No. _____

In the Supreme Court of the United States

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

Petitioners,

v.

CITY OF BOULDER; JANE S. BRAUTIGAM, City Manager of the City of Boulder, in her official capacity; MARIS HEROLD, Chief of Police of the City of Boulder, in her official capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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September 24, 2020

QUESTIONS PRESENTED

Contrary to this Court's precedent, the courts below exercised *Pullman* abstention, delaying adjudication of constitutional questions despite the challenged laws' chilling effect on the exercise of a natural, fundamental right. In so doing, both courts relegated consideration of abstention's effect on Petitioners' Second Amendment protected rights to a discretionary afterthought, rather than the threshold inquiry as conducted by this Court. Further, neither court considered the effect of Petitioners' damages claims on the *Pullman* inquiry; namely, that regardless of the resolution of the state law questions, a federal court must evaluate the federal constitutional issues in order to evaluate Petitioners' damages claims properly sought against a municipality under 42 U.S.C. § 1983. Finally, the lower courts did not employ a surgical, issue-by-issue *Pullman* abstention analysis as mandated by this Court, instead opting for an all or nothing approach. As such, the questions presented to this Court are:

1) Is *Pullman* abstention appropriate where abstaining has a chilling effect on the exercise of a natural, fundamental, constitutionally protected right?
2) Is *Pullman* abstention appropriate in a case involving damages when there is no possibility of limiting the constitutional questions put before a federal district court?
3) Did the lower courts err in failing to appropriately and adequately analyze *Pullman* abstention on an issue-by-issue basis, as mandated by this Court?

PARTIES TO THE PROCEEDINGS

Petitioners are Jon C. Caldara; Boulder Rifle Club, Inc., a nonprofit corporation; General Commerce, LLC, d/b/a Bison Tactical, a Wyoming limited liability company; Tyler Faye; and Mark Ringer. All Petitioners were plaintiffs in the United States District Court for the District of Colorado and appellants in the United States Court of Appeals for the Tenth Circuit.

Respondents are the City of Boulder, a Colorado home rule municipality; Jane S. Brautigam, City Manager of the City of Boulder, in her official capacity; and Maris Herold, Chief of Police of the City of Boulder, in her official capacity. The City of Boulder and Jane S. Brautigam were both defendants in the United States District Court for the District of Colorado and appellees in the United States Court of Appeals for the Tenth Circuit. Maris Herold's predecessor, Gregory Testa, was as well, and the Chief of Police of the City of Boulder was and is sued in his or her official capacity. Maris Herold was appointed to the position in April 2020.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state as follows:

Petitioner Boulder Rifle Club, Inc. has no parent corporation and no publicly held company owns 10 percent of more or its stock.

Petitioner General Commerce, LLC, d/b/a Bison Tactical, has no parent corporation and no publicly held company owns 10 percent or more of its stock.

The remaining Petitioners are individuals.

RELATED CASES

- *Caldara v. City of Boulder*, No. 18-cv-01211, U.S. District Court for the District of Colorado. Abstention order entered September 17, 2018.
- *Caldara v. City of Boulder*, No. 18-1421, U.S. Court of Appeals for the Tenth Circuit. Judgment entered April 10, 2020.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

PETITION FOR WRIT OF *CERTIORARI*

The Second Amendment has been a heavily litigated issue in federal courts since this Court's opinions in 2008 and 2010. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Such litigation is necessary to allow parties and courts to elucidate the precise contours of the protections afforded by the Second Amendment—protections sparsely, and only relatively recently, addressed by this Court. Petitioners, however, were not afforded the opportunity to test the City of Boulder's laws against the United States Constitution. Petitioners ask this Court to grant their Petition for Writ of *Certiorari* to simply allow them to litigate their federal constitutional claims, rather than sanction the continued chilling effect on the exercise of Petitioners', and all Boulder residents', natural and fundamental rights for the foreseeable future.

The lower courts' invocation of the *Pullman* abstention doctrine, as first set forth in *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), is contrary to this Court's aversion to employing the doctrine in cases where there is, or even may be, a chilling effect on the exercise of a natural, fundamental right. The *Pullman* doctrine, established in 1941, remained in its original form for a number of years, highlighting the importance of comity between the federal and state courts. The underlying principles of the doctrine are noble—to ensure state courts have the first opportunity to adjudicate important questions of state law, conserve the resources of federal courts by narrowing or

eliminating the federal questions before them, and to reinforce the principles of federalism. But our Nation had an inappropriately limited view of individual, civil rights in the 1940s and 1950s.

In 1964, Congress passed a new iteration of the Civil Rights Act, recognizing that expanded federal jurisdiction was necessary to ensure all Americans could fairly vindicate their civil rights in a federal forum. Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. § 2000d *et seq*. (1964). Congress provided an enhanced enforcement mechanism under 42 U.S.C. § 1983, ensuring that any citizen of the United States could bring federal suit against their state or municipal government for violations of a citizen's rights under color of law. This Court's treatment of those rights necessarily took a similar and concomitant shift.

This Court recognized a related refinement of its *Pullman* jurisprudence as early as 1965. When individuals from the State of Virginia brought a federal court action alleging violations of the Twenty-Fourth and Seventeenth Amendments, this Court had the opportunity to evaluate the interplay of *Pullman* abstention and fundamental rights. *Harman v. Forssenius*, 380 U.S. 528, 537 (1965) ("In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens."). The nature of the right under attack and the harm from the inhibited exercise of the right were given new prominence: "In addition to the clarity of the Virginia statutes, support for the District Court's refusal to stay the proceedings is found in the nature of the

constitutional deprivation alleged and the probable consequences of abstaining." *Id.* (citations omitted).

Pullman abstention has, however, remained appropriate in cases involving minor federal or statutorily created rights, such as disputes over standards for water quality, the scope of a fishing license, or proper roofing materials. *See Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972) (addressing regulation of the discharge of treated sewage); *Reetz v. Bozanich*, 397 U.S. 82 (1970) (reviewing regulation of salmon net gear licenses for commercial fishing); *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 621 (9th Cir. 1993) (examining ban on wooden roofing shingles). The nature of the right at issue is central to this Court's inquiry.

The elevated consideration of the type of right impacted, however, has not been uniformly recognized by the lower courts when conducting *Pullman* analyses. Here, the City of Boulder enacted multiple ordinances that not only prohibit the possession of constitutionally protected property but also impose a chilling effect on the exercise of Petitioners', and all Boulder residents', natural, fundamental rights. Even so, this Court need not rule on the merits of Petitioners' Second Amendment, or other federal constitutional, claims. Instead, this Court should grant *certiorari* to affirmatively clarify for the lower courts the developments in *Pullman* jurisprudence and to ensure Petitioners and future litigants are not forced to suffer a prolonged, unconstitutional chilling on the exercise of their most basic rights.

In addition to the lower courts' failure to recognize the evolution of the *Pullman* doctrine, the courts failed to recognize that the basic *Pullman* factors are not satisfied here. The lower courts' divergence from this Court's established precedent is significant enough to warrant this Court's review on the merits.

The *Pullman* Court established three factors that must be met before a federal court may abstain. If even a single factor is not met, then abstention is inappropriate—there is no discretion. In the Tenth Circuit, those factors are articulated as:

> (1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law . . . would hinder important state law policies.

Lehman v. City of Louisville, 967 F.2d 1474, 1478 (10th Cir. 1992) (citations omitted).

Here, the lower courts erred by failing to recognize that Petitioners' damages claim prevents the second factor of *Pullman* from being met—no decision of state law will obviate the need for a federal court to evaluate whether Petitioners suffered constitutional violations that entitle them to damages under federal law. Petitioners properly pled damages claims in their Complaint, and if Petitioners are successful on the merits, the City of Boulder is liable for damages under 42 U.S.C. § 1983. Even if a state court decides the *entirety* of Boulder's ordinances are

preempted under state law, a federal court must still determine if those same ordinances are federally unconstitutional. There is no state provision that would provide Petitioners with any alternative form of monetary relief.

The lower courts also erred in failing to engage in a thorough analysis of the individual issues at play, as is the practice of this Court. If the lower courts had analyzed the three *Pullman* factors on a surgical, issue-by-issue basis, they would have determined that not all of the challenged provisions of Boulder's ordinances meet the stringent requirements for abstention. In those instances, *Pullman* abstention is not appropriate, and this Court should grant *certiorari* to allow Petitioners to proceed with their claims in a federal forum.

Petitioners do not ask this Court to create a new rule of law utterly prohibiting abstention in all cases brought pursuant to 42 U.S.C. § 1983. Instead, Petitioners ask this Court to grant their Petition for Writ of *Certiorari* to review and firmly establish this Court's unwillingness to allow for abstention in cases where there is a chilling effect on the exercise of a fundamental right and to ensure the *Pullman* factor analysis is adhered to by the lower courts. Federal court jurisdiction, and the right of individuals to seek vindication of their rights, is simply too important to allow the lower courts' precedent to stand.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 955 F.3d 1175 and reproduced at App.1–17. The order denying rehearing *en banc* is reprinted at App.18–19. The district court's opinion is reported at 341 F. Supp. 3d 1241 and reproduced at App.20–35.

JURISDICTION

The Tenth Circuit issued its opinion on April 10, 2020. Petitioners timely filed a petition for rehearing *en banc*, which the court denied on June 11, 2020. This Petition is timely filed on September 24, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The district court had jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331, 1334(a)(3), 2201, 2202, and 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second, Fifth, and Fourteenth Amendments to the United States Constitution, as well as the relevant portions of Colorado state law and the City of Boulder's Ordinances are reproduced at App.39–71.

STATEMENT OF THE CASE

A. Factual Background

In May 2018, the Boulder City Council approved Ordinance 8245 banning the sale, possession, and transfer of certain firearms and magazines commonly owned by law-abiding citizens for self-defense and other lawful purposes. App.47–66. The ordinance also raised the age for legal firearm purchase and possession from eighteen to twenty-one years of age. App.53. The ordinance immediately became law in the City of Boulder, infringing upon the natural, fundamental, constitutionally protected rights of Boulder residents. App.63. The Boulder City Council soon thereafter approved Ordinance 8259, making certain amendments to provisions that were established by Ordinance 8245 (collectively, "Ordinances"). App.64–71. Ordinance 8259, *inter alia*, removed a previously enacted exemption for handgun magazines possessed in compliance with state law and removed the exemption for persons authorized to carry a concealed weapon under the Law Enforcement Officers Safety Act. App.65–66.

B. Procedural History

Petitioners filed their original complaint in the United States District Court for the District of Colorado one day after the Boulder City Council approved Ordinance 8245. Petitioners allege Boulder's Ordinances and Defendants' actions violate multiple provisions of the U.S. Constitution—including the Second Amendment—as well as other

federal and state laws. Petitioners seek declaratory and injunctive relief, as well as damages under 42 U.S.C. § 1983.

At a status hearing, the district court ordered the parties brief whether *Pullman* abstention applied in this matter. App.36–38. On September 17, 2018, the district court entered an *Opinion and Order of Abstention Pursuant to Pullman*. App.20–35. The district court found the necessary *Pullman* abstention factors present and that no factors sufficiently weighed against abstention. App.23–34. The district court's analysis of the nature of the rights at issue occurred after its *Pullman* factor analysis, and was framed as a discretionary consideration. App.30–32. The court abstained from adjudicating Petitioners' federal and constitutional claims until a "state court can conclusively resolve the question of whether the Ordinances are preempted" by Colorado state law and administratively closed the case. App.34.[1]

Petitioners appealed and the parties presented oral argument on September 24, 2019. On April 10, 2020, the Tenth Circuit Panel affirmed the district court's order invoking *Pullman* to abstain from adjudicating Petitioners' federal and constitutional

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[1] After Petitioners filed their case in the federal district court, a separate group of plaintiffs, unaffiliated with Petitioners, filed a lawsuit challenging some state law aspects of the Ordinances in state court. *Chambers v. City of Boulder*, No. 2018-CV-30581 (Colo. D. Ct., Boulder Cty. filed June 14, 2018). The state case is still pending but does not cover all of the same claims as Petitioners' Complaint. The previously set trial date of April 2021 has been vacated as plaintiffs are only proceeding on two, state law claims—registration and magazine limits. All other claims have been dismissed by the court or by the plaintiffs.

claims. App.1–17. The panel found each *Pullman* factor present and that no factors sufficiently weighed against abstention. App.6–17. The Tenth Circuit Panel, like the district court, relegated analysis of the rights at issue to a question of discretion, only briefly examining the chilling effect on Petitioners' natural, fundamental rights after the Panel's *Pullman* analysis. App.14–17.

As demonstrated below, the Panel Opinion affirming *Pullman* abstention is inconsistent with this Court's precedent establishing the weight federal courts accord the chilling effect of natural, fundamental rights when weighing whether a federal court should stay its hand and defer ruling. The Panel Opinion also gave improperly constrained consideration to the unavoidability of the constitutional questions at issue.

REASONS FOR GRANTING THE PETITION

"[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (citations omitted); *see Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 821 (1976) (Stewart, J., dissenting) ("[F]ederal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them.") (internal quotations omitted); *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) ("When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take

such jurisdiction.") (quoting *Wilcox v. Consolidated Gas Co. of N.Y.*, 212 U.S. 19, 40 (1909)).

> Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with federal courts, ". . . to guard, enforce, and protect every right granted or secured by the [C]onstitution of the United States . . . ."

Zwickler v. Koota, 389 U.S. 241, 248 (1967) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)).

This Court established *Pullman* abstention to provide some level of deference to state courts regarding important, unanswered questions of state law when such questions are enmeshed with a federal or constitutional claim. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498–502 (1941). This Court, however, also emphasizes that federal courts abstaining under *Pullman* should do so rarely, and only in the most exceptional of circumstances. *See, e.g.*, *Allegheny Cty. v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) ("The doctrine of abstention . . . is an extraordinary and narrow exception . . . .").

In *Pullman*, decided during the Jim Crow Era, the Pullman Company filed suit against the Railroad Commission of Texas for promulgating a regulation that prevented black Pullman porters from working in sleeping cars on railways in Texas—effectively banning black Pullman porters from working in Texas

altogether. *Pullman*, 312 U.S. at 497–98.[2] Instead of evaluating the Texas regulation against the United States Constitution, the *Pullman* Court deferred consideration of the case to allow Texas state courts to determine whether the Railroad Commission had the authority to promulgate the regulation in the first place—something the Court deemed to be an as yet unresolved question of state law. *Id.* at 501–02.

When deciding to abstain, the *Pullman* Court made a threshold finding that the case "touches a sensitive area of social policy upon which the *federal courts ought not enter* unless no alternative to its adjudication is open." *Id.* at 498 (emphasis added). The areas of social policy federal courts "ought not enter," however, were fundamentally altered in 1964 by the enactment of the new iteration of the Civil Rights Act. An evolution thoroughly recognized by this Court. The Tenth Circuit Panel Opinion, and the district court, erred when they failed to recognize, as this Court has, that federal courts' expanded role in civil rights concomitantly narrowed *Pullman* abstention.

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[2] Notably, the Pullman Company brought claims alleging violations of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, as well as the Commerce Clause of Article I of the United States Constitution. *Pullman*, 312 U.S. at 498. In addition, "[t]he intervening porters adopted these objections but mainly objected to the order as a discrimination against Negroes in violation of the Fourteenth Amendment." *Id.*

I. The Tenth Circuit Failed To Treat The Chilling Of A Natural, Fundamental Right As A Primary Consideration For *Pullman* Abstention

For the last several decades, this Court has treated evaluation of abstention's effect on natural, fundamental rights as paramount to the *Pullman* factors. The lower courts, however, erroneously relegated consideration of the chilling effect on Petitioners' natural, fundamental right to keep and bear arms to a discretionary afterthought.

In contrast to this Court's disfavor of abstention in cases where there is a chilling effect on the exercise of a natural, fundamental right, the Tenth Circuit stated, "consideration of the nature of the right and the chilling effect of abstention is a secondary assessment to determining whether the *Pullman* requirements are met." App.15 (citing *Harman*, 380 U.S. at 535–37). The Tenth Circuit reached this conclusion, in part, by observing, "in each Supreme Court case cited by [Petitioners] to support their chilling argument, the Court determined that at least one of the *Pullman* factors was not satisfied." App.15 n.7 (citation omitted). As a result, the Tenth Circuit treated the nature of the rights at issue as a minor, discretionary consideration.

Our nation has not always demonstrated the appropriate reverence for all Americans' natural, fundamental rights. But, as a growing Republic, our collective treatment of the importance of individual rights, in all individuals, has greatly progressed—as has our national jurisprudence. *Compare Korematsu v. United States*, 323 U.S. 214, 218 (1944) ("[W]e

cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of [the Japanese-American] population, whose number and strength could not be precisely and quickly ascertained.") (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)) *with Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority."). While there have been many milestones along the way, Congress's passage of the Civil Rights Act of 1964 tangibly demonstrated the importance the federal government now places on the protection of all Americans' individual and civil rights. Since the passage of that Act, this Court's abstention jurisprudence has evolved to ensure that state and municipal infringements of individuals' constitutionally protected rights can be properly, efficiently, and expediently adjudicated in a federal forum.

One such evolution is this Court's increased militance against allowing *Pullman* abstention when there is an impermissible chilling effect on the exercise of a fundamental right, such as free expression, voting, or due process. *See, e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 489–90 (1965) ("We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression."); *Zwickler*, 389 U.S. at 252 (refusing to abstain due to the *possibility* of an impermissible chilling on the exercise of fundamental rights); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965)

("[S]upport for the District Court's refusal to stay the proceedings is found in the nature of the constitutional deprivation [of the fundamental right to vote] alleged and the probable consequences of abstaining.") (citations omitted); *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (refusing to abstain in a due process case because of no possibility of state due process protections for plaintiff's public reputation). The evaluation of the fundamental rights at issue is not discretionary, but rather sits at the forefront of this Court's analysis to determine whether *Pullman* abstention is appropriate. Both the Tenth Circuit and the district court failed to recognize the evolution of this Court's precedent when they noted the nature of the rights at issue, and any potential chilling effect on the exercise of those rights, only *after* conducting the *Pullman* factor analysis and assuming *Pullman* abstention was appropriate.

In *Harman*, while this Court stated there was no ambiguity in the Virginia statutes at issue, the 7-2 majority opinion went much further after noting that the first *Pullman* factor was not satisfied. *Harman*, 380 U.S. at 537. Chief Justice Warren, writing for the Court, expressly—but according to the lower courts' reasoning here, needlessly—reiterated that the alleged impairment of plaintiff's right to vote, including alleged Fourteenth, Seventeenth, and Twenty-Fourth Amendment violations, implicated a right so important to our Republic that *Pullman* abstention was not appropriate. *Id.* If this Court, sitting in 1965, considered the fundamental rights analysis secondary, it would have avoided unnecessary constitutional pronouncements and ended its inquiry when it determined the *Pullman*

factors unmet. If even a single *Pullman* factor was unsatisfied, there would be no discretion to abstain. Instead, this Court specifically analyzed the nature of the constitutionally protected rights at issue and refused to abstain due to the chilling effect on the exercise of the fundamental rights involved. *Id.*

In *City of Houston v. Hill*, a facial challenge under the First Amendment was enough for an 8-1 majority of this Court to determine *Pullman* abstention was inappropriate. 482 U.S. 451, 468 (1987) ("*Even if* this case did not involve a facial challenge under the First Amendment, we would find abstention inappropriate.") (emphasis added). The *Pullman* factor analysis detailed by Justice Brennan in *Hill* was subsequent and secondary to the determination that there was an impermissible chilling effect on plaintiff's exercise of First Amendment protected rights. *Id.*

Given the lack of discretion to abstain when even a single *Pullman* factor is not satisfied, then the nature of the right, and chilling effect on the exercise of that right, could and should have been ignored by the *Harman* and *Hill* Courts as irrelevant. But that is not the case. This Court has gone to great lengths, with significant majorities, to analyze the nature of the rights involved and to consider the chilling effect on the exercise of those rights as part of its abstention analysis. When this Court determines there is a chilling effect, or even the *possibility* of a chilling effect, on the exercise of a natural, fundamental right, it has been unwilling to allow for *Pullman* abstention. *See Harman*, 380 U.S. at 537; *Hill*, 482 U.S. at 468; *Dombrowski*, 380 U.S. at 492; *Zwickler*, 389 U.S. at 252.

Initially, the district court in this matter correctly articulated the standard for abstention in free expression cases by quoting *Hill*: "The Supreme Court has stated that 'abstention is inappropriate for cases where statutes are justifiably attacked on their face as abridging free expression.'" App.30 (quoting *Hill*, 482 U.S. at 467 and *Dombrowski*, 380 U.S. at 489 (1965)). This standard illuminates this Court's treatment of the fundamental rights analysis as primary and preeminent. The district court, however, then watered-down consideration of fundamental rights by adopting the analysis of a footnote in Justice Powell's dissenting opinion. App.31 ("[T]he reasons why free expression cases are particularly ill-suited for abstention has less to do with their categorical label and more to do with the interplay of federal and state law interest in such cases.") (citing *Hill*, 482 U.S. at 476 n.4 (Powell, J., in part concurring in judgment and dissenting in part)). Notably, Justice Powell specifically acknowledged how he differed from the majority opinion on this matter:

> The Court concludes that *Pullman* abstention is inappropriate for two reasons. First, it suggests that this Court should be 'particularly reluctant to abstain in cases involving facial challenges based on the First Amendment' . . . . The Court supports this conclusion with a citation to *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L.Ed.2d 22 (1965). I see nothing in that case that supports such a broad principle.

Hill, 482 U.S. at 476 n.4 (Powell, J., in part concurring in judgment and dissenting in part) (citation omitted).

The district court attempted to justify its reasoning when it stated: "In none of these cases did the Supreme Court simply declare that 'because free expression rights are implicated, abstention is inappropriate.'" App.31 (no citation in original). The district court's application of dissenting dicta in place of this Court's binding precedent demonstrates the error of the district court's truncated *Pullman* analysis, which the Tenth Circuit upheld.

The chilling effect of Boulder's Ordinances is patent. Since Boulder's Ordinances prohibit the sale, possession, and transfer of constitutionally protected property, the Ordinances prevent Boulder residents from engaging in constitutionally protected conduct and increase the likelihood residents will avoid conduct they reasonably believe will subject them to both fines and/or incarceration—up to a $1,000 fine and up to 90 days in jail *per violation*. J.A. at A025.[3] As Boulder likely intended, the prohibition of constitutionally protected property, and the threat of punishment, will cause Boulder residents to not exercise their constitutionally protected rights.

Further, and more insidiously, a probable result of the Ordinances is that Boulder and other Colorado residents will fear to exercise their Second Amendment protected rights more generally. Residents will be deterred from purchasing and possessing firearms that are not banned, because they cannot understand the full extent or limits of the Ordinances; because of the concern that the ban will be expanded geographically, or to other Arms; and

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[3] "J.A." refers to the joint appendix Petitioners filed with the Tenth Circuit.

because they are concerned about owning or having to register Arms derisively labeled as "military-style assault weapons."[4]

This Court should grant the Petition for Writ of *Certiorari* to correct the Tenth Circuit's error and to formally articulate this Court's long-standing, well-established precedent to analyze *Pullman* abstention by considering the chilling effect on Petitioners' exercise of their natural, fundamental rights. Such analysis will reveal that *Pullman* abstention is inappropriate in this matter.

II. The Tenth Circuit Did Not Conduct Its *Pullman* Analysis In The Manner Prescribed By This Court

While this Court does not often grant *certiorari* to address a circuit's misapplication of this Court's precedent, the Tenth Circuit's deviation in this matter, and the ramifications of that error, call for an exercise of this Court's supervisory power. Not only do the lower court opinions endorse an impermissible

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[4] The lower courts both assumed that the delay inherent in abstention could have been mitigated by Petitioners certifying the unanswered state law questions to the Colorado Supreme Court. App.15–17; App.33–34. This Court has looked favorably upon certification of state law questions to state courts when that is a viable option and abstention would otherwise be appropriate. *See Expressions Hair Design v. Schniderman*, 137 S. Ct. 1144, 1156 (2017) (noting that certification, where available, is a "more precise tool" than the "blunt instrument" of abstention). Here, however, Petitioners could not unilaterally seek certification and the parties could not reach agreement as to the specific language of the questions to certify, along with the undisputed facts necessary to answer those questions. Petitioners' inability to opt for certification to resolve any state law question(s) does not justify saddling them with the burden of delay.

chilling effect, those decisions ignore the interplay of Petitioners' damages claims with the established *Pullman* factors. The lower courts' misapplication does not end there. The lower courts' failure to analyze the requisite *Pullman* factors on a surgical, issue-by-issue basis, resulted in both courts failing to note that the *Pullman* factors are not met for each and every of Petitioners' claims, thereby making abstention non-discretionary and inappropriate for those claims.

A. The Constitutional Questions Cannot be Avoided

The Tenth Circuit, after engaging in only the most perfunctory of analyses, incorrectly determined that abstention would allow the federal courts to avoid the question of whether a local law violates the federal Constitution, therefore finding this *Pullman* factor satisfied. Fuller consideration demonstrates that no state law interpretation could narrow the scope of the federal constitutional claims, which must be adjudicated by a federal court.

The second *Pullman* factor is whether "the state issues are amenable to interpretation and such interpretation *obviates the need for or substantially narrows the scope* of the constitutional claim." *Lehman*, 967 F.2d at 1478 (emphasis added) (citing *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981)). Such avoidance or narrowing of constitutional issues is most likely where a plaintiff seeks injunctive or declaratory relief that becomes unnecessary because the question is moot if the challenged state or local action is deemed invalid pursuant to the state's own law. In cases brought against municipalities or

municipal agents pursuant to 42 U.S.C. § 1983, however, a plaintiff may seek and receive damages for a violation of plaintiff's civil rights under color of law. *Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658 (1978); *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 140 S. Ct. 1525, 1535 (2020) (Alito, J., dissenting). Petitioners have no such remedy available under Colorado state law.

The Tenth Circuit's and district court's analyses neglect Petitioners' damages demand when holding that a Colorado state court decision may remove the federal constitutional issues from this case. The Tenth Circuit reasoned, "if the state court were to conclude that the Colorado statutes preempt the Boulder [Ordinances], there would be *no need for us to resolve* the federal constitutional questions." App.11 (emphasis added). The district court similarly reasoned, "if the state courts were to conclude that the Ordinances are preempted by C.R.S. § 29-11.7-103, such determination would nullify the Ordinances and *eliminate entirely* the need for a determination of whether the Ordinances offend the U.S. Constitution." App.28 (emphasis added). This follows Boulder's assertion: "Indeed, as [Petitioners] have acknowledged, if the state court . . . finds that the Ordinance was not a valid exercise of the City of Boulder's municipal powers, then [Petitioners] will have nothing left to challenge." J.A. at A112.

In arguing against abstention, however, Petitioners noted, "[e]ven though a court could potentially invalidate the Ordinances based solely on state-law grounds, [Petitioners] have still suffered violations of their constitutionally protected rights, rights which would remain unvindicated, and they

would still be entitled to recover damages for those violations." J.A. at A167 n.2. Petitioners properly pleaded their damages claim at the district court and no state court action can deprive Petitioners of their damages remedy.

Moreover, to address Petitioners' damages claim, the federal district court need not make any decision of state law. If Boulder's Ordinances are valid under Colorado law, they may still violate the federal Constitution. More importantly, even if the Boulder Ordinances contravene Colorado state law, a federal court must *still* apply federal law to determine whether Defendants violated the United States Constitution such that Petitioners are entitled to damages. No state law decision could obviate the need for—or even alter—a federal court's inquiry in this matter and there is no need for the federal court to evaluate the state law issues.

No matter what occurs in a state proceeding, a federal court will be required to adjudicate Petitioners' pure, federal constitutional claims. As such, the second *Pullman* factor is not met, and discretionary abstention was, and remains, wholly inappropriate.

B. The Tenth Circuit Failed to Conduct its *Pullman* Analysis on an Issue-by-Issue Basis, Instead Remaining at an Abstract Level

The Tenth Circuit erred because it failed to address *Pullman* abstention on the surgical, issue-by-issue basis employed by this Court.

To balance individuals' claims to timely justice against the policy of deferring state law questions to state courts, this Court engages in a thorough analysis of a case and record to frame which issues, if any, require abstention. *Pullman*, 312 U.S. at 499 (finding abstention was appropriate only after analyzing the final judgment of the district court); *accord Babbitt v. United Farm Workers Natl. Union*, 442 U.S. 289, 292 (1979) (same); *Harrison v. NAACP*, 360 U.S. 167 (1959) (determining abstention was appropriate on all provisions only after analyzing each one individually).

In *Babbitt*, this Court analyzed five challenged provisions of Arizona's farm labor statute. 442 U.S. at 292. Justice White, writing for a 7-2 majority in 1979, analyzed each provision of the statute individually under the *Pullman* factors, finding abstention to be appropriate for some and not others. *Id.* at 305–12. Importantly, this Court allowed the claims not subject to *Pullman* abstention to proceed on the merits—exercising abstention for those issues where the *Pullman* factors were satisfied. *Id.*

Both the Tenth Circuit and the district court incorrectly analyzed the challenges against Boulder's Ordinances as a single issue under *Pullman* abstention. App.6–14; App.23–29. The analysis, however, should have turned on the more discrete questions of whether the individual provisions of Boulder's Ordinances are subject to *Pullman* abstention, not "whether Boulder's regulation of firearms" is subject to *Pullman* abstention. *See* App.26. Without engaging in detailed analysis, neither the Tenth Circuit nor the district court can say the *Pullman* prerequisites were met for each

individually challenged provision of the Boulder Ordinances.

Boulder's Ordinances contain multiple provisions, and Petitioners present issues brought by multiple parties. If Boulder had merely prohibited nineteen, twenty, and twenty-one-year-olds from buying or possessing rifles, the court's *Pullman* analysis would appropriately address that single specific issue. But Boulder's Ordinances individually define prohibited pistols, shotguns, rifles, and magazines. App.50–53. The Ordinances then require the removal, destruction, and/or registration of those Arms; prohibit the purchase and transfer of those Arms; regulate the transportation of Arms within the city; and completely prohibit their possession by nineteen, twenty, and twenty-one-year-olds. App.53–62. The Tenth Circuit's and district court's inquiries should have determined if each of these issues met the stringent requirements of *Pullman* abstention, not whether the questioned legality of the Ordinances *en toto* may have.[5]

While this approach requires additional effort, that is not a basis for expanding *Pullman* abstention under this Court's jurisprudence, particularly where the right at issue is one so important "that the Framers and ratifiers of the Fourteenth Amendment

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[5] As an example of a question where *Pullman* abstention is inappropriate, the State of Colorado has already authoritatively defined "large-capacity magazines." App.40, C.R.S. § 18-12-301(2). Boulder's attempted redefinition of "large-capacity magazines" and prohibition on magazines that a "person may lawfully sell, purchase, or possess under state or federal law," is preempted by Colorado state law and thus does not constitute an uncertain question of state law. App.43, C.R.S. § 29-11.7-103.

counted . . . [it to be] necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 778.

An issue-by-issue *Pullman* analysis would have demonstrated that *Pullman* abstention, at minimum, should not have been applied to the entire case and Petitioners should have been allowed to proceed with at least some of their federal constitutional claims. This Court should grant *certiorari* to ensure that the Tenth Circuit's cursory *Pullman* analysis does not stand as a precedential dilution of this Court's rigorous and thorough *Pullman* jurisprudence.

III. This Case Presents An Ideal Vehicle For This Court To Reinforce Its Modern *Pullman* Jurisprudence While Maintaining A Statutory Status Quo

This case presents this Court with the ideal opportunity to clarify and reinforce its existing *Pullman* doctrine jurisprudence while not disrupting the currently existing regulatory regime in Colorado or the City of Boulder. This case does not require the Court evaluate the constitutionality of Boulder's ordinance at this stage, nor does this case require the Court to adjudicate the interplay between state and municipal law. Should this Court grant this Petition for Writ of *Certiorari*, review would be limited to the question of whether Petitioners should be allowed their timely day in a federal district court to argue for their constitutionally protected rights and damages.

As demonstrated above, this Court's *Pullman* jurisprudence, when confronted with fundamental rights, is well established. Starting with *Harman* in 1965, moving through *Hill* in 1987, and arriving at today, this Court has shown a consistent trend over 50

years in both refusing to allow for abstention when there is a chilling effect on the exercise of a fundamental right, and of periodically reminding the lower courts of that trend. Moreover, this Court's decisions in these matters have not been close. *Dombrowski* was decided by a 5-2 majority, *Zwickler* was unanimous, *Harman* was decided by a 7-2 majority, *Constantineau* by a 6-3 majority, and *Hill* by an 8-1 majority. *Dombrowski*, 380 U.S. at 489–90 (free expression); *Zwickler*, 389 U.S. at 252 (free expression); *Harman*, 380 U.S. at 537 (right to vote); *Constantineau*, 400 U.S. at 439 (due process); *Hill*, 482 U.S. at 468 (overbreadth). This Court's continued, overwhelming support of individuals' rights in the face of abstention is clear.

What makes this case notable, however, is that Petitioners seek to litigate a right that was only formally declared fundamental by this Court in 2010. *See McDonald*, 561 U.S. at 778 ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."). While this Court has expressed its unwillingness to exercise *Pullman* abstention generally in fundamental rights cases, it has only explicitly done so in First, Fifth, Fourteenth, Seventeenth, and Twenty-Fourth Amendment cases. This case presents this Court the opportunity to clarify and reinforce its jurisprudence in a case predominantly addressing Second Amendment questions.[6]

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[6] Petitioners have also advanced claims pursuant to the First, Fifth, and Fourteenth Amendments. App.21–22.

The only other circuit thus far presented with the interplay of this Court's modern *Pullman* abstention doctrine and the Second Amendment is the Second Circuit. *Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. 2013). There, the Second Circuit simply certified the underlying state law question to the New York Court of Appeals. *Id.* at 140, 145. Even in *Osterweil*, while the court acknowledges *Pullman* abstention may be appropriate, it notes that there would be a significant concern for delay without certification. *Id.* at 145.

The ultimate decision in this case, on the merits, will not unduly disrupt any existing statutory structure, but will merely clarify a procedural point set forth by this Court in 1941 and altered by this Court since 1965. Should this Court grant *certiorari*, it need not rule on the constitutionality of Boulder's Ordinances, or any question of the interplay between Colorado state law and municipal law. This Court, however, will have the important opportunity to clarify an extraordinarily narrow exception to this Court's broad jurisdictional rule. *United States v. Bureau of Revenue of State of N.M.*, 291 F.2d 677, 679 (10th Cir. 1961) ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.") (quoting *Allegheny*, 360 U.S. at 188).

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This Court is not often presented with such a clean vehicle for reinforcing and clarifying its precedents for the lower courts. Much has changed since *Pullman* was decided in 1941. This Court's

jurisprudence has expanded to recognize the importance of federal court adjudication of all individuals' constitutionally protected rights—especially when those rights are violated by a state or municipal government. Petitioners do not ask this Court to fundamentally alter its precedent, but rather ask this Court require lower courts to act upon the changes that occurred with the Civil Rights Act of 1964 and the declaration of a fundamental right in *McDonald* in 2010, to allow Petitioners their day in their chosen federal forum.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

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September 24, 2020