bison Tactical might have grounds to assert a Second Amendment claim on behalf of its customers, Bison Tactical has not demonstrated that it has standing to assert a pre-enforcement challenge on behalf of “unknown, potential customers who are not directly subject to the application” of the Ordinance. *See Leo Combat*, 2016 WL 6436653, at *10. Indeed, Bison

⁴ Defendants do not concede standing as to any Plaintiff or claim.

Tactical expressly alleges that at least some of its customers “reside outside of Boulder city limits.” Mot. ¶ 66.

2. Individual Plaintiff Faye’s Second Amendment Challenge to the Age Restriction Fails.

For several reasons, Plaintiff Faye failed to establish a likelihood of success on his Second Amendment challenge to the Ordinance’s expanded definition of “minor.”

a. Faye Has No Standing to Challenge the Ordinance’s Age Provisions.

As a threshold matter, Faye has not established that he has standing to assert a Second Amendment claim. Standing to bring a Second Amendment challenge requires a plaintiff to establish “a continuing injury by showing that he or she intends to engage in conduct protected by the Second Amendment but which violates [the ordinance], and that if the Plaintiff engaged in such conduct, there is a credible threat that he or she would be prosecuted.” *Colo. Outfitters*, 24 F. Supp. 3d at 1061. Faye has not alleged or provided evidence that he lacks the consent of a parent or guardian to possess firearms for purposes including self-defense in the home and competitions. *See* B.R.C. § 5-8-16(c). Because “plaintiffs bear the burden of establishing standing,” *Colo. Outfitters II*, 823 F.3d at 544, and Faye has failed to demonstrate that he can satisfy this burden, he lacks standing to assert a Second Amendment claim.

b. Faye Cannot Demonstrate a Likelihood of Success on the Merits.

The City of Boulder’s Ordinance is congruent with numerous other municipalities and states that prohibit minors under the age of twenty-one from purchasing or possessing firearms. While these laws are frequently challenged, every court to consider a Second Amendment challenge to age restrictions on the purchase or possession of firearms has upheld them. *See*,

e.g., *Nat'l Rifle Ass'n*, 700 F.3d at 195; *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015); *Nat'l Rifle Ass'n v. McCraw*, 719 F.3d 338 (5th Cir. 2013).

The result should be the same under the Tenth Circuit's two-pronged approach to Second Amendment claims, described above. *See Peterson*, 707 F.3d at 1208. First, Faye's claim fails step one because the Ordinance does not impose a burden on conduct falling within the scope of the Second Amendment's guarantee. And second, Faye is unlikely to succeed on his claim even if he survived step one because the age limitations survive intermediate scrutiny.

(i) ***Prohibitions on Gun Possession by Minors Are Historically Unprotected and Outside the Scope of the Second Amendment.***

There is a “longstanding tradition of targeting select groups’ ability to access and use firearms for the sake of public safety.” *Nat'l Rifle Ass'n*, 700 F.3d at 203. Underage minors have long been held to be such a select group. *Id.* at 202-03; *see also United States v. Rene E.*, 583 F.3d 8, 14 (1st Cir. 2009). When America was founded—and indeed, for centuries before—a “minor” was understood as an individual under the age of twenty-one. *Nat'l Rifle Ass'n*, 700 F.3d at 201-02 (“The age of majority at common law was 21, and it was not until the 1970s that States enacted legislation to lower the age of majority to 18.”); *Horsley*, 808 F.3d at 1130. As the Fifth Circuit has observed, “[i]f a representative citizen of the founding era conceived of a ‘minor’ as an individual who was unworthy of the Second Amendment guarantee, and conceived of 18-to-20-year-olds as ‘minors,’ then it stands to reason that the citizen would have supported restricting an 18-to-20-year-old’s right to keep and bear arms.” *Nat'l Rifle Ass'n*, 700 F.3d at 202. Accordingly, courts have upheld firearm prohibitions on individuals under twenty-one since at least the nineteenth century, and by the end of that century nineteen states and the

District of Columbia had enacted such laws. *Id.* at 202-03 (citing *State v. Callicutt*, 69 Tenn. 714, 715 (1878); *Coleman v. State*, 32 Al. 581, 582 (1858)); *see also Rene E.*, 583 F.3d at 14.

This long history demonstrates that prohibitions on minor possession—including minors under the age of twenty-one—are among the “longstanding prohibitions” that are outside the scope of the Second Amendment. *Heller*, 554 U.S. at 627; *see also People v. Jordan G.*, 33 N.E.3d 162, 168 (Ill. 2015) (finding that the conclusion that “age based restrictions on the right to keep and bear arms are historically rooted[] applies equally to those persons under 21 years of age”); *People v. Aguilar*, 2 N.E.3d 321, 329 (Ill. 2013) (“nothing like a right for minors to own and possess firearms has existed at any time in this nation’s history”).

(ii) ***The Ordinance’s Age Limits Satisfy Intermediate Scrutiny.***

If the Court were to proceed to consider the Ordinance’s age limitation under step two of the Second Amendment analysis, it nevertheless survives. As described above, intermediate scrutiny is the appropriate standard of review. This is particularly so because the Ordinance only restricts firearm rights temporarily, until minors reach the age of majority, and because, by allowing those under twenty-one to possess a gun with parental permission, it “does not prevent those under 21 from using guns in defense of hearth and home.” *McCraw*, 719 F.3d at 349; *see also Nat’l Rifle Ass’n*, 700 F.3d at 204 (finding intermediate scrutiny to be the appropriate standard and concluding that a ban on minors purchasing handguns survives scrutiny because “[a]ny 18-to-20-year-old subject to the ban will soon grow up and out of its reach.”); *Powell v. Tompkins*, 926 F. Supp. 2d 367, 378 (D. Mass. 2013) *aff’d on other grounds*, 783 F.3d 332 (1st Cir. 2015).

Applying intermediate scrutiny to the Ordinance’s age provisions, the City of Boulder meets its “burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective.” *Reese*, 627 F.3d at 802. The age restrictions aim to protect public safety, a compelling government interest, and are closely tailored to that interest in light of extensive evidence that individuals under the age of twenty-one are far more likely than the population at large to engage in gun violence. *Horsley*, 808 F.3d at 1133; *see also McCraw*, 719 F.3d at 348. Empirical research demonstrates that, in states without a minimum age requirement on gun ownership and possession, nearly a quarter of gun offenders would have been prohibited from possessing the gun if the legal age were set at twenty-one. *See, e.g., Katherine Vittes et al., Legal Status and Source of Offenders’ Firearms in States with the Least Stringent Criteria for Gun Ownership*, 19 *Inj. Prevention* 26 (2013).

3. The Ordinance Does Not Violate Due Process.

Plaintiffs will not succeed on their claim that the Ordinance violates the Due Process Clause by depriving Plaintiffs of assault weapons and LCMs (and, with respect to Plaintiff Faye, by imposing an under-twenty-one age restriction on firearm possession) “without any legitimate government objective.” *See, e.g., Compl. ¶ 191.*

As Plaintiffs acknowledge, the standard of review of legislation for substantive-due-process violations is highly deferential. *Bolden v. City of Topeka*, 327 F. App’x 58, 61 (10th Cir. 2009) (citing *Okla. Educ. Ass’n v. Alcoholic Beverage Laws Enf’t Comm’n*, 889 F.2d 929, 935 (10th Cir. 1989)). “An ordinance complies with substantive due process under the rational-basis test if there is any conceivable rational relationship between the ordinance and the government’s stated purpose.” *Id.*

Plaintiffs’ assertion that the Ordinance does not meet this low bar is unavailing. The Ordinance explains that it is intended to further an important interest: the protection of citizens’ lives and safety through the reduction of mass shootings. *See* Ord., Findings K-L. As already discussed in connection with Plaintiffs’ Second Amendment claims, the relationship between the Ordinance and this purpose is not only rational, but indeed satisfies intermediate scrutiny. *See supra* Sections III.B.1(c), III.B.2(b); *see also Rupp*, 2018 WL 2138452, at *7 (dismissing substantive due process challenge to California law prohibiting assault weapons under rational-basis review).

Plaintiffs also assert that the Ordinance “retroactively ban[s] property,” violating Plaintiffs’ property interests without due process. *See, e.g.,* Compl. ¶ 193. The Ordinance does not “ban” property going forward, as the Ordinance provides for a number of alternatives to removal (*see, e.g.,* Ord. § 7), and it certainly does not ban property “retroactively”—the possession of assault weapons and LCMs was generally lawful in the past, and the Ordinance does not change that.

4. The Ordinance Does Not Violate the Privileges or Immunities Clause.

Plaintiffs’ claim under the Privileges or Immunities Clause merely restates their claim under the Second Amendment, and fails for the same reasons. *See* Mot. ¶ 31 (“Defendants’ actions violate Plaintiffs’ right to keep and bear arms as protected by the Privileges or Immunities Clause of the Fourteenth Amendment.”).

To the extent the Privileges or Immunities Clause provides a right to keep and bear arms, the standard for evaluating a violation of that right is lesser than (or at most equal to) the Second Amendment standard. *See Peruta v. Cnty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2017) (en

banc) (holding that a derivative privilege and immunities claim was “necessarily resolve[d]” by the court’s Second Amendment holding), *cert. denied*, 137 S. Ct. 1995 (2017); *Culp v. Madigan*, 270 F. Supp. 3d 1038, 1059 (C.D. Ill. 2017).

For the same reasons that Plaintiffs are unlikely to succeed on their claims under the Second Amendment, *see supra* Sections III.B.1 and III.B.2, they are also unlikely to succeed on their Privileges or Immunities Clause claims. *See Peruta*, 824 F.3d at 942; *Culp*, 270 F. Supp. 3d at 1059.

5. The Ordinance Does Not Violate the Colorado Constitution.

The Plaintiffs restate their Second Amendment claims as a violation of Article II, Sections 3 and 13 of the Colorado Constitution. *See* Compl. ¶ 123 (“The right to keep and bear arms protected by the Colorado Constitution is the same . . . right protected by the Second Amendment”); *id.* ¶ 130 (“Both the right of self-defense and the right to defend one’s property, in addition to being protected by the Colorado Constitution, are also protected by the Second Amendment.”).⁵ Because of the similarities between the federal and state laws, Plaintiffs’ Colorado Constitution claims fail, as well.

The Supreme Court of Colorado has provided that “[t]he right to bear arms” conveyed by the Colorado Constitution “may be regulated by the state under its police power in a reasonable

⁵ Article II, Section 3 of the Colorado Constitution recognizes, generally, that “[a]ll persons have certain natural, essential and inalienable rights,” including the right of “defending their lives” and “protecting property.” Colo. Const. art. II, § 13. Section 13 of that Article provides, more specifically, that “[t]he right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question.” Colo. Const. art. II, § 3. Because Plaintiffs do not articulate a material difference between the two legal standards, and Colorado courts appear to treat the two similarly (*see, e.g., People v. Cisneros*, 356 P.3d 877, 887–88 (Colo. App. 2014)), Defendants address both of these claims in terms of the more-specific Article II, Section 13.

manner.” *Robertson v. City of Denver*, 874 P.2d 325, 330-31 (Colo. 1994); *see also Cisneros*, 356 P.3d at 887–88. This standard is satisfied if the state action “is reasonably related to a legitimate governmental interest such as the public health, safety, or welfare.” *Id.* at 331 (citing *People v. Gross*, 830 P.2d 933 (Colo. 1993)); *see also Rocky Mtn. Gun Owners v. Hickenlooper*, No. 2013CV33879, 2017 WL 4169712, at *9 (Colo. Dist. Ct. July 28, 2017). The right to bear arms protected by the Colorado Constitution is no more expansive than the right protected under the U.S. Constitution, and for the same reasons that Plaintiffs’ Second Amendment claims fail under intermediate scrutiny, *see supra* Section III.B.1-2, their claims under the Colorado Constitution must also fail.

6. The Ordinance Does Not Violate Equal Protection.

Plaintiff Faye will not succeed in establishing that the Ordinance violates the Equal Protection Clause by raising the minimum age from eighteen to twenty-one. “[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar advantage of a suspect class.” *Nat’l Rifle Ass’n*, 700 F.3d at 211 (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976)).

Because the Ordinance does not impermissibly interfere with Second Amendment rights, and because “age is not a suspect classification” (*id.*), the age restriction is subject to rational basis review. *See id.* (“[T]he government may ‘discriminate on the basis of age without offending’ the constitutional guarantee of equal protection ‘if the age classification in question is rationally related to a legitimate state interest.’”). As already discussed, the age restrictions are not only rational, but indeed pass intermediate scrutiny. *See supra* Section III.B.2 (citing

Horsley, 808 F.3d at 1133 for the proposition that “[t]he goal of protecting public safety is supported by studies and data regarding persons under 21 and violent and gun crimes.”). Faye will therefore not prevail on his Equal Protection claim.

7. The Ordinance Does Not Violate the Takings Clause.

Plaintiffs cannot show a likelihood of success on their Takings Clause claims for two reasons: (1) the Ordinance provides multiple options for retaining the regulated property; and (2) as a legal matter, any deprivation of property rights effected by the Ordinance falls within the police power exception to the Takings Clause.

First, the plain text of the Ordinance leaves Plaintiffs with several options to extract monetary value from, continue possessing, or ultimately bequeath the regulated assault weapons and LCMs. *See* B.R.C. § 5-8-28(1) (allowing owners to, among other things, (1) remove the article from the City of Boulder; or (2) obtain a certificate for the assault weapon); *see also* B.R.C. § 5-8-10(d) (exempting firearms that have been modified to “permanently make it not an assault weapon”); B.R.C. § 5-8-28(f)(3) & (4) (providing options for heirs to sell to a licensed dealer or remove from Boulder). In addition, Faye can obtain parent or guardian consent to continue possessing firearms for lawful purposes until he turns twenty-one and the age restriction ends. B.R.C. § 5-8-16(c)(6). These statutory options for continued possession, modification, or sale of the regulated weapons mean that no Plaintiff can prevail on a claim that the Ordinance effects a physical or regulatory taking. *See Wiese v. Becerra*, No. 2:17-903-WBS-KJN, WL 746398, at *5 n.10 (E.D. Cal. Feb. 7, 2018).

Plaintiff Caldara’s challenge to the bequeathment provision fails, independently, for two additional reasons. *See* Compl. ¶ 201. First, Caldara lacks standing to assert this claim because

he does not allege or provide evidence that his only heirs live within the City of Boulder.

Second, as a facial challenge, it cannot succeed where there are “any number of weapons owners whose ability to bequeath their weapons would not be implicated,” such as when their heirs live in cities or states where they may lawfully possess assault weapons. *Rupp*, 2018 WL 2138452, at *9 (rejecting facial Takings Clause challenge on this basis).

Plaintiffs’ claim would also fail even if the Ordinance did not provide alternatives to surrender or destruction. Laws prohibiting possession or use of dangerous products fall squarely within the police power exception to the Takings Clause described in *Mugler v. Kansas*, 123 U.S. 623 (1887) and its progeny, and do not implicate the physical or regulatory takings doctrines. In *Lucas v. South Carolina Coastal Council*, the Supreme Court affirmed that *Mugler* governs personal property regulations, where government has a “traditionally high degree of control.” 505 U.S. 1003, 1015-19, 1027-28 (1992).⁶ Thus, courts have repeatedly relied on *Mugler* to uphold restrictions on dangerous weaponry as lawful exercises of the police power. *E.g.*, *Rupp*, 2018 WL 2138452, at *9 (assault weapons); *Wiese*, 263 F. Supp. 3d at 995 (LCMs); *Akins v. United States*, 82 Fed. Cl. 619, 622-24 (Fed. Cl. 2008) (newly designed machine gun); *Fesjian v. Jefferson*, 399 A.2d 861, 866 (D.C. 1979) (machine guns).

Under *Mugler* and *Lucas*, the Ordinance is not an unlawful taking, but a legitimate exercise of Boulder’s police power to restrict possession of dangerous devices—assault weapons and LCMs—and to prohibit dangerous uses of firearms by minors who lack consent of a parent or guardian. The fact that LCMs and assault weapons previously were not restricted in this

⁶ While the Court acknowledged an exception to the *Mugler* rule for regulations depriving *land* of all value, 505 U.S. 1003, 1015-19, 1027-28 (1992), that exception is not implicated by regulations of particular firearms or accessories.

manner, and minors under twenty-one previously did not need parental consent, does not change the Takings Clause calculus. *Mugler*, 123 U.S. at 669.

Plaintiffs’ cited authorities are inapposite because, unlike the Ordinance, those cases involved either land (*e.g.*, *Lucas*, 505 U.S. at 1017), or the appropriation of personal property or land for the government’s *own use* (a “classic taking,” *see Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2425-26, 2427 (2015)). *See* Compl. ¶¶ 96-102. None of the decisions Plaintiffs cite disturb the default rule that compensation is not due when government exercises its police power to prohibit use of personal property for purposes it determines are “injurious to the health, morals, or safety of the community.” *Mugler*, 123 U.S. at 668.

8. The Certification Requirement Does Not Compel Speech in Violation of the First Amendment.

Plaintiffs’ claim that the certification provision of the Ordinance “compels speech” in violation of the First Amendment fails on its face. *See* Mot. ¶¶ 28-30. As a threshold matter, Plaintiffs do not have standing to bring the claim because they present no evidence that they intend to obtain a certificate for their alleged assault weapons (as opposed to removing them from the City, for example). Moreover, the Motion’s inability to cite any supporting legal authority other than *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) demonstrates that Plaintiffs’ theory is unsupportable.

In *Wooley*, the Court found that a New Hampshire law criminalizing the concealment of the phrase “Live Free or Die” on the state’s license plates constituted “compelled speech” in violation of the First Amendment. *Id.* at 717. The Court held that a state may not “constitutionally require an individual to participate in the dissemination of an ideological

message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.” *Id.* at 713.

The Ordinance does no such thing. The Ordinance allows individuals who owned assault weapons as of June 15, 2018 to keep the weapon within city limits by obtaining a certificate from the Boulder Police Department. *See* Ord. § 5. As the Ordinance explains, the City does not retain or publicize any record of such certificates. *See id.* § 7. Rather, the individual retains both copies of the certificate, and is required to keep “one copy with the weapon certified and the second copy in a secure place.” *Id.* The Ordinance thus imposes no requirement that an individual “participate in the dissemination” of any message, let alone an ideological message that is intended to be observed by the public. *See Wooley*, 430 U.S. at 413.

Other more factually analogous decisions concerning the reporting of identifying information in other contexts confirm that this claim cannot succeed. *See, e.g., United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014) (holding that the registration requirement under the Sex Offender Registration and Notification Act does not compel speech in violation of the First Amendment); *United States v. Fox*, 286 F. Supp. 3d 1219 (D. Kan. 2018) (same).

9. Colorado State Law Does Not Preempt the Ordinance.

The Colorado Constitution recognizes the sovereignty of home-rule cities such as Boulder by providing that ordinances made pursuant to a city charter “shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.” *City of Longmont v. Colo. Oil & Gas Assoc.*, 369 P.3d 573, 579 (Colo. 2016). “To ensure home-rule cities this constitutionally-guaranteed independence from state control in their local affairs, [the Colorado Supreme Court] has consistently said that in matters of local concern,

a home-rule ordinance supersedes a conflicting state statute.” *Id.* “In contrast, when a home-rule ordinance conflicts with a state law in a matter of either statewide or mixed state and local concern, the state law supersedes that conflicting ordinance.” *Id.*

There are thus two steps to determine whether state law preempts the Ordinance: (1) determining “whether the issue the ordinance regulates is one of local, statewide, or mixed local and statewide concern”; and (2) if the issue is not purely of local concern, determining “whether the ordinance conflicts with state law on that issue.” *Ryals v. City of Englewood*, 364 P.3d 900, 904–05 (Colo. 2016).

Courts address the first inquiry by “weigh[ing] the relative interests of the state and the municipality in regulating the particular issue in the case,” and make a determination on a case-by-case basis considering the totality of the circumstances. *City of Longmont*, 369 P.3d at 580. The pertinent factors guiding the inquiry include “(1) the need for statewide uniformity of regulation, (2) the extraterritorial impact of the local regulation, (3) whether the state or local governments have traditionally regulated the matter, and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation.” A determination by the General Assembly that a matter is of statewide concern is relevant, although not conclusive in itself. *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013) (citing *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 37 (Colo. 2000)). The second step of the analysis requires a determination whether the home-rule city’s ordinance authorizes what state statute forbids, or forbids what state statute authorizes. *Webb*, 295 P.3d at 492.

Plaintiffs’ preemption challenge, which seeks invalidation of the Ordinance’s assault weapons and LCM provisions (*see* Compl. ¶¶ 413-434), is resolved at the first step of the

analysis. The regulation of assault weapons and LCMs in Boulder is one of purely local concern. Even assuming the issue is of statewide concern or of mixed state and local concern, there is no conflict between the Ordinance and 29-11.7-102, C.R.S. Finally, even if the Court were to have concerns regarding the preemption issue, the appropriate course would be to stay this action while Colorado state courts resolve the issue.

a. The Ordinance Regulates a Matter of Local Concern.

A Denver District Court decision upholding a Denver assault weapon ordinance demonstrates that Plaintiffs' preemption argument fails at the first step. *See City & Cnty. of Denver v. Colorado*, No. 03-CV-3809, 2004 WL 5212983 (Colo. Dist. Ct. Nov. 5, 2004), *affirmed by an equally divided court*, 139 P.3d 635 (Colo. 2006). In *City and County of Denver*, Denver sought a declaratory judgment that section 29-11.7-103, C.R.S. (the same statute Plaintiffs cite), did not preempt several local firearms ordinances, including an ordinance prohibiting the carrying, possessing, keeping, manufacturing, or selling of assault weapons. *Id.* at *6.

Rejecting the State's argument that the Denver assault weapon ordinance touched on an area of mixed state and local concern, the court found that the ordinance regulated purely local issues and upheld it notwithstanding a potential conflict. *Id.* The court credited "the City Council's findings as to why assault weapons pose a threat to the health, safety and security of the citizens of Denver and that the increasing use of assault weapons for criminal activities has resulted in a record number of related homicides and injuries to both citizens and law enforcement officers." *Id.* at *7. The court also found that there was little need for statewide uniformity "given the unique characteristics of Denver," including its high population density.

Id. The court further determined that the ordinance had a minimal extraterritorial impact, in part because it did not prohibit the transportation of assault weapons through Denver by nonresidents. *Id.*

The conclusion here should be the same: the Ordinance regulates a matter of local concern. Like the city council in *City and County of Denver*, the Boulder City Council made a number of detailed findings “as to why assault weapons [and, in the case of Boulder, LCMs] pose a threat to the health, safety and security” in Boulder, including the city’s high population density. Moreover, Boulder has one of the highest student-per-population ratios in the nation. *See, e.g., Ord.*, Findings A, B, C, K, L. Moreover, like the Denver ordinances upheld in *City and County of Denver*, the Boulder Ordinance has a minimal extraterritorial impact by allowing lawful transportation of weapons and magazines through the City of Boulder. *See Ord.* § 3. Additionally, the City of Boulder has regulated assault weapons since early 2002 with the adoption of Ordinance 7115, in response to the Columbine High School mass shooting.

Finally, as explained in *City and County of Denver*, that section 29-11.7-103 purports to broadly prohibit local government regulation is not determinative. *Id.* at *6; *see also Webb*, 295 P.3d at 486. Without undertaking an actual analysis of the respective interests involved, including the State’s willingness to regulate in a particular area, “[r]elying on the declarations alone to demonstrate the statewide interest would render the home rule amendment meaningless.” *Id.*

b. The Certification Requirement Does Not Create a Registry in Violation of Section 29-11.7-102, C.R.S.

Even if the regulation of assault weapons were found to implicate statewide concerns, there is no conflict between the Ordinance and section 29-11.7-102, C.R.S. That section provides:

(1) A local government, including a law enforcement agency, shall not maintain a list or other form of record or database of:

(a) Persons who purchase or exchange firearms or who leave firearms for repair or sale on consignment;

(b) Persons who transfer firearms, unless the persons are federally licensed firearms dealers;

(c) The descriptions, including serial numbers, of firearms purchased, transferred, exchanged, or left for repair or sale on consignment.

C.R.S. § 29-11.7-102.

The Ordinance’s certification process does not “authorize[] what state statute forbids” because it does not create “a list or other form of record or database” of assault weapon owners. *See Webb*, 295 P.3d at 492. Rather, the Ordinance expressly provides that the “City of Boulder *shall not* maintain any records of certificates issued.” Ord. § 7 (emphasis added). Both copies of every certificate are returned to the qualified applicant. *See id.* Thus, there is no conflict between the statute and the Ordinance.

c. In the Alternative, *Pullman* Abstention Is Appropriate.⁷

If the Court perceived a conflict between the Ordinance and state law, the proper course of action would be to stay this case under the *Pullman* doctrine while Colorado state courts resolve the issue, rather than grant Plaintiffs the extraordinary relief they seek at the injunction stage.

Pullman abstention applies when: “(1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law would hinder important state law policies.” *Kan. Judicial Review*, 519 F.3d at 1118-19.

Other courts have found *Pullman* abstention to be the appropriate course when faced with determining the state-law preemption of a local firearms ordinance. *See W. Va. Citizens Def. League, Inc. v. City of Martinsburg*, No. 3:11-CV-5, 2011 WL 4074684, at *4 (N.D.W. Va. Sept. 13, 2011), *aff’d*, 483 F. App’x 838 (4th Cir. 2012); *see also see Davis v. Grimes*, 9 F. Supp. 3d 12, 33 (D. Mass. 2014). In *West Virginia Citizens Defense League*, the plaintiff challenged a provision of the Martinburg City Code that prohibited possession of a firearm in a building owned by the city. *Id.* at *1. The plaintiff asserted several claims, including state constitutional claims and state-law preemption, in addition to federal constitutional claims. *See id.* The court

⁷ For the same reasons, the Court may also certify this question to the Colorado Supreme Court under Colorado Appellate Rule 21.1. *See, e.g., Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008), *certified question answered*, 196 P.3d 1162 (2008), *opinion after certified question answered*, 562 F.3d 1240 (10th Cir. 2009) (“Recognizing these problems with *Pullman* abstention, the Supreme Court has expressed a preference for certifying questions to a state’s supreme court.”).

chose to abstain under *Pullman*, staying the case “so that the plaintiff may present its state law issues to the state court.” *Id.* at *4.

Any determination that the Ordinance is preempted is more properly made by the state courts of Colorado.⁸

C. The Ordinance Will Not Irreparably Harm Plaintiffs.

A preliminary injunction may not enter in the absence of a showing of irreparable harm. *See First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1143 (10th Cir. 2017). “[M]erely serious or substantial” harm is not irreparable harm; to be irreparable, an injury must be “certain, great, actual and not theoretical.” *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (citations and quotations omitted). Plaintiffs must show that the injury “is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.” *Id.* This requires Plaintiffs to prove “a significant risk that [they] will experience harm that cannot be compensated after the fact by money damages.” *Roda Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Additionally, Plaintiffs must show “that irreparable injury is *likely* in the absence of an injunction”; the mere *possibility* of irreparable harm is not sufficient. *Winter*, 555 U.S. at 22.

For at least five reasons, the Motion fails to demonstrate that the Ordinance will cause the Plaintiffs irreparable harm. First, Plaintiffs assert that the alleged violation of their constitutional rights constitutes irreparable injury. *See* Mot. ¶¶ 54-56. But this presumes that Plaintiffs will succeed in establishing constitutional violations. As discussed *supra*, they will not; accordingly,

⁸ A lawsuit against the City of Boulder challenging the Ordinance on preemption grounds was filed in Boulder County District Court (Case No. 2018CV30581) on June 14, 2018.

their primary theory of irreparable harm fails. *See Fyock v. City of Sunnyvale (Fyock I)*, 25 F. Supp. 3d 1267, 1282 (N.D. Cal. 2014), *aff'd*, *Fyock II*, 779 F.3d 991; *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 38 F. Supp. 3d 1365, 1379 (N.D. Ga. 2014), *aff'd*, 788 F.3d 1318 (11th Cir. 2015).

Second, Plaintiffs allege that they will be irreparably harmed by the Ordinance because they will be “required to destroy, surrender, remove, sell, transfer, or register” their assault weapons or LCMs. *See* Mot. ¶¶ 59-60. As an initial matter, Plaintiffs have not offered any evidence that they own any “assault weapons” or “large capacity magazines.” And Plaintiffs have certainly not proffered any evidence regarding any sort of unique, non-fungible assault weapon or magazine whose loss would be irreparable. But even if they did, Plaintiffs’ premise that they would permanently lose those articles is false, as Plaintiffs have multiple options that would allow Plaintiffs to retain them, such as disabling their illegal features or storing them outside of the City while the lawsuit is pending. *See* Ord. §§ 3, 7.⁹

Third, Bison Tactical has failed to demonstrate irreparable harm because its alleged injury is purely economic. *See* Mot. ¶¶ 62-66 (alleging that Bison Tactical “stands to suffer extreme and irreparable economic injuries,” including the inability to transfer “more than \$80,000.00 worth of firearms,” reimbursing customers, losing business). Bison Tactical’s arguments are self-defeating, as irreparable harm is, by definition, harm that cannot be remedied

⁹ Plaintiffs cannot establish a likelihood of irreparable harm on any of their Takings Clause claims for the additional reason that injunctive relief is not an available or appropriate remedy for an unlawful government taking. *Wiese*, 263 F. Supp. 3d at 996; *Lingle v. Chevron U.S.A., Inc.*, 554 U.S. 528 (2005) (Takings Clause intended only “to secure *compensation*”) (emphasis in original).

through compensatory damages. *See Roda Drilling*, 552 F.3d at 1210. Put differently, Bison Tactical expressly admits its harm is not irreparable.

Fourth, Faye has failed to demonstrate irreparable harm on his own. Faye alleges that he can no longer possess a firearm in the City of Boulder, including in his home. *See* Mot. ¶¶ 67-69. However, section 5-8-16(c), B.R.C., allows minors to possess a firearm with the consent of their parent or legal guardian in six specific instances, including in the home for self-defense. *See* B.R.C. § 5-8-16(c)(1)-(6). Section 5-8-16(c)(3) also specifically allows minors to possess firearms for the purposes of shooting competitions, in which Faye allegedly participates. *See id.*; *see* Compl. ¶ 28. Faye has not introduced any evidence demonstrating, nor has he even alleged, that his parent or legal guardian has denied such consent. Accordingly, the Ordinance does not cause irreparable harm to Faye by virtue of his alleged status as a twenty-year-old minor.

Finally, all of Plaintiffs' arguments are weakened by their delayed effort to obtain preliminary relief. *See Intelligent Office Sys., LLC v. Virtualink Canada, LTD.*, No. 15-CV-02724-CMA-MEH, 2016 WL 687348, at *7 (D. Colo. Feb. 18, 2016). When Plaintiffs filed suit on May 16, 2018, they had a full thirty days to seek preliminary relief from the restrictions taking effect June 15, 2018, but waited until June 12, 2018 to file the Motion.

D. The Balance of Hardships Favors Defendants.

Plaintiffs must show, but have failed to show, “that the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction.” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (citation omitted). “[T]he ability of a city to enact and enforce measures it deems to be in the public interest is [] an equity to be considered in balancing hardships.” *Id.* at 1191. In other words, any time a government is “is enjoined by a

court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). When balancing the hardships “of the public interest against a private interest, the public interest should receive greater weight.” *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1236 (9th Cir. 1999).

The harm to Boulder and its populace that would flow from an injunction against the Ordinance would significantly outweigh the vague potential harms alleged by Plaintiffs. As an initial matter, the requested injunction would irreparably harm Boulder’s government and its citizens by preventing the government from enforcing a public safety ordinance it (through a unanimous City Council) has determined to be in the public interest. *See* Ord., Findings A-N; *see also infra* Section III.E. On the other hand, Plaintiffs failed to demonstrate that they will be irreparably harmed, especially to the extent their irreparable harm argument depends significantly on the success of their constitutional claims, which is doubtful. *See supra* Section III.C; *see also Fyock I*, 25 F. Supp. 3d at 1282.

The potential irreparable harm to Boulder is particularly acute given the devastating and unpredictable nature of mass shootings. Just as the Ordinance is not guaranteed to prevent all mass shootings, an injunction against the Ordinance is not certain to allow one to happen. However, considering the truly irreparable harm that a mass shooting would cause the City of Boulder and its citizens, even a small probability that a shooting may occur should tilt the balance of hardships decisively in Defendants’ favor. *See S.F. Veteran Police Officers Ass’n*, 18 F. Supp. 3d at 1005. This is especially true given that “the public interest should receive greater weight.” *Affordable Media*, 179 F.3d at 1236.

E. The Injunction Is Contrary to the Public Interest.

Finally, Plaintiffs have failed to, and cannot, demonstrate that the requested injunction “is not adverse to the public interest.” *See Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) (citing *Heideman*, 348 F.3d at 1191). Numerous courts have found that enjoining a law intended to protect public safety would not be in the public interest. *See, e.g., Rupp*, 2018 WL 2138452, at *12; *Fyock I*, 25 F. Supp. 3d at 1283; *S.F. Veteran Police Officers Ass’n*, 18 F. Supp. 3d at 1005. As one court cautioned in a similar context, “[t]he costs of being mistaken, on the issue of whether the injunction would have a detrimental effect on handgun crime, violence, and suicide, would be grave.” *Tracy Rifle & Pistol LLC v. Harris*, 118 F. Supp. 3d 1182, 1193 (E.D. Cal. 2015), *aff’d*, 637 F. App’x 401 (9th Cir. 2016).

The City Council’s findings, made after significant deliberations and public input, demonstrate that the enforcement of the Ordinance is in the public interest. *See* Ord., Findings A-N. Citing over a dozen well-known mass shootings (which represent only a portion of the many mass shootings and other incidents of gun violence in the past decade involving the use of assault weapons or LCMs), the City Council found that “[a]ssault weapons and/or large capacity ammunition magazines have been the tools of choice in many mass shootings of innocent civilians.” Ord., Finding G (noting, for example, that 12 individuals were killed and 58 wounded in the 2012 Aurora theater shooting with a M&P15 assault rifle and 100-round ammunition magazines, among other weapons). Based in part on the finding that mass shootings “occur most often at in public places and at schools,” the City Council specifically determined that the Ordinance was “necessary for the public safety” as a result of Boulder’s “dense population and

high concentration of students,” as well as its hosting “a large number of public events creating crowds.” *See* Ord., Findings B, L, M.

The Tenth Circuit concluded recently that, in general, “democratically elected representatives . . . are in a better position than the court to determine the public interest.” *Id.* That is, “[t]he courts’ peculiar function is to say what the law is, not to second-guess democratic determinations of the public interest.” *Id.* Particularly in light of the considerable deliberation that went into the Ordinance, the City Council’s determination should be upheld.

The Motion fails to establish why enforcement of a narrowly drawn public safety law would not be in the public interest. Instead, the Motion generically argues that preventing the violation of constitutional rights is in the public interest, as is the exercise of those rights. *See* Mot. ¶¶ 81-83. While these statements are theoretically accurate, they depend on the assumption that the Ordinance violates Plaintiffs’ rights. But as discussed *supra*, Plaintiffs are not likely to succeed on any of their claims, including their federal and state constitutional claims.

IV. CONCLUSION

For the foregoing reasons Plaintiffs’ Motion should be denied.

DATED: July 3, 2018.

Respectfully submitted,

/s/ Evan M. Rothstein

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of July, the foregoing **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was filed via CM-ECF and addressed as follows:

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Exhibit A

ORDINANCE 8245

AN ORDINANCE AMENDING CHAPTER 5, "GENERAL OFFENSES," B.R.C. 1981, TO BAN THE SALE AND POSSESSION OF ASSAULT WEAPONS, LARGE-CAPACITY MAGAZINES AND MULTI-BURST TRIGGER ACTIVATORS, AND SETTING FORTH RELATED DETAILS.

THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO, FINDS AND RECITES THE FOLLOWING:

A. The City of Boulder is an urban, densely populated city, with a population density similar to that of Denver, Colorado. With a population of 682,545 in 155 square miles, Denver has a density of 4,213 residents per square mile. Boulder's population of 108,707 resides in 25.8 square miles with a population density of 4,031 residents per square mile.

B. There has been a significant increase in mass shootings over the last two decades. Mass shootings occur most often at in public places and at schools and involve assault weapons.

C. Boulder is home to the main campus of the University of Colorado, with an enrollment of 33,246 students and the campus of Naropa University, with 932 students enrolled. In addition, Boulder is home to Boulder Valley School District elementary, middle and high schools, with 14,357 students enrolled. In addition, the city is home to private schools with approximately 1,500 students. Boulder's estimated population is 108,707. Boulder has one of the highest ratios of students per capita in the country. Students are disproportionately victims of mass shootings. Thus, the presence of a large number of students in the city of Boulder creates a higher than normal level of risk for the community.

D. Assault weapons are semi-automatic firearms designed with military features to allow rapid spray firing for the quick and efficient killing of humans.

1 E. Large capacity ammunition magazines (generally defined as magazines capable of
2 holding more than 10 rounds) are feeding devices that and may hold as many as 100 rounds of
3 ammunition.

4 F. Multi-Burst Trigger activators are devices that effectively increase the rate at which
5 a weapon can be fired.

6 G. Assault weapons and/or large capacity ammunition magazines have been the tools
7 of choice in many mass shootings of innocent civilians, including those described below:

- 8 1. Parkland, Florida, February 14, 2018: a shooter killed 17 and wounded 17 at Marjory
9 Stoneman Douglas High School with an AR-15-style assault rifle.
- 10 2. Sutherland Springs, Texas, November 5, 2017: a shooter killed 26 and wounded 20 at
11 the First Baptist Church with a Ruger AR-556 assault rifle.
- 12 3. Las Vegas, Nevada, October 1, 2017: a shooter killed 59 and wounded 527 armed with
13 23 guns, including both AR-15s and AK-47s as well as at least one gun modified with
14 a bump stock. The following weapons were found inside of the killer's hotel room:
 - 15 a. Colt M4 Carbine AR-15 .223/5.56 with a bump stock, vertical fore grip and 100
16 round magazine.
 - 17 b. Noveske N4 AR-15 .223/5.56 with a bump stock, vertical fore grip and 40
18 round magazine.
 - 19 c. LWRC M61C AR-15 .223/5.56 with a bump stock, vertical fore grip and 100
20 round magazine.
 - 21 d. POF USA P-308 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.
 - 22 e. Christensen Arms CA-15 AR-15 .223 Wylde with a bump stock, vertical fore
23 grip and 100 round magazine.
 - 24
 - 25

- f. POF USA P-15 P AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
- g. Colt Competition AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
- h. Smith & Wesson 342 AirLite .38 caliber revolver with 4 cartridges and 1 expended cartridge case.
- i. LWRC M61C AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
- j. FNH FM15 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.
- k. Daniel Defense DD5V1 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.
- l. FNH FN15 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
- m. POF USA P15 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
- n. Colt M4 Carbine AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
- o. Daniel Defense M4A1 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
- p. LMT Def. 2000 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
- q. Daniel Defense DDM4V11 AR-15 .223/5.56 with a bump stock, vertical fore grip. No magazine. EOTech optic.

- 1 r. Sig Sauer SIG716 AR-10 .308/7.62 with a bipod, red dot optic and 25 round
- 2 magazine.
- 3 s. Daniel Defense DD5V1 AR-10 .308/7.62 with a bipod and scope. No
- 4 magazine.
- 5 t. FNH FN15 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100
- 6 round magazine.
- 7 u. Ruger American .308 caliber bolt action rifle with scope.
- 8 v. LMT LM308MWS AR-10 .308/7.62 with a bipod and red dot scope. No
- 9 magazine.
- 10 w. Ruger SR0762 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.
- 11 x. LMT LM308MWS AR-10 with a bipod, scope and 25 round magazine.
- 12
- 13 4. Orlando, Florida, June 12, 2016: a shooter killed 49 and wounded 58 at the Pulse
- 14 Nightclub with an AR-15-style assault rifle and a Glock 17 9mm handgun.
- 15 5. San Bernardino, California, December 2, 2015: two shooters killed 14 and wounded 22
- 16 using a DPMS AR-15-style assault rifle and a Smith and Wesson M&P 15.
- 17 6. Newtown, Connecticut, December 14, 2012: a shooter killed 26 and wounded 2 at
- 18 Sandy Hook Elementary School with an AR-15-style assault rifle. The killer murdered
- 19 his mother with a .22 caliber rimfire rifle. He also had a Glock 10mm and a Sig Sauer
- 20 9mm.
- 21 7. Aurora, Colorado, July 20, 2012: a shooter killed 12 and wounded 58 armed with a
- 22 Smith & Wesson M&P15 assault rifle and 100-round ammunition magazines and a
- 23 Remington 870 pump shotgun. He also had a Glock 22 .40 caliber pistol.
- 24
- 25

1 8. Carson City, Nevada, September 6, 2011: a shooter killed 4 and wounded 7 armed with
2 a Norinco Mak 90, that had been altered from a semi-automatic assault weapon to a
3 fully-automatic machine gun.

4 9. Washington D.C. area, October 2002: shooters killed 10 and wounded 3 during a 3-
5 week rampage armed with a Bushmaster XM-15 assault rifle.

6 10. Columbine, Colorado, April 20, 1999: shooters killed 13 and wounded 21 at Columbine
7 High School armed with a TEC-9 assault pistol and several large capacity ammunition
8 magazines. The killers also had two shotguns.

9 11. San Francisco, California, July 1, 1993: a shooter killed 8 and wounded 6 armed with
10 TEC-9 assault pistols and 40- and 50-round ammunition magazines. The suspect used
11 a Hell-Fire trigger, which is a type of multi-burst trigger activator.

12
13 H. The City Council intends a narrow ban that respects the constitutionally guaranteed
14 right to bear arms.

15 I. Americans constitute 4.4 percent of the global population and own 42 percent of
16 the world's guns.

17 J. Worldwide a country's rate of gun ownership correlates with the occurrence of
18 mass shootings.

19 K. This ordinance is a reasonable exercise of the city's police powers to restrict access
20 to weapons that are of the type used in mass shootings and that are designed to kill large numbers
21 of people quickly.

22 L. Because of Boulder's dense population and high concentration of students the
23 council believes that it is necessary for the public safety to adopt this ordinance.

1 M. Boulder hosts a large number of public events creating crowds that are uniquely
2 vulnerable to mass shooters.

3 N. This ordinance will impact only a small percentage of the weapons possessed by
4 Boulder residents.

5 BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER,
6 COLORADO:

7 Section 1. Section 5-1-1, "Definitions," B.R.C. 1981, is amended to delete the definition
8 of "Illegal weapon."
9

10 ~~... Illegal weapon means a blackjack, gas gun, metallic knuckles, gravity knife or switchblade~~
11 ~~knife.~~
12 ~~...~~

13 Section 2. Section 5-8-2, "Definitions," B.R.C. 1981, is amended to read as follows:

14 **5-8-2. – Definitions.**

15 The following terms used in this chapter have the following meanings unless the context clearly
16 requires otherwise:

17 *About the person* means sufficiently close to the person to be readily accessible for immediate
18 use.

19 *Assault weapon* means:

20 (a) ~~All semi-automatic firearms center-fire rifles that have the capacity to accept a~~
21 ~~detachable magazine and that have with any of the following characteristics:~~

22 ~~_____ (1a) A pistol grip or thumbhole stock, semi-automatic action rifles with a detachable~~
23 ~~magazine with a capacity of twenty-one or more rounds.;~~

24 ~~_____ (2b) All semiautomatic shotguns with a folding or telescoping stock or a magazine~~
25 ~~capacity of more than six rounds or both.; or~~

_____ (3e) ~~Any protruding grip or other device to allow the weapon to be stabilized with~~
~~the non-trigger hand. All semiautomatic pistols that are modifications of rifles~~
~~having the same make, caliber, and action design but a short barrel or~~
~~modifications of automatic weapons originally designed to accept magazines~~
~~with a capacity of twenty-one or more rounds.~~

(b) All semi-automatic center-fire pistols that have any of the following characteristics:

(1) Have the capacity to accept a magazine other than in the pistol grip; or

(2) Have a secondary protruding grip or other device to allow the weapon to be stabilized with the non-trigger hand.

(c) All semi-automatic shotguns that have any of the following characteristics:

(1) A pistol grip or thumbhole stock;

(2) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;

(3) A folding or telescoping stock;

(4) A fixed magazine capacity in excess of 5 rounds; or

(5) The capacity to accept a detachable magazine.

(d) Any firearm which has been modified to be operable as an assault weapon as defined herein.

(e) Any part or combination of parts designed or intended to convert a firearm into an assault weapon, including ~~a detachable magazine with a capacity of twenty-one or more rounds, or~~ any combination of parts from which an assault weapon may be readily assembled if those parts are in the possession or under the control of the same person.

Constructive knowledge means knowledge of facts or circumstances sufficient to cause a reasonable person to be aware of the fact in question.

Illegal weapon means an assault weapon, large-capacity magazine, multi-burst trigger activator, blackjack, gas gun, metallic knuckles, gravity knife or switchblade knife.

Large-capacity magazine means any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:

(a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.

(b) A 22-caliber tube rim-fire ammunition feeding device.

(c) A tubular magazine that is contained in a lever-action firearm.

(d) A pistol magazine designed to fit into a pistol grip that has a capacity to hold no more than 15 rounds.

Locked container means a secure container which is enclosed on all sides and locked by a padlock, key lock, combination lock, or similar device.

Minor means a person under ~~eighteen~~ twenty-one years of age.

Multi-Burst Trigger Activator means:

- (a) A device that attaches to a firearm to allow the firearm to discharge two or more shots in a burst when the device is activated; or
- (b) A manual or power-driven trigger-activating device that, when attached to a firearm increases the rate of fire of that firearm.

Pistol Grip means a grip that protrudes conspicuously beneath the action of the weapon and that allows for a pistol style grasp in which the web of the trigger hand (between the thumb and index finger) can be placed below the top of the exposed portion of the trigger while firing.

Provide means to give, lend, sell, or otherwise place in an unsecured location where a minor or other unauthorized or incompetent person could foreseeably gain access to a firearm.

Semi-automatic means a firearm that fires a single round for each pull of the trigger and automatically chambers a new round immediately after a round is fired.

Section 3. Section 5-8-10, "Possession of Illegal Weapons," B.R.C. 1981, is amended to read as follows:

5-8-10. – Possession and Sale of Illegal Weapons.

- (a) No person shall knowingly possess or sell or otherwise transfer an illegal weapon.
- (b) The defendant's knowledge that the weapon was illegal is not an aspect of knowledge required for violation of this section.
- (c) Nothing in this section shall be construed to forbid any person:
 - (1) Holding a Federal Firearms License issued by the United States Government from possession of any firearm authorized pursuant to such license;
 - (2) From possessing a weapon for which the United States Government has issued a stamp or permit pursuant to the National Firearms Act;
 - (3) From possessing a handgun magazine so long as the possession of the handgun and magazine are in compliance with state law; or
 - (4) Selling an illegal weapon to a person identified in Section 5-8-25, "Exemptions from this Chapter," B.R.C. 1981.
- (d) Nothing in this section shall be deemed to apply to any firearm that has been modified either to render it permanently inoperable or to permanently make it not an assault weapon.
- (e) Nothing in this section shall be deemed to restrict a person's ability to travel with a weapon in a private automobile or other private means of conveyance for hunting or for lawful protection of a person's or another's person or property while traveling into,

though, or within, the City of Boulder, regardless of the number of times the person stops in the City of Boulder.

Section 4. Section 5-8-21, "Open Carriage of Firearms in Carrying Cases Required," B.R.C. 1981, is amended to read as follows:

5-8-21. - Open Carriage of Firearms in Carrying Cases Required.

Any person carrying a firearm off of the person's property or outside of the person's business or vehicle shall carry the firearm in a carrying case. The carrying case must be recognizable as a gun carrying case by a reasonable person. A plain-shaped case must be clearly marked to be deemed recognizable under this standard. A holster satisfies the requirement of a carrying case for a pistol. The carrying case must be openly carried and must not be concealed on or about the person. This section shall not apply to individuals who have a permit to carry a concealed weapon issued pursuant to state law, unless the weapon being carried is an assault weapon.

Section 5. Section 5-8-22, "Defenses," B.R.C. 1981, is amended to read as follows:

5-8-22. – Defenses.

(a) It is an affirmative defense to a charge of violating sections 5-8-3, "Discharge of Firearms," 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space," 5-8-5, "Negligently Shooting Bow or Slingshot," 5-8-6, "Aiming Weapon at Another," 5-8-7, "Flourishing Deadly Weapon in Alarming Manner," and 5-8-8, "Possession of Loaded Firearms," B.R.C. 1981, that the defendant was:

(1) Reasonably engaged in lawful self-defense under the statutes of the State of Colorado; or

(2) Reasonably exercising the right to keep and bear arms in defense of the defendant's or another's home, person and property or in aid of the civil power when legally thereto summoned.

(b) It is a specific defense to a charge of violating sections 5-8-3, "Discharge of Firearms," 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space," and 5-8-8, "Possession of Loaded Firearms," B.R.C. 1981, that the events occurred in an area designated as a target range by the city manager under section 5-8-26, "City Manager May Designate Target Ranges," B.R.C. 1981, for the type of weapon involved. It is a specific defense to a charge of violating section 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space," B.R.C. 1981, by possession that the defendant was going directly to or returning directly from such a target range.

(c) It is an affirmative defense to a charge of violating sections 5-8-8, "Possession of Loaded Firearms," 5-8-9, "Carrying a Concealed Weapon," and 5-8-11, "Possessing Firearm While Intoxicated," B.R.C. 1981, that the defendant was:

- (1) In the defendant's own dwelling or place of business or on property owned or under the defendant's control at the time; or
 - (2) In a private automobile or other private means of conveyance at the time and was carrying the weapon for lawful protection of the defendant's or another's person or property while traveling; or
 - (3) Charged with carrying a knife that was a hunting or fishing knife carried by the defendant for sport use.
- (d) It is a specific defense to a charge of violating sections 5-8-8, "Possession of Loaded Firearms," and 5-8-9, "Carrying a Concealed Weapon," B.R.C. 1981, that the defendant was carrying the weapon pursuant to a concealed weapons permit valid under the statutes of the State of Colorado.
- (e) It is a specific defense to a charge of violating sections 5-8-3, "Discharge of Firearms," and 5-8-8, "Possession of Loaded Firearms," B.R.C. 1981, that the loaded gas or mechanically operated gun was possessed or discharged in a building with the permission of the property owner and the projectile did not leave the building.
- (f) It is a specific defense to a charge of violating section 5-8-10, "Possession of Illegal Weapons," B.R.C. 1981;;
- (1) ~~That the person had a valid permit for such weapon pursuant to federal law at the time of the offense;~~ or
 - (2) That the illegal weapon was an assault weapon accompanied by a certificate issued by the Boulder Police Department.
- (g) It is a specific defense to a charge of violating section 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space," B.R.C. 1981, that the firearm, gas or mechanically operated gun, bow, slingshot or crossbow possessed by the person was being transported in a motor vehicle. This defense does not apply to a charge of violation involving discharge of a missile.

Section 6. Section 5-8-25, "Exemptions from Chapter," B.R.C. 1981, is amended to read as follows:

5-8-25. – Exemptions from Chapter.

The following individuals are exempt from the provisions of this Chapter:

- (a) ~~Nothing in this chapter shall be construed to forbid Any officer of the United States,~~ including but not limited to federal agents and United States ~~m~~Marshals, any sheriffs, constables and their deputies; any regular or ex-officio police officer; any other peace officers; or members of the United States Armed Forces, Colorado National Guard or Reserve Officer Training Corps from having in their possession, displaying, concealing or discharging such weapons as are necessary in the authorized and proper performance of their official duties; or

(b) Any person authorized to carry a concealed weapon under the Federal Law Enforcement Officers Safety Act.

Section 7. A new Section 5-8-28, "Assault Weapons," B.R.C. 1981, is added to read as follows, and remaining sections in Chapter 5-8 are renumbered:

5-8-28. – Assault Weapons.

- (a) Any person who, prior to June 15, 2018, was legally in possession of an assault weapon large capacity magazine shall have until December 31, 2018 to do any of the following without being subject to prosecution:
- (1) Remove the assault weapon or large capacity magazine from the City of Boulder;
 - (2) Render the assault weapon permanently inoperable;
 - (3) Surrender the assault weapon or large capacity magazine to the Boulder Police Department for destruction; or
 - (4) If eligible, obtain a certificate for the assault weapon as provided in subsection (c).
- (b) Any person who, prior to June 15, 2018, was legally in possession of multi-burst trigger activator shall have until July 15, 2018 to do any of the following without being subject to prosecution:
- (1) Remove the multi-burst trigger activator from the City of Boulder; or
 - (2) Surrender the multi-burst trigger activator to the Boulder Police Department for destruction.
- (c) Any person seeking to certify an assault weapon that he or she legally possessed prior to June 15, 2018 must comply with the following requirements:
- (1) Submit to a background check conducted by the appropriate law enforcement agency to confirm that he or she is not prohibited to possess a firearm pursuant to 18 U.S.C. § 922 or C.R.S § 18-12-108;
 - (2) Unless the person is currently prohibited by law from possessing a firearm, prior to December 31, 2018 apply for a certificate for the assault weapon from the Boulder Police Department;
 - (3) Safely and securely store the assault weapon pursuant to the regulations adopted by the appropriate law enforcement agency;
 - (4) Possess the assault weapon only on property owned or immediately controlled by the person, or while on the premises of a licensed gunsmith for the purpose of lawful repair, or while engaged in the legal use of the assault weapon at a duly licensed firing range, or while traveling to or from these locations, provided that the assault weapon is stored unloaded in a locked container during

transport. The term “locked container” does not include the utility compartment, glove compartment, or trunk of a motor vehicle; and

(5) Report the loss or theft of a certified assault weapon to the appropriate law enforcement agency within 48 hours of the time the discovery was made or should have been made.

(d) If a certified assault weapon is used in the commission of a crime, the owner shall be civilly liable for any damages resulting from that crime. The liability imposed by this subsection shall not apply if the assault weapon was stolen and the certified owner reported the theft of the firearm to law enforcement within 48 hours of the time the discovery was made or should have been made.

(e) Certified assault weapons may not be purchased, sold or transferred in the City of Boulder, except for transfer to a licensed gunsmith for the purpose of lawful repair, or transfer to the appropriate law enforcement agency for the purpose of surrendering the assault weapon for destruction.

(f) Persons acquiring an assault weapon by inheritance, bequest, or succession shall, within 90 days of acquiring title, do one of the following:

(1) Modify the assault weapon to render it permanently inoperable;

(2) Surrender the assault weapon to the Boulder Police Department for destruction;

(3) Transfer the assault weapon to a firearms dealer who is properly licensed under federal, state and local laws; or

(4) Permanently remove the assault weapon from the City of Boulder.

(g) The owner of a certified assault weapon may not possess in the City of Boulder any assault weapons purchased after June 15, 2018.

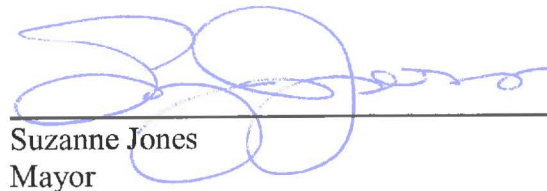
(h) The city manager shall charge a fee for each certificate sufficient to cover the costs of administering the certificate program.

(i) The city manager shall issue to qualified applicants two original copies of each certificate issued. The City of Boulder shall not maintain any records of certificates issued. The person receiving the certificate shall keep one copy with the weapon certified and the second copy in a secure place to replace the certificate maintained with the weapon.


Section 8. This ordinance is necessary to protect the public health, safety, and welfare of the residents of the city, and covers matters of local concern.

Section 9. The city council deems it appropriate that this ordinance be published by title only and orders that copies of this ordinance be made available in the office of the city clerk for public inspection and acquisition.

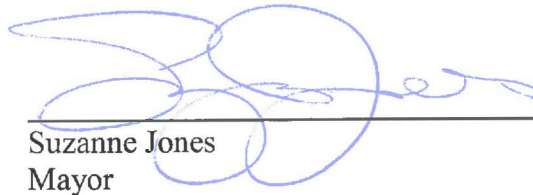
1 INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY
2 TITLE ONLY this 5th day of April, 2018.
3

4 
5 Suzanne Jones
6 Mayor

7 Attest:

8 
9 Lynnette Beck
City Clerk

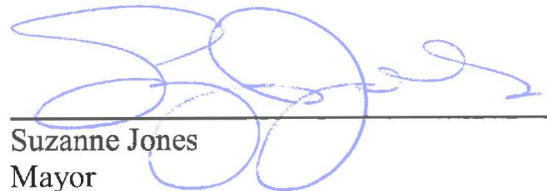
10 READ ON SECOND READING AND AMENDED this 1st day of May, 2018.
11

12 
13 Suzanne Jones
14 Mayor


15 Attest:

16 
17 Lynnette Beck
City Clerk

18 READ ON THIRD READING, PASSED AND ADOPTED this 15th day of May, 2018.
19

20 
21 Suzanne Jones
22 Mayor

23 Attest:

24 
25 Lynnette Beck
City Clerk