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' REPLY BRIEF

(Oral Argument is Requested)

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INTRODUCTION

Will this Court as jealously defend the constitutionally protected right to keep and bear arms as it defends the freedom of expression and racial equality? Or will it treat the regulation of arms as mundanely as the definition of a milk bottle or the proper materials for roofing? This is the question posed but not articulated by Defendants-Appellees ("Boulder"). Appellants ask this Court to recognize the importance of Second Amendment rights, yet in so doing, merely seek an opportunity to litigate their constitutional claims in a federal forum. Boulder asks this Court to view the district court's action as merely procedural and endorses an extraordinary abstention from jurisdiction that will put Appellants out of court indefinitely—leaving the resolution of their Second Amendment claims dependent on a state court proceeding to which Appellants are not a party and where the Second Amendment is not at issue.

Unfortunately for Boulder, the Second Amendment matters. The Second Amendment, like the First or the Fourth, enshrines a pre-existing, natural right. The Framers viewed the rights protected by the Second Amendment as fundamental to our ordered system of liberty. Having just paid the high cost of extricating themselves from a tyrannical government, and in an attempt to protect future generations from a repeat of that history, the Framers placed the right to keep and bear arms in a place of prominence in the Bill of Rights; one of the few specific

limitations placed on the newly created federal government. Despite this, yet consistent with the troubling theme throughout its brief, Boulder invites this Court to disregard the Second Amendment issues underlying this case and further asserts that the Appellants' Second Amendment protected rights are "uncertain." Brief of Appellees ("Boulder Br.") at 28.

Abstention from exercising jurisdiction to adjudicate the violation of a fundamental, constitutionally protected right is not the normal course for a federal court and should not be exercised so perfunctorily as it was below. Appellants request that this Court reverse the district court and allow Appellants to proceed with the vindication of their constitutionally and federally protected rights in federal court.

STANDARD OF REVIEW

De novo is the appropriate standard of review. While Boulder argues for a more deferential standard in this case, they agree that *de novo* is the appropriate standard to determine whether *Pullman* factors are satisfied. Boulder Br. at 13 ("An appellate court's review of [the question of whether the requirements for *Pullman* are met] is *de novo* because '[t]he district court has no discretion to abstain in cases that do not meet the requirements of the abstention doctrine being invoked.") (quoting *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 939 (9th Cir. 2002)).

The Tenth Circuit has established that it reviews *de novo* the question of whether "the requirements for *Pullman* abstention have been met." *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1114–15 (10th Cir. 2008) (citing *Spoklie v. Montana*, 411 F.3d 1051, 1055 (9th Cir. 2005) (reviewing question of *Pullman* abstention *de novo*)). Even the *Vinyard* case, cited by Boulder as favoring an abuse of discretion standard, applied *de novo* review. Boulder Br. at 12; *Vinyard v. King*, 655 F.2d 1016, 1018–19 (10th Cir. 1981) (the question of whether the *Pullman* requirements are met "is essentially legal in nature and our review is de novo.").

Boulder argues that here the existence of the "special circumstances" that permit abstention is not contested. Boulder Br. at 13. Not so. Appellants offer at least three reasons why the requirements permitting *Pullman* abstention are not met, and thus the district court lacked any discretion to abstain: (1) the *Pullman*

requirements should not be considered due to the impermissible effect Boulder Ordinance 8245 and Ordinance 8259 (collectively, "Ordinances") have on the exercise of a natural, fundamental right, Appellants' Opening Brief ("Aplt. Br.") at 23–27; (2) Appellants' constitutional rights can be evaluated without reference to the Colorado preemption doctrine; and (3) the district court could not properly analyze the *Pullman* test because of inadequate factual and legal development. Aplt. Br. at 28–39.

Further, Boulder relies upon decisions that reviewed the continuance of jurisdiction; not the extraordinary decision to abstain. In arguing that the Supreme Court reviews *Pullman* abstention for abuse of discretion, Boulder cites *Hawaii Housing Authority v. Midkiff* and *Harman v. Forssenius*. Boulder Br. at 12. In both cases, however, the Court reviewed the district court's decisions to retain jurisdiction and **not** abstain. *Hawaii Hous. Auth.*, 467 U.S. 229, 236 (1984); *Harman*, 380 U.S. 528, 534 (1965). That difference is significant, because the decision not to abstain does not carry the same concerns inherent in abstention.

ARGUMENT

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

U.S. CONST. Amend. II.

I. BOULDER INFRINGES AND TRIVIALIZES APPELLANTS' NATURAL, FUNDAMENTAL RIGHT TO KEEP AND BEAR ARMS

> Municipal respondents, in effect, ask us to treat the [Second Amendment] right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees….

McDonald v. City of Chicago, Ill., 561 U.S. 742, 780 (2010).

A. Boulder Exhibits and Invites Disdain for Appellants' Second Amendment Protected Rights

Appellants filed suit in federal court to vindicate their rights guaranteed by the First, Second, Fifth, and Fourteenth Amendments to the Constitution for the United States. *See* Aplt. App. at A017–103; U.S. CONST. Amends. I, II, V, XIV. Appellants rely on the mandate placed on federal courts to enforce constitutionally protected rights—a mandate specifically created to protect rights, even when those holding such rights have become disfavored by the majority. *See* 42 U.S.C. § 1983.

Boulder, in contrast, demonstrates indifference—even disdain—for the existence and scope of Second Amendment protected rights. Boulder asks this Court to view abstention as "a narrow procedural question" in a case that merely "happens to involve a firearms ordinance." Boulder Br. at 2–3. Boulder also argues that this

Court need not be troubled by abstention here because of the "uncertain nature of [Appellants'] purported federal right" and suggests that Second Amendment rights need not come to the fore unless they touch upon "the right to possess a handgun for self-defense within the home." Boulder Br. at 28, 32. Boulder further engages in lateral attacks on Appellants' rights, repeatedly and insidiously referring to the constitutionally protected arms at issue as "assault weapons" with "military-like features" or "military-style assault weapons" responsible for "mass violence." Boulder Br. at 3–4, 16, 24, 28, 32.

Boulder also downplays the Second Amendment protected rights at issue by asking the Court to analogize this case to cases involving disputes over standards for water quality, the definition of a milk bottle, proper roofing material, or the scope of a fishing license. Boulder Br. at 10, 14, 19.[1] Boulder's arguments are based on an apparent contempt for the natural, fundamental rights that underly this case—an attitude not shared by the Framers or the Supreme Court.

[1] Citing, respectively: *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972) (addressing regulation of the discharge of treated sewage); *City of Chicago v. Fieldcrest Dairies*, 316 U.S. 168 (1942) (addressing definition and regulation of milk bottles); *City of Meridian v. S. Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959) (regarding utility's use of public streets); *Reetz v. Bozanich*, 397 U.S. 82 (1970) (reviewing regulation of salmon net gear licenses for commercial fishing); and *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 621 (9th Cir. 1993) (examining ban on wooden roofing shingles).

B. The Natural Rights Protected by the Second Amendment are Fundamental to Our System of Ordered Liberty

Appellants' challenge to Boulder's infringement of Second Amendment protected rights is much more significant than a case that merely "happens to involve a firearms ordinance." Boulder Br. at 2. Attempting to discredit Appellants' concerns, Boulder categorizes its Ordinances, which ban entire categories of firearms that are legal at the state and federal level, as "respect[ful] [of] lawful uses of firearms." Boulder Br. at 3. Boulder profoundly misunderstands the natural, fundamental right to keep and bear arms.

"[T]he 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." *McDonald*, 561 U.S. at 778. The right to keep and bear arms, and the right to self-defense, were not creations of the Framers, but rather were among the natural rights that the Framers held sacred. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be *self-evident*, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness.") (emphasis added); *Cotting v. Godard*, 183 U.S. 79, 107 (1901) ("[I]t is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.").

George Washington and James Madison, among other Framers, "firmly believed that *the character and spirit of the republic* rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society." Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 614 (1982) (emphasis added). The colonial experience and the American Revolution strengthened the notion that an armed populace is essential to liberty. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 327 (1991).

The Supreme Court recounted this history and foundation of the Second Amendment in *District of Columbia v. Heller*:

> [I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L.Ed. 588 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ."

554 U.S. 570, 592 (2008) (emphasis in original). The *Heller* Court explicitly recognized the analogous nature of the Second Amendment and the First and Fourth Amendments, refusing to allow the right to keep and bear arms to be treated differently than the right to free expression or the right to be free from government intrusion into one's home. *Id.*; U.S. CONST. Amends. I, II, IV.

The Supreme Court has recognized that natural, fundamental rights must be zealously protected. *See De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937) ("For the right [of peaceable assembly] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause.") (citations omitted); *McDonald*, 561 U.S. at 778 ("[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."). A fundamental right is a "significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications." *Fundamental Right*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also Natural Right*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A right that is conceived as part of natural law and that is therefore thought to *exist independently of rights created by government or society* . . . .") (emphasis added).

Boulder's disrespect for the Second Amendment mimics the approach taken by the City of Chicago against Otis McDonald—an attitude thoroughly criticized by the Supreme Court. *See McDonald*, 561 U.S. at 780 ("Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we

have held to be incorporated into the Due Process Clause."). This Court should as thoroughly reject Boulder's argument as the Supreme Court did Chicago's.

C. The Supreme Court Disfavors Abstention, Especially When Confronted with a Chilling of the Exercise of a Natural, Fundamental Right

1. Abstention is a Narrow Exception, Not a Broad Rule

"Abstention [under *Pullman*] is, of course, the exception and not the rule . . . ." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 467 (1987) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)); *see* Aplt. Br. at 18–23; *see also Allegheny Cnty. v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) ("The doctrine of abstention . . . is an extraordinary and narrow exception . . . .").

Boulder attempts to expand *Pullman* abstention, treating it as a matter of routine. For example, Boulder proposes that *Pullman* abstention is appropriate whenever "state law 'is susceptible of a construction by the state courts that would avoid or modify the federal constitutional questions.'" Boulder Br. at 10 (citing *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510–11 (1972)).[2]

Supreme Court precedent establishes otherwise. For instance, in *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, the Supreme Court rejected an invitation to abstain, despite the fact that the statute in question was

[2] In that case, the Supreme Court was examining a claim that a Michigan law requiring "vessels with marine toilets to have sewage storage devices" unduly burdened "interstate and foreign commerce." *Id*. at 498.

argued to be preempted by the Puerto Rico Constitution. 426 U.S. 572, 597–98 (1976). In rejecting abstention, the Court noted that "to hold that abstention is required because [the statute] might conflict with the cited broad and sweeping [Puerto Rico] constitutional provisions, *would convert abstention from an exception into a general rule*." *Id.* at 598 (emphasis added). Likewise, in *Wisconsin v. Constantineau*, the Supreme Court found that the questioned state statute itself was not uncertain, and abstention in such a case "would negate the history of the enlargement of the jurisdiction of the federal district courts . . . ." 400 U.S. 433, 439 (1971) (citing 28 U.S.C. §§ 1331, 1343(3) and *Zwickler v. Koota*, 389 U.S. 241, 245–48 (1971)).

Here, in arguing against the chilling effect of its Ordinances, Boulder affirmatively states, "the Ordinance unambiguously restricts the sale or possession of firearms with specific military-like features . . . ." Boulder Br. at 32. As the Ordinances "unambiguously restrict[]" at least some conduct that falls within the protection of the Second Amendment, a federal court need not defer until the Colorado courts sort out a question as to whether Colorado law permits Boulder to violate the United States Constitution. *See City of Houston*, 482 U.S. at 469 ("In sum, [s]ince the naked question, uncomplicated by [ambiguous language], is whether the Act on its face is unconstitutional . . . abstention from federal

jurisdiction is not required.") (alterations in original and internal quotes omitted) (quoting *Constantineau*, 400 U.S. at 439 and *Hawaii Hous. Auth.*, 467 U.S. at 237).

2. Abstention is Even More Rarely Exercised in the Presence of a Facial Challenge to a Violation of a Natural, Fundamental Right

The Supreme Court routinely holds that the chilling effect on the exercise of a natural, fundamental right that occurs during abstention is too much of a concern to allow invocation of *Pullman* abstention. Aplt. Br. at 23–27; *see e.g.*, *Harman*, 380 U.S. at 537 (refusing to abstain because of the deprivation of the fundamental right to vote); *see also Zwickler*, 389 U.S. at 252 (refusing to abstain due to the *possibility* of an impermissible chilling on the exercise of plaintiffs' fundamental rights). The Supreme Court is not alone—the principle of disfavoring abstention where there is a chilling effect on the exercise of a fundamental right has also been recognized by the First, Second, Fourth, Sixth, Ninth, and Eleventh Circuits. *See Mangual v. Rotger-Sabat*, 317 F.3d 45, 64 (1st Cir. 2003) ("[T]he delay involved in abstention is especially problematic where First Amendment rights are involved."); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385–86 (2d Cir. 2000) (recognizing that district courts must exercise caution when abstaining in cases where there may be an impermissible chilling on the exercise of a fundamental right); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999) (finding abstention is inappropriate where "the statute's mere existence risks

chilling First Amendment rights."); *Jones v. Coleman*, 848 F.3d 744, 750 (6th Cir. 2017) (recognizing the Supreme Court's reluctance in abstaining from adjudicating facial challenges under the First Amendment) (citing *City of Houston*, 482 U.S. at 467; *Dombrowski v. Pfister*, 380 U.S. 479, 489–90 (1965); *Zwickler*, 389 U.S. at 252); *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989) (quoting *Zwickler*, 389 U.S. at 252); *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000) ("Our conclusion that abstention is inappropriate is strengthened by the fact that Plaintiffs allege a constitutional violation of their voting rights.").

Boulder acknowledges that "a discretionary determination on abstention should account for 'the nature of the constitutional deprivation alleged and the probable consequences of abstaining.'" Boulder Br. at 27 (citing *Harman*, 380 U.S. at 537). Boulder nonetheless undervalues the scope and strength of Appellants' Second Amendment rights and erroneously claims that Supreme Court precedent weighs in favor of abstention. In support of its counter argument, Boulder cites *City of Meridian* and *Reetz*, as well as the Ninth Circuit's decision in *Cedar Shake & Shingle Bureau*. Boulder Br. at 19. These cases concerned, respectively: (1) a statute imposing a charge on public utilities for using public streets and places, *City of Meridian*, 358 U.S. at 639; (2) "salmon net gear licenses for commercial fishing," *Reetz*, 397 U.S. at 83; and (3) a "city ordinance banning the use of wood shake and shingle roofing materials in new construction in the City of Los Angeles," *Cedar*

Shake & Shingle Bureau, 997 F.2d at 621. Boulder fails to cite any Supreme Court precedent favoring *Pullman* abstention in the context of a facial challenge to a statue infringing the exercise of a natural, fundamental right.

Moreover, contrary to Boulder's argument, government action may chill the exercise of rights beyond those in the First Amendment. The Supreme Court's first mention of the concept of "chilling effect" appears in Justice Frankfurter's concurrence in *Wieman v. Updegraff*. 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) ("Such unwarranted inhibition on the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially cultivate and practice . . . ."). The Supreme Court was reviewing the constitutionality of a "loyalty oath" in that case and found that requiring employees to take the oath "offends due process." *Id.* at 191. Justice Frankfurter was specifically concerned with the chilling effect the oath could have on not simply the freedom of speech, but also the freedoms of inquiry, thought, and association. *Id*. at 195 (Frankfurter, J., concurring). The Supreme Court has continued to recognize the doctrine of chilling outside of the free expression context. *See Shapiro v. Thompson*, 394 U.S. 618, 623 (1969) (affirming district court's finding that a statute was unconstitutional because it "has a *chilling effect on the right to travel*.") (internal citations omitted and emphasis added); *Textile Workers Union of Am. v. Darlington*

Mfg. Co., 380 U.S. 263, 275 (1965) (recognizing the doctrine of chilling in a labor and union matter); *see also James v. Illinois*, 493 U.S. 307, 314 (1990) ("More significantly, expanding the impeachment exception to encompass the testimony of all defense witnesses likely would *chill some defendants from presenting their best defense* . . . .") (emphasis added); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 832–42 (1969) (detailing the Supreme Court's recognition of the doctrine of chilling in civil rights cases). Even Black's Law Dictionary recognizes the doctrine applies beyond just free expression. *Chilling Effect*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The result of a law or practice that *seriously discourages the exercise of a constitutional right*, such as the *right to appeal* or the right of free speech . . . Broadly, the result when any practice is discouraged.") (emphasis added).

Appellants have already established that Boulder's Ordinances chill the exercise of residents' right to keep and bear arms in two ways. First, the Ordinances are directly aimed at banning an entire class of constitutionally protected property, preventing residents from purchasing or possessing many of the most commonly owned semi-automatic rifles, pistols, and shotguns in the United States. *See* Aplt. App. at A040–47 (describing the breadth of Boulder's Ordinances). As Boulder likely intended, the prohibition of constitutionally protected property, and the threat

of punishment, will cause Boulder residents to not exercise their constitutionally protected rights.

Second, and more insidiously, a probable result of the Ordinances is that Boulder and other Colorado residents will fear to exercise their Second Amendment protected rights more generally. Residents will be deterred from purchasing and possessing firearms that are not banned, because they cannot understand the full extent of the Ordinances;[3] because of the concern that the ban will be expanded geographically, or to other arms; and because they are concerned about owning or having to register arms derisively labeled as "military-style assault weapons."

Boulder attempts to analogize this case to *Osterweil v. Bartlett*, a Second Circuit case that certified a question addressing New York's handgun licensing regime to the New York Court of Appeals.[4] Boulder Br. at 20; *Osterweil v. Bartlett*, 706 F.3d 139, 140 (2d Cir. 2013). But in that case, the Second Circuit was neither reviewing a categorical ban on an entire class of firearms (something the *Heller*

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[3] Even if the Ordinances are not legally vague, a point Appellants do not concede, a layperson would likely have difficulty interpreting the Ordinances. With the threat of 90 days in jail and a $1,000 fine *per violation*, Boulder residents will fear retribution for exercising the right to keep and bear arms and will be discouraged from so doing. Aplt. App. at A025.

[4] Notably, the Supreme Court recently granted *certiorari* to review the constitutionality of this same licensing scheme. *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, N.Y.*, 139 S. Ct. 939 (2019) (Mem.).

Court specifically cautioned against, 544 U.S. at 628–36) nor did the Second Circuit make any decision based on *Pullman* abstention, which was only addressed in *dicta*, instead eventually certifying a question to state court. *Osterweil*, 706 F.3d at 141–45. This court has recognized that certification is favored over abstention.[5] *Kansas Judicial Review*, 519 F.3d at 1119. Similarly, while Boulder cites *University of Utah v. Shurtleff* as a firearm regulation case impacted by abstention, the analysis in that case, unlike here, was also affected by the *Pennhurst* branch of Eleventh Amendment doctrine. Boulder Br. at 25; *University of Utah*, 252 F. Supp. 2d 1264, 1281–83 (D. Utah 2003) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). Likewise, Boulder's application of *Moore v. Sims* is diminished given that *Moore* addressed *Younger* abstention issues where a Texas

[5] Appellants reject Boulder's characterization that "Plaintiffs did not accept the district court's offer to certify the preemption issue and move forward with expedited discovery." Boulder Br. at 36. First, as addressed by Appellants' Opening Brief, certification is not appropriate in this case. Aplt. Br. at 38–39. Further, the district court's "offer" required *agreement of the parties and stipulation to all relevant facts*, Aplt. App. at A105; Appellants could not alone assent to certification. Boulder Br. at 6 ("The court informed the parties that it would certify the state-law question to the Colorado Supreme Court if the parties agreed to a stipulated set of operative facts.") (citation omitted). Second, the district court, during its non-evidentiary hearing held on August 15, 2018, stated that the case could proceed on an expedited basis, conducting discovery and a trial prior to the end of 2018, but that was prior to the court entertaining the *Pullman* issue and exercising abstention.

government agency had been enjoined by a federal court. Boulder Br. at 25; *Moore v. Sims*, 442 U.S. 415, 423–35 (1979).

Due to the chilling effect the Boulder's Ordinances have on fundamental rights, Supreme Court precedent weighs heavily against abstention.

3. Appellants are not Asking for a *Per Se* Rule Against Abstention

Appellants are not asserting that the Supreme Court has refused, and that this Court should therefore refuse, to abstain in *all* civil rights cases, as Boulder attempts to characterize Appellants' argument.[6] Rather, Appellants assert, based on clear precedent, that the Supreme Court has expressed an overwhelming reluctance to abstain under *Pullman* in cases where a potentially unconstitutional law may have a chilling effect on the exercise of a natural, fundamental right. *See supra*, § I(A)(2); *see also City of Houston*, 482 U.S. at 451 (abstention inappropriate where freedom of expression chilled); *Harman*, 380 U.S. at 537 (abstention inappropriate where right to vote is chilled). This is above and beyond the Supreme Court's already established hesitancy in abstaining under *Pullman*.

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[6] Appellants have argued, in the alternative, that the Supreme Court has expressed concern in abstaining in any cases brought under 42 U.S.C. § 1983. Aplt. Br. at 16–18. Boulder correctly states that this would likely apply in the original *Pullman* case, a fact that is irrelevant because it is not at issue in this matter due to the nature of the rights involved. If, however, Boulder is suggesting that Appellants would argue that the Supreme Court today may refuse to abstain from vindicating the civil rights of black Pullman porters in a Jim Crow-era Texas, Appellants do not dispute that characterization.

Overall, despite Boulder's continued insistences, Appellants are not arguing for some new, *per se* rule in this case. Boulder claims that the district court, in its Order, "rejected Plaintiff's contention that the court *must* 'categorically refuse to abstain' in cases asserting a deprivation of Second Amendment Rights." Boulder Br. at 8 (quoting Aplt. App. at A189) (emphasis added). The full quote from the district court's Order reads: "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*." Aplt. App. at A189 (emphasis added). The district court's summation of Appellants' argument is generally accurate. Boulder, however, misconstrues and overstates Appellants' narrowly tailored argument. Appellants recognize that even in some First Amendment cases, such as those involving commercial speech and zoning, courts have upheld abstention. *See, e.g.*, *Chez Sez III Corp v. Township of Union*, 945 F.2d 628, 633 (3d Cir. 1991) (cited by Boulder Br. at 15).[7] Appellants are simply asking this Court to recognize that *Pullman* abstention is a very narrow doctrine that is not applicable in the matter at hand because Appellants are suffering an ongoing infringement of the exercise of their natural, fundamental, constitutionally protected right to keep and bear arms; an infringement which will undoubtedly chill the

[7] Appellants also recognize that no fundamental right is unlimited. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

exercise of that same right. *See Dombrowski*, 380 U.S. at 489 ("[T]he abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."); *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 488 (9th Cir. 1984) ("In [F]irst [A]mendment cases, the first of [the *Pullman*] factors will almost never be present because the constitutional guarantee of free expression is, quite properly, always an area of particular federal concern.") (citing *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983) *rev'd on other grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

D. Resolution of Appellants' Federal Claims Does Not Depend on Resolution of Their State Law Claims

A significant portion of Boulder's argument hinges on its concern that if this case were allowed to proceed at the district court, the district court would necessarily be forced to issue an "advisory opinion" regarding an "uncertain" or "unsettled" state-law issue of "important policy." Boulder Br. at 2, 12, 14, 16, 18, 20. Resolution of Appellants' federal claims, however, does not require the resolution of any state-law issues. Appellants have asked this Court to remand this matter back to the district court to allow them to proceed on the merits of their constitutional and federal claims. Aplt. Br. at 9, 27. This Court could remand, directing the district court to proceed in adjudicating the merits of Appellants' constitutional and federal

claims while allowing the district court to bifurcate and abstain from hearing Appellants' state claims. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 305–12 (1979) (reversing and remanding to the district court to consider "appellees' challenge to [Arizona's] statutory election procedures," but upholding abstention on other "statutory provisions that are patently ambiguous on their face.").

Boulder's further insistence that Appellants must wait for the resolution of the unrelated state case, *Chambers, et al. v. City of Boulder*, ignores the fact that that case does not raise *any* federal or U.S. constitutional claims. Boulder Br. at 1, 5–6, 35. "The *Chambers* plaintiffs' sole theory of relief is state-law preemption . . . ." Boulder Br. at 6. Additionally, the *Chambers* case does not challenge the age restrictions imposed by Boulder. *See* Boulder Br. at 35.

Boulder's suggestion that Appellants merely could have intervened in the *Chambers* action to vindicate Appellants' rights essentially suggests a return to the pre-Civil Rights Act world, where states and their political subdivisions were allowed to discriminate against their citizens and violate their rights while also depriving them of a federal forum within which to vindicate those rights. *See* H.R. Rep. No. 96-548, at 1 (1979) ("Section 1983 . . . was enacted to provide a measure of Federal control over state and territorial officials who were reluctant to enforce state laws against persons who violated the rights of newly freed slaves and union

sympathizers," thereby providing a "neutral Federal forum to air his complaint, instead of being forced to sue his state officials in State Courts."). Boulder's argument is not persuasive in light of the Supreme Court precedent weighing against abstention in cases such as this.

II. THE DISTRICT COURT COULD NOT PROPERLY EXAMINE THE *PULLMAN* FACTORS BECAUSE OF THE LACK OF FACTUAL AND LEGAL DEVELOPMENT

Boulder's argument against allowing sufficient factual and legal development at the district court suffers two major flaws. First, Boulder errs in concluding that Appellants do not challenge the district court's finding that the *Pullman* factors are met in this case. Boulder Br. at 10, 11–12. As demonstrated above, Appellants assert that the requirements of *Pullman* are not met due to the rights at issue in this matter. *See supra*, § I. In the alternative, Appellants argue that the district court could not properly examine the *Pullman* factors with the incomplete and undeveloped record it had before it. Aplt. Br. at 28–39.

The *Pullman* analysis has not been sufficiently developed as to questions of law. Upon a facial examination of the Boulder Ordinances, the district court opined that "the Ordinances violate [the Colorado Preemption] statute because at least some firearms covered [i.e. banned] by the Ordinances can be legally possessed under Colorado and/or federal law." Aplt. App. at A185. The Colorado Preemption 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." C.R.S. § 29-11.7-103 (emphasis added). federal law, of course, encompasses the Second Amendment. The Colorado Preemption statute, thus provides, in part, that no local government may prohibit the possession of a firearm that a person may lawfully possess under the Second Amendment.

Despite the facial conflict between the Ordinances and Colorado and federal law, the district court found that it should abstain because it could not predict whether the Boulder Ordinances would nonetheless be found valid under Colorado law. Aplt. App. at A185–88. Yet, as it relates to firearms protected by the Second Amendment, there is only one possible outcome—the Boulder Ordinances are invalid. Boulder may not infringe constitutionally protected rights, even if such a result would be permitted by a mechanical application of Colorado law that fails to take federal concerns into account. The federal court may therefore completely avoid Colorado's preemption analysis. In so doing the federal court need never address any of the "sensitive" or "uncertain" issues of social policy regarding local firearm regulation or the respective sovereignty of the state or a home rule city. There is therefore no risk that a federal court's decision of federal constitutional law would "hinder important state law policies." *See Lehman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992).

Similarly, the Colorado Supreme Court's divided affirmance in *State of Colorado v. City and County of Denver*, 139 P.3d 635 (Colo. 2006) does not militate in favor of abstention. In the underlying case, the district could held that under the Colorado Preemption statute strict municipal gun control ordinances, including regulation of so-called "assault weapons," could prevail over more forgiving state laws. *City & Cnty. of Denver v. State of Colorado*, No. 03CV3809, 2004 WL 5212983, *14–15 (Colo. Dist. Ct. Nov. 5, 2004). Thus, a Colorado court has already held that a municipal "assault weapon" regulation is lawful under Colorado law.[8] The federal case may therefore proceed. For example, in *City of Houston*, the United States Supreme Court found abstention inappropriate because Houston Municipal Courts already had the opportunity to interpret and apply a challenged ordinance. 482 U.S. at 469–70. Rejecting an argument that it should nonetheless abstain, the Supreme Court stated, "We have long recognized that trial court interpretations, such as those given in jury instructions, constitute 'a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance.'" *Id.* at 470 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). For purposes of *Pullman* it is therefore doubtful that there are material, uncertain issues of state law in this matter. Or if there are, the district court did not parse the Boulder

[8] Appellants specifically disagree with the decision of the Colorado district court in that matter, which failed to consider any federal or constitutional issues. Regardless, it cannot be said that the Colorado courts have not spoken on the issue.

Ordinances against the decision in *City and County of Denver v. State of Colorado*, to determine if and to what extent the Boulder Ordinances present new factual or legal questions. Aplt. Br. at 28–39.

Further, while Boulder derides the utility of factual development in this case, Boulder relies on several unsubstantiated factual assertions to support its argument that the rights advocated by Appellants are "uncertain." For example, Boulder claims: (1) "the types of weapons and accessories regulated by Ordinance 8245 are frequently involved in mass shootings and other gun violence," Boulder Br. at 4; (2) the features banned by Boulder's Ordinances are "military-like," Boulder Br. at 3; and (3) "the residents of Boulder are particularly vulnerable to the threat of mass gun violence," Boulder Br. at 4. Such facts are neither subject to judicial notice nor found in the record and would be controverted in an evidentiary hearing.[9] Boulder also does not define "military-like," nor explain what makes certain banned "features" inherently dangerous. A foregrip, for example, is nothing more than a nondescript piece of plastic or metal that attaches towards the front of a rifle, below the barrel. While a foregrip is component of certain firearms for which Boulder has expressed a clear distaste, Boulder offers no explanation as to why such features place a firearm beyond the protection of the Second Amendment.

[9] For example, Appellants know of no data, nor has Boulder produced any evidence, that supports the contention that Boulder residents are somehow "particularly vulnerable to the threat of mass gun violence."

Both the Supreme Court and Tenth Circuit generally only proceed through *Pullman* analysis 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. Aplt. Br. at 29–31; *see e.g., R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499 (1941) (finding abstention was appropriate after analyzing the judgment of the district court); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1569–70, 1576 (10th Cir. 1995) (finding abstention was not appropriate after reviewing the district court's grant of summary judgment). Yet Boulder suggests that this portion of Appellants' argument is unfounded, and that the citations provided by Appellants are "easily outweighed." Boulder Br. at 36–37. To support its counter point, Boulder offers five district court cases, none in the Tenth Circuit, and claims those "easily outweigh[]" the six Supreme Court cases and three Tenth Circuit cases cited by Appellants. Boulder Br. at 37; Aplt. Br. at 36–37. As explained above, without engaging in detailed analysis one cannot say that *Pullman* prerequisites were met for each of Appellants' federal and constitutional claims. *See generally*, *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620 (9th Cir. 1993) (engaging in an exhaustive analysis of potential conflicts in state and local building codes prior to abstention).

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.

DATED this 3rd day of April 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 28 and 32 and 10th Cir. R. 32, the foregoing *Appellants' Reply Brief* contains 6,362 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 3rd day of April 2019.

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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 April 3, 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 3rd day of April 2019.

/s/ Cody J. Wisniewski
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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 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 3rd day of April 2019.

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