RECORD NO. 11-2231

In The

United States Court Of Appeals

For The Fourth Circuit

WEST VIRGINIA CITIZENS DEFENSE LEAGUE, INCORPORATED, a West Virginia Nonprofit Corporation,

Plaintiff – Appellant,

v.

CITY OF MARTINSBURG, a West Virginia municipal corporation; GEORGE KAROS, personally and in his official capacity as the Mayor of the City of Martinsburg; MARK S. BALDWIN, personally and in his official capacity as the City Manager of the City of Martinsburg; KEVIN MILLER, personally and in his official capacity as the Chief of Police of the City of Martinsburg,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT MARTINSBURG

BRIEF OF APPELLANT

James M. Mullins, Jr.
THE LAW OFFICES OF JAMES M. MULLINS, JR., PLLC
101 North Kanawha Street
Suite 401
Beckley, WV 25801
(304) 687-5492

Counsel for Appellant

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 11-2231 Caption: West Virginia Citizens Defense League, Inc. v. City of Martinsburg, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

West Virginia Citizens Defense League, Inc.
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on November 23, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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November 23, 2011 — (date)

I. Table of Contents.

Page

I. Table of Contents i

II. Table of Authorities ii

III. Jurisdictional Statement 1

IV. Statement of Issues 1

V. Statement of the Case 2

VI. Statement of Facts 2

VII. Summary of Argument 4

VIII. Argument 4

A. Standard of Review 4

B. *Pullman* Abstentions Should Be Rarely Invoked 5

C. The District Court's Order of Abstention is Contrary to *Arizonans for Official English v. Arizona* and Its Progeny 8

D. The District Court's Order of Abstention was not Supported by Sufficiently Open Question of State Law 16

E. The District Court's Order of Abstention Unduly Delays Litigation in Defense of a Sensitive Constitutional Right 17

X. Conclusion 19

XI. Certificate of Compliance

XII. Certificate of Filing and Service

II. Table of Authorities.

Page(s)

Cases:

Allstate Insurance Co. v. Serio,
261 F.3d 143 (2d Cir. 2001) 10, 13

American Booksellers Foundation for Free Expression v. Strickland,
560 F.3d 443 (6th Cir. 2009) 9

Arbaugh v. Board of Educ., County of Pendleton,
214 W.Va. 677, 591 S.E.2d 235 (2003) 15

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997).....8, 9, 10, 13

Arrington v. City of Raleigh,
369 Fed. Appx. 420 (4th Cir. 2010) 8

Barr v. NCB Management Services, Inc.,
227 W.Va. 507, 711 S.E.2d 577 (2011) 15

Baucom v. Cabarrus Eye Center, P.A.,
2006 WL 2569079 (M.D. N.C. 2006) 16-17

Bower v. Westinghouse Elec. Corp.,
206 W.Va. 133, 522 S.E.2d 424 (1999) 15

Brownsburg Area Patrons Affecting Change v. Baldwin,
137 F.3d 503 (7th Cir. 1998) 9

Catlin v. Ambach,
820 F.2d 588 (2d Cir. 1987) 13, 14, 15

Chase Brexton Health Services, Inc. v. Maryland,
411 F.3d 457 (4th Cir. 2005) 7

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 7

Currie v. Group Insurance Commission,
290 F.3d 1 (1st Cir. 2002) 10, 12

Deakins v. Monaghan,
484 U.S. 193 (1988) 7

Doyle v. City of Medford,
565 F.3d 536 (9th Cir. 2009) 10

Examining Board of Engineers v. Flores De Otero,
426 U.S. 572 (1976).....14

Feliciano v. 7-Eleven, Inc.,
210 W.Va. 740, 559 S.E.2d 713 (2001) 15

Ford Motor Co. v. Meredith Motor Co., Inc.,
257 F.3d 67 (1st Cir. 2001).....12

Hennis v. Hemlick,
666 F.3d 270 (4th Cir. 2012) 4

In re Carefirst of Maryland, Inc.,
305 F.3d 253 (4th Cir. 2002) 6

Kansas Judicial Review v. Stout,
519 F.3d 1107 (10th Cir. 2008) 11

Kidney v. Kolmar Labs., Inc.,
No. 86-7194 (2d Cir. July 7, 1986),
68 N.Y.2d 343, 502 N.E.2d 168 (1986),
808 F.2d 955 (2d Cir. 1987) 13

L.H. Jones Equipment Co. v. Swenson Spreader LLC,
224 W.Va. 570, 687 S.E.2d 353 (2009) 15

Martin v. Stewart,
499 F.3d 360 (4th Cir. 2007) 5, 7

Nationwide Mutual Insurance Co. v. Unauthorized Practice of Law Committee of State Bar of Texas,
283 F.3d 650 (5th Cir. 2002) 10, 12

Nivens v. Gilchrist,
444 F.3d 237 (4th Cir. 2006) 5, 6

North Carolina Right to Life, Inc. v. Bartlett,
168 F.3d 705 (4th Cir. 1999) 18

Pittman v. Cole,
267 F.3d 1269 (11th Cir. 2001) 11

Procunier v. Martinez,
416 U.S. 396 (1974).....18

PSINet, Inc. v. Chapman,
317 F.3d 413 (4th Cir. 2003) 9, 11

Pure Country, Inc. v. Sigma Chi Fraternity,
312 F.3d 952 (8th Cir. 2002) 17

Quackenbush v. Allstate Ins. Co.,
517 U.S. 706 (1996) 7

Railroad Comm'n of Texas v. Pullman Co.,
312 U.S. 496 (1941).....*passim*

Romero v. Colegio de Abogados de Puerto Rico,
204 F.3d 291 (1st Cir. 2000).....9, 12

Rufino v. United States,
No. 86-6175 (2d Cir. Jan. 21, 1987),
69 N.Y.2d 310, 506 N.E.2d 910 (1987),
829 F.2d 354 (2d Cir. 1987) 13-14

Southeast Booksellers Ass'n v. McMaster,
282 F. Supp. 2d 389 (D. S.C. 2003) 18

Standard Chlorine of Del., Inc. v. Sinibaldi,
821 F. Supp. 232 (D. Del. 1992) 16

Thornburgh v. Abbott,
490 U.S. 401 (1989).....18

Timber Ridge, Inc. v. Hunt Country Asphalt & Paving, LLC,
222 W.Va. 784, 671 S.E.2d 789 (2008) 15

Tunick v. Safir,
209 F.3d 67 (2d Cir. 2000) 10, 13

U.S. v. Chester,
628 F.3d 673 (4th Cir. 2010) 18

Virginia Office for Protection and Advocacy v. Stewart,
563 U.S. ___, 131 S. Ct. 1632 (2011) 6

Young v. City of Mount Ranier,
238 F.3d 567 (4th Cir. 2001).....16

Statutes:

28 U.S.C. § 1291.....1

28 U.S.C. § 1331.....1

28 U.S.C. § 1343.....1

28 U.S.C. § 1367.....1, 7, 8

28 U.S.C. § 1367(a) 8

28 U.S.C. § 2201.....1

28 U.S.C. § 2202.....1

42 U.S.C. § 1983.....1, 9

Martinsburg City Code § 545.14 2

W.Va. Code § 51-1A-3 15

Constitutional Provisions:

N.Y. Const. art. VI, § 3(b), cl. 9 14

U.S. Const. amend. I 18

U.S. Const. art. III 1, 7-8

Rules:

Fed. R. Civ. P. 12(b)(1).....2

Fed. R. Civ. P. 12(b)(6).....2, 16

Fed. R. Civ. P. 60(b)(1).....1

Fed. R. Civ. P. 60(b)(6).....1

Other Authorities:

Judith S. Kaye and Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373 (2000), available at http://ir.lawnet.fordham.edu/flr/vol69/iss2/3 .....13, 14, 15

Molly Thomas-Jensen, *Certification After* Arizonans for Official English v. Arizona*: A Survey of Federal Appellate Courts' Practices*, 87 Den. U. L. Rev. 139 (2009), available at http://mediaserv.law.du.edu/pdf/lawreview/Thomas-Jensen_ToDarby_10.28.09.pdf. 11

III. Jurisdictional Statement.

The United States District Court for the Northern District of West Virginia has jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983 to hear original proceedings in this case as a federal question case. Said Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367 because they are so related to the federal question claims that they form part of the same case or controversy under Article III of the United States Constitution. The District Court entered its original Order of Abstention on September 6, 2011. Appellant filed a motion to reconsider the Order of Abstention pursuant to Fed. R. Civ. P. 60(b)(1) and (6) on September 27, 2011. The District Court entered an order denying Appellant's motions to reconsider the Order of Abstention and Appellant's motion for a preliminary injunction on October 24, 2011. Appellant filed a Notice of Appeal on November 1, 2011. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

IV. Statement of Issues.

Whether the District Court abused its discretion by abstaining under the *Pullman* abstention doctrine and ordering WVCDL to commence and fully litigate a separate civil action in state court to address the questions of state law presented in this case.

V. Statement of the Case.

This case involves a preenforcement challenge by WVCDL, on behalf of its members, to Martinsburg City Code § 545.14 (prohibiting the carrying of firearms or other weapons in any building owned, leased or controlled by the City of Martinsburg) and the decision of the District Court to abstain under the *Pullman* abstention doctrine.

VI. Statement of Facts.

WVCDL commenced this action on January 24, 2011, on behalf of its individual members, seeking, *inter alia*, declaratory and injunctive relief against the City of Martinsburg, Mayor George Karos, City Manager Mark Baldwin, and Police Chief Kevin Miller (collectively cited as "the City"). Joint Appendix ("J.A.") 9-19. WVCDL alleged 2 federal constitutional claims, 2 state constitutional claims, and 2 state statutory and common law claims, all arising from the City's adoption and ongoing enforcement Martinsburg City Code § 545.14. *Id.*; *see* J.A. 48-49, 63 for full text of the ordinance. The City responded by filing a pre-answer motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), alleging both a lack of subject-matter jurisdiction (standing) and failure to state a claim upon which relief may be granted. J.A. 20-23. Following full briefing by the parties, *see* J.A. 3 (docket entries), the District Court denied the City's motion to dismiss for lack of subject-matter jurisdiction, did not act on the City's motion to

dismiss for failure to state a claim, and *sua sponte* raised the question of Pullman abstention and invited the parties to comment or object thereto. J.A. 27-35, 88-97 (amended order). Following full briefing by the parties, *see* J.A. 4 (docket entries), the filing of a motion by WVCDL for leave to file an amended complaint, *see generally* J.A. 39-45 (motion and order granting same), 98-99 (amended order), the filing of an amended complaint, J.A. 46-59, and the filing of an answer by the City to the amended complaint, J.A. 60-71, the District Court entered an Order of Abstention. J.A. 72-79, 80-87 (amended order). WVCDL then filed a motion to reconsider the order of abstention, J.A. 100-01, a motion to strike certain insufficient defenses or, in the alternative, test certain defenses in the City's answer, J.A. 102-04, a motion for a preliminary injunction, J.A. 117-19, a motion for partial summary judgment, J.A. 131-34, a motion to certify questions of law, J.A. 120-27, and a motion to permit discovery. J.A. 128-30. In support of WVCDL's motions, counsel submitted a declaration containing as an attachment an e-mail exchange between opposing counsel, J.A. 105-16, that WVCDL argued contained sufficient admissions of certain factual matters by the City's counsel that the City denied in its answer to WVCDL's amended complaint to complete the factual record for the purposes of WVCDL's motions for a preliminary injunction and partial summary judgment. The District Court summarily denied all of these motions. J.A. 135-36. WVCDL then filed a timely notice of appeal. J.A. 137-39.

VII. Summary of Argument.

The District Court abused its discretion by invoking the *Pullman* abstention doctrine and ordering WVCDL to bring separate litigation in state court to dispose of the issues of state law presented for which the District Court has supplemental jurisdiction. Longstanding Supreme Court and Fourth Circuit precedent holds that *Pullman* abstentions should be rarely invoked. Moreover, the District Court violated clear Supreme Court precedent directing the federal courts to resolve *Pullman*-type problems through state certified questions procedures rather than abstention. While modern precedent now directs that abstention should be a last resort, the District Court below made abstention its first resort to wash its hands of a case over which it chose to abdicate its jurisdiction. The District Court made this choice despite a lack of a sufficiently open question of state law and the lack of any live, dispositive motion by the City pending at the time of the abstention order. The District Court's choice to abstain is needlessly delaying WVCDL's pursuit of justice in defense of its members' rights.

VIII. Argument.

A. Standard of Review.

"This Court reviews a district court's decision to abstain for abuse of discretion." *Hennis v. Hemlick*, 666 F.3d 270 (4th Cir. 2012) (citations omitted). "A district court abuses its discretion whenever its decision is guided by erroneous

legal principles." *Martin v. Stewart*, 499 F.3d 360, 363 (4th Cir. 2007) (internal quotation marks and citation omitted). "[T]here is little or no discretion to abstain in a case which does not meet traditional abstention requirements." *Id.* (citation omitted).

B. *Pullman* Abstentions Should Be Rarely Invoked.

The *Pullman* abstention doctrine has its origins in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). In *Pullman*, the Supreme Court considered state law and constitutional challenges to a newly enacted order by the Texas Railroad Commission, which would have required that "a federal court of equity. . . decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Id.* at 500 (citations omitted). In abstaining, the Supreme Court explained that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies," and that a review of case law "reflect[s] a doctrine of abstention appropriate to our federal system whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." *Id.* at 500-01 (citations omitted).

Pullman abstention is appropriate "when a plaintiff brings a federal case that would require the federal court to interpret an unclear state law." *Nivens v.*

Gilchrist, 444 F.3d 237, 246 (4th Cir. 2006) (*citing Pullman*, 312 U.S. at 498-99). "*Pullman* abstention serves two primary goals: (1) avoiding constitutional questions when their resolution is unnecessary, and (2) allowing state courts to decide issues of state law." *Id.* at 246 n. 6 (*citing Pullman*, 312 U.S. at 500); *see also Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. ___, ___, 131 S. Ct. 1632, 1644 (2011) (Kennedy, J., concurring) ("*Pullman* recognizes the importance of state sovereignty by limiting federal judicial intervention in state affairs to cases where intervention is necessary. If an open question of state-law would resolve a dispute, then federal courts may wait for the resolution of the state-law issue before adjudicating the merits. Likewise, certification of questions of state law to the state courts may pretermit an otherwise sensitive federal controversy.")).

The Fourth Circuit and Supreme Court cases analyzing *Pullman* direct that abstention is unwarranted here, and that the District Court should exercise its Congressionally-given jurisdiction over this case. "[A] plaintiff's choice of forum is . . . entitled to respect and deference[.]" *In re Carefirst of Maryland, Inc.*, 305 F.3d 253, 260 (4th Cir. 2002). WVCDL chose to bring its case in the District Court despite the initial possibility of abstention and has chosen to remain in federal court and bring this appeal to affirm its choice of forum.

Abstention doctrines, including *Pullman*, "constitute extraordinary and narrow exceptions to a federal court's duty to exercise the jurisdiction conferred on it." *Martin*, 499 F.3d at 363 (*quoting Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 728 (1996) (alteration marks and internal quotation marks omitted)). "[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush*, 517 U.S. at 716. "This Court repeatedly has stated that the federal courts have a virtually unflagging obligation to exercise their jurisdiction except in those extraordinary circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988) (internal citations and quotation marks omitted). "Federal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not.'" *Chase Brexton Health Services, Inc. v. Maryland*, 411 F.3d 457, 462 (4th Cir. 2005) (*quoting Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

In this case, Congress has conferred jurisdiction over all of WVCDL's claims because, as WVCDL pleaded in its Amended Complaint, the District Court has "supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367 because they are so related to the federal question claims that they form part of the same case or controversy under Article III of the United States

Constitution." J.A. 48. WVCDL's invocation of § 1367 was appropriate. *See* 28 U.S.C. § 1367(a); *Arrington v. City of Raleigh*, 369 Fed. Appx. 420, 423 n. 1 (4th Cir. 2010) ("District courts have supplemental jurisdiction over state law claims that 'form part of the same case or controversy' as the federal claim supporting removal." (*quoting* 28 U.S.C. § 1367(a))).

C. The District Court's Order of Abstention is Contrary to *Arizonans for Official English v. Arizona* and Its Progeny.

While the District Court granted WVCDL a basic notice of its contemplation of *Pullman* abstention, *see* J.A. 33-35, 94-96, neither the District Court nor the City raised a significant possibility of the District Court disregarding the clear guidance of the Supreme Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), and its progeny that federal courts should use state certification procedures where available in lieu of *Pullman* abstention absent particularly unusual circumstances. However, that is exactly what the District Court did. The District Court's surprising disregard of *Arizonans* and its progeny in this Court and at least 7 other circuits compels WVCDL to request that this Court reverse the District Court's order of abstention and remand this case with instructions to proceed to adjudicate WVCDL's claims on their merits and resolve any fairly disputed points of state law by first resorting to certification rather than abstention.

Following *Arizonans*, no less than 8 Circuits endorsed, as a general rule, certification over exercising abstention (which would force § 1983 plaintiffs to file additional litigation in state court) in most *Pullman*-type cases. This Court and the First, Sixth, and Seventh Circuits have certified state-law questions in *Pullman*-type cases subsequent to *Arizonans* in compliance with the Supreme Court's directive. *See, e.g., PSINet, Inc. v. Chapman*, 317 F.3d 413, 415 (4th Cir. 2003) (certifying 2 questions to the Supreme Court of Virginia); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 305 (1st Cir. 2000) (directing the District Court to certify question on remand); *American Booksellers Foundation for Free Expression v. Strickland*, 560 F.3d 443 (6th Cir. 2009) (certifying *sua sponte* 2 questions of law to the Supreme Court of Ohio and briefly discussing the merits of certification); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 509-10 (7th Cir. 1998) (certifying *sua sponte* a question to the Supreme Court of Indiana).

Other Circuits have also certified state-law questions in *Pullman*-type cases and directly addressed the merits of certification over abstention with much greater clarity. The Ninth Circuit prefers certification over abstention "in *Pullman*-type abstention cases 'because the alternative to certification is federal court abstention and the attendant delay until resolution of derivative state court . . . action (including trial, the right to a direct appeal, and the right to seek discretionary

review after the direct appeal).'" *Doyle v. City of Medford*, 565 F.3d 536, 543 (9th Cir. 2009) (citation omitted) (certifying question to the Oregon Supreme Court). The Second, Tenth, and Eleventh Circuits have likewise expressed strong preferences for certification over abstention in the absence of unusual circumstances, such as parallel litigation pending in state courts,[1] following the Supreme Court's decision in *Arizonans for Official English*. "*Arizonans* made quite clear that . . . the device of certification provides all the benefits of *Pullman* abstention . . . [and] therefore . . . we should consider certifying in more instances than had previously been thought appropriate." *Tunick v. Safir*, 209 F.3d 67, 73 (2d Cir. 2000) (certifying 3 questions to the New York Court of Appeals); *see also Allstate Insurance Co. v. Serio*, 261 F.3d 143, 151 (2d Cir. 2001) (observing in constitutional case that "the Supreme Court indicated that certification is usually preferable to abstention" and certifying 4 questions to the New York Court of Appeals). The Tenth Circuit rejected *Pullman* abstention because "the Supreme Court has expressed a preference for certifying questions to a state's supreme

[1] The Fifth Circuit's decision in *Nationwide Mutual Insurance Co. v. Unauthorized Practice of Law Committee of State Bar of Texas*, 283 F.3d 650 (5th Cir. 2002), which the District Court cited in its Order of Abstention, relied heavily on the Fifth Circuit's prudential concern for not interfering with at least two parallel cases pending in state court. *Id.* at 656-57. *See also Currie v. Group Insurance Commission*, 290 F.3d 1 (1st Cir. 2002) (refusing to certify because state-law issue was pending in state courts). This case does not present this "unusual circumstance," as there is no parallel litigation pending in state court.

court." *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008) (certifying 5 questions to the Kansas Supreme Court). "Certification . . . offers substantial benefits over the traditional *Pullman* abstention method . . . . '[It] save[s] time, energy, and resources and helps build a cooperative judicial federalism.'" *Pittman v. Cole*, 267 F.3d 1269, 1289-91 (11th Cir. 2001) (citation omitted) (holding that the District Court abused its discretion by exercising *Pullman* abstention and directing the District Court to certify questions to the Alabama Supreme Court on remand).

The Fifth Circuit alone "has tended to avoid certification in favor of abstention." Molly Thomas-Jensen, *Certification After* Arizonans for Official English v. Arizona*: A Survey of Federal Appellate Courts' Practices*, 87 Den. U. L. Rev. 139, 158 (2009), available at http://mediaserv.law.du.edu/pdf/lawreview/Thomas-Jensen_ToDarby_10.28.09.pdf. There is no reported instance of the Fifth Circuit ever certifying a state-law question in a *Pullman*-type setting. *Id.* [2] The Fifth Circuit's approach is contrary to binding Fourth Circuit precedent, see *PSINet*, 317 F.3d at 415, and the precedents of at least 7 other Circuits that have taken the same approach as this Court with varying levels of explanation and analysis of the merits of certification over abstention. Based on both the contrary precedent of this Court and the Fifth Circuit's predication of its

[2] *See also* footnote 1, supra.

decision in *Nationwide* on a prudential concern for avoiding interference with active state court litigation, 283 F.3d at 656-57, not present here, *Nationwide* does not support abstention in this case.

The District Court next erred in its citation of *Ford Motor Co. v. Meredith Motor Co., Inc.*, 257 F.3d 67 (1st Cir. 2001), in support of its decision to abstain. In *Ford*, the First Circuit abstained because "[s]ince the filing of its federal court action, Ford has appealed the decision of the [New Hampshire Motor Vehicle Industry] Board to the New Hampshire Superior Court." 257 F.3d at 72. By its own action, Ford removed the option of certification in its federal case from the table.[3] In the previous year, the First Circuit ordered the District Court to certify questions on remand to resolve a *Pullman*-type problem in *Romero*. 204 F.3d at 305. Two years after *Romero* and one year after *Ford*, the First Circuit again abstained in *Currie*, where the Court found, as in *Ford*, parallel litigation pending in state

[3] The District Court's Order of Abstention in this case will force WVCDL and its coplaintiffs who are not parties to this case in this Court to jeopardize their pursuit of federal court litigation in *West Virginia Citizens Defense League, Inc., et al. v. City of Charleston, et al.*, Civil Action No. 2:11-cv-48 (S.D. W.Va. filed Jan. 24, 2011), as the parallel litigation directed by the District Court's Order of Abstention may raise sufficiently similar state-law litigation to constitute the requisite "unusual circumstance" to justify abstention over certification even though all parties to the *Charleston* litigation, unlike the Defendants in this case, have joined WVCDL and the other plaintiffs in support of certification over abstention. WVCDL has made patently clear in both cases that it opposes abstention and its *Charleston* litigation will likely be prejudiced by state court litigation in this case if the District Court's Order of Abstention stands.

courts. The First Circuit's abstention cases are perfectly in line with WVCDL's position and do not support abstention here, where there are no similar cases pending in state court.

Finally, the District Court erred in its citation of *Catlin v. Ambach*, 820 F.2d 588, 591 & n. 2 (2d Cir. 1987), in support of its decision to abstain. *Catlin* does not support abstention in this case for two reasons:

First, *Catlin* predates the Supreme Court's decision in *Arizonans* and the Second Circuit's decisions in *Tunick* and *Allstate* adopting a more expansive view of certification in light of *Arizonans*. *Catlin* was one of the first cases presented under New York's certification law, which took effect January 1, 1986—less than 18 months prior to the decision in *Catlin*. Judith S. Kaye and Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373, 373, 392 (2000), available at http://ir.lawnet.fordham.edu/flr/vol69/iss2/3. At the time of the *Catlin* decision, the New York Court of Appeals had answered one certified question in *Kidney v. Kolmar Labs., Inc.*, No. 86-7194 (2d Cir. July 7, 1986) (certification order); 68 N.Y.2d 343, 502 N.E.2d 168 (1986) (certified question answered); 808 F.2d 955 (2d Cir. 1987) (opinion after certified question answered), and declined to answer two certified questions in *Rufino v. United States*, No. 86-6175 (2d Cir. Jan. 21, 1987) (certification order); 69 N.Y.2d 310, 506 N.E.2d 910 (1987) (declining to

answer certified questions); 829 F.2d 354 (2d Cir. 1987) (opinion after certified questions declined), on the grounds that the same issue was being litigated in state courts. *See generally* Appendix B, *Interactive Judicial Federalism*, 69 Fordham L. Rev. at 423-25 (collecting New York certified question cases from Jan. 1, 1986 to Sep. 18, 2000).

Second, the second footnote of *Catlin*, 820 F.2d at 591 n. 2 ("We deem abstention preferable to use of the new certification procedure because the resolution of the state law issue might require factfinding in the state courts."), appears to be a significant aberration that has no subsequent reported judicial history—until now. WVCDL urges this Court to disregard footnote 2 of *Catlin* because *Catlin* is not binding on this Court and it would create the perfect pretext for a party moving for abstention or a court acting *sua sponte* to assert the most miniscule possibility of a need for factfinding that "would convert abstention from an exception into a general rule." *Examining Board of Engineers v. Flores De Otero*, 426 U.S. 572, 598 (1976) (avoiding application of *Pullman* that threatened to expand abstention from an exception to a general rule). To the extent this footnote has any currency, it cannot be read in isolation. New York's certification procedure does not permit federal district courts to certify questions; only "the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state," N.Y. Const. art. VI, § 3(b), cl. 9; *see*

also Interactive Judicial Federalism, 69 Fordham L. Rev. at 392-93, may certify questions of law to the New York Court of Appeals. *Compare with* W.Va. Code § 51-1A-3 (permitting, *inter alia*, "any court of the United States," to certify questions). The West Virginia Supreme Court of Appeals regularly answers questions certified by the federal courts. E.g., *Barr v. NCB Management Services, Inc.*, 227 W.Va. 507, 711 S.E.2d 577 (2011); *L.H. Jones Equipment Co. v. Swenson Spreader LLC*, 224 W.Va. 570, 687 S.E.2d 353 (2009); *Timber Ridge, Inc. v. Hunt Country Asphalt & Paving, LLC*, 222 W.Va. 784, 671 S.E.2d 789 (2008). To the extent *Catlin*'s second footnote is still followed in the Second Circuit, it cannot be lost on this Court that West Virginia's more permissive certification process permits early certification by a district court, which eliminates the possibility of unnecessarily litigating an issue that cannot be resolved at an early stage by a district court in New York. The questions certified by the District Court and answered by the West Virginia Supreme Court of Appeals in, e.g., *Barr*; *L.H. Jones*; *Arbaugh v. Board of Educ., County of Pendleton*, 214 W.Va. 677, 591 S.E.2d 235 (2003); *Feliciano v. 7-Eleven, Inc.*, 210 W.Va. 740, 559 S.E.2d 713 (2001); and *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999), were certified during the District Court's consideration of pre-answer motions to dismiss each of those cases.

D. The District Court's Order of Abstention was not Supported by Sufficiently Open Question of State Law.

Neither the District Court's Order of Abstention, nor its supplemental briefing order contained in the order denying the Defendants' pre-answer motion to dismiss, nor the City's Memorandum in Support of Abstention, identified any cogent arguments demonstrating that the controlling state law is unsettled to the degree that would support *Pullman* abstention.

At the time the District Court entered its Order of abstention, the City's pre-answer motion to dismiss, J.A. 20-23, remained before the District Court without action on the Defendants' naked assertion that the original Complaint failed to state a claim upon which relief may be granted, Fed. R. Civ. P. 12(b)(6). Because WVCDL filed an amended complaint, this motion became moot. "As a general rule, an amended pleading ordinarily supersedes the original and renders it of no legal effect." *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) (citation and quotation marks omitted). Accordingly, the filing of WVCDL's First Amended Complaint rendered moot the Defendants' pre-answer motion to dismiss for failure to state a claim upon which relief may be granted and any case for abstaining based on the original Complaint and motion to dismiss in response thereto. *Standard Chlorine of Del., Inc. v. Sinibaldi*, 821 F. Supp. 232, 239-40 (D. Del. 1992) (holding that filing an amended complaint renders a motion to dismiss the original complaint moot); *Baucom v. Cabarrus Eye Center, P.A.*, 2006 WL

2569079 (M.D. N.C. 2006) (same); *cf. Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 956 (8th Cir. 2002) (holding that the court should rule on a motion for leave to amend a complaint before deciding a motion to dismiss that same complaint because allowing leave to amend renders the motion to dismiss moot).

Based upon the City's choice to file an answer rather than a pre-answer motion to dismiss the First Amended Complaint and the mootness of the original Complaint and the City's motion to dismiss, WVCDL submits that the District Court was without a record supporting its decision to abstain under the *Pullman* doctrine, entered just hours after the Defendants' answer to WVCDL's First Amended Complaint. Accordingly, WVCDL urges this Court to instruct the District Court on remand to require the City to fully brief any legal arguments it wishes to assert in its defense of this case and not rely upon pure speculation and conjecture as to the possible ways West Virginia state law could be interpreted differently than WVCDL has argued at length in its District Court memoranda.

E. The District Court's Order of Abstention Unduly Delays Litigation in Defense of a Sensitive Constitutional Right.

The District Court's Order of Abstention is unduly delaying WVCDL's efforts to vindicate its members' fundamental, individual, constitutionally-protected right to keep and bear arms. Applying Supreme Court and Fourth Circuit precedent disfavoring abstention in cases involving sensitive constitutional rights,

the U.S. District Court for the District of South Carolina declined to exercise *Pullman* abstention in *Southeast Booksellers Ass'n v. McMaster*, 282 F. Supp. 2d 389 (D. S.C. 2003), noting:

> The Supreme Court has indicated that abstention is disfavored in the setting of sensitive Constitutional rights, such as freedom of speech. *See, e.g.*, *Procunier v. Martinez*, 416 U.S. 396, 404 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989). Similarly, the Fourth Circuit has noted that courts "have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment, because the delay involved might itself effect the impermissible chilling of the very constitutional right [the litigant] seeks to protect." *[North Carolina Right to Life, Inc. v.] Bartlett*, 168 F.3d [705,] 711 n. 1 [(4th Cir. 1999)] (internal citations omitted).

Id. at 396-97 (first alteration in original). An individual's right to keep and bear arms is among those sensitive, fundamental, individual, constitutionally-protected rights deserving of the same protection as an individual's freedom of speech. *See U.S. v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

Without a live motion to dismiss pending at the time the Order of Abstention was entered, the District Court elected an impermissible course of action that is unnecessarily delaying WVCDL's pursuit of justice in this case and frustrate its efforts to defend its members' rights.

X. Conclusion.

For the reasons stated above, WVCDL requests that this Court reverse the District Court's Order of Abstention and remand this case with instructions to proceed to adjudicate WVCDL's claims on their merits and resolve any fairly disputed points of state law by first resorting to certification rather than abstention. WVCDL further requests that this Court hear oral arguments to aid its decision in this case.

Dated this 14th day of February, 2012,

West Virginia Citizens Defense League, Inc.,

By Counsel,

s/ James M. Mullins, Jr.

James M. Mullins, Jr. (WV State Bar # 11129)
The Law Offices of James M. Mullins, Jr., PLLC
101 North Kanawha Street, Suite 401
Beckley, WV 25801
Telephone: 304-929-3500 (o)/304-687-5492 (c)
FAX: 304-929-3503
E-mail: jim@mullinslawoffices.com

Attorney for Appellant

XI. Certificate of Compliance with Rule 32(a).

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 4,417 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   this brief has been prepared in a proportionally typeface using Microsoft Word in 14 point Times New Roman.

s/ James M. Mullins, Jr.
James M. Mullins, Jr.

Dated: February 14, 2012

XII. Certificate of Filing and Service.

I hereby certify that on February 14, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Floyd M. Sayre, III
BOWLES, RICE, MCDAVID,
GRAFF & LOVE, LLP
101 South Queen Street
Martinsburg, WV 25401
(304) 264-4226

Counsel for Appellees

s/ James M. Mullins, Jr.
James M. Mullins, Jr.