

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue, 4th Floor Denver, Colorado 80203</p>	<p><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p>
<p>Appeal from: Denver District Court Judge Lawrence Manzanaras, 03 CV 8609</p>	
<p>Plaintiff – Appellant: John A. Sternberg</p> <p>v.</p> <p>Defendant – Appellees: City and County of Denver, a home rule Municipal corporation of the State of Colorado; and John Hickenlooper, as Mayor of the City and County of Denver</p>	<p>Case Number:</p> <p>05 SA 22</p>
<p>Attorney for <i>Amicus Curiae</i>:</p> <p>Thomas C. "Doc" Miller, #22652 24 East Ellsworth Avenue Denver, Colorado 80209 Telephone: 720.422.6502 Facsimile: 303.733.0931</p>	<p>Brief of the Rocky Mountain Gun Owners as Amicus Curiae</p>

TABLE OF CONTENTS

Interest of <i>Amicus Curiae</i>	1
Issues presented	1
Statement of the Case	2
Summary of the Argument	10
Arguments	13
I. The district court failed to consider an <i>ad hoc</i> review of fact and policy in the totality of circumstances when concluding that D.R.M.C. 38-130 was a matter of local concern.	13
II. The legislative declaration relied upon in enacting D.R.M.C. 38-130 was based upon false premises, as opposed to the General Assembly’s factual concerns, in the legislative declaration requiring statewide uniformity in firearms regulation.	16
III. The district court failed to adequately address and resolve the key factors supporting statewide preemption of Denver’s firearms ordinances.	22
IV. Article II §§ 3 and 13 of the Colorado Constitution grant all citizens rights that take precedence over a home rule municipality’s right of self government.	25
V. Denver’s ongoing enforcement of the assault weapons ban violates citizens’ rights.	28
Conclusion	32

TABLE OF AUTHORITIES

CASES

<i>City of Commerce City v. State</i> , 40 P.3d 1273 (Colo. 2002)	11, 14
<i>City and County of Denver v. Quest, Corp.</i> , 18 P.3d 748 (Colo. 2001) ..	11, 14
<i>City and County of Denver v. State</i> , 788 P.2d 764 (Colo. 1990)	10, 14
<i>City of Golden v. Ford</i> , 141 Colo. 472, 348 P.2d 951 (Colo. 1960)	25, 31
<i>City of Lakewood v. Pillow</i> , 180 Colo. 20, 501 P.2d 744 (Colo. 1972)	28
<i>City of Northglenn v. Ibarra</i> , 62 P.3d 151 (Colo. 2003)	12
<i>Miller v. Collier</i> , 878 P.2d 141 (Colo. App. 1994)	5, 10, 17
<i>Olin Mathieson Chem. Corp. v. Francis</i> , 134 Colo. 160, 301 P.2d 139 (Colo. 1956)	26
<i>People v. Ford</i> , 193 Colo. 459, 568 P.2d 26 (Colo. 1977)	26, 27
<i>People v. Germany</i> , 674 P.2d 345 (Colo. 1983)	30-31
<i>People v. Nothaus</i> , 147 Colo. 210, 363 P.2d 180 (Colo. 1961)	26
<i>Robertson v. City and County of Denver</i> , 874 P.2d 325 (Colo. 1994)	6, 12, 14, 20, 23, 27
<i>Trinen v. City and County of Denver</i> , 53 P.3d 754 (Colo. App. 2002)	8, 10-11, 27
<i>Town of Telluride v. Lot Thirty-Four Venture, L.L.C.</i> , 3 P.3d 30 (Colo. 2000)	14, 22-22

CONSTITUTIONS

Colo. Const. Art. II § 3	9, 13, 24, 25, 32
Colo. Const. Art. II § 6	13, 30
Colo. Const. Art. II § 13	9, 13, 24, 25, 27, 32
Colo. Const. Art. II § 16	13, 30
Colo. Const. Art. II § 25	13, 30
Colo. Const. Art. XX	4
U.S. Const. amend. XIII	24

COLORADO STATUTES

§ 16-11-309(8)	24
§ 18-1.3-406(7)(a) and (b)	24
§ 18-12-201, <i>et. seq.</i> (alternatively 03 SB 24)	3, 6, 9
§ 18-12-201(1)(c)	6, 12

§ 29-11.7-101 *et. seq.* (alternatively 03 SB 25)
 3, 9, 12, 15, 24, 26, 29, 32, 33

U.S. CODE

36 U.S.C. 40721 *et. seq.*19
 36 U.S.C. 40729(3)19
 42 U.S.C. 19836

DENVER REVISED MUNICIPAL CODE

Section 38-117(a)6
 Section 38-117(b).....6
 Section 38-120(c)30
 Section 38-130.....1, 2, 8, 10, 16, 17, 18, 19, 24, 27, 28, 29, 32
 Section 38-130(b)(1)(c).....7
 Section 38-130(e)(3)(a).....29
 Section 38-130(e).....31
 Section 38-130(h)(1)(c).....7
 Section 38-130(h)(1)(i).....7
 Section 38-130(h)(1)(l).....7
 Section 38-130(h)(1)(p).....7
 Section 38-130(h)(2)(e).....7
 Section 38-130(h)(3)(b).....7
 Section 38-130(h)(3)(c).....7
 Section 38-130(h)(5).....7
 Section 38-130(k).....31- 32

OTHER AUTHORITIES

Miller, Thomas C., *Driving through Denver and Defending the Gun*, Trial
 Talk, Vol. 46, Num.1, January, 1997 (attached as exhibit D).....6, 8

Comes now Rocky Mountain Gun Owners, through its lawyer, Thomas C. "Doc" Miller, pursuant to Rule 29, Colo.App.R., and files this Brief as amicus curiae in support of the appellant, John A. Sternberg.

INTERESTS OF *AMICUS CURIAE*

Rocky Mountain Gun Owners is a statewide organization of citizens, some of whom have been charged in Denver with firearms violations, and who have had their property seized, particularly with regard to D.R.M.C. 38-130. The members of the organization have an interest in uniformity of state laws affecting firearms. The matter on appeal before the court involves an issue of significant public concern and importance to the members of the organization.

ISSUES PRESENTED

1. Did the district court err by failing to address the facts and circumstances on an ad hoc basis in the instant case as it relied upon different facts and circumstances from *State of Colorado v. City and County of Denver* in 03 CV 3809, now 04 SA 396?

2. Did the district court err by denying sufficient weight to the constitutional significance of firearms regulation to all citizens of Colorado?

3. Did the City and County of Denver violate constitutional protections to citizens both within and extraterritorial to Denver through

imprisonment, the unlawful taking of property, and subjection to criminal proceedings under D.R.M.C. 38-130 since the passage of the state’s preemption, and during the appeals process?

STATEMENT OF THE CASE

A. Case Histories

This appeal stems from a long simmering dispute between the City & County of Denver (Denver) and the State of Colorado (State) over firearms regulation. (See Motion to Complete Record, Affidavit of James W. Winchester). In 1989 Denver passed a ban on so-called “assault weapons” under Denver Revised Municipal Code 38-130 (D.R.M.C. 38-130). That ordinance forbids the sale, transfer, or ownership of certain types of firearms within Denver’s city limits. D.R.M.C. 38-130 added to a long list of firearms prohibitions Denver police and courts have rigorously enforced.

Responding to statewide concerns over patchwork municipal regulations affecting firearms, and in particular to Denver’s broad prohibitions, the General Assembly adopted two Senate Bills, 03-24 and 03-25. Senate Bill 03-24 primarily addressed statewide issuance of permits to carry concealed weapons, thus eliminating arbitrary and capricious standards in local jurisdictions. Senate Bill 03-25 addressed the broader issue of municipal ordinances restricting firearm sales, ownership, and possession on

the person, in the vehicle, and at the home that conflict with Colorado statutes. Senate Bill 03-25 declared municipal ordinances prohibiting the sale, purchase, or possession of firearms otherwise permitted by state or federal law to be void and unenforceable as of March 18, 2003. 03 SB 24 is now codified under C.R.S. 18-12-201 *et. seq.*, and 03 SB 25 under C.R.S. 29-11.7-101 *et. seq.*

The conflict between enforcement of municipal ordinances or compliance with new statutes immediately spawned two civil actions. In Denver District Court case number 03 CV 3809 (04 SA 396), Denver filed first against the State on May 24, 2003, seeking declaratory judgment that the new state statute did not preempt its local ordinances. That case is now under appeal in the Supreme Court in 04 SA 396. Denver argued that that home rule status under Article XX the Colorado Constitution provides broad authority to regulate firearms wholly within Denver city limits and its park system. Denver sought an injunction preventing state enforcement of the new law. The State moved for dismissal, but failed for lack of standing. The lower court set the matter for trial. Both parties later agreed to cross motions for summary judgment for the district court to make its decision.

Both parties stipulated that the statutes and ordinances are a matter of mixed local and state concerns, and that there were no disputed facts. The

State argued its statutes preempted all of the Denver ordinances as a matter of mixed local and state concern. Denver argued primarily that its ordinances did not conflict with state statutes. Secondarily, Denver conceded that, “in general, the field of firearms is one of ‘mixed’ state and local concern under home rule analysis” (*See* 04 SA 396 Responses to State’s Motion for Summary Judgment, R. 315). Denver sought, through a qualification of terms, an individual approach to each ordinance to harmonize or determine if local interests outweighed the State’s interest. The district court agreed with Denver’s position, and wrote an order with individual analysis of each ordinance under home rule jurisprudence. The State appealed.

The second action arose from citizens concerned that additional facts needed to be addressed. This prompted the Aurora Gun Club and John Sternberg to move to intervene. That motion was denied. They then filed their separate action on November 10, 2003, in the Denver District Court in case number 03 CV 8609 (Sternberg). That has become the subject of this appeal. While the Sternberg action raised the same issues with regard to Denver’s ordinances, it enunciated many different facts. The Aurora Gun Club later withdrew from the action as it proceeded on appeal. Unlike 04 SA

396, Sternberg argues that the issues are entirely a matter of statewide concern.

During a hearing on November 22, 2004, the district court in Sternberg placed great emphasis on the analysis and order in what is now 04 SA 396. The lower court agreed entirely with the order in the prior case, as it discounted the arguments that the Sternberg matter had not stipulated to mixed and/or local concern, and that different facts mandated different results. The court in Sternberg adopted the prior order as its order. The two cases have thus become entangled and require reference to both to make sense of Sternberg.

B. Judicial Histories

The issue of concealed and open carry of firearms in Colorado, as well as Denver's "assault weapons" ban, had long been examined by the Colorado legislature. Winchester Affidavit, *id.* Much of the examination occurred in response to citizen outcry at perceived Constitutional violations resulting in civil actions. Three cases in the Denver District Court and their appellate rulings address the issues prompting the legislative reform of firearms regulation in the 2003 General Assembly.

In *Miller v. Collier*, 878 P.2d 141 (Colo. App. 1994), the court found that the City and County of Denver had exercised arbitrary and capricious

standards sufficient to violate civil rights under 42 U.S.C. § 1983 in refusing to provide applications for concealed weapons permits to civilians. Despite the decision, the City and County of Denver failed to open its permitting process, while continuing to arrest and prosecute citizens who carried a firearm on their person or in an automobile within its boundaries under D.R.M.C. 38-117(a) Carrying a Concealed Weapon, and quite often, D.R.M.C. 38-117(b) Possession of a Dangerous Weapon.¹ SB 03-24 states in its legislative declaration, “Inconsistency results in the arbitrary and capricious denial of permits to carry concealed handguns based on the jurisdiction of residence rather than the qualifications for obtaining a permit.” C.R.S. 18-12-201(1)(c).

Robertson v. City and County of Denver, 874 P.2d 325 (Colo. 1994) examined the assault weapons ban imposed under D.R.M.C. 38-130. This case did not discuss the preemptive authority of the state over local ordinances nor the status of the right to bear arms for self-defense. Rather, it addressed the reasonable exercise of a state’s police powers. While upholding the ban, *Robertson* also determined that firearms are subject to reasonable regulation. “An ordinance, intended to prevent crime, serves a legitimate governmental interest . . .” *Id.* at 332. Public health, safety, and

¹ Miller, Thomas C., *Driving through Denver and Defending the Gun*, Trial Talk, Vol. 46, Num.1, January, 1997, pg. 17.

welfare provide government at both the local and state levels an interest in regulation. This ruling, while finding for Denver, did not preclude the state from intervention in the area of firearms regulation. The court also found one section of Denver's assault weapons ban void for vagueness:

D.R.M.C. 38-130 (b)(1)(c) – All semiautomatic pistols that are modifications of rifles having the same make, caliber, and action design but a shorter barrel and no rear stock or modifications of automatic weapons originally designed to accept magazines with a capacity of twenty-one (21) or more rounds.

Further, the court found six of the categories of “assault weapons” not to be semiautomatics or to not even exist:

1. D.R.M.C. 38-130 (h)(1)(i) – Specified prohibited assault rifles: Heckler & Koch HK-91, H-93, HK-94 and PSG-1;
2. D.R.M.C. 38-130 (h)(1)(l) – Specified prohibited assault rifles: SIG AMT, SIG 500 Series, and SIG PE-57;
3. D.R.M.C. 38-130 (h)(1)(p) – Specified prohibited assault rifles: Valmet M62, M71S, and M78;
4. D.R.M.C. 38-130 (h)(2)(e) – Specified pistols: Mitchell Arms Spectre Auto;
5. D.R.M.C. 38-130 (h)(3)(b) – Specified shotguns: Gilbert Equipment Company Striker 12;
6. D.R.M.C. 38-130 (h)(3)(c) – Specified shotguns: Encom CM-55.

Denver did not appeal D.R.M.C. 38-130 (h)(5) that the court found void for vagueness. That section reads:

Firearms which have been redesigned from, renamed, renumbered, or patterned after one (1) of the listed firearms in subdivisions (1), (2), (3) or those described in subdivision (4) regardless of the company of production or distribution or the country of origin or any firearm which has been manufactured

or sold by another company under a licensing agreement to manufacture or sell the identical or nearly identical firearms as those listed in subdivisions (1), (2), (3) or those described in subdivision (4) regardless of the company of production or distribution or the country of origin.

Ignoring the court's findings, the unconstitutional section remains codified under D.R.M.C. 38-130 to this day, as are the nonexistent and non-classified semiautomatic weapons, and the section found void for vagueness and not appealed by Denver.

Trinen v. City and County of Denver, 53 P.2d 754 (Colo. App. 2002), addressed the open carry of firearms within Denver city limits. The parties in *Trinen* agreed that the matter was one of mixed and local concerns. Denver prevailed as the district court found the matter to be one of local interest. This Court refused to review the decision of the Colorado Court of Appeals.

Legislative History

Citizens throughout the State of Colorado grew increasingly frustrated with confusing and often conflicting municipal ordinances versus state statutes. At one point, over 200,000 Colorado citizens faced criminal prosecution for carrying a firearm in their automobile for self-defense when driving through Denver.² The issue of permitting citizens to carry concealed weapons became an annual issue in the General Assembly. The ongoing

² Miller, *ibid.*

annual debates finally came to a resolution in 2003 with the passage of SB 03-24, and SB 03-25.

The General Assembly took the unmistakable position that the issuance of concealed weapons permits would be based on statewide, universal guidelines, thus making the issuance of concealed weapons permits a matter of statewide concern. It eliminated arbitrary and capricious standards imposed by local police officials. Denver relented. The city accepted statewide authority and began issuing permits for concealed carry consistent with the new law.

The General Assembly also concluded that local ordinances conflicted with state law and confused the citizenry in C.R.S. 29-11.7-101 *et. seq.* With clarity equal to S.B. 03-24, S.B. 03-25 enunciated its rationale for intervention of the state in matters of firearms regulation. The General Assembly began its findings under Art. II § 3 of the Colorado Constitution regarding the inalienable right to defend one's life and property, and Art. II § 13, protecting the fundamental right to keep and bear arms. Finding inconsistency among local governments as to lawful possession, ownership, sales, transportation, extraterritorial impact, and civil and criminal penalties, the General Assembly stated, "The regulation of firearms is a matter of statewide concern." C.R.S. 29-11.7-101(2)(a).

This new state law prohibited enforcement of municipal ordinances that conflict with state or federal law with regard to the sale, purchase, or possession of a firearm. Denver, following a pattern of defying the authority of the Colorado Court of Appeals, in *Miller v. Collier* 878 P.2d 141 (Colo. App. 1994), and this Supreme Court, in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. App. 1994), not only filed its law suit in 04 SA 396, but continued enforcement of D.R.M.C. 38-130.³ Lead counsel for Denver in Sternberg agreed to a stay of enforcement until resolution through the appeals process on November 22, 2004. Volume III, pg 21. The stay was made an order of the district court. *Id.* At 22. Nevertheless, the city pursued a course of action resulting in an arrest, incarceration, illegal takings, and abuse of civil liberties through utter denial of due process despite a court ordered stay.

SUMMARY OF THE ARGUMENT

The district court in 04 SA 396, adopted in Sternberg, enunciated three broad categories of regulatory matters to consider: 1) matters of local concern; 2) matters of statewide concern; and 3) matters of mixed local and statewide concern. The courts derived their reasoning from *City and County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990); *Trinen v. City and*

³ Attached hereto and incorporated herein are certified copies of case numbers 04 GS 775900, *People v. Coleman*, as Exhibit A, and 04 GD 755053, *People v. Lopez*, as Exhibit B, as evidence of ongoing enforcement of D.R.M.C. 38-130 in the City and County of Denver.

County of Denver, 53 P.3d 754, 758-759 (Colo. App. 2002); *City of Commerce City v. State*, 40 P.3d 1273, 1279-1280 (Colo. 2002); and *City and County of Denver v. Quest Corp.*, 18 P.3d 748, 754 (Colo. 2001).
Volume II at 345.

Under the authorities above, the General Assembly has exclusive authority to legislate in areas of statewide concern. Home rule ordinances and state statutes may coexist where the laws may be harmonized, but even where considerable home rule interests are at stake, when sufficient state interests are implicated, the matter must be resolved in favor of the state in a mixed matter of local and state concern. The lower courts also relied on a dissenting opinion in *City of Northglenn v. Ibarra*, 62 P.3d 151, 165 (Colo. 2003) stating that the General Assembly cannot make a matter of local concern any less so by imposing its own regulatory scheme, even where it has legitimate statewide concerns. Volume II at 345.

The district court in 04 SA 396 then applied a balancing test including the totality of circumstances, legislative declarations, and key factors including: 1) the need for statewide uniformity of legislation; 2) the impact of measures on citizens living outside the municipality (extraterritorial impact); 3) historical considerations concerning whether the subject matter is one traditionally governed by state or local government; 4) whether the

Colorado Constitution specifically commits the particular matter to state or local regulation; and 5) whether there is a need for governmental cooperation to facilitate the laws concerning the subject matter in question.

What is remarkable about the Sternberg case is that the lower court adopted entirely the decision in 04 SA 396. It ignored that Sternberg, and the General Assembly, had claimed the matter to be one of statewide concern. It then failed to perform any *ad hoc* balancing of facts and circumstances in the broad categories for review under home rule jurisdiction of the individual case. Different facts and circumstances were present in Sternberg that were not present in 04 SA 396.

The Sternberg case raises, as does 04 SA 396, the Constitutional significance of firearms regulation to all citizens of Colorado. *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994) did not address the fundamental right to keep and bear arms, relying instead on the reasonable exercise of state police powers. In this matter, the specific language of the legislative declaration in the adoption of C.R.S. 29-11.7-101 raises a constitutional question. That is, does the adoption of C.R.S. 29-11.7-101 preempt Denver ordinances regulating firearms as a matter of constitutional and statewide interest to all Colorado citizens?

There also remains the issue of enforcement of D.R.M.C. 38-130 since the filing of the two civil actions in question and during the appeals process. The imprisonment of Santiago Lopez for thirty days in 04 GD 755053, and the prosecution of Cyrus C. Coleman in 04 GS 775900 (see footnote number 3) deprived both persons of many rights under the Colorado Constitution. Each lost the inalienable right to enjoy their lives while seeking and obtaining their safety and happiness under Art. II § 3. Equality of justice was lost under Art. II § 6. The right to keep and bear arms in defense of the home, person and property under Art. II § 13 fell prey to Denver's overzealous enforcement. Rights as defendants in a criminal prosecution under Art. II § 16 were breached. Clearly, their due process rights under Art. II § 25, were violated. The Denver Police Department, the City and County's prosecutors, and the Denver County Court itself all acted in concert to deny these men their rights, if not having committed acts of civil contempt.

ARGUMENTS

I. The district court failed to consider an *ad hoc* review of fact and policy in the totality of circumstances when concluding that D.R.M.C. 38-130 was a matter of local concern.

To quote from the order in 04 SA 396:

“To determine whether a state statute or home rule municipality rules govern, the Court must consider the totality

of the circumstances to make its conclusion that a particular subject matter is one of local, statewide, or mixed concern. *City of Commerce City*, 40 P.3d at 1279-1280 [sic]; *Town of Telluride*, 3 P.3d at 37 [sic]. This analysis involves consideration of both fact and policy, *Quest Corp.*, 18 P.3d at 754-755 [sic], directed toward weighing the respective state and local interests implicated by law. *Town of Telluride*, 3 P.3d at 37 [sic]. The determination is *ad hoc*, taking into consideration the facts of each case. *City and County of Denver v. State*, 788 P.2d at 767-768 [sic].”
Volume II at 346.

The district court in Sternberg did not rule on the argument for statewide concern voiced at the hearing by counsel for Sternberg, “. . . we didn’t stipulate as the State did to the issue being of mixed concern.”
Volume III at 5. In response, the district court leaped from the State’s concession of mixed concern to the ultimate conclusion of the validity of the local ordinances:

. . . let me suggest that you’d have a pretty tough time where the State comes in and concedes the validity of an ordinance. It’s a pretty tough argument to come in and say that the State’s wrong about that, and I should find the ordinance is invalid even where the State concedes that it’s valid.” *Id.*

With the district court’s dismissal of the argument that the regulation of firearms is a matter of statewide concern, no argument for the totality of circumstances was heard or ruled upon.

Counsel in Sternberg did cite Justice Erickson’s dissent in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994) in

identifying statewide policy as a basis for the argument. Justice Erickson's dissent was based in large part that the issue of preemption should have been addressed. "The trial court should have determined if the ordinance is reasonably related to public health, welfare, or safety or is rationally related to some other legitimate governmental interest." *Id.* at 348. The Justice then states, "The best determinant of what is a statewide concern is our prior decisions." *Id.* at 350. He then lays out ten areas of statewide concern in a broad range of areas including: unemployment compensation, licensure of electricians, rate of privately owned public utilities inside a municipality, workman's compensation, income tax, driving under the influence, regulation of loans, and powers of county officials. *Id.* at 350-351. To this list he explicitly adds the regulation of firearms, concluding,

"In my view, if preemption is not applied, and every home-rule city or town is permitted to regulate assault weapons, a network of conflicting ordinances will be created that have no uniformity and will invite further litigation on the scope of the right to bear arms." *Id.*

Justice Erickson's prediction has come true.

With the entry of the General Assembly into the debate with the passage of 29-11.7.101 *et. seq.*, examination of fact and policy, *ad*

hoc, in the totality of circumstances advanced overwhelmingly in support of statewide authority.

II. The legislative declaration relied upon in enacting D.R.M.C. 38-130 was based upon false premises, as opposed to the General Assembly’s factual concerns in the legislative declaration requiring statewide uniformity in firearms regulation.

The legislative declaration to D.R.M.C. 38-130 states:

The city council hereby finds and declares that the use of assault weapons poses a threat to the health, safety and security of all citizens of the City and County of Denver. Further, the council finds that assault weapons are capable of both a rapid rate of fire as well as of a capacity to fire an inordinately large number of rounds without reloading and are designed primarily for military or antipersonnel use.

The city council finds that law enforcement agencies report increased use of assault weapons for criminal activities. This has resulted in a record number of related homicides and injuries to citizens and law enforcement officers. It is, therefore, the intent of the city council to place reasonable and necessary restrictions on the sale and possession of assault weapons while placing no restrictions on the right of citizens to use weapons which are primarily designed and intended for hunting, target practice and other legitimate sports or recreational activities and the protection of home, person and property.

The district court’s Order on Cross Motions for Summary Judgment in 04 SA 396 relied on the legislative declaration of the ordinance and went to considerable lengths in then denying the “deference” (Volume II at 352) it claimed should be given the General Assembly’s legislative declaration. “Without more,” the court went on to say, “declarations of the General

Assembly do not clearly establish the significance of the State’s interest in regulating open carry of firearms.” *Id.* This attitude applied equally to the assault weapons ban. There was more in Sternberg.

The district court relied upon a political assumption refuted by documented fact. The affidavit of Dwight Van Horn (Volume II at 335-339) in Sternberg is of particular import with regard to fallacious assertions in an analysis of the legislative declaration leading to the adoption of D.R.M.C. 38-130. Denver offers no expert opinion from a forensic firearms examiner in 04 SA 396, or in Sternberg, to support its legislative declaration. Sternberg offers a respected former police officer and forensic firearms expert with excellent credentials. Volume I at 137-139.

Van Horn states in paragraph nine of his affidavit, “With regard to Denver City Ordinance 38-130, this appears to be an arbitrary and capricious list not grounded in fact or any scientific or technical rationale.” Arbitrary and capricious resonates in Denver firearms regulation, as *Miller v. Collier*, 878 P.2d 141 (Colo. App. 1994) found with regard to permits for concealed weapons, and echoed in the legislative declaration of C.R.S. 18-12-201(1)(c). Van Horn advises there is no definition of an “assault weapon.” There is an assault rifle, but it is defined according to the Department of Defense Small Arms Identification and Operations Guide as, “short,

compact, select fire weapons that fire a cartridge intermediate in power between a submachine gun and a rifle.” The expert explains that “true assault rifle[s] . . . have been regulated since 1934.” Volume II at 337.

Contrary to unsubstantiated rhetoric in the ordinance’s legislative declaration, Mr. Van Horn analyzed crime statistics in Los Angeles, Florida, Connecticut, and Minneapolis. In Los Angeles, the use of an “assault weapon” in crimes was 0.52%. In Florida, a total of 90 such weapons were seized for all reasons from 1986 to 1989. In Connecticut, less than 2% of such weapons were seen by police officials. In Minneapolis, the police had seen a total of 12 such weapons. Mr. Van Horn also cites FBI statistics compiled for the United States Congress in the repeal of the 1994 federal assault weapons ban. The FBI found 2.9% of such weapons in the hands of criminals in 1993. That figure is unchanged at 2.9% in 2002. The Denver City Council may claim an increasing number of assault weapons in the hands of criminals, but the false premises of the legislative declaration Denver relied upon is unmasked in Sternberg.

The legislative declaration of D.R.M.C. 38-130 claims that no restrictions on the right of citizens to firearms for legitimate recreational activities and protection of the home, person, and property are intended. Yet, that is exactly what the ban in D.R.M.C. 38-130 has accomplished. The First

Amended Complaint for Declaratory and Injunctive Relief states the John Sternberg participates in competitive marksmanship competitions, but he is limited in the type of firearms he can use under D.R.M.C. 38-130. Sternberg states that he is uncertain of what, if any, firearm and/or equipment he may possess that may be identified as illegal. Volume I at 112. (See also Motion to Complete Record, Affidavit of John A. Sternberg).

The Denver assault weapons ban places Mr. Sternberg and any other resident of Denver on an unequal status in competitive shooting events. The standard firearm for most competitive shooting events is the Colt AR-15 and its variants. Sternberg Affidavit, *id.*, at paragraph 8. The Civilian Marksmanship Program authorized under 36 U.S.C. 40721 *et. seq.*, was organized to provide marksmanship training, safety, and competitions to U.S. citizens and offers the M-16, a variant of the Colt AR-15, for loan or sale to support the small arms firing school and competitions. 36 U.S.C. 40729(3). Banning the Colt AR-15 and its variants demonstrates the caprice Denver exercised in its adoption of the ordinance, despite the city's claim the ban would "place no restrictions on the right of citizens to use weapons which are primarily designed or intended for hunting, **target practice and other legitimate sports or recreational activities** (emphasis added) and the protection of home, person and property.

The affidavit of Mr. Van Horn explains that while a Ruger Mini 14 is not on the assault weapon ban, the rifle is “functionally identical” to the Colt AR-15, Daewoo, and H&K semiautomatic rifles which are banned. The U.S. M-1 Carbine is not on the list while the identical copy of the rifle made by the Plainfield Machine company is. Chinese copies of the AK-47 are banned, yet Hungarian and Egyptian copies are not. Volume II at 337.

Compounding Denver’s confusing legislation, the city claims on one hand that “assault” weapons pose an ever greater threat to the public, yet the public itself is not permitted the right to possess such firearms for the protection of their homes, their persons, and their property. The city cannot have it both ways.

As Mr. Van Horn’s affidavit explains, Denver’s list of assault weapons confuses an assault rifle with a semi-automatic firearm. Volume II at 337. The ordinance ignores like for like to make one citizen a gun owner and the next a criminal. Still worse, Denver ignores the void for vagueness section of its ban from *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994), leaves nonexistent or nonsensical firearms on the ban, while enforcing the ordinance during a court ordered stay. Such conduct abandons the principles of representative government and statewide

jurisprudence for a city-state bent on tyranny for any citizen who may enter its boundaries. (See footnote number 3).

The General Assembly could no longer ignore this state of affairs and expressed its duty to protect fundamental civil rights in its legislative declaration. It noted the extraterritorial impact of widespread inconsistency in firearms regulation that subjected all citizens of the state to civil and criminal penalties in some jurisdictions for conduct wholly lawful in others. The new statute noted the irrational inequality in the treatment of citizens because of residence, and stated unequivocally that the regulation of firearms is a matter of statewide concern and the necessity to provide statewide laws for the protection of its citizens.

Denver sits as a transportation hub. The intersections of I-70 and I-25 in Denver force the extraterritorial impact of Denver's firearms regulation upon tens, if not hundreds, of thousands of non Denver residents daily. The General Assembly did not rely upon political rhetoric. It responded wholly to its duty to protect its citizens from the unconscionable conduct of well intentioned, but poorly considered municipal ordinances. As Denver admits in its Brief in Support of Summary Judgment:

Even though a declaration of statewide concern is not conclusive, the City acknowledges that the courts sometimes give "great weight" to the legislative declaration. *Town of*

Telluride v. Lot 34 Venture, LLC, I3, 3 P.3d 30, 37 (2000).
Volume I at 166.

III. The district court failed to adequately address and resolve the key factors supporting statewide preemption of Denver’s firearms ordinances.

According to the district court in 04 SA 396, and adopted in Sternberg, five key factors affect the balancing test to determine local, state, or mixed concerns in determining the preemption of Denver’s firearms ordinances. These factors are 1) the need for statewide uniformity of legislation; 2) the impact of measures on citizens living outside the municipality (extraterritorial impact); 3) historical considerations concerning whether the subject matter is one traditionally governed by state or local government; 4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation; and 5) whether there is a need for governmental cooperation to facilitate the laws concerning the subject matter in question. Volume II at 346.

Given *arguendo*, an *ad hoc* review of the facts and circumstances in Sternberg may have resulted in applying mixed local and state concerns, the key factors merit review.

Denver acknowledged the General Assembly’s intent to occupy the area of firearm legislation in its Answer to Amended Complaint in Sternberg:

. . . the City admits that the Colorado General Assembly passed Senate Bills 03-24 and 03-25 and that these Bills asserted that firearms regulation is a matter of statewide concern, and further admit that it was the stated intent of the Legislature to attempt to occupy the field of firearm regulation.”
Volume I at 181.

The General Assembly acted on the problems citizens endured under the conflicting and confusing municipal ordinances throughout Colorado. Given any weight to the statutory legislative declaration, and the falsehoods in the Denver ordinance’s legislative declaration, the state statute must occupy the area of firearms regulation. Long ago, the need for uniformity was acknowledged by Justice Erickson. “Although the General Assembly has the power to regulate assault weapons, every hamlet and home-rule city does not have the same power.” *Robertson v. City and County of Denver*, 874 P.2d 325, 349 (Colo. 1994). Nine years later, after literally years of debate, the General Assembly acknowledged the need for statewide uniformity and took action. In taking action, the General Assembly noted the extraterritorial impact of conflicting, confusing municipal ordinances. It cited the relevant sections of the Colorado Constitution and noted a duty to protect the fundamental rights of all citizens.

Denver argues a historical interest in firearms legislation that predates the Colorado Constitution to claim the matter is one traditionally governed by the city. Volume I at 158. Supporting its contention, Denver offers the

affidavit of Wayne E. Vaden. Volume I at 193-194. Constitutions, however, change things. Just as southern slave states surrendered rights to human bondage upon the passage of the 13th Amendment to the Constitution of the United States of America, Denver's precedence of prosecuting all citizens of Colorado under its various firearms ordinances must give way to Art. II §§ 3 and 13 of the Colorado Constitution, and the statewide interest in protecting those citizens under C.R.S. 29-11.7-101 *et. seq.*

Denver also claims, falsely, that the General Assembly has never legislated assault weapons. C.R.S. 18-1.3-406(7)(a) and b) specifically addresses "assault weapons" by enhancing sentences for their use in violent crimes. The statute was originally adopted in 1989, the same year as the Denver ordinance, under C.R.S. 16-11-309 and was relocated in 2002.

Finally, there is the need for governmental cooperation. The facts speak for themselves. Denver has not cooperated with either the judicial or legislative branches of Colorado government. The city continued withholding concealed weapons permits for years until enactment of 04 SB 24. Denver ignored a district court order and continued to prosecute under D.R.M.C. 38-130. It has passed legislation based upon rhetoric rather than fact, and claims a need for "a more sophisticated analysis," in balancing state and local interests. Volume I at 165. Denver pleads a claim that its

urban nature outweighs the interests of all other municipalities, or the state government. Volume I at 158. It falsely asserts the General Assembly has never addressed the issue. In short, Denver cannot be trusted to regulate in the area of firearms without endangering the rights and liberties of all the citizens of Colorado.

IV. Art. II §§ 3 and 13 of the Colorado Constitution grant all citizens rights that take precedence over a home rule municipality's right of self government.

“Colorado municipalities are creatures of either legislative enactment or constitutional provision or both and are not city-states. They have only powers expressly or impliedly granted to them.” *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951, 954 (1960). The Colorado Constitution, on the other hand, grants rights to all citizens in the Bill of Rights under Article II.

The argument is simple:

All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; possessing and protecting property, and of seeking and obtaining their safety and happiness. Colo. Const. Art. II § 3.

Firearms are possessions. Sometimes they are essential to defend lives and liberties, to protect property, and in obtaining safety and happiness.

Whether one wishes to own a Colt AR-15 for competitive shooting events, for hunting, or for defense of the home, person, and property, the right is

inalienable. “The term ‘property,’ within the meaning of the due process clause, includes the right to make full use of the property which one has the inalienable right to acquire.” *People v. Nothaus*, 147 Colo. 210, 363 P.2d 180, 182 (1961). Denver seeks to deny property to its citizens, and through overzealous enforcement, all citizens.

Gunsmiths and gun stores within the boundaries of Denver are negatively affected by D.R.M.C. 38-130 by limiting the variety of firearms that can be sold or repaired. “The right to pursue any legitimate trade, occupation, or business is a natural, essential, and inalienable right, and is protected by our constitution.” *Olin Mathieson Chem. Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139, 149 (1956).

Denver would like for the court to harmonize its ordinances with the new state statute under 03 SB 25. More realistically, the statute is harmonized with the Colorado Constitution as the General Assembly clearly intended in the legislative declaration to C.R.S. 29-11.7-101. “It is axiomatic that if a statute can reasonably be construed so as to harmonize it with the Constitution, that construction should be preferred.” *People v. Ford*, 193 Colo. 459, 568 P. 2d 26, 28 (1977).

Of course, this debate is not limited to inalienable rights.

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. Colo. Const. Art. II § 13.

Not only does D.R.M.C. 38-130 call into question the right to keep and bear certain firearms, it prohibits their ownership by law abiding citizens. “The right to bear arms is not absolute as that right is limited to the defense of one’s home, person, and property.” *Ford, id.* at 28. Under *Ford*, even a convicted felon may protect his home. The ordinance invades the homes of all Denver citizens, a place specifically protected in the constitution, and settled in case law.

The General Assembly’s action in preempting Denver’s ordinances legislated reforms stemmed in part from the decision in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994), when the court upheld the assault weapons ban. The court also ruled that the district court had erred in reaching the question of the status of the right as fundamental in Art. II § 13. *Id.* at 335. Of note is that *Robertson* at pg. 332 also relied on the false premises of the legislative declaration in the ordinance. The result in *Trinen v. City and County of Denver*, 53 P.3d 754 (Colo. App. 2000), giving local

ordinances authority in intrajurisdictional matters further pushed the enactment of 03 SB 25.

The General Assembly specifically sought to insure fundamental rights in its legislative declaration. And, the courts agree that Denver's interest in the assault weapons ban cannot bludgeon constitutionally insured freedoms.

“Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744, 745 (1972).

V. Denver's ongoing enforcement of the assault weapons ban violates citizens' rights.

Santiago Lopez lived in the City of Aurora, Colorado. On November 10, 2004, he was arrested in Denver and charged under D.R.M.C. 38-130. His unloaded gun, an M-11, and a magazine containing 16 cartridges were taken. He was sentenced the following day to 30 days in jail. Although he had been summoned to appear on the charges on November 29, 2004, Mr. Lopez found “justice” swift in the Denver County Court as he began his jail sentence on November 11, 2004. (See footnote number 3 and attached certified copy incorporated herein and identified as Exhibit B).

According to D.R.M.C. 38-130(e)(3)(a), Santiago Lopez, who did not live in the City and County of Denver, had an affirmative defense to charges under 38-130. Nothing in the record indicates he was represented by counsel. At age 22, Mr. Lopez did not have the sophisticated legal knowledge to understand that the City and County of Denver was acting *ultra vires*, that the law was stayed pending appeal, nor that a court order affirming the stay would take effect on November 22, 2004. Quite likely, Mr. Lopez didn't know what an affirmative defense is. Mr. Lopez lost his liberty and possessions to a city-state prohibited from doing so.

Cyrus Coleman, a resident of the City and County of Denver, was charged under D.R.M.C. 38-130(e) on April 21, 2004, while the issue of preemption awaited rulings in 04 SA 396 and in Sternberg. (See footnote number 3 and attached certified copy incorporated herein and identified as Exhibit A). Preemption, though in effect, was ignored. Two of Mr. Coleman's firearms were seized. At a cost of \$6500 in attorney's fees, an amount far in excess of the value of the firearms, Mr. Coleman's charges were dismissed and his property returned.⁴

According to Mr. Fabian's affidavit, Mr. Coleman was aware of the preemption provided under 03 SB 25 to D.R.M.C. 38-130, and he advised

⁴ *The Affidavit of Anthony Fabian is attached hereto and incorporated herein as Exhibit C.*

the prosecution of this. Rather than comply with the statute in effect during the challenge to it, Denver prosecutors offered Mr. Coleman relief from criminal jeopardy only at the price of surrendering his property. Thus he was forced to obtain a lawyer. Such conduct in the Denver County Attorney's Office adds up to nothing less than judicial extortion, with absolute immunity granted to the public servant for his conduct.

This behavior toward both Mr. Lopez and Mr. Coleman represents the worst in the criminal justice system. Due process under Art. II § 25 was accelerated for Mr. Lopez and extorted for Mr. Coleman. The inalienable rights referenced in the legislative declaration to C.R.S. 29-11.7-101 were abandoned, as well as the right to bear arms under Art. II § 13. Equality of justice under Art. II § 6 went on the auction block for Mr. Coleman, and was simply denied to Mr. Lopez. Society is not protected by Denver's firearms ordinances. Rather, honest citizens are criminalized. Commenting on Art. II § 16, this Court stated:

Both the United States and Colorado Constitutions accord an accused substantive and procedural rights that are binding on the government in a criminal prosecution. Such procedures as are found in this section have been constitutionalized not only to protect the innocent from unjust convictions but, of equal importance, to preserve the integrity of society itself by keeping sound and wholesome the process

by which it visits condemnation on a wrongdoer. *People v. Germany*, 674 P.2d 345 (Colo. 1983).

While Mr. Lopez may be forgiven his ignorance of the law, and Mr. Coleman considered fortunate to have the financial resources to protect his rights and property, there is absolutely no excuse for the conduct of prosecutors who harvest criminal penalties and prosecutions instead of justice. 38-130 takes its toll on all citizens of Colorado, no matter from the City and County of Denver or anywhere else on either side of the Continental Divide. This conduct must not be rewarded by a finding of local concerns exceeding the statewide concerns of all the citizens of Colorado.

Nor do we imply any limitation upon the traditional but statutory rights of municipalities to prevent disturbances of the peace and to maintain law and order by appropriate police action. It is only when the city's acts or regulations attempt to interfere with or cover, as here, a field preempted by the state or which is of statewide concern that they must fail. And it makes no difference whether the attempted exercise of power by a city is reasonable, or is wholly prohibitory. *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951, 954 (1960).

There remains the issue of the disposition of firearms surrendered under D.R.M.C. 38-130(k), which requires certification of destruction by the Denver Chief of Police under 38-120(c):

The chief of police, or a duly authorized agent, shall, on January thirty-first of each year, account to the presiding judge of the county court for all weapons or instruments confiscated and ordered forfeited during the previous year, and the

presiding judge shall order all weapons or instruments so confiscated and ordered forfeited or destroyed, and shall certify that the weapons or instruments are destroyed.

During discovery, only one order for destruction of firearms was provided, and that was for the year 2001. It listed eight firearms, none of which appear in the assault weapons ban. While Denver's firearms regulations and their enforcement is well documented, the requirements for record keeping is less than an afterthought. The affidavit of James W. Winchester states at paragraph 14 (See Motion to Complete Record), only "speculation" provides any answers to the disposition of property seized from citizens. What happened to those guns? If Denver is rigorous in its enforcement of the other sections of D.R.M.C. 38-130, why such lax attention to subsection (k) regarding the destruction of banned firearms? The answer lies in the city-state mentality of Denver that it can do what it wishes, *ultra vires*, unconstitutionally, legislatively preempted, or judicially ordered.

CONCLUSION

The Colorado General Assembly found firearm reform necessary in enacting C.R.S. 29-11.7-101 *et. seq.* as a matter of statewide concern. The General Assembly premised the new law on freedoms guaranteed in the Colorado Constitution, Art. II §§ 3 and 13. Denver firearms ordinances had assailed the inalienable rights for defense of life and liberty, possessing and

protecting property and obtaining safety and happiness. The right to keep and bear arms, a right that shall not be called into question, for defense of the home, person and property, had been surrendered to patchwork municipal ordinances. The lower court in this matter erred when it adopted wholly another court's decision without an *ad hoc* analysis of the particular facts and circumstances before it. The City and County of Denver has treated citizens contemptuously in violating the district court order to stay enforcement, and by refusing to abide by the preemption in place under C.R.S. 29-11.7-103. Before this court are the natural and essential rights of all citizens as a matter of statewide concern. C.R.S. 29-11.7-101 *et. seq.* represents statewide protection from predatory firearms regulation in all areas or the state, and especially in the City and County of Denver.

DATED this 21st day of June, 2005.

Respectfully submitted,

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