RECORD NO. 11-2231

In The

United States Court Of Appeals

For The Fourth Circuit

WEST VIRGINIA CITIZENS DEFENSE LEAGUE, INC.,
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; and **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 APPELLEES

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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 v. City of Martinsburg

Pursuant to FRAP 26.1 and Local Rule 26.1,

City of Martinsburg
(name of party/amicus)

Floyd M. Sayre, III

who is Appelle, 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

****

I certify that on Floyd M. Sayre, III 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:

Floyd M. Sayre, III
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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, and 2202 to hear claims seeking relief pursuant to 42 U.S.C. § 1983 because those claims present a federal question. Under 28 U.S.C. § 1367, the district court also has discretion to exercise supplemental jurisdiction over related state law claims arising from a common nucleus of operative fact. This Court has jurisdiction to hear appeals of final orders entered by the district courts within this circuit under 28 U.S.C. § 1291. For purposes of this Court's appellate jurisdiction under 28 U.S.C. § 1291, a district court order granting abstention is appealable as a "final" order. *Manzanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985).

The district court entered its order of abstention on September 6, 2011. West Virginia Citizens Defense League, Inc. ("WVCDL") filed a motion to reconsider the order of abstention on September 27, 2011. The district court denied the motion for reconsideration on October 24, 2011. WVCDL filed its notice of appeal on November 1, 2011. The district court and this Court, however, do not have jurisdiction to hear the claims raised in the complaint or in this appeal because WVCDL has not demonstrated a credible threat of prosecution

establishing sufficient Article III standing to bring a pre-enforcement challenge to Martinsburg City Code § 545.14.

IV. STATEMENT OF ISSUES

1. Did WVCDL meet its burden of establishing Article III representational standing to bring a pre-enforcement challenge to Martinsburg City Code § 545.14 when (a) a litigant must establish a "credible threat" of prosecution by showing more than the fact that state officials stand ready to perform their general duty to enforce laws, (b) criminal liability under Code § 545.14 only attaches if a person carrying a firearm in a city building refuses to temporarily relinquish possession of the firearm or leave the premises when requested to do so, and (c) the only individual member of WVCDL alleged to have standing is a "regular visitor" of a city building but has never been asked to temporarily relinquish possession of his firearm or to leave the premises?

2. Did the district court abuse its discretion by abstaining when (a) federal courts may abstain if there is an unclear issue of state law presented for decision that is "potentially dispositive" of the case; (b) WVCDL alleges that Martinsburg City Code § 545.14 is pre-empted by W.Va. Code § 8-12-5a and infringes its members' right to bear arms under Article III, § 22 of the West Virginia Constitution; (c) W.Va. Code § 8-12-5a conflicts with the city's right to prohibit

firearms on its property pursuant to W.Va. Code § 61-7-14; and (d) Article III, § 22 of the West Virginia Constitution is materially different from the Second Amendment to the U.S. Constitution?

V. STATEMENT OF THE CASE

This case involves WVCDL's Article III representational standing to bring a pre-enforcement challenge on behalf of its members to Martinsburg City Code § 545.14, which prohibits the carrying of firearms in Martinsburg City buildings and makes it a misdemeanor offense for any non-excepted person to refuse to temporarily relinquish possession of his firearm or leave the premises when requested to do so. The district court determined that WVCDL established a credible threat of prosecution supporting Article III standing, despite the fact that no member of WVCDL has been requested to relinquish possession of his firearm or leave the premises of a Martinsburg city building, based on the court's belief that any WVCDL member attempting to enter a city building would be stopped and prohibited from entering or arrested. The district court, however, also determined *sua sponte* that abstention is appropriate in this case because WVCDL's claims raise unsettled issues of West Virginia law under Article III, § 22 of the West Virginia Constitution, which is not the "mirror image" of the Second Amendment to the United States Constitution.

VI. STATEMENT OF FACTS

The City of Martinsburg is a municipal corporation organized under the constitution and laws of the State of West Virginia. (J.A. 10) Martinsburg City Code § 545.14 provides:

> (a) No person shall carry or possess a firearm or other deadly weapon, whether carried openly or concealed, in any building owned, leased or under the care custody and control of the City of Martinsburg or any political subdivision of the City of Martinsburg.
>
> (b) No provision of this section shall apply to those persons set forth in Section 545.03(c) to (f) while such persons are acting in an official capacity, provided, however, that under no circumstances may any person possess or carry or cause the possession or carrying of any firearm or other deadly weapon on the premises of any primary or secondary educational facility in this State unless such person is a law enforcement officer or he or she has the express written permission of the County School Superintendent.
>
> (c) Any person carrying or possessing a firearm or other deadly weapon in any building owned, leased or under the care, custody and control of the City of Martinsburg or any political subdivision of the City of Martinsburg who refuses to temporarily relinquish possession of such firearm or other deadly weapon, upon being requested to do so, or to leave such premises, while in possession of such firearm or other deadly weapon, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for each offense and, in the discretion of the Police Court Judge, may be placed in jail for a term not to exceed thirty (30) days, or both.

Martinsburg, W.Va., Codified Ordinances art. 545, § 545.14 (W.H. Drane Co. 2011). Section 545.14 was originally enacted in 2005. (J.A. 16)

WVCDL brought this pre-enforcement challenge to Martinsburg City Code § 545.14 on the basis that § 545.14 (1) is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, (2) is unconstitutionally vague in violation of the Due Process Clause of Article III, § 10 of the West Virginia Constitution, (3) violates the right of an individual to keep and bear arms under the Second and Fourteenth Amendments to the United States Constitution, (4) violates the right of an individual to keep and bear arms under Article III, § 22 of the West Virginia Constitution, (5) is preempted by W.Va. Code § 8-12-5a and invalid as a matter of state law, and (6) is void on its face due to a lack of appropriate statutory authorization under the laws of West Virginia. (J.A. 12-19)

In order to demonstrate that it has sufficient representational standing under Article III of the United States Constitution, WVCDL submitted to the district court an affidavit executed by one of its members, Arthur Thomm, II. (J.A. 24-26) In the affidavit, Mr. Thomm, II, states that he is a resident of Berkeley County, West Virginia, who regularly visits Habanero Mexican Grill, a restaurant located in a city-owned building at 100 North Queen Street in Martinsburg. (J.A.

24-25) The affidavit further states that the main public entrance to the building at 100 North Queen Street bears the following sign:

> No Firearms allowed per Martinsburg City Code 545.14. Any person carrying or possessing a firearm or other deadly weapon on any public property or in any building owned, leased or under the care, custody and control of the City of Martinsburg or any political subdivision of the City of Martinsburg who refuses to temporarily relinquish possession of such firearm or other deadly weapon, upon being requested to do so, or to leave such premises, while in possession of such firearm or other deadly weapon, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for each offense and, in the discretion of the Police Court Judge, may be placed in jail for a term not to exceed thirty (30) days, or both.

(J.A. 25) The affidavit does not state that Mr. Thomm, II, has ever been asked to relinquish his firearm while visiting Habanero Mexican Grill or that he has been asked to leave the premises. (*See* J.A. 24-26)

VII. SUMMARY OF ARGUMENT

The district court erred when it determined that WVCDL demonstrated a credible threat of prosecution of its members under Martinsburg Code § 545.14 because no WVCDL members have been asked to relinquish possession of their firearm or leave the premises of a city building. The plain language of Martinsburg Code § 545.14 states that a person carrying or possessing a firearm in a city building is not guilty of a misdemeanor unless he refuses to temporarily relinquish possession of his firearm upon being requested to do so or refuses to leave the premises when requested to do so. The only individual member of WVCDL alleged to be affected by § 545.14 admits to being "a regular visitor" to a city owned building but does not allege that he has ever been asked to relinquish his firearm or leave that building. WVCDL, therefore, lacks sufficient Article III representational standing to bring a pre-enforcement challenge to Martinsburg Code § 545.14.

Even if WVCDL has Article III standing, the district court did not abuse its discretion by abstaining because the test for *Pullman* abstention has been met. WVCDL alleges that Martinsburg Code § 545.14 violates the right to bear arms set forth under Article III, § 22 of the West Virginia Constitution and the Second Amendment of the United States Constitution. Neither constitutional

provision has been interpreted to recognize a right to bear arms for self defense outside of the home. The language of Article III, § 22 of the West Virginia Constitution, however, differs markedly and materially from the language of the Second Amendment of the United States Constitution. The district court determined that the scope of Article III, § 22 of the West Virginia Constitution may be outcome-determinative as to the validity of Martinsburg Code § 545.14, thereby mooting WVCDL's Second Amendment arguments. WVCDL has not challenged this finding of the district court and thus has failed to carry its burden of proving that the ruling was an abuse of discretion.

Rather than attack the district court's finding that the test for *Pullman* abstention has been met, WVCDL chooses instead to argue that *Arizonans for Official English v. Arizona* requires certification in lieu of abstention. WVCDL, however, misinterprets or misapplies the case law it relies upon. All but one of the cases cited by WVCDL, including the *Arizonans* case, involve First Amendment freedom of speech issues, an area of law in which the United States Supreme Court has held abstention to be particularly inappropriate. Unlike the First Amendment freedom of expression, private citizens do not have a recognized Second Amendment right outside of their home, so the chilling effect concerns raised by the Court in First Amendment cases are simply inapplicable.

Furthermore, abstention is particularly appropriate in this case due to the serious public policy issues presented by the scope of the right to bear arms. Although the *Heller* decision recognized that citizens have a limited right to bear arms in their own home for self defense purposes, courts around the country are justifiably hesitant to address whether that right should be expanded. Certification, however, would force the West Virginia Supreme Court to consider the constitutional issue without a fully-developed record and without an opportunity to decide this case on other grounds.

VIII. ARGUMENT

A. WVCDL Failed to Demonstrate Sufficient Article III Representational Standing to Bring a Pre-Enforcement Challenge to Martinsburg Code § 545.14 Because No WVCDL Member Has Been Asked to Relinquish His Firearm or Leave the Premises of a City Building

The district court erred when it determined that WVCDL demonstrated sufficient Article III Representational Standing to bring a Pre-Enforcement Challenge to Martinsburg Code § 545.14 based on a credible threat of prosecution of one of its members. A person is not guilty of a misdemeanor under § 545.14 unless he refuses to relinquish his firearm or leave the premises of a city building after being asked to do so. No WVCDL member has been asked to relinquish his firearm or leave a city building, so no credible threat of prosecution exists to support standing. This Court, therefore, must reverse and remand this matter and instruct the district court to dismiss for lack of jurisdiction.

"The standing doctrine is an indispensable expression of the Constitution's limitation on Article III courts' power to adjudicate 'cases and controversies.'" *Frank Krasner Enters., Ltd.v. Montgomery County, MD*, 401 F.3d 230, 234 (4th Cir. 2005) (citing *Allen v. Wright*, 468 U.S. 737, 750-51 (1984)). "The burden of establishing standing to sue lies squarely on the party claiming subject-matter jurisdiction." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986)). "We

review the question of whether a party possesses standing, like other questions of law, *de novo*." *Id.* (citing *Marshall v. Meadows*, 105 F.3d 904, 905-06 (4th Cir. 1997)).

A motion to dismiss for lack of subject matter jurisdiction may be raised at any time. *Sasser v. Administrator, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993) (issue of subject matter jurisdiction, raised for the first time in appellant's reply brief on appeal, was timely). "As a court of limited jurisdiction, we are obligated to satisfy ourself of our jurisdiction as well as that of the district court." *Choice Hotels Intern., Inc. v. Shiv Hospitality, L.L.C*, 491 F.3d 171, 175 (4th Cir. 2007) (citing *United States v. Hadden*, 475 F.3d 652, 659 (4th Cir. 2007)). "When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Choice Hotels Intern., Inc. v. Shiv Hospitality, L.L.C.*, 491 F.3d 171, 175 (4th Cir. 2007) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055 (1997)).

An organization has Article III representational standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual

members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). In order to have representational standing to bring a pre-enforcement challenge to a statute, an organization is required to demonstrate that one of its members "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder . . . ." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (2007). "The fear of prosecution cannot be imaginary or wholly speculative." *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 386 (4th Cir. 2001). "A litigant must show more than the fact that state officials stand ready to perform their general duty to enforce laws." *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) (citing *Poe v. Ullman*, 367 U.S. 497 (1961); *Watson v. Buck*, 313 U.S. 387, 399 (1941)). "[S]ubjective fear of prosecution does not establish an objective threat." *Id.* (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

The district court erroneously determined that WVCDL demonstrated sufficient Article III representational standing to bring this pre-enforcement challenge to Martinsburg Code § 545.14 based upon a credible threat that one of its individual members, Arthur Thomm, II, would be arrested if he entered Habanero Mexican Grill, a restaurant located in a city building at 100 North Queen Street, Martinsburg, West Virginia. First, simply entering a city building with a firearm is

not a crime. Martinsburg Code § 545.14 clearly states that a person is guilty of a misdemeanor only if that person "refuses to temporarily relinquish possession of such firearm or other deadly weapon, upon being requested to do so, or to leave such premises, while in possession of such firearm . . . ." Martinsburg, W.Va., Codified Ordinances art. 545, § 545.14 (W.H. Drane Co. 2011). Thus, criminal liability does not attach under § 545.14 unless an individual (a) is asked to either relinquish his firearm or leave the premises of a city building and (b) refuses to comply with that request. The district court, therefore, incorrectly determined that "if one of the plaintiff's members attempts to enter certain of the City's buildings, that person will be stopped and prohibited from entering or arrested." (J.A. 32)

Second, the affidavit provided by WVCDL in support of standing fails to establish its members are under an actual, imminent threat of enforcement. Section 545.14 was enacted over six (6) years ago in 2005, and during those six years of potential enforcement, WVCDL member Arthur Thomm, II, was "a regular visitor to the Habanero Mexican Grill, which is located in a City owned building at 100 North Queen Street in Martinsburg." (J.A. 16, 25) Despite regularly visiting a city building during six years of potential enforcement, Mr. Thomm has never been asked to relinquish his weapon or leave the premises. (*See* J.A. 16, 24-26) Thus, although Mr. Thomm may "feel inhibited" in his conduct, no case or controversy exists in this matter because he has not claimed that he has

"ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible." *Younger*, 401 U.S. at 42 (1971). Since "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases," *see id.*, this Court should find that WVCDL lacks sufficient standing and reverse and remand this matter to the district court with instruction to dismiss for lack of jurisdiction.

B. The District Court Did Not Abuse Its Discretion By Choosing to Abstain Because a State Court Decision Construing Article III, § 22 of the West Virginia Constitution or W.Va. Code § 8-12-5a May Dispose of This Controversy Without Addressing WVCDL's Enmeshed Federal Claims

The district court correctly determined that *Pullman* abstention is appropriate because this case involves issues of unsettled West Virginia constitutional and statutory law that could potentially moot WVCDL's enmeshed federal claims. The district court, therefore, did not abuse its discretion by abstaining because the elements of *Pullman* abstention are met.

"This Court reviews a district court's decision to abstain for abuse of discretion." *Hennis v. Hemlick*, 666 F.3d 270, 274 (4th Cir. 2012) (citing *Nivens v. Gilchrist*, 444 F.3d 237, 240-41 (4th Cir. 2006); *Richmond, Fredericksburg & Potomac R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993)). "The complaining party has the burden of showing that the trial court abused its discretion; such abuse will

not be presumed, but instead it will be presumed that the discretion was properly exercised." 5 C.J.S. *Appeal and Error* § 908 (2011).

"A district court abuses its discretion if its conclusion is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). Reversal of a district court decision is warranted only if the appellate court "has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* (quoting *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 506 (4th Cir. 1977)). A district court does not abuse its discretion in abstaining pending resolution of the state law questions in state court if the test for *Pullman* abstention has been met. *See Patel v. City of Los Angeles*, No. 10-55219, 2011 WL 5074275 (9th Cir. Oct. 13, 2011).

"[T]o the extent there is some . . . state-law issue that may be dispositive, federal courts should abstain under *Railroad Comm'n of Tex. v. Pullman Co.*" *Virginia Office for Protection & Advocacy v. Stewart*, --- U.S. ---, 131 S. Ct. 1632, 1644 (2011) (Kennedy, J. concurring). This Court has distilled the *Pullman* abstention doctrine down to a two-part test, finding abstention appropriate where "there is (1) an unclear issue of state law presented for decision

(2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is 'potentially dispositive.'" *Educ. Servs., Inc. v. Maryland State Bd. For Higher Educ.*, 720 F.2d 170, 174 (4th Cir. 1983) (internal citations omitted).

WVCDL challenges City Code § 545.14, arguing that the ordinance is unconstitutional under both the West Virginia and United States Constitutions and that the ordinance is preempted by W.Va. Code § 8-12-5a. The scope of the Second Amendment is a relatively new and extremely controversial issue of federal constitutional law. *See District of Columbia v. Heller*, 554 U.S. 570 (2008) (federal right to keep and bear arms inside the home recognized); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (right to keep and bear arms inside the home incorporated by the Fourteenth Amendment and applicable to the states). As noted by the district court, Article III, § 22 of the West Virginia Constitution is not a "mirror image" of the Second Amendment of the United States Constitution[1] (*See* J.A. 84), and to date the West Virginia courts have not interpreted its scope in the wake of *Heller* and *McDonald*. Additionally, WVCDL argues that § 545.14 is pre-empted by W. Va. Code § 8-12-5a, which states in part that "neither a

[1] Compare W.Va. Const. Art. III, § 22 ("A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.") with U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

municipality nor the governing body of any municipality may limit the right of any person to purchase, possess, transfer, own, carry, transport, sell or store any [firearm or ammunition]." W.Va. Code § 8-12-5a (2011). Section 8-12-5a, however, is not an absolute limitation of the city's powers because the city, as an owner of property within the meaning of W.Va. Code § 61-7-14, "may prohibit the carrying openly or concealing of any firearm or deadly weapon on property under his or her domain." *Cf.* W.Va. Code § 8-12-5a (2011); W.Va. Code § 61-7-14 (2011). The West Virginia courts have yet to interpret how these two competing statutes should be reconciled. As determined by the district court, resolution of these underlying questions of state law could potentially moot WVCDL's federal constitutional claims. WVCDL fails to dispute the district court's finding that the test for *Pullman* abstention has been met, so this Court should find that the district court did not abuse its discretion by abstaining.

C. WVCDL Overstates the Significance of the Precedent It Cites In Favor of Certification By Either Misinterpreting or Misapplying Those Cases

Rather than contest the district court's finding that the test for *Pullman* abstention has been met, WVCDL cites a litany of cases supposedly holding that "federal courts should use state certification procedures where available in lieu of *Pullman* abstention barring particularly unusual circumstances." (Appellant's Br. 8) WVCDL, however, overstates the holdings of

the case law it relies on. A number of the cases cited by WVCDL express no preference between abstention or certification, and the cases it leans most heavily on deal with the First Amendment, an area of law in which the United States Supreme Court has cautioned courts to be particularly reluctant to abstain. Ultimately, no precedent constrains the lower court's discretion to choose abstention over certification in this case. In fact, one circuit recently upheld a district court's *Pullman* abstention order, and recent *dicta* from this Court suggests that the district court does, in fact, have discretion to choose between certification and abstention.

The genesis of WVCDL's argument is *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), in which the United States Supreme Court chastised the lower federal courts for continuing to adjudicate the plaintiff's claims, finding that "[t]he complexity [of the case] might have been avoided had the District Court, more than eight years ago, accepted the certification suggestion made by Arizona's Attorney General." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). In so finding, the Court discussed how certification procedures overlap with *Pullman* abstention:

> Certification today covers territory once dominated by a deferral device called "*Pullman* abstention," after the generative case, *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

> Designed to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues, the *Pullman* mechanism remitted parties to the state courts for adjudication of the unsettled state-law issues. If settlement of the state-law question did not prove dispositive of the case, the parties could return to the federal court for decision of the federal issues. Attractive in theory because it placed state-law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court.
>
> Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response. Most States have adopted certification procedures.

Arizonans, 520 U.S. at 75-76 (internal citations omitted). *Arizonans* does not, however, require the lower federal courts to forego abstention, but simply expands the circumstances in which those courts may instead elect to certify questions to the appropriate state court. *Compare Yniguez v. Arizonans for Official English*, 69 F.3d 920, 930-31 (9th Cir. 1995) (declining to certify question to the Arizona Supreme Court because no "unique circumstances" existed militating in favor of certification) *to Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) (stating that novel, unsettled questions of state law, not "unique circumstances," are necessary before federal courts may avail themselves of state certification procedures).

In attempting to overemphasize the significance of the Court's discussion in *Arizonans*, WVCDL overstates the holdings of numerous cases in an effort to show that "no less than 8 Circuits endorse[], as a general rule, certification over exercising abstention . . . in most *Pullman*-type cases." (Apellant's Br. 9) First, nearly half of the cases cited by the Plaintiff do not even mention or discuss *Pullman* abstention. *See American Booksellers Found. for Free Expression v. Strickland*, 560 F.3d 443 (6th Cir. 2009); *PSINet, Inc. v. Chapman*, 317 F.3d 413 (4th Cir. 2003); *Romero v. Colegio de Abogado de Puerto Rico*, 204 F.3d 291 (1st Cir. 2000)[2]; *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998). It simply does not logically follow that this Court and the First, Sixth, or Seventh circuits considered and then rejected abstention in the cited cases when those cases express no preference at all. The First Circuit, in fact, recently instructed a district court to abstain pursuant to *Pullman* in a case challenging Massachusetts election laws. *See Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010).

[2] The *Romero* court, interestingly, chose to "remand the case to the district court to enter the preliminary injunction and then to abstain, while retaining jurisdiction, [pending certification of questions to the Supreme Court of Puerto Rico]." *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 306 (1st Cir. 2000). The First Circuit's opinion in *Romero* appears to treat abstention and certification, procedurally, as a distinction without a difference in cases where purely an issue of law is presented -- the court simply abstains, then certifies a question to the state tribunal. The present matter, however, differs from *Romero* because WVCDL believes that discovery is necessary, making this case a mixed question of law and fact. Regardless, more recent case law shows that *Pullman* abstention is still utilized in the First Circuit. *See Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010).

Additionally, one current jurist on the First Circuit Court of Appeals has publicly criticized the value of certification procedures in an extensive article on the subject. *See* Hon. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 Suffolk U.L. Rev. 677 (1995).

Second, WVCDL misstates the holding of *Doyle v. City of Medford*, 565 F.3d 536 (9th Cir. 2009), confusing Oregon law with Ninth Circuit law. In *Doyle*, the Ninth Circuit certified questions to the Oregon Supreme Court in deference to that court's holding in *Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 811 P.2d 627 (Ore. 1991), which held that "[e]xcept in unusual circumstances (examples of which do not readily come to mind), [the Oregon Supreme Court] will accept certification in *Pullman*-type abstention cases." *Doyle v. City of Medford*, 565 F.3d 536, 544 (9th Cir. 2009).[3] The quoted language offered by the Plaintiff is properly attributed to the Oregon Supreme Court; in fact, but for the Oregon court's clear preference, the Ninth Circuit may have abstained rather than certify a question:

> Therefore, we could simply abstain from deciding this case under the *Pullman* doctrine and, accordingly, wait

[3] The *Doyle* case is also procedurally and factually distinguishable from the present case because parallel litigation was occurring in the state courts of Oregon at the time and the presence of additional state law claims in that parallel litigation threatened to unduly delay resolution of the federal case if the court abstained. *See Doyle v. City of Medford*, 565 F.3d 536, 543-44 (9th Cir. 2009).

> for the parallel state court action to work its way through the state court system. However, as the Oregon Supreme Court recognized in *Western Helicopter*, certification is appropriate in *Pullman*-type abstention cases . . . .

Doyle, 565 F.3d at 543 (quoting *Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 811 P.2d 627, 632 (Ore. 1991)).

Third, the remaining cases cited by WVCDL -- including the *Arizonans* case -- are simply inapplicable because those cases dealt with facial challenges to statutes on First Amendment grounds, which are particularly inappropriate cases for abstention. The United States Supreme Court has specifically stated that courts should avoid abstention in free expression cases:

> Abstention is, of course, the exception and not the rule, and we have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment. We have held that "abstention . . . is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression." "In such case[s] to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."

City of Houston, Texas v. Hill, 482 U.S. 451, 467-68 (1987) (internal citations omitted). Nearly all of the cases cited by WVCDL are First Amendment cases,

including the *Arizonans* case and the only case law from this Court.[4] *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (First Amendment facial challenge to Arizona constitutional amendment establishing English as the official language of the state); *American Booksellers Found. for Free Expression v. Strickland*, 560 F.3d 443 (6th Cir. 2009) (First Amendment challenge to Ohio statute prohibiting dissemination over the internet of material harmful to juveniles); *Kansas Judicial Review v. Stout*, 519 F.3d 1107 (10th Cir. 2008) (First Amendment political expression challenge to Kansas Code of Judicial Conduct Canons preventing campaign contributions); *Pittman v. Cole*, 261 F.3d 143 (2d Cir. 2001) (First Amendment overbreadth challenge to enforcement provisions of Alabama Judicial Inquiry Commission and Alabama State Bar advisory opinions preventing judicial candidates from responding to voter questionnaire); *Allstate Ins. Co. v. Serio*, 261 F.3d 143 (2d Cir. 2001) (First Amendment commercial speech challenge to insurance law preventing unsolicited referrals to preferred repair shops); *Tunick v. Safir*, 209 F.3d 67 (2d Cir. 2000) (First Amendment freedom of expression challenge to law prohibiting public nudity as applied to artist-photographer); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998) (First Amendment challenge to law regulating political

[4] The only case that is not a First Amendment case is *Romero*. As noted *supra* in Footnote 2, at least one recent opinion from the First Circuit directed the district court, on remand, to abstain pursuant to *Pullman*. *See Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010).

action committees). *See also PSINet, Inc. v. Chapman*, 317 F.3d 413 (4th Cir. 2003) (First Amendment challenge to Virginia law criminalizing sale, rental, or loan to juveniles of sexually harmful material). Unlike the cases cited above, the present matter is a Second Amendment case, which the courts have not specifically singled out for avoiding abstention. In fact, as of this date, no court has recognized a Second Amendment right to bear arms outside of the home, so the same chilling effect concerns that weigh against abstention in First Amendment cases simply do not apply to WVCDL's claims.[5]

Fourth, contrary to WVCDL's argument that "[t]he Ninth Circuit prefers certification over abstention," in *Patel v. City of Los Angeles*, No. 10-55219, 2011 WL 5074275 (9th Cir. Oct. 26, 2011), the Ninth Circuit recently

[5] The United States Supreme Court recently denied *certiorari* in three cases that refused to expand Second Amendment rights beyond the "core" holding of *Heller*, which only recognizes the right of law-abiding, responsible citizens to use arms in defense of hearth and home. *See United States v. Booker*, 644 F.3d 12 (1st Cir. 2011) (Lautenberg Amendment prohibiting individuals convicted of a misdemeanor crime of domestic violence from possessing a firearm does not infringe "core" constitutional right of law-abiding citizens to possess a firearm for defense of their home), *cert. denied*, No. 11-6765 (U.S. Feb. 21, 2012); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011) (Wilkinson, J.) ("On the question of *Heller's* applicability outside the home environment, we think it prudent to await direction from the [Supreme] Court itself."), *cert. denied*, No. 10-11212 (U.S. Nov. 28, 2011); *Williams v. State of Maryland*, 10 A.3d 1167 (Md. 2011) (upholding a Maryland statute prohibiting wearing, carrying, or transporting a handgun without a permit and outside of one's home, finding the statute to be outside the scope of the Second Amendment and further finding that language from *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) suggesting the opposite was merely dicta), *cert. denied*, No. 10-1207 (U.S. Oct. 3, 2011).

affirmed a district court's decision to abstain from the exercise of jurisdiction under the *Pullman* abstention doctrine. The court summarily affirmed the lower court decision without oral argument, holding that "[b]ecause we find that the test for *Pullman* abstention has been met, we conclude that the district court did not abuse its discretion in abstaining pending resolution of the state law questions in state court." *See Patel*, 2011 WL at *2. The Ninth Circuit has ordered district courts to abstain pursuant to *Pullman* in several other post-*Arizonans* cases. *See Lueck v. Nevada Judicial Ethics & Election Practices Comm'n*, 106 Fed.Appx. 552 (9th Cir. 2004); *Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 45 Fed.Appx. 585 (9th Cir. 2002); *Santa Clara County Correctional Peace Officers' Ass'n. Inc. v. Board of Supervisors*, 225 F.3d 663 (9th Cir. 2000). *See also Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791 (9th Cir. 2001) (district court should have abstained under *Pullman*).

Finally, *Nivens v. Gilchrist*, 444 F.3d 237 (4th Cir. 2006), a post-*Arizonans* case from this Court, suggests that district courts within this circuit still have discretion to exercise *Pullman* abstention over certification:

> For example, *Pullman* abstention is appropriate when a plaintiff brings a federal case that requires the federal court to interpret an unclear state law. Exercising *Pullman* abstention, the federal court then stays the proceeding (or certifies the question) and directs the plaintiff to first press his claim in state court.

Nivens v. Gilchrist, 444 F.3d 237, 246 (4th Cir. 2006). Although this language is *dicta* from a case that did not apply *Pullman* abstention or certify a question to the state court, it indicates that this Court has not expressed a preference for one procedure over the other, thus leaving it up to the discretion of the district courts to decide whether to abstain or certify questions. Ultimately, WVCDL's extensive but misguided application of the law fails to contradict the above passage: if a plaintiff brings a federal case that requires the federal court to interpret an unclear state law, that court may exercise its own discretion and either stay the proceedings or certify a question to the state tribunal. The fact that the district court in this case chose the former approach rather than the latter does not require reversal.

D. The Policy Concerns Normally Weighing in Favor of Certification Actually Favor Abstention in this Case Because Abstention Will Allow WVCDL to Develop a Factual Record as Requested While Allowing an Authoritative Court to Determine Issues of Law That Are Particularly Controversial and Sensitive

The policy concerns normally weighing in favor of certification actually favor abstention in this case because WVCDL wishes to develop a factual record and the issues presented by this case are particularly controversial and sensitive. If *Pullman* abstention is appropriate, the major concern of the court shifts to whether certification would avoid unnecessary expense and delay: "[w]here delay and expense are the chief drawbacks to abstention, the availability

of certification becomes an important factor in deciding whether to abstain." *City of Houston, Texas v. Hill*, 482 U.S. 451, 470 (1987). No delay has occurred in this case because the district court determined that abstention was appropriate at the very outset of the case. The only delay that WVCDL has experienced is this appeal, which it chose to file rather than pursue its interests in state court. Furthermore, WVCDL has demanded discovery (*see* J.A. 128-29), so abstaining would allow a state trial court to develop a record for the West Virginia Supreme Court while simultaneously allowing WVCDL to seek relief. *See Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Committee*, 283 F.3d 650 (5th Cir. 2002) (abstention, rather than certification, was appropriate to allow the trial court to develop a record for the Texas Supreme Court). Any record developed below would also benefit the district court if this case returns to federal court.

Additionally, *Pullman* abstention is particularly appropriate in this case due to the controversial nature of the right to bear arms. "The need for such authoritative declarations of state law in sensitive constitutional contexts has been the very reason for the development of the abstention doctrine by [the Supreme Court]." *Sibron v. New York*, 392 U.S. 40, 58 (1968) (citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)). This Court and other courts around the country have been justifiably reluctant to address the scope of the Second Amendment without clear guidance from the United States Supreme Court. *See*

United States v. Masciandaro, 638 F.3d 458, 475-76 (4th Cir. 2010) (Wilkinson, J.) ("There simply is no need in this litigation to break ground that our superiors have not tread . . . This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights . . . If ever there was an occasion for restraint, this would seem to be it."); *see also Williams v. State of Maryland*, 10 A.3d 1167, 1177 (Md. 2011) ("*Heller* and *McDonald* emphasize that the Second Amendment is applicable to statutory prohibitions against home possession . . . . If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly.").[6] This Court should be similarly reluctant to force upon the West Virginia Supreme Court certified questions concerning the scope of the right to bear arms under West Virginia law. The gravity of the state rights debated in this case require caution that is best served by allowing the courts of West Virginia to fully develop and interpret its own constitutional and statutory provisions without interference by the federal courts.

[6] On at least five separate occasions since deciding *Masciandaro*, this Court "deferred reaching any conclusion about the scope of the Second Amendment's protection." *United States v. Carter*, --- F.3d ---, 2012 WL 207067, at *4 (4th Cir. Jan. 23, 2012). *See also United States v. Mahin*, --- F.3d ---, 2012 WL 336151 (4th Cir. Feb. 3, 2012); *United States v. Moore*, 666 F.3d 313 (4th Cir. Jan. 25, 2012); *United States v. Chapman*, 666 F.3d 220 (4th Cir. Jan. 4, 2012); *United States v. Staten*, 666 F.3d 154 (4th Cir. Dec. 5, 2011).

IX. CONCLUSION

WVCDL failed to demonstrate that one of its members is subject to a credible threat of prosecution under Martinsburg Code § 545.14. Section 545.14, by its plain language, does not subject a person to criminal liability unless that person refuses a request to either relinquish his firearm or leave the premises of a city building. The only individual WVCDL member alleged to have standing, Arthur Thomm, II, is a "regular visitor" to a city building but has never been asked to relinquish his firearm or leave the premises during the six (6) year period that Martinsburg Code § 545.14 has been effective. Considering that Mr. Thomm, II, regularly visits city buildings without threat of prosecution, WVCDL failed to demonstrate an actual, live, "case or controversy" within the meaning of Article III. As it is the duty of WVCDL to demonstrate that federal court jurisdiction is appropriate and WVCDL failed to do so, the City of Martinsburg requests that this Court reverse and remand this case to the district court with instruction to dismiss for lack of jurisdiction.

Alternatively, even if WVCDL has Article III representational standing, this case deals with unsettled and controversial issues of state law relating to the scope of a citizen's right to keep and bear arms outside the home under the West Virginia Constitution as well as the appropriate interpretation of

conflicting sections of the West Virginia Code. The district court already determined that abstention is appropriate, WVCDL failed to challenge those findings, and the only delay that WVCDL has suffered in this case has been this appeal. Due to the importance and sensitivity of the issues presented in this case, abstention is the most appropriate course of conduct for the federal courts to take. Therefore, even if WVCDL has sufficient Article III representational standing, this Court should affirm the district court's decision to abstain so that the parties may seek resolution of these important issues before the state courts of West Virginia.

X. STATEMENT WITH RESPECT TO ORAL ARGUMENT

The City of Martinsburg believes that the briefs submitted by the parties and the district court record adequately present the facts and legal arguments relevant to this appeal. However, in the event that West Virginia Citizens Defense League, Inc. ("WVCDL") requests and is granted oral argument by this Court, the City of Martinsburg respectfully requests a similar opportunity for oral argument in order to respond to any facts or legal arguments raised by WVCDL in the hearing before the Court.

Respectfully submitted this 19th day of March, 2012,

CITY OF MARTINSBURG, GEORGE KAROS, MARK S. BALDWIN, AND KEVIN MILLER

By Counsel,

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XI. CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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

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s/ Floyd M. Sayre, III -- Counsel for Appellees

Dated: March 19, 2012

XII. CERTIFICATE OF FILING AND SERVICE

I, Floyd M. Sayre, III, hereby certify that on March 19, 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:

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