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

CITY OF CHARLESTON, et al,

Defendants.

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

Defendants City of South Charleston, Frank A. Mullens, in his official capacity as the Mayor of the City of South Charleston and Brad L. Rinehart, in his official capacity as the Chief of Police of the City of South Charleston (collectively "South Charleston Defendants" or "Defendants") submit this Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' First Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

INTRODUCTION

Plaintiffs, a group of citizens, a firearms dealer, and a gun rights organization, challenge several ordinances regulating the possession of firearms in the cities of Charleston, South Charleston and Dunbar. In Counts 35, 36 and 37 of the First Amended Complaint, Plaintiffs allege that South Charleston City Code §545.15, which regulates the possession of firearms at city-owned buildings, parks and recreation areas, violates the Second Amendment to the United States Constitution, the West Virginia Constitution and state statutory law. The South Charleston Defendants seek dismissal of these Counts pursuant to Federal Rules of Civil Procedure 12(b)(1)

and (6). As more fully set forth below, this Court lacks subject matter jurisdiction because, under the applicable standard for standing to mount a pre-enforcement challenge to a criminal statute, the Complaint reveals that no Plaintiff faces a credible threat of prosecution. For the same reason, the injunctive relief sought against Defendants Frank Mullens and Brad Rinehart is unavailable.

Assuming *arguendo* that Plaintiffs have established standing, Plaintiffs' constitutional challenges must also fail. South Charleston City Code §545.15 does not violate the Second Amendment under United States Supreme Court in District of Columbia v. Heller, 128 S.Ct. 2783 (2008) and McDonald v. City of Chicago, Ill., __ U.S. ___, 130 S.Ct. 3020 (2010). Likewise, §545.15 does not violate the West Virginia Constitution because it is a reasonable restriction on the right to keep and bear arms as defined in Article III, §22. Finally, Plaintiffs' claim that §545.15 is unauthorized by state statute also fails because it was lawfully enacted prior to the 1999 amendment to West Virginia Code §8-12-5(a). Accordingly, as more fully set forth below, the Court should grant the South Charleston Defendants' Motion to Dismiss Counts 35, 36 and 37 of the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

FACTUAL BACKGROUND

In 1994, South Charleston's City Council enacted §545.15 of the South Charleston City Code, which regulates possession of firearms at city-owned buildings, parks and recreation areas.[1] At the time §545.15 was passed, W. Va. Code §8-12-5(16) authorized the ordinance. In 1999 the legislature enacted W. Va. Code §8-12-5a, which prohibited municipalities from, *inter alia*, regulating the possession of firearms. However, that section expressly grandfathered any

[1] South Charleston City Code §545.15 provides, in pertinent part: "No person other than an authorized law enforcement official shall bring into or have in his possession in any City-owned

ordinances passed prior to the amendment. See W. Va. Code §8-12-5a. On March 16, 2011, Plaintiffs, West Virginia Citizens Defense League, Inc. ("WVCDL"), Keith T. Morgan ("Mr. Morgan"), Elizabeth L. Morgan ("Mrs. Morgan"), Jereomy W. Schulz ("Mr. Schulz"), Benjamin L. Ellis ("Mr. Ellis") and Masada Enterprises, LLC ("Masada") filed the First Amended Complaint against the South Charleston Defendants and additional municipal corporations and government officials, asserting, *inter alia*, that a number of city ordinances that regulate firearms are unconstitutional.

In the Counts against South Charleston, Plaintiffs claim that the prohibition of carrying weapons at the locations specified in South Charleston City Code §545.15 violates the Second Amendment to the United States Constitution and Article III, §22 of the West Virginia Constitution and is void on its face and as applied to Plaintiffs. See Complaint at Counts 35 and 36. Plaintiffs further allege, without any level of specificity, that South Charleston City Code §545.15 is unauthorized by state law and is void on its face and as a matter of state law. See id. at Count 37.

In support of these allegations, Plaintiffs allege that Mr. Schulz frequently visits Joplin Park, and that Mr. Morgan, Mrs. Morgan, and Mr. Ellis occasionally visit public parks, recreation areas, or buildings owned by the City of South Charleston. Complaint, ¶¶ 202-03. These Plaintiffs allege that they "reasonably fear arrest, prosecution, fine, and imprisonment if they set foot in any location described in South Charleston City Code §545.15 while exercising their constitutionally-protected right to keep and bear arms for personal protection." See id. at ¶204. These Plaintiffs further allege that "[b]ut for the ongoing threat of enforcement of South

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building, park or recreation area, any revolver, pistol . . ., or any other dangerous or deadly weapon of like kind or character."

Charleston City Code §545.15, they "would regularly carry handguns when they visit various locations described in South Charleston City Code §545.15." See id. at ¶205.

Beyond the specific reference to these Plaintiffs (only one being a resident of South Charleston), 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 South Charleston City Code §545.15 while exercising their constitutionally-protected right to keep and bear arms for personal protection." See id. at ¶ 204

ARGUMENT

I. Plaintiffs Lack Standing to Challenge South Charleston City Code §545.15 as Set Forth in Counts 35, 36 and 37 of the Complaint.

A. Legal Standard

Rule 12(b)(1) provides for dismissal when a court lacks subject matter jurisdiction. Fed. R. Civ. Pr. 12(b)(1). Article III, Section 2 of the Constitution limits the jurisdiction of federal courts to actual cases and controversies. Bishop v. Barlett, 575 F.3d 419, 423 (4th Cir. 2009). To establish standing, the party invoking federal jurisdiction must show: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) causation; and (3) redressibility. See id. at 423; see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 556-61 (1992).

"To establish standing to challenge the constitutionality of a statute under Babbitt, 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 statute, and that there exists a credible threat of prosecution for such conduct." See 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)).

The Fourth Circuit and Supreme Court have "made it abundantly clear that one challenging the validity of a criminal statute must show a threat of prosecution under the statute to present a case or controversy. Doe v. Duling, 782 F.2d 1202, 1205 (4th Cir. 1986) (citing, inter alia, Babbitt, 442 U.S. at 298-9; Ellis v. Dyson, 421 U.S. 426 (1975)). The threat of prosecution must be "credible and alive at each stage of the litigation." Id. at 1206 (citing Poe v. Ullman, 367 U.S. 497, 501 (1961)). A Plaintiff must allege "more than the fact that state officials stand ready to perform their general duty to enforce laws." Id. (citing Golden v. Zwickler, 394 U.S. 103, 109-110 (1969)).

The party invoking federal jurisdiction bears the burden of establishing the case-or-controversy standing requirement. Bishop, 575 F.3d at 424 (citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990)). That party "must include the necessary factual allegations in the pleading, or else the case must be dismissed for lack of standing. Id. (citing McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936)).

B. Plaintiffs, Mr. Morgan, Mrs. Morgan, Mr. Schulz and Mr. Ellis, Have Not Alleged A Credible and Imminent Threat of Prosecution.

A review of the Complaint in the present case reveals that it is devoid of any allegation that any one of the individual Plaintiffs or any member of WVCDL has been arrested, prosecuted, fined, imprisoned, or otherwise sanctioned for violation of South Charleston City Code §545.15. Nor do Plaintiffs allege any credible, "real and immediate" threat of such repercussions. See Duling, 782 F.2d at 1205. The Complaint is devoid of any allegation that Plaintiffs have been specifically threatened with prosecution if they violate the provisions of South Charleston City Code §545.15. Moreover, the Complaint is devoid of any allegation that these Plaintiffs intend to engage in the prohibited conducted. Rather, the Complaint asserts that these Plaintiffs do not carry firearms at those locations because South Charleston §545.15

prohibits it. If Plaintiffs have no present intent to possess a firearm at these locations, there cannot possibly be a credible threat of prosecution. Finally, the Plaintiffs do not allege any history of any prosecution of violation of South Charleston City Code §545.15. As illustrated in the cases discussed below, in the absence of such allegations, Plaintiffs lack standing to mount a pre-enforcement challenge to §545.15 and Counts 35, 36 and 37 of the Complaint must be dismissed.

In San Diego County Gun Rights Committee v. Reno, 98 F. 3d 1121 (9th Cir. 1996) (hereinafter "San Diego County"), 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.

Addressing the lack of any specific threat of prosecution, the court acknowledged although that a *specific* threat of prosecution could be sufficient to confer standing, a *general* threat of prosecution is insufficient. As stated by the court "[h]ere, 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.

In NRA v. Magaw, 132 F.3d 272, 293 (6th Cir. 1997), the Sixth Circuit found that individual and association plaintiffs lacked standing to challenge a law prohibiting the transfer or possession of semiautomatic assault weapons and large capacity ammunition feeding devices based upon the following reasoning:

> The individual plaintiffs aver that they "desire" and "wish" to engage in certain possibly prohibited activities, but are "restrained" and "inhibited" from doing so. They allege that they "are unable and unwilling, in light of the serious penalties threatened for violation of the statute, to obtain and possess the firearms and large capacity ammunition feeding devices prohibited by the statute." Although the standing requirement of an injury-in-fact is fairly lenient and may include a wide variety of economic, aesthetic, environmental, and other harms, the individual plaintiffs herein allege merely that they would like to engage in conduct, which might be prohibited by the statute, without indicating how they are currently harmed by the prohibitions other than their fear of prosecution. Plaintiffs' assertions that they "wish" or "intend" to engage in proscribed conduct is not sufficient to establish an injury-in-fact under Article III. The mere "possibility of criminal sanctions applying does not in and of itself create a case or controversy." The individual plaintiffs have failed to show the high degree of immediacy necessary for standing when fear of prosecution is the only harm alleged.

Id. at 293 (citing, inter alia, San Diego County, 98 F.3d at 1127) (emphasis added).

The court dismissed the claims for lack of standing even though the plaintiffs in that case had telephoned authorities, posed hypothetical questions, and received an answer that the subject activity could subject them to federal prosecution. Id. Even in those circumstances, which allege a threat with more credibility than that at issue here, the court found the threat of prosecution to be "abstract, hypothetical, and speculative. Id. at 293-94.; see also Duling, 782 F.2d at 1205 ("A litigant must show more than the fact that state officials stand ready to perform their general duty to enforce laws."); Mont. Shooting Sports Ass'n, 2010 U.S. Dist. LEXIS 104301, *36-45 (finding that a general threat of prosecution is not enough to confer standing); Kegler v. United States DOJ, 436 F. Supp.2d 1204, 1219-20 (D. Wyo. 2006).

Consistent with the cases discussed above, the Plaintiffs in this case do not assert any intent to violate South Charleston City Code §545.15 nor do they face a credible threat of prosecution by the South Charleston Defendants. Accordingly, Counts 35, 36 and 37 must be dismissed for lack of standing. [2]

C. 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

[2] Dismissal of these claims is also warranted under Fourth Circuit precedent on federal court review of state criminal statutes. As the court explained in Duling, federal courts are "principally deciders of disputes, no oracular authorities." 782 F.2d at 1205. "The case or controversy requirement maintains proper separation of powers between courts and legislatures, provides courts with arguments sharpened by the adversarial process, and narrows the scope of judicial scrutiny to specific facts. Where state criminal statutes are challenged, the requirement protects federalism to specific facts. Where state criminal statutes are challenged, the requirement protects federalism by allowing the state to control the application of their own criminal laws." Id. (emphasis added). Where, as here, no prosecution or credible threat of prosecution is before the Court, no case or controversy exists and this Court cannot pass judgment on the adequacy of the South Charleston ordinance.

(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).

As set forth above, Mr. Morgan, Mrs. Morgan, Mr. Schulz and Mr. Ellis are the only Plaintiffs (and specified members of WVCDL) who allegedly fear arrest, prosecution, fine and imprisonment if they carry a firearm on City of South Charleston property within the purview of South Charleston City Code §545.15.[3] Since they lack standing to pursue the claims in Counts 35, 36 and 37, WVCDL also lacks standing to pursue those claims.

II. Plaintiffs Fail to State a Claim Upon Which Relief May Be Granted with Respect to Counts 35, 36 and 37.

A. Legal Standard

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). In assessing a Rule 12(b)(6) motion for failure to state a claim, the court must accept the factual allegations in the complaint as true. Advanced Health-Care Servs., Inc.

[3] Otherwise, the Complaint only vaguely alleges that other members of the WVCDL fear arrest, prosecution, fine and imprisonment if they carry a firearm on City of South Charleston property. Complaint at ¶204.

v. Radford Cmty. Hosp., 910 F.2d 139, 143 (4th Cir. 1990). The court need not accept legal conclusions. Evans v. CDX Servs., LLC, 528 F. Supp.2d 599, 603 (S.D. W. Va. 2007) (citing Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994)).

B. South Charleston City Code §545.15 Does Not Implicate Protected Second Amendment Activity Because *Heller* and *McDonald* Did Not Establish a Fundamental Right to Carry Firearms in Public Places.

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, 128 S.Ct. 2783, 2799, 2822 (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 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

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[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., 130 S.Ct. 3020 (2010).

> 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, 128 S.Ct. at 2817-18. As with government buildings, city-owned parks and 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

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[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

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 South Charleston ordinance at issue in this case does not meaningfully impede on the ability of individuals to keep handguns in defense of their homes. Instead, it only pertains to carrying and/or possessing firearms in sensitive areas (city buildings, parks and recreation areas), a different issue entirely, and one that neither the Supreme Court nor other courts have recognized as protected under the Second Amendment.[7] As a result, the Court should find that Plaintiffs' challenge is not based on protected Second Amendment activity.

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by other courts. See, e.g., United States v. Masciandaro, 648 F. Supp.2d 779, 790-91 (E.D. Va. 2009); 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.

[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).

C. Even if South Charleston City Code §545.15 Implicates 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, 128 S.Ct. at 2817 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, 128 S.Ct. at 2817 n.26 (finding that restrictions on the possession of firearms in "sensitive places" are "presumptively lawful"). See Heller, 128 S.Ct. at 2817 n.26. Two recent decisions in the Fourth Circuit 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. 2011 WL 1053618 at *13.

Following this logic, the majority of federal courts, post-Heller, have addressed the right to bear arms outside the home under an intermediate scrutiny standard. 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, South Charleston City Code §545.15 is valid. This ordinance promotes a number of important interests on the part of the City of South Charleston. 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). South Charleston has a substantial interest in providing for the safety of individuals who visit and/or make use of city buildings, parks and recreation areas. See Heller, 128 S.Ct. at 2817 (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 1221, 1229 (W. D. Wa. 2010) (citing Heller, 128 S.Ct. at 2816-17) (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).[8]

[8] In addressing a challenge to an ordinance under state constitution, the United States 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.").

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

City buildings, parks and recreation areas 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). South Charleston City Code §545.15 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. South Charleston City Code §545.15 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.

Plaintiffs' claim that South Charleston City Code §545.15 is facially unconstitutional under the Second Amendment must fail as well. Facial challenges are disfavored in the law. Wash. State Grange v. Wash. State Republican Party, 128 S.Ct. 1184, 1191 (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 South Charleston City Code §545.15 would be valid because it does not violate the Second Amendment as applied to them.

D. South Charleston City Code §545.15 Contains Reasonable Limitations With Respect to the Right to Keep and Bear Arms under the West Virginia Constitution and Therefore Constitutes a Proper Exercise of Police Power.

The West Virginia Constitution, Article III, § 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." 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). Section 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." [9] W. Va. Code 8-12-5(13). In the present case, prohibiting the possession of weapons at city buildings, parks and recreation areas is a proper exercise of a municipality's plenary power to enact ordinances to protect the safety and welfare of its citizens. City buildings, parks and recreation areas 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 E 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 could regulate the possession and use of firearms prior to the enactment of the amendment. Acts of the Legislature are always

[9] 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

presumed to be constitutional. State ex rel. City of Charleston v. Coghill, 207 S.E.2d 113, 118 (W. Va. 1973). In this case, the Court should conclude that South Charleston City Code § 545.15 was properly promulgated by the City of South Charleston. This Court should further conclude that West Virginia law permits reasonable limitations on the right to keep and bear arms, Rohrbaugh, *supra*., and that South Charleston City Code § 545.15 does not violate Article III, Section 22 of the West Virginia Constitution.

E. Count 37 of the Complaint Should Be Dismissed on the Independent and Alternative Ground That South Charleston City Code §545.15 Predates the Enactment of W. Va. Code §8-12-5(a) and is Exempt From Application of the Statute.

Count 37 of the Complaint simply asserts, without specificity, that South Charleston City Code §545.15 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 South Charleston City Code §545.15 was enacted in 1994, 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 37 of the Complaint fails to state a claim upon which relief may be granted and should be dismissed.

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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).

F. Because Plaintiffs Lack Standing To Pursue A Pre-Enforcement Challenge To South Charleston City Code §545.15, Plaintiffs' Claims For Injunctive Relief Against Defendants Mullens And Rinehart 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 South Charleston City Code §545.15 is either unconstitutional or otherwise in violation of state statute. Because the Plaintiffs lack standing to pursue the claims asserted in Counts 35, 36 and 37 of the Complaint, it follows that any claims to enjoin Mullens and Rinehart from enforcing South Charleston City Code §545.15 fail to state a claim upon which relief may be granted.

CONCLUSION

For the foregoing reasons, the Court should dismiss Counts 35, 36 and 37 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 SOUTH CHARLESTON FRANK A. MULLENS, MAYOR, and BRAD L. RINEHART, CHIEF OF POLICE,

By counsel,

/s/ W. Michael Moore
W. Michael Moore (WVSB #5168)
Alicia A. Deligne (WVSB #10343)
MOORE & BISER PLLC
317 Fifth Avenue
South Charleston, WV 25303
Phone: 304-414-2300
Fax: 304-414-4506