No. 18-1421

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JON C. CALDARA, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF BOULDER, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
No. 18-cv-01211-MSK, The Honorable Marcia S. Krieger

APPELLANTS' OPENING BRIEF

(Oral Argument is Requested)

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CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Plaintiff-Appellant, Boulder Rifle Club, Inc., certifies that Boulder Rifle Club, Inc. is a non-profit corporation that it not publicly traded and has no parent corporation. There is no publicly held corporation that owns more than 10% of its stock.

The undersigned attorney for Plaintiff-Appellant, General Commerce, LLC, d/b/a Bison Tactical, certifies that General Commerce, LLC is a for-profit limited liability company, formed in the State of Wyoming. General Commerce, LLC is not publicly traded and has no parent corporation. There is no publicly held corporation that owns more than 10% of its stock or membership units.

Respectfully submitted this 10th day of January 2019.

/s/ Cody J. Wisniewski
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STATEMENT OF PRIOR OR RELATED APPEALS

Counsel for Plaintiffs-Appellants are unaware of any prior or related appeals within the meaning of 10th Cir. R. 28.2(c)(3).

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over Appellants' claims pursuant to 28 U.S.C. § 1331, because a majority of Appellants' claims arise under the United States Constitution, thus raising multiple federal questions. The district court also had jurisdiction under 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983 because the underlying action seeks redress for the deprivation of constitutionally protected rights by those acting under the color of state and/or municipal law.

On September 17, 2018, the district court issued an *Opinion and Order of Abstention Pursuant to* Pullman, thereby "deferring the consideration of the Plaintiffs' federal constitutional claims until the state court can conclusively resolve the question of whether the Ordinances are preempted by C.R.S. § 29-11.7-103" and administratively closing the case. Aplt. App. at A192. On October 17, 2018, Appellants timely appealed the district court's Order. Aplt. App. at A193–95; Fed R. App. P. 4(a)(1)(A). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. *See Weitzel v. Div. of Occupational & Prof'l Licensing of Dep't of Commerce of State of Utah*, 240 F.3d 871, 874 n.1 (10th Cir. 2001) ("Federal courts of appeal have jurisdiction pursuant to § 1291 of a district court's abstention from exercising jurisdiction over a matter because it is a 'final decision' that puts the litigants 'effectively out of court.'" (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713 (1996))).

STATEMENT OF THE ISSUE

Whether the district court erred in abstaining from adjudicating all of Plaintiffs-Appellants' constitutional and federal claims on the merits by declining to exercise jurisdiction over any of those claims under the *Pullman* doctrine, as first set forth by the Supreme Court in *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), and administratively closing the underlying case, leaving Plaintiffs-Appellants indefinitely without remedy for ongoing violations of their constitutionally protected rights.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On May 15, 2018, the Boulder City Council voted 9–0 to approve Ordinance 8245, banning, within Boulder city limits, firearms and magazines in common use by law-abiding citizens for lawful purposes across the United States. Aplt. App. at A018. In addition, Ordinance 8245 raised the age for legal firearm purchase and possession from eighteen to twenty-one years of age. Aplt. App. at A018. Upon enactment, Ordinance 8245 immediately became law in the City of Boulder, thereby infringing upon the rights of all of Boulder's approximately 108,700 residents. Aplt. App. at A018. On June 19, 2018, the Boulder City Council voted 8–1 to approve Ordinance 8259, making certain amendments to provisions of Chapter 5 of the Boulder Revised Code that were established by Ordinance 8245. Aplt. App. at A018–19. Ordinance 8259, *inter alia*, removed a previously enacted exemption for handgun magazines that were possessed in compliance with state law and removed the exemption for persons authorized to carry a concealed weapon under the Law Enforcement Officers Safety Act. Aplt. App. at A018–19.

II. PROCEDURAL BACKGROUND

On May 16, 2018, Plaintiffs-Appellants initiated the underlying lawsuit by filing a complaint in the United States District Court for the District of Colorado. Aplt. App. at A009. On August 6, 2018, Plaintiffs-Appellants filed their *First*

Amended Complaint as of right. Aplt. App. at A017–103. Plaintiffs-Appellants alleged that Ordinance 8245 and Ordinance 8259 (collectively, "Ordinances"), and the actions of Defendants, violate: (1) multiple provisions of the U.S. Constitution, including Article I, Article VI, the First Amendment, the Second Amendment, the Fifth Amendment, and the Fourteenth Amendment; (2) federal law, namely, the Law Enforcement Officers Safety Act, 18 U.S.C. §§ 926B, 926C; (3) multiple provisions of the Colorado State Constitution, including Article 2, section 3, and Article 2, section 13; and (4) multiple Colorado state statutes, including C.R.S. §§ 29-11.7-102 and 29-11.7-103. The district court held a non-evidentiary status hearing on August 15, 2018, to address the process for resolving Plaintiffs-Appellants' *Motion for Preliminary Injunction*. Aplt. App. at A104–05. At that hearing, the court ordered the parties to brief the issue of whether *Pullman* abstention applied in the underlying matter. Aplt. App. at A105. Plaintiffs-Appellants and Defendants-Appellees both filed their briefs addressing the *Pullman* issue on August 22, 2018. Aplt. App. at A106–63, A164–80.

III. RULING PRESENTED FOR REVIEW

On September 17, 2018, the district court entered a 12-page *Opinion and Order of Abstention Pursuant to* Pullman. Aplt. App. at A181–92. In its Opinion and Order, the district court found that the necessary *Pullman* abstention factors were present and that there were no factors that sufficiently weighed against

abstention in the case. Aplt. App at A183–92. In so finding, the court decided to abstain from adjudicating Plaintiffs-Appellants' federal and constitutional claims until the "state court can conclusively resolve the question of whether the Ordinances are preempted," and administratively closed the case. Aplt. App. at A192.

SUMMARY OF ARGUMENT

Plaintiffs-Appellants asserted violations of, *inter alia*, their natural and fundamental right to keep and bear arms, as protected by the Second Amendment to the United States Constitution—a violation that the United States District Court for the District of Colorado was well-equipped to adjudicate. Instead of exercising its jurisdiction and adjudicating the merits of Plaintiffs-Appellants' constitutional and federal claims, however, the district court opted to defer jurisdiction under the narrow *Pullman* doctrine. The district court's exercise of *Pullman* abstention in this case ignores federal policy as well as Supreme Court and Tenth Circuit precedent against abstaining from adjudicating violations of fundamental rights, which violations will undoubtedly have an impermissible chilling effect on those same rights. In addition, by abstaining so early in the case, the district court failed to allow for the factual and legal development necessary to properly engage in an analysis of the *Pullman* requirements as set forth by the Supreme Court and the Tenth Circuit.

Federal courts are the primary tribunals for the vindication of constitutionally protected rights. With the passage of the Civil Rights Act, Congress further granted to the federal courts jurisdiction over violations of individuals' federally guaranteed rights by state or local governments under the color of state law. *See* 42 U.S.C. § 1983. *Pullman* abstention is a narrow and extraordinary exception to the federal courts' otherwise "virtually unflagging" duty to exercise that jurisdiction.

Importantly, the *Pullman* court required, as a threshold, that a case must be one that the federal courts ought not enter. The Supreme Court has recognized that federal courts ought always enter when there is concern of a chilling effect on a fundamental right. Here, the district court erred in abstaining when the exercise of Plaintiffs-Appellants' fundamental rights would be impermissibly chilled by the actions of the City of Boulder and its unconstitutional Ordinances.

Even assuming the matter before the district court satisfied the threshold requirement established by *Pullman*, the district court did not allow for the legal and factual development necessary to properly engage in the *Pullman* analysis. Given the gravity of deferring resolution of claimed federal law violations, historically, federal courts have engaged in the thorough and extensive analysis as to the applicability of *Pullman* abstention only after there has been sufficient development of the factual and legal record. Here, the district court abstained prior even to Defendants-Appellees' *Motion to Dismiss* being fully briefed and prior to the resolution of Plaintiffs-Appellants' *Motion for Preliminary Injunction*, and as a result was unable to engage in an in-depth *Pullman* analysis. If the court would have allowed for sufficient development of the record, the court would have been able to appropriately examine and frame the state law questions before it, and potentially could have answered some of those questions.

Due to the district court's error in exercising *Pullman* abstention in this matter, this Court should vacate the district court's Opinion and Order exercising *Pullman* abstention and remand this case to the district court to proceed on the merits of Plaintiffs-Appellants' constitutional and federal claims.

STANDARD OF REVIEW

This Court reviews the district court's decision to abstain from exercising jurisdiction *de novo*. *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1114–15 (10th Cir. 2008) (the Tenth Circuit "review[s] de novo whether the requirements for *Pullman* abstention have been met") (citing *Spoklie v. Montana*, 411 F.3d 1051, 1055 (9th Cir. 2005) (reviewing question of *Pullman* abstention *de novo*); *Taylor v. Jaquez*, 126 F.3d 1294, 1296 (10th Cir. 1997) (reviewing question of *Younger* abstention *de novo*)).

ARGUMENT

> For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.

Peruta v. California, 137 S.Ct. 1995, 1999–2000 (2017) (Mem.) (Thomas, J., dissenting from the denial of cert.).

The right to keep and bear arms is a fundamental, natural right that pre-dates and is protected by the Second Amendment to the United States Constitution. *See* U.S. CONST. Amend. II; *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010) ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." (emphasis in original)); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) ("This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The [S]econd [A]mendment declares that it shall not be infringed . . ..").

The United States Supreme Court, in its most in-depth analysis of the Second Amendment to date, found that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. More specifically, the Court found that the Second Amendment protects arms that are in "common use" that are "typically possessed by law-abiding citizens for lawful purposes." *Id*. at 625 (internal quotations omitted). Further, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of founding." *Id*. at 582.

Despite these constitutional protections, in May 2018, the City of Boulder passed Ordinance 8245, and shortly thereafter Ordinance 8259, purporting to define and ban "assault weapons" and "large-capacity magazines." Aplt. App. at A040–47. Boulder's definition of "assault weapons" relies upon the characteristics of a firearm's magazine, grip, and/or stock. Aplt. App. at A041. Boulder's Ordinances effectively prohibit the possession or functional use of numerous common firearms and magazines possessed by law-abiding citizens for lawful purposes. In short, the Boulder Ordinances violate Appellants' constitutionally and federally protected rights.

Federal courts have a strict, "virtually unflagging," duty to exercise their jurisdiction, and stand as the primary tribunals for the enforcement of federal constitutional rights, such as those protected by the Second Amendment. *See*

Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." (citations omitted)); *McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 672 (1963) ("The First Congress created federal courts as the chief . . . tribunals for enforcement of federal rights."). While Congress could have required all constitutional questions to be funneled through the state courts in the first instance, it elected otherwise. *Wisconsin v. Constantineau*, 400 U.S. 433, 437–38 (1971). Rather, "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

Properly invoking the jurisdiction of the court below, Appellants brought suit in the United States District Court for the District of Colorado seeking vindication of their constitutionally and other federally protected rights. Faced with the duty to adjudicate Appellants' claims that the City of Boulder violated their Second Amendment rights by its prohibition on certain types of firearms and magazines, and its newly imposed age restriction, the district court balked. Specifically, the district court invoked the extraordinarily narrow *Pullman* doctrine, and held it would abstain from hearing Appellants' constitutional claims and would set such questions aside

indefinitely, until a Colorado state court determined whether the Boulder Ordinances were preempted by Colorado state law.

The district court abstained in error. First, an examination of the policies and precedent surrounding federal court jurisdiction and the limited instances in which a court may abstain from exercising jurisdiction under the *Pullman* doctrine demonstrate that the fundamental nature of Appellants' rights militates against *Pullman* abstention. Second, given federal courts' weighty obligation to exercise jurisdiction, as a matter of practice *Pullman* abstention is applied surgically, usually on an issue-by-issue basis and after development of the factual record and/or a judgment on the merits by a lower court. In this case, that surgical dissection is complicated by the granular nature of Colorado's preemption analysis. The district court failed to allow for the necessary level of factual or legal development prior to abstention and failed to engage in the surgical, issue-by-issue analysis of the Colorado state law issues at play.[1] Reversal of the district court's abstention order is therefore appropriate to allow Appellants the opportunity to vindicate their federal rights in a federal forum as Congress intended, or, at the very least, to allow the

[1] As a result, contrary to the district court's suggestion that abstention may be mitigated by the certification of a question to the Colorado Supreme Court, this case is not properly prepared for the Colorado Supreme Court. Aplt. App. at A191–92; *see* C.A.R. 21.1(c) ("A certification order must set forth: (1) The questions of law to be answered; and (2) A statement of *all facts relevant to the questions* certified and *showing fully the nature of the controversy in which the questions arose*." (emphasis added)); *see also Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1118–22 (10th Cir. 2008) (deciding to certify state law questions while abstaining after conducting an extensive analysis of the state law issues).

parties to develop the factual and legal record necessary to determine what claims truly warrant abstention.

I. FEDERAL POLICY AND PRECEDENT ESTABLISH THAT THE COURT SHOULD NOT EXERCISE *PULLMAN* ABSTENTION TO PROLONG BOULDER'S VIOLATION OF APPELLANTS' FUNDAMENTAL RIGHTS

A. Federal Judicial Policy Places Federal Courts in the Primary Position of Protecting Fundamental Rights

The United States Supreme Court unflinchingly acknowledges "that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush*, 517 U.S. at 716 (citations omitted); *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 821 (1976) ("[F]ederal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them." (internal quotations omitted)) (Stewart, J., dissenting); *England v. Louisiana Bd. of Medical Examiners,* 375 U.S. 411, 415 (1964) ("When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction." (quoting *Wilcox v. Consolidated Gas Co. of N.Y.*, 212 U.S. 19, 40 (1909))). Indeed, Congress placed a duty upon the federal judiciary "to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims . . .. [E]scape from that duty is not permissible merely because state courts also have the solemn responsibility . . . 'to guard, enforce, and

protect every right granted or secured by the [C]onstitution of the United States.'" *Zwickler*, 389 U.S. at 248 (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)).

Congress has given the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Congress also explicitly granted the district courts jurisdiction over civil actions commenced to "redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." 28 U.S.C. § 1343(a)(3). Following the Civil War and the enactment of the Fourteenth Amendment, Congress granted federal courts even broader jurisdiction over state and local violations of federally guaranteed rights. The Civil Rights Act of 1871, ch. 22, § 42, 17 Stat. 13 (April 20, 1871) (current version at 42 U.S.C. § 1983). "The legislative intent—which has been well documented by commentators and the [Supreme] Court itself—was to interpose the *federal* judiciary between the individual and the state, largely because of the failure of the state courts adequately to protect the individual." Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 111 (1984) (citations omitted) (emphasis in original). With the enactment of 42 U.S.C. § 1983, federal "courts ceased to be restricted tribunals of fair dealing between citizens of

different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM, 65 (Transaction Publishers 2009) (earlier edition quoted by *Zwickler*, 389 U.S. at 247).

The Supreme Court and the Tenth Circuit have recognized the importance of Congress's broad jurisdictional grant to the federal judiciary under 42 U.S.C. § 1983, reasoning "we note that courts must exercise caution before abstaining from considering the merits of constitutional claims brought under section 1983." *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1576 (10th Cir. 1995) (citing *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979) and C*olorado River*, 424 U.S. at 817–18); *McNeese*, 373 U.S. at 672 ("We would defeat those purposes [of 42 U.S.C. § 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court."). Absent exceptional circumstances, a federal court should not decline the jurisdiction Congress has conferred upon it—an action that "would thwart the purpose of the jurisdictional act." *Meredith v. City of Winter Haven*, 320 U.S. 228, 234–35 (1943); *accord. Harris County Com'rs Court v. Moore*, 420 U.S. 77, 90 (1975) (Douglas, J., dissenting).

Both the Supreme Court and the Tenth Circuit have stressed that abstention is an extraordinarily narrow exception to this broad jurisdictional rule. *See, e.g.*,

United States v. Bureau of Revenue of State of N.M., 291 F.2d 677, 679 (10th Cir. 1961) ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." (quoting *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959))).

Here, the district court was granted explicit jurisdiction, by an act of Congress, to adjudicate the violation and deprivation of Appellants' federally and constitutionally protected rights by a municipality under the color of local and/or state law. See Aplt. App. at A019–20. No party objected to the district court's jurisdiction. Abstaining in the matter at hand not only denies Appellants the ability to litigate their vitally important constitutional and federal claims, but also indefinitely denies Appellants access to a federal forum. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.") *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

B. *Pullman* Abstention Is a Narrow, Carefully Employed Exception to the General Rule of Federal Courts' Broad Exercise of Jurisdiction

Pullman abstention is a judicially created doctrine, intended to provide some level of deference to state courts regarding important, unanswered questions of state

law, when such questions are enmeshed with a federal or constitutional claim. *Pullman*, 312 U.S. at 498–502. Both the Supreme Court and the Tenth Circuit have emphasized that federal courts abstaining under the doctrine should do so rarely, and only in the most exceptional of circumstances. *See, e.g. Allegheny*, 360 U.S. at 188 ("The doctrine of abstention . . . is an extraordinary and narrow exception . . ..").

In *Pullman*, decided during the Jim Crow Era, the Pullman Company filed suit against the Railroad Commission of Texas for promulgating a regulation that prevented black Pullman porters from working in sleeping cars on railways in Texas—effectively banning black Pullman porters from operating in Texas altogether. *Id*. at 497–98. Instead of addressing the discriminatory nature of the regulation, the Supreme Court deferred to allow Texas state courts to answer the question of whether the Railroad Commission had the authority to promulgate such a regulation in the first place—something the Court deemed to be an as yet unresolved question of state law. *Id.* at 501–02.

The *Pullman* court was troubled by its threshold finding that the case "touches a sensitive area of social policy upon which the *federal courts ought not enter* unless no alternative to its adjudication is open." *Id*. at 498 (emphasis added). Hesitant to tread where it ought not, the court closely examined the particular facts and issues present in the case to determine if there was an alternative to the adjudication of the sensitive area of social policy available at state law. *Id*. at 498–99. The *Pullman*

court looked to three specific factors to determine whether abstention was appropriate: (1) would the federal court avoid "needless friction with state policies," *id.* at 500; (2) the state court's "final authority . . . to interpret doubtful regulatory laws of the state," *id.* at 500; and (3) whether a decision on the state issue could obviate the need for a decision on the federal or constitutional issues, *id.* at 501. The *Pullman* court concluded: "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise." *Id.* at 501.

The Supreme Court continually stresses that "[t]he doctrine of abstention . . . is an extraordinary and narrow exception . . .," *Allegheny*, 360 U.S. at 188, and regularly highlights the importance of courts treating *Pullman* abstention as such. *Id.*; *Zwickler*, 389 U.S. at 248 (reasoning abstention is only appropriate in "narrowly limited special circumstances." (internal citations and quotations omitted)); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) (recognizing that there must exist "special circumstances" that are prerequisite to the application of abstention on a case-by-case basis (internal citations and quotations omitted)); *NAACP v. Bennett*, 360 U.S. 471, 471 (1959) (*per curiam*) ("When the validity of a state statute, challenged under the United States Constitution, is properly for adjudication before a United States District Court, reference to the state courts for construction of the statute should not automatically be made."); *Propper v. Clark*, 337 U.S. 472, 492 (1949) ("[I]n the

absence of special circumstances . . . [abstention] is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy." (citations omitted)). The Tenth Circuit heeds these warnings. *Kansas Judicial Review*, 519 F.3d at 1119 (*Pullman* abstention is "a narrow exception" and "is used only in exceptional circumstances." (internal citations and quotations omitted)); *S&S Pawn Shop Inc. v. City of Del City*, 947 F.2d 432, 442 (10th Cir. 1991) (quoting *Allegheny*); *Bureau of Revenue of State of N.M.*, 291 F.2d at 679 (quoting *Allegheny* and *NAACP*). In fact, this approach is consistent across the various circuits. *See e.g.*, *Casiano-Montanez v. State Ins. Fund Corp.*, 707 F.3d 124, 128 (1st Cir. 2013) (abstention can only be used in "exceptional circumstances" (internal citations and quotational omitted)); *Garvin v. Rosenau*, 455 F.2d 233, 238 (6th Cir. 1972) ("[A]bstention is appropriate only in narrowly limited special circumstances."); *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) ("*Pullman* abstention is an extraordinary and narrow exception . . .." (internal citations and quotations omitted)).

Comparing where abstention has and has not been granted demonstrates that *Pullman* has indeed been applied narrowly and in exceptional circumstances. For instance, as discussed more fully below, *Pullman* abstention is not applied when the inevitable delay in addressing a fundamental constitutional right may in and of itself chill the right by causing citizens to refrain from engaging in protected activity. *See*

infra, Section I(C); *see also, Dombrowski v. Pfister*, 380 U.S. 479, 489–90 (1965). It is also well established that *Pullman* abstention is not applied where the state law in question does not require interpretation; *see, e.g.*, *Wisconsin*, 400 U.S. at 437–38; *Lehman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992); where only damages are sought as a remedy, *see Quackenbush*, 517 U.S. at 713; where the challenged state statute is constitutional, *see Clajon*, 70 F.3d at 1576; or where there is no federal constitutional claim at issue, *see, e.g., Allegheny*, 360 U.S. at 188.

In contrast, abstention has been permitted when it is not clear that there is a state property right that underpins a federal constitutional claim, *Harris County Com'rs*, 420 U.S. at 82–89; where the challenged state law arguably tracked common law limitations on disruptive or criminal conduct; *Babbitt v. United Farm Workers Natl. Union*, 442 U.S. 289, 305–12 (1979); *Harrison v. NAACP*, 360 U.S. 167, 173–175 (1959); where matters of comity are complicated by questions of language and culture underlying commonwealth laws, *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42–43 (1970); or where the problems of abstention can be mitigated by certifying a question to a state's highest court, *Kansas Judicial Review v. Stout*, 519 F.3d at 1114–15.

Abstention is not appropriate in this case. As explained in greater detail below, Appellants seek vindication of fundamental constitutional right and the case has not been developed to a point that would properly permit certification of questions to

the Colorado Supreme Court. As such, this case should be returned to the district court for further proceedings.

C. The *Pullman* Doctrine Should be Inapplicable to Cases Asserting Ongoing Violations of Fundamental Rights

The vindication of a fundamental, constitutionally protected right is an area where federal courts *ought always enter*. In essence, there are cases where the right at issue and the impact of allowing an ongoing infringement of that right outweigh the concern of allowing state courts to resolve ambiguities of state law.

Fundamental rights are so basic and necessary for the preservation of the Republic that federal courts should not abstain from resolving an infringement of those rights. Fundamental rights, like the right to keep and bear arms and the right of free expression, are not granted to the people by the Constitution, but rather are guaranteed and safeguarded by the Constitution. *See* U.S. CONST. Amends. I, II; *Cruikshank*, 92 U.S. at 542 ("The right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for its existence."); *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937) ("Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.").

The Supreme Court has regularly found that the chilling effect that would occur from abstaining when fundamental rights are involved is too significant to allow for abstention. *See Dombrowski*, 380 U.S. at 489–90 ("We hold the abstention

doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression"); *accord Zwickler*, 389 U.S. at 252 (quoting *Dombrowski*); *Harman v. Fossenius*, 380 U.S. 528, 537 (1965) ("[S]upport for the District Court's refusal to stay the proceedings is found in the nature of the constitutional deprivation [of the fundamental right to vote] alleged and the probable consequences of abstaining." (citations omitted)).[2] The concern expressed by the Supreme Court is not simply that a fundamental right is being infringed, but that such an infringement also has a chilling effect upon the exercise of that right. *See Dombrowski*, 380 U.S. at 487 ("Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." (citations omitted)); *Zwickler*, 389 U.S. at 252 (requiring the plaintiff to "suffer the delay of state court proceedings might itself effect [an] impermissible chilling.").

The Ninth Circuit has also echoed the concerns of the Supreme Court. *Porter*, 319 F.3d at 486–87 ("It is rarely appropriate for a federal court to abstain under *Pullman* in a First Amendment case, because there is a risk in First Amendment cases that the delay that results from abstention will itself chill the exercise of the

[2] The Supreme Court has found that the right to vote is fundamental because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *accord Harman*, 380 U.S. at 537; *see also* U.S. CONST. Amend. XXIV.

rights that the plaintiffs seek to protect by suit."). The Ninth Circuit has recognized a connection between federal courts' frequent refusal to abstain in First Amendment cases and the preliminary *Pullman* question—whether the case "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Pullman*, 312 U.S. at 498. Specifically, the Ninth Circuit found that the "ought not to enter" consideration will almost never be present in First Amendment cases "because the guarantee of free expression is always an area of particular federal concern." *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989); *accord Porter*, 319 F.3d at 492.

In *Heller*, the Supreme Court regularly draws parallels between the rights protected by the First and Second Amendments. *See Heller*, 554 U.S. at 582 (comparing the interpretation of First and Second Amendments based on technological advancements), at 579 (comparing the interpretation of the First and Second Amendment rights as "right[s] of the people."), at 591 (noting that the First and Second Amendment both protect multiple rights), at 592 (observing the First and Second Amendments as both protecting a "*pre-existing* right."), at 595 (recognizing that both First and Second Amendment protected rights are not unlimited), at 635 (rejecting an "interest-balancing" approach in the context of both First and Second Amendment rights analyses); *see also* David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (2014) ("[T]he

Supreme Court has strongly indicated that First Amendment tools should be employed to help resolve Second Amendment issues."). "The Second Amendment is neither second class, nor second rate, nor second tier. The 'right of the people to keep and bear Arms' has no need of penumbras or emanations. It's right there, 27 words enshrined for 227 years." *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J. dissenting from denial of rehearing *en banc*) (citations omitted). The rights protected by the Second Amendment, like those protected by the First Amendment, are natural, pre-existing rights that are fundamental to the continuation and protection of the American mode of government.

The Ordinances have and will continue to have a chilling effect on the exercise of Appellants' fundamental rights. Each violation of the Ordinances is punishable by up to 90 days in jail and up to a $1,000 fine. Aplt. App. at A025. Since the Ordinances ban certain firearms—which Appellants assert are constitutionally protected—the Ordinances require Appellants and other residents of Boulder to destroy, surrender, register, or remove those firearms from city limits, thereby limiting Appellants' ability to exercise their right to keep and bear arms and their right to defend hearth and home. Aplt App. at A041, A044. In addition, the Ordinances ban certain magazines and do not allow for registration, or so-called "grandfathering," meaning Boulder residents will have to destroy, surrender, or remove their constitutionally-protected property during the pendency of the legal

challenges. Aplt. App. at A042, A044. If a resident of the City of Boulder had two banned magazines and two banned firearms, they would be subject to nearly a full year in jail and a fine of $4,000. At this time, the residents of Boulder have no reason to assume they will not be prosecuted for violations of Boulder's Ordinances. Additionally, laws criminalizing the ownership of firearms and magazines that are commonly owned will likely cause people not to exercise their constitutionally protected rights in the future.

Abstention should not delay the adjudication of Appellants' Second Amendment protected rights. Even if there is an unresolved, underlying state law issue, the more pressing concern is the present and justifiable fear of prosecution or punishment that clearly chills the exercise of a fundamental right. In this way, this case is akin to *Dombrowski*, *Zwickler*, and *Harman*.

The district court erred in exercising *Pullman* abstention because such a refusal amounts to the court prolonging violations of fundamental individual rights in favor of deference to state law processes.

This Court should vacate the district court's Order due to the chilling effect that abstention will have on the exercise of Appellants' and others' fundamental rights, as protected by the United States Constitution.

II. AS A MATTER OF FEDERAL PRACTICE, *PULLMAN* IS PROPERLY ANALYZED ON AN ISSUE-BY-ISSUE BASIS, NOT WITH THE BROAD STROKES APPLIED BELOW

In light of the weighty obligations on courts to exercise jurisdiction and the risks of leaving constitutional violations unresolved, *Pullman* abstention is analyzed on a surgical, issue-by-issue basis, only after significant development of the factual record or even a judgment on the merits by a lower court. The purpose of such detailed analysis is to allow the court to properly determine if the requirements for *Pullman* abstention have been satisfied. The Tenth Circuit has found *Pullman* abstention appropriate when: "(1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law . . . would hinder important state law policies." *Lehman*, 967 F.2d at 1478 (citing *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981); *accord Kansas Judicial Review*, 519 F.3d at 1118–19. In this case, the district court did not engage in the prescribed, detailed analysis. This Court should not exacerbate this error and should remand this case to the district court to proceed on the merits or, at least, allow for the additional factual and legal development necessary to properly conduct the *Pullman* analysis.

A. The District Court Failed to Allow for the Factual and Legal Development Necessary to Determine if *Pullman* Abstention was Appropriate for Any and All Issues

In order to proceed through the *Pullman* abstention analysis, the court must allow for sufficient development of the facts and issues in the case, to make an informed and precise decision as to whether abstention is appropriate, and if so, which claims warrant abstention and which claims do not. Such development was not permitted in this case.

Generally, the Supreme Court proceeds through the *Pullman* analysis only after there is a sufficient record necessary to determine the extent of the issues in the case and to frame which issues, if any, require abstention. *Pullman*, 312 U.S. at 499 (finding abstention was appropriate after analyzing the judgment of the district court); *accord Babbitt*, 442 U.S. at 292 (same); *Moore v. Sims*, 442 U.S. 415, 418–23 (1979) (same); *Propper*, 337 U.S. at 474–75, 497 (same); *Allegheny*, 360 U.S. at 188 (finding abstention was not appropriate after reviewing district court's order granting defendant's motion to dismiss); *Baggett*, 377 U.S. at 366, 375–79 (finding abstention was not appropriate after a trial before a three-judge district court). A federal court cannot properly analyze the factors set forth by *Pullman*, and its subsequent applications, without a sufficient factual record. The Tenth Circuit is no different. *Kansas Judicial Review*, 519 F.3d at 1111, 1118–22 (finding abstention was appropriate after reviewing district court's grant of a preliminary injunction);

S&S Pawn Shop, 947 F.2d at 436, 442 (finding abstention was appropriate after reviewing the district court's grant of summary judgment); *Clajon*, 70 F.3d at 1569–70, 1576 (finding abstention was not appropriate after reviewing the district court's grant of summary judgment).

In *Pullman* itself, the Supreme Court had the full record of the case below to rely on, which proceeded all the way through the merits of the case and received a final judgment. *Pullman Co. v. R.R. Comm'n of Tex.*, 33 F. Supp. 675 (W.D. Tex. 1940), *rev'd sub nom. R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). In fact, the only other Supreme Court opinions cited by the district court in order to frame its *Pullman* analysis in this case, *Babbitt v. United Farm Workers Natl. Union*, 442 U.S. 289 (1979) and *Moore v. Sims*, 442 U.S. 415 (1979), had each proceeded completely through the merits at the district court level, providing the Supreme Court with a complete factual record upon which to base its analysis. *See* Aplt. App. at A184–88; *see Babbit*, 442 U.S. at 292 ("In this case we review the decision of a three-judge District Court setting aside as unconstitutional Arizona's farm labor statute."); *Moore*, 442 U.S. at 422 (". . . the District Court addressed the merits of the due process challenges."). In addition, in the one Tenth Circuit case cited by the district court, *Kansas Judicial Review*, this Court only found that abstention was appropriate after the district court held a full evidentiary hearing and oral argument and granted an injunction. *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209,

1215 (D. Kan. 2006), *opinion vacated, appeal dismissed sub nom*. *Kansas Judicial Review v. Stout*, 562 F.3d 1240 (10th Cir. 2009).

Here, the district court ordered the parties to brief the issue of *Pullman* abstention prior even to the conclusion of briefing on Defendants-Appellees' *Motion to Dismiss*. Aplt. App. at A104–05. Defendants-Appellees did not file an answer to Appellants' *First Amended Complaint*. *See* Aplt. App. at A009–16. Additionally, the district court exercised *Pullman* abstention despite both parties anticipating the need for some level of discovery and with discovery deadlines pending in the case. Aplt. App. at A015, ECF No 46. This preliminary level of factual development does not allow for the in-depth analysis employed by the Supreme Court and the Tenth Circuit prior to abstention.

The district court erred in excising *Pullman* abstention in this case without first allowing for sufficient factual development to allow for the analysis of such an exceptional and narrow doctrine.

B. The District Court Failed to Adequately Examine, Frame, or Attempt to Answer the State Law Questions

Once the questions of state law are properly framed and considered, it is clear that at least some of the state law questions do not meet the requirements of *Pullman* abstention. The question, as the district court framed it based on the limited facts available, was "whether the regulation of firearms within the city is a 'local and

municipal matter' or a matter of statewide concern." Aplt. App. at A186. This is too simplistic.

Colorado has enacted two statutes that underlie two of Appellants' thirty-nine claims. *See* Aplt. App. at A049–100. The Colorado Revised Statutes, at § 29-11.7-103 ("Colorado Preemption Statute"), provides as follows: "A local government may not enact an ordinance, regulation, or other law that prohibits the sale, purchase, or possession of a firearm that a person may lawfully sell, purchase, or possess under state or federal law." Additionally, C.R.S. §29-11.7-102 ("Colorado Registration Prohibition") provides that:

> (1) A local government, including a law enforcement agency, shall not maintain a list or other form of record or database of:
>
> (a) Persons who purchase or exchange firearms or who leave firearms for repair or sale on consignment;
> (b) Persons who transfer firearms, unless the persons are federally licensed firearms dealers;
> (c) The descriptions, including serial numbers, of firearms purchased, transferred, exchanged, or left for repair or sale on consignment.

Colorado has numerous other laws addressing limitations on firearms, including laws defining and prohibiting "dangerous" and "illegal" weapons, C.R.S. § 18-12-101–102; defining and prohibiting large capacity magazines, C.R.S. § 18-12-301–302; regulating the carry of concealed firearms, C.R.S. § 18-12-105; regulating the transportation of firearms in private vehicles, C.R.S. § 18-12-105.6, C.R.S. § 33-6-125; and regulating the possession of weapons by juveniles, C.R.S. § 18-12-108.5.

Appellants asserted below that, in addition to the many constitutional violations, Boulder's Ordinances are preempted by operation of the Colorado Preemption Statute, the Colorado Registration Prohibition, and other Colorado state laws. Aplt. App. at A097–100. Defendants-Appellees asserted that they are exempt from such statutes, by virtue of being a "home rule municipality," as defined in Article XX of the Colorado Constitution. Aplt. App. at A107, A110–12. The Colorado Supreme Court previously had an opportunity to confront a similar question but found itself equally divided. *See State v. City & Cnty. of Denver*, 139 P.3d 635 (Colo. 2006) (Mem.). The fact that the Colorado Supreme Court has not rendered an explicit decision in this area, however, does not mean the question is unanswered, nor does it obviate the district court's obligation to fully analyze the state law questions properly before the court.

The trial court opinion affirmed by *State v. City & Cnty. Of Denver*, 139 P.3d 635 (Colo. 2006) (Mem.), set forth detailed, extensive steps for framing and answering the question of whether a local ordinance is preempted by state law—an inquiry that is well established in Colorado jurisprudence. *City & Cnty. of Denver v. State*, Case No. 03CV3809, 2004 WL 5212983 (Colo. Dist. Ct. Nov. 5, 2004). First, the court must determine if the issue is a matter of local concern, a matter of statewide concern, or a matter of mixed local and statewide concern. *City & Cnty. of Denver*, 2004 WL 5212983 at *3 (citing *City of Commerce City v. State*, 40 P.3d

1273, 1279–1280 (Colo. 2002); *City & Cnty. of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990); *Trinen v. City & Cnty. of Denver*, 53 P.3d 754, 758–59 (Colo. App. 2002)). In matters of purely local concern, a home rule ordinance controls in the event of a conflict with state law. *City & Cnty. of Denver v. State*, 788 P.2d at 767; *City & Cnty. of Denver*, 2004 WL 5212983 at *3. In matters of statewide concern, legislation enacted by the Colorado General Assembly controls over a conflicting municipal ordinance. *City & Cnty. of Denver v. State*, 788 P.2d at 767; *City & Cnty. of Denver*, 2004 WL 5212983 at *3. "[I]n matters of mixed local and state concern, a charter or ordinance provision of a home rule municipality may coexist with a state statute as long as there is no conflict, but in the event of conflict the state statute supersedes the conflicting provision of the charter or ordinance." *City & Cnty. of Denver v. State*, 788 P.2d at 767 (citing *Nat'l Advert. Co. v. Dep't of Highways of State of Colo.*, 751 P.2d 632, 635 (Colo. 1988)); *accord City & Cnty. of Denver by & through Bd. of Water Comm'rs v. Colorado River Water Conservation Dist.*, 696 P.2d 730, 741 (Colo. 1985) (citations omitted); *City & Cnty. of Denver*, 2004 WL 5212983 at *3.

To determine what category an issue falls under, Colorado courts look to a number of factors, including: (1) the need for statewide uniformity; (2) the extraterritorial impact of the municipality's ordinance; (3) whether the matter is one traditionally governed by state or local government; (4) whether the Colorado

Constitution specifically assigns regulation of the issue area to the state or local government; and (5) whether there is a need for government cooperation. *See, e.g.*, *City & Cnty. of Denver v. State*, 788 P.2d at 768 (citations omitted). Colorado courts weigh these under a totality of the circumstances test. *City & Cnty. of Denver v. State*, 788 P.2d at 767; *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 37 (Colo. 2000). Importantly, in addition to the five factors, when determining which category the issue falls under, the Colorado Supreme Court also gives "great weight to legislative declarations that a particular matter is of statewide concern." *City & Cnty. of Denver v. State*, 788 P.2d at 768 n.6 (citing *Nat'l Advert.*, 751 P.2d at 635); *accord Town of Telluride*, 3 P.3d at 37.

Colorado courts then examine whether there are any of three types of conflicts between the state law and the municipal ordinance—express, implied, or operational. *City of Longmont v. Colorado Oil & Gas Ass'n*, 369 P.3d 573, 582 (Colo. 2016). "Express preemption applies when the legislature clearly and unequivocally states its intent to prohibit a local government from exercising its authority over the subject matter at issue." *Id.* (citations omitted). A conflict is implied if there is some implication available in the factual record that the General Assembly intended to occupy a given field. *Id*. (citations omitted). Operational conflicts are analyzed on a case-by-case basis, but can arise, for example, if the function of a local ordinance would "materially impede or destroy a state interest." *Id*. (citations omitted). To

identify potential conflicts between a state law and a municipal ordinance, courts examine each relevant section of the ordinance(s) independently, to determine if there is a conflict on a provision by provision basis. *See, e.g.*, *City of Commerce City*, 40 P.3d at 1284–85. For example, *City & Cnty. of Denver*, 2004 WL 5212983 painstakingly analyzed five areas of the local ordinance related to firearms, completing a full preemption analysis for each one. *City & Cnty. of Denver*, 2004 WL 5212983, at *2–14.

As an illustration, a court's analysis of the issue of "large-capacity magazines," should proceed as follows. First, the court would need to determine if the regulation of magazines, which are integral to the operation of certain firearms, was a matter of local concern, statewide concern, or mixed state and local concern. To determine this, the court must examine: (1) whether there is a need for the people of Colorado to have statewide uniformity in the regulation of magazines, (2) whether Boulder's prohibition on magazines with a capacity of more than 10 rounds will have an impact outside of Boulder city limits; (3) whether magazine size is an area traditionally governed by the State of Colorado or by local governments; (4) whether the Colorado Constitution specifically assigns regulation of magazines to the state or to municipalities; and (5) whether there is a need for Boulder and the State of Colorado to cooperate on the regulation of magazines. The court also should have looked to the legislative declaration passed by the Colorado General Assembly when it enacted

the Colorado Preemption Statute, which clearly, and at length, establishes that the General Assembly views this as a matter of state-wide concern, C.R.S. § 29-11.7-101, as well as any other Colorado laws that may relate to the regulation of magazines.

After establishing what category the regulation of magazines falls into, the court must then proceed with conflicts analysis. In the matter at hand, in addition to the Colorado General Assembly's legislative declaration, the General Assembly has enacted C.R.S. § 18-12-301(2), which defines a "large-capacity magazine" as, *inter alia*, a "fixed or detachable magazine . . . capable of accepting . . . more than fifteen rounds of ammunition." Here, there is either an express or operational conflict with Boulder's Ordinances, which define a "large-capacity magazine" as, *inter alia*, "any ammunition feeding device with the capacity to accept more than 10 rounds," Aplt. App. at A042. Since there is a conflict, if the court had previously determined that the regulation of magazines was a matter of either statewide or mixed state and local concern, then the provisions in Boulder's Ordinances applying to "large-capacity magazines" would be preempted by operation of Colorado state law. Alternatively, if the court had determined that the regulation of magazines was a matter of purely local concern, then the Boulder Ordinances would control within Boulder city limits.

Importantly, the court must go through this extensive analysis with *each and every* provision of the Boulder Ordinances to properly determine what the questions

of state law actually are and whether those questions are answered. These provisions include, at minimum: (1) the definition and regulation of "assault weapons," (2) the definition and regulation of "large-capacity magazines," (3) the definition of "minor" as it relates to firearm possession and ownership, and (4) firearm registration.

While such extensive analysis of state and local laws may be tedious, it is nonetheless necessary prior to abstention. *See generally*, *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620 (9th Cir. 1993) (engaging in an exhaustive analysis of state and local building codes prior to abstention). Indeed, without engaging in this level of analysis, the court cannot truly say that there are unanswered questions of state law that underly *all* of Appellants' federal and constitutional claims.

For the same reasons, this case is not appropriate for certification. *See* Aplt. App. at A191–92. The record below does not meet the requirements necessary to satisfy Colorado's certification statute, C.A.R. 21.1(c) ("A certification order must set forth: (1) The questions of law to be answered; and (2) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose." (emphasis added)).

This Court should not allow the district court to abstain, exercising such a narrow and exceptional doctrine, without, at the very least, thoroughly examining the issues before it and attempting to frame the questions that it refuses to answer.

Accordingly, this Court should vacate the district court's order exercising *Pullman* abstention and remand this case to proceed on the merits.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's Order exercising *Pullman* abstention and administratively closing the underlying case and remand this matter to that court to proceed on the merits of Plaintiffs-Appellants' claims.

DATED this 10th day of January 2019.

Respectfully submitted,

/s/ Cody J. Wisniewski
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. This is a case of first impression involving the interplay between *Pullman* abstention and claims brought under the Second Amendment. Because of the national significance of this issue, oral argument would be beneficial.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 28 and 32 and 10th Cir. R. 32, the foregoing *Appellants' Opening Brief* contains 8,504 words, as determined by the Microsoft Word word count tool, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

DATED this the 10th day of January 2019.

/s/ Cody J. Wisniewski
Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION

CERTIFICATE OF ELECTRONIC FILING

In accordance with this Court's CM/ECF User's Manual and Local Rules, I hereby certify that the foregoing has been scanned for viruses with Webroot SecureAnywhere Antivirus, updated January 10, 2019, and is free of viruses according to that program.

In addition, I certify that all required privacy redactions have been made and the electronic version of this document is an exact copy of the written document to be filed with the Clerk.

DATED this the 10th day of January 2019.

/s/ Cody J. Wisniewski
Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the Court's appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished through the appellate CM/ECF system.

Additionally, I certify that seven copies of the foregoing document will be delivered to the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit within two business days.

DATED this the 10th day of January 2019.

/s/ Cody J. Wisniewski
Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION

ADDENDA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CHIEF JUDGE MARCIA S. KRIEGER

Courtroom Deputy: Patricia Glover
Court Reporter: Terri Lindblom

Date: August 15, 2018

Civil Action No. 18-cv-01211-MSK-MEH

Parties:	*Counsel Appearing:*
JON C. CALDERA, BOULDER RIFLE CLUB, INC., GENERAL COMMERCE, LLC, TYLER FAYE, and MARK RINGER, Plaintiffs, v. CITY OF BOULDER, JANE S. BRAUTIGAM, GREGORY TESTA, SUZANNE JONES, AARON BROCKETT, CYNTHIA A. CARLISLE, LISA MORZEL, MIRABAI KUK NAGLE, SAMUEL P. WEAVER, ROBERT YATES, MARY D. YOUNG, JILL ADLER GRANO, and John Does 1-10, Defendants.	Sean Smith Cody Wisniewski Evan Rothstein Patrick Hall Timothy Macdonald Luis Toro

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COURTROOM MINUTES

HEARING: Law and Motion

10:01 a.m. Court in session.

The Court addresses the matters set forth in its Order (**Doc. #37**) and other issues.

Statements from counsel Wisniewski and Macdonald on the issues at hand.

ORDER: Plaintiff's will file a supplemental response to the Motion to Dismiss **(Doc. #35)** by **August 29, 2018.**

The Court addresses how to proceed with the case.

Argument.

ORDER: The parties will brief the issue as to whether the *Pullman* abstention should be applied in this case by **August 22, 2018.** If the parties decide during this time period they want to certify the question to the Colorado Supreme Court on the fast track, it must be done by agreement and stipulate to all relevant facts that pertain to the home rule challenge. The parties may respond with seven days **(August 22, 2018)** that they have entered into that agreement, and then a stipulation as to all relevant facts and a statement as to the question to be presented to the Colorado Supreme Court should be filed seven days thereafter, by **August 29, 2018**.

ORDER: All claims against Boulder City Council members are dismissed as duplicative of the claim brought against the City of Boulder. The caption will read plaintiffs v The City of Boulder, Jane Brautigam, Gregory Testa and John Does 1 through 10. All of the remaining individuals will be deleted from the caption.

10:55 a.m. Court in recess.

Total Time: 54 minutes.
Hearing concluded.

OIN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 18-cv-01211-MSK-NYW

JON C. CALDERA,
BOULDER RIFLE CLUB, INC.,
GENERAL COMMERCE, LLC,
TYLER FAYE, and
MARK RINGER,

Plaintiffs,

v.

CITY OF BOULDER, and
John Does 1-10,

Defendants.

OPINION AND ORDER OF ABSTENTION PURSUANT TO *PULLMAN*

THIS MATTER comes before the Court pursuant to the Court's discussion with the parties during a hearing on August 15, 2018 **(# 46)**, and the parties' supplemental briefing on the issue of *Pullman* abstention **(# 48, 49)**.

FACTS

For purposes of this Order, the pertinent facts of this case are straightforward and undisputed. On May 15, 2018, the City of Boulder adopted Ordinance 8245. That Ordinance amended the Boulder Revised Code to prohibit, within the City of Boulder, the sale or possession of "assault weapons" (defined generally as semi-automatic rifles, pistols, and shotguns having certain specific characteristics) and large-capacity ammunition magazines (defined generally as magazines with a capacity of more than 10 rounds, 15 for pistols), among other things. The Ordinance provided that individuals in possession of such weapons or

magazines as of the passage of the Ordinance could choose to retain those items by providing certain information about the items to the Boulder Police Department, undergoing a background check, and obtaining a "certificate" to be kept with the weapon or magazine.[1]

The Plaintiffs – citizens of the City of Boulder and entities with various interests in the sale or possession of weapons within Boulder – commenced this action challenging the Ordinances. Their Amended Complaint **(# 41)** asserts a total of 39 claims, although the bulk of those claims are a core group of seven distinct claims, asserted by each of the five Plaintiffs: (i) a claim that the Ordinances violate the Second Amendment to the United States Constitution; (ii) a claim that the Ordinances violate the Due Process Clause of the Constitution (apparently a substantive due process claim, as it contends that the Ordinance lacks "any legitimate government objective"); (iii) a claim that the Ordinances violate the Takings Clause of the 5th Amendment to the U.S. Constitution, in that the Ordinances "force [the Plaintiffs] to surrender [their] lawfully acquired and lawfully owned property . . . without any government compensation"; (iv) a claim that the Ordinances violate the First Amendment to the Constitution, in that they compel the Plaintiffs "to speak to the Boulder Police Department and provide information about banned, but currently exempted, firearms"; (v) a claim asserting a violation of the Privileges and Immunities Clause of the 14th Amendment to the Constitution, in that the Ordinance deprives them of the rights secured by the Second Amendment; (vi) a claim that the Ordinances violate Article 2, § 13 of the Colorado Constitution, which guarantees citizens the right to keep and bear arms; and (vii) a claim that the Ordinances violate Article 2, § 3 of the Colorado Constitution, which guarantees citizens the right "of enjoying and defending

[1] On June 18, 2019, the City passed Ordinance 8259, which amended Ordinance 8245 in certain respects, but which did not fundamentally change the thrust of the prior Ordinance.

their lives and liberties," in that the Ordinance deprives them of their right of self-defense. In addition, to these core claims (and certain additional claims asserted by certain specific Plaintiffs), two claims by unspecified Plaintiffs seek a declaratory judgment that the Ordinance violates home rule provisions found in C.R.S. § 29-11.7-102 and -103.[2]

The Plaintiffs sought a preliminary injunction **(# 4)** against enforcement of the Ordinance, and on August 15, 2018, this Court conducted a non-evidentiary hearing to address that request. Among the issues raised by the Court at that hearing was the question of whether it was appropriate for the Court to abstain, on *Pullman* grounds, from hearing the constitutional challenges to the Ordinances until the Plaintiffs' claims under C.R.S. § 29-11.7-103 were resolved. The Court invited the parties to brief the issue of the appropriateness of *Pullman* abstention, and the parties did so **(# 48, 49)**.

ANALYSIS

The doctrine of abstention that has become known as the *Pullman* abstention has its origins in the U.S. Supreme Court's decision in *Railroad Comm'n. of Texas v. Pullman Co.*, 312 U.S. 496 (1941). There, a Texas regulation prohibited passenger railroads from operating trains without a conductor, a regulation that implicated the railroads' ability to employ black persons as sleeper car attendants. The railroads and certain black employees sued the state railroad commission, arguing that the regulation violated both Texas state law and the Equal Protection and Due Process clauses of the U.S. Constitution. A trial court enjoined enforcement of the regulation, and the state appealed to the U.S. Supreme Court. The Court conceded that the

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[2] C.R.S. § 29-11.7-102(1) prohibits local governments from "maintaining a list or other form of record or database of" firearms ownership or transfers.

C.R.S. § 29-11.7-103 provides that local government "may not enact an ordinance . . . that prohibits the sale, purchase, or possession of a firearm that a person may lawfully sell, purchase, or possess understate or federal law."

plaintiffs "tendered a substantial constitutional issue," but noted that it "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." 312 U.S. at 498. It observed that "[s]uch constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy," and explained that, in addressing the question of whether the regulation violated Texas state law, the federal courts could offer only "a forecast rather than a determination" of how state law might apply. The last word, it explained, "belongs neither to us nor the district court, but to the supreme court of Texas." The Court observed that "[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court," and suggested that federal courts should endeavor to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." Noting that the state courts provided "easy and ample means for determining" the state law issue, the Court declared that the federal court "should exercise its wise discretion by staying its hands" as to the constitutional question and remanded the action back to the district court to "retain the bill" – essentially stay the case – "pending a determination of proceedings, to be brought with reasonable promptness, in the state court." *Id.* at 498-502.

Pullman abstention is founded on the notion that federal courts should avoid "premature constitutional adjudication." *Babbit v. United Farm Workers Natl. Union*, 442 U.S. 289, 306 (1979). The danger is that a federal court may render "a constitutional adjudication [ ] predicated on a reading of the [state] statute that is not binding on state courts and may be discredited at any time, thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless." *Moore v. Sims*, 442 U.S. 415, 428 (1979). Thus, *Pullman* abstention is appropriate when three elements are present: (i) an uncertain issue of state law

underlies the federal constitutional claim; (ii) the state issues are amenable to interpretation and such an interpretation would obviate the need for or substantially narrow the scope of the constitutional claim; and (iii) an incorrect decision of state law by the federal court would hinder important state law policies. *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1118-19 (10th Cir. 2008).

A. Are the predicate elements for abstention are present?

Turning first to the existence of "an uncertain issue of state law," the issue is framed by the Plaintiffs' Thirty Ninth Cause of Action. It seeks a declaration that the Boulder Ordinances violate a Colorado State Statute - C.R.S. § 29-11.7-103. Such statute provides that "a local government may not enact 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."[3] It would appear that the Ordinances violate the statute because at least some firearms covered by the Ordinances can be legally-possessed under Colorado and/or federal law.

But C.R.S. § 29-11.7-103 does not exist in a vacuum. It rubs up against Art. XX, Section 6 of the Colorado constitution, which provides generally that municipalities are given the authority to pass laws affecting "local and municipal matters" which "supersede . . . any law of the state in conflict therewith" (sometimes referred to as a "home rule" provision). If the regulation of firearms is a "local and municipal matter," then Art. XX, Section 6 would require that C.R.S. § 29-11.7-103 yield to that local interest. Thus, the question of whether the Ordinances are barred by C.R.S. § 29-11.7-103, or whether that statute yields to Boulder's home

[3] The Plaintiffs argue that, because C.R.S. § 29-11.7-103 encompasses weapons legally possessed under "federal law," "the underlying state law explicitly implicates a question of federal law" and thus falls outside of *Pullman* consideration entirely. For the reasons set forth herein, that argument is without merit.

rule authority turns significantly on the question of whether the regulation of firearms within the city is a "local and municipal matter" or a matter of statewide concern.

The answer to that question is decidedly uncertain and certainly an issue of state, not federal law. As far as this Court is aware, the state courts have squarely considered that question only once. In *City and County of Denver v. State of Colorado*, 2004 WL 5212983 (Colo. Dist. Ct., Denver County Nov. 5, 2004), the City of Denver had passed several municipal ordinances governing the sale or use of firearm within the city limits. Citing the recently-enacted C.R.S. § 29-11.7-103 (sometimes referred to by the courts as "Senate Bill 25"), the State sued, seeking a declaration that Denver's ordinances were preempted; in response, Denver argued that the ordinances addressed local matters within the scope of Denver's home rule rights. Ultimately, the Denver District Court found that several of Denver's ordinances (including a prohibition on the sale of "assault weapons") were properly considered matters of uniquely local concern, trumping C.R.S. § 29-11.7-103's prohibition. The state appealed that ruling to the Colorado Supreme Court, but the Supreme Court split evenly on the issue, with three justices voting to affirm the Denver District Court, three justices voting to reverse, and one justice not participating. *State of Colorado v. City and County of Denver*, 139 P.3d 635 (Colo. 2006). By operation of Colorado Appellate Rule 35(e), the even split by the Supreme Court resulted in the affirmance of the Denver District Court's ruling.

There can be little argument that, where the state's highest court splits evenly on a question of law, that legal question is "uncertain"; indeed, it is hard to conceive of a more potent way of demonstrating such uncertainty. The Plaintiffs here argue that the application of C.R.S. § 29-11.7-103 is not uncertain because "the plain language of" that statute "is clear and unambiguous," as are the principles for determining whether matters fall within the Colorado

constitution's "home rule" provisions, such this Court "need only look to the state statutes in question . . . and apply them to the case at hand." But *City and County of Denver* clearly belies the Plaintiffs' contention that the state law determinations to be made here are straightforward and obvious. Surely, they were not straightforward and obvious to the Colorado Supreme Court in 2006, and although the Colorado state courts have spoken generally on the subject of home rule in the interim, the Plaintiffs point to no subsequent decisions that have revisited – much less conclusively resolved -- the particular question of whether municipal firearms regulations constitute matters of local or statewide concern. Thus, the first element of *Pullman* abstention – an uncertain question of state law – is present here.

The second element considers whether the state issue is ripe for review and whether its resolution would obviate the need for a determination of federal constitutionality is also satisfied. The state law issue is ripe, as the Plaintiffs have asserted it as one of their causes of action here. There is no apparent impediment to the Plaintiffs litigating the applicability of C.R.S. § 29-11.7-103 to the Ordinances herein in the state courts, or at least the Plaintiffs have not identified any such impediment (except perhaps time, which the Court addresses below). Likewise, it is clear that if the state courts were to conclude that the Ordinances are preempted by C.R.S. § 29-11.7-103, such determination would nullify the Ordinances and eliminate entirely the need for a determination of whether the Ordinances offend the U.S. Constitution. Thus, the second element of *Pullman* abstention is present as well.

Finally, the third element examines whether an incorrect prediction of state law by this Court would hinder important state policies. Both sides of the state law issue implicate important state rights: on the one hand, the state's interest in the uniform enforcement of firearms laws is a matter of substantial state interest, as reflected by the legislative declaration found in

C.R.S. § 29-11.7-101. On the other hand, the principles of municipal home rule enshrined in the Colorado constitution reflect important state interests as well, given the state's intention to confer upon municipalities the same powers possessed by the state legislature itself, at least as to matters of local concern. *City and County of Denver v. State of Colorado*, 788 P.2d 764, 767 (Colo. 1990). Thus, any incorrect prediction by this Court about the correct interpretation of C.R.S. § 29-11.7-103 and Art. XX, Section 6 of the Colorado constitution will necessarily disrupt an important state interest.

Accordingly, the Court finds that all the predicate elements necessary for *Pullman* abstention are present here.[4]

B. Should this Court abstain from hearing this matter?

Having determined that all the predicate elements for *Pullman* abstention are present, the only remaining question is whether the Court should abstain. Abstention is a discretionary exercise of the Court's equity powers, to be applied only in special circumstances. *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). The Plaintiffs offer two arguments as to why abstention would be inappropriate: (i) because the Ordinances implicate fundamental rights under the U.S. Constitution; and (ii) because abstention would needlessly delay consideration of the substantial federal questions raised by the Plaintiffs' claims.

[4] Occasionally, the Supreme Court makes a passing reference to abstention only being appropriate in "special circumstances." *Baggett v. Bullitt*, 377 U.S. 360, 376 (1964). At least one such circumstance is "the susceptibility of a state statute to a construction by the state courts that would avoid or modify the constitutional question." *Zwickler v. Koota*, 389 U.S. 241, 248-49 (1967). To the extent that "special circumstances" are an additional element that must be present for *Pullman* abstention to be appropriate, for the reasons set forth above, this Court finds that this special circumstance is present here.

1. Nature of the right at issue

The Supreme Court has stated that "abstention is inappropriate for cases where statutes are justifiably attacked on their face as abridging free expression."[5] *City of Houston v. Hill*, 482 U.S. 451, 467 (1987), *quoting Dombrowksi v. Pfister*, 380 U.S. 479, 489 (1965). The Plaintiffs assert that Second Amendment rights should enjoy the same protection as First Amendment free expression rights, and thus this Court should categorically refuse to abstain in this case.

Putting aside the difficulty in attempting to compare and contrast the relative importance of constitutional rights and the absence of any cited legal authority for the proposition advanced by the Plaintiffs, this Court observes, as does Justice Powell's concurring opinion in *Hill*, 482 U.S. at 476 n. 4, that the reasons why free expression cases are particularly ill-suited for abstention has less to do with their categorical label and more to do with the interplay of federal and state law interests in such cases. Each of the cases that the Plaintiffs here cite in support of their argument, including *Zwickler v. Koota*, 389 U.S. 241 (1967), *Dombrowski*, and others such as *Hill* and *Baggett v. Bullitt*, 377 U.S. 360 (1964), involve individuals challenging state statutes restricting free expression as being vague or overbroad in violation of the First Amendment. In none of these cases did the Supreme Court simply declare that "because free expression rights are implicated, abstention is inappropriate." Rather, a close reading of all those cases reveals that common reasons why the Supreme Court found *Pullman* abstention to be inappropriate. In

[5] But see *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 509-10 (1985) (O'Connor, J., concurring) ("the Court of Appeals asserted that *Pullman* abstention should almost never apply where a state statute is challenged on First Amendment grounds because the constitutional guarantee of free expression is, quite properly, always an area of particular federal concern. This Court has never endorsed such a proposition. On the contrary, even in cases involving First Amendment challenges to a state statute, abstention may be required to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.") (internal quotes and citations omitted).

these cases, (particularly with regard to vagueness challenges), the Court found that was no likelihood of a single, conclusive determination of state law that would eliminate the need for a federal constitutional analysis – that the state courts would only be able to render a string of sequential rulings in piecemeal fashion that might resolve the constitutional question if viewed in aggregation. *See e.g. Zwickler*, 389 U.S. at 397 ("appellee concedes that state court construction cannot narrow its allegedly indiscriminate cast and render unnecessary a decision of appellant's constitutional challenge"); *Baggett*, 377 U.S. at 378 ("It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty"). The Court also found in some cases that there was no meaningful state law question presented. *Dombrowski*, 380 U.S. at 490 (law enforcement "invoked. . . criminal process [against the appellant] without any hope of ultimate success [ ] only to discourage appellant's civil rights activities," and in such circumstances, "the interpretation ultimately put on the statutes by the state courts is irrelevant"); *Hill*, 482 U.S. at 471 ("here, there is no uncertain question of state law whose resolution might affect the pending federal claim").

Neither of these situations is present here. The question of whether the Ordinances regulate matters of local concern (such that they are a permissible exercise of Boulder's home rule rights), or whether they regulate matters of general statewide concern (such that they are impermissible under C.R.S. § 29-11.7-103), is concrete, ripe, capable of conclusive resolution in a single state court lawsuit, and, if resolved against Boulder, will entirely dispositive of the claims herein without requiring any adjudication of the federal constitutional issues. Thus, the factors that sometimes lead the Supreme Court to assert that free expression cases generally are

not suitable for *Pullman* abstention are not present here.

2. Delay

Of course, the crux of the Plaintiffs' argument that abstention would burden their fundamental rights is based on the assumption that resolving the state law issue in state court will interpose a lengthy delay before this Court might thereafter reach the federal constitutional issues, and that throughout that time, the Plaintiffs will suffer an ongoing intrusion into their Second Amendment rights. The Court understands and appreciates this argument, but finds it unavailing. The notion that individuals will continue to suffer an ongoing alleged deprivation of constitutional rights is, unfortunate as it may be, baked into the concept of abstention. The Supreme Court's rulings make clear that, as between the risk of individual constitutional deprivations and the risk of premature constitutional adjudication, the Court should defer to the latter over the former.

Nevertheless, the Supreme Court is troubled by that problem and has recently offered at least one possible approach in mitigation. In *Expressions Hair Design v. Schniderman*, 137 S.Ct. 1144, 1156 (2017), it explained that "abstention is a blunt instrument" that "sends the plaintiff to state court" and "entails a full round of litigation in the state court system before any resumption of proceedings in federal court." *Expressions* offered, as an alternative, the possibility that the federal court could certify the state law question directly to the state's supreme court, "reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.* Colorado permits this Court to certify a question directly to the Supreme Court if: (i) the question of state law would be determinative of the case, and (ii) it appears that there is no controlling precedent from the Colorado Supreme Court on the issue. Colo. App. R. 21.1(a). Both criteria are met here, and, as the Court informed the parties at the hearing in this matter, it

would offer to make such a certification, subject to the parties stipulating to all the facts pertinent to the issue. Colo. App. R. 21.1(c)(2).

For whatever reasons, the parties were unable to come to an agreement regarding certification of the state law issue to the Colorado Supreme Court. That failure to agree, although unfortunate, is not a basis to otherwise alter the Court's conclusion that abstention is warranted here.

CONCLUSION

For the foregoing reasons, the Court finds that it is appropriate to exercise *Pullman* abstention in this action, deferring the consideration of the Plaintiffs' federal constitutional claims until the state court can conclusively resolve the question of whether the Ordinances are preempted by C.R.S. § 29-11.7-103. The Court accepts the Plaintiffs' suggestion that a stay of this action, rather than dismissal, is an appropriate way to effectuate the abstention, and the Court therefore stays this action in its entirety. However, because of the unknown time frame in which the state court can be expected to finally resolve the question, it is impractical to leave this case open indefinitely. Accordingly, the Clerk of the Court shall administratively close this case, subject to any party moving to reopen it upon a showing that the state courts have fully resolved the state law issue herein.

Dated this 17th day of September, 2018.

BY THE COURT:

Marcia S. Krieger
Chief United States District Judge