

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

Civil Action No. 1:18-cv-01211

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

Plaintiffs,

v.

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

Defendants.

**MOTION FOR PRELIMINARY INJUNCTION
Evidentiary Hearing Requested**

NOW COME the Plaintiffs, by and through their counsel, Mountain States Legal Foundation, by Cody J. Wisniewski and Sean P. Smith, and for their Motion for Preliminary Injunction with respect to all Defendants, state and allege as follows:

INTRODUCTION

1. Plaintiffs filed their Complaint herein on May 16, 2018, seeking, *inter alia*, declaratory and injunctive relief against Defendants.

2. The facts and allegations stated in Plaintiffs' Complaint are hereby incorporated into and made a part of this Motion for Preliminary Injunction, as if fully set forth herein. Complaint, Case No. 18-01121, ECF No. 1.¹

3. Defendants have demonstrated a systematic and calculated pattern of behavior designed and intended to deprive Plaintiffs of their constitutionally protected rights and privileges.

4. Defendants acted, and continue to act, under color of state law to deprive Plaintiffs of their constitutionally protected rights and privileges.

5. Without a preliminary injunction, Defendants are presently able and likely to infringe upon Plaintiffs' constitutionally protected rights by enforcement of Ordinance 8245.

6. Implementation of Ordinance 8245 will immediately transform Plaintiffs, and all similarly situated individuals and entities, into criminals.

7. Defendants' enforcement of the Ordinance 8245 not only interferes with Plaintiffs' constitutionally protected rights, but will also cause Plaintiffs significant and irreparable economic loss.

8. Plaintiffs are likely to prevail in this cause against Defendants and have established a *prima facie* case in their Complaint relative to injunctive and declaratory relief.

9. There is no adequate remedy at law to protect Plaintiffs' rights and interests.

¹ Hereinafter, each citation to the Court's electronic record in this Motion refers to the electronic record for Case No. 18-01121, unless otherwise specified.

10. Injunctive relief is necessary to maintain the status quo and prevent additional harm to Plaintiffs during the pendency of this action.

11. This Court has jurisdiction to grant the preliminary relief sought in this motion, pursuant to Federal Rule of Civil Procedure 65.

12. Pursuant to D.C.Colo.LCivR 7.1, Plaintiffs' counsel attempted to confer with counsel for Defendants; however, counsel for Defendants failed or refused to engage in any discussion related to the instant motion.

ANALYSIS

13. The Tenth Circuit Court of Appeals recognizes a four-factor test when determining whether a preliminary injunction is appropriate. A moving party must establish: (1) a substantial likelihood the moving party will prevail on the merits; (2) that the moving party will suffer irreparable injury without such an injunction; (3) that the balance of interests weighs in favor of the moving party; and (4) that the injunction would not be adverse to public interest. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980).

14. If a moving party establishes that factors 2, 3, and 4 weigh in favor of the moving party, "the test is modified, and [the moving party] may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Soskin v. Reinertson*, 353 F.3d 1242, 1247 (10th Cir. 2004) (citing *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002)).

I. Plaintiffs Have Demonstrated A Substantial Likelihood Of Success

15. Plaintiffs have asserted clear violations of the United States Constitution, the Colorado Constitution, and Colorado State Statutes perpetrated by Defendants under color of law.

16. Defendants' actions infringe on Plaintiffs' Second-Amendment-protected rights, under a plain reading of the Second Amendment, and as articulated by the Supreme Court in *District of Columbia v. Heller*, 544 U.S. 570, 624–25 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); and *United States v. Miller*, 307 U.S. 174, 178–179 (1939). *See* Complaint, ECF No. 1, ¶¶ 73–90, 176–88, 230–44, 297–310, 345–58.

17. Ordinance 8245 constitutes a clear infringement on Plaintiffs' right of self-defense and right to keep and bear arms, which is a facial violation of the Second Amendment.

18. Ordinance 8245 prohibits Plaintiffs from acquiring, possessing, and transferring some of the most commonly used self-defense tools in the City of Boulder, in direct violation of the precedent set in *Heller* and *McDonald*. *Heller*, 544 U.S. at 624–26; *McDonald*, 561 U.S. at 767.

19. Ordinance 8245 prohibits Plaintiffs from acquiring, possessing, and/or transferring firearms and magazines that are in common use that could contribute to the common defense, in violation of the precedent set in *Miller*. 307 U.S. at 178–79.

20. Defendants' actions violate Plaintiffs' due process rights, as protected by the Fifth and Fourteenth Amendments. *See* Complaint, ECF No. 1, ¶¶ 91–95, 189–94, 245–52, 311–18, 359–68.

21. Ordinance 8245 constitutes an *ex post facto* prohibition of property that was legally acquired and legally possessed prior to passage of Ordinance 8245. The pieces of property in

question are not contraband but are constitutionally protected firearms and magazines that are now prohibited in the City of Boulder.

22. Defendants' actions violate Plaintiffs' property rights, as protected by the Takings Clause of the Fifth Amendment. *See id.* ¶¶ 96–102, 195–202, 253–62, 319–24, 369–75.

23. Ordinance 8245 constitutes a physical taking of Plaintiffs' property, by requiring Plaintiffs to turn over their lawfully-acquired and lawfully-possessed, but newly-banned property, to the government without any form of compensation.

24. Ordinance 8245 constitutes a regulatory taking, by denying Plaintiffs their essential property rights, including the right to possess and transfer their property, without just compensation.

25. Simply because Ordinance 8245 allows Plaintiffs to choose if they wish to surrender their physical property or surrender their property rights, does not mean the ordinance does not constitute a taking, rather it means Plaintiffs are forced to choose between a physical taking or a regulatory taking.

26. Defendants' actions violate Plaintiff Faye's rights as protected by the Equal Protection Clause of the Fourteenth Amendment. *See id.* ¶¶ 103–11, 380–93.

27. Due to Ordinance 8245, Faye cannot purchase, possesses, or transfer any firearm, regardless of type, simply because of his age, which constitutes arbitrary discrimination and a violation of his right to equal protection under the law.

28. Defendants' actions violate Plaintiffs' First-Amendment-protected rights. *See id.* ¶¶ 112–16, 203–07, 263–68.

29. Ordinance 8245 requires Plaintiffs, should they wish to continue to possess their lawfully-acquired and lawfully-possessed, but newly-banned firearms, to register each firearm with the Boulder City Police Department—providing the government entity with Plaintiffs’ personal information and information about their lawfully-owned, constitutionally protected property.

30. Ordinance 8245 is violative of the First Amendment because it constitutes the government compelling the speech of Plaintiffs.

31. Defendants’ actions violate Plaintiffs’ right to keep and bear arms as protected by the Privileges or Immunities Clause of the Fourteenth Amendment. *See id.* ¶¶ 117–19, 208–11, 269–74, 376–79.

32. The right to keep and bear arms is a privilege of citizenship, which is protected by the Privileges or Immunities Clause of the Fourteenth Amendment.

33. Ordinance 8245 infringes on Plaintiffs’ right to keep and bear arms, and thereby infringes on a privilege guaranteed to Plaintiffs by the Fourteenth Amendment.

34. It is substantially likely, if not certain, that this Court will determine Defendants’ actions violate Plaintiffs’ rights as protected by the Second Amendment, Fifth Amendment, Fourteenth Amendment, and/or First Amendment, under those amendments’ clear and unambiguous meanings.

35. In the alternative, it is substantially likely, if not certain, that this Court will determine Defendants’ actions violate Plaintiffs’ rights as protected by the Second Amendment, Fifth Amendment, Fourteenth Amendment, and/or First Amendment, as articulated by the United States Supreme Court.

36. Defendants’ actions violate Plaintiffs’ right to keep and bear arms as protected by Article 2, section 13 of the Colorado State Constitution. *See id.* ¶¶ 120–25, 212–20, 275–85, 334–44, 394–402.

37. Ordinance 8245 operates as a facial violation of Plaintiffs’ right to keep and bear arms as protected by the Colorado State Constitution.

38. The Colorado Constitution was adopted pursuant to the Enabling Act of 1875, which required the state constitution to “not be repugnant to the constitution [*sic*] of the United States and the principles of the declaration of independence [*sic*].” Enabling Act of 1875, 18 Stat. 474 (1875).

39. The right to keep and bear arms protected by the Colorado Constitution is the same unalienable, natural, and fundamental right protected by the Second Amendment of the U.S. Constitution—the right to self-defense.

40. Ordinance 8245 deprives Plaintiffs of their right to self-defense as protected by the Colorado Constitution.

41. Defendants’ actions violate Plaintiffs’ inalienable rights, as protected by Article 2, section 3 of the Colorado State Constitution. *See* Complaint, ECF No. 1, ¶¶ 126–31, 221–29, 286–96, 334–44, 403–12.

42. Two of the “inalienable rights” protected by the Colorado Constitution are the right to self-defense and the right to defend one’s property. COLO. CONST. Art. 2, § 3.

43. Both the right of self-defense and the right to defend one’s property, in addition to being protected by the Colorado Constitution, are also protected by the Second Amendment.

44. The right of self-defense and the right to defend one's property protect the right of Colorado residents to use the common tools of the time to effectuate that defense.

45. Ordinance 8245 deprives Plaintiffs of their right of self-defense and the right to defend their property as protected by the Colorado Constitution.

46. It is substantially likely, if not certain, that this Court will determine Defendants' actions violate Plaintiffs' rights as protected by Article 2, sections 3 and 13 of the Colorado Constitution.

47. Defendants' actions violate Colorado Revised Statute § 29-11.7-102, which, *inter alia*, prohibits the registration of firearms. *See* Complaint, ECF No. 1, ¶¶ 132–37, 167–75, 413–21.

48. Ordinance 8245 requires Plaintiffs to register their lawfully-acquired and lawfully-owned, but newly-banned firearms with the City of Boulder Police Department, which is prohibited by C.R.S. § 29.11.7-102.

49. Defendants' actions violate Colorado Revised Statute § 29-11.7-103, which prohibits a local government from enacting an ordinance that “prohibits the sale, purchase, or possession of a firearm that a person may lawfully sell, purchase, or possess under state or federal law.” C.R.S. § 29-11.7-103; *see* Complaint, ECF No. 1, ¶¶ 138–45, 167–75, 422–34.

50. Ordinance 8245 violates C.R.S. § 29-11.7-103 by banning the sale, purchase, and possession of firearms and magazines that are legally sold, purchased, and/or possessed under federal law and under Colorado State law.

51. It is substantially likely, if not certain, that this Court will determine Defendants' actions violate one or more Colorado State statutes.

52. Plaintiffs have demonstrated a substantial likelihood of success on the merits in this matter, sufficient to support this Court’s granting of a preliminary injunction in this matter.

53. Even if this Court were to find that Plaintiffs do not have a substantial likelihood of success, the other three factors weigh in Plaintiffs’ favor, and the constitutional and statutory questions arising in this matter are so serious and substantial as to make the issue ripe for litigation and deserving of a more deliberate investigation. *See Soskin*, 353 F.3d at 1247 (citation omitted).

II. Plaintiffs Are Suffering And Will Continue To Suffer Irreparable Injury

54. Plaintiffs are currently suffering and will continue to suffer irreparable injuries should this Court decline to grant this Motion for Preliminary Injunction.

55. “When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (citing 11A Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice and Procedure* § 2948.1 (2013)); *accord Pinson v. Pacheco*, 397 Fed. Appx. 488, 491–92 (10th Cir. 2010).

56. Given that Plaintiffs raise substantial constitutional claims, no further showing of irreparable injury is necessary. *See Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (Like the First Amendment, “[t]he Second Amendment protects similarly intangible and unquantifiable interests. *Heller* held that the Amendment’s central component is the right to possess firearms for protection. Infringements of this right cannot be compensated by damages” (citing *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 867 (“[V]iolations of First Amendment rights are presumed to constitute irreparable injuries . . .” (citations omitted)))).

57. Plaintiffs must choose to either exercise their constitutionally and statutorily protected rights and be deemed criminals by the Defendants, or to surrender their rights in order to comply with the requirements imposed by Defendants.

58. Should Plaintiffs choose to comply with Ordinance 8245, and this Court determines Defendants' actions violate the U.S. Constitution, the Colorado State Constitution, and/or Colorado State statute, then Plaintiffs will be in a substantially worse position than they were prior to the Defendants' actions.

59. Absent this Court's enjoinder of Defendants, Plaintiffs are required to destroy, surrender, remove, sell, transfer, or register their legally-purchased and lawfully-owned, but newly-banned firearms, which actions could not be undone after successful litigation.

60. Absent this Court's enjoinder of Defendants, Plaintiffs are required to destroy, surrender, remove, sell, or transfer their legally-purchased and lawfully-owned, but newly-banned magazines, which actions could not be undone after successful litigation.

61. Plaintiff General Commerce, LLC, d/b/a Bison Tactical ("Bison Tactical"), stands to suffer extreme and irreparable economic injuries should this Court not grant Plaintiffs' motion for preliminary injunction.

62. Bison Tactical currently possesses more than \$80,000.00 worth of firearms that have already been paid for by customers, which it can no longer legally transfer to those same customers within the City of Boulder.

63. If this Court does not enjoin Defendants' enforcement of Ordinance 8245, Defendants, along with Bison Tactical, may be liable to the customers for Bison Tactical's inability to legally transfer the firearms for which its customers have already paid.

64. Bison Tactical currently has thousands of dollars of merchandise that it acquired and possesses legally, but now cannot otherwise sell or transfer, because it is located within Boulder city limits.

65. Given the uncertainty arising out of Ordinance 8245, regarding what is and is not prohibited in the City of Boulder, Bison Tactical's economic injuries also extend to any potential lost business due to the actual and perceived effects of Ordinance 8245 by its current and/or potential customers.

66. Bison Tactical is currently losing and will continue to lose business to persons who reside outside of Boulder city limits who would otherwise make purchases at Bison Tactical's retail location in the City of Boulder but for the sale and transfer prohibition contained in Ordinance 8245.

67. Plaintiff Faye can no longer exercise his unalienable, natural, and fundamental right to self-defense in his home due to Defendants' actions and Ordinance 8245.

68. Faye can no longer legally possess any firearm within the Boulder city limits, where he resides.

69. Defendants' deprivation of Faye's unalienable, natural, and fundamental right to self-defense already constitutes an irreparable injury, which continues each day Defendants are allowed to enforce Ordinance 8245.

70. Plaintiffs have demonstrated irreparable injuries to their constitutionally protected rights and economic injuries that will continue should this Court decline to grant Plaintiffs' Motion for Preliminary Injunction.

III. The Balance Of Interests Weighs In Favor Of Plaintiffs

71. Plaintiffs have suffered violations of their constitutionally and statutorily protected rights, as well as substantial economic injuries, due to Defendants' actions perpetrated under color of law.

72. Defendants have not and cannot demonstrate a significant or legitimate interest in immediately enforcing Ordinance 8245.

73. Ordinance 8245 only applies within the city limits of Boulder and does not, and cannot, actually prevent any person from purchasing a newly-banned firearm or magazine outside the City of Boulder and bringing it into the city.

74. Defendants cannot demonstrate any ability to actually enforce Ordinance 8245, a factor which weighs against the need for immediate enforcement.

75. Even if Defendants could demonstrate a significant or legitimate interest, that interest could not outweigh the interests of Plaintiffs in exercising their constitutionally and statutorily protected rights.

76. Plaintiffs stand to suffer substantial economic losses if this Court declines to grant this Motion for Preliminary Injunction, while Defendants will suffer no economic losses.

77. Plaintiffs stand to suffer a loss of their constitutionally and statutorily protected rights if this Court does not grant this Motion for Preliminary Injunction, while Defendants will not suffer any loss of right.

78. Defendants will stand to save a significant amount in administrative and enforcement costs should this Court grant Plaintiffs' Motion for Preliminary Injunction, another factor weighing against Defendants.

79. The harm to Plaintiffs' constitutionally protected rights in the absence of a preliminary injunction far outweighs any illusory harm to Defendants that could result from this Court granting Plaintiffs' Motion for Preliminary Injunction.

IV. The Injunction Would Not Be Adverse To The Public Interest

80. The public interest weighs in favor of this Court granting this Motion for Preliminary Injunction and enjoining Defendants from enforcing Ordinance 8245.

81. In general, public interest concerns are clearly implicated when a government entity has violated a person's constitutionally protected rights. *See Awad v. Ziriya*, 670 F.3d 1111, 1132 (10th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (citations omitted)); *accord Oklahoma Corrections Professional Ass'n Inc. v. Doerflinger*, 521 Fed. Appx. 674, 678 (10th Cir. 2013).

82. The rights violated by Ordinance 8245 are unalienable, natural, and fundamental and are protected by the U.S. Constitution, the Colorado Constitution, and Colorado State statutes.

83. The general public, along with Plaintiffs, have a clear interest in continuing to exercise their unalienable, natural, and fundamental rights, without being deemed criminals by Defendants.

84. Defendants cannot assert any legitimate public interest in favor of immediately enforcing Ordinance 8245 against Plaintiffs and the residents of the City of Boulder.

85. Defendants cannot demonstrate that Ordinance 8245 is enforceable or that it would prevent any lawfully-acquired and lawfully-possessed, but newly-banned, firearms or magazines from remaining in or entering into Boulder city limits.

86. Plaintiffs' interest in exercising their rights to self-defense and to keep and bear arms, as protected by the U.S. Constitution, the Colorado Constitution, and Colorado State statute, clearly outweighs any interest Defendants may have in attempting to enforce their unconstitutional and unenforceable ordinance.

WAIVER OF BOND

87. This Court has the discretion to waive the security requirements of FRCP 65(c) or require only a nominal bond. *Pharmaceutical Soc'y of N.Y. v. Dep't of Soc. Serv.*, 50 F.3d 1168, 1174 (2nd Cir. 1995); *Crowley v. Local 82 Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers*, 679 F.2d 978, 999 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984); *Temple University v. White*, 941 F.2d 201, 220 (3rd Cir. 1991).

88. Where a preliminary injunction would merely require compliance with the Constitution, no bond is required. *Doe v. Pittsylvania County, Va.*, 842 F.Supp.2d 927, 937 (W.D. Va. 2012) (fixing the bond at zero dollars where an injunction merely required compliance with the Constitution); *accord Campos v. I.N.S.*, 70 F.Supp.2d 1296, 1310 (S.D. Fla. 1998).

89. Plaintiffs are seeking to vindicate their constitutionally protected rights and to this end they are represented pro bono by a nonprofit organization, so bond waiver or a minimal bond is appropriate. *See Natural Resources Defense Council, Inc. v. Morton*, 337 F.Supp. 167, 168–69 (D.D.C. 1971) (requiring the plaintiffs to post security in the case at bar would have the effect of denying the parties' ability to obtain judicial review); *accord Environmental Defense Fund v. Corps of Engineers (Tennessee-Tombigbee)*, 331 F.Supp. 925 (D.D.C. 1971) (requiring a bond in the amount of \$1.00); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (requiring a bond in the amount of \$100.00).

90. Since Plaintiffs have demonstrated a high likelihood of success on the merits, a bond waiver is appropriate. *See People of State of Cal. Ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1326 (9th Cir. 1985), *amended on other grounds*, 775 F.2d 998 (9th Cir. 1985).

91. Defendants do not stand to suffer any economic losses should they be enjoined from enforcing Ordinance 8245, so a bond waiver would be appropriate.

CONCLUSION

92. Ordinance 8245 requires Plaintiffs to destroy, surrender, remove, sell, or transfer their constitutionally-protected property. Therefore, even if Plaintiffs are successful in litigating the merits of this case, they will still have suffered a permanent loss of their constitutionally-protected property. The only means of preventing such an egregious injury is for this Court to preliminarily enjoin Defendants' enforcement of Ordinance 8245.

93. Plaintiffs have demonstrated a substantial likelihood of success on the merits, irreparable injuries, that the balance of interests weighs in favor of Plaintiffs, and that an injunction would not be adverse to the public interest.

94. Plaintiffs have demonstrated that the relevant factors weigh in favor of this Court granting Plaintiffs' motion for a preliminary injunction.

WHEREFORE, Plaintiffs respectfully pray for the following relief:

A. That Defendants be temporarily prohibited, restrained, and enjoined from enforcing any provision of Ordinance 8245, including but not limited to the confiscation and registration of lawfully owned and possessed self-defense tools;

B. That Defendants be temporarily prohibited, restrained, and enjoined from interfering with the ongoing business operations of Plaintiffs; and

C. For such other and further relief as this Court deems equitable and proper.

DATED this the 12th day of June 2018.

Respectfully Submitted,

/s/ Cody J. Wisniewski

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2018, I electronically filed the foregoing with the Clerk of Court using this Court's CM/ECF system, which will send notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D.C.COLO.LCivR 5.1(d).

/s/ Cody J. Wisniewski

Cody J. Wisniewski

MOUNTAIN STATES LEGAL FOUNDATION