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## State and Municipal Regulation of Firearms in Colorado

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*Contents of this presentation reflects the view of the presenter, not of CML.*



# In today's session we will cover

- Preview of upcoming activity in the U.S. Supreme Court
- An overview of important federal and state precedents
- The history of firearms preemption under Colorado state law
- SB 21-256 and the legal context for municipal regulation of firearms going forward



# A study in contrasts . . .

## Second Amendment (1791)

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

## Colo. Const. (1876)

“The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.”



# Landmark ruling just ahead

- Pending in the Supreme Court: *New York State Rifle and Pistol Association v. Bruen*, 818 Fed. Appx. 99
- NYC concealed carry law requires “proper cause” to qualify for a permit (Unlike Colorado law)
- **Explicit Issue:** “Whether the state’s denial of petitioners’ applications for concealed carry licenses for self-defense violated the Second Amendment?”
- **Implicit issue:** What is the proper standard of review for any ordinance restricting Second Amendment rights?
- Oral argument to occur 11/3/21



# *Heller and McDonald set the table*

- *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008);  
*McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010)
  - SCOTUS holds for the first time that the Second Amendment secures a personal right to bear arms
  - Each case struck down a municipal ordinance severely restricting the right to possess handguns in the home
  - Court stopped short of declaring Second Amendment rights “fundamental” or requiring “strict scrutiny” of any laws restricting firearms, but . . .
  - Rational basis not enough; some form of intermediate scrutiny required; a “freestanding ‘interest balancing’ approach” is not appropriate



# *Heller and McDonald: Key quotes* from Justice Scalia

- The personal right to bear arms secured by the Second Amendment is not “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”
- These rulings were not intended to cast doubt on many “longstanding regulatory measures” such as “laws forbidding the carrying of weapons in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”



# *Heller and McDonald: Limited impact in Colorado (so far)*

- Colorado citizens already enjoyed an expansive right to keep and bear firearms for personal self-defense under the Colorado Constitution.
- No state or municipal law in Colorado nearly as restrictive as the D.C. and Chicago ordinances that were struck down.
- Colorado courts already employed an intermediate standard of review when firearms laws were challenged.
- Since 2010, no state or municipal firearms law has been successfully challenged under the Second Amendment



# ***Heller and McDonald: “Assault weapons” and large capacity magazines (LCMs)***

- State and federal courts throughout the U.S. have tended to uphold restrictions and prohibitions on firearms with a high rate of fire since 2010.
- Key exception in the Ninth Circuit: *Miller v. Bonta* striking down California’s 1989 “assault weapon” ban; ruling stayed by a circuit panel on 6/21/21.
- Key question: are high-capacity semi-automatic weapons now in such “common use” for personal self-protection, they should be analyzed the same as the handguns in *Heller* and *McDonald*?





# Second Amendment challenges to “assault weapon” and LCM laws in Colorado

- In 2013 the Colorado General Assembly adopted HB 13-1224, imposing a 15-round limit on LCMs
- A Second Amendment challenge to that law was dismissed by the Tenth Circuit on a finding that the plaintiffs (particularly county sheriffs) lacked standing. *Colorado Outfitters Assn. v. Hickenlooper*, 823 F. 3d 537 (10<sup>th</sup> Cir. 2016).
- In 2018 the City of Boulder adopted two ordinances restricting assault weapons and LCMs (10-round limit).
- A Second Amendment challenge to the ordinances was dismissed by the Tenth Circuit on abstention principles (pointing to pending state law challenges to the ordinances on preemption grounds). *Caldara v. City of Boulder*, 955 F.3d 1175 (10<sup>th</sup> Cir. 2020).



# Other Second Amendment Opinions in the Tenth Circuit since 2010

- ***Locational restrictions on where firearms may be carried.*** The court upheld a federal regulation prohibiting any firearm from being brought onto the grounds of a post office. *Bonidy v. United States Postal Service*, 790 F.3d 1121 (10<sup>th</sup> Cir. 2015)
- **Out-of-state resident does not have a right to demand a Colorado CCW permit when traveling to Colorado.** *Peterson v. Martinez*, 707 F.3d 1197 (10<sup>th</sup> Cir. 2013)



# Firearms rights under the Colorado Constitution (Art. II, Sec. 13)

- Three important appellate decisions to know:
  - *City of Lakewood v. Pillow*, 501 P.2d 744 (Colo. 1972)
  - *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994)
  - *Rocky Mountain Gun Owners v. Polis*, 467 Colo. 2020)



# *City of Lakewood v. Pillow*

- Colorado Supreme Court strikes down city firearms ordinance for being so broad as to violate state constitutional rights.
- The Lakewood ordinance essentially prohibited anybody (except law enforcement) from carrying a loaded firearm outside the home for self-defense.



# *Robertson v. City and County of Denver*

- Supreme Court upholds a 1989 ordinance restricting “assault weapons” and imposing a 20-round LCM limit.
- Court rejects a “strict scrutiny” standard for evaluating the constitutionality of firearms restrictions; applies a “reasonableness” standard instead.
- “we have no hesitancy in holding that the ordinance does not impose such an onerous restriction on the right to bear arms as to constitute an unreasonable or illegitimate exercise of the state's police power: there are literally hundreds of alternative ways in which citizens may exercise the right to bear arms in self-defense.”



# *Rocky Mountain Gun Owners v. Polis*

- Supreme Court upholds the 2013 law limiting LCMs to 15 rounds, while clarifying the standard of review for state constitutional challenges under the “reasonable exercise test first articulated in Robertson:
    - Does the law serve a legitimate government purpose under the police power?
    - Is there a reasonable fit between the purpose and the means?
    - Does the law serve an actual purpose, not just a conceivable purpose?
    - Does the law stop short of rendering the constitutional right to bear firearms for self-defense a nullity?
    - 467 P.3d 314 (Colo. 2020)
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# The story of firearms preemption in Colorado

- In the ensuing slides, we will tell the preemption story in four chapters:
  - Regulation of firearms in vehicles
  - Concealed handgun permits
  - Omnibus preemption legislation in 2003
  - Partial relief from preemption in 2021



# Right to carry a loaded handgun in a private vehicle

- 2000: Municipalities prohibited from regulating firearms in private vehicles traveling “into or through” the municipality. C.R.S. 18-12-105
- 2003: Statute amended to apply to vehicles travelling “within” the municipality, and to clarify that no qualification or permit is required for adults to carry loaded handguns in vehicles.. C.R.S. 18-12-214(1)(a).
- Long guns must be unloaded and packed away.
- No right to carry firearms on public transportation (without a concealed carry permit) C.R.S. 18-9-118.





# Concealed handgun permits

- Prior to 2003, municipal police chiefs (along with county sheriffs) were vested with authority to issue concealed carry permits within their jurisdiction.
- The decision to issue permits was highly discretionary—a “*may issue*” system.
- As a practical matter, many police chiefs rarely if ever issued permits, or did so only when a special need for a permit could be shown. See: *Miller v. Collier*, 878 P.2d 141 (Colo. App. 1994).



# Concealed handgun permits

- Via the adoption of SB 03-025 in 2003, Colorado switched to a “*must issue*” system of concealed handgun permitting, codified at 18-12-201, et seq.
  - If an applicant meets the criteria under the statute, they have a right to receive a permit. *Copley v. Robinson*, 224 P.3d 431 (Colo. App. 2009)
  - A statewide system of permitting, albeit one that is administered by 64 individual county sheriffs, with no role for municipal police departments.
  - Very broad authority for permit holders to carry their handgun in public places in Colorado, including state-owned and municipal property. *Regents of the University of Colorado v. Students for Concealed Carry on Campus*, 271 P.3d 496 (Colo. 2012)



# Concealed handgun permits

- Currently an estimated 400,000 to 500,000 Colorado citizens exercise their constitutional right to carry a firearm in public via a concealed handgun permit.
- No way to know a precise number because state law does not create a central database of all permit holders statewide.
- Number of permit applications increased substantially in the second half of 2020



# Omnibus preemption legislation in 2003

- SB 03-025 declared the entire field of firearms regulation to be a matter of statewide concern, in the interest of enforcing consistency on local governments. Specific components:
  - Reinforced right to carry firearms in private vehicles
  - Prohibited municipalities from maintaining records of persons who purchase or transfer firearms
  - Prohibited municipal regulation of types of firearms that a person may lawfully possess under state and federal law.
  - Affirmatively allowed municipalities to regulate “open carry” of firearms, but only in a building or “specific area” where signs are posted



# Denver's home rule challenge to SB 03-025

- Immediately after the adoption of SB 03-25, Denver filed a civil action seeking declaratory and injunctive relief seeking a judicial ruling on the continuing validity of seventeen different city firearms laws and regulations.
  - The litigation had two objectives:
    - A determination of whether the preemption language in SB 25 even applied to certain kinds of city firearms laws.
    - A determination of whether, even if the new state law applied, the ordinance in question addressed a matter of purely “local concern” and therefore should survive the state’s attempt to preempt the law.
  - Denver did not mount a home rule challenge to the new concealed handgun permit statute adopted in 2003.
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# Denver's home rule challenge to SB 03-025

- The Attorney General stipulated that SB 25 did not affect the following Denver ordinances and regulations:
  - Display and flourishing of firearms
  - Firing and discharge of weapons within city limits
  - Record keeping of firearms sales by dealers and pawnshops
  - Furnishing firearms to intoxicated persons
  - Regulation of firearms associated with licensed security guards
  - Prohibition on sales of firearms in residential zone districts
  - City personnel regulations prohibiting employees from bringing firearms to work
  - Airport regulations prohibiting firearms in restricted areas



# Denver's home rule challenge to SB 03-025

- The Denver District Court ruled that the following aspects of Denver's laws were preempted by SB 03-025 and/or SB 03-024:
  - Firearms in vehicles (to the extent the city ordinance was more restrictive than state law)
  - Complete ban on furnishing firearms to minors (to the extent that the ordinance did not reflect the exceptions contained in state law)
  - Complete ban on firearms in city-owned parks and open spaces (to the extent the ordinance did not reflect an exception for concealed handgun permit holders)



# Denver's home rule challenge to SB 03-025

- The Denver District Court ruled that the following Denver ordinance were not preempted by SB 25, based on Denver's home rule authority to legislative on matters of local concern:
  - The 1989 ban on assault weapons and LCMs that had previously been upheld in the *Robertson* case.
  - Citywide restrictions on “open carry” of firearms
  - General prohibition on firearms in parks (applicable to anyone other than concealed carry permit holders)
  - “Safe storage” law





# Denver's home rule challenge to SB 03-25

- When the Denver case was cross-appealed by both the city and the state to the Colorado Supreme Court, the court deadlocked 3-3. *State v. City and County of Denver*, 139 P.3d 635 (Colo. 2006)
- The result of the tie was to affirm the decision of the district court; but the district court ruling has no binding precedential effect in any other judicial district.
- Denver subsequently amended the local firearms ordinances that were deemed to be preempted by state law, and substantially simplified its “assault weapon” and LCM ordinance which remains on the books.



# Preemption challenge to Boulder firearms laws

- In 2018 the City of Boulder adopted two ordinances restricting “assault weapons” and LCMs
- In a state court challenge, the district court ruled in March of this year that the Boulder ordinances were preempted under the 2004 statute.
- Key differences from the earlier Denver case:
  - Subsequent home rule decisions by the Colorado Supreme Court have trended against cities on matters of mixed state and local concern.
  - In 2013 the state adopted an LCM law that “occupied the field” and directly conflicted with Boulders’ ordinance.



# New state firearms laws in 2021

- **SB 21-078:** Duty to report to law enforcement lost or stolen firearms
- **HB 21-1106:** Safe storage of firearms in the home
- **HB 21-1255:** Firearms and domestic abuse protection orders
- **HB 21-1298:** Expanded background checks for certain firearms transfers
- **HB 21-1299:** Creation of Office of Gun Violence Prevention
- **SB 21-256:** Local regulation of firearms



# SB 21-256: Partial relief from the 2003 preemption statutes

- Motivated in large part by events in Boulder, this legislation revisited the preemption laws adopted in 2003. Key features:
  - Substantially modifies the original legislative declaration by providing that firearms regulation is a matter of “mixed” concerns
  - Affirmatively authorized local governments to regulate firearms and firearms components, unless local regulation is expressly prohibited by another statute.
  - Substantially broadens the authority of state and local governments to prohibit concealed handgun permit holders from bringing handguns into “a building or specific area” where the prohibition is posted. (I.e. reverses the *Board of Regents* case from 2012)



# SB 21-256: Partial relief from the 2003 preemption statutes

- Key caveats in the new state law:
  - Local governments are still preempted where another state law expressly precludes local regulation, e.g. firearms in vehicles
  - Local governments are prohibiting from adopting firearms laws and policies that are less strict than state law
  - The CBI cannot consider violations of local firearms laws when doing background checks
  - Concealed carry permit holders can be subject to only a civil penalty and a requirement to “leave the premises” if they enter public property in violation of a posted prohibition.
  - Criminal penalties for violating a local firearms ordinance can only be imposed upon “a person who knew or reasonably should have known that the person’s conduct was prohibited.” Compare: C.R.S. 18-1-504.



# Questions or comments?

*Thanks for attending today!*



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