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EXHIBIT A

SPONSOR: Rep. Longhurst & Sen. Poore & Rep. Schwartzkopf & Rep. Mitchell & Rep. Dorsey Walker & Rep. Baumbach & Rep. Bolden & Rep. Griffith & Rep. Lynn
Reps. Bentz, Chukwuocha, Freel, Heffernan, K. Johnson, Kowalko, Lambert, Minor-Brown, Morrison, Osienski; Sens. Gay, Lockman, S. McBride, Paradee, Pinkney, Sokola, Sturgeon, Townsend

HOUSE OF REPRESENTATIVES
151st GENERAL ASSEMBLY

HOUSE BILL NO. 450
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND THE DELAWARE CODE RELATING TO DEADLY WEAPONS.

WHEREAS, on May 24 an 18-year-old gunman entered Robb Elementary School in Uvalde, Texas and murdered 19 children and 2 teachers with an AR-15-style semi-automatic rifle; and

WHEREAS, this tragedy came just 10 days after a shooting in Buffalo, New York where a gunman with an AR-15-style semi-automatic rifle murdered 10 people in a grocery store; and

WHEREAS, there have been dozens more mass shootings during the last decade, including in 2019 at a Walmart in El Paso, Texas, where a gunman using a WASR-10 semi-automatic rifle murdered 23 people and wounded 23 others; and

WHEREAS, in 2018 at Stoneman Douglas High School in Parkland, Florida, a gunman with an AR-15-style semi-automatic rifle murdered 14 students and 3 adults and injured 17 more people; and

WHEREAS, in 2017, a gunman barricaded himself in a Las Vegas hotel room and used multiple AR-15 and AR-10-type rifles to murder 60 people and injure hundreds more at an outdoor music festival; and

WHEREAS, in 2012, a shooter walked into Sandy Hook Elementary School in Newtown, Connecticut armed with a Bushmaster semi-automatic rifle with 30-round magazines enabling him to fire 154 rounds in less than 5 minutes, murdering 20 first-grade children and 6 adults; and

WHEREAS, assault-style weapons have been used disproportionately to their ownership in mass shootings; and

WHEREAS, in 1994, Congress adopted the Violent Crime Control and Law Enforcement Act of 1994, which prohibited the possession and sale of assault-style weapons and large capacity ammunition magazines which limited magazines to 10 rounds; and

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WHEREAS, between 1994 and 2004 when the Act was in effect, there were fewer than 20 mass shootings during that decade, substantially lower than the decades since, and since the law expired in 2004 there has been a proliferation of assault-style weapons in the United States; and

WHEREAS, since 2009, there have been 274 mass shootings in the United States resulting in 1,536 people shot and killed and 983 people shot and wounded, including 362 children and teens and 21 law enforcement officers; and

WHEREAS, between 2009 and 2020, there were at least 30 mass shootings that involved the use of an assault-style weapon, resulting in 347 deaths and 719 injuries, with mass shootings that involved an assault-style weapon accounting for 25 percent of all mass shooting deaths and 76 percent of injuries; and

WHEREAS, assault-style weapons have immense killing power which amplifies the deadly will of a person seeking to kill others and the use of an assault weapon has led to six times as many people shot per mass shooting; and

WHEREAS, the AR-15, AK-47 and other similar firearm profiles now recognized as assault-style weapons were originally designed solely for military use, and these weapons, which have been modified over time to be marketed and sold to civilians, were not intended for sport or self-defense; and

WHEREAS, the Delaware General Assembly has a compelling interest to ensure the safety of Delawareans and finds that assault-style weapons are exceptionally lethal weapons of war that have no place in civilian life.

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Subchapter VII, Chapter 5, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

~~§§ 1464–1469. [Reserved.]~~

§ 1464. Legislative findings.

The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in § 1465 of this title based upon finding that each firearm has such a high rate of fire and capacity for firepower that its potential function as a sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the possession and use of assault weapons. It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities.

§ 1465. Definitions related to assault weapons.

For purposes of this section and § 1466 and § 1467 of this title:

(1) "Ammunition feeding device" means any magazine, belt, drum, feed strip, or similar device that holds ammunition for a firearm.

(2) "Assault long gun" means any of the following or a copy, regardless of the producer or manufacturer:

a. American Arms Spectre da Semiautomatic carbine.

b. Avtomat Kalashnikov semiautomatic rifle in any format, including the AK-47 in all forms.

c. Algimec AGM-1 type semi-auto.

d. AR 100 type semi-auto.

e. AR 180 type semi-auto.

f. Argentine L.S.R. semi-auto.

g. Australian Automatic Arms SAR type semi-auto.

h. Auto-Ordnance Thompson M1 and 1927 semi-automatics.

i. Barrett light .50 cal. semi-auto.

j. Beretta AR70 type semi-auto.

k. Bushmaster semi-auto rifle.

l. Calico models M-100 and M-900.

m. CIS SR 88 type semi-auto.

n. Claridge HI TEC C-9 carbines.

o. Colt AR-15, CAR-15, and all imitations except Colt AR-15 Sporter H-BAR rifle.

p. Daewoo MAX 1 and MAX 2, aka AR 100, 110C, K-1, and K-2.

q. Dragunov Chinese made semi-auto.

r. Famas semi-auto (.223 caliber).

s. Feather AT-9 semi-auto.

t. FN LAR and FN FAL assault rifle.

u. FNC semi-auto type carbine.

v. F.I.E./Franchi LAW 12 and SPAS 12 assault shotgun.

w. Steyr-AUG-SA semi-auto.

x. Galil models AR and ARM semi-auto.

y. Heckler and Koch HK-91 A3, HK-93 A2, HK-94 A2 and A3.

z. Holmes model 88 shotgun.

aa. Manchester Arms "Commando" MK-45, MK-9.

bb. Mandell TAC-1 semi-auto carbine.

cc. Mossberg model 500 Bullpup assault shotgun.

dd. Sterling Mark 6.

ee. P.A.W.S. carbine.

ff. Ruger mini-14 folding stock model (.223 caliber).

gg. SIG 550/551 assault rifle (.223 caliber).

hh. SKS with detachable magazine.

ii. AP-74 Commando type semi-auto.

jj. Springfield Armory BM-59, SAR-48, G3, SAR-3, M-21 sniper rifle, and M1A, excluding the M1 Garand.

kk. Street sweeper assault type shotgun.

ll. Striker 12 assault shotgun in all formats.

mm. Unique F11 semi-auto type.

nn. Daewoo USAS 12 semi-auto shotgun.

oo. UZI 9mm carbine or rifle.

pp. Valmet M-76 and M-78 semi-auto.

qq. Weaver Arms "Nighthawk" semi-auto carbine.

rr. Wilkinson Arms 9mm semi-auto "Terry".

(2) "Assault pistol" means any of the following or a copy, regardless of the producer or manufacturer:

a. AA Arms AP-9 pistol.

b. Beretta 93R pistol.

c. Bushmaster pistol.

d. Claridge HI-TEC pistol.

e. D Max Industries pistol.

f. EKO Cobra pistol.

g. Encom MK-IV, MP-9, or MP-45 pistol.

h. Heckler and Koch MP5K, MP7, SP-89, or VP70 pistol.

i. Holmes MP-83 pistol.

j. Ingram MAC 10/11 pistol and variations, including the Partisan Avenger and the SWD Cobray.

k. Intratec TEC-9/DC-9 pistol in any centerfire variation.

l. P.A.W.S. type pistol.

m. Skorpion pistol.

n. Spectre double action pistol (Sile, F.I.E., Mitchell).

o. Stechkin automatic pistol.

p. Steyer tactical pistol.

q. UZI pistol.

r. Weaver Arms Nighthawk pistol.

s. Wilkinson "Linda" pistol.

(3) "Assault weapon" means any of the following:

a. An assault long gun.

b. An assault pistol.

c. A copycat weapon.

(4) "Completed a purchase" means that the purchaser completed an application, passed a background check, and has a receipt or purchase order for the assault weapon, without regard to whether the purchaser has actual physical possession of the assault weapon. If receipt of the assault weapon will not occur until more than 1 year after [the effective date of this Act], it is not a completed purchase.

(5) "Copycat weapon" means any of the following:

a. A semiautomatic, centerfire rifle that can accept a detachable magazine and has at least 1 of the following:

1. A folding or telescoping stock.

2. Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing.

3. A forward pistol grip.

4. A flash suppressor.

5. A grenade launcher or flare launcher.

b. A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

c. A semiautomatic pistol that can accept a detachable magazine and has at least 1 of the following:

1. An ability to accept a detachable ammunition magazine that attaches at some location outside of the pistol grip.

2. A threaded barrel capable of accepting a flash suppressor, forward pistol grip or silencer.

3. A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to fire the firearm without being burned, except a slide that encloses the barrel.

4. A second hand grip.

d. A semiautomatic shotgun that has both of the following:

1. A folding or telescoping stock.

2. Any grip of the weapon, including a pistol grip, a thumbhole stock, or any other stock, the use of which would allow an individual to grip the weapon, resulting in any finger on the trigger hand in addition to the trigger finger being directly below any portion of the action of the weapon when firing.

e. A semiautomatic shotgun that has the ability to accept a detachable magazine.

f. A shotgun with a revolving cylinder.

g. A semiautomatic pistol with a fixed magazine that can accept more than 17 rounds.

h. A semiautomatic, centerfire rifle that has a fixed magazine that can accept more than 17 rounds.

(6) "Detachable magazine" means an ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or cartridge.

(7) "Family" means as defined in § 901 of Title 10.

(8) "Flash suppressor" means a device that functions, or is intended to function, to perceptibly reduce or redirect muzzle flash from the shooter's field of vision.

(9) "Qualified retired law-enforcement officer" means as defined in § 1441B(c) of this title.

(10) "Shooting range" means any land or structure used and operated in accordance with all applicable laws and ordinances for the shooting of targets for training, education, practice, recreation, or competition.

(11) "Grenade launcher" means a device designed to fire, launch, or propel a grenade.

(12) "Secure storage" means a firearm that is stored in a locked container or equipped with a tamper resistant mechanical lock or other safety device that is properly engaged so as to render the firearm inoperable by a person other than the owner or other lawfully authorized user.

§ 1466. Manufacture, sale, transport, transfer, purchase, receipt, and possession of assault weapons; class E or F felony.

(a) Prohibitions. - Except as provided in subsection (b) or (c) of this section, it is unlawful for a person to do any of the following:

(1) Transport an assault weapon into this State.

(2) Manufacture, sell, offer to sell, transfer, purchase, receive, or possess an assault weapon.

(b) Applicability - This section does not apply to any of the following:

(1) The following individuals, if acting within the scope of official business:

a. Personnel of the United States government or a unit of that government.

b. Members of the armed forces of the United States or of the National Guard.

c. A law-enforcement officer.

(2) An assault weapon modified to render it permanently inoperative.

(3) Possession, importation, manufacture, receipt for manufacture, shipment for manufacture, storage, purchases, sales, and transport to or by a licensed firearms dealer or manufacturer who does any of the following:

a. Provides or services an assault weapon for a law-enforcement agency of this State or for personnel exempted under paragraph (b)(1) of this section.

b. Acts to sell or transfer an assault weapon to a licensed firearm dealer in another state or to an individual purchaser in another state through a licensed firearms dealer.

c. Acts to return to a customer in another state an assault weapon transferred to the licensed firearms dealer or manufacturer under the terms of a warranty or for repair.

(4) Organizations that are required or authorized by federal law governing their specific business or activity to maintain assault weapons.

(5) The receipt of an assault weapon by inheritance, and possession of the inherited assault weapon, if the decedent lawfully possessed the assault weapon and the person inheriting the assault weapon is not otherwise a person prohibited under § 1448 of this title.

(6) The receipt of an assault weapon by a personal representative of an estate for purposes of exercising the powers and duties of a personal representative of an estate, including transferring the assault weapon according to will or probate proceedings.

(7) Possession by a qualified retired law-enforcement officer who is not otherwise prohibited from receiving an assault weapon if either of the following applies:

a. The assault weapon is sold or transferred to the qualified retired law-enforcement officer by the law-enforcement agency on retirement.

b. The assault weapon was purchased or obtained by the qualified retired law-enforcement officer for official use with the law-enforcement agency before retirement.

(8) Possession or transport by an armored car guard, as defined in § 1302 of Title 24, if the armored car guard is acting within the scope of employment with an armored car agency, as defined under § 1302 of Title 24, and is licensed under Chapter 13 of Title 24.

(9) Possession, receipt, and testing by, or shipping to or from any of the following:

a. An ISO 17025 accredited, National Institute of Justice-approved ballistics testing laboratory.

b. A facility or entity that manufactures or provides research and development testing, analysis, or engineering for personal protective equipment or vehicle protection systems.

(c) Exceptions. -

(1) A licensed firearms dealer may continue to do all of the following with an assault weapon that the licensed firearms dealer lawfully possessed on or before [the effective date of this Act]:

a. Possess the assault weapon.

b. Sell the assault weapon or offer the assault weapon for sale. But, the licensed firearms dealer may only sell the assault weapon or offer the assault weapon for sale as permitted under paragraph (b)(3)b. of this section.

c. Transfer the assault weapon. But, the licensed firearms dealer may only transfer the assault weapon as permitted by paragraph (b)(3)b. or (b)(3)c. of this section.

(2)a. A licensed firearms dealer may take possession of an assault weapon from a person who lawfully possessed the assault weapon before [the effective date of this Act] for the purposes of servicing or repairing the assault weapon.

b. A licensed firearms dealer may transfer possession of an assault weapon received under paragraph (c)(2)a. of this section for purposes of accomplishing service or repair of the assault weapon.

(3) A person who lawfully possessed, or completed a purchase of an assault weapon prior to [the effective date of this Act], may possess and transport the assault weapon on or after [the effective date of this Act] only under the following circumstances:

a. At that person's residence, place of business, or other property owned by that person, or on property owned by another person with the owner's express permission.

b. While on the premises of a shooting range.

c. While attending any exhibition, display, or educational project that is about firearms and that is sponsored by, conducted under the auspices of, or approved by a law-enforcement agency or a nationally or state recognized entity that fosters proficiency in, or promotes education about, firearms.

d. While transporting the assault weapon between any of the places set forth in this this paragraph (c)(3) of this section, or to any licensed firearms dealer for servicing or repair under paragraph (c)(2) of this section, if the person places the assault weapon in secure storage.

(4) A person may transport an assault weapon to or from any of the following if the person places the assault weapon in secure storage:

a. An ISO 17025 accredited, National Institute of Justice-approved ballistics testing laboratory.

b. A facility or entity that manufactures or provides research and development testing, analysis, or engineering for personal protective equipment or vehicle protection systems.

(5) Ownership of an assault weapon may be transferred from the person owning the assault weapon to a member of that person's family, and it is lawful for the family member to possess the transferred assault weapon under paragraph (c)(3) of this section, if the transferor lawfully possessed the assault weapon and the family member to whom the assault weapon is transferred is otherwise lawfully permitted to possess it.

(d) Penalty. – A violation of this section is a class D felony.

(e) Disposal. - A law-enforcement agency in possession of a person's assault weapon as a result of an arrest under this section shall dispose of the assault weapon under the process established for deadly weapons and ammunition under § 2311 of this title following the person's adjudication of delinquency or conviction under this section or by the person's agreement to forfeit the assault weapon under an agreement to plead delinquent or guilty to another offense.

§ 1467. Voluntary certificate of possession.

(a) A person who is exempt from § 1466(a) of this title under § 1466(c)(3) of this title may, no later than 1 year from the [effective date of this Act], apply to the Secretary of the Department of Safety and Homeland Security for a certificate of possession.

(b) In a prosecution under § 1466 of this title, it is an affirmative defense that the defendant was lawfully in possession or had completed a purchase of the assault weapon prior to [the effective date of this Act]. A certificate of possession is conclusive evidence that a person lawfully possessed or had completed a purchase of an assault weapon before [the effective date of this Act] and is entitled to continue to possess and transport the assault weapon on or after [the effective date of this Act] under § 1466(c)(3) of this title.

(c) The Secretary of the Department of Safety and Homeland Security shall establish procedures with respect to the application for and issuance of certificates of possession for assault weapons that are lawfully owned and possessed before [the effective date of this Act]. Rules and procedures under this subsection must include all of the following:

(1) That the application contain proof that the person lawfully possessed or had completed a purchase of an assault weapon before [the effective date of this Act].

(2) That the certificate of possession must contain a description of the assault weapon, including the make, model, and serial number. For an assault weapon manufactured before 1968, identifying marks may be substituted for the serial number.

(3) That the certificate of possession must contain the full name, address, date of birth, and thumbprint of the person who owns the assault weapon, and any other information the Secretary deems appropriate.

(4) That the Department will not retain copies of the certificate or other identifying information relating to any individual who applies for a voluntary certificate of possession.

(d) A person who inherits or receives a weapon from a family member that is lawfully possessed under § 1466(c)(3) of this title and lawfully transferred may apply for a certificate of possession within 60 days of taking possession of the weapon. To receive a certificate, the person must show that the transferor was lawfully in possession and that he/she is the lawful recipient of the transfer.

§§ 1468 – 1469. [Reserved.]

Section 2. Amend § 1457, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1457. Possession of a weapon in a Safe School and Recreation Zone; class D, E, or F felony; class A or B misdemeanor.

(a) Any person who commits any of the offenses described in subsection (b) of this section, or any juvenile who possesses a firearm or other deadly weapon, and does so while in or on a "Safe School and Recreation Zone" shall be guilty of the crime of possession of a weapon in a Safe School and Recreation Zone.

(b) The underlying offenses in Title 11 shall be:

(1) Section 1442. — Carrying a concealed deadly weapon; class G felony; class D felony.

(2) Section 1444. — Possessing a destructive weapon; class E felony.

(3) Section 1446. — Unlawfully dealing with a switchblade knife; unclassified misdemeanor.

(4) Section 1448. — Possession and purchase of deadly weapons by persons prohibited; class F felony.

(5) Section 1452. — Unlawfully dealing with knuckles-combination knife; class B misdemeanor.

(6) Section 1453. — Unlawfully dealing with martial arts throwing star; class B misdemeanor.

(7) Section 14XX. – Manufacture, sale, transport, transfer, purchase, receipt, or possession of assault weapons; class E or F felony.

Section 3. If any provision of this Act or the application of this Act to any person or circumstance is held invalid, the provisions of this Act are severable if the invalidity does not affect the other provisions or applications of the Act which can be given effect without the invalid provision or application.

Section 4. This Act is to be known as the "Delaware Lethal Firearms Safety Act of 2022."

EXHIBIT B

SPONSOR: Sen. Sokola & Sen. Sturgeon & Sen. Townsend & Rep. Mitchell
Sens. Gay, Hansen, S. McBride, Pinkney, Poore; Reps. Baumbach, Bentz, Chukwuocha, Griffith, Heffernan, Kowalko, Lynn, Minor-Brown, Morrison

DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1
FOR
SENATE BILL NO. 6
AS AMENDED BY
SENATE AMENDMENT NO. 1, HOUSE AMENDMENT NO. 1,
AND HOUSE AMENDMENT NO. 2
AS AMENDED BY HOUSE AMENDMENT NO. 3.

AN ACT TO AMEND TITLE 11 OF THE DELAWARE CODE RELATING TO DEADLY WEAPONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Subchapter VII, Chapter 5, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

~~§§ 1464-1469. [Reserved.]~~

§ 1465. Definitions related to large-capacity magazines.

For purposes of this section and §§ 1466 and 1467 of this title:

(1) "Ammunition feeding device" means any magazine, belt, drum, feed strip, or similar device that holds ammunition for a firearm.

(2)a. "Large-capacity magazine" means any ammunition feeding device capable of accepting, or that can readily be converted to hold, more than 17 rounds of ammunition.

b. "Large-capacity magazine" does not include an attached tubular device designed to accept, and only capable of operating with, .22 caliber rimfire ammunition.

c. For purposes of this subsection, the presence of a removable floor plate in an ammunition feeding device that is not capable of accepting more than 17 rounds of ammunition shall not, without more, be sufficient evidence that the ammunition feeding device can readily be converted to hold more than 17 rounds of ammunition.

(3) "Licensed firearms dealer" means a person licensed under Chapter 9 of Title 24 or 18 U.S.C. § 921 et seq.

(4) "Qualified retired law-enforcement officer" means as defined under § 1441B(c) of this title.

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§ 1466. Large-capacity magazines prohibited; class E felony; class B misdemeanor; or civil violation.

(a) Except as otherwise provided in subsections (c) and (d) of this section, it is unlawful for a person to manufacture, sell, offer for sale, purchase, receive, transfer, or possess a large-capacity magazine.

(b)(1) A violation of this section which is a first offense which only involves possession of a large capacity magazine is a civil penalty of $100.

(2) A second violation of this section which only involves possession of a large capacity magazine is a class B misdemeanor.

(3) All other violations of this section, including a subsequent offense involving only possession of a large capacity magazine are a class E felony.

(4) A large-capacity magazine is subject to forfeiture for a violation of this section.

(5) The Superior Court has exclusive jurisdiction over violations under subsections (b)(2) and (b)(3) of this section.

(c) This section does not apply to any of the following:

(1) Personnel of the United States government or a unit of that government who are acting within the scope of official business.

(2) Members of the armed forces of the United States or of the National Guard who are acting within the scope of official business.

(3) A law-enforcement officer.

(4) A qualified retired law-enforcement officer.

(5) An individual who holds a valid concealed carry permit issued by the Superior Court under § 1441 of this title.

(6) A licensed firearms dealer that sells a large-capacity magazine to another licensed firearms dealer or to an individual exempt under paragraphs (c)(1) through (5) of this section.

(7) A large-capacity magazine that a person has rendered permanently inoperable or has permanently modified to accept 17 rounds of ammunition or less.

(d)(1) The Secretary of the Department of Safety and Homeland Security ("Secretary") shall establish and administer a compensation program for residents of this State to allow a resident in possession of a large-capacity magazine on [the effective date of this Act] to relinquish the large-capacity magazine to the Department of Safety and Homeland Security ("Department") or a participating local law-enforcement agency in exchange for a monetary payment established under this subsection.

(2) The Secretary shall adopt rules to implement the compensation program, including the following:

a. That the compensation program be implemented between [the effective date of this Act] and June 30, 2023, at locations throughout this State. The Department shall coordinate with local law-enforcement agencies in implementing the program.

b. That the compensation program allows a resident to relinquish a large-capacity magazine to the Department, or a local law-enforcement agency participating in the program, in exchange for a compensation in the amount of the market rate for each large-capacity magazine.

c. That establishes the method for providing the monetary payment and reimbursing a participating law-enforcement agency for payments made to residents under the compensation program.

d. That the compensation program is subject to the availability of funds appropriated for this specific purpose by the General Assembly. This subsection does not create a right or entitlement in a resident to receive a monetary payment under the compensation program.

(3) The Secretary shall submit a report to the General Assembly by December 29, 2023, providing the results of the compensation program, including the number of large-capacity magazines relinquished to law-enforcement agencies, by county, and the total amount expended under the program.

§ 1467. Possession of a large-capacity magazine during the commission of a felony; class B felony.

(a) It is unlawful for a person to possess a large-capacity magazine during the commission of a felony.

(b) Possession of a large-capacity magazine during the commission of a felony is a class B felony.

(c) A person may be found guilty of violating this section notwithstanding that the felony for which the person is convicted and during which the person possessed the large-capacity magazine is a lesser included felony of the one originally charged.

§§ 1468-1469. [RESERVED].

Section 2. The sum of $45,000 is appropriated from the General Fund in Fiscal Year 2023 for the purpose of providing compensation for the purchase of large-capacity magazines by the Department of Safety and Homeland Security under Section 1 of this Act.

Section 3. If any provision of this Act or the application of this Act to any person or circumstance is held invalid, the provisions of this Act are severable if the invalidity does not affect the other provisions or applications of the Act which can be given effect without the invalid provision or application.

Section 4. This Act is to be known as the "Delaware Large-Capacity Magazine Prohibition Act of 2022."

Section 5. This Act takes effect 60 days after its enactment into law.

Section 6. Section § 1466(d) of Title 11, as contained in Section 1 of this Act, expires on January 1, 2024.

EXHIBIT C

SPONSOR: Sen. Townsend & Sen. McDowell & Rep. Chukwuocha
Sens. Sokola, Sturgeon; Reps. Baumbach, Bentz, Bolden,
Heffernan, K. Johnson, Kowalko

DELAWARE STATE SENATE
150th GENERAL ASSEMBLY

SENATE BILL NO. 68

AN ACT TO AMEND THE DELAWARE CODE RELATING TO DEADLY WEAPONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Subchapter VII, Chapter 5, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

~~§§ 1462–1469. [Reserved.]~~

§ 1463. Definitions related to assault weapons.

For purposes of this section and §§ 1464 and 1465 of this title:

(1) "Ammunition feeding device" means any magazine, belt, drum, feed strip, or similar device that holds ammunition for a firearm.

(2) "Assault long gun" means any of the following or a copy, regardless of the producer or manufacturer:

a. American Arms Spectre da Semiautomatic carbine.

b. Avtomat Kalashnikov semiautomatic rifle in any format, including the AK-47 in all forms.

c. Algimec AGM-1 type semi-auto.

d. AR 100 type semi-auto.

e. AR 180 type semi-auto.

f. Argentine L.S.R. semi-auto.

g. Australian Automatic Arms SAR type semi-auto.

h. Auto-Ordnance Thompson M1 and 1927 semi-automatics.

i. Barrett light .50 cal. semi-auto.

j. Beretta AR70 type semi-auto.

k. Bushmaster semi-auto rifle.

l. Calico models M-100 and M-900.

m. CIS SR 88 type semi-auto.

n. Claridge HI TEC C-9 carbines.

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o. Colt AR-15, CAR-15, and all imitations except Colt AR-15 Sporter H-BAR rifle.

p. Daewoo MAX 1 and MAX 2, aka AR 100, 110C, K-1, and K-2.

q. Dragunov Chinese made semi-auto.

r. Famas semi-auto (.223 caliber).

s. Feather AT-9 semi-auto.

t. FN LAR and FN FAL assault rifle.

u. FNC semi-auto type carbine.

v. F.I.E./Franchi LAW 12 and SPAS 12 assault shotgun.

w. Steyr-AUG-SA semi-auto.

x. Galil models AR and ARM semi-auto.

y. Heckler and Koch HK-91 A3, HK-93 A2, HK-94 A2 and A3.

z. Holmes model 88 shotgun.

aa. Manchester Arms "Commando" MK-45, MK-9.

bb. Mandell TAC-1 semi-auto carbine.

cc. Mossberg model 500 Bullpup assault shotgun.

dd. Sterling Mark 6.

ee. P.A.W.S. carbine.

ff. Ruger mini-14 tactical rifle.

gg. SIG 550/551 assault rifle (.223 caliber).

hh. SKS with detachable magazine.

ii. AP-74 Commando type semi-auto.

jj. Springfield Armory BM-59, SAR-48, G3, SAR-3, M-21 sniper rifle, and M1A, excluding the M1 Garand.

kk. Street sweeper assault type shotgun.

ll. Striker 12 assault shotgun in all formats.

mm. Unique F11 semi-auto type.

nn. Daewoo USAS 12 semi-auto shotgun.

oo. UZI 9mm carbine or rifle.

pp. Valmet M-76 and M-78 semi-auto.

qq. Weaver Arms "Nighthawk" semi-auto carbine.

rr. Wilkinson Arms 9mm semi-auto "Terry".

(2) "Assault pistol" means any of the following or a copy, regardless of the producer or manufacturer:

a. AA Arms AP-9 pistol.

b. Beretta 93R pistol.

c. Bushmaster pistol.

d. Claridge HI-TEC pistol.

e. D Max Industries pistol.

f. EKO Cobra pistol.

g. Encom MK-IV, MP-9, or MP-45 pistol.

h. Heckler and Koch MP5K, MP7, SP-89, or VP70 pistol.

i. Holmes MP-83 pistol.

j. Ingram MAC 10/11 pistol and variations, including the Partisan Avenger and the SWD Cobray.

k. Intratec TEC-9/DC-9 pistol in any centerfire variation.

l. P.A.W.S. type pistol.

m. Skorpion pistol.

n. Spectre double action pistol (Sile, F.I.E., Mitchell).

o. Stechkin automatic pistol.

p. Steyer tactical pistol.

q. UZI pistol.

r. Weaver Arms Nighthawk pistol.

s. Wilkinson "Linda" pistol.

(3) "Assault weapon" means any of the following:

a. An assault long gun.

b. An assault pistol.

c. A copycat weapon.

(4) "Copycat weapon" means any of the following:

a. A semiautomatic centerfire rifle that can accept a detachable magazine and has any 2 of the following:

1. A folding stock.

2. A grenade launcher or flare launcher.

3. A flash suppressor.

4. A pistol grip that protrudes conspicuously beneath the action of the weapon.

b. A semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.

c. A semiautomatic centerfire rifle that has an overall length of less than 29 inches.

d. A semiautomatic pistol with a fixed magazine that can accept more than 10 rounds.

e. A semiautomatic shotgun that has a folding stock.

f. A shotgun with a revolving cylinder.

(5) "Detachable magazine" means an ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or cartridge.

(6) "Flash suppressor" means a device that functions, or is intended to function, to perceptibly reduce or redirect muzzle flash from the shooter's field of vision.

(7) "Qualified retired law-enforcement officer" means as defined in § 1441B(c) of this title.

(8) "Shooting range" means any land or structure used and operated in accordance with all applicable laws and ordinances for the shooting of targets for training, education, practice, recreation, or competition.

(9) "Grenade launcher" means a device designed to fire, launch, or propel a grenade.

(10) "Secure storage" means a firearm that is stored in a locked container or equipped with a tamper resistant mechanical lock or other safety device that is properly engaged so as to render the firearm inoperable by a person other than the owner or other lawfully authorized user.

§ 1464. Manufacture, sale, transport, transfer, purchase, receipt, and possession of assault weapons; class E or F felony.

(a) Prohibitions. - Except as provided in subsection (b) or (c) of this section, it is unlawful for a person to do any of the following:

(1) Transport an assault weapon into this State.

(2) Manufacture, sell, offer to sell, transfer, purchase, receive, or possess an assault weapon.

(b) Applicability - This section does not apply to any of the following:

(1) The following individuals, if acting within the scope of official business:

a. Personnel of the United States government or a unit of that government.

b. Members of the armed forces of the United States or of the National Guard.

c. A law-enforcement officer.

(2) An assault weapon modified to render it permanently inoperative.

(3) Possession, importation, manufacture, receipt for manufacture, shipment for manufacture, storage, purchases, sales, and transport to or by a licensed firearms dealer or manufacturer who does any of the following:

a. Provides or services an assault weapon for a law-enforcement agency of this State or for personnel exempted under paragraph (b)(1) of this section.

b. Acts to sell or transfer an assault weapon to a licensed firearm dealer in another state or to an individual purchaser in another state through a licensed firearms dealer.

c. Acts to return to a customer in another state an assault weapon transferred to the licensed firearms dealer or manufacturer under the terms of a warranty or for repair.

(4) Organizations that are required or authorized by federal law governing their specific business or activity to maintain assault weapons.

(5) The receipt of an assault weapon by inheritance, and possession of the inherited assault weapon, if the decedent lawfully possessed the assault weapon and the person inheriting the assault weapon is not otherwise a person prohibited under § 1448 of this title.

(6) The receipt of an assault weapon by a personal representative of an estate for purposes of exercising the powers and duties of a personal representative of an estate.

(7) Possession by a qualified retired law-enforcement officer who is not otherwise prohibited from receiving an assault weapon if either of the following applies:

a. The assault weapon is sold or transferred to the qualified retired law-enforcement officer by the law-enforcement agency on retirement.

b. The assault weapon was purchased or obtained by the qualified retired law-enforcement officer for official use with the law-enforcement agency before retirement.

(8) Possession or transport by an armored car guard, as defined in § 1302 of Title 24, if the armored car guard is acting within the scope of employment with an armored car agency, as defined under § 1302 of Title 24, and is licensed under Chapter 13 of Title 24.

(9) Possession, receipt, and testing by, or shipping to or from any of the following:

a. An ISO 17025 accredited, National Institute of Justice-approved ballistics testing laboratory.

b. A facility or entity that manufactures or provides research and development testing, analysis, or engineering for personal protective equipment or vehicle protection systems.

(c) Exceptions. -

(1) A licensed firearms dealer may continue to do all of the following with an assault weapon that the licensed firearms dealer lawfully possessed on or before [the effective date of this Act]:

a. Possess the assault weapon.

b. Sell the assault weapon or offer the assault weapon for sale. But, the licensed firearms dealer may only sell the assault weapon or offer the assault weapon for sale as permitted under paragraph (b)(3)b. of this section.

c. Transfer the assault weapon. But, the licensed firearms dealer may only transfer the assault weapon as permitted by paragraph (b)(3)b. or (b)(3)c. of this section or by paragraph (d)(2)b. of this section.

(2)a. A licensed firearms dealer may take possession of an assault weapon from a person who lawfully possessed the assault weapon before [the effective date of this Act] for the purposes of servicing or repairing the assault weapon.

b. A licensed firearms dealer may transfer possession of an assault weapon received under paragraph (c)(2)a. of this section for purposes of accomplishing service or repair of the assault weapon.

(3) A person who lawfully possessed, had a purchase order for, or completed an application to purchase an assault weapon before [the effective date of this Act], may possess and transport the assault weapon on or after [the effective date of this Act] only under the following circumstances:

a. At that person's residence, place of business, or other property owned by that person, or on property owned by another person with the owner's express permission.

b. While on the premises of a shooting range.

c. While attending any exhibition, display, or educational project that is about firearms and that is sponsored by, conducted under the auspices of, or approved by a law-enforcement agency or a nationally or state recognized entity that fosters proficiency in, or promotes education about, firearms.

d. While transporting the assault weapon between any of the places set forth in this this paragraph (c)(3) of this section, or to any licensed firearms dealer for servicing or repair under paragraph (c)(2) of this section, if the person places the assault weapon in secure storage.

(4) A person may transport an assault weapon to or from any of the following if the person places the assault weapon in secure storage:

a. An ISO 17025 accredited, National Institute of Justice-approved ballistics testing laboratory.

b. A facility or entity that manufactures or provides research and development testing, analysis, or engineering for personal protective equipment or vehicle protection systems.

(5) The transfer of an assault weapon from the person owning the assault weapon to a family member, and possession of the transferred assault weapon, if the person lawfully possessed the assault weapon and the family member to whom the assault weapon is transferred is not otherwise a person prohibited under § 1448 of this title. For purposes of this paragraph, "family member" means a spouse or an individual related by consanguinity within the third degree as determined by the common law.

(d) Penalty. - A violation of this section is a class F felony for a first offense and a class E felony for any subsequent offense within 10 years of a prior offense.

(e) Disposal. - A law-enforcement agency in possession of a person's assault weapon as a result of an arrest under this section shall dispose of the assault weapon under the process established for deadly weapons and ammunition under § 2311 of this title following the person's adjudication of delinquency or conviction under this section or by the person's agreement to forfeit the assault weapon under an agreement to plead delinquent or guilty to another offense.

§ 1465. Voluntary certificate of possession.

(a) A person who is exempt from § 1464(a) of this title under § 1464(c) of this title may, no later than 1 year from the [effective date of this Act], apply to the Secretary of the Department of Safety and Homeland Security for a certificate of possession.

(b) A certificate of possession is conclusive evidence that person lawfully possessed, had a purchase order for, or completed an application to purchase an assault weapon before [the effective date of this Act] and is entitled to continue to possess and transport the assault weapon on or after [the effective date of this Act] under § 1464(c)(3) of this title.

(c) The Secretary of the Department of Safety and Homeland Security shall promulgate regulations to establish procedures with respect to the application for and issuance of certificates of possession for assault weapons that are lawfully owned and possessed by person [the effective date of this Act]. Regulations under this subsection must include all of the following:

(1) That the application contain proof that the person lawfully possessed, had a purchase order for, or completed an application to purchase an assault weapon before [the effective date of this Act].

(2) That the certificate of possession must contain a description of the assault weapon, including the make, model, and serial number. For an assault weapon manufactured before 1968, identifying marks may be substituted for the serial number required by paragraph (c)(1) of this section.

(3) That the certificate of possession must contain the full name, address, date of birth, and thumbprint of the person who owns the assault weapon, and any other information the Secretary deems appropriate.

(4) That the name and address of the person issued a certificate of possession is confidential and may not be disclosed, except to a law-enforcement agency and its employees acting in the performance of official duties.

(5) That the Secretary shall make certificates of possession available in a searchable, centralized database, to any state or federal law enforcement agency to be used only for valid law enforcement purposes.

(d) A certificate of possession only authorizes the possession of an assault weapon specified in the certificate by the resident to whom the Secretary issued the certificate.

(e) A person in possession of multiple assault weapons on [the effective date of this Act] must apply for a separate certificate for each assault weapon the person wants to certify lawfully possessed, had a purchase order for, or completed an application to purchase an assault weapon before [the effective date of this Act].

§§ 1466 – 1469. [Reserved.]

Section 2. Amend § 1457, Title 11 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1457. Possession of a weapon in a Safe School and Recreation Zone; class D, E, or F felony; class A or B misdemeanor.

(a) Any person who commits any of the offenses described in subsection (b) of this section, or any juvenile who possesses a firearm or other deadly weapon, and does so while in or on a "Safe School and Recreation Zone" shall be guilty of the crime of possession of a weapon in a Safe School and Recreation Zone.

(b) The underlying offenses in Title 11 shall be:

(1) Section 1442. — Carrying a concealed deadly weapon; class G felony; class D felony.

(2) Section 1444. — Possessing a destructive weapon; class E felony.

(3) Section 1446. — Unlawfully dealing with a switchblade knife; unclassified misdemeanor.

(4) Section 1448. — Possession and purchase of deadly weapons by persons prohibited; class F felony.

(5) Section 1452. — Unlawfully dealing with knuckles-combination knife; class B misdemeanor.

(6) Section 1453. — Unlawfully dealing with martial arts throwing star; class B misdemeanor.

(7) Section 1464. – Manufacture, sale, transport, transfer, purchase, receipt, or possession of assault weapons; class E or F felony.

Section 3. If any provision of this Act or the application of this Act to any person or circumstance is held invalid, the provisions of this Act are severable if the invalidity does not affect the other provisions or applications of the Act which can be given effect without the invalid provision or application.

Section 4. This Act is to be known as the "Delaware Assault Weapons Prohibition Act of 2019."

230 Section 5. This Act takes effect 60 days after its enactment into law.

SYNOPSIS

This Act prohibits the manufacture, sale, offer to sell, transfer, purchase, receipt, possession, or transport of assault weapons in Delaware, subject to certain exceptions. One exception relevant to individuals is that the Act does not prohibit the possession and transport of firearms that were lawfully possessed or fully applied for before the effective date of this Act; although for these firearms there are certain restrictions relating to their possession and transport after the effective date of this Act. This Act creates a voluntary certificate of possession, to enable persons who lawfully possess an assault weapon before the effective date of this Act to be able to prove ownership after the effective date of this Act.

This Act is based on the Firearm Safety Act of 2013 ("FSA") passed in Maryland in the wake of the tragic slaughtering of children on December 14, 2012, at Sandy Hook Elementary School in Newtown, Connecticut. The FSA's assault weapons ban was upheld as constitutional on February 21, 2017, by the full membership of the United States Court of Appeals for the Fourth Circuit, in the case of Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017).

The names Newtown, Aurora, San Bernardino, Orlando, Las Vegas, and Parkland, among others, have become synonymous with tragic killing of innocent, unsuspecting Americans of all ages and backgrounds, amidst a framework of federal and state laws that have permitted the purchase of weapons designed for the battlefield — not for our schools, our theaters, our places of worship, or our homes.

Safety — both for the general public, as well as members of Delaware's law-enforcement community — is the objective of this Act, as it was for the FSA. And, as with the FSA, a primary goal of this Act is to reduce the availability of assault weapons so that when a criminal acts, he or she does so with a less dangerous weapon and less severe consequences.

Relying on United States Supreme Court precedent from District of Columbia v. Heller, 554 U.S. 570 (2008), as well as the holdings of its sister circuits, the full Fourth Circuit concluded that the assault weapons banned by the FSA are not protected by the Second Amendment. The Fourth Circuit was convinced that the banned assault weapons are among those arms that are "like" "M-16 rifles" — "weapons that are most useful in military service" — which the Heller Court singled out as being beyond the Second Amendment's reach.

The Fourth Circuit concluded that Maryland had presented extensive uncontroverted evidence demonstrating that the assault weapons outlawed by the FSA are exceptionally lethal weapons of war. The Fourth Circuit also concluded that the evidence showed the difference between the fully automatic and semiautomatic versions of military-style weapons is slight. Further evidence considered by the Fourth Circuit that motivates this Act is as follows:

(1) Like their fully automatic counterparts, the banned assault weapons are firearms designed for the battlefield, for the soldier to be able to shoot a large number of rounds across a battlefield at a high rate of speed, and that their design results in a capability for lethality — more wounds, more serious, in more victims — far beyond that of other firearms in general, including other semiautomatic guns.

(2) The banned assault weapons have been used disproportionately to their ownership in mass shootings and the murders of law-enforcement officers.

(3) The banned assault weapons further pose a heightened risk to civilians in that rounds from assault weapons have the ability to easily penetrate most materials used in standard home construction, car doors, and similar materials, and that criminals armed with the banned assault weapons possess a "military-style advantage" in firefights with law-enforcement officers, as such weapons allow criminals to effectively engage law-enforcement officers from great distances and their rounds easily pass through the soft body armor worn by most law-enforcement officers.

(4) Although self-defense is a conceivable use of the banned assault weapons, most individuals choose to keep other firearms for that purpose.

(5) Prohibitions against assault weapons will promote public safety by reducing the availability of those armaments to mass shooters and other criminals, by diminishing their especial threat to law-enforcement officers, and by hindering their unintentional misuse by civilians.

(6) In many situations, the semiautomatic fire of an assault weapon is more accurate and lethal than the automatic fire.

Finding this evidence and these conclusions by the Fourth Circuit to be strongly persuasive of the applicable framework of constitutional rights, and firmly believing that promoting the safety of the Delaware public and Delaware law-enforcement is a paramount function of the Delaware General Assembly, Delaware legislators file this Act in the name of public safety and with adherence to core constitutional principles.

Author: Senator Townsend

Released: 04/10/2019 11:23 AM

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EXHIBIT D

LexisNexis

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1. *Bianchi v. Frosh, 858 Fed. Appx. 645*

Client/Matter: 999999.999999
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Search Type: Natural Language
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Cases	Court: State Courts > Maryland,Federal > U.S. Sup. Ct.,Federal > 4th Circuit4th Cir. - Ct. of App.,Federal > 4th Circuit4th Cir. - U.S. Dist. Cts. > U.S. Dist. Md.,Federal > 4th Circuit4th Cir. - U.S. Bankr. Cts. > U.S. Bankr. Md.,Federal > U.S. Cir. Cts. (1789-1911)Maryland (1789-1911)

Bianchi v. Frosh

United States Court of Appeals for the Fourth Circuit

September 14, 2021, Submitted; September 17, 2021, Decided

No. 21-1255

Reporter
858 Fed. Appx. 645 *; 2021 U.S. App. LEXIS 28163 **; 2021 WL 4240385

DOMINIC BIANCHI, an individual and resident of Baltimore County; DAVID SNOPE, an individual and resident of Baltimore County; MICAH SCHAEFER, an individual and resident of Anne Arundel County; FIELD TRADERS LLC, A resident of Anne Arundel County; FIREARMS POLICY COALITION, INC.; SECOND AMENDMENT FOUNDATION; CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS, Plaintiffs - Appellants, v. BRIAN E. FROSH, in his official capacity as Attorney General of Maryland; COL. WOODROW W. JONES, III, in his official capacity as Secretary of State Police of Maryland; R. JAY FISHER, in his official capacity as Sheriff of Baltimore County, Maryland; JIM FREDERICKS, in his official capacity as Sheriff of Anne Arundel County, Maryland, Defendants - Appellees.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Vacated by, Remanded by *Bianchi, Dominic v. Frosh, Att'y Gen of Md., 2022 U.S. LEXIS 3258 (U.S., June 30, 2022)*

Prior History: **[**1]** Appeal from the United States District Court for the District of Maryland, at Baltimore. (1:20-cv-03495-JKB). James K. Bredar, Chief District Judge.

Andrews v. United States, 2005 U.S. Dist. LEXIS 53075 (E.D.N.C., July 19, 2005)

Disposition: AFFIRMED.

Core Terms

en banc

Counsel: Raymond M. DiGuiseppe, THE DIGUISEPPE LAW FIRM, P.C., Southport, North Carolina; Adam Kraut, FIREARMS POLICY COALTION, Sacramento, California; David H. Thompson, Peter A. Patterson, Tiernan B. Kane, COOPER & KIRK, PLLC, Washington, D.C., for Appellants.

Brian E. Frosh, Attorney General of Maryland, Robert A. Scott, Assistant Attorney General, Ryan R. Dietrich, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees.

Judges: Before THACKER and RICHARDSON, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Opinion

[*646] PER CURIAM:

Plaintiffs appeal the district court's order dismissing their *42 U.S.C. § 1983* complaint for failure to state a claim upon which relief may be granted. In this action, Plaintiffs sought to challenge Maryland's Firearm Safety Act's ban on assault weapons as violative of the *Second Amendment*. As Plaintiffs concede, however, their argument is squarely foreclosed by this court's decision in *Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017)* (en banc). "As a panel, we are not authorized to reconsider an en banc holding." *Joseph v. Angelone, 184 F.3d 320, 325 (4th Cir. 1999)*. Accordingly, we affirm the district court's **[**2]** order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

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EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 22-cv-01685-RM

ROCKY MOUNTAIN GUN OWNERS,
NATIONAL ASSOCIATION FOR GUN RIGHTS, and
CHARLES BRADLEY WALKER,

Plaintiffs,

v.

THE TOWN OF SUPERIOR, a Colorado municipality, and
JOE PELLE, in his capacity as Sheriff of Boulder County, Colorado

Defendants.

TEMPORARY RESTRAINING ORDER

Before the Court is Plaintiffs' Motion for a Temporary Restraining Order and for Preliminary Injunction (ECF No. 11). While the Motion seeks a temporary restraining order ("TRO") and a preliminary injunction, at this time, the Court rules only on the request for a TRO. The request for a preliminary injunction will be deferred until the hearing set forth below. The Court grants in part, denies in part, and defers in part the Motion for the reasons below. The Court also sets this matter for a status hearing and a hearing on the Motion for a Preliminary Injunction.

I. BACKGROUND

The Town of Superior, Colorado, one of the defendants in this case[1], adopted an ordinance that went into effect on July 1, 2022, which amended the Superior Municipal Code, Article 9, Section 10, (the "Amended Code") and which regulates the possession, use, transfer, and sale of certain weapons within the Town limits. Town of Superior Ordinance 0-9 Series 2022. Plaintiffs, two nonprofit organizations that represent gun owners, as well as one current resident of Superior, Colorado, filed a Complaint raising one claim for relief. (ECF No. 1.) Plaintiffs assert that the Amended Code violates their rights to keep and bear arms pursuant to the Second and Fourteenth Amendments to the United States Constitution. They seek declaratory judgment holding the provisions unconstitutional on their face or as applied to law-abiding adults. Plaintiffs also filed the Motion at issue, requesting that this Court enter a TRO immediately and that it set this matter for consideration of their motion for a preliminary injunction. (ECF No. 11.)

In its effort to rule on the Motion, the Court has faced two significant challenges. It is not entirely clear to the Court, based on Plaintiffs' Motion, which precise provisions of the Amended Code they wish to challenge. The Court also notes, however, that the Amended Code is not, itself, a model of clarity. Nevertheless, based on the Motion, it appears to the Court that Plaintiffs primarily challenge three of the Amended Code's provisions—section 10-9-40, section 10-9-240, and section 10-9-260.

[1] Defendant Joe Pelle is named in his official capacity as the Sheriff of Boulder County, Colorado. The Town of Superior contracts with the Boulder County Sheriff's Office for public safety purposes and Plaintiffs assert that it is Defendant Pelle who will be responsible for implementing the provisions of the amended Municipal Code.

II. LEGAL STANDARDS AND ANALYSIS

The Court begins its analysis with a discussion of the standard for the granting of a TRO and then proceeds to briefly review the Supreme Court's recent pronouncements on the right to bear arms. The Court then turns to each of the challenged provisions and will discuss them in turn.

A. TRO Standard

To obtain a TRO or injunctive relief in any other form a plaintiff must establish: "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (quotation omitted). The final two requirements merge when the government is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). " It is the movant's burden to establish that each of these factors tips in his or her favor." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003). In cases like this one, in which a TRO would provide the movant all of the relief that could be sought at trial on the merits, an injunction is considered disfavored. *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012). The Court must, therefore, scrutinize such motions more closely and the movant must make a strong showing of both the likelihood of success on the merits and that the balance of harms favors the relief. *Id.* at 1125-26. If the movant, however, demonstrates that "the three 'harm' factors tip *decidedly* in its favor, the 'probability of success requirement' is somewhat relaxed." *Heideman*, 348 F.3d at 1189 (emphasis original).

A TRO is an extraordinary remedy, and therefore the plaintiff must demonstrate a right to relief that is clear and unequivocal. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). A TRO may issue without notice to the opposing party, but its duration is limited to fourteen days unless the Court extends it for an additional fourteen days for good cause or the adverse parties agree to a longer extension. Fed. R. Civ. P. 65(b)(2).

B. The Right to Bear Arms

Beginning with its 2008 decision in the case of *District Columbia v. Heller*, 554 U.S. 570 (2008), through its recent decision in *New York State Rifle & Pistol Assn. v. Bruen*, 142 S.Ct. 2111 (2022), the Supreme Court has issued several opinions clarifying the scope of the right to bear arms as protected by the Second and Fourteenth Amendments to the Constitution. In *Heller*, the Court concluded that the Second Amendment secures the right to bear arms and that an absolute prohibition on the possession of handguns violated that right. 554 U.S. at 573, 636. The Court acknowledged that "[l]ike most rights, the right secured by the Second Amendment is not unlimited. . . .[T]he right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. The Court concluded that the type of weapons protected are "those 'in common use at the time.'" *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). Governments can, the Court noted, restrict certain dangerous and unusual weapons, "those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id.* at 625-627.

In *McDonald v. City of Chicago, Il.*, 561 U.S. 742, 749, 791 (2010), the Court concluded that the Second Amendment "is fully applicable to the States" as incorporated by the Fourteenth Amendment.

Finally, in *Bruen*, the Court concluded that the Second and Fourteenth Amendments protect the right of "ordinary, law-abiding citizens" to "carry handguns publicly for self-defense." 142 S.Ct. at 2122. The Court also concluded that the New York licensing regime at issue in that case, which permitted only licensed individuals to carry guns in public, and which required a showing of a "special need for self-defense" in order to obtain such a license, violated the Constitution. *Id.* The Court ultimately concluded that the Second Amendment specifically "guaranteed 'all Americans' the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions." *Id.* at 2156. The Court directed that a governmental entity seeking to limit or restrict the right to bear arms must meet its "burden to identify an American tradition justifying" the limitation at issue. *Id.* The Court pointed out some such historic restrictions, such as limitations on the intent for which one could carry arms, the manner in which one could carry arms, or certain "exceptional circumstances" under which one could not carry arms at all. *Id.* But it noted that "American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense." *Id.* In its simplest terms, the Second and Fourteenth Amendments prohibit governments from preventing "law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.*

In none of these cases has the Supreme Court expressly adopted one of the traditional levels of scrutiny to be applied when reviewing legislative enactments that impact the right to bear arms. However, in *Bruen*, the Court stated,

> We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the

> individual's conduct falls outside the Second Amendment's "unqualified command."

142 S. Ct. at 2129–30 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49, n.10 (1961)).

It is in front of this backdrop that the Court must consider the provisions of Superior's Amended Code.

C. Section 10-9-40, "Possession and sale of illegal weapons"

Section 10-9-40, entitled "Possession and sale of illegal weapons" prohibits any person from knowingly possessing, selling, or otherwise transferring an "illegal weapon." An "illegal weapon" is defined in the Amended Code as "an assault weapon, large-capacity magazine, rapid-fire trigger activator, blackjack, gas gun, metallic knuckles, gravity knife or switchblade knife." § 10-9-20. The Amended Code also defines an "assault weapon" to include a semi-automatic center-fire rifle which has the capacity to accept a detachable magazine and also has one of a list of enumerated characteristics, a semi-automatic center-fire pistol with any one of certain listed characteristics, a semi-automatic center-fire pistol with a fixed magazine that has the capacity to accept more than ten (10) rounds, all semi-automatic shotguns with any one of a list of characteristics, any firearm that has been modified to be operable as an assault weapon, and any part designed to convert a firearm into an assault weapon. *Id.*

Section 10-9-40 also contains a list of exemptions to which, it states, the prohibition shall not apply. Of particular significance to the Court, though not entirely clear, are the first two listed exemptions. "This Section shall not apply to: (1) Any person holding a valid federal firearms license from possession of any firearm authorized pursuant to such license; [and] (2) A firearm for which the U.S. Government has issued a stamp or permit pursuant to the National Firearms Act." § 10-9-40(b). The Amended Code does not, however, specify the provisions to which it refers in the first exception, related to a "federal firearms license."

The Amended Code further includes a section on "Defenses." § 10-9-190. Among those listed, it states that,

> (e) It is a specific defense to a charge of violating Section 10-9-40 that: (1) 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 valid certificate of ownership."

As in the provision itself, the Defenses section of the Amended Code does not identify what federal permits are available that would provide such a defense to prosecution.

Plaintiffs also submitted a supplement to their Motion which included an e-mail, sent by the Town of Superior, regarding this provision as well as the provision addressing assault weapons. In the email, the Town informed residents that

> [a]s of July 30, 2022, in the Town of Superior, a person may not possess an illegal weapon as defined under Sec. 10-9-20. Per the ordinance, an illegal weapon means an assault weapon, large-capacity magazine, rapid-fire trigger activator, blackjack, gas gun, metallic knuckles, gravity knife or switchblade knife.
>
> . . .
>
> The items listed above should be removed from the Town by July 30, 2022, unless an exemption applies to you in the ordinance. You may dispose of them at the Boulder County Sherriff's Office.

(ECF No. 13-1.)

1. Substantial Likelihood of Success on the Merits

Because this Motion would award Plaintiffs the same relief they would seek after a trial on the merits—i.e. an injunction preventing Defendants from enforcing these provisions—a TRO or preliminary injunction is disfavored and Plaintiffs must make a strong showing on this factor. *Awad*, 670 F.3d at 1126. Even applying such a standard, however, the Court concludes that Plaintiffs have a strong likelihood of success on the merits as to this provision.

As noted above, the Court must first consider whether the Second Amendment's plain language encompasses the conduct at issue in this section. *Bruen*, 142 S.Ct. at 2129–30. In this

case, the provision provides that no person may knowingly possess, sell, or otherwise transfer a so-called "illegal weapon." § 10-9-40(a). As discussed, the Amended Code defines "illegal weapon" to include assault weapons, which in turn are defined to include a number of different semi-automatic weapons. § 10-9-20. Plaintiffs have stated that semi-automatic weapons, as well as magazines that hold more than ten rounds, are commonly used by law-abiding citizens for lawful purposes. Plaintiffs have submitted the Declaration of James Curcuruto (ECF No. 11-3) in support of their assertion. Plaintiffs also cite to a dissent in a Fourth Circuit case in which the Judge sets out a number of statistics that support that proposition. *Kolbe v. Hogan*, 849 F.3d 114, 153-55 (4th Cir. 2017) (Traxler, J., dissenting). For example, Judge Traxler cites a statistic that between 1990 and 2012, "the number of AR- and AK- style weapons manufactured and imported into the United States was 'more than double the number of the most commonly sold vehicle in the U.S., the Ford F-150.'" *Id.* at 153 (quoting the appellate record). A decision of this Court, furthermore, noted that, as the parties in that case had stipulated, "lawfully owned semiautomatic firearms using a magazine with the capacity of greater than 15 rounds number in the tens of millions, although the exact number subject to regulation in Colorado is unknown," and "semiautomatic firearms are commonly used for multiple lawful purposes, including self-defense." *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014), *vacated in part on other grounds and remanded*, 823 F.3d 537 (10th Cir. 2016). The Court concludes, therefore, that the conduct regulated by this provision of the Amended Code, the right to possess, sell, or transfer illegal weapons, (which, as defined, include weapons commonly used by law-abiding citizens for lawful purposes), is covered, at least in part, by the Second Amendment, and therefore that conduct is presumptively protected.

The Court turns, then, to the government's justification for its regulation, and whether it is consistent with the Nation's historical tradition of firearm regulation. At this stage, what the Court has available to it is only the Ordinance itself. The Town of Superior set out at length its justifications for enacting the Amended Code in its preamble. Among the reasons it lists are (1) gun violence's grave threat to public safety, in particular given the Town's population density; (2) the elevated levels of mass shootings in 2020 and 2021, including a shooting in the neighboring city of Boulder, at a King Soopers, where ten people were killed with an assault weapon and large capacity magazine; (3) the fact that such weapons are commonly used in mass shooting events; (4) the particular military and criminal applications of semi-automatic weapons and the fact that the pertinent features of those weapons "are unnecessary in shooting sports or self-defense"; (5) the fact that such weapons are also commonly used in other types of violent crimes, beyond mass shootings; (6) the fact that some such weapons, specifically the AK- and AR-style pistols possess many of the same features, and pose the same threats to public safety, as short-barreled rifles, which are highly restricted; (7) the ease with which users can modify semi-automatic weapons with bump stocks and other accessories to convert them to something resembling fully automatic machine guns; (8) the fact that mass shootings involving large-capacity magazines result in nearly five times as many people shot as those that do not involve such magazines; (9) the fact that federal and state-level prohibitions like the ones the Town was enacting have been shown to have a statistically significant protective effect in lowering the number of high-fatality mass shootings; and (10) that gaps in current law permit people with dangerous histories to purchase such firearms without a background check. Town of Superior Ordinance 0-9 Series 2022.

The Court is sympathetic to the Town's stated reasoning. However, the Court is unaware of historical precedent that would permit a governmental entity to entirely ban a type of weapon that is commonly used by law-abiding citizens for lawful purposes, whether in an individual's home or in public.

The Court also notes that the Town's justifications are somewhat undermined by the other subsections of this very provision. Specifically, subsection (b)(1) provides that "[a]ny person holding a valid federal firearms license from possession of any firearm authorized pursuant to such license" will not be subject to the prohibition of 10-9-40. The following subsection, (b)(2) likewise exempts any "firearm for which the U.S. Government has issued a stamp or permit pursuant to the National Firearms Act." The National Firearms Act, referenced in the latter subsection, provides for permitting such firearms as short-barreled shotguns and rifles, machineguns, and silencers. Each of those weapons is arguably even more deadly than the semi-automatic weapons that the Town of Superior seeks to ban, yet these provisions would permit individuals to possess, sell, or otherwise transfer them.

The Court acknowledges that the nature of this TRO has required it to issue an Order without hearing from Defendants, who may be aware of pertinent historical precedent. Based on the information before it, however, the Court concludes that there is a strong likelihood that Plaintiffs will be successful on the merits as to this provision.

2. *Irreparable Harm*

The most important of the TRO factors is the risk that a plaintiff will suffer an irreparable harm if the TRO is not granted. *First W. Cap. Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1141 (10th Cir. 2017). Most courts, however, "consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Free the Nipple-Fort Collins v.*

City of Fort Collins, Colo., 916 F.3d 792, 805 (10th Cir. 2019). Thus, in the context of a constitutional challenge like this one, that "principle collapses the first and second preliminary-injunction factors, equating likelihood of success on the merits with a demonstration of irreparable injury." *Id.* at 806. Because this challenge involves a constitutional right, and because the Court already concluded that Plaintiffs are likely to succeed on the merits, the Court also concludes that Plaintiffs have established that they will be irreparably harmed if a TRO is not issued.

3. Balance of Harms/Public Interest

Because the government is the opposing party in this case, as previously noted, the final two factors collapse into one. *Nken*, 556 U.S. at 435. When "a constitutional right hangs in the balance, . . . 'even a temporary loss' usually trumps any harm to the defendant." *Free the Nipple-Fort Collins*, 916 F.3d at 806. This is true, in part, because the government "has no interest in keeping an unconstitutional law on the books." *Id.* It is also always in the public interest to prevent the violation of an individual's constitutional rights. *Id.* at 807. Thus, the Court concludes that these factors, too, weigh in favor of Plaintiffs in this case.

Under the circumstances presented here, the Court concludes that it must maintain the status quo until such time as the parties can more fully brief this matter. Therefore, the Court GRANTS the Motion for Temporary Restraining Order as to section 10-9-40.

D. Section 10-9-240, "Assault weapons"

The second section with which Plaintiffs take exception is section 10-9-240, which addresses assault weapons and, specifically, those weapons already possessed by someone in Superior prior to the effective date of the Amended Code, July 1, 2022. The provision provides that a person who legally possessed an assault weapon before July 1, 2022 can obtain a

certificate in order to legally continue to possess the assault weapon. It states that any such certificates must be obtained by December 31, 2022. To qualify for such a certificate, the person must submit to a background check.

The provision goes on to state that even a person with a proper certificate may "[p]ossess 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 using the weapon on a licensed firing range, or traveling to or from one of those locations. § 10-9-240(d)(2). It goes on to state that, while traveling, the weapon must be stored unloaded and in a locked container. *Id.*

The section also prohibits the purchase, sale, or transfer of even properly certified assault weapons unless they are being transferred to a licensed gunsmith for repair or to law enforcement for destruction. § 10-9-240(e). Finally, it provides that any person who acquires an assault weapon by inheritance must either (1) modify the weapon to render it permanently inoperable; (2) surrender the assault weapon for destruction; (3) transfer the assault weapon to a properly licensed firearms dealer; or (4) permanently remove the weapon from the Town of Superior. § 10-9-240(f).

Finally, the provision prohibits the owner of a certified assault weapon from possessing in the town any additional assault weapons purchased after the effective date of the Amended Code, July 1, 2022. § 10-9-240(g).

As noted with regard to Section 10-9-40, the Town of Superior sent information to its residents informing them of this new provision of the Amended Code. Specifically, the Town informed residents that they have until December 31, 2022, in which to obtain a certificate for any assault weapon they legally possessed prior to July 1, 2022.

1. Substantial Likelihood of Success on the Merits

For all of the reasons the Court discusses in its analysis of section 10-9-40, the Court concludes that Plaintiffs are very likely to succeed on the merits of their claim as to this section. While the provision does provide protection for those individuals who already owned assault weapons on July 1, 2022, and provides only a licensing scheme for those individuals, any residents who wish to possess such a weapon but did not obtain one before that date are not permitted to do so now or in the future. Furthermore, the provision makes no allowance for individuals who may have owned such a weapon prior to July 1, 2022, but who do not move to the Town of Superior until after December 31, 2022, the deadline on which to register them. There is no similar legacy provision for such owners. The Court also notes that the provision prohibits any individual who receives such a weapon through inheritance, bequest, or succession, from maintaining it as a working assault weapon. § 10-9-240(f). Such a recipient can only choose between modifying the weapon to render it inoperable, surrendering it for destruction, transferring it to a licensed firearms dealer, or permanently removing the weapon from the Town of Superior. Thus, eventually every weapon that currently qualifies for legacy protection will, upon the death of its owner, lose such protection.

As previously discussed, the Court concludes that the Second Amendment encompasses the conduct addressed by this provision. And, also as previously discussed, the Court is unaware of a historical precedent that would permit the Town of Superior to impose such a regulation that would, in reality, eventually ban all assault weapons. Therefore, despite the Town of Superior's substantial and legitimate concerns, the Court concludes that Plaintiffs are likely to prevail on the merits of their claim as to this provision.

2. Irreparable Harm and the Balance of Harms/Public Interest

For the reasons discussed above in Subpart D, the Court concludes that Plaintiffs have met their burdens with regard to these factors as well. This provision, too, infringes on a constitutional right and therefore no further showing of irreparable harm is required. Similarly, because the public has an interest in ensuring that constitutional rights are protected, and the Town has no interest in maintaining an unconstitutional provision, the balance of Plaintiffs' harms and the public interest weigh in favor of granting the TRO. The Court therefore GRANTS the Motion for a TRO with regard to section 10-9-240.

E. Section 10-9-260, "Open carry of firearms"

The third provision at issue states that "No person shall knowingly openly carry a firearm on or about their person in a public place." § 10-9-260(a). It then carves out a number of exceptions, stating that this provision will not apply to, among others, individuals who are "carrying a concealed handgun . . . with a valid permit to carry issued or recognized pursuant to C.R.S. § 1812-201, et. seq., or the otherwise lawful use of a handgun by a person with a valid permit to carry." § 10-9-260(b)(7). The section does not discuss what, precisely, is required to obtain a permit to open carry a handgun, and Plaintiffs have not addressed any such regulations or statutes in their motion. Individuals are also permitted to openly carry firearms on their own property, business or dwelling or on the property of another with permission of the property owner, and to carry firearms in motor vehicles or other private means of transit. § 10-9-260(b)(4), (5).

1. Substantial Likelihood of Success on the Merits

On this final provision, the Court reaches a different conclusion regarding whether Plaintiffs have met their burden to demonstrate that they are highly likely to succeed on the

merits of their claim. The conduct at issue clearly comes within the coverage of the language of the Second Amendment, as the Supreme Court has held that the right to "bear arms" includes the right to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting; alterations original). The Supreme Court has also concluded that "[t]he definition of 'bear' naturally encompasses public carry." *Bruen*, 142 S.Ct. at 2135. As the Court noted, "confining the right to 'bear' arms to the home would make little sense given that self-defense is 'the *central component* of the [Second Amendment] right itself.'" *Id.* (quoting *Heller*, 554 U.S. at 599; alterations original). And, as previously explained, the Court concludes that this prohibition applies to weapons that are commonly used by law-abiding citizens for lawful purposes.

Unlike the prior provisions discussed in this Order, however, section 10-9-260 appears to include a pair of, in the Court's view, important exemptions. This provision does not apply to (1) "[t]he carrying of a concealed handgun by a person with a valid permit to carry issued or recognized pursuant to C.R.S. § 18-12-201, et seq." and (2) "the otherwise lawful use of a handgun by a person with a valid permit to carry." § 10-9-260(b)(7). The Supreme Court explained in *Heller* that,

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. at 626-27 (citations omitted).

In *Bruen*, furthermore, the Supreme Court considered the licensing scheme enacted by the State of New York. 142 S.Ct. at 2122. Far from concluding that *any* licensing scheme fails under the Second Amendment, the Court's majority alone spent over thirty pages explaining that *one particular requirement* of the scheme failed to pass constitutional muster. *Id.* at 2122-56. Specifically, the Court concluded that the scheme violated the Constitution because it permitted citizens to bear arms "only after demonstrating to government officers some special need" to do so. *Id.* at 2156. Thus, while the Supreme Court has concluded that the Constitution prohibits certain, unreasonable licensing requirements, it has not held that all such requirements are unconstitutional.

In this case, as noted, the Amended Code provides an exemption for those who carry a gun either pursuant to a concealed carry permit *or* pursuant to an otherwise lawful "permit to carry." 10-9-206(b)(7). Plaintiffs have not provided the Court with any argument or information as to why those permit requirements are unreasonable or whether the exemption fails to adequately protect their rights to openly carry weapons. Thus, the Court concludes that Plaintiffs have failed to carry their burden of demonstrating that they are highly likely to prevail on the merits as to this provision.

2. *Irreparable Harm*

Because Plaintiffs have not demonstrated to date that this section likely violates their constitutional rights, they can also not rely on that fact to prove that they will suffer irreparable harm if the Court declines to issue a TRO as to this provision. Plaintiffs, however, offer no other arguments as to why they will suffer irreparable harm absent a TRO. They do not explain why they cannot obtain the necessary permits in order to continue to openly carry

their weapons without fear that an enforcement action will be taken against them. Accordingly, Plaintiffs have not established that they will be irreparably harmed if a TRO is not issued.

3. Balance of Harms/Public Interest

Finally, the Court concludes that the balance of harm and the public interest as to this section also weigh in favor of denying the TRO. The government has a substantial interest in protecting the public in general, and in this case it has apparently sought to do so by ensuring that anyone who openly carries a weapon in the Town of Superior does so only having received an appropriate license. Pursuant to the provisions cited in the Amended Code, for example, an individual can obtain a license to carry a concealed weapon after demonstrating, and submitting proof of, "competence with a handgun" and after meeting other eligibility-related requirements, such as not being ineligible to possess a firearm on account of a status as a previous criminal offender. §§ 18-12-203, 18-12-108, C.R.S. (2021). Plaintiffs have not provided any information to the Court regarding the other permitting mentioned in the Amended Code, nor have they made any argument regarding any alleged inadequacies of these exceptions to the prohibition on the open carrying of firearms.

For all these reasons, the Court DENIES the TRO with regard to section 10-9-260.

III. CONCLUSION

Based on the foregoing, it is

ORDERED that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 11) is **GRANTED IN PART**, **DENIED IN PART**, and **DEFERRED IN PART** as follows:

(1) The Motion for Temporary Restraining Order is GRANTED as to section 10-9-40 of the Municipal Code of the Town of Superior and Defendants are hereby **RESTRAINED** from enforcing the provisions of that section;

(2) The Motion for Temporary Restraining Order is GRANTED as to section 10-9-240 of the Municipal Code of the Town of Superior and Defendants are hereby **RESTRAINED** from enforcing the provisions of that section;

(3) That security as provided for by Fed. R. Civ. P. 65(c) is not required in this matter;

(4) The Motion for Temporary Restraining Order is **DENIED** as to section 10-9-260 of the Municipal Code of the Town of Superior. Defendants will not be restrained from enforcing that section;

(5) The Motion for Preliminary Injunction is **DEFFERRED** and will be heard as set forth below; and it is

FURTHER ORDERED that pursuant to Fed. R. Civ. P. 65(b)(4), any Defendant restrained may apply to this Court to dissolve or modify this Order on two (2) days' notice, or such shorter notice as this Court may allow, but no such application shall serve to suspend this Temporary Restraining Order once effective or stay its terms unless otherwise ordered by this Court; and it is

FURTHER ORDERED that this Temporary Restraining Order shall remain in effect for fourteen (14) days from its effective date, unless it is otherwise modified by the Court;[2] and it is

FURTHER ORDERED that on **July 29, 2022 at 10:30 a.m.** counsel for the Parties shall appear for a status conference on this matter in Courtroom A601 at the Alfred A. Arraj Courthouse, 901 19th Street, Denver, Colorado; and it is

[2] If Plaintiffs seek to extend this Temporary Restraining Order or if Defendants consent to an extension of this Temporary Restraining Order, they shall notify the Court as soon as possible. *See* Fed. R. Civ. P. 65(b)(2).

FURTHER ORDERED that this case is set for a preliminary injunction hearing on **Thursday, August 4, 2022, at 9:00 a.m.** in Courtroom A601 at the Alfred A. Arraj Courthouse, 901 19th Street, Denver, Colorado. The parties shall comply with any requirements for evidentiary hearings in Judge Raymond P. Moore's Civil Practice Standards found at http://www.cod.uscourts.gov/Portals/0/Documents/Judges/RM/Civil%20Practice%20Standards%20-%20March%202015.pdf.

DATED this 22nd day of July, 2022 at 3:00 p.m.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Charlotte N. Sweeney

Civil Action No. 1:22-cv-02113-CNS-MEH

ROCKY MOUNTAIN GUN OWNERS,
NATIONAL ASSOCIATION FOR GUN RIGHTS, and
MARTIN CARTER KEHOE,

Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY,

Defendant.

ORDER

Before the Court is Plaintiffs' Motion for a Temporary Restraining Order (TRO) and for Preliminary Injunction. (ECF No. 14). Defendant opposes the motion for preliminary injunction but does not contest the motion for a TRO. (*Id.*, p. 1). This Order only addresses the motion for a TRO; the motion for a preliminary injunction will be deferred until the Court conducts a hearing. As such, the Court GRANTS the motion for the TRO for the following reasons.

I. FACTS

On August 2, 2022, the Board of County Commissioners of Boulder County adopted Ordinance No. 2022-5, which prohibits the sale and purchase of assault weapons, large capacity

magazines, and trigger activators.[1] (ECF No. 1-1). The Ordinance prohibits a person, corporation, or other entity in unincorporated Boulder County from manufacturing, importing, purchasing, selling, or transferring any assault weapon, large-capacity magazine, or rapid-fire trigger activator. (*Id.*, p. 6). The Ordinance does not prohibit a person, corporation, or other entity from possessing an assault weapon, large-capacity magazine, or rapid-fire trigger activator.

On August 18, 2022, Plaintiffs (consisting of two nonprofit groups and Martin Kehoe) filed an Amended Complaint alleging that the Ordinance violates the Second and Fourteenth Amendments of the United States Constitution and seeking declaratory judgment and any other remedies available under 42 U.S.C. §§ 1983 and 1988. (ECF No. 2, pp. 7-8). Specifically, Plaintiffs challenge only the Ordinance's regulation of assault weapons and large-capacity magazines. (ECF No. 14, pp. 2-3).

II. LEGAL STANDARD

To obtain a temporary restraining order, a plaintiff must establish "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016). The final two requirements (harm to the opposing party and the public interest) merge when the Government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Because injunctive relief is an extraordinary remedy, the plaintiff's right to relief must be clear and unequivocal. *Schrier v. Univ.*

[1] Plaintiffs refuse to use the terms "assault weapon" and "large-capacity magazine" arguing that it is "politically charged rhetoric." (ECF No. 14, p. 2). Regardless, it is the law that is at issue and the Court will use the language and terminology that was used in the Ordinance.

Of Co., 427 F.3d 1253, 1258 (10th Cir. 2005) (citation omitted). The Tenth Circuit specifically disfavors injunctions that will (1) alter the status quo, (2) mandate an affirmative act by the defendant, or (3) afford the movant all the relief that he could recover at the conclusion of a full trial on the merits. *Id.* at 1259. The Tenth Circuit's definition of "probability of success" is liberal, especially where "the moving party has established that the three 'harm' factors tip decidedly in its favor." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). The duration of a TRO issued without notice to the opposing party is limited to fourteen days unless extended for good cause or the adverse party agrees to an extension. Fed. R. Civ. P. 65(b)(2). Plaintiffs' motion falls into the third category of disfavored injunctions, however, this Court notes that Defendant does not oppose the motion for a TRO.

III. ANALYSIS

The Court will first examine the "harm" factors before examining whether Plaintiffs have established a probability of success. *See Otero Sav. & Loan Ass'n v. Fed. Rsrv. Bank of Kansas City, Mo.*, 665 F.2d 275, 278 (10th Cir. 1981).

1. Irreparable Harm

This factor requires the Court to ask whether irreparable injury will befall the movants without an injunction. The Tenth Circuit has noted that the infringement of a constitutional right is enough to satisfy this factor and requires no further showing of irreparable injury. *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 805 (10th Cir. 2019). Here, Plaintiffs allege that their Second and Fourteenth Amendment rights will be violated by the Ordinance and therefore satisfy this factor.

2. Balance of Harms and Public Interest

The next two factors collapse into one because the Government is the opposing party. This analysis requires the Court to balance the irreparable harms identified above against the harm that the preliminary injunction causes to Defendant. "When a constitutional right hangs in the balance, though, even a temporary loss usually trumps any harm to the defendant." *Free the Nipple*, 916 F.3d at 806 (citation omitted). Moreover, it is "always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 807. Because Plaintiffs challenge parts of an allegedly unconstitutional ordinance, the Court finds that the analysis tips in favor of granting Plaintiffs' motion.

3. Substantial Likelihood of Prevailing on the Merits

Because Plaintiffs have established that the harm factors tip decidedly in their favor, the Court's analysis of this fact is "somewhat relaxed." *Heideman*, 348 F.3d at 1189. "The movant need only show questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." *Resol. Tr. Corp. v. Cruce*, 972 F.2d 1195, 1199 (10th Cir. 1992) (internal quotations and citation omitted). Plaintiffs are challenging the constitutionality of Defendant's regulation of assault weapons and large-capacity magazines. The Supreme Court has recently ruled that individuals have a constitutional right to carry a handgun for self-defense outside the home and New York's licensing regime for public-carry licenses impermissibly interfered with that right. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022); *but see id.* at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed

anything that we said in *Heller* or *McDonald v. Chicago* . . . about restrictions that may be imposed on the possession or carrying of guns."). On this admittedly limited record and with a liberal analysis of this factor, the Court finds that Plaintiffs establish a substantial likelihood of success on the merits.

IV. CONCLUSION

Accordingly, it is ORDERED that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 14, is GRANTED IN PART and DEFERRED IN PART.

It is FURTHER ORDERED that the Motion for Temporary Restraining Order is GRANTED as to Ordinance No. 2022-5 regarding assault weapons and large-capacity magazines and Defendant is hereby RESTRAINED from enforcing it as to these categories. Defendant is not restrained from enforcing Ordinance No. 2022-5 as to rapid-fire trigger activators. The security under Rule 65(c) is not required in this case.

The Motion for Preliminary Injunction is DEFERRED, and a hearing will be set after the Court conducts a status conference.

It is FURTHER ORDERED that the parties shall appear for a **status conference** on this matter on **September 8, 2022, at 9:00 a.m.** in Courtroom C204 before Judge Charlotte N. Sweeney at the Byron G. Rogers United States Courthouse.

It is FURTHER ORDERED that under Rule 65(b)(4), the restrained Defendant may apply to this Court to dissolve or modify this Order on two (2) days' notice, or such shorter notice as this Court may allow, but no such application shall serve to suspend this Temporary Restraining Order once effective or stay its terms unless otherwise ordered by this Court.

Finally, it is FURTHER ORDERED that this Temporary Restraining Order shall remain in effect for fourteen (14) days from its effective date unless it is otherwise modified by the Court. If Plaintiffs seek to extend the Temporary Restraining Order or if Defendant consents to an extension of this Temporary Restraining Order, they shall notify the Court as soon as possible. *See* Fed. R. Civ. P. 65(b)(2).

DATED this day 30th of August 2022.

BY THE COURT:

Charlotte N. Sweeney
United States District Judge

EXHIBIT F

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1830

EUGENE MICHAEL FREIN; DEBORAH FREIN,
Appellants

v.

PENNSYLVANIA STATE POLICE; PIKE COUNTY DISTRICT ATTORNEY'S OFFICE; RAYMOND TONKIN; JOHN/JANE DOE I–V

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3:20-cv-00939)
District Judge: Honorable Malachy E. Mannion

Argued: March 23, 2022

Before: BIBAS, MATEY, and PHIPPS, *Circuit Judges*

(Filed: August 30, 2022)

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OPINION OF THE COURT

BIBAS, *Circuit Judge*.

Although police may seize potential evidence using a warrant, they may not keep it forever. Yet they did that here. After a man assassinated a Pennsylvania State Trooper and injured another, troopers seized his *parents*' guns. The government never used the guns as evidence. And eight years after the crime, once the son lost his last direct appeal, the officers still refused to return them—even though the officers do not claim that the parents or the guns were involved in the crime.

Because the parents were never compensated, they have a takings claim. And because they lawfully owned the guns, they have a Second Amendment claim too. But since they had a real chance to challenge the government's keeping the guns, they got procedural due process. So we will affirm in part, reverse in part, vacate in part, and remand.

I. BACKGROUND

Eric Matthew Frein is on death row for cold-blooded murder. In 2014, he ambushed two Pennsylvania State Troopers, killing one and injuring the other. For a while, he evaded capture. Police knew he had used a .308-caliber rifle. So they got a warrant to search the home that he shared with his parents and seize that type of rifle and ammunition.

When they executed the warrant, state police did not find a .308-caliber rifle. Instead, they found forty-six guns belonging to the parents: twenty-five rifles, nineteen pistols, and two shotguns. None was a .308. Even so, the officers got a second warrant and seized them all.

Eventually, the long arm of the law caught Frein. He was arrested, tried, convicted, and sentenced to death. His conviction was affirmed on direct appeal and certiorari was denied. But throughout that long process, the government never used the guns it had seized from the parents—not at trial, at sentencing, or on appeal. Plus, it never arrested or charged the parents and never alleged that any of their guns was involved in the crime. So the parents went to Pennsylvania state court and asked to get their guns back, raising Second Amendment,

takings, due-process, excessive-fines, and state-law objections. In a one-sentence order, their motion was denied.

The parents now sue the state police, its officers, the Pike County District Attorney, and its prosecutors under 42 U.S.C. § 1983. The parents do not challenge the seizure under the Fourth Amendment. But they say that by keeping the guns after the criminal case ended, the government is violating two other parts of the Constitution: the Fifth Amendment's Takings Clause and the Second Amendment's right to "keep … Arms." Plus, they argue that the state's procedure for letting them reclaim their property violated procedural due process.

In response, the officials concede that they never used the guns at trial or on appeal. They claim that they might need the guns as evidence if Frein's state habeas (technically, PCRA) or federal habeas petition yields a new trial, but can only speculate about how they might use them. And they stress that they seized the guns under a valid search warrant. The District Court agreed and dismissed their suit for failure to state a claim.

Now the parents appeal. We review de novo. *Vorchheimer v. Phila. Owners Ass'n*, 903 F.3d 100, 105 (3d Cir. 2018).

II. By Keeping the Parents' Guns After the Criminal Case Ended, the Officials Took Their Property for Public Use Without Compensating Them

Start with the Fifth Amendment claim. The parents correctly charge the government with taking their "private property … for public use, without just compensation." U.S. Const. amend. V. They challenge *not* the searching officers'

initial seizure under a warrant, but the state police's continued retention of the guns once the criminal case ended.

A. The parents have stated a takings claim

The Fifth Amendment's text supports the parents. After all, their guns are "private property." And they were "taken" by the officials. Plus, the parents have never gotten a dime, let alone "just compensation." *Id.*

Finally, the officials pressed the property into "public use." *Id.* The parents' property was seized by public officials (police) to help public prosecutors enforce state law at a public trial. So their claim checks all the Fifth Amendment boxes.

The officials counter that because the parents have tried to get their guns back in state court, they are collaterally estopped from using a takings claim to try again. Not so. The state court's order would preclude this takings claim only if the state court had decided an "identical" issue. *Metro. Edison Co. v. Pa. Pub. Util. Comm'n*, 767 F.3d 335, 351 (3d Cir. 2014). But that one-sentence order said nothing about takings or the government's need to keep the evidence for a possible retrial; it gave no reasoning at all. Nor could claim preclusion have barred this claim, even if the officials had raised it, because Rule 588 motions are the wrong vehicle for seeking just compensation for a taking. *Compare* Pa. R. Crim. P. 588 (authorizing only "the return of the property"), *with Dep't of Transp. v. A & R Dev. Co.*, 2020 WL 1130855, at *6 (Pa. Commw. Ct. Mar. 9, 2020) (explaining that Pennsylvania's "Eminent Domain Code … is the exclusive remedy for a de facto taking").

Next, the government says *Bennis v. Michigan* forecloses this claim. *Bennis* held that the government need not compensate the owner when it has "lawfully acquired" property in reliance on its police powers, rather than "eminent domain." 516 U.S. 442, 452 (1996). No one doubts that the government seized the guns under its literal police powers. And because it had a valid warrant, it says it lawfully acquired the guns too.

But *Bennis* applies only when the government gains title to the property. There, formal ownership of the property had been "transferred by virtue of [a forfeiture] proceeding from [the owner] to the State." *Id.* Here, by contrast, the government has never "lawfully acquired" title to the guns; they still belong to the parents. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (confirming that a taking happens "when[ever] the government physically takes possession of property without acquiring title to it"). Plus, the guns are not forfeitable as contraband, instrumentalities, or proceeds of a crime. They are, at most, potential evidence, and police do not gain title to "mere evidence." *Warden v. Hayden*, 387 U.S. 294, 306 n.11 (1967). So *Bennis* is no obstacle to the parents' takings claim.

B. The warrant does not immunize officials who keep property this long

The officials have one last card to play: they seized the parents' property under a judicial warrant. *See Warden*, 387 U.S. at 301–02 (letting police seize evidence under search warrants). The seizure, the parents agree, was valid. And warrants can shield officials from liability.

But not for this long. Though valid warrants immunize officers who stay within their scope, they are not blank checks. *See Bruce v. Rawlins*, 95 Eng. Rep. 934 (KB 1770) (letting officers be sued for trespass when a search under a writ of assistance turned up nothing); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 586–89 (1999) (noting that trespass liability for valid yet unsuccessful search warrants was "an aspect of common law … well known at the time of the framing"). *But cf.* Fabio Arcila, Jr., *The Death of Suspicion*, 51 Wm. & Mary L. Rev. 1275, 1284 & nn.15–16 (2010) (noting a debate over how much immunity warrants and writs of assistance conferred). They are a limited exception to the rule against taking private property.

And that exception applies narrowly. At the Founding, warrants authorized taking property tied to a particular crime or wrong—hence the Fourth Amendment's requirement of probable cause. So warrants had to "particularly" identify the "things to be seized," and those "things" had to be tied to the crime for which there was probable cause. U.S. Const. amend. IV; *see* Davies at 601, 651–52. And though officers could also take evidence not listed in the warrant, it still needed to be "material as evidence *on the charge made against the prisoner*." *Rex v. Barnett*, 172 Eng. Rep. 563, 564 (CP 1829) (emphasis added); *see also Crozier v. Cundey*, 108 Eng. Rep. 439, 439 (KB 1827) (letting officers seize items not mentioned in the warrant only if those items were "likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant"). If officers exceeded these limits, they would be liable. Thus, at the Founding, warrants immunized officers from trespass suits only for seizing evidence tied to a particular charge.

Because the point of seizing evidence is to use it in a criminal proceeding, the government may hang onto it through that proceeding. *See, e.g.*, Kensington Dist. N. Liberties, Pa., Act of Mar. 28, 1787, 2 Smith 401, §XII (letting the government keep seized gunpowder until a court decided whether it was lawfully possessed). And at the Founding, that proceeding would have ended by the time the conviction was final, not after the prisoner had exhausted collateral review. Indeed, collateral review was historically a civil remedy treated as a matter of legislative grace, not an integral part of the criminal process. *See, e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202, 209 (1830) (Marshall, C.J.) (holding that the writ of habeas corpus "excepts from those who are entitled to its benefit … persons convicted" by "a court of competent jurisdiction"); *see also Brown v. Davenport*, 142 S. Ct. 1510, 1520–21 (2022) (tracing the history of "permissive," not "mandatory," grants of habeas power to courts).

Thus, the warrant immunizes the officers who first seized the guns. But after the conviction became final, the warrant's justification ran out. "It is well settled that the government is permitted to seize evidence for use in investigation and trial, but that such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture." *United States v. Chambers*, 192 F.3d 374, 376 (3d Cir. 1999); *accord United States v. Francis*, 646 F.2d 251, 262 (6th Cir. 1981).

If the government wants to keep the property after the conviction becomes final, it needs some justification. That is why it may keep contraband, property that is illegal to own. It may

also keep the proceeds of the crime or the instrumentalities used to commit it. *See* 21 U.S.C. § 853; *Kaley v. United States*, 571 U.S. 320, 323 (2014). But it may do that only after going through one of two processes. First, it may use criminal forfeiture to get the proceeds or instrumentalities as "an element of the sentence imposed *following conviction*." *Libretti v. United States*, 516 U.S. 29, 38–39 (1995) (second word of emphasis added). In other words, it must first prove the owner's guilt at trial. *United States v. Sandini*, 816 F.2d 869, 873 (3d Cir. 1987).

Or the government may use civil forfeiture to take the property even without convicting the owner. *See United States v. U.S. Currency in the Amount of $145,139.00*, 18 F.3d 73, 75 (2d Cir. 1994). But even then, the government must have at least probable cause to link the property to the crime. *See, e.g.*, *United States v. $10,700.00*, 258 F.3d 215, 222 (3d Cir. 2001) (analyzing 19 U.S.C. § 1615).

The parents' guns fall into none of these categories. The police have never said the guns are contraband. Nor have they tried to forfeit them. A new warrant or other proof of continued compliance with the Fourth Amendment could justify retention for collateral review, say, or a new investigation or prosecution. But the government offers no such justification. When we asked the district attorney's lawyer if there would be probable cause to seize the guns today, he conceded, "I would think not." Oral Arg. Tr. 41:18–42:11. Because the government has not compensated the parents for the guns either, their takings claim may proceed.

We need not decide when, after the criminal case, this liability accrues and whether the plaintiff must first demand return of the property and be refused.

III. By Holding on to the Parents' Guns After the Criminal Case Ended, the Officials Infringed Their Right to Keep Arms

The Second Amendment guarantees "the right of the people to keep and bear Arms." According to the parents, the officials validly *seized* their guns under a warrant, but violated that right by *refusing to return* them. To decide that claim, we ask whether the constitutional text and "this Nation's historical tradition" permit holding on to the guns. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (abrogating *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), which set forth our previous framework for evaluating Second Amendment challenges). They do not. We hold that unless an exception applies, the Second Amendment protects a person's right to keep his lawfully owned guns.

A. The Second Amendment's text protects a person's right to keep his own guns for self-defense

Start with the constitutional text: "keep … Arms." The Second Amendment secures an individual right to "have weapons" on hand. *District of Columbia v. Heller*, 554 U.S. 570, 582, 592 (2008) (defining "keep"). So aside from a few exceptions, the government may not prevent citizens from buying and owning guns. *Id.* at 628–29.

Nor may it barge into a home, seize guns, and keep them beyond the scope of a warrant or other authorized seizure. By

protecting the "keep[ing of] … Arms," the Second Amendment ensures that the People may "retain" their firearms "in [their] custody." *Keep* (defs. 1 & 2), Samuel Johnson, *A Dictionary of the English Language* (1755); *see also Keep* (defs. 1 & 2), Noah Webster, *American Dictionary of the English Language* (1828) ("[t]o hold; to retain in one's power or possession").

The government may not "infringe[]"on this right. U.S. Const. amend. II. That guarantee, of course, forbids "destroy[ing]" the right by banning gun ownership. *Infringe* (def. 2), Samuel Johnson, *A Dictionary of the English Language* (1755). But it also forbids lesser "violat[ions]" that "hinder" a person's ability to hold on to his guns. *Id.* (defs. 1 & 2); *accord Infringe* (defs. 2 & 3), Noah Webster, *American Dictionary of the English Language* (1828). Indeed, the Supreme Court recently instructed us to closely scrutinize *all* gun restrictions for a historically grounded justification. *Bruen*, 142 S. Ct. at 2131–33.

That approach makes sense. With other constitutional rights, we scrutinize not only total bans but also lesser restrictions and burdens. Thus, we may be skeptical of public-health rules that cap how many people may physically attend church, even if the rules do not ban them from worshipping. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). Or an execution protocol that lets a chaplain into the execution chamber but stops him from praying out loud. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1274 (2022). Or a law that criminalizes flag burning without regulating spoken or written words. *See Texas v. Johnson*, 491 U.S. 397, 402–03, 419–20 (1989). Even if the government has not entirely

prevented citizens from speaking or worshipping, its burdens on speech and worship may violate the First Amendment.

Likewise, the Second Amendment prevents the government from hindering citizens' ability to "keep" their guns. Here, retaining the parents' "entire collection of guns" hinders their ability to hold on to it. Oral Arg. Tr. 27:18–19. So the government "infringed" on the parents' right to "keep" their arms when it began holding on to the guns indefinitely. The seizure under a valid warrant immunized the government for the duration of the criminal case. But now that the case is over, the government must either get another warrant or return the property.

B. History confirms the parents' Second Amendment right to get their guns back

The history bears this out. The ratifiers of both the Second Amendment and the Fourteenth Amendment (which secures the right in the states) understood that arbitrary seizures prevent citizens from keeping arms for their self-defense. *Cf. McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the right to keep arms against the states).

The seeds of the Second Amendment were planted centuries ago in England, when King Charles II authorized his officers "to search for and seize all Armes in the custody or possession of any person" whom they considered dangerous. An Act for ordering the Forces in the several Counties of this Kingdom, 13 & 14 Car. II, c.3, § XIII (1662); *see also* Stephen P. Halbrook, *That Every Man Be Armed* 43, 210 n.40 (1984) (noting that a 1670 ban on commoners' owning guns and bows was

used "to justify breaking and entering houses to search for arms"); Joyce Lee Malcolm, *To Keep and Bear Arms* 23–53 (1994) (discussing various seventeenth-century seizures).

After Charles II was deposed, the English Bill of Rights guaranteed the right of Protestants to "have arms for their defence suitable to their conditions, and as allowed by law." Bill of Rights, 1 W. & M., ch. 2, §7, *in* 3 Eng. Stat. at Large 441 (1689); *see* Malcolm, *To Keep and Bear Arms* 115–21 (summarizing parliamentary debates).

Like Englishmen, colonial Americans feared arbitrary gun seizures. In 1774, with tensions rising, the Crown "instituted a general policy of searching places [in the Boston area] for arms and seizing them." Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. Dayton L. Rev. 91, 105 (1989). The Crown's efforts to search and disarm colonists continued over the next two years. Indeed, "[t]he British attempt to seize or destroy the arms and ammunition at Lexington triggered the" Revolutionary War. Halbrook, *That Every Man Be Armed* 62.

Plus, the Fourteenth Amendment's ratifiers understood that it would stop gun seizures. Before the Civil War, black people had been denied citizenship and, with it, the right "to keep and carry arms." *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857). Though *Dred Scott* fell with the Confederacy, Southerners kept seizing the freedmen's guns. *Heller*, 554 U.S. at 615. In Mississippi, white militias "seized every gun and pistol found in the hands of the (so called) freedmen," insisting that state law did not recognize their right to arms. Halbrook, *That Every*

Man Be Armed 117 (quoting a *Harper's Weekly* column); *accord McDonald*, 561 U.S. at 772. So too in South Carolina, where a former federal official reported similar seizures to Congress. H.R. Rep. No. 39-30, pt. 2, at 229 (1866), *quoted in* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. Rev. 1359, 1447–48. As one senator put it, "the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description." Cong. Globe, 39th Cong., 1st Sess. 915 (1866), *quoted in McDonald*, 561 U.S. at 772.

In response, the federal government took pains to explain to freedmen that "no military or civil officer ha[d] the right or authority to disarm" them. Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876*, at 19 (1998) (quoting a Freedmen's Bureau circular). Against this backdrop, Congress passed the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1871 to protect all citizens' constitutional rights, including the right to arms. *Id.* The Fourteenth Amendment was designed to secure that right as well. *McDonald*, 561 U.S. at 772–76.

C. The narrow historical exceptions do not justify holding on to the guns

As this history shows, the government may not ordinarily seize and hold on to weapons. There are few exceptions to that rule, and none applies here.

For instance, the government may confiscate guns from those who have been convicted of serious crimes or committed

dangerous acts. *Binderup v. Att'y Gen.*, 836 F.3d 336, 349 (3d Cir. 2016) (en banc) (plurality opinion), *abrogated on other grounds by Bruen*; *see Heller*, 554 U.S. at 626–27 (dictum). But the parents have neither been convicted of any crime nor committed any dangerous act.

The government may also seize and forfeit guns used to commit a crime. But that does not help the government here either. It first seized the parents' guns under a warrant. But that warrant was tied to the son's trial; as explained, its immunity ran out by the time the parents sued. And the government has not gotten and cannot get another warrant because it admits that there is no probable cause. So the parents had the right to keep the guns that they had lawfully bought and still lawfully owned. When the government took the parents' guns and refused to return them, it burdened that right.

Pushing back, the government cites other authority suggesting that seizures do not burden Second Amendment rights as long as citizens can "retain[] or acquir[e] other firearms." *Walters v. Wolf*, 660 F.3d 307, 318 (8th Cir. 2011); *see also Houston v. City of New Orleans*, 675 F.3d 441, 445 (5th Cir.), *vacated*, 682 F.3d 361 (5th Cir. 2012); *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 571–72 (7th Cir. 2014); John L. Schwab & Thomas G. Sprankling, Houston, *We Have a Problem: Does the Second Amendment Create a Property Right to a Specific Firearm?*, 112 Colum. L. Rev. Sidebar 158 (2012).

The government notes that the Takings and Due Process Clauses more clearly protect private property. *Walters*, 660 F.3d at 317; Schwab & Sprankling at 167–68. So, it suggests, the Second Amendment provides "not a property-like right to

a specific firearm," but just a general right to buy guns. *Houston*, 675 F.3d at 445.

We disagree. We would never say the police may seize and keep printing presses so long as newspapers may replace them, or that they may seize and keep synagogues so long as worshippers may pray elsewhere. Just as those seizures and retentions can violate the First Amendment, seizing and holding on to guns can violate the Second. The Second Amendment may let the government outlaw specific types of weapons—perhaps "dangerous and unusual weapons." *Heller*, 554 U.S. at 627 (dicta); *accord Bruen*, 142 S. Ct. at 2143; Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1548 (2009). But as we have explained, it does forbid unjustifiable burdens on the right to "keep" one's own arms.

And that protection is not redundant of more property-focused protections. For instance, the Takings Clause allows seizures so long as the government pays "just compensation." But the Second Amendment appears to forbid "disarm[ing] private citizens" even if the government compensates those citizens for their property. *Cf. Heller*, 554 U.S. at 591–92. The other guarantees do not prevent this one from applying too.

IV. Pennsylvania Gave the Parents Due Process

Finally, the parents claim that the government violated their due process rights by holding on to their guns. They insist that they were entitled to process before the deprivation. And they say the deprivation happened when the government held on to

their guns after the criminal case, not when it first seized them. Thus, they claim that process was due after seizure but before retention.

We disagree. True, we usually require that the government give process before it deprives people of their property. *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). But if that is not "feasibl[e]," it may give process after the deprivation. *Id.*

The core of due process is an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). The parents got that opportunity here: They sought the return of their property under Pennsylvania Rule of Criminal Procedure 588, the state analogue to Federal Rule of Criminal Procedure 41(g). Doing so entitled them to a hearing at which they could introduce evidence. Pa. R. Crim. P. 588(B). The hearing was conducted by a judge, and the parents had the assistance of a lawyer. They could have appealed that judge's decision, but did not. *See, e.g.*, *Commonwealth v. Durham*, 9 A.3d 641, 642 (Pa. Super. Ct. 2010).

This process was all that was due under *Mathews*. *See* 424 U.S. at 335. The parents' Second Amendment right makes their private interest substantial. But the extensive process minimized the risk of erroneous deprivation. So Pennsylvania's scheme is "constitutionally adequate." *Zinermon*, 494 U.S. at 126.

The parents parry with two out-of-circuit cases, yet neither saves their claim. One case rejected a post-deprivation replevin suit as inadequate. But it did so because Missouri made the gun

owner sue in four counties. *Lathon v. City of St. Louis*, 242 F.3d 841, 844 (8th Cir. 2001). Pennsylvania, by contrast, lets owners simply file a motion. Pa. R. Crim. P. 588. The other case did hold that post-deprivation tort suits are generally inadequate. *Walters*, 660 F.3d at 313. But the Eighth Circuit has since walked that case back. *Mickelson v. Cnty. of Ramsey*, 823 F.3d 918, 928–29 (8th Cir. 2016).

Because it was infeasible to give process before deprivation, and because the process the parents got was robust, we will affirm the District Court on this point.

V. The Parents May Not Seek Damages Against the State Police

The Pennsylvania State Police is an arm of the Commonwealth of Pennsylvania. So the parents may not sue the police for money damages. *Ex parte Young*, 209 U.S. 123, 151 (1908). All they may seek is an injunction. *See id.* at 159; Oral Arg. Tr. 3:25–4:12 (conceding the point).

In reaching this conclusion, we hold that states must specifically authorize takings claims *for compensation*. True, Congress has authorized takings suits against states. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2168, 2176–77 (2019). But that does not mean that plaintiffs may seek compensation. That is because the Takings Clause, as incorporated against the states, did not alter the states' traditional immunity from federal suits, at least if state courts remain open to hear these claims. *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 734–35 (6th Cir. 2022); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) (collecting cases). Pennsylvania's Eminent Domain

Code opens its state courts to takings claims. *Knick,* 139 S. Ct. at 2168. Unless Pennsylvania decides that it prefers to pay damages to compensate owners for takings, federal plaintiffs like the parents may get only a declaration and injunction requiring the state to return their property.

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The police understandably seized the parents' guns in 2014 while a killer was still at large. But he has long since been captured and convicted, and his conviction has been affirmed. The judicial warrant does not authorize keeping the guns past this point. The Constitution requires the officials who are holding on to the guns to pay the parents just compensation and bars them from keeping the guns indefinitely. So we will reverse the District Court's dismissal of the Takings and Second Amendment claims. But because the parents got enough process, we will affirm the dismissal of their procedural-due-process claim.