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
Civil Action No. 18-cv-1211-MSK-MEH
Hon. Marcia S. Krieger, United States District Judge

BRIEF OF APPELLEES

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Oral Argument Not Requested

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STATEMENT OF RELATED CASES

There are no prior or related appeals in this matter.

STATEMENT OF ISSUE PRESENTED

A Colorado state court is currently deciding whether a firearms ordinance recently enacted by the City of Boulder, Colorado, is preempted under Colorado law. That determination involves an interplay of local and state laws relating to the sale or possession of certain firearms and large-capacity ammunition magazines, as well as the application of a Colorado constitutional provision that allocates regulatory power between the State and its municipalities. When the Colorado Supreme Court last considered preemption of a local firearms regulation in 2006, the high court deadlocked 3-3 with one judge not participating, leaving the issue unresolved.

The question presented in this appeal is whether the district court properly exercised its discretion to stay Plaintiffs' federal-court challenge to the Boulder ordinance under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), to afford Colorado state courts the opportunity to first decide whether the ordinance is preempted by Colorado law—a determination that could narrow or eliminate the need to resolve Plaintiffs' federal constitutional challenges.

STATEMENT OF THE CASE

This appeal asks the Court to decide which judicial forum should first resolve an unsettled issue of Colorado law that underlies Plaintiffs' challenge to a public-safety ordinance enacted by the City of Boulder, Colorado. Should a Colorado state court, in an already-pending action, have the first say in interpreting a state preemption law with far-reaching implications for Colorado's citizens? Or, alternatively, should a federal court resolve that sensitive issue of state law—without awaiting guidance from state courts—and then, perhaps, decide whether Boulder's ordinance passes federal constitutional muster?

The district court held that Colorado *state* courts should decide the state-law issue first and stayed this action pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). That determination was well within the court's discretion. It was also squarely rooted in longstanding precedent from this Court and the U.S. Supreme Court that affirms principles of federalism and comity among courts, and counsels against unnecessary constitutional pronouncements.

The context of this case happens to involve a firearms ordinance. But this appeal is not a referendum on the wisdom of gun legislation generally, or on the legality of Boulder's ordinance specifically. Resolution of this appeal does not require the Court to delineate the boundaries of the Second Amendment or to opine on the alleged infringement of Plaintiffs' constitutional rights. The narrow

procedural question here is simply whether the district court properly exercised its discretion in abstaining on *Pullman* grounds to allow Colorado courts to decide an unresolved issue of Colorado law. The answer to that question is yes, and this Court should affirm.

STATEMENT OF FACTS

A. The Boulder Ordinance

The City of Boulder is a home-rule municipality under Article XX, section 6 of the Colorado Constitution. Appellants' Appendix ("App") 25, ¶ 45. That status gives the City the authority to regulate matters of local concern. On the basis of that authority, the Boulder City Council voted unanimously on May 15, 2018 to adopt Ordinance 8245, which added new firearms-related restrictions to the Boulder Revised Code. Specifically, Ordinance 8245 banned "multi burst trigger activators" such as bump stocks; enacted a prohibition against "assault weapons," which are defined as semi-automatic weapons with certain military-like features; raised the minimum age of firearm possession to twenty-one; and imposed restrictions on gun magazines holding more than ten rounds. App-181; *see also* Addendum ("Add") at 1–13 (Ordinance 8245). The Ordinance contains exceptions and provisions intended to respect lawful uses of firearms, such as hunting and self-defense, as well as a grandfather clause for weapons already in one's possession. *See, e.g.*, Add-8, § 3; Add-11–12, § 7.

In enacting Ordinance 8245, the City Council found that these restrictions were necessary to protect the citizens of Boulder from the threat of mass violence. The City Council determined that the types of weapons and accessories regulated by Ordinance 8245 are frequently involved in mass shootings and other gun violence—a fact tragically demonstrated by modern massacres at schools in Columbine, Colorado, Parkland, Florida, and Newtown, Connecticut. The City Council determined that residents of Boulder are particularly vulnerable to the threat of mass gun violence due to the city's high student population, population density, and other local characteristics. *See* Add-1–6, Findings A–G, L–M. Ordinance 8245 went into effect on June 15, 2018.

B. Proceedings below

1. On May 16, 2018, Plaintiffs sued the City of Boulder and various city officials in their official capacities (collectively, "the City") in the U.S. District Court for the District of Colorado to contest the legality of Ordinance 8245, with the exception of the Ordinance's ban on bump stocks, which Plaintiffs do not challenge. App-182; R.1.[1] The operative complaint asserts 39 causes of action

[1] "R." refers to the docket number in the proceeding below. Plaintiffs subsequently amended their complaint in August 2018, in part to address Ordinance 8259, which made various revisions to Ordinance 8245. *See* Add-14–18 (Ordinance 8259). The district court found that Ordinance 8259 did not "fundamentally change the thrust of the prior Ordinance." App-182. Plaintiffs do not challenge

under state and federal law. Plaintiffs seek a declaration that the Ordinance is preempted by Colo. Rev. Stat. §§ 29-11.7-102 and 103. App-182–83; *see* App-97–100. Section 29-11.7-103 provides that "[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." Colo. Rev. Stat. § 29-11.7-103. Section 29-11.7-102 restricts the type of information that local governments can maintain on guns and gun owners.

In addition to these state-law causes of action, the operative complaint includes dozens of claims arising directly or derivatively from the Second Amendment to the U.S. Constitution.

Three weeks after filing the complaint, Plaintiffs moved to enjoin enforcement of the Ordinance under Federal Rule of Civil Procedure 65. App-183. The City opposed the injunction and moved to dismiss the case. R.28, 35. The City argued, among other grounds, that abstention would be appropriate to allow Colorado state courts an opportunity to resolve Plaintiffs' state-law preemption claims. R.35 at 29-30. The City noted that on June 14, 2018, another group of plaintiffs had filed suit in Boulder County District Court to challenge the Ordinance. *Chambers et al. v. City of Boulder*, No. 2018CV30581 (Boulder Cty.

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that determination on appeal, and it is not material to the abstention determination.

Dist. Ct., filed June 14, 2018). The *Chambers* plaintiffs' sole theory of relief is state-law preemption, App-125–28, identical to the claims asserted by Plaintiffs here in Counts XXXVIII and XXXIX of the operative federal-court complaint. App-97–100.

The district court held a non-evidentiary hearing on Plaintiffs' preliminary injunction motion on August 15, 2018. App-183. At the conclusion of the hearing, the district court ordered the parties to submit supplemental briefs on whether *Pullman* abstention was warranted in light of Plaintiffs' claims of state-law preemption. *See* App-183. 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. App-105. The parties took opposing positions on *Pullman* abstention and did not submit stipulated facts.

2. In an Opinion and Order dated September 17, 2018, the district court held that the case should be stayed under *Pullman* pending resolution of the state-law preemption question in state court. App-181–92.

The court first determined that the three "predicate elements for abstention" laid out in *Kansas Judicial Review v. Stout*, 519 F.3d 1107 (10th Cir. 2008), are present. App-185–88. As to the first element—the existence of an uncertain, threshold issue of state law—the court found that the validity of the Ordinance under § 29-11.7-103 "is decidedly uncertain." App-186. The court explained that

the Colorado Supreme Court was unable to resolve the issue when it arose in *State of Colorado v. City & County of Denver*, 139 P.3d 635 (Colo. 2006). App-186. Because the state high court split 3-3 in *City & County of Denver*, issuing a non-binding affirmance, and has not had occasion to consider the issue since then, the district court observed that "it is hard to conceive of a more potent way of demonstrating" uncertainty in the law, which satisfies the first *Pullman* predicate. App-186.

The court next held that the second *Pullman* element—whether the resolution of the uncertain state-law issue would obviate the federal constitutional claim—was easily met here. The court determined that the state-law issue is ripe, that Plaintiffs face no impediment to litigating it in state court, and that a determinative ruling by the state court that the Ordinance is preempted by state law would "eliminate entirely the need for a determination of whether the Ordinances offend the U.S. Constitution." App-187.

Finally, the court found that the third *Pullman* predicate—whether an incorrect prediction of state law by the federal court would hinder important state policies—is also satisfied. App-187–88. Two aspects of the preemption dispute, the court held, "implicate important state rights." App-187. On the one hand, the legislative declaration in § 29-11.7-103 asserts a state interest in uniform firearms laws. App-187. On the other hand, "the principles of municipal home rule

enshrined in the Colorado constitution," by which the City of Boulder is allowed to regulate issues of local concern, "reflect important state interests as well." App-188. Because of these competing values, the district court concluded that any incorrect prediction on the preemption issue "will necessarily disrupt an important state interest." App-188.

After finding that all three predicates for *Pullman* abstention were met, the court exercised its discretion to abstain until the Colorado courts addressed the state-law preemption issue. App-188–92. In so holding, the court rejected Plaintiffs' contention that the court must "categorically refuse to abstain" in cases asserting a deprivation of Second Amendment rights. App-189. The court noted "the absence of any cited legal authority for [Plaintiffs'] proposition," App-189, and distinguished First Amendment cases cited by Plaintiffs that—unlike this case—involved non-dispositive questions of state law. App-189–90 (citing *Zwickler v. Koota*, 389 U.S. 241, 397 (1967); *Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965); *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964); *City of Houston v. Hill*, 482 U.S. 451, 471 (1987)). Thus, the district court reasoned, "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." App-190–91.

The district court also rejected Plaintiffs' alternative argument that abstention was inappropriate because "resolving the state law issue in state court

will interpose a lengthy delay" during which "Plaintiffs will suffer an ongoing intrusion into their Second Amendment rights." App-191. The district court acknowledged the concern, but reasoned that delay was necessarily "baked into the concept of abstention," App-191, and was an inevitable consequence of avoiding premature constitutional adjudication. App-191. The court noted that the U.S. Supreme Court has promoted the certification of state-law questions to state courts to minimize the impact of delay, but since the parties were unable to agree on stipulated facts necessary to certify the issue to the Colorado Supreme Court, certification would be inappropriate. App-192.

Having found all *Pullman* prerequisites present and that the overall circumstances warranted abstention, the district court stayed the case. App-192. Plaintiffs timely appealed. App-193–94.

SUMMARY OF ARGUMENT

The district court properly abstained under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), to stay this case while Colorado courts analyze the validity of the City's 2018 firearms ordinance under Colorado's constitutional preemption framework. On appeal, Plaintiffs do not dispute that this case satisfies the three conditions that warrant *Pullman* abstention. Instead, they challenge only the second step of the district court's analysis: the propriety of a stay. The discretion to make that determination is vested with the district court.

The circumstances here constitute the "paradigm case for abstention" under *Pullman* because Colorado state law "is susceptible of a construction by the state courts that would avoid or modify the federal constitutional questions." *Lake Carriers' Ass'n v. MacMullen*, 406 U.S. 498, 510–11 (1972) (internal quotation marks and alterations omitted). Three factors compel this conclusion.

First, Colorado courts have not issued any binding opinion to determine whether the Ordinance is valid under Colorado law. The only previous Colorado case concerning state-law preemption of a municipal firearms ordinance ended with a non-precedential affirmance by an equally divided Colorado Supreme Court. Second, because all of Plaintiffs' federal constitutional claims turn on the validity of the Ordinance, any decision by the Colorado court in a pending state-court action finding that the Ordinance is preempted under state law would

moot all of Plaintiffs' federal claims. Third, the interplay between Colorado state and municipal law under the Colorado Constitution is a matter that should be left to the state's courts, particularly in an area of public policy as sensitive as gun violence prevention. The collective weight of these factors places the district court's holding squarely in the heartland of *Pullman*.

Plaintiffs fail to show that any countervailing factors overcome the presumption in favor of *Pullman* abstention. Plaintiffs' principal argument is that this Court should establish a *per se* rule that precludes *Pullman* abstention in cases involving fundamental constitutional rights. But numerous decisions, including controlling Supreme Court precedent, reject such a proposition, as it would eviscerate the *Pullman* doctrine where it is most applicable—in civil rights cases.

Plaintiffs' related attempt to extend the First Amendment principle of "chilling" to the Second Amendment is without merit, as chilling concerns arise from the unique nature of First Amendment expressive rights. It does not denigrate the Second Amendment, as Plaintiffs suggest, to resist extending speech-specific principles beyond their traditional domain. But even if chilling principles were extended to the Second Amendment, they would not warrant abstention here.

Finally, Plaintiffs' assertion that the district court was obligated to conduct extensive proceedings prior to abstaining is not only unfounded, but would

effectively result in a federal advisory opinion on important issues of state law—the very danger the *Pullman* doctrine is designed to avoid.

The district court properly exercised its discretion in deciding to forgo ruling on an uncertain, sensitive state-law issue that Colorado courts are already poised to resolve in *Chambers et al. v. City of Boulder*, No. 2018CV30581 (Boulder Cty. Dist. Ct., filed June 14, 2018). The decision below should be affirmed in its entirety.

STANDARD OF REVIEW

The district court's ultimate decision to abstain under *Pullman* is reviewed for an abuse of discretion. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984); *Harman v. Forssenius*, 380 U.S. 528, 534 (1965) ("In applying the doctrine of abstention, a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law."); *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981) (If "the particular case falls within the ambit of *Pullman* …, [the court] must then make a discretionary determination … as to whether abstention is in fact appropriate." (quoting *D'Iorio v. County of Delaware*, 592 F.2d 681, 686 (3d Cir. 1978))). "A court abuses its discretion only when it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable

judgment." *Liberty Mut. Fire Ins. Co. v. Woolman*, 913 F.3d 977, 990 (10th Cir. 2019) (internal quotation marks omitted).

Plaintiffs contend that this Court should apply a *de novo* standard of review. Appellants' Opening Brief ("Br.") at 10. That standard, which Plaintiffs derive from *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1114 (10th Cir. 2008), does not apply to the issues raised in this appeal. In *Kansas Judicial Review*, this Court reviewed *de novo* only the threshold issue of "whether the *requirements* for *Pullman* abstention have been met." *Id*. (citing *Spoklie v. Montana*, 411 F.3d 1051, 1055 (9th Cir. 2005)) (emphasis added). An appellate court's review of that question 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." *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 939 (9th Cir. 2002) (cited in *Spoklie*, 411 F.3d at 1055).

Here, Plaintiffs do not challenge the three "special circumstances generally prerequisite to the application of [*Pullman*]," *Vinyard*, 655 F.2d at 1018 (quoting *D'Iorio*, 592 F.2d at 686), or that the district court correctly found that those prerequisites had been met. Instead, Plaintiffs question whether the district court properly accounted for *other* factors Plaintiffs deem relevant to the abstention analysis. Thus, this Court reviews the decision below for abuse of discretion.

ARGUMENT

The district court properly decided to stay this action under *Pullman* pending the Colorado courts' determination whether the City's Ordinance is valid under Colorado law. "The delicacy of that issue and an appropriate regard for the rightful independence of state governments reemphasize that it is a wise and permissible policy for the federal [judge] to stay his [or her] hand in absence of an authoritative and controlling determination by the state tribunals." *City of Chicago v. Fieldcrest Dairies*, 316 U.S. 168, 172 (1942) (internal citation and quotation marks omitted).

Where, as here, "resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law," abstention is warranted "to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). *Pullman* abstention thus "recognizes the importance of state sovereignty by limiting federal judicial intervention in state affairs to cases where intervention is necessary." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 264 (2011) (Kennedy, J., concurring).

Under *Pullman*, a district court "should abstain if three conditions are satisfied: (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 by the district court would hinder important state law policies." *Lehman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992). The district court "must first consider whether the particular case falls within the ambit of *Pullman* as defined by these criteria, and must then make a discretionary determination, based on the weight of these criteria and other relevant factors, as to whether abstention is in fact appropriate." *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981) (quoting *D'Iorio v. County of Delaware*, 592 F.2d 681, 686 (3d Cir. 1978)). "[A]bsent significant reasons to the contrary, abstention is generally proper once it has been ascertained that the threshold 'special circumstances' have been fulfilled." *Chez Sez III Corp. v. Township of Union*, 945 F.2d 628, 633 (3d Cir. 1991) (quoting *D'Iorio*, 592 F.2d at 686) (internal alteration omitted).

Plaintiffs do not dispute that the three *Pullman* criteria set forth above are met. Instead, Plaintiffs challenge the district court's discretionary determination that the weight of those factors favors abstention and that no competing factors exist to overcome the presumption of a stay. As explained below, both the substantive determination and the procedure the district court followed to reach that conclusion were proper and should be affirmed.

I. All three *Pullman* criteria strongly favor abstention.

Although Plaintiffs do not directly challenge the *Pullman* criteria, this Court must consider the weight of each factor to determine whether the district court properly exercised its discretion in finding that they supported abstention. Each of the prerequisites is met here and weighs heavily in favor of abstention.

A. An unresolved question of state law underlies all of Plaintiffs' federal constitutional claims.

Plaintiffs maintain that the City's Ordinance conflicts with, and is thus preempted by, two Colorado state statutes: §§ 29-11.7-102 and 103. App-97–100; Br. 5. As noted above, § 29-11.7-103 generally prohibits local governments from restricting the sale or possession of firearms that would be lawful to sell or possess under state or federal law. Section 29-11.7-102 generally limits the information that local governments can maintain about individuals who purchase or transfer firearms. According to Plaintiffs, the Ordinance runs afoul of both state statutes.

But that is just the beginning of the analysis. Adjudicating Plaintiffs' preemption claims raises unresolved questions of Colorado law relating to the division of power between the State and its municipalities to regulate public-safety issues like the threat of mass violence. Under the Colorado Constitution, "a home-rule ordinance supersedes a conflicting state statute" "in matters of local concern." *City of Longmont v. Colo. Oil & Gas Assoc.*, 369 P.3d 573, 579 (Colo. 2016); Colo. Const. art. XX, § 6. The City's ability to regulate firearms as provided in the

Ordinance thus depends on two considerations: (1) "whether the issue the ordinance regulates is one of local, statewide, or mixed local and statewide concern"; and (2) if the issue is not purely of local concern, "whether the ordinance conflicts with state law on that issue." *Ryals v. City of Englewood*, 364 P.3d 900, 904–05 (Colo. 2016), *answering question certified by Ryals v. City of Englewood*, 560 F. App'x 726, 728 (10th Cir. 2014)).

As this Court has noted, "[t]he issue [of state-law preemption] is an important one, and every step of its resolution is firmly within the province of Colorado law." *Ryals*, 560 F. App'x at 729. But Colorado courts have not resolved the extent to which §§ 29-11.7-102 and 103 preempt a home-rule municipality's ability to enact firearm regulations, if at all. In 2004, a state trial court considered the validity of Denver's firearms ordinances in light of multiple state statutes, including § 29-11.7-103, and found that certain provisions were preempted and some were not. *See City & County of Denver v. State of Colorado*, No. 03-CV-3809, 2004 WL 5212983 (Colo. Dist. Ct. Nov. 5, 2004). The State appealed the judgment directly to the Colorado Supreme Court,[2] but the *en banc* court divided equally on the issue, with one justice not participating. *State of Colorado v. City & County of Denver*, 139 P.3d 635, 636 (Colo. 2006).

[2] A Colorado statute divests Colorado's intermediate appellate court of jurisdiction in cases "in which a statute, a municipal charter provision, or an ordinance has been declared unconstitutional." *See* Colo. Rev. Stat. § 13-4-102(1)(b).

No subsequent challenges to municipal firearms ordinances have reached the Colorado Supreme Court. As a result, there is no controlling Colorado decision concerning a municipality's power to enact firearms laws like the Ordinance at issue here.

As the court below correctly concluded, "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." App-186. The first *Pullman* factor is therefore satisfied, and weighs in favor of abstention. *See Thompson v. Hous. Auth. of New Orleans*, 689 F. App'x 324, 327–28 (5th Cir. 2017) (first *Pullman* factor met where the plaintiff alleged that a state statute was unconstitutional under the Louisiana Constitution and there was no controlling case law on its constitutionality); *Tyler v. Collins*, 709 F.2d 1106, 1108–09 (6th Cir. 1983) (pending challenge to a statute's constitutionality under state law confirmed the presence of the first *Pullman* element).

B. Resolution of the state-law question could narrow or eliminate the need to decide Plaintiffs' federal claims.

The second *Pullman* factor is also satisfied. "[T]he pivotal question in determining whether abstention is appropriate is whether [the state law] is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *City of Houston v. Hill*, 482 U.S. 451, 468 (1987) (internal quotation marks omitted). That standard is easily met here—as

evidenced by Plaintiffs' own position. Plaintiffs contend that two Colorado statutes preempt every contested aspect of the Ordinance. App-97–100. If Plaintiffs are correct, the disputed parts of the Ordinance would be void, thus mooting all of Plaintiffs' federal claims. As a result, resolution of the issue of state-law preemption might not just narrow, but might in fact entirely resolve Plaintiffs' federal claims.

A long line of U.S. Supreme Court precedent confirms that abstention is appropriate here. In a similar case that implicated the constitutionality of a Mississippi statute under the state's constitution, the Supreme Court ordered abstention under *Pullman*, holding that "when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily." *City of Meridian v. S. Bell Tel. & Tel. Co.*, 358 U.S. 639, 641 (1959). The Supreme Court has explained that abstention is particularly appropriate where, as here, "the nub of the whole controversy may be the state constitution." *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970); *see also Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 622–23, 626 (9th Cir. 1993) (abstention warranted because "[i]f a state court were to determine that the local ordinance is preempted, the ordinance would be invalidated and a federal court would not have to decide

[plaintiffs'] equal protection claim"). The state-law preemption question here casts a dispositive shadow across Plaintiffs' entire case. Accordingly, the second *Pullman* factor is not only satisfied, but weighs heavily in favor of abstention.

C. An incorrect decision of state law, in either direction, would hinder important state policies.

The third *Pullman* factor also weighs in favor of abstention because an incorrect decision of state law would impede Colorado state policies. As this Court has recognized, any state statute or regulatory measure "inherently involves state interests to some degree." *Vinyard*, 655 F.2d at 1020. Consequently, "the considerations of comity and federalism underlying the Pullman Doctrine are *immediately* raised in an attack on the statute or regulation in federal court." *Id*. (emphasis added). An incorrect decision on the state law issues in this case would unduly intrude on the State's authority with respect to public safety, and its determinations about how best to balance those considerations against questions of individual liberties. As the Second Circuit explained in a case reviewing a New York firearm licensing statute, "[q]uestions like the one before us require a delicate balance between individual rights and the public interest, and federal courts should avoid interfering with or evaluating that balance until it has been definitively struck." *Osterweil v. Bartlett*, 706 F.3d 139, 143 (2d Cir. 2013) (O'Connor, J., sitting by designation).

Federalism concerns are particularly salient in this case, where the unresolved state-law issue—whether Colorado state statutes preempt the Ordinance—turns on how the state constitution allocates regulatory power between the State and local governments. Determining the scope of a home-rule city's regulatory power requires the court to "weigh the relative interests of the state and the municipality in regulating the particular issue in the case," guided by factors including "(1) the need for statewide uniformity of regulation, (2) the extraterritorial impact of the local regulation, (3) whether the state or local governments have traditionally regulated the matter, and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation." *City of Longmont*, 369 P.3d at 580. This inquiry is layered with value-laden determinations about Colorado's structure of government and the independence and interdependence of its communities. Such determinations are generally not ones a federal court should undertake. *See Ryals*, 560 F. App'x at 729 (certifying question of home-rule preemption to Colorado Supreme Court).

In *City of Chicago v. Fieldcrest Dairies, Inc.*, the Supreme Court held that when "[a] dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State …, [t]he delicacy of that issue," coupled with the due regard for state independence, dictates that a federal judge should "stay his [or her] hand in absence of an authoritative and controlling determination by the

state tribunals." 316 U.S. at 172. In *Fieldcrest*, the City of Chicago had enacted an ordinance providing that milk products "sold in quantities of less than one gallon shall be delivered in standard milk bottles." *Id*. at 169. The court of appeals invalidated the ordinance on federal constitutional grounds, but the Supreme Court reversed unanimously, citing "the doubtful propriety of the [federal courts] in undertaking to decide such an important question of Illinois law instead of remitting the parties to state courts for litigation of the state questions involved in the case." *Id*. at 171.

The Court explained that *Pullman* abstention was appropriate because "Illinois has the final say as to the meaning of the ordinance in question," as well as "the final word on the alleged conflict between the ordinance and the state Act." *Id*. at 171–72. The Supreme Court warned that any decision by federal courts would be a mere "forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois." *Id*. at 172. The Supreme Court ordered abstention until the conclusion of "a case involving substantially identical issues … pending in the state court." *Id*. at 173.

This appeal presents an even more compelling case for abstention given that the underlying issues of public safety and the allocation of state power further multiply the federalism stakes. In light of the foregoing, Plaintiffs unfairly assert that the district court "balked" at its judicial responsibility by applying *Pullman*

and staying the case. Br. 13. On the contrary, the district court followed binding Supreme Court and Tenth Circuit precedent to correctly determine that that the *Pullman* factors were met, and that they collectively and conclusively favored abstention.[3]

II. No relevant considerations preclude a stay.

It bears repeating that Plaintiffs, in this appeal, do not challenge the satisfaction of the *Pullman* factors above. That strategic choice is significant because "[u]nder *Pullman* abstention, a district court *should* abstain if [the] three conditions are satisfied." *Lehman*, 967 F.2d at 1478 (emphasis added). Plaintiffs therefore bear a heavy burden to show, based on other considerations, that the district court abused its discretion by following the presumption favored by this Court in *Lehman*. Plaintiffs' objections, many of which are foreclosed by binding precedent, cast no doubt on the decision below.

A. There is no *per se* rule against abstention in cases concerning fundamental rights.

Plaintiffs contend that *Pullman* abstention "[s]hould be" inapplicable to cases asserting ongoing violations of fundamental rights. Br. 23. As the phrasing

[3] Under *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1575–76 (10th Cir. 1995) (cited at Br. 17, 22), a federal court may *assume*, without deciding, that the challenged measure is valid under state law if the court would uphold the measure under the U.S. Constitution regardless. That result leaves unscathed the underlying state interest. Plaintiffs cite *Clajon*, but presumably they do not advocate for its application here. Br. 22.

indicates, however, this argument is purely aspirational. The leading treatise on federal procedure concludes that "[i]t is clear there is no rule" that "there should not be abstention in civil rights cases." 17A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4242 (3d ed. 2018) (citing, *e.g.*, *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983)).

Plaintiffs' contrary position is, in effect, a call to overturn *Pullman*, because a rule that federal courts "ought always enter" a civil rights case (Br. 23) would "virtually end Pullman-type abstention, since almost all of the cases that fit the Pullman pattern are civil rights actions brought under 42 U.S.C. § 1983." Wright & Miller, *supra*. Indeed, as Plaintiffs' brief describes in detail, the *Pullman* doctrine itself originated in a case asserting the right to be free from racial discrimination in employment—a right unquestionably as "fundamental" as Plaintiffs' claimed entitlement to possess military-style assault weapons within Boulder city limits or to buy a magazine holding over ten rounds of ammunition. 312 U.S. at 501.

In light of the civil-rights context in which the *Pullman* doctrine arose, it is no surprise that courts regularly abstain in cases where fundamental rights are implicated, including in cases concerning the Second Amendment. *See W. Va. Citizens Def. League, Inc. v. City of Martinsburg*, 483 F. App'x 838, 839 (4th Cir. 2012) (*per curiam*) (affirming abstention where a firearms restriction was challenged under the Second Amendment); *Osterweil*, 706 F.3d at 145 (ordering

certification to the New York Court of Appeals where handgun licensing scheme was challenged under the Second Amendment); *Univ. of Utah v. Shurtleff*, 252 F. Supp. 2d 1264, 1286 (D. Utah 2003) (finding abstention appropriate where a firearms restriction was challenged under the First and Fourteenth Amendments). Other abstention cases involving "fundamental rights" abound. *See, e.g.*, *Coley v. Clinton*, 635 F.2d 1364, 1373 (8th Cir. 1980) (affirming abstention from due process challenge to the procedures of commitment and release of criminal defendants in state mental hospitals); *Smelt v. County of Orange*, 447 F.3d 673, 681–82 (9th Cir. 2006) (affirming abstention from challenge to California's prohibition on same-sex marriage, notwithstanding the "importan[ce] [of] the institution of marriage").

In *Moore v. Sims*, 442 U.S. 415 (1979), the Supreme Court expressly rejected the idea that abstention is unwarranted whenever fundamental rights are involved. The plaintiffs in *Moore* brought a federal action to challenge the State of Texas's deprivation of the plaintiffs' parental rights after the state took involuntary custody of their children. As the Supreme Court explained, the district court's refusal to abstain was "prompted by [its] observation that the constitutional issues raised by the plaintiffs" touched upon "an area of the greatest importance to our society, the family." *Id*. at 434 (internal quotation marks omitted). Despite the unquestioned importance of the rights at stake, the Supreme Court reversed and

ordered abstention. The Court explained that the district court's reasoning "inverts traditional abstention logic when it states that because the interests involved are important, abstention is inappropriate." *Id*. at 434–35. When the right also touches on "a traditional area of state concern," the Supreme Court was "unwilling to conclude that state processes are unequal to the task of accommodating the various interests … that may arise in child-welfare litigation." *Id*. at 435.

So, too, in *Reetz v. Bonzanich*, 397 U.S. 82 (1970). There, a group of fishermen sued to enjoin fishing licensing laws and regulations in Alaska that limited their ability to engage in salmon fishing, which they argued violated their rights under the Fourteenth Amendment to the U.S. Constitution. *Id*. at 83–84. The federal district court denied a request for abstention, and the Supreme Court unanimously reversed on direct review. The Court acknowledged the potential for "grave and irreparable injury to the economic livelihood of the [fishermen] which would result, if they could not engage in their occupation during this year's forthcoming fishing season." *Id*. at 86. But the threat to this right alone, dire though it may be, did not outweigh the countervailing need to abstain for "a state court decision [that] could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." *Id*. at 86–87.

To be sure, a discretionary determination on abstention should account for "the nature of the constitutional deprivation alleged and the probable consequences of abstaining." *Harman*, 380 U.S. at 537. But the Supreme Court has accounted for those risks by limiting *Pullman* abstention to narrow circumstances like those presented here. Recognizing that abstention always poses "the danger that valuable federal rights might be lost in the absence of expeditious adjudication in the federal court," the Supreme Court has cautioned that "abstention must be invoked only in 'special circumstances.'" *Harris Cty. Commr's Court v. Moore*, 420 U.S. 77, 83 (1975). The Supreme Court then explained, "[i]f the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, *the argument for abstention is strong*." *Id*. at 84 (emphasis added).

As these cases show, the district court correctly declined Plaintiffs' invitation to fashion a broad, categorical rule in the face of overwhelming and binding precedent to the contrary. The *Pullman* doctrine erects a well-defined perimeter to delineate the narrow territory a federal court "ought not to enter unless no alternative to its adjudication is open." *Pullman*, 312 U.S. at 498; Br. 19. These legal parameters, described in Section I, *supra*, define the application of *Pullman*, not Plaintiffs' conviction what courts categorically "ought" to do. Br. 23.

The uncertain nature of Plaintiffs' purported federal right—a right to possess military-style assault weapons and high-capacity magazines in Boulder, Colorado—further counsels in favor of abstention. As the Supreme Court explained in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), "[i]t is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'" *Id*. at 786 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). In particular, the Supreme Court in *Heller* took pains to highlight that the Second Amendment does not preclude certain "longstanding prohibitions" and "presumptively lawful regulatory measures," such as prohibitions on "the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 626–27, 627 n.26; *see also Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013) ("In light of our nation's extensive practice of restricting citizens' freedom to carry firearms in a concealed manner, we hold that this activity does not fall within the scope of the Second Amendment's protections."). Notably, federal circuit courts have upheld restrictions on assault weapons and/or large-capacity magazines under *Heller*.[4]

[4] *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 123–24 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 140–41 (4th Cir. 2017)

The Court need not wade into that morass, however, to resolve this appeal. The point is that Plaintiffs' purported right is far from certain, and "it is difficult to imagine an area more fraught with sensitive policy considerations in which federal courts should not involve themselves if there is an alternative." *Smelt*, 447 F.3d at 681. Notwithstanding Plaintiffs' insistence otherwise, "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." *Harman*, 380 U.S. at 535. Indeed, "[a]voidance of constitutional adjudications where not absolutely necessary is part of the wisdom of the doctrine of the Pullman case." *Fieldcrest Dairies*, 316 U.S. at 173.

B. The First Amendment's "chilling" principle does not apply here.

In support of their proposed *per se* rule, Plaintiffs contend that the "chilling effect that would occur from abstaining when fundamental rights are involved is too significant to allow for abstention." Br. 23. "Chilling," however, is not a colloquial term that encompasses all collateral deterrent effects on any activity. Rather, it is a First Amendment-specific concern that animates unique First Amendment doctrines like overbreadth, vagueness, and prior restraint. *See, e.g.*,

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(en banc), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 247, 263–64 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Friedman v. City of Highland Park*, 784 F.3d 406, 411–12 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1260–64 (D.C. Cir. 2011).

New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1500 (10th Cir. 1995) ("The primary reasons for relaxing the ripeness analysis in [the First Amendment] context is the chilling effect that potentially unconstitutional burdens on free speech may occasion."); *see also United States v. Chester*, 628 F.3d 673, 688 (4th Cir. 2010) (Davis, C.J., concurring) (explaining that the chilling effect of overbroad regulations on expressive conduct is a "speech-specific problem"); *Ollie v. Univ. of Conn.*, No. 3:18-CV-2070, 2019 WL 441160, at *5 (D. Conn. Feb. 4, 2019), *appeal docketed*, No. 19-526 (2d Cir.) ("The chilling doctrine arose as a specific solution to a problem presented in the First Amendment context."). It is therefore unsurprising that the cases on which Plaintiffs rely involve freedom of expression. *See* Br. 23–24 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965) (challenge to Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law); *Zwickler v. Koota*, 389 U.S. 241, 242 (1967) (challenge to New York Penal Law against distributing political handbills);[5] *Porter v. Jones*, 319 F.3d 483, 486–87 (9th Cir. 2003) (concerning state threat to shut down website)).[6]

[5] Plaintiffs' Supreme Court authorities are readily distinguishable for additional reasons. In *Dombrowski*, abstention was unnecessary because the state statute could not be definitively interpreted or given a limiting construction that would have saved it from constitutional challenge. Moreover, any state interpretation was irrelevant because plaintiffs "attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue

Because of its roots in the uniquely "delicate and vulnerable" nature of First Amendment freedoms, "courts have repeatedly declined to apply the chilling doctrine outside of the limited context of free speech and free expression claims under the First Amendment." *Ollie*, 2019 WL 441160, at *5 (collecting cases). For instance, the Second Circuit explained that, although the First Amendment analytical framework may inform emerging Second Amendment doctrine, it would be "imprudent to assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second." *Kachalsky v. County of Westchester*, 701 F.3d 81, 91–92 (2d Cir. 2012), *cert. denied* 133 S. Ct. 1806 (2013); *see also United States v. Focia*, 869 F.3d 1269, 1284 (11th Cir. 2017) (joining decisions from the First, Second, Third, Fourth, and Seventh Circuits that refused to apply the prior restraint doctrine to the Second Amendment);

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to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities." 380 U.S. at 490. In *Zwickler*, the state officials "concede[d] that state court construction cannot narrow [the] allegedly indiscriminate cast [of the challenged law] and render unnecessary a decision of appellant's constitutional challenge." 389 U.S. at 250.

[6] The only non-First Amendment case cited in this section of Plaintiffs' brief, *Harman v. Fossenius*, 380 U.S. 528 (1965), concerns a Virginia poll tax. Br. 24. *Harman* ruled that the trial court did not abuse its discretion in declining abstention because, among other things, the state statute was "clear and unambiguous in all material respects," an upcoming election was only months away when adjudication was sought, and there was no ongoing state proceeding that could resolve the issue in a timely fashion. *See id.* at 535–37. None of those circumstances are present here.

Teixeira v. County of Alameda, 873 F.3d 670, 688 (9th Cir. 2017) (en banc) (cataloging textual and other differences between the First and Second Amendments and rejecting argument that the Second Amendment independently protects rights of commercial gun owners in the same manner that the First Amendment protects bookstores, print shops, and publishers). Plaintiffs' attempt to draw an automatic parallel between abstention concerns in Second Amendment and First Amendment cases without addressing the unique nature of those rights suffers from this exact flaw.

Plaintiffs' argument highlights why courts should be skeptical of transposing the First Amendment's "chilling" principle onto Second Amendment doctrine and why this case is a particularly poor vehicle to raise the issue. Plaintiffs do not actually make a chilling argument here—that is, they have not argued that the Ordinance incidentally deters them from exercising admittedly constitutional behavior beyond the Ordinance's scope. Subject to certain limitations, the Ordinance unambiguously restricts the sale or possession firearms with specific military-like features and magazines that accept more than ten rounds (or fifteen in the case of pistols). Plaintiffs do not contend the Ordinance is vague or that it may be misinterpreted to burden a recognized Second Amendment right, such as the right to possess a handgun for self-defense within the home. *See McDonald*, 561 U.S. at 780. In other words, chilling is not a practical concern here.

Moreover, even in the context of First Amendment challenges, there is no absolute rule against abstention. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring) ("[E]ven in cases involving First Amendment challenges to a state statute, abstention may be required[.]"). For example in *Almodovar v. Reiner*, 832 F.2d 1138 (9th Cir. 1987), the Ninth Circuit upheld abstention in a First Amendment challenge to a California statute regulating sexually explicit films, finding that, due to the pendency of a similar state court action, "[t]he fears of chill that justify our preference against abstention in first amendment cases are not present in this instance." *Id.* at 1140; *see also Pub. Citizen, Health Research Grp. v. Comm'n on Med. Discipline of Md.*, 573 F.2d 863, 865–66 (4th Cir. 1978) ("[A]bstention is not always precluded by a claim of First Amendment privilege[.]"); *Chez Sez III*, 945 F.2d at 634 ("The mere fact that the Ordinance is being challenged on First Amendment grounds is not enough to automatically render *Pullman* abstention inappropriate in this case."); *Beavers v. Ark. State Bd. of Dental Exam'rs*, 151 F.3d 838, 841 (8th Cir. 1998) (upholding *Pullman* abstention in First Amendment challenge to dental advertising laws).

There is no basis to fashion a Second Amendment-specific *Pullman* doctrine based on First Amendment principles. And even if there were, the result would not be the *per se* rule against abstention that Plaintiffs advocate.

C. A stay will not unduly delay adjudication of Plaintiffs' claims.

The crux of Plaintiffs' argument is that abstention will delay adjudication of their purported Second Amendment rights. App-191. As the district court noted, some delay is "baked into the concept of abstention," App-191, and the Supreme Court has not hesitated to require abstention even when delay may pose a risk of "grave and irreparable injury" to those challenging a state regulation, when "the first judicial application of [the potentially invalidating state constitutional provisions] should properly be by [the state] court." *Reetz*, 397 U.S. at 86–87.

Regardless, the potential for delay here does not weigh against preemption for at least three reasons. First, the City raised abstention at the earliest opportunity, and the district court acted promptly on the *Pullman* issue. The court highlighted the issue at a non-evidentiary hearing just three months after the lawsuit was filed, ordered expedited supplemental briefing, and ruled on abstention in a written opinion within one month. App-104–05, App-192. (The hearing was initially scheduled for July 25, 2018, but was vacated and postponed at Plaintiffs' request. *See* R.38.) This case is therefore unlike cases where abstention was deemed inappropriate due to its late invocation. *See City of Houston*, 482 U.S. at 467 n.16 (1987) (failure to assert abstention until the court of appeals' *en banc* review "undercut the force of the City's argument, but does not bar us from considering it").

Second, the pendency of the *Chambers* lawsuit in Boulder District Court mitigates any concerns of delay. The *Chambers* case presents the same question of preemption that Plaintiffs have alleged here. *See* App-118. The state case was filed shortly after this one and is proceeding apace: the court has already decided a portion of the City's motion to dismiss relating to standing and has ordered a three-hour argument on April 30, 2019, on the preemption claims. Notice of Hearing, *Chambers et al. v. City of Boulder*, No. 2018CV30581 (Boulder Cty. Dist. Ct., Feb. 22, 2019). If the state court upholds the City's Ordinance, an appeal of the trial court's final judgment will proceed directly to the Colorado Supreme Court, ensuring a prompt final disposition. *See* Colo. Rev. Stat. § 13-4-102(1)(b).

This relatively unique circumstance—an already-pending state lawsuit concerning the very legal issue implicating *Pullman*—alleviates the delay in adjudicating Plaintiffs' claims. *See W. Food Plan Inc. v. MacFarlane*, 588 F.2d 778, 781 (10th Cir. 1978) ("We do not find fault with the decision of the trial court to abstain on the basis that proceedings were then pending in the [Colorado] district court and these were capable of disposing of the action."); *Harris Cty.*, 420 U.S. at 83 ("Where there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, we have regularly ordered abstention."); *Albertson v. Millard*, 345 U.S. 242, 244–45 (1953) (abstaining in favor of pending state court action alleging unconstitutionality of election law on

state and federal grounds); *Tyler*, 709 F.2d at 1108–09 (finding considerations of delay not dispositive where the state issue is part of an ongoing state case).

Third, Plaintiffs have forgone two subsequent opportunities for faster disposition. Plaintiffs did not accept the district court's offer to certify the preemption issue and move forward with expedited discovery. *See* App-105. On appeal, Plaintiffs go a step farther, arguing that "this case is not appropriate for certification." Br. 38; *id*. at 14 n.1. Then, although the district court entered its abstention order more than three months before the December 31, 2018 deadline to comply with portions of the Ordinance, Plaintiffs did not attempt to intervene in the *Chambers* suit to seek expedited relief. Contrary to Plaintiffs' overtures about delay, their actions demonstrate that an expedient resolution is not their priority.

III. Plaintiffs' procedural objections are unfounded.

The district court did not abuse its discretion in deciding the *Pullman* issue when and how it did. There is no requirement, as Plaintiffs suggest (Br. 29), that a district court must perform fact-finding before issuing a stay under *Pullman*. The examples Plaintiffs recount (Br. 29–31) in which a court happened to decide the issue of abstention on a more-developed record are descriptive, not prescriptive, and easily outweighed by the numerous cases in which abstention was decided

based on the parties' allegations and argument.[7] Tellingly, Plaintiffs fail to identify a single disputed issue of fact that they believe the district court should have resolved below. *See* Br. 29–31.

Furthermore, Plaintiffs do not explain why additional fact-finding would be necessary in light of the Colorado Supreme Court's observation that both steps of the state-law preemption analysis are predominantly legal in nature. First, whether a matter is of statewide, local, or mixed state and local concern "is a legal question." *City of Longmont*, 369 P.3d at 580. Second, "in virtually all cases, [the analysis of whether a conflict exists] will involve a facial evaluation of the respective regulatory schemes, not a factual inquiry as to the effect of those schemes 'on the ground.'" *Id.* at 579. Given the legal nature of the underlying issue

[7] *See, e.g.*, *W. Va. Citizens Defense League*, 483 F. App'x at 839–40 ("WVCDL's assertion that the record is bereft of evidence demonstrating the presence of thorny and potentially dispositive state law questions is without merit, given that WVCDL's complaint squarely demonstrates the presence of numerous such issues.") (affirming abstention in challenge to city's restrictions on the ability to possess a firearm within public buildings); *W. Food Plan*, 588 F.2d at 781 (affirming grant of abstention based on allegations in complaint); *Fender v. Washington County*, No. 14-cv-142, 2014 WL 1491138, at *1 (W.D. Pa. Apr. 15, 2014), *appeal dismissed*, No. 14-2736 (3d Cir.) (abstaining in challenge involving state concealed carry statute based on allegations in complaint); *Coalition of N.J. Sportsmen v. Florio*, 744 F. Supp. 602, 605, 610 (D.N.J. 1990) (abstaining in challenge to large-capacity magazine statute at preliminary injunction stage); *Cristina v. Dep't of State of State of N.Y.*, 417 F. Supp. 1012, 1018 (S.D.N.Y. 1976) (abstaining in challenge to pistol licensing requirement at motion to dismiss stage).

and the value to all parties in quick adjudication, the district court's approach was sound.

Similarly, there is no requirement that a district court complete the very explication of state law it has determined should be left to the state court. *See* Br. 31–38. On the contrary, "where the challenged statute is part of an integrated scheme of related constitutional provisions, statutes, and regulations, and where the scheme as a whole calls for clarifying interpretation by state courts, we have regularly required the district courts to abstain." *Harris Cty.*, 420 U.S. at 84 n.8.

Nevertheless, Plaintiffs contend that the district court should have performed both steps of Colorado's preemption analysis as to each component of the Ordinance, even considering "whether there is a need for the people of Colorado to have statewide uniformity in the regulation of magazines." Br. 36. But here again, Plaintiffs' proposed rule lacks legal support, and actually runs counter to a primary purpose of the *Pullman* doctrine, which is to *avoid* advisory opinions, not *issue* them. *See Moore*, 442 U.S. at 428 (describing the "*Pullman* concern" as the danger of issuing an interpretation of state law that "may be discredited at any time—thus essentially rendering the federal-court decision advisory"). Plaintiffs' position "inverts traditional abstention reasoning. The breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it." *Id*. at 427 (emphasis in original).

Indeed, this Court recently held with respect to Colorado home-rule preemption that "every step of its resolution is firmly within the province of Colorado law." *Ryals*, 560 F. App'x at 729. Thus, to the extent Plaintiffs contend that the state-law analytical framework is clear, that is beside the point. Even if a federal court knows *how* to analyze the question, that does not mean it can predict with confidence what the outcome would be. "In light of the lack of precedential decisions on point, and in furtherance of comity and federalism, [this Court] conclude[d] the Colorado Supreme Court should have the opportunity to answer this important question in the first instance." *Id.*

* * *

The district court's procedure, like its ultimate conclusion on abstention, was proper and well-supported. The decision to stay this case pending the Colorado courts' determination whether the Ordinance is preempted by state law was correct, carefully considered, and a proper exercise of the district court's discretion.

CONCLUSION

The City respectfully asks this Court to affirm the decision below.

Dated: March 13, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,085 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word 365.

/s/ *R. Reeves Anderson*
Robert Reeves Anderson

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing **BRIEF OF APPELLEES**:

a) All required privacy redactions have been made;

b) The ECF submission is an exact copy of the hard copy document that is being filed with the Court;

c) The ECF submission has been scanned for viruses with the most recent version of the commercial virus scanning program Checkpoint Endpoint Security (Version 80.86.8083, most recently updated March 13, 2019), and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2019, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will electronically send notice to:

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ADDENDUM

INDEX TO ADDENDUM

ORDINANCE 8245

AN ORDINANCE AMENDING CHAPTER 5, "GENERAL OFFENSES," B.R.C. 1981, TO BAN THE SALE AND POSSESSION OF ASSAULT WEAPONS, LARGE-CAPACITY MAGAZINES AND MULTI-BURST TRIGGER ACTIVATORS, AND SETTING FORTH RELATED DETAILS.

THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO, FINDS AND RECITES THE FOLLOWING:

A. The City of Boulder is an urban, densely populated city, with a population density similar to that of Denver, Colorado. With a population of 682,545 in 155 square miles, Denver has a density of 4,213 residents per square mile. Boulder's population of 108,707 resides in 25.8 square miles with a population density of 4,031 residents per square mile.

B. There has been a significant increase in mass shootings over the last two decades. Mass shootings occur most often at in public places and at schools and involve assault weapons.

C. Boulder is home to the main campus of the University of Colorado, with an enrollment of 33,246 students and the campus of Naropa University, with 932 students enrolled. In addition, Boulder is home to Boulder Valley School District elementary, middle and high schools, with 14,357 students enrolled. In addition, the city is home to private schools with approximately 1,500 students. Boulder's estimated population is 108,707. Boulder has one of the highest ratios of students per capita in the country. Students are disproportionately victims of mass shootings. Thus, the presence of a large number of students in the city of Boulder creates a higher than normal level of risk for the community.

D. Assault weapons are semi-automatic firearms designed with military features to allow rapid spray firing for the quick and efficient killing of humans.

E. Large capacity ammunition magazines (generally defined as magazines capable of holding more than 10 rounds) are feeding devices that and may hold as many as 100 rounds of ammunition.

F. Multi-Burst Trigger activators are devices that effectively increase the rate at which a weapon can be fired.

G. Assault weapons and/or large capacity ammunition magazines have been the tools of choice in many mass shootings of innocent civilians, including those described below:

1. Parkland, Florida, February 14, 2018: a shooter killed 17 and wounded 17 at Marjory Stoneman Douglas High School with an AR-15-style assault rifle.
2. Sutherland Springs, Texas, November 5, 2017: a shooter killed 26 and wounded 20 at the First Baptist Church with a Ruger AR-556 assault rifle.
3. Las Vegas, Nevada, October 1, 2017: a shooter killed 59 and wounded 527 armed with 23 guns, including both AR-15s and AK-47s as well as at least one gun modified with a bump stock. The following weapons were found inside of the killer's hotel room:
    a. Colt M4 Carbine AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
    b. Noveske N4 AR-15 .223/5.56 with a bump stock, vertical fore grip and 40 round magazine.
    c. LWRC M61C AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.
    d. POF USA P-308 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.
    e. Christensen Arms CA-15 AR-15 .223 Wylde with a bump stock, vertical fore grip and 100 round magazine.

f. POF USA P-15 P AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.

g. Colt Competition AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.

h. Smith & Wesson 342 AirLite .38 caliber revolver with 4 cartridges and 1 expended cartridge case.

i. LWRC M61C AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.

j. FNH FM15 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.

k. Daniel Defense DD5V1 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.

l. FNH FN15 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.

m. POF USA P15 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.

n. Colt M4 Carbine AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.

o. Daniel Defense M4A1 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.

p. LMT Def. 2000 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.

q. Daniel Defense DDM4V11 AR-15 .223/5.56 with a bump stock, vertical fore grip. No magazine. EOTech optic.

r. Sig Sauer SIG716 AR-10 .308/7.62 with a bipod, red dot optic and 25 round magazine.

s. Daniel Defense DD5V1 AR-10 .308/7.62 with a bipod and scope. No magazine.

t. FNH FN15 AR-15 .223/5.56 with a bump stock, vertical fore grip and 100 round magazine.

u. Ruger American .308 caliber bolt action rifle with scope.

v. LMT LM308MWS AR-10 .308/7.62 with a bipod and red dot scope. No magazine.

w. Ruger SR0762 AR-10 .308/7.62 with a bipod, scope and 25 round magazine.

x. LMT LM308MWS AR-10 with a bipod, scope and 25 round magazine.

4. Orlando, Florida, June 12, 2016: a shooter killed 49 and wounded 58 at the Pulse Nightclub with an AR-15-style assault rifle and a Glock 17 9mm handgun.

5. San Bernardino, California, December 2, 2015: two shooters killed 14 and wounded 22 using a DPMS AR-15-style assault rifle and a Smith and Wesson M&P 15.

6. Newtown, Connecticut, December 14, 2012: a shooter killed 26 and wounded 2 at Sandy Hook Elementary School with an AR-15-style assault rifle. The killer murdered his mother with a .22 caliber rimfire rifle. He also had a Glock 10mm and a Sig Sauer 9mm.

7. Aurora, Colorado, July 20, 2012: a shooter killed 12 and wounded 58 armed with a Smith & Wesson M&P15 assault rifle and 100-round ammunition magazines and a Remington 870 pump shotgun. He also had a Glock 22 .40 caliber pistol.

8. Carson City, Nevada, September 6, 2011: a shooter killed 4 and wounded 7 armed with a Norinco Mak 90, that had been altered from a semi-automatic assault weapon to a fully-automatic machine gun.

9. Washington D.C. area, October 2002: shooters killed 10 and wounded 3 during a 3-week rampage armed with a Bushmaster XM-15 assault rifle.

10. Columbine, Colorado, April 20, 1999: shooters killed 13 and wounded 21 at Columbine High School armed with a TEC-9 assault pistol and several large capacity ammunition magazines. The killers also had two shotguns.

11. San Francisco, California, July 1, 1993: a shooter killed 8 and wounded 6 armed with TEC-9 assault pistols and 40- and 50-round ammunition magazines. The suspect used a Hell-Fire trigger, which is a type of multi-burst trigger activator.

H. The City Council intends a narrow ban that respects the constitutionally guaranteed right to bear arms.

I. Americans constitute 4.4 percent of the global population and own 42 percent of the world's guns.

J. Worldwide a country's rate of gun ownership correlates with the occurrence of mass shootings.

K. This ordinance is a reasonable exercise of the city's police powers to restrict access to weapons that are of the type used in mass shootings and that are designed to kill large numbers of people quickly.

L. Because of Boulder's dense population and high concentration of students the council believes that it is necessary for the public safety to adopt this ordinance.

M. Boulder hosts a large number of public events creating crowds that are uniquely vulnerable to mass shooters.

N. This ordinance will impact only a small percentage of the weapons possessed by Boulder residents.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. Section 5-1-1, "Definitions," B.R.C. 1981, is amended to delete the definition of "Illegal weapon."

…

~~*Illegal weapon* means a blackjack, gas gun, metallic knuckles, gravity knife or switchblade knife.~~

…

Section 2. Section 5-8-2, "Definitions," B.R.C. 1981, is amended to read as follows:

5-8-2. – Definitions.

The following terms used in this chapter have the following meanings unless the context clearly requires otherwise:

About the person means sufficiently close to the person to be readily accessible for immediate use.

Assault weapon means:

(a) A~~a~~ll semi-automatic ~~firearms~~ center-fire rifles that have the capacity to accept a detachable magazine and that have ~~with~~ any of the following characteristics:

(1~~a~~) A pistol grip or thumbhole stock~~ll semiautomatic action rifles with a detachable magazine with a capacity of twenty-one or more rounds.~~;

(2~~b~~) ~~All semiautomatic shotguns with a~~ folding or telescoping stock ~~or a magazine capacity of more than six rounds or both.~~; or

(3~~c~~) Any protruding grip or other device to allow the weapon to be stabilized with the non-trigger hand.~~All semiautomatic pistols that are modifications of rifles having the same make, caliber, and action design but a short barrel or modifications of automatic weapons originally designed to accept magazines with a capacity of twenty-one or more rounds.~~

(b) All semi-automatic center-fire pistols that have any of the following characteristics:

(1) Have the capacity to accept a magazine other than in the pistol grip; or

(2) Have a secondary protruding grip or other device to allow the weapon to be stabilized with the non-trigger hand.

(c) All semi-automatic shotguns that have any of the following characteristics:

(1) A pistol grip or thumbhole stock;

(2) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;

(3) A folding or telescoping stock;

(4) A fixed magazine capacity in excess of 5 rounds; or

(5) The capacity to accept a detachable magazine.

(d) Any firearm which has been modified to be operable as an assault weapon as defined herein.

(e) Any part or combination of parts designed or intended to convert a firearm into an assault weapon, including ~~a detachable magazine with a capacity of twenty-one or more rounds, or~~ any combination of parts from which an assault weapon may be readily assembled if those parts are in the possession or under the control of the same person.

Constructive knowledge means knowledge of facts or circumstances sufficient to cause a reasonable person to be aware of the fact in question.

Illegal weapon means an assault weapon, large-capacity magazine, multi-burst trigger activator, blackjack, gas gun, metallic knuckles, gravity knife or switchblade knife.

Large-capacity magazine means any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:

(a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.

(b) A 22-caliber tube rim-fire ammunition feeding device.

(c) A tubular magazine that is contained in a lever-action firearm.

(d) A pistol magazine designed to fit into a pistol grip that has a capacity to hold no more than 15 rounds.

Locked container means a secure container which is enclosed on all sides and locked by a padlock, key lock, combination lock, or similar device.

Minor means a person under ~~eighteen~~ twenty-one years of age.

Multi-Burst Trigger Activator means:

(a) A device that attaches to a firearm to allow the firearm to discharge two or more shots in a burst when the device is activated; or

(b) A manual or power-driven trigger-activating device that, when attached to a firearm increases the rate of fire of that firearm.

Pistol Grip means a grip that protrudes conspicuously beneath the action of the weapon and that allows for a pistol style grasp in which the web of the trigger hand (between the thumb and index finger) can be placed below the top of the exposed portion of the trigger while firing.

Provide means to give, lend, sell, or otherwise place in an unsecured location where a minor or other unauthorized or incompetent person could foreseeably gain access to a firearm.

Semi-automatic means a firearm that fires a single round for each pull of the trigger and automatically chambers a new round immediately after a round is fired.

Section 3. Section 5-8-10, "Possession of Illegal Weapons," B.R.C. 1981, is amended to read as follows:

5-8-10. – Possession and Sale of Illegal Weapons.

(a) No person shall knowingly possess or sell or otherwise transfer an illegal weapon.

(b) The defendant's knowledge that the weapon was illegal is not an aspect of knowledge required for violation of this section.

(c) Nothing in this section shall be construed to forbid any person:

(1) Holding a Federal Firearms License issued by the United States Government from possession of any firearm authorized pursuant to such license;

(2) From possessing a weapon for which the United States Government has issued a stamp or permit pursuant to the National Firearms Act;

(3) From possessing a handgun magazine so long as the possession of the handgun and magazine are in compliance with state law; or

(4) Selling an illegal weapon to a person identified in Section 5-8-25, "Exemptions from this Chapter," B.R.C. 1981.

(d) Nothing in this section shall be deemed to apply to any firearm that has been modified either to render it permanently inoperable or to permanently make it not an assault weapon.

(e) Nothing in this section shall be deemed to restrict a person's ability to travel with a weapon in a private automobile or other private means of conveyance for hunting or for lawful protection of a person's or another's person or property while traveling into,

though, or within, the City of Boulder, regardless of the number of times the person stops in the City of Boulder.

Section 4. Section 5-8-21, "Open Carriage of Firearms in Carrying Cases Required," B.R.C. 1981, is amended to read as follows:

5-8-21. - Open Carriage of Firearms in Carrying Cases Required.

Any person carrying a firearm off of the person's property or outside of the person's business or vehicle shall carry the firearm in a carrying case. The carrying case must be recognizable as a gun carrying case by a reasonable person. A plain-shaped case must be clearly marked to be deemed recognizable under this standard. A holster satisfies the requirement of a carrying case for a pistol. The carrying case must be openly carried and must not be concealed on or about the person. This section shall not apply to individuals who have a permit to carry a concealed weapon issued pursuant to state law, unless the weapon being carried is an assault weapon.

Section 5. Section 5-8-22, "Defenses," B.R.C. 1981, is amended to read as follows:

5-8-22. – Defenses.

(a) It is an affirmative defense to a charge of violating sections 5-8-3, "Discharge of Firearms," 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space," 5-8-5, "Negligently Shooting Bow or Slingshot," 5-8-6, "Aiming Weapon at Another," 5-8-7, "Flourishing Deadly Weapon in Alarming Manner," and 5-8-8, "Possession of Loaded Firearms," B.R.C. 1981, that the defendant was:

(1) Reasonably engaged in lawful self-defense under the statutes of the State of Colorado; or

(2) Reasonably exercising the right to keep and bear arms in defense of the defendant's or another's home, person and property or in aid of the civil power when legally thereto summoned.

(b) It is a specific defense to a charge of violating sections 5-8-3, "Discharge of Firearms," 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space," and 5-8-8, "Possession of Loaded Firearms," B.R.C. 1981, that the events occurred in an area designated as a target range by the city manager under section 5-8-26, "City Manager May Designate Target Ranges," B.R.C. 1981, for the type of weapon involved. It is a specific defense to a charge of violating section 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space," B.R.C. 1981, by possession that the defendant was going directly to or returning directly from such a target range.

(c) It is an affirmative defense to a charge of violating sections 5-8-8, "Possession of Loaded Firearms," 5-8-9, "Carrying a Concealed Weapon," and 5-8-11, "Possessing Firearm While Intoxicated," B.R.C. 1981, that the defendant was:

(1) In the defendant's own dwelling or place of business or on property owned or under the defendant's control at the time; or

(2) In a private automobile or other private means of conveyance at the time and was carrying the weapon for lawful protection of the defendant's or another's person or property while traveling; or

(3) Charged with carrying a knife that was a hunting or fishing knife carried by the defendant for sport use.

(d) It is a specific defense to a charge of violating sections 5-8-8, "Possession of Loaded Firearms," and 5-8-9, "Carrying a Concealed Weapon," B.R.C. 1981, that the defendant was carrying the weapon pursuant to a concealed weapons permit valid under the statutes of the State of Colorado.

(e) It is a specific defense to a charge of violating sections 5-8-3, "Discharge of Firearms," and 5-8-8, "Possession of Loaded Firearms," B.R.C. 1981, that the loaded gas or mechanically operated gun was possessed or discharged in a building with the permission of the property owner and the projectile did not leave the building.

(f) It is a specific defense to a charge of violating section 5-8-10, "Possession of Illegal Weapons," B.R.C. 1981:

(1) That the person had a valid permit for such weapon pursuant to federal law at the time of the offense; or

(2) That the illegal weapon was an assault weapon accompanied by a certificate issued by the Boulder Police Department.

(g) It is a specific defense to a charge of violating section 5-8-4, "Possessing and Discharging Firearm or Bow in Park or Open Space," B.R.C. 1981, that the firearm, gas or mechanically operated gun, bow, slingshot or crossbow possessed by the person was being transported in a motor vehicle. This defense does not apply to a charge of violation involving discharge of a missile.

Section 6. Section 5-8-25, "Exemptions from Chapter," B.R.C. 1981, is amended to read as follows:

5-8-25. – Exemptions from Chapter.

The following individuals are exempt from the provisions of this Chapter:

(a) ~~Nothing in this chapter shall be construed to forbid~~ Any officer of the United States, including but not limited to federal agents and United States ~~m~~Marshals, any sheriffs, constables and their deputies; any regular or ex-officio police officer; any other peace officers; or members of the United States Armed Forces, Colorado National Guard or Reserve Officer Training Corps from having in their possession, displaying, concealing or discharging such weapons as are necessary in the authorized and proper performance of their official duties; or

(b) Any person authorized to carry a concealed weapon under the Federal Law Enforcement Officers Safety Act.

Section 7. A new Section 5-8-28, "Assault Weapons," B.R.C. 1981, is added to read as follows, and remaining sections in Chapter 5-8 are renumbered:

5-8-28. – Assault Weapons.

(a) Any person who, prior to June 15, 2018, was legally in possession of an assault weapon large capacity magazine shall have until December 31, 2018 to do any of the following without being subject to prosecution:

(1) Remove the assault weapon or large capacity magazine from the City of Boulder;

(2) Render the assault weapon permanently inoperable;

(3) Surrender the assault weapon or large capacity magazine to the Boulder Police Department for destruction; or

(4) If eligible, obtain a certificate for the assault weapon as provided in subsection (c).

(b) Any person who, prior to June 15, 2018, was legally in possession of multi-burst trigger activator shall have until July 15, 2018 to do any of the following without being subject to prosecution:

(1) Remove the multi-burst trigger activator from the City of Boulder; or

(2) Surrender the multi-burst trigger activator to the Boulder Police Department for destruction.

(c) Any person seeking to certify an assault weapon that he or she legally possessed prior to June 15, 2018 must comply with the following requirements:

(1) Submit to a background check conducted by the appropriate law enforcement agency to confirm that he or she is not prohibited to possess a firearm pursuant to 18 U.S.C. § 922 or C.R.S § 18-12-108;

(2) Unless the person is currently prohibited by law from possessing a firearm, prior to December 31, 2018 apply for a certificate for the assault weapon from the Boulder Police Department;

(3) Safely and securely store the assault weapon pursuant to the regulations adopted by the appropriate law enforcement agency;

(4) Possess the assault weapon only on property owned or immediately controlled by the person, or while on the premises of a licensed gunsmith for the purpose of lawful repair, or while engaged in the legal use of the assault weapon at a duly licensed firing range, or while traveling to or from these locations, provided that the assault weapon is stored unloaded in a locked container during

transport. The term "locked container" does not include the utility compartment, glove compartment, or trunk of a motor vehicle; and

(5) Report the loss or theft of a certified assault weapon to the appropriate law enforcement agency within 48 hours of the time the discovery was made or should have been made.

(d) If a certified assault weapon is used in the commission of a crime, the owner shall be civilly liable for any damages resulting from that crime. The liability imposed by this subsection shall not apply if the assault weapon was stolen and the certified owner reported the theft of the firearm to law enforcement within 48 hours of the time the discovery was made or should have been made.

(e) Certified assault weapons may not be purchased, sold or transferred in the City of Boulder, except for transfer to a licensed gunsmith for the purpose of lawful repair, or transfer to the appropriate law enforcement agency for the purpose of surrendering the assault weapon for destruction.

(f) Persons acquiring an assault weapon by inheritance, bequest, or succession shall, within 90 days of acquiring title, do one of the following:

(1) Modify the assault weapon to render it permanently inoperable;

(2) Surrender the assault weapon to the Boulder Police Department for destruction;

(3) Transfer the assault weapon to a firearms dealer who is properly licensed under federal, state and local laws; or

(4) Permanently remove the assault weapon from the City of Boulder.

(g) The owner of a certified assault weapon may not possess in the City of Boulder any assault weapons purchased after June 15, 2018.

(h) The city manager shall charge a fee for each certificate sufficient to cover the costs of administering the certificate program.

(i) The city manager shall issue to qualified applicants two original copies of each certificate issued. The City of Boulder shall not maintain any records of certificates issued. The person receiving the certificate shall keep one copy with the weapon certified and the second copy in a secure place to replace the certificate maintained with the weapon.

Section 8. This ordinance is necessary to protect the public health, safety, and welfare of the residents of the city, and covers matters of local concern.

Section 9. The city council deems it appropriate that this ordinance be published by title only and orders that copies of this ordinance be made available in the office of the city clerk for public inspection and acquisition.

INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY TITLE ONLY this 5th day of April, 2018.

Suzanne Jones
Mayor

Attest:

Lynnette Beck
City Clerk

READ ON SECOND READING AND AMENDED this 1st day of May, 2018.

Suzanne Jones
Mayor

Attest:

Lynnette Beck
City Clerk

READ ON THIRD READING, PASSED AND ADOPTED this 15th day of May, 2018.

Suzanne Jones
Mayor

Attest:

Lynnette Beck
City Clerk

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ORDINANCE 8259

AN ORDINANCE AMENDING CHAPTER 5, "GENERAL OFFENSES," B.R.C. 1981, TO DELETE A PROVISION EXEMPTING CERTAIN HANDGUN MAGAZINES AND TO CLARIFY THE CERTIFICATION PROCESS FOR ASSAULT WEAPONS AND SETTING FORTH RELATED DETAILS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. Section 5-8-10, "Possession and Sale of Illegal Weapons," B.R.C. 1981, is amended to read as follows:

5-8-10. – Possession and Sale of Illegal Weapons.

(a) No person shall knowingly possess or sell or otherwise transfer an illegal weapon.

(b) The defendant's knowledge that the weapon was illegal is not an aspect of knowledge required for violation of this section.

(c) Nothing in this section shall be construed to forbid any person:

(1) Holding a Federal Firearms License issued by the United States Government from possession of any firearm authorized pursuant to such license;

(2) From possessing a weapon for which the United States Government has issued a stamp or permit pursuant to the National Firearms Act;

~~(3) From possessing a handgun magazine so long as the possession of the handgun and magazine are in compliance with state law; or~~

(34) Selling an illegal weapon to a person identified in Section 5-8-25, "Exemptions from this Chapter," B.R.C. 1981.

(d) Nothing in this section shall be deemed to apply to any firearm that has been modified either to render it permanently inoperable or to permanently make it not an assault weapon.

(e) Nothing in this section shall be deemed to restrict a person's ability to travel with a weapon in a private automobile or other private means of conveyance for hunting, ~~or~~ for lawful protection of a person's or another's person or property or for competition, while traveling into, though, or within, the City of Boulder, regardless of the number of times the person stops in the City of Boulder.

Section 2. Section 5-8-25, "Exemptions from Chapter," B.R.C. 1981, is amended to read as follows:

5-8-25. – Exemptions from Chapter.

~~The following individuals are exempt from the provisions of this Chapter:~~

~~(a)~~ Nothing in this chapter shall be construed to forbid the following persons from having in their possession, displaying, concealing or discharging such weapons as are necessary in the authorized and proper performance of their official duties: ~~Any officer of the United States, including but not limited to federal agents and~~

(1) United States Marshals, any sheriffs, constables and their deputies~~,~~;

(2) any regular or ex-officio police officer~~,~~;

(3) any other peace officers~~,~~; or

(4) members of the United States Armed Forces, Colorado National Guard or Reserve Officer Training Corps. ~~from having in their possession, displaying, concealing or discharging such weapons as are necessary in the authorized and proper performance of their official duties; or~~

~~(b) Any person authorized to carry a concealed weapon under the Federal Law Enforcement Officers Safety Act.~~

Section 3. Section 5-8-28, "Assault Weapons," B.R.C. 1981, is amended to read as follows:

5-8-28. – Assault Weapons.

(a) Any person who, prior to June 15, 2018, was legally in possession of an assault weapon or large capacity magazine shall have until December 31, 2018 to do any of the following without being subject to prosecution:

(1) Remove the assault weapon or large capacity magazine from the City of Boulder;

(2) Render the assault weapon permanently inoperable;

(3) Surrender the assault weapon or large capacity magazine to the Boulder Police Department for destruction; or

(4) If eligible, obtain a certificate for the assault weapon as provided in subsection (c).

(b) Any person who, prior to June 15, 2018, was legally in possession of multi-burst trigger activator shall have until July 15, 2018 to do any of the following without being subject to prosecution:

(1) Remove the multi-burst trigger activator from the City of Boulder; or

(2) Surrender the multi-burst trigger activator to the Boulder Police Department for destruction.

(c) Any person seeking to certify an assault weapon that he or she legally possessed prior to June 15, 2018 must comply with the following requirements:

(1) Submit to a background check conducted by the appropriate law enforcement agency to confirm that he or she is not prohibited to possess a firearm pursuant to 18 U.S.C. § 922 or C.R.S § 18-12-108;

(2) ~~Unless the person is currently prohibited by law from possessing a firearm, p~~Prior to December 31, 2018 apply for a certificate for the assault weapon from the Boulder Police Department;

(3) No person prohibited by state or federal law from possessing a firearm shall be issued a certificate.

(d) Any person issued a certificate shall:

(~~3~~1) Safely and securely store the assault weapon pursuant to the regulations adopted by the appropriate law enforcement agency;

(42) Possess the assault weapon only on property owned or immediately controlled by the person, or while on the premises of a licensed gunsmith for the purpose of lawful repair, or while engaged in the legal use of the assault weapon at a duly licensed firing range, or while traveling to or from these locations, provided that the assault weapon is stored unloaded in a locked container during transport. The term "locked container" does not include the utility compartment, glove compartment, or trunk of a motor vehicle; and

(~~5~~3) Report the loss or theft of a certified assault weapon to the appropriate law enforcement agency within 48 hours of the time the discovery was made or should have been made.

(~~d~~e) If a certified assault weapon is used in the commission of a crime, the owner shall be civilly liable for any damages resulting from that crime. The liability imposed by this subsection shall not apply if the assault weapon was stolen and the certified owner reported the theft of the firearm to law enforcement within 48 hours of the time the discovery was made or should have been made.

(~~e~~f) Certified assault weapons may not be purchased, sold or transferred in the City of Boulder, except for transfer to a licensed gunsmith for the purpose of lawful repair, or transfer to the appropriate law enforcement agency for the purpose of surrendering the assault weapon for destruction.

(~~f~~g) Persons acquiring an assault weapon by inheritance, bequest, or succession shall, within 90 days of acquiring title, do one of the following:

(1) Modify the assault weapon to render it permanently inoperable;

(2) Surrender the assault weapon to the Boulder Police Department for destruction;

(3) Transfer the assault weapon to a firearms dealer who is properly licensed under federal, state and local laws; or

(4) Permanently remove the assault weapon from the City of Boulder.

(~~g~~h) The owner of a certified assault weapon may not possess in the City of Boulder any assault weapons purchased after June 15, 2018.

(~~h~~i) The city manager shall charge a fee for each certificate sufficient to cover the costs of administering the certificate program.

(~~i~~j) The city manager shall issue to qualified applicants two original copies of each certificate issued. The City of Boulder shall not maintain any records of certificates issued. The person receiving the certificate shall keep one copy with the weapon certified and the second copy in a secure place to replace the certificate maintained with the weapon.

Section 4. This ordinance is necessary to protect the public health, safety, and welfare of the residents of the city, and covers matters of local concern.

Section 5. The city council deems it appropriate that this ordinance be published by title only and orders that copies of this ordinance be made available in the office of the city clerk for public inspection and acquisition.

INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY TITLE ONLY this 5th day of June 2018.

Suzanne Jones
Mayor

Attest:

Lynnette Beck
City Clerk

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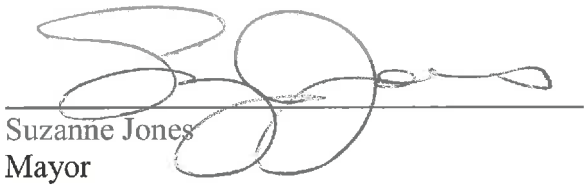
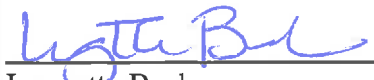
READ ON SECOND READING, PASSED AND ADOPTED this 19th day of June 2018.



Suzanne Jones
Mayor

Attest:



Lynnette Beck
City Clerk

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