

**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.

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**DEFENDANTS' MOTION TO DISMISS**

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**COME NOW** 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”), who move to dismiss the Complaint filed by Plaintiffs Jon C. Caldara; Boulder Rifle Club, Inc. (sometimes referred to as

the “Club”); General Commerce, LLC d/b/a Bison Tactical; and Tyler Faye (together, “Plaintiffs”) as follows:

- Defendants move to dismiss certain claims asserted by Plaintiffs Faye and Bison Tactical for lack of standing under Federal Rule of Procedure 12(b)(1).
- Defendants move to dismiss all claims of all Plaintiffs (Counts I through XXVIII) for failure to state a claim under Federal Rule of Procedure 12(b)(6).
- Defendants move to dismiss Boulder City Council members Suzanne Jones, Aaron Brockett, Cynthia A. Carlisle, Lisa Morzel, Mirabai Kuk Nagle, Samuel P. Weaver, Robert Yates, Mary D. Young, and Jill Adler Grano (the “City Council Members”) on the grounds of legislative immunity.

Defendants certify that, pursuant to D.C.COLO.LCivR 7.1(a), undersigned counsel discussed this Motion with counsel for Plaintiffs by telephone on July 5, 2018. Plaintiffs oppose the relief requested herein.

## **I. INTRODUCTION**

Plaintiffs’ Complaint seeks to overturn the City of Boulder’s recently-passed Ordinance 8245 (the “Ordinance”) containing new regulations regarding the use and possession of assault weapons, large-capacity magazines, and of firearms by minors. Despite the Complaint’s length and number of claims, the issues it presents are not novel: numerous federal and state courts since the U.S. Supreme Court’s *Heller* decision have considered, and overwhelmingly rejected, similar legal challenges to comparable laws, including at the motion to dismiss stage. The Complaint fails to allege why the result here should differ. In light of the substantial, and largely uniform, body of jurisprudence upholding reasonable firearms safety measures such as those at

issue here and the Complaint's lack of plausible allegations, the Complaint fails as a matter of law and should be dismissed.<sup>1</sup>

## II. FACTS

On May 15, 2018, the City of Boulder adopted the Ordinance through a unanimous City Council. Compl. ¶ 1. A true and correct copy of the Ordinance is attached as Exhibit A. The Court may consider the Ordinance as a public record and as a document referenced in the pleadings without converting this Motion into a motion for summary judgment under Rule 56. *See Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503 (10th Cir. 1997) (“We conclude it was entirely appropriate for the district court to take judicial notice of the provisions of Ordinance 863.”); *see also Armstrong v. JPMorgan Chase Bank Nat’l Ass’n*, 633 F. App’x 909, 911 (10th Cir. 2015); *Pace v. Swerdlow*, 519 F.3d 1067, 1072 (10th Cir. 2008).

As further explained in Defendants’ PI Opposition, the Ordinance added regulations to the Boulder Revised Code relating to (i) assault weapons, (ii) large-capacity magazines (“LCMs”), and (iii) the minimum age for possessing firearms without a parent or legal guardian’s consent. *See* PI Opp. 3-4; Compl. ¶¶ 148-65. The four Plaintiffs filed their facial challenge the day after the Ordinance passed. *See* Compl. Plaintiffs sued numerous individuals in addition to the City of Boulder, including every member of Boulder’s City Council. *See* Compl. ¶¶ 45-65.

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<sup>1</sup> Defendants filed their Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction (“PI Opposition”) on July 3, 2018. *See* Dkt. No. 28. Because Plaintiffs’ Motion solely relied on the allegations in the Complaint, the likelihood-of-success arguments advanced in Defendants’ PI Opposition were similar to a Rule 12(b) challenge. Accordingly, because of the significant overlap, and to comply with the Court’s requirement that more complex Rule 12(b) arguments be addressed in a separate brief (*see* Court’s Sample Motion to Dismiss at 1 n.1), Defendants incorporate by reference arguments made in Section III.B of their PI Opposition. *See* PI Opp. at 6-30. This Motion will refer to and incorporate specific portions of the PI Opposition.

### III. ARGUMENT

The Complaint's deficiencies require its dismissal. First, Faye and Bison Tactical lack standing under Rule 12(b)(1) to assert certain claims for relief. Second, each of the Complaint's twenty-eight counts fails to state a claim for a relief under Rule 12(b)(6). And, third, the City Council Members named as Defendants are exempt from suit as a result of their absolute legislative immunity.

#### A. Plaintiffs Faye and Bison Tactical Lack Standing.

When presented with a motion to dismiss a complaint for lack of standing, the court “must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *COPE v. Kans. State Bd. of Educ.*, 821 F.3d 1215, 1220 (10th Cir. 2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); see also *Am. Tradition Inst. v. Colorado*, 876 F. Supp. 2d 1222, 1229 (D. Colo. 2012). However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *COPE*, 821 F.3d at 1221 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). To adequately plead standing, plaintiffs must therefore allege, among other things, a plausible claim of injury. *Id.*

#### 1. Burden of proof.

The burden is on the party invoking federal subject matter jurisdiction to establish the elements of standing at each stage of the litigation. *Id.* at 1220. Each plaintiff must establish standing as to each claim and form of relief. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

#### 2. Elements.

Standing requires a plaintiff to allege facts that, if proven, would establish “injury in fact.” *COPE*, 821 F.3d at 1220 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409

(2013)). To establish injury in fact in a pre-enforcement challenge to a criminal statute, a plaintiff must demonstrate: “(1) ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the challenged statute,’ and (2) that ‘there exists a credible threat of prosecution thereunder.’” *Colo. Outfitters Ass’n v. Hickenlooper (Colo. Outfitters II)*, 823 F.3d 537, 545 (10th Cir. 2016) (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)) (further quotation and alteration omitted).

### **3. Elements not supported by Complaint.**

Faye and Bison Tactical fail to plausibly plead the injury-in-fact element of standing.

#### **a. Faye.**

Plaintiff Faye fails to plausibly allege that the Ordinance prevents him from possessing and using firearms due to his age. Faye, who alleges to be twenty years old, challenges the Ordinance’s age restriction as part of each of his claims, and as the entire basis for his Equal Protection claim. *See* Compl. ¶¶ 352 (Count XX), 364-65 (Count XXI), 371 (Count XXII), 378 (Count XXIII), 380-93 (Count XXIV), 400 (Count XXV), 407 (Count XXVI). According to Faye, because the Ordinance raises the minimum age from eighteen to twenty-one, he is now prohibited from possessing “any firearm” within the City. *See, e.g., id.* ¶¶ 28, 32, 172, 352.

Faye’s allegations are legally inadequate due to the provisions of the Boulder Revised Code that allow minors to possess firearms for multiple purposes with a parent or legal guardian’s consent. *See* B.R.C. § 5-8-16(c) (permitting firearm possession for home self-defense, target shooting, competitive shooting, and hunting). Both of the activities Faye alleges he can no longer undertake—self-defense and competitive shooting—fall within these specific

exceptions. *See* B.R.C. § 5-8-16(c)(3), (6). The Complaint does not allege that Faye has sought and failed to obtain parent or legal-guardian consent to possess a firearm for these purposes.

By failing to plead that this exception does not apply, Faye has not plausibly alleged that the Ordinance has restricted his ability to possess a firearm (other than an assault weapon or LCM). As a result, Faye has not plausibly pled that he intends to engage in a course of conduct proscribed by the Ordinance. *See Colo. Outfitters II*, 823 F.3d at 545. It follows that Faye has not plausibly pled that there exists a credible threat of prosecution. *See id.* Faye thus fails to plead the injury-in-fact element of standing.

Accordingly, Faye's claims that rely on the age restriction should be dismissed and Faye's Equal Protection claim should be dismissed in its entirety.

**b. Bison Tactical.**

Bison Tactical lacks standing to assert claims under the Second Amendment or the Colorado Constitution. 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). The *Leo* court based its ruling on *Heller*'s conclusion that the "historic purpose of the Second Amendment right to 'keep and bear arms' was the ability to acquire, use, possess, or carry lawful firearms *for the purpose of self-defense*." *Id.* at \*9 (citing *Colo. Outfitters Ass'n v. Hickenlooper (Colo. Outfitters I)*, 24 F. Supp. 3d 1050, 1064 (D. Colo. 2014)) (emphasis in original). This same reasoning forecloses a claim by a corporation under the Colorado Constitution, which provides for a "right to keep and bear arms in defense of [one's] home,

person, and property.” Colo. Const. art. II, § 13; *see also* Colo. Const. art. II, § 3 (providing that persons have the rights of “defending their lives” and “protecting property”).

Further, by failing to identify any of its customers with specificity, Bison Tactical did not plausibly plead associational standing. A corporation does not have 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. The absence of any allegation that any particular customers of Bison Tactical will be impacted by the Ordinance precludes a theory of associational standing.

Bison Tactical’s Counts XV, XVIII, and XIX should be dismissed for lack of standing.

**B. The Complaint Fails to State a Claim Under Rule 12(b)(6).**

The Complaint should be dismissed in its entirety under Rule 12(b)(6) for failure to state a claim. To survive a Rule 12(b)(6) motion, a plaintiff’s allegations must “state a claim to relief that is plausible on its face.” *Moya v. Garcia*, 887 F.3d 1161, 1162–63 (10th Cir. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible only if it contains sufficient factual allegations to allow the court to reasonably infer liability. *Id.* (citing *Iqbal*, 556 U.S. at 678).

Each of the Complaint’s twenty-eight counts fails to satisfy this standard. The claims fall into the following eight categories, which are analyzed in turn below:

- 1) Violation of Second Amendment, brought by Caldara (Count I), Boulder Rifle Club (Count VIII), Bison Tactical (Count XV), and Faye (Count XX).
- 2) Violation of Due Process Clause, brought by Caldara (Count II), Boulder Rifle Club (Count IX), Bison Tactical (Count XVI), and Faye (Count XXI).

- 3) Violation of Privileges or Immunities Clause, brought by Caldara (Count V), Boulder Rifle Club (Count XII), and Faye (Count XXIII).
- 4) Violation of Article 2, Sections 13 and 3 of Colorado Constitution, brought by Caldara (Counts VI and VII), Boulder Rifle Club (Counts XIII and XIV), Bison Tactical (Counts XVIII and XIX), and Faye (Counts XXV and XXVI).
- 5) Violation of Takings Clause, brought by Caldara (Count III), Boulder Rifle Club (Count X), Bison Tactical (Count XVII), and Faye (Count XXII).
- 6) Violation of the First Amendment, brought by Caldara (Count IV) and Boulder Rifle Club (Count XI).
- 7) Violation of Equal Protection Clause, brought by Faye (Count XXIV).
- 8) Violation of Sections 29-11.7-102 and -103, C.R.S. (Counts XXVII and XXVIII).

**1. The Second Amendment Claims by All Plaintiffs (Counts I, VIII, XV, XX) Fail to State a Claim.**

**a. Elements.**

To state a claim for violation of the Second Amendment, a plaintiff must allege that the challenged law (i) “imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee”; and (ii) fails to satisfy intermediate scrutiny (that is, it is not “substantially related to an important government objective”). *See United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010).

**b. Burden of proof.**

The burden is first on the challenger to establish that his or her Second Amendment rights have been violated and that intermediate scrutiny applies. *See N.Y. State Rifle & Pistol Ass’n v. City of N.Y.*, 883 F.3d 45, 62 n.11 (2d Cir. 2018). If the plaintiff establishes this, the burden then



shifts to the government to demonstrate that the law nevertheless satisfies intermediate scrutiny. *See id.*; *Reese*, 627 F.3d at 802.

**c. Elements not supported by Complaint.**

The Complaint fails to establish either prong of the Second Amendment test as to (i) the claims by all Plaintiffs challenging the assault weapon and LCM regulations, or (ii) the claim by Faye challenging the age restriction (to the extent he has standing to assert it). In support of this argument, Defendants refer to and incorporate by reference Sections III.B.1-2 of their PI Opposition.

*(i) Plaintiffs' challenge to the assault weapon and LCM restrictions (Counts I, VIII, XV, XX).*

All Plaintiffs assert that the Ordinance's assault weapon and LCM restrictions violate the Second Amendment. *See* Compl. ¶¶ 184-88 (Caldara), 239-43 (Boulder Rifle Club), 306-08 (Bison Tactical), 354-58 (Faye). These counts fail to satisfy either element of the Tenth Circuit's Second Amendment analysis.

First, the Complaint does not plausibly allege that possession and use of the weapons and LCMs regulated by the Ordinance fall within the scope of Second Amendment protection. *See generally* Compl. The Complaint also does not plausibly allege why or how the Ordinance's assault weapon or LCM regulations differ from those upheld in numerous opinions across the country. *See generally id.*

The Complaint's only allegation in this regard is that such weapons are "widely used," *see, e.g.*, Compl. ¶¶ 185, 187, but this conclusory allegation does not contain any supporting information that would make it plausible. The paucity of information is not surprising because multiple courts have rejected the so-called "common use" test, which purports to evaluate

whether restrictions on a firearm implicate the Second Amendment based on the weapon’s “present-day popularity” and how widely it is circulated in the commercial market. *See Kolbe v. Hogan*, 849 F.3d 114, 141-42 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D. Mass. 2018).

These pleading deficiencies aside, the Complaint fails at the first step of the Second Amendment analysis as a matter of law. *See* PI Opp. at 8-11. As discussed in the PI Opposition, the assault weapons and LCMs regulated by the Ordinance are “‘like’ ‘M-16 rifles,’ i.e., ‘weapons that are most useful in military service,’ and thus outside the ambit of the Second Amendment.” *See Kolbe*, 849 F.3d at 136-37 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)) (internal quotation marks omitted); *see Worman*, 293 F. Supp. 3d at 264-67. The City Council, indeed, expressly recognized the “military” nature of these weapons and magazines in adopting the Ordinance. *See* Ord., Findings D, E & N. Moreover, the Ordinance’s assault weapon and LCM restrictions do not burden the Second Amendment right because they are “akin to restrictions that were historically imposed and customarily accepted.” *Colo. Outfitters I*, 24 F. Supp. 3d at 1067-74; *see* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 *Law & Contemp. Probs.* 55, 68-71, 81 (2017).

Plaintiffs’ claims also fail at the second step of the test, as the Complaint does not contain any allegations that the assault weapons and LCM regulations are not (a) substantially related to (b) an important government interest. *See Reese*, 627 F.3d at 800. Nor would such allegations be plausible, as a matter of law. *See* PI Opp. at 11-13. Public safety and, in particular, the reduction and prevention of deadly mass shootings—which the City Council expressly provided are the reasons for passage of the Ordinance (*see* Ord., Findings; *id.* § 8)—are “undoubtedly . . .

important” government objectives. *Colo. Outfitters I*, 24 F. Supp. 3d at 1072; *see, e.g., Kolbe*, 849 F.3d at 139; *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016). As other courts have found, the Ordinance’s restrictions are substantially related to those objectives in that assault weapons “pose unusual risks” to public safety, as do LCMs. *See, e.g., N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 262; *accord Kolbe*, 849 F.3d at 140.

Furthermore, the City Council only reached the conclusions it did about the dangers of assault weapons and LCMs and the efficacy of the sort of measures it was taking in the Ordinance to combat them after many meetings and months of analyzing relevant data. *See, e.g., Ord., Findings G-N; accord Christopher S. Koper et al., Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: an Updated Examination of Local and National Sources*, 95 J. Urb. Health 313 (Oct. 2017), <https://bit.ly/2MRVqkd> (finding that assault weapons and LCM-compatible firearms “appear to account for 22 to 36% of crime guns in most places, with some estimates upwards of 40% for cases involving serious violence”). This is the role reserved for elected officials: to examine competing concerns, weigh them against each other, and create social policy in the form of legislation. *See Colo. Outfitters I*, 24 F. Supp. 3d at 1055.

As Defendants noted in their PI Opposition (at 7 & n.3), every federal court of appeals to consider Second Amendment challenges to similar state laws or city ordinances regarding restrictions on assault weapons and LCMs has rejected them. *See Kolbe*, 849 F.3d at 130-41 (Maryland assault weapons and LCMs); *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 247, 252-64 (New York and Connecticut assault weapons and LCMs); *Friedman v. City of Highland Park*, 784 F.3d 406, 411-12 (7th Cir. 2015) (Highland Park, Illinois assault weapons and LCMs), *cert.*

*denied*, 136 S. Ct. 447 (2015); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1001 (9th Cir. 2015) (Sunnyvale, California LCMs); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011) (D.C. assault weapons and LCMs). This Court has done so as well. *See Colo. Outfitters I*, 24 F. Supp.3d at 1067-74 (Colorado’s 15-round magazine prohibition). The same result should follow in this case.

Plaintiffs’ Second Amendment claims challenging the Ordinance’s assault weapons and LCM restrictions (Counts I, VIII, XV, XX) should be dismissed.

**(ii) *Faye’s challenge to the age restriction (Count XX).***

Even assuming he had standing, Plaintiff Faye’s separate Second Amendment challenge to the Ordinance’s age restriction fails at both steps of the analysis.

First, the Complaint does not allege that individuals aged eighteen to twenty have a recognized right to possess firearms under the Second Amendment. They do not. *See* PI Opp. at 14-16. Prohibitions on firearm possession by minors are among the “longstanding prohibitions” that are outside the scope of the Second Amendment. *Heller*, 554 U.S. at 627; *see Powell v. Tompkins*, 926 F. Supp. 2d 367, 388 (D. Mass. 2013), *aff’d on other grounds*, 783 F.3d 332 (1st Cir. 2015); *In re Jordan G.*, 33 N.E.3d 162, 168 (Ill. 2015); *People v. Aguilar*, 2 N.E.3d 321, 329 (Ill. 2013); *see also Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 203-04 (5th Cir. 2012).

Faye’s Second Amendment claim is also deficient because the Complaint does not allege facts supporting a plausible conclusion that the restriction is (i) not directed to an important government objective, and (ii) not substantially related to that objective. Multiple Circuits have found that any such allegations would not be plausible, regardless, because there is extensive

evidence that individuals under the age of twenty-one are far more likely than the population at large to engage in gun violence. *See Horsley v. Trame*, 808 F.3d 1126, 1133 (7th Cir. 2015); *Nat'l Rifle Ass'n v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013); *Nat'l Rifle Ass'n*, 700 F.3d at 209-10; *see also Powell*, 926 F. Supp. 2d at 392-93. The Ordinance's age restriction satisfies intermediate scrutiny, as a matter of law. *See PI Opp.* at 16-17.

Every court to consider a Second Amendment challenge to age restrictions on the purchase or possession of firearms has upheld them. *See id.* at 14-15 & cases cited. The Complaint does not contain any allegations that would warrant a different result. Faye's Second Amendment challenge (Count XX) should be dismissed.

**2. The Due Process Claims by All Plaintiffs (Counts II, IX, XVI, XXI) Fail.**

**a. Elements.**

A legislative enactment “that fails to serve any legitimate government objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005); *see Bolden v. City of Topeka*, 327 F. App'x 58, 61 (10th Cir. 2009). Such an enactment may be unconstitutional on substantive due process grounds if its “provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926); *see Rupp v. Becerra*, No. 17-cv-00746-JLS-JDE, 2018 WL 2138452, at \*5 (C.D. Cal. May 9, 2018). But “[w]here a particular Amendment,” such as the Second Amendment, “provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.” *Doe v. Heil*, 533 F. App'x 831, 838 n.7

(10th Cir. 2013) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998)) (internal quotation marks omitted); *see also Clark v. City of Shawnee*, 228 F. Supp. 3d 1210, 1223 (D. Kan. 2017), *appeal dismissed*, 706 F. App'x 478 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1267 (2018).

**b. Burden of proof.**

Under rational basis review, the plaintiff has the “burden to negative every conceivable basis which might support” the government action. *See Heublein v. Wefald*, 784 F. Supp. 2d 1186, 1196 n.25 (D. Kan. 2011) (quoting *Wasatch Pedicab Co. L.L.C. v. Salt Lake City Corp.*, 343 F. App'x 351, 354 (10th Cir. 2009)). To the extent that Plaintiffs’ substantive due process claim is duplicative of their Second Amendment challenges, the applicable burden is the one governing Second Amendment claims, set forth above. *See supra* Section III.B.1(b).

**c. Elements not supported by Complaint.**

The Complaint does not adequately plead the elements of (i) the lack of a rational basis, or (ii) in the alternative, the elements of a Second Amendment claim.

The Complaint’s primary assertion is that the Ordinance fails under the rational basis test because it has no “legitimate government objective.” *See, e.g.*, Compl. ¶ 191. This is a bare legal conclusion entitled to no weight; it does not “negative every conceivable basis which might support” the Ordinance, as is required to establish a due process violation. *See Heublein*, 784 F. Supp. 2d at 1196. To the contrary, as discussed *supra* Section III.B.1, as well as in Sections III.B.1-2 of the PI Opposition, the Ordinance satisfies not only rational basis review, but indeed intermediate scrutiny, in that its regulations are substantially related to the important objective of reducing mass shootings and gun violence. The Complaint does not sufficiently allege a lack of

a rational basis, and such an allegation would not be plausible as a matter of law. Nor, despite Plaintiffs' conclusory assertions, *see, e.g.*, Compl. ¶ 193, does the Complaint allege any "retroactive[]" liability. *See* PI Opp. at 17-18; *Rupp*, 2018 WL 2138452, at \*7 (dismissing similar substantive due process challenge to California law prohibiting assault weapons under rational-basis review).

The Complaint alleges, in the alternative, that the Ordinance violates substantive due process by infringing Plaintiffs' "fundamental right to keep and bear arms." *See, e.g.*, Compl. ¶ 192. Such a claim "is no more than an indirect and duplicative Second Amendment challenge," *Clark*, 228 F. Supp. 3d at 1223, which must be evaluated under the law of the Second Amendment, *Heil*, 533 F. App'x at 838 n.7. For the same reasons that Plaintiffs' Second Amendment claims fail, *see supra* Section III.B.1, their alternative substantive due process theory fails to state a claim, as well. *See Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 763 (N.D. Ill. 2015); *Montalbano v. Port Authority of N.Y. & N.J.*, 843 F. Supp. 2d 473, 483 (S.D.N.Y. 2012).

Accordingly, Plaintiff's due process claims in Counts II, IX, XVI, XXI should be dismissed.

**3. The Privileges or Immunities Clause Claims by Plaintiffs Caldara, Boulder Rifle Club, and Faye (Counts V, XII, XXII) Fail as a Matter of Law.**

**a. Elements and burden of proof.**

To sustain a claim for a violation of the Privileges or Immunities Clause of the Fourteenth Amendment, a plaintiff must show that the claimed right "amounts to a privilege or immunity of federal citizenship." *Galahad v. Weinshienk*, 555 F. Supp. 1201, 1206 (D. Colo. 1983).

**b. Elements not supported by Complaint.**

Plaintiffs’ claims that the Ordinance violates their “right to keep and bear arms” under the Privileges or Immunities Clause of the Fourteenth Amendment fail because there is no such right. *See, e.g.*, Compl. ¶ 209. The Supreme Court declined the invitation to recognize one in *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010). Rather, as a result of the *Slaughter-House Cases*, the clause protects “very few rights,” namely “the right to petition Congress, the right to vote in federal elections, the right to interstate travel or commerce, the right to enter federal lands, or the rights of a citizen while in the custody of federal officers.” *Peterson v. Farrow*, No. 215CV00801-JAM-EFB, 2016 WL 3477238, at \*5 (E.D. Cal. June 27, 2016) (quoting 2 John E. Nowak, et al., *Treatise on Const. L.* § 14.3(b) (2d ed. 1987)). The right to keep and bear arms is not among them, and cannot support a claim for relief. *See id.*

Plaintiffs’ claims under the Privileges or Immunities Clause (Counts V, XII, XXII) should be dismissed as a matter of law.

**4. The Colorado Constitution Claims by All Plaintiffs (Counts VI, VII, XIII, XIV, XVIII, XIX, XXV, XXVI) Fail as a Matter of Law.**

**a. Burden of proof.**

An ordinance is presumed to be constitutional, and the party attacking it must establish its unconstitutionality beyond a reasonable doubt. *Trinen v. City & County of Denver*, 53 P.3d 754, 757 (Colo. App. 2002).

**b. Elements.**

To state a claim for a violation of the “[t]he right to bear arms in defense of [one’s] home, person and property” conveyed by Article II, Section 13 of the Colorado Constitution, the plaintiff must show that the state action is not “reasonably related to a legitimate governmental



interest such as the public health, safety, or welfare.” *Robertson v. City of Denver*, 874 P.2d 325, 331 (Colo. 1994); *Rocky Mtn. Gun Owners v. Hickenlooper*, 371 P.3d 768, 772-74 (Colo. App. 2016); *see also Rocky Mtn. Gun Owners v. Hickenlooper*, No. 2013CV33879, 2017 WL 4169712, at \*9 (Colo. Dist. Ct. July 28, 2017). To the extent the more general rights of individuals to “defend[] their lives” and “protect[] property” under Article II, Section 3 of the Colorado Constitution implicates a “right to bear arms,” the same standard should apply.

**c. Elements not supported by Complaint.**

The Complaint fails to adequately plead that the Ordinance’s provisions on assault weapons, LCMs, and age of possession are not “reasonably related to a legitimate governmental interest such as the public health, safety, or welfare.” *See Robertson*, 874 P.2d at 331. Indeed, the Complaint does not contain any plausible allegations that the objectives of the Ordinance are not legitimate, or that the Ordinance’s provisions do not reasonably relate to those objectives. As already explained in connection with Plaintiffs’ Second Amendment claims, the Ordinance more than satisfies both of these requirements. *See supra* Section III.B.1; PI Opp. Sections III.B.1-2.

Plaintiffs fail to state a claim for any violation of the Colorado Constitution, requiring dismissal of Counts VI, VII, XIII, XIV, XVIII, XIX, XXV, and XXVI.

**5. The Equal Protection Claim by Plaintiff Faye (Count XXVI) Fails as a Matter of Law.**

**a. Elements.**

“[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.’” *Nat’l Rifle Ass’n of Am.*, 700 F.3d at 211.

**b. Burden of proof.**

The plaintiff alleging that a law violates the Equal Protection Clause bears “the burden to negative every conceivable basis which might support it.” *Wasatch Pedicab*, 343 F. App’x at 354.

**c. Elements not supported by Complaint.**

Faye fails to plausibly allege facts that the Ordinance is not rationally related to a legitimate government interest. Indeed, the Complaint does not contain a single plausible allegation that the Ordinance has no conceivable rational basis, or is aimed at an illegitimate interest. *See, e.g.*, Compl. ¶¶ 380-93. The Complaint suggests that the age restriction is impermissible because individuals aged eighteen are allowed to vote. *See id.* ¶ 392. But voting and possessing a firearm are highly distinguishable actions, and implicate different considerations. As explained, the Ordinance’s age restriction is not only rational, but supported by the fact that individuals under the age of twenty-one are far more likely than the population at large to engage in gun violence. *See supra* Section III.B.1(c); PI Opp. Section III.B.2; *see also, e.g., Horsley*, 808 F.3d at 1133; *McCraw*, 719 F.3d at 348; *National Rifle Ass’n*, 700 F.3d at 209-10.

As with his due process claim, Faye suggests that his equal protection claim implicates a fundamental right, *i.e.*, “his constitutional right to keep and bear arms.” *See* Compl. ¶¶ 388, 392. But where an “equal protection challenge is no more than a Second Amendment claim dressed in equal protection clothing, it is subsumed by, and coextensive with the former, and therefore not cognizable under the Equal Protection Clause.” *Teixeira v. County of Alameda*, 822 F.3d 1047, 1052 (9th Cir. 2016) (quotations marks, brackets, and internal citation omitted), *vacated by* 854

F.3d 1046 (9th Cir. 2016), *and reh'g en banc*, 873 F.3d 670 (9th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 1988 (2018);<sup>2</sup> *see, e.g., Kwong v. Bloomberg*, 723 F.3d 160, 170 n.18 (2d Cir. 2013); *Flanagan v. Harris*, No. LA-CV-16-06164-JAK-ASX, 2017 WL 729788, at \*5 (C.D. Cal. Feb. 23, 2017).

Count XXIV for violation of the Equal Protection Clause should be dismissed.

**6. The Takings Clause Claims by All Plaintiffs (Counts III, X, XVI, XXII) Fail.**

**a. Burden of proof.**

A party challenging governmental action as an unconstitutional taking “bears a substantial burden.” *Pittsburg Cty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 718 (10th Cir. 2004) (quoting *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998)) (internal quotation marks omitted).

**b. Elements.**

To establish a violation of the Fifth Amendment’s Takings Clause, a plaintiff must show that there was a (i) “physical” or “regulatory” taking of his or her property (ii) without just compensation. *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 2018 WL 746398, at \*4 (E.D. Cal. 2018).

Defendants refer to and incorporate by reference the arguments in Section III.B.6 of their PI Opposition.

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<sup>2</sup> The en banc Ninth Circuit expressly adopted the three-judge panel’s decision and reasoning on the Equal Protection Clause: “Teixeira did not seek rehearing of the panel’s rejection of his Equal Protection claims. We affirm the district court on that claim for the reasons given in the panel opinion.” *Teixeira*, 873 F.3d at 676 n.7.

**c. Elements not supported by Complaint.**

For at least two reasons, the Complaint fails to adequately plead a physical or regulatory taking. First, the Complaint’s conclusory allegations that the Ordinance requires them to “surrender [their] lawfully acquired property” (*see, e.g.*, Compl. ¶ 198); deprives them of the right “to possess, use, sell, and transfer” property (*see, e.g., id.* at ¶ 200); or deprives them of the right to devise property (*see, e.g., id.* at ¶ 201) are simply not true. The Ordinance, by its plain text, provides Plaintiffs with several options to continue possessing, using, extracting monetary value from, and ultimately bequeathing 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 could 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). Because the Ordinance provides multiple options for continued possession and use of assault weapons and LCMs, Plaintiffs’ takings claims fail as a matter of law. *See Wiese*, 2018 WL 746398, at \*4-5.

Second, the Ordinance does not effect a taking as a matter of law because laws prohibiting possession or use of dangerous products fall within the police power exception to the Takings Clause described in *Mugler v. Kansas*, 123 U.S. 623 (1887) and its progeny. Numerous courts have 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).

The Complaint does not plausibly plead that the Ordinance’s restrictions on assault weapons, LCMs, and possession of firearms by minors are not a legitimate exercise of police power. And as discussed in connection with Plaintiffs’ Second Amendment claim, no such allegation is plausible. *See supra* Section III.B.1; PI Opp. Sections III.B.1-2.

**7. The First Amendment Compelled Speech Claims by Plaintiffs Caldara and Boulder Rifle Club (Counts IV and XI) Fail.**

**a. Elements.**

To state a claim of compelled speech in violation of the First Amendment, the plaintiff must show that the law violates the right to remain silent in one of two ways “(1) by forcing an individual, through his speech, to affirm a ‘religious, political [or] ideological cause[ ]’ that the individual did not believe in; or (2) by forcing ‘an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.’” *United States v. Arnold*, 740 F.3d 1032, 1034 (5th Cir. 2014).

**b. Burden.**

The plaintiff bears the burden of establishing that a government action compels speech to which he objects. *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015).

**c. Elements not supported by Complaint.**

The Complaint fails to plausibly allege that the Ordinance’s certification provision constitutes either form of compelled speech identified in *Arnold*. *See* Ord. § 5. As an initial matter, the plain text of the Ordinance provides Plaintiffs with multiple alternatives to applying for a certificate. For example, Plaintiffs have the options of removing their assault weapons or

LCMs from the City of Boulder, or modifying their assault weapons. *See* Ord. §§ 3, 7. Because the certification process is completely voluntary under the plain text of the Ordinance, Plaintiffs cannot plausibly allege that any alleged “speech” associated with that process is compelled. *See Cressman*, 798 F.3d at 951 (“In order to compel the exercise or suppression of speech, the government measure must punish, or threaten to punish, protected speech by governmental action that is ‘regulatory, proscriptive, or compulsory in nature.’”).

Even if the certification process were mandatory, the Complaint fails to state a claim. First, the Complaint does not allege that the certification process requires Plaintiffs to “affirm a religious, political or ideological cause.” *See Arnold*, 740 F.3d at 1034. The Complaint only alleges that, as part of the certification process, Plaintiffs are required to provide the Boulder Police Department with “personal information” and “information identifying” the assault weapon. *See, e.g.*, Compl. ¶¶ 205-06. Supplying this information does not plausibly constitute “affirming” a “religious, political or ideological cause” in violation of the First Amendment.

Second, the Complaint does not plausibly allege that, by obtaining a certificate, an individual becomes an “instrument for fostering public adherence to an ideological point of view he finds unacceptable.” *See Arnold*, 740 F.3d at 1034. The certification process does not turn Plaintiffs into “walking billboards.” *See* Ord. § 7. The City does not retain or publicize *any record* of such certificates; 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 v. Maynard*, 430 U.S. 705, 413 (1977).

The Complaint’s implication that a First Amendment violation arises because the information to be shared is “constitutionally protected” also fails to state a claim. *See, e.g.*, Compl. ¶ 207. There is no support for the proposition that the mere fact of ownership of a weapon is protected by the Constitution. This is especially true in regard to ownership of weapons that are not protected by the Constitution. *See supra* Section III.B.1; PI Opp. Sections III.B.1-2.

**8. The Ordinance Is Not Preempted by Sections 29-11.7-102 and -103, C.R.S. (Counts XXVII and XXVIII).**

In support of this Section, Defendants refer to and incorporate by reference the arguments in Section III.B.6 of their PI Opposition.

**a. Burden of proof.**

The party asserting preemption bears the burden of proof. *City of Longmont v. Colo. Oil & Gas Assoc.*, 369 P.3d 573, 578 (Colo. 2016).

**b. Elements.**

To state a claim that state law preempts a municipal ordinance, a plaintiff must allege that (i) the issue the ordinance regulates is not one of purely local concern—that is, it is a matter of local or mixed local and statewide concern, and (ii) that the ordinance conflicts with state law on that issue. *Ryals v. City of Englewood*, 364 P.3d 900, 904–05 (Colo. 2016).

**c. Elements not supported by Complaint.**

The Complaint does not adequately allege either prong of the test for preemption. First, the Complaint fails to allege that sections 29-11.7-102 or 29-11.7-103, C.R.S., regulate matters other than those of purely local concern. *See generally* Compl. ¶¶ 413-434. Colorado law is clear that, “in matters of local concern, a home-rule ordinance supersedes a conflicting state

statute.” *City of Longmont*, 369 P.3d at 579. Accordingly, both claims fail at the first step of the preemption analysis. Any alleged conflict is thus irrelevant.

Notwithstanding Plaintiffs’ pleading deficiencies, the Ordinance only regulates matters of local concern, as a matter of law. Whether an issue is of local concern is a legal question. *See id.* at 579-80. The pertinent factors that guide 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.” *Id.* at 580. As explained in Defendants’ PI Opposition, each factor demonstrates that the Ordinance regulates the purely local issue of preventing mass shootings, and gun violence more generally, in a locality that is especially prone to such attacks due to its population density and large student population. *See* PI Opp. Section III.B.9 (citing Ord., Findings); *see also City & County 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).

Additionally, Plaintiffs’ challenge to section 29-11.7-102 fails for the independent reason that there is facially no conflict between the statute and the Ordinance. 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 persons transferring, exchanging, purchasing or leaving firearms for repair or sale on consignment. *Compare* Ord. § 7 *with* C.R.S. § 29-11.7-102; *see Webb v. City of Black Hawk*, 295 P.3d 480, 492 (Colo. 2013). 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, Count XXVII fails to state a claim for this additional reason.

**C. The City Council Members Are Immune from Suit.**

The City Council Members are entitled to absolute legislative immunity and should therefore be dismissed from this lawsuit with prejudice. “Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity.” *Sable v. Myers*, 563 F.3d 1120, 1123 (10th Cir. 2009) (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)) (internal quotation marks omitted). “Voting for an ordinance is quintessentially legislative.” *Sladek v. City of Colorado Springs*, No. 13-cv-02165-PAB-MEH, 2014 WL 86819, at \*5 (D. Colo. Jan. 9, 2014) (quoting *Bogan*, 523 U.S. at 55) (internal quotations and alteration omitted). Legislative immunity directly applies to members of municipal city councils, including mayors. *See Bogan*, 523 U.S. at 51; *Sable*, 563 F.3d at 1124; *Sladek*, 2014 WL 86819 at \*5.

Absolute legislative immunity bars Plaintiffs’ claims against the City Council Members. According to the Complaint’s allegations, the City Council Members’ only involvement in the dispute is that they “voted in favor of passing Ordinance 8245.” *See, e.g.*, Compl. ¶ 40. Because “voting for an ordinance is quintessentially legislative,” *Bogan*, 523 U.S. at 55, the City Council Members are absolutely immune from suit and should be dismissed with prejudice.

**IV. CONCLUSION**

For the foregoing reasons, Plaintiffs’ Complaint should be dismissed with prejudice.

DATED: July 16, 2018.

Respectfully submitted,

/s/ Evan M. Rothstein

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Evan M. Rothstein, CO Bar No. 35990

Patrick B. Hall, CO Bar No. 45317

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*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 16th day of July, the foregoing **DEFENDANTS' MOTION TO DISMISS** was filed via CM-ECF and addressed as follows:

Cody James Wisniewski  
Sean P. Smith  
Mountain States Legal Foundation  
2596 South Lewis Way  
Lakewood, CO 80227  
cody@mountainstateslegal.com  
ssmith@mountainstateslegal.com

/s/ Susan Cole

# Exhibit A

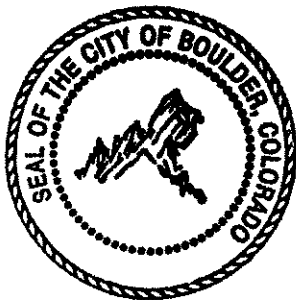
STATE OF COLORADO     )  
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COUNTY OF BOULDER    ) SS:  
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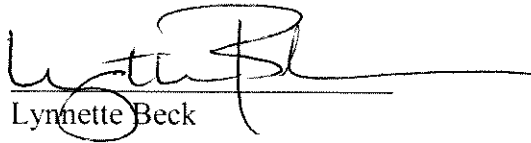
**CERTIFICATION**

I, Lynnette Beck, City Clerk of Boulder, Colorado, do hereby certify that the attached document is a **true and correct copy** of City of Boulder Ordinance No. 8245.

I further certify that the original is on file in the Municipal Building, Office of Central Records, 1777 Broadway, 2nd Floor, Boulder, CO 80302.

Dated this 16th day of July 2018.



  
Lynnette Beck

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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

- 1 f. POF USA P-15 P AR-15 .223/5.56 with a bump stock, vertical fore grip and
- 2 100 round magazine.
- 3 g. Colt Competition AR-15 .223/5.56 with a bump stock, vertical fore grip and
- 4 100 round magazine.
- 5 h. Smith & Wesson 342 AirLite .38 caliber revolver with 4 cartridges and 1
- 6 expended cartridge case.
- 7 i. LWRC M61C AR-15 .223/5.56 with a bump stock, vertical fore grip and 100
- 8 round magazine.
- 9 j. FNH FM15 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.
- 10 k. Daniel Defense DD5V1 AR-10 .308/7.62 with a bipod, scope and 25 round
- 11 magazine.
- 12 l. FNH FN15 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100
- 13 round magazine.
- 14 m. POF USA P15 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100
- 15 round magazine.
- 16 n. Colt M4 Carbine AR-15 .223/5.56 with a bump stock, vertical fore grip and 100
- 17 round magazine.
- 18 o. Daniel Defense M4A1 AR-15 .223/5.56 with a bump stock, vertical fore grip
- 19 and 100 round magazine.
- 20 p. LMT Def. 2000 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100
- 21 round magazine.
- 22 q. Daniel Defense DDM4V11 AR-15 .223/5.56 with a bump stock, vertical fore
- 23 grip. No magazine. EOTech optic.
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- r. Sig Sauer SIG716 AR-10 .308/7.62 with a bipod, red dot optic and 25 round magazine.
- s. Daniel Defense DD5V1 AR-10 .308/7.62 with a bipod and scope. No magazine.
- t. FNH FN15 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
- u. Ruger American .308 caliber bolt action rifle with scope.
- v. LMT LM308MWS AR-10 .308/7.62 with a bipod and red dot scope. No magazine.
- w. Ruger SR0762 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.
- x. LMT LM308MWS AR-10 with a bipod, scope and 25 round magazine.

- 4. Orlando, Florida, June 12, 2016: a shooter killed 49 and wounded 58 at the Pulse Nightclub with an AR-15-style assault rifle and a Glock 17 9mm handgun.
- 5. San Bernardino, California, December 2, 2015: two shooters killed 14 and wounded 22 using a DPMS AR-15-style assault rifle and a Smith and Wesson M&P 15.
- 6. Newtown, Connecticut, December 14, 2012: a shooter killed 26 and wounded 2 at Sandy Hook Elementary School with an AR-15-style assault rifle. The killer murdered his mother with a .22 caliber rimfire rifle. He also had a Glock 10mm and a Sig Sauer 9mm.
- 7. Aurora, Colorado, July 20, 2012: a shooter killed 12 and wounded 58 armed with a Smith & Wesson M&P15 assault rifle and 100-round ammunition magazines and a Remington 870 pump shotgun. He also had a Glock 22 .40 caliber pistol.

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.  
24  
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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~~ semiautomatic 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

26 (3e) Any protruding grip or other device to allow the weapon to be stabilized with  
27 the non-trigger hand. ~~All semiautomatic pistols that are modifications of rifles~~  
28 ~~having the same make, caliber, and action design but a short barrel or~~  
29 ~~modifications of automatic weapons originally designed to accept magazines~~  
30 ~~with a capacity of twenty-one or more rounds.~~

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

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

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

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

6 (1) A pistol grip or thumbhole stock;

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

9 (3) A folding or telescoping stock;

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

11 (5) The capacity to accept a detachable magazine.

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

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

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

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

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

25 (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.

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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,

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

3 Section 4. Section 5-8-21, "Open Carriage of Firearms in Carrying Cases Required,"

4 B.R.C. 1981, is amended to read as follows:

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

6 Any person carrying a firearm off of the person's property or outside of the person's  
7 business or vehicle shall carry the firearm in a carrying case. The carrying case must be  
8 recognizable as a gun carrying case by a reasonable person. A plain-shaped case must be clearly  
9 marked to be deemed recognizable under this standard. A holster satisfies the requirement of a  
10 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.

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

12 **5-8-22. – Defenses.**

- 13 (a) It is an affirmative defense to a charge of violating sections 5-8-3, "Discharge of  
14 Firearms," 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space,"  
15 5-8-5, "Negligently Shooting Bow or Slingshot," 5-8-6, "Aiming Weapon at Another,"  
16 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:
  - 17 (1) Reasonably engaged in lawful self-defense under the statutes of the State of  
Colorado; or
  - 18 (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  
19 when legally thereto summoned.
- 20 (b) It is a specific defense to a charge of violating sections 5-8-3, "Discharge of Firearms,"  
21 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space," and 5-8-  
22 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  
23 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  
24 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.
- 25 (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:

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- (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 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

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

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

5 **5-8-28. – Assault Weapons.**

6        (a) Any person who, prior to June 15, 2018, was legally in possession of an assault weapon  
7 large capacity magazine shall have until December 31, 2018 to do any of the following  
8 without being subject to prosecution:

- 8            (1) Remove the assault weapon or large capacity magazine from the City of  
9 Boulder;
- 10           (2) Render the assault weapon permanently inoperable;
- 11           (3) Surrender the assault weapon or large capacity magazine to the Boulder Police  
12 Department for destruction; or
- 13           (4) If eligible, obtain a certificate for the assault weapon as provided in subsection  
14 (c).

15        (b) Any person who, prior to June 15, 2018, was legally in possession of multi-burst trigger  
16 activator shall have until July 15, 2018 to do any of the following without being subject  
17 to prosecution:

- 18           (1) Remove the multi-burst trigger activator from the City of Boulder; or
- 19           (2) Surrender the multi-burst trigger activator to the Boulder Police Department for  
20 destruction.

21        (c) Any person seeking to certify an assault weapon that he or she legally possessed prior  
22 to June 15, 2018 must comply with the following requirements:

- 23           (1) Submit to a background check conducted by the appropriate law enforcement  
24 agency to confirm that he or she is not prohibited to possess a firearm pursuant  
25 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.

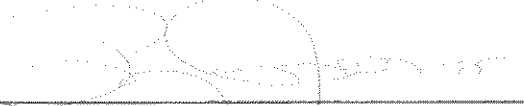
(i) The city manager shall issue to qualified applicants two original copies of each certificate issued. The City of Boulder shall not maintain any records of certificates issued. The person receiving the certificate shall keep one copy with the weapon certified and the second copy in a secure place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

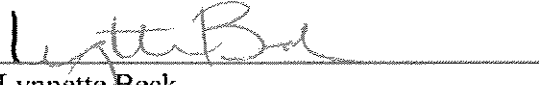
Section 8. This ordinance is necessary to protect the public health, safety, and welfare of the residents of the city, and covers matters of local concern.

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.

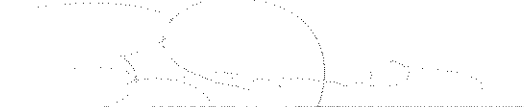
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INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY  
TITLE ONLY this 5<sup>th</sup> day of April, 2018.

  
\_\_\_\_\_  
Suzanne Jones  
Mayor

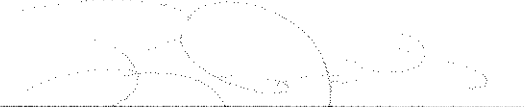
Attest:  
  
\_\_\_\_\_  
Lynnette Beck  
City Clerk

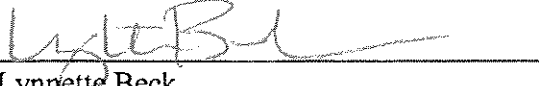
READ ON SECOND READING AND AMENDED this 1<sup>st</sup> day of May, 2018.

  
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Suzanne Jones  
Mayor

Attest:  
  
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Lynnette Beck  
City Clerk

READ ON THIRD READING, PASSED AND ADOPTED this 15<sup>th</sup> day of May, 2018.

  
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Suzanne Jones  
Mayor

Attest:  
  
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Lynnette Beck  
City Clerk