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

WEST VIRGINIA CITIZENS DEFENSE LEAGUE, INC., a West Virginia nonprofit corporation, KEITH T. MORGAN, ELIZABETH L. MORGAN, JEREOMY W. SCHULZ, BENJAMIN L. ELLIS, AND, MASADA ENTERPRISES LLC, a West Virginia Limited Liability Company,

Plaintiffs,

vs. **Case No.: 2:11-0048**

CITY OF CHARLESTON, a West Virginia municipal corporation, DANNY JONES, personally and in his official capacity as the Mayor of the City of Charleston, BRENT WEBSTER, personally and in his official capacity as the Chief of Police of the City of Charleston, CITY OF SOUTH CHARLESTON, a West Virginia municipal corporation, FRANK MULLENS, JR., in his official capacity as the Mayor of the City of South Charleston, BRAD L. RINEHART, in his official capacity as the Chief Of Police of the City of South Charleston, CITY OF DUNBAR, a West Virginia municipal corporation, JACK YEAGER, in his official capacity as the Mayor of the City of Dunbar, EARL WHITTINGTON, in his official capacity as the Chief of Police of the City of Dunbar,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF THE DUNBAR DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Webster J. Arceneaux, III (WV Bar No. 155)
Spencer D. Elliott (WV Bar No. 8064)
Lewis, Glasser, Casey & Rollins, PLLC
P.O. Box 1746
Charleston, West Virginia 25326
Telephone: (304) 345-2000
Facsimile: (304) 343-7999

Defendants City of Dunbar, Jack Yeager, in his official capacity as Mayor of the City of Dunbar and Earl Whittington, in his official capacity as Chief of Police of the City of Dunbar, (hereinafter "Dunbar Defendants"), file this Memorandum of Law in support of their Motion to Dismiss Counts 38, 39 and 40 of the First Amended Complaint ("Complaint"). The Dunbar Defendants have moved to dismiss the Complaint under Rule 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, because no Plaintiff has standing to pursue this matter and therefore, this Court lacks Article III subject matter jurisdiction. As a matter of well established federal case law, the Plaintiffs must establish a "case-or-controversy" to confer subject matter jurisdiction upon this Court.

The Complaint, on its face, fails to establish that any Plaintiff faces a credible threat of prosecution under Dunbar City Code §545.13 nor has any Plaintiff alleged a specific plan or intent to violate that ordinance.[1] Under the applicable standard for standing to mount a pre-enforcement challenge to a criminal statute, the Complaint, accepted as true, reveals that no plaintiff has standing to pursue Counts 38, 39 and 40. For the same reason, the injunctive relief sought against Yeager and Whittington is unavailable.

In the alternative, assuming *arguendo* that Plaintiffs have established standing, the Plaintiffs' constitutional arguments fail on the merits. Dunbar City Code §545.13 comports with the Second Amendment and it is constitutional under *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, __ U.S. __, 130 S.Ct. 3020 (2010). Similarly, Dunbar City Code §545.13 does not violate Article III, Section 22 the West Virginia Constitution because the ordinance is a reasonable limitation on the right to keep and bear arms under West Virginia law. Finally, the claim in Count 40 asserting that Dunbar City Code §545.13 is

[1] The provisions of Dunbar City Code §545.13 are set forth in their entirety in paragraph 43 of the Complaint. They generally provide that it is unlawful to carry a firearm or other dangerous weapon at

unauthorized fails as a matter of law because it was lawfully enacted and it remains valid to this date under West Virginia law.

Based on the foregoing reasons, as discussed more fully herein, this Court should grant the Dunbar Defendants' Motion to Dismiss and dismiss Counts 38, 39 and 40 of the Plaintiffs' First Amended Complaint under Rule 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure.

BACKGROUND FACTS

In 1996, the City of Dunbar enacted Dunbar City Code §545.13 which regulates possession of firearms and other dangerous weapons in city municipal buildings and city owned parks. At the time of its enactment, W. Va. Code § 8-12-5(16) authorized that ordinance. Thereafter, in 1999 the legislature enacted W.Va. Code § 8-12-5a which prohibited municipalities from regulating in the area of firearms, but it specifically grandfathered any ordinances passed prior to the amendment. While this ordinance has been on the books since 1996, the Dunbar Defendants are not aware, nor have the Plaintiffs alleged, that anyone has ever been criminally prosecuted for a violation of Dunbar City Code §545.13.

On March 16, 2011, Plaintiffs, West Virginia Citizens Defense League, Inc. ("WVCDL"), Keith T. Morgan, Elizabeth L. Morgan ("Mrs. Morgan"), Jereomy W. Schulz, Benjamin L. Ellis and Masada Enterprises, LLC filed the First Amended Complaint against the Dunbar Defendants and additional municipal corporations and government officials, essentially asserting that a number of city ordinances that regulate firearms violate the Second Amendment to the United States Constitution and are otherwise in violation of the West Virginia Constitution or in violation of West Virginia statutory law.

Dunbar City Hall, any other municipal building or any City owned park. It is a misdemeanor to violate these provisions.

The only Plaintiff specifically identified in Counts 38, 39 and 40 claiming to be impacted by Dunbar City Code §545.13 is Mrs. Morgan. *See* Complaint, ¶¶ 214-230. Count 38 asserts that Mrs. Morgan is employed in the City of Dunbar and that before she began regularly carrying a handgun, was a regular visitor to the Dunbar Wine Cellar Park and the Dunbar Recreation Center, parks owned by the City of Dunbar that are covered by Dunbar City Code §545.13. Count 38 further asserts that Mrs. Morgan ceased visiting the Dunbar Wine Cellar Park and the Dunbar Rec. Center due to the provisions of Dunbar City Code §545.13 further asserts that "she reasonably feared arrest, prosecution, fine and imprisonment if she carried a handgun into those locations." Complaint, ¶219.

Beyond the specific reference to Mrs. Morgan, Count 38 of the Complaint merely states that "many other WVDCL members reasonably fear arrest, prosecution, fine and imprisonment if they set foot in any location described in Dunbar City Code §545.13 while exercising their constitutionally-protected right to keep and bear arms for personal protection." Complaint, ¶221. Counts 39 and 40 effectively incorporate by reference the allegations in Count 38. Count 39 asserts that Dunbar City Code §545.13 violates the right of an individual to keep and bear arms under Article III, §22 of the West Virginia Constitution. Count 40 simply asserts, without specificity, that Dunbar City Code §545.13 is unauthorized by statute and void on its face as a matter of state law.

STANDARD OF REVIEW

The U.S. Supreme Court in *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) has modernized the pleading standards required for a federal complaint. While a complaint does not need "detailed factual allegations," it must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. (quoting *Twombly*, 550 U.S. at 555); *see also Deel v. W.Va. EMS Technical Support Network, Inc.*, No. 2:06-

1064, 2009 WL 2366524, at *2 (S.D. W.Va. July 24, 2009) (applying *Iqbal* and dismissing complaint). The Dunbar Defendants seek dismissal of Plaintiffs' First Amended Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Even accepting Plaintiffs factual allegations as true and all reasonable inferences drawn therefrom in their favor, *Flood v. New Hanover County*, 125 F.3d 249, 251 (4th Cir. 1997), the Court should grant the Dunbar Defendants' motion to dismiss under Rule 12(b)(6) because it appears beyond doubt that Plaintiffs can prove no set of facts that would entitle them to relief, *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In addition, because the Plaintiffs are in Federal Court under federal question jurisdiction, federal law governing standing will control the Court's analysis with respect to Counts 38, 39 and 40. *Shavitz v. Guilford Cty Bd. of Educ.*, 100 Fed. Appx. 146, 150 (4th Cir. N.C. 2004). As discussed more fully herein, the Plaintiff have not alleged sufficient facts to create standing in this case and therefore, Plaintiffs First Amended Complaint against the Dunbar Defendants must be dismissed.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO MOUNT A PRE-ENFORCEMENT CHALLENGE TO DUNBAR CITY CODE §545.13.

A. WVCDL Lacks Standing, Absent A WVCDL Member's Standing.

Binding precedent within the Southern District of West Virginia has established that an association lacks standing to pursue a claim on behalf of its members unless at least one of its members has individual standing in his or her own right:

> An association has standing to sue on behalf of its members when: (1) at least one of it members would have individual standing to sue in his or her own right, (2) the interests the organization seeks to protect are germane to its purpose, and (3) there is no need for the direct participation of individual members in the action.

Ohio Valley Envtl. Coalition, Inc. v. Hobet Mining, LLC, 702 F. Supp. 2d 644, 649 (S.D. W. Va. 2010); *United Transp. Union v. Perdue*, 2008 U.S. Dist. LEXIS 80991 (S.D. W. Va. Sept. 30, 2008) (confirming that in order for an association to have standing to sue, its members must otherwise have standing to sue in their own right).

Mrs. Morgan is the only Plaintiff and the only member of WVCDL who specifically alleges that she fears arrest, prosecution, fine and imprisonment if she carries a firearm on City of Dunbar property within the purview of Dunbar City Code §545.13. Complaint, ¶ 219. Otherwise, the Complaint only vaguely alleges that other members of WVCDL fear arrest, prosecution, fine and imprisonment if they carry a firearm on City of Dunbar property. Complaint, ¶ 221. Therefore, if it is established that Mrs. Morgan or any other plaintiff lacks standing to pursue the claims in Counts 38, 39 and 40, then WVCDL will likewise lack standing to pursue the same claims.

B. Because Neither Mrs. Morgan Nor Any Other Plaintiff Can Establish A Credible And Imminent Threat Of Prosecution, None Of The Plaintiffs Has Standing To Bring This Pre-Enforcement Challenge.

As stated by this Court: "To establish standing to challenge the constitutionality of a statute under *Babbitt*, the plaintiffs must allege that they intend to 'engage in a course of conduct arguably affected with a constitutional interest,' that such conduct is proscribed by the statute, and that there exists a credible threat of prosecution for such conduct." *Daniel v. Underwood*, 1998 U.S. Dist. LEXIS 22290 (S.D. W. Va. Nov. 5, 1998) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, (1979). *See also Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1985)(one must show a threat of prosecution that is both real and immediate, before a federal court may examine the validity of a criminal statute); *NRA of AM. V. Magaw*, 132 F. 3d 272 (6th Cir. 1997) (Plaintiffs' assertions that they wish or intend to engage in proscribed conduct is not sufficient to establish an injury-in-fact under Article III or confer standing); *Crooker v. Magaw*, 41 F. Supp 2d 87 (D. Mass.

1999) (although Plaintiff need not expose herself to arrest or prosecution under a statute, fear of possible future prosecution does not confer standing).

Here, all that is necessary to grant dismissal of Counts 38, 39 and 40 is examination of the Complaint. Thorough review of the paragraphs pertaining to the City of Dunbar reveals that there is simply no credible threat of prosecution of Mrs. Morgan or any Plaintiff for violation of Dunbar City Code §545.13. Moreover, the Complaint is devoid of any allegation that Mrs. Morgan or any other Plaintiff *intends* to engage in the prohibited conduct. Rather, the Complaint asserts that Mrs. Morgan no longer goes to the Wine Cellar Park or the Dunbar Recreation Center because Dunbar City Code §545.13 prohibits possession of a firearm there. If Mrs. Morgan has no present intent to possess a firearm in the Wine Cellar Park or the Dunbar Recreation Center, there cannot possibly be a credible threat of prosecution. Moreover, the Complaint makes no allegation that Mrs. Morgan has been specifically threatened with prosecution if she violates the provisions of Dunbar City Code §545.13. The most the Complaint can muster in this regard is that Dunbar City Code §545.13 exists and that its prohibitions are displayed on signs at the entrances to affected buildings and parks. Finally, the Complaint does not allege any history of any prosecution of violation of Dunbar City Code §545.13. As set forth more fully below, because (i) Mrs. Morgan has no concrete plan or intent to violate Dunbar City Code §545.13, (ii) there is no specific, credible threat of prosecution, and (iii) because there is no asserted history of any prosecution for violation of Dunbar City Code §545.13, Mrs. Morgan, and the remaining Plaintiffs lack standing to mount a pre-enforcement challenge to Dunbar City Code §545.13 and Counts 38, 39 and 40 of the Complaint should be dismissed in their entirety.

In *San Diego County Gun Rights Committee v. Reno*, 98 F. 3d 1121 (9th Cir. 1996), plaintiffs attempted a pre-enforcement challenge to the Violent Crime Control and Law Enforcement Act of

1994 ("Crime Control Act") which places certain restrictions on possession and manufacture of semiautomatic assault weapons. As here, the Plaintiffs in *San Diego County* sought both declaratory and injunctive relief. In their Complaint, the Plaintiffs alleged that they "wish and intend" to engage in unspecified conduct prohibited by the Crime Control Act. *Id*.

The Court held that the Plaintiffs must show a "genuine threat of imminent prosecution." *Id*. In finding the absence of a genuine threat of imminent prosecution, the Court looked at three factors: (i) specific intent to violate the challenged law, (ii) a specific threat of prosecution, and (iii) history of prior prosecutions. *Id*.

In its analysis, the Court first found that the Plaintiffs had only an indefinite intent to violate the Crime Control Act:

> The first obstacle that plaintiffs encounter in establishing that they face a genuine threat of prosecution is that they have not articulated concrete plans to violate the Crime Control Act. Instead, plaintiffs merely assert that they "wish and intend to engage in activities prohibited by *Section 922(v)(1)*." The complaint does not specify any particular time or date on which plaintiffs intend to violate the Act. As the Supreme Court has observed, "such 'some day' intentions - without any description of concrete plans, or indeed even any specification of *when* the some day will be - do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan, 504 U.S. at 564*.

Id. Significantly, the Court determined that "the acts necessary to make plaintiffs' injury – prosecution under the challenged statute – materialize are almost entirely within plaintiffs' own control." *Id*.

Addressing the lack of any specific threat of prosecution, the Court acknowledged that although a *specific* threat of prosecution could be sufficient to confer standing, a *general* threat of prosecution is insufficient. As stated by the Court "Here, plaintiffs do not identify even a general threat made against them. Plaintiffs concede that they have not been threatened with arrest, prosecution or incarceration." *Id*. Finally, the lack of prior prosecutions for violation of the Crime

Control Act further undermined the *San Diego County* plaintiffs' standing argument: "Plaintiffs' inability to point to any history of prosecutions undercuts their argument that they face a genuine threat of prosecution." *Id*.

More recently, in *Montana Shooting Sports Ass'n v. Holder*, 2010 U.S. Dist. LEXIS 104301 (D. Mont. Aug. 31, 2010),[2] the plaintiffs mounted a pre-enforcement challenge to the Montana Firearms Freedom Act (the "Montana Act") which purports to exempt firearms, accessories, or ammunition manufactured commercially or privately in Montana from federal law or federal regulation. Mont. Code Ann. § 30-20-104.

Plaintiff, Gary Marbut, wrote to the ATF expressing a desire to manufacture firearms, accessories and ammunition consistent with the Montana Act and inquiring whether Federal law would permit him to do so. The ATF took the position that Federal regulations would continue to apply and further wrote to Marbut cautioning that a violation of Gun Control Act and the National Firearms Act "could lead to . . . potential criminal prosecution." *Id*. at 5. Marbut along with the Montana Shooting Sports Association and the Second Amendment Foundation commenced an action for declaratory judgment, seeking among other things, a determination that federal law does not pre-empt the Montana Act. The United States moved to dismiss for lack of standing and additional grounds.

Citing to the US Supreme Court's opinion in *Babbitt*, the Montana District Court stated that: "To demonstrate an injury in fact when bringing such a pre-enforcement challenge, a plaintiff must

[2] Although LEXIS shows no negative history with respect to the Opinion, the Dunbar Defendants are informed and believe that the Montana District Court and the United States Court of Appeals for the Ninth Circuit electronic case filing systems show that some aspect of this case is on appeal. The Dunbar Defendants have been unable to obtain a Statement of Issues on Appeal to determine precisely the issues raised on appeal and briefing is apparently not scheduled to commence until May of 2011. As of the filing of this Memorandum of Law the opinion has not been reversed.

show that 'there exists a credible threat of prosecution.'" *Id*. at 32 (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, (1979). The Court further determined that the mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *Id*.

The Montana District Court articulated a three-pronged standard to assess whether a plaintiff in a pre-enforcement challenge to a criminal statute has established a credible threat of prosecution: (1) whether the plaintiffs have articulated a "concrete plan" to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or enforcement under the challenged statute. *Id*. The Court had no difficulty in determining that Marbut faced no credible threat of prosecution.[3]

Although the Dunbar Defendants have not located any decision from the United States Court of Appeals for the Fourth Circuit cases involving pre-enforcement challenges to gun laws, *Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1985), involves precisely the same analysis under a pre-enforcement challenge to a Virginia anti-fornication law. In discussing the threat of prosecution, the Fourth Circuit stated:

> A litigant must show more than the fact that state officials stand ready to perform their general duty to enforce laws, *Poe v. Ullman, 367 U.S. 497, 501, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961)*; *Watson v. Buck, 313 U.S. 387, 399, 85 L. Ed. 1416, 61 S. Ct. 962 (1941)*. Even past threats of prosecution may not be sufficient to establish a controversy susceptible of resolution in federal court. *See, e.g., Ellis, 421 U.S. 426, 44 L. Ed. 2d 274, 95 S. Ct. 1691*. In short, one must show a threat of prosecution that is both real and immediate, *Golden v. Zwickler, 394 U.S. 103, 109-110, 22 L. Ed. 2d 113, 89 S. Ct. 956 (1969)*, before a federal court may examine the validity of a criminal statute.

[3] The Montana District Court also addressed the fact that the two association plaintiffs could only establish standing through standing of a member in his own right. "While Marbut is a member of Montana Shooting Sports Association, he has failed to demonstrate that he has standing to bring this action in his own right. Consequently, the Montana Shooting Sports Association also lacks standing." *Id*. at 44.

Id. The Court found that the Plaintiffs' fear of prosecution was subjective and failed to establish an objective threat. *Id*. *See also Rock for Life-UMBC v. Hrabowski*, 2010 U.S. App. LEXIS 25800 (4th Cir. Md. Dec. 16, 2010) (denying pre-enforcement challenge to university sexual harassment policy for lack of standing based upon plaintiffs' failure to establish a credible threat of disciplinary action under the sexual harassment policy).

Consistent with the cases discussed above, neither Mrs. Morgan nor any other plaintiff: (i) asserts any intent to violate Dunbar City Code §545.13, or (ii) alleges a credible threat of prosecution. Counts 38, 39 and 40 must be dismissed for lack of Article III standing.

C. Because Plaintiffs Lack Standing To Challenge Dunbar City Code §545.13, Plaintiffs' Claims For Injunctive Relief Also Fail As A Matter Of Law.

It is axiomatic that the injunctive relief sought in the Complaint is dependent upon a declaratory judgment that Dunbar City Code §545.13 is either unconstitutional or otherwise in violation of state statute. Because the Plaintiffs lack standing to pursue Counts 38, 39 and 40 of the Complaint, it follows that any claims to enjoin Mayor Yeager and Chief of Police Whittington from enforcing Dunbar City Code §545.13 fail to state a claim upon which relief may be granted.

II. DUNBAR CITY CODE §545.13 DOES NOT IMPLICATE PROTECTED SECOND AMENDMENT ACTIVITY.

The U. S. Supreme Court concluded in *Heller* that the Second Amendment confers an individual right to keep and bear arms in the home for the purpose of self defense. *See District of Columbia v. Heller*, 554 U.S. 570, 594, 635 (2008).[4] The Court never recognized a right to carry guns in public, but specifically limited its holding to the right to keep firearms in the home. *Id*. at

[4] More recently, in *McDonald*, the Supreme Court held that the Second Amendment right recognized in *Heller* was applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, Ill., __ U.S. __, 130 S.Ct. 3020 (2010).

2822. The Court was clear that it "[did] not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation . . . ." *Id*. at 2799, 2816 ("the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). The Court found a Second Amendment right based in substantial part on a historical review of firearms possession, and in this context expressly limited its finding regarding the scope of the Second Amendment:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th century cases, *commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues*. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or *laws forbidding the carrying of firearms in sensitive places such as schools and government buildings*, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 2816-17 (emphasis added). Moreover, the Court identified these examples as *"presumptively lawful regulatory measures"* and noted that the list "does not purport to be exhaustive." *Id*. at 2817 n.26 (emphasis added).

The Court also recognized that the Constitution allows State and local government to use "a variety of tools" to combat violence, including measures that regulate weapons. *See id*. at 2822. In *McDonald*, the Court repeated its assurances in *Heller* regarding the limited effect on other gun laws and agreed that "state and local experimentation with reasonable firearm regulations will continue under the Second Amendment," and that the Court's holding "does not imperil every law regulating firearms." 130 S.Ct. at 3047. Significantly, neither *Heller* nor *McDonald* disturbed the holding in *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897), where the Supreme Court

recognized that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Baldwin*, 165 U.S. at 281-82. This Court should reject any interpretation of *Heller* as implicitly overruling *Robertson's* recognition that the Second Amendment does not protect a right to carry firearms, especially given the approval of reasonable state regulations in *Heller* and *McDonald*.

Federal and state courts interpreting *Heller* have cautioned against construing its holding more broadly than the Court intended. *See, e.g., United States v. Tooley*, 717 F. Supp.2d 580, 596 (S.D.W. Va. 2010) ("[P]ossession of a firearm outside of the home or for purposes other than self-defense in the home are not within the "core" of the Second Amendment right as defined by *Heller*.") (*emphasis added*); *Gonzales v. Village of West Milwaukee*, 2010 WL 1904977 (E.D. Wis. May 11, 2010) ("The Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home."); *United States v. Hart*, 726 F. Supp.2d 56, 60 (D. Mass. 2010) ("*Heller* does not hold, or even suggest, that concealed weapons laws are unconstitutional."); *Dorr v. Weber*, 741 F. Supp.2d 993, 1005 (N.D. Iowa 2010) ("*Roberston* remains the law, and a "right to carry a concealed weapon under the Second Amendment has not been recognized to date."); *State of Illinois v. Dawson*, 934 N.E.2d 598, 605-06 (Ill. App. 2010) (*Heller* limited its ruling to interpreting the Second Amendment's protection of the right to possess handguns in the home, not the right to possess handguns outside the home in case of confrontation); *State v. Knight*, 218 P.3d 1177, 1189 (Kan. Ct. App. 2009) (*Heller* related to use of a handgun in the home for self defense purposes, but did not establish a right to carry concealed weapons).

Throughout history governments exercising police power have had "great latitude" to protect their citizens' lives and safety. *Medtronic v. Lohr*, 518 U.S. 470, 475 (2006). There is no reason to believe that latitude does not encompass laws prohibiting the carrying of firearms in

"sensitive areas." In fact, the Supreme Court recognized that regulations prohibiting the carrying of firearms in sensitive places, such as schools and government buildings, are presumptively valid. *See Heller*, 554 U.S. at 626-627. As with government buildings, city-owned parks and/or recreation areas where individuals congregate for a number of purposes, are sensitive places where it is permissible to prohibit the possession of firearms. *See Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009); 575 F.3d 890 (9th Cir. 2009)(ordering rehearing en banc); 611 F.3d 1015 (9th Cir. 2010)(remanding back to panel after *McDonald*)[5] (finding that open, public spaces fit within the same category as schools and government buildings and that prohibiting the possession of firearms on municipal property fits within the exception from the Second Amendment for sensitive places that *Heller* recognized); *Warden v. City of Seattle*, 697 F. Supp.2d 1221, 1228-29 (W.D. Wash. 2010)[6] ("As with a government building or school, a city-owned park where children and youth recreate is a 'sensitive' place where it is permissible to ban possession of firearms.").

The Dunbar firearm regulation at issue in this case does not meaningfully impede on the ability of individuals to keep handguns in defense of their homes. Instead, it pertains only to carrying and/or possessing firearms in sensitive areas (city buildings and city parks), a different issue entirely, and one that neither the Supreme Court nor any other federal court has recognized to

[5] The *Nordyke* opinion was issued after the Supreme Court's Heller decision, but before *McDonald*. Prior to addressing the constitutionality of the county ordinance, the panel held that the Second Amendment was incorporated by the Due Process Clause of the Fourteenth Amendment. 563 F.3d at 457. The Ninth Circuit set the case for rehearing en banc. 575 F.3d 890 (9th Cir. 2009). After *McDonald* was decided by the Supreme Court, the Ninth Circuit remanded the case back to the same panel. 611 F.3d 1015 (9th Cir. 2010). Although its decision is vacated, the panel's analysis of laws regulating guns in sensitive places has been recognized by other courts. *See, e.g., United States v. Masciandaro*, __F.3d __, 2011 WL 1053618, *13 (4th Cir. 2011); *Brown v. United States*, 979 A.2d 630, 641 (D.C. Cir. 2009).

[6] Although the *Warden* court found the Second Amendment inapplicable to cities and states since it was pre-McDonald, its analysis regarding city parks as sensitive places is persuasive because the court relied on *Heller* as guidance to assess the scope of the rights reserved to individuals in Article I, § 24 of the Washington State Constitution. *See id*. at 1228.

date as protected under the Second Amendment.[7] As a result, and notwithstanding that the Plaintiffs lack standing as set forth more fully above, the Court should find that Plaintiffs' challenge is not based on protected Second Amendment activity.

A. Even If Dunbar City Code §545.13 Did Implicate Protected Second Amendment Activity, It Withstands The Appropriate Level Of Scrutiny As A Reasonable Regulation Of Firearms In "Sensitive Areas."

The U.S. Supreme Court has indicated that firearms prohibitions should be scrutinized at a higher level than rational basis analysis. *Heller*, 554 U.S.at 628 n.27. Although the Supreme Court declined to pronounce the appropriate level of scrutiny, it has indicated that strict scrutiny is not appropriate for restrictions on possession of firearms in "sensitive places." *See Heller*, 554 U.S.at 627 n.26 (finding that restrictions on the possession of firearms in "sensitive places" are "presumptively lawful"). Within the Fourth Circuit, two recent decision have applied the intermediate scrutiny standard, *United States v. Masciandaro*, __F.3d __, 2011 WL 1053618, *13 (4th Cir. 2011) (prohibition on carrying or possessing a loaded weapon in a motor vehicle within a national park area) and *United States v. Chester*, 628 F.3d 673, 677 (4th Cir. 2010)(prohibition on possession of firearms by person convicted of a misdemeanor crime of domestic violence). In *Masciandaro*, the Fourth Circuit recognized "that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home" and then applied an intermediate scrutiny standard.

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[7] This Court should be mindful of Judge Wilkinson's statement on behalf of the majority in *United States v. Masciandaro*, __F.3d __, 2011 WL 1053618, *17 (4th Cir. 2011):

> This case underscores the dilemma faced by lower courts in the post-*Heller* world: how far to push Heller beyond its undisputed core holding. On the question of *Heller's* applicability outside the home environment, we think it prudent to await direction from the Court itself. *See Williams v. State*, 10 A.3d 1167, 1177 (Md.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."); *see also Sims v. United States*, 963 A.2d 147, 150 (D.C.2008).

Following this logic, the majority of federal courts, post-*Heller*, have addressed the right to bear arms outside the home under intermediate scrutiny. *See, e.g., United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) (ban on possession of handgun with obliterated serial number evaluated under intermediate scrutiny). Under an intermediate scrutiny standard, a regulation may be upheld if the government can demonstrate that it is reasonably adapted to a substantial government interest. *See Masciandaro*, 2011 WL 1053618, *13 (4th Cir. 2011). Importantly, "intermediate scrutiny does not require that the regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question." *See id*. at *16 (*citing United States v. Baker*, 45 F.3d 837, 847 (4th Cir. 1995).

Under intermediate scrutiny, Dunbar City Code §545.13 is valid. This ordinance promotes a number of important interests on the part of the City of Dunbar. Municipalities are authorized by statute to maintain and operate public buildings, recreational parks, playgrounds and other recreational facilities for public use. *See* W. Va. Code §8-12-5(13),(16),(36)-(39), (44).[8] Dunbar has a substantial interest in providing for the safety of individuals who visit and/or make use of city buildings and city parks. *See Heller*, 554 U.S. at 626-27 (noting that laws forbidding the carrying of firearms in "sensitive places" such as schools and government buildings are presumptively lawful); *Masciandaro*, 2011 WL 1053618 at *13 ("the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks") (citing cases describing government's interest in public safety as compelling); *Warden v. Nickels, et al.*, 697 F. Supp. 2d

[8] In West Virginia, municipalities have plenary power to enact ordinances to provide for the safety and welfare of its citizens; to prevent injury to the public or individuals from anything dangerous; to punish any individual for carrying a revolver or other pistol; to establish, maintain and operate public buildings, recreational parks, playgrounds and other recreational facilities for public use; and to establish maintain and operate instrumentalities for the improvement, recreation and welfare of the municipality's inhabitants as necessary or appropriate for the public interest. *See* W. Va. Code §8-12-5(13),(16),(36)-(39), (44).

1221, 1229 (W. D. Wa. 2010) (citing *Heller*, 554 U.S. at 626-27) (finding that a city-owned park where children and youth recreate is a sensitive place where it is permissible to ban the possession of firearms, as with a government building or school).[9]

The Dunbar ordinance at issue in this case directly advances this important interest by prohibiting the possession of certain weapons at city buildings and city parks. By deterring potential violence at these "sensitive areas," the ordinances assist the citizens of Dunbar in visiting these locations without fear of violence or intimidation.

City buildings and city parks are not akin to a gun owner's home, but are public places in which a large number of people, including children, can visit and/or congregate for a number of purposes. These circumstances justify reasonable measures to secure public safety. *See Masciandaro*, 2011 WL 1053618 *15 (recognizing that a national park area where large numbers of people congregate for recreation justifies reasonable measure to secure public safety). Dunbar City Code § 545.13 is reasonably adapted to advance the important government interest of enhancing public safety on city-owned property by deterring crime without infringing upon the right to keep and bear arms in the home. The ordinance survives intermediate scrutiny as a permissible restriction on the possession of firearms in "sensitive areas," and does not violate the Second Amendment as applied to Plaintiffs' allegations.

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[9] In addressing a challenge to an ordinance under state constitution, the U.S. District Court for the Western District of Washington recognized that a city-owned park where children and youth recreate is a sensitive place where it is permissible to ban the possession of firearms, as with a government building or school. *See Warden v. Nickels, et al.*, 697 F. Supp. 2d 1221, 1229 (W.D. Wa. 2010) (citing *Heller*, 128 S.C.t at 2816-17)(There is "no logical distinction between a school on the one hand and a community center where educational and recreational programming for children is also provided on the other. Just as Federal Courts do not want civilians entering into courthouses with weapons, the City does not want those firearms entering parks where children and youth are likely present.").

To the extent that Plaintiffs assert that Dunbar City Code § 545.13 is facially unconstitutional under the Second Amendment, that claim must fail as well. Facial challenges are disfavored in the law. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). A facial challenge can succeed only when a plaintiff shows that "no set of circumstances exists under which the [ordinance] would be valid." *Id*. at 1190 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987). To be facially invalid, the law must be unconstitutional in all of its applications. *Id.* In the present case, Plaintiffs have failed to demonstrate that no set of circumstances exists under which the law would be valid because the law does not violate the Second Amendment as applied to them.

III. DUNBAR CITY CODE §545.13 IS A PROPER EXERCISE OF POLICE POWER AND A REASONABLE LIMITATION TO THE RIGHT TO KEEP AND BEAR ARMS UNDER THE W. VA. CONSTITUTION.

The West Virginia Constitution, Article III, Section 22 provides, "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." However, the Supreme Court of Appeals of West Virginia has recognized that this right is not unlimited. *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 145 (W. Va. 1988). Specifically, the right to keep and bear arms must be balanced with the State's duty pursuant to its police power to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens. *See id*. at 467. The legislature "may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed to not frustrate the constitutional freedoms guaranteed by article III, section 22 of the West Virginia Constitution (known as the Right to Keep and Bear Arms Amendment)." *Perito v. The Couth of Brooke*, 597 S.E.2d 311, 315-16 (W. Va. 2004). Specifically, the Supreme Court of

Appeals of West Virginia has held that "the legislature may enact laws limiting one's firearm rights in conjunction with its inherent police power." *Rohrbaugh v. State of West Virginia*, 607 S.E.2d 404, 413 (W. Va. 2004). Among the restrictions the Supreme Court of Appeals of West Virginia has upheld as being constitutionally within the Legislature's police power are prohibitions on the vehicular transportation of a loaded firearm; criminal penalties for the brandishment of a firearm; and misdemeanor charges for the negligent shooting, wounding, or killing of another while hunting." *See id*. at 413 (citing cases). The Supreme Court of Appeals of West Virginia also found that the restrictions contained in W. Va. Code §61-7-7 limiting the firearm rights of ex-felons were reasonable as applied to a convicted felon who received pardon, in light of the wide acceptance of such prohibitions. *See id.* at 414.

West Virginia law permits the "governing body of any municipality" to adopt ordinances relating to "general public, health, safety or welfare." W. Va. Code §8-11-4. The Supreme Court of Appeals of West Virginia has held that ordinances concerning the public health, safety or welfare are presumed to have been "passed in good faith," and that the "legislative body of the municipality acted in the best interest of the community." *Perdue v. Ferguson*, 350 S.E.2d 555, 560 (W. Va. 1986). W.Va. Code § 8-12-5 of the West Virginia Code also provides municipalities with the power to "prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome."[10] In the present case, prohibiting the possession of weapons at city buildings and city parks is a proper exercise of a municipality's plenary power to enact ordinances

[10] Municipalities have plenary power to enact ordinances to provide for the safety and welfare of its citizens; to prevent injury to the public or individuals from anything dangerous; to punish any individual for carrying a revolver or other pistol; to establish, maintain and operate public buildings, recreational parks, playgrounds and other recreational facilities for public use; and to establish maintain and operate instrumentalities for the improvement, recreation and welfare of the municipality's inhabitants as necessary or appropriate for the public interest. *See* W. Va. Code §8-12-5(13),(16),(36)-(39), (44).

to protect the safety and welfare of its citizens. City buildings and city parks are public places where a large number of people, including children, can visit and/or congregate for a number of purposes. Such circumstances justify reasonable measures to ensure public safety. *See Masciandaro*, 2011 WL 1053618 *15.

Moreover, as set forth in Section IV below, the West Virginia Legislature expressly exempted prior municipal ordinances from its 1999 amendment to W. Va. Code §8-12-5a. In so doing, the Legislature effectively pronounced that "municipalities *may* regulate or impose limitations on possession and use of firearms so long as they did so prior to this amendment." Acts of the Legislature are always presumed to be constitutional *State ex rel. City of Charleston v. Coghill*, 207 S.E.2d 113, 118 (W. Va. 1973). In this case, this Court should conclude that Dunbar City Code § 545.13 was properly promulgated by the City of Dunbar. This Court should further conclude that West Virginia law permits reasonable limitations on the right to keep and bear arms, *Rohrbaugh, supra.*, and that Dunbar City Code § 545.13 does not violate Article III, Section 22 of the West Virginia Constitution.

IV. COUNT 40 OF THE COMPLAINT SHOULD BE DISMISSED ON THE INDEPENDENT AND ALTERNATIVE GROUND THAT DUNBAR CITY CODE §545.13 PREDATES THE AMENDMENT OF W. VA. CODE §8-12-5a AND IS EXEMPT FROM APPLICATION OF THE STATUTE.

Count 40 of the Complaint simply asserts, without specificity, that Dunbar City Code §545.13 is unauthorized by statute and void on its face as a matter of state law. West Virginia Code §8-12-5(16) historically allowed municipalities to regulate individuals carrying revolvers, pistols or other dangerous weapons. However, on March 3, 1999, the West Virginia Legislature amended W. Va. Code §8-12-5a to preclude municipalities from regulating the transporting of certain dangerous weapons, but it include the following language: "*Provided*, That any municipal ordinance in place

as of the effective date of this section shall be excepted from the provisions of this section . . ." *Id*. Because Dunbar City Code §545.13 was enacted in 1996, it predates amended W. Va. Code §8-12-5a and is excluded from the scope of the statute's prohibition against a municipality restricting possession of a firearm. As a result, Count 40 of the Complaint fails to state a claim upon which relief may be granted and should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants City of Dunbar, Jack Yeager, in his official capacity as Mayor of the City of Dunbar and Earl Whittington, in his official capacity as Chief of Police of the City of Dunbar, move this Court to dismiss Counts 38, 39 and 40 of the Complaint either for lack of jurisdiction or for failure to state a claim under Rules 12(b)(1) and 12(b)(6), respectively.

CITY OF DUNBAR
JACK YEAGER, MAYOR, and
EARL WHITTINGTON, CHIEF OF POLICE,
By Counsel

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III (WV Bar No. 155)
Spencer D. Elliott (WV Bar No. 8064)
Lewis, Glasser, Casey & Rollins, PLLC
P.O. Box 1746
Charleston, West Virginia 25326
Telephone: (304) 345-2000
Facsimile: (304) 343-7999