District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3792	DATE FILED: March 12, 2021 5:41 PM CASE NUMBER: 2018CV30581
ROBERT LYNN CHAMBERS AND JAMES MICHAEL JONES, PLAINTIFFS v. **THE CITY OF BOULDER,** DEFENDANT	**▲ COURT USE ONLY ▲**
Attorney for Plaintiffs: Richard Westfall, Esq.; John Sweeney, Esq.; James Porter, III, Esq.; and Connor Blair, Esq. *Attorneys for Defendant*: Timothy Macdonald, Esq; Evan Rothstein, Esq.; Patrick Hall, Esq.; and Molli DiBrell, Esq.	Case Number: 18CV30581 Division 2 Courtroom P
ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	

This Matter comes before the Court on both the *Plaintiffs' Motion for Summary Judgment* ("Plaintiffs' Motion"), Nov. 13, 2020; *The City of Boulder's Motion for Summary Judgment* ("Defendant's Motion"), Nov. 13, 2020; *The City of Boulder's Opposition in Response to Plaintiff's Motion for Summary Judgment* ("Defendant's Response"), Dec. 4, 2020; Plaintiff's *Opposition to Defendant's Motion for Summary Judgment* ("Plaintiff's Response"), Dec. 4, 2020; *Plaintiff's Reply in Support of Motion for Summary Judgment* ("Plaintiff's Reply"), Dec. 18, 2020; *The City of Boulder's Reply in Support of Motion for Summary Judgment* ("Defendant's Reply"), Dec. 18, 2020; Plaintiff's *Sur-Reply in Opposition to Defendant's Motion for Summary Judgment* ("Plaintiff's Surreply"), Dec. 24, 2020.

The Court, having carefully considered the Motions, file, and applicable law and for the reasons cited herein:

(1) DENIES Defendant's Motion in part, finding that Plaintiffs have standing to challenge the Ordinance's assault weapon sale and transfer ban and the LCMs ban;

(2) GRANTS Defendant's Motion in part, finding that Plaintiffs' challenge to the Certification Procedure is moot and that they lack standing to challenge the Certification Procedure;

(3) GRANTS Plaintiffs' Motion in part, finding that the Ordinance's Assault Weapons Possession, Sale, and Transfer Ban is expressly, impliedly, and operationally preempted by state law and the Ordinance's LCMs Ban is operationally preempted; and therefore

(4) DENIES Defendant's Motion in part on issue (3).

In sum, the Court finds that State of Colorado law preempts Boulder City Ordinance 8245 and Ordinance 8259 as they relate to the prohibition of the sale, possession, and transfer of assault weapons and LCMs, specifically the inclusion of "assault weapons" and "LCMs" in the definition of "illegal weapons" pursuant to Boulder Rev. Code § 5-8-2. These provisions are invalid, and enforcement of them is enjoined. The Court has determined that only Colorado state (or federal) law can prohibit the possession, sale, and transfer of assault weapons and large capacity magazines. As detailed below, the State of Colorado has passed laws that are effectively a scheme preempting local governments from enacting municipal firearms and magazine possession ordinances.

I. BACKGROUND

On May 15, 2018 and June 19, 2018, the Boulder City Council unanimously passed Ordinance 8245 and Ordinance 8259 (collectively, "the Ordinance"), which amends relevant parts of the Boulder Revised Code to impose several new firearm-related restrictions throughout the City of Boulder.

The Ordinance defines "assault weapons" and includes them in a list of illegal weapons. See Boulder Revised Code § 5-8-10(a); Boulder, Colo., Ordinance 8245 (May 15, 2018) (amending Boulder Rev. Code §5-8-10 and § 5-8-2). The Ordinance also defines large capacity magazines ("LCMs") as "any ammunition feeding device with the capacity to accept more than ten rounds" and makes LCMs illegal weapons. Boulder, Colo. Ordinance 8245 (amending Boulder Rev. Code § 5-8-2). Under Boulder Revised Code § 5-8-1(a), no person shall possess, sell, or transfer an illegal weapon. Thus, the Ordinance had the effect of prohibiting the possession, sale and transfer of assault weapons and LCMs.

The Ordinance additionally outlined a Certification Procedure, through which Boulder city residents who legally possessed assault weapons or LCMs on or before June 15, 2018 could certify the weapons by complying with an application process before December 31, 2018. *Id.* (amending Boulder Rev. Code § 5-8-28); Boulder, Colo. Ordinance 8259 (June 19, 2018) (amending Boulder Rev. Code § 5-8-28). Certificate holders may lawfully possess LCMs and assault weapons under the Ordinance. The Ordinance also strictly prohibited maintaining any records of certificates issued under Boulder Rev. Code § 5-8-28(j).

Plaintiffs, two individual Boulder residents, filed their Complaint for declaratory and injunctive relief from the Ordinances under Colo. R. Civ. P. 57(b) on June 14, 2018. Pls.' Second Amended Compl., Sept 30, 2020. Plaintiffs seek an entry of judgment that Ordinance 8245 is preempted by state law on two counts: Count 1 – that the portions of the Ordinance banning the sale purchase, and possession of assault weapons, and enacting the certification process are preempted by state law; Count 2 – that the portion of the Ordinance that ban LCMs are preempted by state law. Pls.' Second Am. Compl. ¶¶ 26-33, 34-39. The three provisions of the Ordinance at issue in Plaintiffs' Complaint are identified as: 1) Assault Weapon Possession, Sale, and Transfer Ban; 2) LCMs Ban; and 3) the Certification Procedure.

On November 13, 2020, Plaintiffs filed Plaintiffs' Motion requesting the Court grant its motion for summary judgment and enter a declaratory judgment that the Ordinance is expressly, impliedly, and operationally preempted by state law. Plaintiffs argue that the Colorado legislature enacted comprehensive firearms legislation in C.R.S. § 29-11.7-101 to 103, which lays out a scheme preempting local governments from enacting municipal firearms ordinances. Section 29-11.7-101, the legislative declaration for Article 11.7, recites the legislature's findings that there is statewide inconsistency in firearms regulations among Colorado's jurisdictions, which leads to extraterritorial impacts on state citizens by subjecting them to criminal and civil penalties for conduct that is lawful in other jurisdictions, and as such, that the regulation of firearms is a matter of statewide concern. Section 29-11.7-102 prohibits local governments from maintaining a list or other record of persons who purchase or exchange firearms or leave for repair or sale; persons who transfer firearms except federally licensed dealers; and descriptions of firearms transferred, purchased, or left for repair or sale. And section 29-11.7-103 prohibits local governments from enacting regulations that prohibits the sale, purchase, or possession of a firearm that a person may lawfully possession under state or federal law.

Plaintiffs also argue that the state legislature has enacted laws regulating firearms in Article 12 of Title 18, Colorado's Criminal Code, which demonstrates an intent to occupy the entire field of firearms regulation. Section 18-12-102(1) and (2) defines "dangerous weapons" as silencers, machine guns, short shotguns and rifles, and "illegal weapons" as blackjacks, gas guns, and metallic knuckles. Possessing a dangerous weapon is a class 5 felony, and possessing an illegal weapon is a class 1 misdemeanor, with exceptions including possession by permit holders or peace officers acting in the discharge of their duties. Section 18-12-301 defines LCMs as a magazine that accepts or is designed to convert to accept more than 15 rounds of ammunition, and § 18-12-302 makes the possession, sale, and transfer of LCMs a class 2 misdemeanor, with limited exceptions.

On November 13, 2020, Defendant filed Defendant's Motion, moving the Court to grant summary judgment in its favor on four grounds: 1) that Plaintiffs lack standing to challenge Count 1 in part and Count II in whole; 2) that the certification process, which constitutes a part of Plaintiffs' claim in Count 1, is moot; 3) that the Ordinance's assault weapons and LCMs regulations are not preempted by state law because they regulate matters of purely local concern; and 4) the Ordinance assault weapons and LCMs regulations are not preempted because even if they regulate matters of mixed state and local concern, there is no conflict between the Ordinance and state law.

At the status conference on September 2, 2020, the parties notified the court that they agreed this case should be decided on the basis of the instant motions for summary judgment rather than trial. The Court agrees and issues this order.

II. STANDARD OF REVIEW

Under the Uniform Declaratory Judgments Law, an interested person may have determined any question of construction or validity arising under a local ordinance and obtain a declaration if the person's rights, status, or other legal relations are affected by the ordinance. C.R.S. § 13-51-106, C.R.S.; Colo. R. C. P. 57(b). Thus, a declaratory judgment under Rule 57 affords judicial

relief from uncertainty and insecurity with respect to rights and legal relations. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 240 (Colo. 1984).

A plaintiff seeking declaratory relief from a local ordinance must "demonstrate that the challenged ordinance will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future." *Id.* See also *Board of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1053 (Colo.1992). Summary judgment may be an appropriate remedy in declaratory judgment actions involving a declaration of rights under an ordinance, however, the requirements for granting summary judgment are no less stringent in the declaratory judgment context. See *Mt. Evans Mining Co.*, 690 P.2d at 240.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c). Summary judgment "permits prompt disposition of actions which lack a genuine issue of material fact . . . and is designed to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial." *Ginter v. Palmer & Co.*, 585 P.2d 583, 584 (Colo. 1978). Summary judgment is a drastic remedy, and, therefore, it is only properly entered upon a clear showing that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pueblo W. Metro. Dist. v. Se. Colorado Water Conservancy Dist.*, 689 P.2d 594, 600 (Colo. 1984). A fact is material if it "will affect the outcome of the case." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). "In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party." *Id*. at 376. As noted above, the parties agree that the court should resolve this case on summary judgment.

"The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party." *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987); *see also* C.R.C.P. 56(e). "Once a movant makes a convincing showing that genuine issues are lacking, C.R.C.P. 56(e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists." *Ginter*, 585 P.2d at 585. When the "facts are undisputed, or so certain as not to be subject to dispute, the court is in [a] position to determine the issue strictly as a matter of law." *Rogerson v. Rudd*, 345 P.2d 1083 (Colo. 1959). Summary judgment is not proper if under the evidence a reasonable person might reach different conclusions. *Morlan v. Durland Trust Co.*, 252 P.2d 98, 100 (Colo. 1952). "A motion for summary judgment supported by an affidavit, to which no counter-affidavit is filed, establishes the absence of an issue of fact, and the court is entitled to accept the affidavit as true." *Witcher v. Canon City*, 716 P.2d 445, 457 (Colo.1986).

III. PLAINTIFFS HAVE STANDING TO CHALLENGE THE ASSAULT WEAPON SALE AND TRANSFER BAN AND THE LCMs BAN

a. *Argument*

Defendant argues that Plaintiffs lack standing to challenge the provisions of the Ordinance that 1) ban the sale or transfer of LCMs or assault weapons ("sale and transfer ban") and 2) the

ban on possession of LCMs with more than a 10-round capacity ("LCMs ban"), as the facts do not establish an injury in fact under either provision. Defendant argues that Plaintiffs have not demonstrated that they plan to imminently sell, transfer, or acquire assault weapons or LCMs, and therefore, they have failed to satisfy the standing requirement of injury-in-fact necessary to challenge the sale and transfer ban. Defendant specifically argues that because Plaintiffs are not firearms vendors, they cannot have standing to challenge the "sale" provision of the assault weapons and LCMs ban. Defendant also argues Plaintiffs failed to demonstrate standing for the LCMs possession ban because they have not shown that the 15-round LCMs Plaintiffs possess do not fall into an exception outlined by the Ordinance. Defendant requests that the Court dismiss in part Count I, which relates to the ban on the sale and transfer of assault weapons, and in whole Count II, the ban on the sale and transfer of LCMs and the ban on the possession of LCMs. Def.'s Mot. at 31-32.

Plaintiffs respond that they have standing on Count I's challenge the assault weapon sale and transfer ban because the ban restricts their ability to buy assault weapons and LCMs and because they credibly fear prosecution, injuries in fact in a declaratory judgment action. Plaintiffs also argue that they have standing on Count II – the challenge to the LCMs possession ban – because they cannot acquire additional LCMs. Pls.' Resp. at 6.

b. *Applicable Law*

A plaintiff must have standing to bring a case in order for a court to have jurisdiction. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). To establish standing in a declaratory judgment action, a plaintiff must demonstrate an "injury in fact" to a legally protected or cognizable interest. *Id.* (citing *Board of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Assocs.*, 830 P.2d 1045 (Colo.1992)).

The injury element of standing in a case challenging a regulatory scheme "is established when the allegations of the complaint, along with any other evidence submitted on the issue of standing, establishes that the regulatory scheme threatens to cause injury to the plaintiff's present or imminent activities." *Bowen/Edwards*, 830 P.2d at 1053. The alleged injury in fact may be tangible, like economic or physical harm, or intangible, like the deprivation of civil liberties. *Barber v. Ritter*, 196 P.3d 238, 245–46 (Colo. 2008). Alleged injuries in fact that are based on a remote possibility of future injury or an injury that that is overly indirect and incidental to defendant's actions do not convey standing. *Ainscough*, 90 P.3d at 856.

A plaintiff does not need to show they were fined or imprisoned because of a challenged regulation; they need only show that the regulation will likely cause detriment to activities presently occurring or likely to occur in the near future. *Citizens Progressive All.*, 97 P.3d at 310-11 (citing *Mt. Emmons Min. Co.*, 690 P.2d at 240). See also *Community Tele-Communications, Inc. v. Heather Corp.*, 677 P.2d 330, 334 (Colo. 1984) (finding that the claimant must establish that its rights are adversely affected by the challenged ordinance and that claimant need not risk imprisonment or fines to secure a declaratory judgment); *Bowen/Edwards*, 830 P.2d at 1053 (providing that a plaintiff does not have to violate the regulation to secure declaratory judgment); *High Gear and Toke Shop v. Beacom*, 689 P.2d 624, 629 n.4 (Colo. 1984) (quoting *Steffel v. Thompson*, 415 U.S. 425, 459 (1979) (noting that the threat of prosecution is sufficient injury to confer standing when challenging a statute that deters the exercise of a constitutional right)).

The second requirement of standing is that the plaintiff shows that the injury is "to a legally protected interest[.]" *Bowen/Edwards*, 830 P.2d at 1053. Whether the injury is to a legally protected interest "is a question of [if] plaintiff has a claim for relief under the constitution, common law, a statute, or a rule or regulation." *Barber v. Ritter*, 196 P.3d 238, 245–46 (Colo. 2008). A legally protected interest may involve free speech, *Conrad v. City and Cnty. of Denver*, 656 P.2d 662, 668 (Colo. 1982), or an interest in ensuring that governmental units conform to the state constitution. *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 866 (Colo. 1995).

c. *Analysis and Orders*

The Court finds that Plaintiffs have sufficiently established the injury element of standing as it relates to the Ordinances' regulation of sale and transfer bans and its ban on the possession of LCMs. The Ordinance currently restricts the market in Boulder by preventing purveyors of guns and ammunition from selling or transferring assault weapons and LCMs to Plaintiffs, which detrimentally confines Plaintiffs' conduct. The sale and transfer ban effectively prevents Plaintiffs' desired purchases of assault weapons and LCMs. Plaintiffs, who may purchase and possess assault weapons and LCMs under Colorado and federal law, would both purchase and acquire assault weapons and LCMs but are prevented from doing so because venders cannot sell LCMs and assault weapons in Boulder. Joint Stipulated Undisputed Facts 6-7, Nov. 13, 2020.[1] This injury is not remote, speculative, or indirect; Plaintiffs are presently being injured by sale and transfer ban, because if it were not currently restricting the sale and transfer of assault weapons and LCMs, Plaintiffs would purchase assault weapons and LCMs.

The Court finds that Plaintiffs have sufficiently established the injury element of standing to challenge the Ordinance's LCMs possession ban. It is undisputed that both Plaintiffs own magazines with 15-round capacities and would acquire or purchase magazines that the Ordinance labels LCMs but for the threat of prosecution. Joint Stipulated Undisputed Facts ¶¶ 8, 16, 11, 19. Despite the factual dispute raised by Defendant – that Plaintiffs have failed to show the 15-round magazines they own do not fall into an exception – the Court is not precluded from finding that they have standing in a summary judgment action. Both Plaintiffs would presently acquire and possess magazines that fit the Ordinance's definition of LCMs if they were able to and but for the threat of prosecution.[2] See also SUF Ex. 1, 6; SUF Ex. 5, 6. The LCMs possession ban therefore

[1] The Court agrees that Plaintiffs need not risk punishment by violating the sale or transfer ban because their desire and intent to purchase assault weapons and LCMs and the deterrence thereof by threat of prosecution under the sale and transfer ban is sufficient to show injury in fact. However, Plaintiffs would not be risking punishment and are not threatened by the risk of prosecution for the sale or transfer because neither stipulate that they intend to sell or transfer. The Plaintiffs injury is that they are prevented from acquiring in their city of residence the firearms and ammunition they otherwise could lawfully possess.

[2] Under the Joint Stipulated Undisputed Facts, Plaintiff Chambers would "purchase" an LCM and Plaintiff Jones would "acquire" "large-capacity magazines" but for the threat of prosecution. A purchase is the acquisition of property by one's own act. *Purchase*, BLACK'S LAW DICTIONARY (11th ed. 2019). To acquire property is to gain possession of it or obtain it. *Acquire*, BLACK'S LAW DICTIONARY (11th ed. 2019). By the plain language of the Joint Stipulated Undisputed Facts, both Plaintiffs desire and intend to gain possession of prohibited LCMs.

has the effect of preventing Plaintiffs from acquiring more magazines defined as LCMs under the Ordinance, which directly injures their present ability acquire and possess LCMs.

Defendant argues that Plaintiffs have no standing since they have "no concrete plans" to purchase assault weapons or LCMs within the City of Boulder. Def's Reply 6. This is irrelevant. Unlike other City of Boulder ordinances that have largely symbolic effect, e.g. Ordinance No. 5002, Boulder Revised Code § 6-8-3, Prohibition of Nuclear Weapons, "After December 1, 1986, no person shall knowingly produce, store, process or dispose of a nuclear weapon or component of a nuclear weapon within the city", the Ordinance at issue here clearly causes an injury-in-fact to Plaintiffs.

The Court finds, and neither party disputes, that Plaintiffs' alleged injury-in-fact is to a legally cognizable interest, namely, their right to possess firearms in defense of home, person, and property as it relates to the Ordinance. Colo. Const. art. 2, § 13; U.S. Const. amend. 2. The right to bear arms is an individual but not unlimited right and is subject to reasonable regulation. *Mountain Gun Owners v. Polis*, 467 P.3d 314, 322 (Colo. 2020); C.R.S. § 18-12-102; § 18-12-301 et seq.; *District of Columbia v. Heller*, 554 U.S. 570 (2008). Colorado courts have resolved disputes in actions initiated by claimants with interests comparable to Plaintiffs, who similarly moved for declaratory relief from laws that touch upon the right to bear arms *Rocky Mountain Gun Owners*, 467 P.3d at 317; *Robertson v. City and Cnty. of Denver*, 874 P.2d 325 (Colo. 1994). Therefore, the Court finds that the sale and transfer ban and the LCMs ban limit Plaintiffs' rights to defend themselves and their property and to bear arms, cognizable legal interests under the Colorado and U.S. constitutions.

For the foregoing reasons, the Court finds that Plaintiffs have standing to challenge the sale and transfer ban and the LCMs possession ban.

IV. THE CHALLENGE TO THE CERTIFICATION PROCEDURE IS MOOT

a. Background

The Ordinance as it relates to the certification procedure and enacted in Boulder Municipal Code § 5-8-28(c) provides that persons seeking to certify an assault weapon must submit to a background check to confirm they may lawfully possess a firearm and apply for a certificate before December 31, 2018. Section § 5-8-28(d) imposes requirements on certificate holders, including that they must adhere to storage regulations adopted by the controlling law enforcement agency, possess assault weapons only on property owned or controlled by the certificate holder, and report the loss or theft of an assault weapon within 48 hours of discovery. Section § 5-8-28(j) provides that "[t]he City of Boulder shall not maintain any records of certificates issued."

Plaintiffs' Count 1, captioned as "The Boulder Ordinance Requiring Certification of Assault Weapons is Preempted by Colorado Stat Law," challenges the certification requirement as preempted by state law. Plaintiffs claim they are injured by the certification requirement because they must "endure an intrusive and unnecessary certification process to possess" assault weapons, which is encoded in Boulder Municipal Code § 5-8-28(c). Count 1 also claims "[the certification procedure] directly violates Colorado state law prohibiting the maintenance of a list or other form of record or database of persons who purchase or exchange firearms and details about the firearms

themselves" and violates state law prohibiting local governments from regulating the purchase, sale, or possess of firearms. Am. Compl. ¶ 31.

Defendant moves the Court to find moot Plaintiffs' Count 1 as it relates to the certification procedure prescribed in Boulder Municipal Code 5-8-28(c). Def.'s Mot. Summ. J. 33. Defendant argued that because the certification period closed on December 31, 2018, certification cannot be enjoined and an entry of judgment in Plaintiffs' favor would have no practical effect. Id. at 33-34. Thus, ruling that the process is preempted by state law would have no legal effect on Plaintiffs or on anyone else. Id. Defendant additionally explains that the certification procedure is not a "requirement" as labeled by Plaintiffs, but rather an exception to the assault weapons ban; persons possessing assault weapons in Boulder prior to the enactment of the Ordinance could continue to lawfully possess them if they underwent the certification process by December 31, 2018. Additionally, Defendant argues that Plaintiffs abandoned their claim that the certification procedure is preempted because "they challenge the certification requirement as one part of an impermissible impediment to the State's interest in allowing law-abiding, responsible Colorado citizens such as Plaintiffs' to acquire 'assault weapons.'"

Plaintiffs argue that the issue of whether state law preempts the certification process is not moot because certification process injured and continues to injure Plaintiffs, and Plaintiffs seek nominal damages, which satisfies the "case or controversy" requirement. Plaintiffs possessed assault weapons prior to the enactment of the Ordinance and while residing in Boulder, but they wished to avoid the certification process and moved their assault weapons outside of Boulder, which caused them injury. JSFU ¶¶ 5-7, 13-15. Plaintiffs' rely on Colorado Rule of Civil Procedure 57 to establish jurisdiction, and request that the Court enter declaratory judgment that the Ordinance is preempted by state law and that it enjoin Defendant from enforcing the Ordinance. Second Am. Compl. ¶¶ 6, 25. Plaintiffs also specifically request that the Court award them nominal damages. Id. at 8.

b. Applicable Law

A dispute is moot when judgment would have no practical legal effect on the existing controversy. *Van Schaack Holdings, Lt. v. Fulenwide*, 798 P.2d 424, 426 (Colo. 1990). In their mootness determinations, courts must look at the circumstances that have arisen after a complaint has been filed. *Independence Institute v. Coffman*, 209 P.3d 1130, 1141 (Colo. App. 2008). Underlying a court's mootness determination is the equitable concept that "the true value of injunctive relief is in the anticipation and prevention of probable prospective injury." *Zoning Bd. Of Adjustment of Garfield Cnty. v. DeVilbiss*,729 P.2d 353 (Colo. 1986). Thus, a case will generally be mooted when the action plaintiffs seek to prevent is completed or where legislation forecloses the prospect of meaningful relief. See e.g. *Giuliani v. Jefferson Cnty. Bd. Of Cny. Com'rs*, 303 P.3d 131, 135 (Colo. App. 2012) (holding claim for injunctive relief moot when local regulation foreclosed meaningful prospective relief); *Johns v. Powell*, 543 P.2d 1261, 1262 (Colo. 1975) (holding issue moot when new legislation precludes prospective relief).

There exists two exceptions to the mootness doctrine. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 71 (Colo. 2003). First, the court may address an otherwise moot issue if it "is capable of repetition, yet evading review." *Nowak v. Suthers*, 320 P.3d 340, 343-44 (Colo. 2014) (quoting

Humphrey v. Sw. Dev. Co., 734 P.2d 637, 639 (Colo.1987) (holding that although plaintiff's release to parole rendered his challenge to DOC's parole eligibility computation moot, the issues was nonetheless reviewable under the "capable of repetition yet evading review" exception)). Second, the court may address a "moot" claim if the matter involves a question of great public importance. *Simpson*, 69 P.3d at 71. See and *Carney v. Civil Service Com'n*, 30 P.3d 861, 864 (Colo. App. 2001) (finding an exception to mootness of police promotional procedures because the matter involved a question of great public importance and was capable of repetition yet evading review).

Generally, a party has "no legally cognizable interest in the constitutional validity of an obsolete statute." *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000). However, in precedent established in the 10th Circuit for claims under 42 U.S.C. § 1983, when nominal damages are sought in addition to declaratory and injunctive relief, an otherwise moot claim survives. *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1257 (10th Cir. 2004). Claims for nominal damages relate to past conduct, not prospective relief. *Comm for First Amendment v. Campbell*, 962 F.2d 1517, 1526 (10th Cir. 1992).

c. *Analysis and Orders*

The Court could not find and Plaintiffs did not provide binding precedent that an otherwise moot claim for declaratory judgment under Colorado Rule Civil Procedure 57 survives if the claimant additionally seeks nominal damages. Plaintiffs cited compelling federal case law for the proposition, however, the claimants in those 10th Circuit cases filed their claims under 42 U.S.C. § 1983, which specifically creates damages liability.

Unlike § 1983, which was enacted to give parties deprived of their constitutional rights a federal remedy, Rule 57 is meant "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." C.R.C.P. 57(k).[3] While not the primary function of a declaratory judgment proceeding, Rule 57 and the Declaratory Judgment Act permits a court to grant "further necessary and proper relief, after notice and hearing[,]" implying that the relief is supplemental to any declaratory judgment or decree. Moreover, under the rule, courts must require adverse parties "whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted[.]" C.R.C.P. 57(h). In this Court's plain reading of Rule 57, a grant of further relief depends on whether declaratory judgment is appropriate.

The Court, therefore, examines the challenge to the certification process under Colorado's mootness doctrine, and finds that Plaintiffs' challenge to the certification procedure is moot. The certification period has been closed since December 31, 2018. Plaintiffs cannot participate in the certification procedure now, they did not participate in the certification when the period was open,

[3] The recent U.S. Supreme Court nominal damages ruling in *Uzuegbunam v. Preczewski*, No. 19-968, 2021 WL 850106 (U.S., March 8, 2021) is not applicable as it addressed Article III standing rather than mootness.

and they make no argument about the certification deadline itself. Thus, any declaration that the certification procedure was preempted by state law resolves no existing controversy and will have no practical effect as to a determination of Plaintiffs' rights under Boulder Rev. Code § 5-8-28(c).

The Court also finds that Plaintiffs, do not have standing to challenge the Ordinance's "database" of assault weapon certificate holders[4] and regulation of certificate holders. Plaintiffs' activities or rights are not threatened by a certification database or regulation of certificate holders because they were not issued a certificate and opted not to participate in the procedure. Plaintiffs will not appear on any "database" and are not subject to regulation of certificate holders. Regulations relating to certificate holders will not prospectively cause Plaintiffs injuries as the certification period has closed and they cannot apply for certification, such that they cannot be subjected to regulation as certificate holders.

Having found that Plaintiffs' challenge to the certification procedure is moot and that Plaintiffs lack standing to challenge a "database" or regulation of certificate holders, the Court DISMISSES with prejudice Count 1, as it relates to the certification procedure.[5]

V. STATEWIDE, LOCAL, OR, MIXED STATE AND LOCAL CONCERN

a. *Boulder Is a Home-Rule City with the Regulatory Authority to Enact Local Ordinances Regulating Firearms Under its Police Powers that Are Not Preempted by State Law.*

Cities and towns that have populations of over 2,000 have the power to make, amend, and replace city charters. Colo. Const., art. XX, § 6. Home-rule cities are guaranteed independence from state control in governing local and municipal matters under the Colorado Constitution, art. XX, § 6. *Ryals v City of Englewood*, 364 P.3d 900, 905 (Colo. 2016). In matters of local concern, home-rule ordinances supersede conflicting state statute. *Longmont*, 369 P.3d at 579. However, when a home-rule ordinance conflicts with state law in a matter of statewide or mixed state and local concern, the conflicting provision of the home-rule ordinance is preempted by the state law. *Id.*; *Voss v. Lundvall Bros., Inc*, 830 P.2d 1061, 1066 (Colo. 1992).

Article XX grants to home-rule cities police powers; if there is a rational basis related to protecting the health, safety, and welfare or residents, a home-rule city may constitutionally legislate in that area. *City & Cty. of Denver v. Qwest Corp.*, 18 P.3d 748, 755 (Colo. 2001). As with other home-rule powers, "a home rule city's police powers are supreme only in matters of

[4] Pursuant to Boulder Municipal Code § 5-8-28(j), "[t]he 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." The Ordinance therefore specifically prohibits the maintenance of a certificate holder database; however, such an issue may be one of disputed fact which the Court need not resolve here.

[5] The Court interprets Count 1 as also including a challenge to the Ordinance's definition of an assault weapon as an illegal weapon, which in effect is a ban on the possession of assault weapons in Boulder. The claim for declaratory relief from the assault weapon possession ban survives.

purely local concern." *Id.* An otherwise legitimate exercise of a home-rule city's police powers in a matter of mixed statewide and local concern is invalid if it conflicts with state law. *Id.*

The Court finds and the parties do not dispute that Boulder is a home-rule municipality, and it therefore, may enact local ordinances, including ones regulating weapons under its police powers. The Ordinance at issue here is a home-rule rule ordinance. The Court therefore, begins its examination of the validity of the Ordinance with a determination of whether the regulation of the transfer, sale, and possession of assault weapons and LCMs is a matter of local, state, or mixed state and local concern.

b. *The Matter Is of Mixed Statewide and Local Concern*

In answering whether a home-rule ordinance is a matter is of a state, local, or mixed state and local concern, courts must consider the totality of the circumstances, weighing the interests of the state and the city in regulating the particular matter. *Id.* (quoting *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013)). Several factors guide courts in their inquiry:

> (1) the need for statewide uniformity of regulation;
> (2) the extraterritorial impact of the local regulation;
> (3) whether the matter has traditionally been regulated at the state or local level; and
> (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation.

Webb, 295 P.3d at 486. *See also Longmont*, 369 P.3d at 580.

i. <u>The need for statewide uniformity weighs in favor that it is a state concern</u>.

With respect to the first factor, the Supreme Court of Colorado provides that "although uniformity in itself is no virtue, it is necessary when it achieves and maintains specific state goals." *City of Longmont v. Colorado Oil & Gas Ass'n*, 369 P.3d 573, 580 (Colo. 2016) (quoting *City of Northglenn v. Ibarra*, 62 P.3d 151, 160 (Colo. 2003)). In the context of local bans on oil and gas development, the state's interest in the efficient and fair development of oil and gas resources statewide suggested a need for statewide uniformity. See *Voss*, 830 P.2d at 1067; *Longmont*, 369 P.3d at 580. The court considered in its uniformity analysis the rights of oil and gas owners and their need for the fair and consistent oil production; the likelihood of wasteful production due patterns of oil and gas pools that do not correspond with city boundaries; and the adverse impact a local ban would have on the rights of oil and gas owners in light of the irregular patterns of oil and gas pools. *Id.*

Uniform access and expectations of consistency are important in the supreme court's consideration of the need for uniformity. *Ibarra*, 62 P.3d at 160. Where a local ordinance limited the number of juvenile sex offenders who could reside in one foster home, the court found the need for uniformity upon examining legislative goals of making adjudicated delinquent children in foster care feel safe and secure from arbitrary removal in their foster homes and ensuring these

children have uniform access to foster care families and consistent rehabilitation practice. *Ibarra*, 62 P.3d at 160. Similarly, in context of a local ordinance that had the effect of banning sex offenders from living in most of the city, the need for uniformity in regulating sex offender residency was indicated by the creation of the Sex Offender Management Board, which was established to promulgate statewide standards for sex offender management. *Ryals*¸364 P.3d at 906. See also, *Century Elec. Serv. & Repair, Inc. v. Stone*, 564 P.2d 953, 955 (1977) (finding an overriding statewide concern in regulating electricians because electricians needed uniform access to markets throughout the state).

The Court finds that the need for statewide uniformity favors the state's interest in regulating assault weapons and LCMs. Statewide uniformity in regulations prohibiting the possession and transfer of assault weapons and LCMs aligns with the legislature's declared interest in protecting citizen's fundamental right to bear arms and consistent treatment under criminal law. See C.R.S. § 29-11.7-101(b),(c). Uniformity protects a law-abiding public from being subjected to civil and criminal penalties for conduct that is lawful in some jurisdictions and unlawful in others. It recognizes the need for expectations of consistency in treatment of assault weapons and LCMs and protection of the right to bear arms and defend person and property. Uniform statewide law regulating assault weapons and LCMs eliminates the danger of unequal treatment of people in the City of Boulder (whether they are residing or visiting) who want to exercise their right to bear arms by possessing lawful firearms and magazines lawful under state law.

The Court is not persuaded by Defendant's argument that there is no need for uniformity in the treatment under the law because assault weapons and LCMs pose a special danger to a demographically unique Boulder. The state's declared interest in protecting the fundamental right to bear arms and ensuring that citizens' expectations of consistent treatment under the law is not overcome by Boulder's uniqueness; these goals remain in spite of the purported heightened danger of assault weapons and LCMs in Boulder. Defendant's reliance on *City & County of Denver* is misplaced, as it nonbinding and was issued before the supreme court decided *Longmont*, which is controlling law in preemption determinations. No. 03 CV 3809, 2004 WL 5212983 (D. Colo. Nov. 5, 2004).

Similarly, Defendant's argument that the uniformity is not necessary because there is no statewide scheme regulating assault weapons is not persuasive. The General Assembly has enacted comprehensive scheme regulating firearms and ammunition, see C.R.S. § 18-12-101 through -508, which includes the prohibition of magazines capable of accepting more than 15 rounds. That assault weapons are plainly omitted from the list of "dangerous and illegal weapons" and are therefore not prohibited under Colorado law, suggests an intent to make lawful the possession of assault weapons in Colorado in light of the comprehensive nature of the firearm scheme and the prohibition of LCMs accepting more than 15 rounds.

ii. Extraterritorial impact weighs in favor of a statewide concern.

The supreme court defines the second factor, extraterritorial impact, "as a ripple effect that impacts state residents outside the municipality." *City of Northglenn v. Ibarra*, 62 P.3d 151, 161 (Colo. 2003). The extraterritorial impact of the local regulation must have serious consequences to non-residents, and those consequences must be more than incidental or *de minimus* to satisfy the "ripple effect" definition. *Id.* (citing *City and County of Denver v. State,* 788 P.2d 764, 769

(Colo.1990)). In *Webb v. City of Black Hawk*, the supreme court examined a local ordinance prohibiting bicycles on city streets, finding it had an extraterritorial impact because non-resident Coloradans would not expect to be unable to bike through Black Hawk on the only route to Central City; the ordinance effectively closed off the neighboring city from bike travel depriving it of the economic benefit of recreational tourists, and could prevent cyclists and bicycle tours to avoid the entire area harming tourism in the entire area. 295 P.3d 480, 490-91 (Colo. 2013). In *Longmont*, the supreme court found that the extraterritorial impacts of a local ban on hydraulic fracturing included increased costs associated with oil and gas production limited only to portions of the gas pool outside of Longmont and the ripple effect that Longmont's ban might have on other municipalities in encouraging the enactment of similar local bans. 369 P.3d at 581.

The Court finds the second factor weighs in favor of the state's interest in regulating assault weapons and magazines. The Ordinance's assault weapons and LCMs ban have serious consequences for non-residents in the City of Boulder. Non-residents unaware of the Ordinance could be subject to criminal prosecution even while complying with Colorado law; visitors might expect that their assault weapons, which are lawful in other parts of the state, are lawful in Boulder city; tourists may be dissuaded from visiting the area to avoid prosecution for otherwise lawful possession of a firearm, affecting economic benefits of tourism in surrounding municipalities; non-residents wanting or needing to relocate to the Boulder area may be deterred from moving to the area. In addition, the City of Boulder's assault weapons and LCMs ban could create a ripple effect across the state by encouraging other municipalities to enact their own bans, ultimately leading[6] to a statewide de facto ban or to a patchwork of municipal laws regulating assault weapons and LCMs.

iii. Traditional regulation of the matter weighs in favor that it is a mixed state and local concern.

The third factor examines whether the municipality or the state traditionally regulated the matter at issue. *Id.* In examining the traditional regulation of a matter at issue, courts should "focus[] on the importance of the facts and circumstances of the particular case to determine the status of the matter at issue . . . including the time, technology, and economics" *Webb*, 295 P.3d at 491 (citing *City of Commerce City v. State*, 40 P.3d 1273, 1282-83 (Colo. 2002)); *Ibarra*, 62 P.3d at 162).

[6] At least one Council Member and the Mayor Pro Tem intended this outcome:

Council Member Morzel: "I just think even in our municipalization discussion, or our climate change, or just look at open space. Everybody laughed at us when we started buying open space a long time ago. And now people are following suit. So if there's a way to lead in an appropriate way, there may be others who will follow our suit. And that's what I hope." May 1, 2018 City Council recording, at 7:42 1:41:16, available at https://youtu.be/LO9FxAZ7pf8. Plaintiff's SUF at ¶ 78.

Mayor Pro Tem Brockett: "[M]y hope is that more communities will join us and that we'll play a powerful role in that sense. And that we will also see more of these bans at the state level, and one day at the federal level." May 15, 2018 City Council recording, at 8:08pm 2:38:20, available at https://youtu.be/- 3o2huWG1vw. Plaintiff's SUF at ¶ 79.

Both State and local governments have historically regulated firearms under a home-rule city's authority to enact regulations under its police power. *City and Cty. of Denver v. Qwest Corp.*, 18 P.3d 748, 755 (Colo. 2001). Local communities across Colorado have adopted firearm ordinances and have historically regulated in the area of possession, transfer, and use of firearms, including limiting magazine capacity and banning assault weapons. Denver has enacted over a dozen ordinances affecting possession, sale, and carrying of firearms, including ordinances prohibiting assault weapons. See e.g., Denver Revised Municipal Code § 38-131 (regulating storage of firearms); § 39-3 (prohibiting possession and display of firearm by unauthorized personnel in a park, parkway, mountain park, or recreational facility); § 38-130 (making unlawful possession and sale of assault weapons); § 38-117 (making unlawful carrying, using, concealing, displaying a dangerous weapon, which includes pistols, revolvers, rifles, shotguns, and machine guns). Denver Revised Municipal § 38-130(i) prohibits possession of a magazine that holds more than 15 rounds.

Vail has similarly enacted local ordinances regulating the use and possession of firearms. See e.g, § 6-3G-1 (prohibiting discharge of a firearm in Town limits); § 6-3G-7 (prohibiting possession of firearms while intoxicated). Vail Town Charter § 6-3H-5 makes unlawful the carrying, storing, keeping, selling and manufacturing of assault weapons with exceptions; and § 6-3H-9 limits magazine capacity. Pueblo Code of Ordinances, Charter Code of the City of Greeley, the Municipal Code of Fort Collins, and the City Code of Colorado Springs all include regulations related to the use and possession of firearms.

The state enacted a comprehensive scheme regulating firearms and ammunition, including "large capacity magazines." Article 12 of Title 18 of the Colorado Revised Statues relates to criminal offenses involving firearms and weapons. Specifically, §§ 18-12-301 through 303 defines a large-capacity magazine as one capable of accepting more than 15 rounds; prohibits the possession, sale, and transfer of large-capacity magazines; and creates exceptions and penalties for possession of unlawful LCMs. The Colorado General Assembly defined dangerous weapons and illegal weapons, prohibits the possession of dangerous and illegal weapons, and creates penalties for their possession in § 18-12-102. The General Assembly also enacted § 29-11.7-102, which relates to local firearms databases; § 13-14.5-108, which requires court to order the surrender of all firearms when an extreme risk protection order is issued; and § 29-11.7-102, which prohibits firearms databases.

Because both local governments and the state have a history of comprehensive regulations related to firearms, the Court finds that the third factor favors that the regulation of assault weapons and LCMs is a matter of mixed statewide and local concern.

iv. Whether the Colorado Constitution commits that matter to the state or to cities weighs in favor of finding it is a matter of mixed state and local concern.

The fourth factor is whether the Colorado Constitution commits the matter to either the state or local government. *Longmont*, 369 P.3d at 581. Where the constitution does not commit the

matter to state or to local regulation, it suggests that it is one of mixed statewide and local concern. *Id.*

The Constitution does not commit the regulation of assault weapons and LCMs to municipalities or to the state. Article V of the Constitution vests in the General Assembly the legislative power of the state; and the constitution itself "presupposes the existence of the police power, and is to be construed with reference to that fact." *Cottrell Clothing Co. v. Teets*, 342 P.2d 1016, 1019 (Colo. 1959). Article XX, § 6 commits to local home-rule governments the authority to enact city ordinances that protect the health, safety, and welfare of citizens in exercise of a home-rule city's police powers. *Qwest Corp.*, 18 P.3d at 755; *United States Disposal Sys., Inc. v. City of Northglenn*, 567 P.2d 365, 368 (1977).

Neither state nor home-rule city is vested with authority under the constitution to regulate firearms and ammunition, and both may exercise their police power to regulate weapons. Therefore, the Court finds the fourth factors suggests the matter is one of mixed local and statewide concern.

v. Legislative declarations demonstrate an intent to make firearms regulation of matter of statewide concern.

Courts have also looked to whether the General Assembly has declared that a matter is one of statewide or local concern. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 37 (Colo. 2000). Legislative declarations are not conclusive or binding. *Id.* (citing *City & Cty. of Denver v. State*, 788 P.2d 764, 768, nt. 6 (Colo. 1990)). Courts must look beyond the mere declaration of a state interest; they must determine whether the statewide interest is actually present. *Denver*, 788 P.2d at 768, nt. 6. Legislative declarations, however, "will be afforded deference in recognition of the legislature's authority to declare the public policy of the state in matters of statewide concern." *Telluride*, 3 P.3d at 37; *Colorado Min. Ass'n v. Bd. of Cty. Comm'rs of Summit Cty.*, 199 P.3d 718, 731 (Colo. 2009) ("[The supreme court] give[s] significant weight to a legislative declaration that a given matter is of statewide interest . . . and [] construes statutes to give effect to such a legislative purpose.").

The General Assembly declared in § 29-11.7-101(2) that the regulation of firearms is a matter of statewide concern and that it is necessary to provide statewide laws regulating ownership and possession of firearms. The General Assembly, in section 29-11.7-101(1)(a)-(g), considered the legislature's duty to protect the fundamental right to bear arms, that there is widespread inconsistency in firearms regulations among municipalities in the state, and that this inconsistency puts Coloradans in position of not knowing when they are violating local laws, subjecting themselves to criminal penalties.

The Court finds the statewide interest in regulating firearms is present. The state has an actual interest in protecting the fundamental right to bear arms and defend life and property, safeguarding citizens from criminal and civil penalties for otherwise lawful firearms protections, and in preventing a patchwork of firearms regulations are important state interests. Thus, the Court affords the General Assembly's declaration that the regulation of firearms is a matter of state interest the appropriate deference.

vi. The Court concludes that the regulation of assault weapons and LCMs is a matter of mixed state and local concern.

In *Longmont*, the supreme court found that the first and second factors – the need for uniform statewide regulation and the extraterritorial impact of the fracking ban – weighed in favor of the state's interest in regulating fracking, and the third factor – whether the matter is traditionally regulated at the state or local level – partially weighed in favor of Longmont's traditional zoning authority. *Longmont*, 369 P.3d at 581. Despite that the factors balanced in favor of finding that the matter was one of statewide interest, the Court nonetheless found that fracking was one of mixed state and local concern.

The Court is faced with similarly balanced factors here. The first and second factors weight in favor of the state's interest in regulation assault weapons and LCMs. The third factor partially weighs in favor of a local interest. The fourth factor weighs in favor of a mixed state and local concern. Additionally, the Court considers that the legislature declared regulating firearms was a matter of statewide concern. The Court finds that the regulation of assault weapons and LCMs is one of mixed state and local concern, despite that it balances somewhat in favor of finding that it is state interest.

VI. EXPRESS, IMPLIED, OR OPERATIONAL CONFLICT PREEMPTION

Upon a finding that the home-rule city's regulation is a matter of mixed state and local concern, the validity of the local rule turns of whether it conflicts with state law. *See Longmont*, 369 P.3d at 581-82; *Ryals*, 364 P.3d at 905 (citing *Webb*, 295 P.3d at 486). Where there is conflict, the state law preempts and supersedes the local ordinance. *Id.* Colorado law "borrows from [Colorado] cases involving federal preemption analysis," under which there are three forms of preemption: express, implied, and operational conflict preemption. *Colo. Min. Ass'n v. Bd. Of cty. Com'rs of Summity Cty*, 199 P.3d 718, 723 (Colo. 2009); *Bd. Cty Comm'rs v. Bowen/Edwar2ds Assocs., Inc.*, 830 P.2d 1045, 1056-57 (Colo. 1992).

Express preemption occurs "when the legislature clearly and unequivocally states its intent to prohibit a local government from exercising its authority over the subject matter at issue." *Longmont*, 369 P.3d at 582.

Implied preemption can be inferred when a "state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest[.]" *Bowen/Edwards*, 830 P.2d at 1056-57. Determining whether a local ordinance is impliedly preempted by state law is a matter of statutory interpretation. *Colo. Min. Ass'n*, 199 P.3d at 723. Sufficient dominancy of a state interest manifested in a case act can establish implied preemption. *Colo. Min. Ass'n*, 199 P.3d at 724. See also *Banner Advert., Inc. v. People of City of Boulder By & on Behalf of People of State of Colo.*, 868 P.2d 1077, 1080 (Colo. 1994) (explaining that implied preemption under federal preemption analysis where a regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it").

Operational conflict preemption applies where a state law preempts a local law because the operational effect of the local law "would conflict with the application of a state law." *Ryals*, 364 P.3d at 911 (quoting *Bowen/Edwards*, 830 P.2d at 1059). Operational conflict analysis requires the examining court to "assess the interplay between the state and local regulatory schemes[,]" which in virtually all cases "will involve a facial evaluation of the respective statutory and regulatory schemes, not a factual inquiry as to the effect of those schemes 'on the ground.'" *Longmont*, 369 P.3d at 582. Preemption by operational conflict can arise when "the effectuation of a local interest would materially impede or destroy a state interest." *Longmont*, 369 P.3d at 582. It will also necessarily arise where a local ordinance "authorizes what state law forbids or . . . forbids what state law authorizes." *Id.*

a. *The Ordinance's Assault Weapons Possession, Sale, and Transfer Ban Is Expressly Preempted by State Law; the LCMs Ban Is Not.*

First, the Court considers whether the legislature has clearly and unequivocally stated an intent to prohibit local governments from exercising their authority to regulate assault weapons and LCMs. The General Assembly enacted § 29-11.7-103, which provides:

> A local government may not enact an ordinance, regulation, or other law that prohibits the sale, purchase, or possession of a firearm that a person may lawfully sell, purchase, or possess under state or federal law. Any such ordinance, regulation, or other law enacted by a local government prior to March 18, 2003, is void and unenforceable.

Here, the legislature clearly and unequivocally stated its intent to prohibit local governments from exercising their authority to regulate lawful firearms.[7] Pursuant to § 18-12-102, possessing dangerous weapons, which are defined as silencers, machine guns, short shotguns, short rifles, or ballistic knifes, is prohibited; and possessing illegal weapons, which are defined as blackjacks, gas guns, or metallic knuckles, is prohibited. However, persons may lawfully possess, sell, and transfer assault weapons because they are not prohibited or regulated under the Colorado or federal[8] firearm schemes, C.R.S. §§ 18-12-102 through 112; 18 U.S.C. §§ 921 - 931.

The Court does not find persuasive Defendant's argument that the Ordinance's Assault Weapons Possession, Sale, and Transfer does not actually prohibit the sale, purchase, and

[7] The City Attorney even expressed this concern during the City's enactment process: "Senate bill 24 and 25 that were passed that were passed in 2003 where the state attempted to preempt all local governments from regulating anything to do with firearms. And you can see the language gets pretty extensive." April 5, 2018 City Council recording, at 6:08pm 47:32, 6:11pm 50:32, 6:13pm 52:12, available at https://youtu.be/I1RGGhF8kJc. Plaintiff's SUF at ¶ 76.

[8] For the sake of completeness, but of no impact to this opinion, the Court notes that there is no current federal ban on assault weapons or magazine capacity since expiration in 2004 of the Public Safety and Recreational Firearms Use Protection Act or Federal Assault Weapons Ban, Pub. L. No. 103–322, §§ 110101–06(1994), a subsection of the Violent Crime Control and Law Enforcement Act of 1994. 34 U.S.C. §§ 12101 et seq. (formerly 42 U.S.C. §§ 13701 et seq.)

possession of assault weapons but rather regulates assault weapons because there are multiple exceptions to the assault weapon prohibition, and thus, it is not subject to § 29-11.7-103. The Ordinance does in fact contain several exceptions to the assault weapons ban. However, language of the Ordinance, that "no person shall knowingly possess or sell or otherwise transfer an [assault weapon]," is prohibitory and effectively precludes possession and transfer under ordinary circumstances. Exceptions to the ban include if a person has complied with the certification process, is traveling through the City of Boulder with an assault weapon in their car or other means of conveyance, or has federal licenses or approval. The several exceptions however do not change that the Ordinance prohibits assault weapons for most people, and § 29-11.7-103 unequivocally seeks to address local ordinances of this nature – i.e., rules that prohibit normal exercise of firearms possession and transfer.

The Ordinance's assault weapon possession, sale, and transfer ban regulates a firearm that a person may lawfully possess and transfer, which is the specific type of local rule the General Assembly clearly and unambiguously intended to prohibit; accordingly, it is expressly preempted by state law.

Second, the Court considers whether the legislature has clearly and unequivocally expressed the intent to occupy the field of LCMs regulation. Regulating magazines based on round capacity and a design that allows them to be converted to accept more rounds could affect what firearms residents may lawfully possess and transfer; and Plaintiffs argue that magazines should be considered a firearms under § 29-11.7-103. However, implied preemption analysis is a matter of statutory interpretation, and the Court cannot presume that the General Assembly used language idly.

The General Assembly's declaration regarding local regulation of firearms and its clear prohibition of local firearms regulations in §§ 29-11.7-101 and 103 do not expressly include magazines and ammunition. LCMs are separately regulated in Title 18, Part Three of Article 12, entitled Large-Capacity Ammunition Magazines §§ 18-12-301 through 303, and are not included in Part One of Article 12, entitled Firearms and Weapons – General, where firearms and weapons are comprehensively regulated. See § 18-12-101 through 112, C.R.S. The General Assembly has not similarly stated a clear and unequivocal intent to prohibit local governments from regulating LCMs, and firearms and magazines are regulated separately under the law.

The Court finds further support for its distinction in the statewide regulation of permits to carry concealed handguns, Title 18, Article 12, Section two (the "CCA"). In § 18-12-201 the General Assembly, akin to its specific preemptive language regarding firearms, enunciated that:

> (e) It is necessary that the state occupy the field of regulation of the bearing of concealed handguns since the issuance of a concealed handgun permit is based on a person's constitutional right of self-protection and there is a prevailing state interest in ensuring that no citizen is arbitrarily denied a concealed handgun permit and in ensuring that the laws controlling the use of the permit are consistent throughout the state.

In *Students for Concealed Carry On Campus LLC v. Regents of University of Colorado*, the Supreme Court of Colorado confirmed that the General Assembly intended to "'occupy the

field of regulation of the bearing of concealed handguns' and 'to provide statewide uniform standards for issuing permits to carry concealed handguns for self-defense.'" 271 P.3d 496, 498 (Colo. 2010) (*citing* § 18-12-201(1)(e), (2)(b)). The Court ruled that, "the CCA's comprehensive statewide purpose, broad language, and narrow exclusions show that the General Assembly intended to divest the Board of Regents of its authority to regulate concealed handgun possession on campus." *Id*. at 498-99.

The General Assembly did not include the preemptive language in the LCM statute, effective July 1, 2013, long after the effective dates of § 29-11.7-103 (and the CCA) in 2003. Thus, the Court concludes that the General Assembly intended to regulate LCMs and firearms separately. Because there are no expressions of clear and unequivocal intent to divest municipalities of the authority to regulate in this area, the state LCM regulatory scheme does not expressly preempt the Ordinance's LCM ban.

b. *The Ordinance's Assault Weapons Possession, Sale, and Transfer Ban Is Impliedly Preempted by State Law; the LCMs Ban Is Not.*

The State has evinced a legislative intent to occupy the field of firearms regulation. Legislative declarations that a matter is of a statewide interest are afforded significant weight, and statutes are construed to give effect to those declared purposes. *Colo. Min. Ass'n*, 199 P.3d at 731. The General Assembly announced in § 29-11.7-101 the state interest in uniform firearms regulations to prevent a patchwork of local firearms laws and unjust criminal prosecution for possession of otherwise lawful firearms; prohibited local governments from enacting regulations banning lawful firearms pursuant to § 29-11.7-103; and enacted a statutory framework relating to firearm offenses and punishments for those offenses, including offenses relating to the possession of certain unlawful firearms, in §§ 18-12-101 through 112. Even if the prohibition on local governments enacting firearms bans under § 29-11.7-103 does not establish express preemption, the declarations announced in §29-11.7-101 coupled with the comprehensive criminal scheme regulating firearms demonstrate the General Assembly's intent to wholly occupy the field of firearms regulation.

The State's regulation of LCMs is not so pervasive or sufficiently dominant as to infer that the General Assembly left no room for the local governments to supplement. Although magazines are not in and of themselves firearms, they are components necessary for the ballistic function of certain firearms, as magazines store and feed ammunition; therefore, regulating magazines necessarily affects the functional possession of certain firearms, including those defined as "assault weapons" in the Ordinance.

But despite their integral (and essential) nature, magazines are treated separately from firearms under Colorado's firearms framework.[9] LCMs are defined and regulated independently

[9] The Colorado Supreme Court considered magazines in its interpretation analysis of whether LCMs regulation infringed on the constitutional right to bear arms. *Rocky Mountain Gun Owners v. Polis*, 467 P.3d 314 (Colo. 2020). It therefore must have considered LCMs is be included in the broad category of "arms." However, the statutes at issue here do not use the broad language of "arms" associated with constitutional analysis, and the issue is one of statutory interpretation. The

of firearms in §§ 12-18-301 through 303, and they are omitted from the declarations and prohibitions pursuant to § 29-11.7-101 and 103.[10] Additionally, unlike the General Assembly's declaration of intent to occupy to the field of firearms prohibitions, no such declaration evincing intent exists as to LCMs. Declining to "presume that the legislature used language idly and with no intent that meaning should be given to its language," the Court cannot find that the state law regulating LCMs is so pervasive and its interest in LCMs regulation is so dominant over a city's police power as to imply an intent by the General Assembly to entirely occupy the field.

c. *The Ordinance's Assault Weapons Possession, Sale, and Transfer Ban and the LCMs Ban Are Operationally Preempted.*

The Court finds that the Ordinance's Assault Weapons Possession, Sale, and Transfer Ban is operationally preempted because it materially impedes the state's interest in firearms regulation, and it forbids what state law authorizes. The General Assembly declared that firearms regulation is a state interest, supported by the announced interests in safeguarding the right to bear arms and the right to defend lives and liberties, preventing a patchwork of inconsistent local laws involving firearms, and protecting people from criminal and civil penalties for conduct that is lawful under state law.

The Ordinance materially impedes the state's interest in preventing inconsistent local firearms regulations because assault weapons are not prohibited under state law, possession and transfer of them is lawful in other Colorado jurisdiction, and the Ordinance subjects people to inconsistent laws making them civilly and criminally liable for otherwise lawful conduct when in Boulder. Furthermore, assault weapons are not prohibited under Colorado law as the General Assembly omitted assault weapons from its list of prohibited firearms in § 18-12-10; therefore, the Ordinance's Assault Weapons Possession, Sale, and Transfer Ban forbids what the state law impliedly authorizes.

The Court finds that Ordinance's LCMs Ban is similarly operationally preempted because it materially impedes the state's interest in consistent firearms regulation as it directly forbids what state law authorizes and encourages a patchwork of regulations affecting possession of firearms. The Court analyzes operational conflict preemption by "considering whether the effectuation of a local interest would materially impede or destroy a state interest, recognizing that a local ordinance . . . that forbids what state law authorizes will necessarily satisfy this standard," *Longmont*, 369 P.3d at 583.

The General Assembly has authorized the possession of magazines capable of holding 15 rounds or less and prohibits magazines capable of hold more than 15 rounds pursuant to C.R.S. § 18-12-301 and 302. The Ordinance's LCMs ban prohibits magazines capable of holding more than

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General Assembly uses "firearms" throughout its regulatory scheme and regulates magazines separately from "firearms and weapons." Thus, the statutory construction demonstrates an intent to regulate LCMs and firearms separately.

[10] As noted *supra*, this also applies to the CCA.

10 rounds. Under state law, a person can lawfully possess magazines capable of holding 15, 14, 13, 12, and 11 rounds, possession of which would be unlawful under the Ordinance.

Moreover, the LCMs Ban materially impedes the General Assembly's interest in consistent laws regarding firearms, in safeguarding the right to bear arms, and in preventing inconsistent treatment of gun possession under local rule.[11] It goes without saying that the firearms at issue in the Ordinance could not function as firearms without their magazine. See B.R.C. § 5-8-2. Prohibiting certain magazines thus affects possession of firearms, implicates the right to bear arms, and leaves people vulnerable to criminal and civil liability for otherwise lawful possession of magazines under State law.

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[11] The City Attorney even expressed this concern during the City's enactment process:

> I'm not terribly comfortable with 10 rounds because the state says 15. And so if there is an area where this law might be vulnerable to challenge, this is probably it. Because it's directly inconsistent with state law and if there is an argument that we can do this and I'm happy to make that argument if council asks me to, but my own if there is any area of the ordinance where I'm a little uncomfortable, it's the large capacity magazines.

April 5, 2018 City Council recording, at 6:27pm 1:06:18, available at https://youtu.be/I1RGGhF8kJc. Plaintiff's SUF at ¶ 77.

Defendant offers a slight variation of this fact, asserting:

> Mr. Carr did not state "if there is an argument that we can do this . . . ." He stated, "I think there's an argument that we can do this and I'm happy to make that argument if council asks me to." April 5, 2018 City Council recording, at 6:27pm 1:06:18, available at https://youtu.be/I1RGGhF8kJc.

April 5, 2018 City Council recording, at 6:27pm 1:06:18, available at https://youtu.be/I1RGGhF8kJc. Defendants Response to Plaintiffs' SUF at ¶ 77.

City Council Members Weaver and Grano seemed to agree, stating that a ban on magazines exceeding 10 rounds will "for sure" "put [Boulder] cross-wise with State law." May 1, 2018 City Council recording, at 10:10pm 4:08:55, available at https://youtu.be/LO9FxAZ7pf8. Plaintiff's SUF at ¶ 80.

Defendant offers an addition to this fact, asserting:

Council Member Jones–not Grano—asked whether the 10- round limitation would "put us cross-wise with State law." Council Member Weaver stated, "For sure." Immediately following that statement, Council Member Weaver stated, "But I don't, you know— we'll see what home rule has to say about that." May 1, 2018 City Council recording, at 10:10pm 4:08:55, available at https://youtu.be/LO9FxAZ7pf8. Defendants' Response to Plaintiffs' SUF at ¶ 80.

VII. CONCLUSIONS

Finding that Plaintiffs' challenge to the Certification Procedure, as part of Count 1 of their Second Amended Complaint, is moot and that they lack standing to challenge this provision, the Court GRANTS Defendant's Motion for Summary Judgment in Part on the Certification Procedure.

Finding that the Ordinance's Assault Weapons Possession, Sale, and Transfer Ban is expressly, impliedly, and operationally preempted and the Ordinance's LCMs Ban is operationally preempted, the Court GRANTS in part the Defendant's Motion for Summary Judgment.

Accordingly, under Rule 57 the Court declares that the provisions of the Ordinance prohibiting the sale, possession, and transfer of assault weapons and LCMs is preempted by state law, are thus invalid, and enjoins their enforcement.

Date: March 12, 2021

BY THE COURT:

Andrew Hartman
District Court Judge