

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

West Virginia Citizens Defense League, Inc.,
et al.,

Plaintiffs,

v.

City of Charleston, *et al.*,

Defendants

Civil Action No.: 2:11-cv-48

(Copenhaver, J.)

Plaintiffs' First Notice of Supplemental Legal Authority

The Plaintiffs, by and through their undersigned counsel, hereby give notice of supplemental legal authority relevant to the above-captioned matter. The recent decision of our Court of Appeals in *U.S. v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), which Plaintiffs have acknowledged as adverse legal authority, [Doc. 26] at 24-25, *but see* [Doc. 29] at 21 n. 7, is now the subject of a pending petition for *certiorari* before the Supreme Court of the United States. No. 10-11212 (filed June 22, 2011).

In light of the pending petition for *certiorari* in *Masciandaro*, Plaintiffs respectfully submit that this Honorable Court should defer any decision on dismissing Plaintiffs' Second Amendment claims in Counts 16, 18, 32, 35, and 38 of their First Amended Complaint until the Supreme Court considers and acts upon the *Masciandaro* petition. A district court should defer action on a critical legal issue where a controlling appellate decision is pending review before the Supreme Court. *Cf. Gilbert v. General Elec. Co.*, 519 F.2d 661, 668 n. 25 (4th Cir. 1975) (suggesting the District Court defer further proceedings when the Supreme Court has granted

certiorari in a case involving a potentially dispositive legal question), *rev'd on other grounds*, 429 U.S. 125 (1976); *U.S. v. Robinson*, 390 F.3d 833 (4th Cir. 2004) (rejecting argument that the District Court improperly postponed criminal sentencing proceedings pending a Supreme Court decision on a controlling legal issue), *vacated*, 544 U.S. 971 (2005), *on remand*, 460 F.3d 550, 560 n. 11 (4th Cir. 2006) (again rejecting argument that “the district court lacked any authority to postpone . . . proceedings to await a Supreme Court decision”).

The prudence of awaiting the further guidance from the Supreme Court was underscored and highlighted in bold colors by the majority in *Masciandaro*. “On the question of *Heller's* applicability outside the home environment, we think it prudent to await direction from the [Supreme] Court itself.” *Masciandaro*, 638 F.3d at 475 (Wilkinson, J., writing for the Court as to Part III.B) (*citing Williams v. State*, 417 Md. 479, 495, 10 A.3d 1167, 1177 (2011) (“If the Supreme Court, in [*McDonald's*] dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.”), *petition for cert. filed*, 79 U.S.L.W. 3594 (Apr. 5, 2011) (No. 10-1207)). The Supreme Court may soon accept one or both of these invitations to speak more plainly and provide the more specific direction begged by our Court of Appeals.

For these reasons, Plaintiffs respectfully request that this Honorable Court defer any dispositive ruling on Plaintiff’s Second Amendment claims in Counts 16, 18, 32, 35, and 38 of their First Amended Complaint until the Supreme Court rules on the pending petition for *certiorari* in *Masciandaro*.¹

¹ As Plaintiffs previously argued, [Doc. 29] at 21 n. 7, “the panel decision in *Masciandaro* is insufficient to dismiss Plaintiffs’ Second Amendment claims against the Charleston handgun sales ordinances, which implicate Plaintiffs’ right to acquire handguns that may be used in their homes as well as outside.”

Dated this 4th day of August, 2011,

s/ James M. Mullins, Jr.

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Certificate of Service

I hereby certify that on August 4, 2011, I electronically filed the foregoing document with the Clerk of the Court, which will send electronic notification of such filing to the following CM/ECF participants:

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