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' MEMORANDUM OF LAW IN RESPONSE AND OPPOSITION TO DUNBAR DEFENDANTS' FIRST MOTION TO DISMISS**

Plaintiffs, by and through their undersigned counsel, respectfully submit the following in response and opposition to the Dunbar Defendants' pre-answer motion to dismiss. Dkt. 18.

## I. INTRODUCTION

On January 24, 2011, Plaintiffs filed the instant action. On March 16, 2011, Plaintiffs filed their First Amended Complaint. Dkt. 13. On March 22, 2011, by stipulation of the parties, Dkt. 15, this court extended the time for the "South Charleston Defendants" and the "Dunbar Defendants" to file their answers or Rule 12 motions to April 15, 2011. On April 15, 2011, the Dunbar Defendants filed a pre-answer motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Dkt. 18, alleging lack of standing by Plaintiffs and failure to state a claim upon which relief may be granted and a memorandum of law in support of said motion, Dkt. 19. For the reasons stated herein, Plaintiffs respectfully requests that this Honorable Court deny the Dunbar Defendants' Pre-Answer Motion to Dismiss or, in the alternative, grant Plaintiffs leave to file an amended Complaint in light of any deficiencies this Honorable Court may identify.

## II. PLAINTIFFS HAVE STANDING TO SUE.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Dunbar Defendants' contention that this Honorable Court is without jurisdiction to hear Plaintiffs' challenge to Dunbar City Code § 545.13 because no individual plaintiff or other member of West Virginia Citizens Defense League, Inc. (hereinafter "WVCDL"), has been identified as under an immediate, actual threat of criminal prosecution, is contrary to recent Supreme Court precedent. Although there must be some minimal threat of adverse action before an allegedly threatened party gains standing to sue,

> where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

*MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) (8-1 decision). With the exception of *Montana Shooting Sports Ass'n v. Holder*, 2010 WL 3926029 (D. Mont. Aug. 31, 2010), whose finality the Dunbar Defendants wisely disclaim, the cases cited by the Dunbar Defendants supporting a more restrictive standard for standing predate *MedImmune*, which is controlling in this case.

In this case, the Dunbar Defendants are mounting only a "facial attack"—as opposed to a "factual attack"—on the Complaint's allegations regarding whether any individual plaintiff or other identified WVCDL member would otherwise have standing to sue as individuals under *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986). *See also Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). As this Court has recently explained:

> Generally, challenges to jurisdiction under Rule 12(b)(1) may be raised in two distinct ways: "facial attacks" and "factual attacks." *Thigpen*[], 800 F.2d [at] 401 n. 15[]. A "facial attack" questions whether the allegations in the complaint are sufficient to sustain the court's jurisdiction. *Id.* If a "facial attack" is made, the court must accept the allegations in the complaint as true and decide if the complaint is sufficient to confer subject matter jurisdiction. *Id.*
>
> On the other hand, a "factual attack" challenges the truthfulness of the factual allegations in the complaint upon which subject matter jurisdiction is based. In this situation, a "district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment."

*Ohio Valley Environmental Coalition, Inc. v. Apogee Coal Co., LLC*, 531 F.Supp.2d 747, 764 (S.D. W.Va. 2008) (internal citations and footnote omitted) ("OVEC I"). In deciding Rule 12(b)(1) motion, a court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (internal quotation marks and citation omitted).

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (*quoting Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)) (quotation marks and alteration in original). A plaintiff's standing oes not depends not upon the merits, *see Warth*, 422 U.S. at 500, but on "whether the plaintiff is the proper party to bring [the] suit." *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *see also Libertad v. Welch*, 53 F.3d 428, 437 n.5 (1st Cir. 1995) ("An analysis of a plaintiff's standing focuses not on the claim itself, but on the party bringing the challenge; whether a plaintiff's complaint could survive on its merits is irrelevant to the standing inquiry."). If a plaintiff's legally-protected interest hinged on whether a given claim could succeed on the merits, then "every unsuccessful plaintiff will have lacked standing in the first place." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997).

It is well-settled that an individual has standing to sue if (1) the person has suffered an actual or threatened injury that is not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged conduct; and (3) a favorable decision is likely to redress the injury. *Defenders of Wildlife*, 504 U.S. at 560-61; *Allen v. Wrigh*t, 468 U.S. 737, 751 (1984).

Elizabeth L. Morgan is a resident of Kanawha County, West Virginia, and is a member of WVCDL. Declaration of Elizabeth L. Morgan ("E.L. Morgan Dec.") ¶¶ 2-3. Mrs. Morgan has a West Virginia concealed handgun license and usually carries a handgun except when and where prohibited by law. *Id.* at ¶¶ 8, 10. Mrs. Morgan would be deprived of her right to keep and bear arms any time she enters a Dunbar city-owned building or park. *Id.* at ¶¶ 12, 14-15, 17-19. The city-owned buildings and parks Mrs. Morgan would like to resume visiting have signs posted at their entrances clearly stating:

> Notice
>
> All Persons Entering This Building Are Subject To Search:
>
> Any And All Weapons Or Contraband Will Be Confiscated With The Potential Of Criminal Prosecution.
>
> - Weapons Subject To Confiscation –
>
> Revolvers, Pistols, Rifles, Shotguns, Dirk, Blackjack, Knife (Except Those Knives Being Utilized As A Utensil At A Picnic Or Party, Or Those Knives Used As An Work Instrument By Employees Or Contractors), Sling Shot, Razor, Billy, Metallic Or False Knuckles, Tear Gas, Or Other Deadly Weapon Of Like Character Or Any Facsimile Thereof That Is Intended Or Readily Adaptable For Use Which May Produce Death Or Serious Bodily Harm.

*Id.* at ¶ 16. Mrs. Morgan's desire to engage in conduct prohibited by Dunbar City Code § 545.13 is far from speculative. "But for the ongoing threatened enforcement of Dunbar City Code § 545.13, I would regularly visit the Dunbar Wine Cellar Park and the Dunbar Rec Center. But for the ongoing threatened enforcement of . . . Dunbar City Code § 545.13, I would regularly carry handguns when I visit various locations described in . . . Dunbar City Code § 545.13."

E.L. Morgan Dec. at ¶¶ 17, 19. "The loss of Second Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citation and footnote omitted).

> Given *Heller's* focus on "core" Second Amendment conduct and the Court's frequent references to First Amendment doctrine, we agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment.

*U.S. v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

In *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 76 (4th Cir. 1991), the court clearly rejected the extreme interpretation of its earlier decision in *Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1986), now asserted by the Dunbar Defendants. *Duling* involved a "challenge[] on privacy grounds [to] a nineteenth century fornication statute which had not been enforced in private homes for years, if not decades." *Mobil Oil*, 940 F.2d at 76 (*quoting American Booksellers Ass'n, Inc. v. Virginia*, 802 F.2d 691, 694 n. 4 (4th Cir. 1986)). Dunbar City Code § 545.13 was initially enacted just 15 years ago. Here, as in *American Booksellers* and *Mobil Oil*, we are dealing with a recently-enacted law, not some anachronistic throwback to a prior century that was being openly violated en masse without any enforcement action of any kind. The signs placed at the entrances to Dunbar city buildings and parks clearly and unambiguously threaten the criminal prosecution of anyone who violates Dunbar City Code § 545.13. Like Mobil Oil, Plaintiffs have "alleged 'an actual and well-founded fear' that the law will be enforced, and ha[ve] in fact 'self-censored' [themselves] by complying with the statute, incurring harm all the while." *Mobil Oil*, 940 F.2d at 76.

Plaintiffs simply are not "required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). As the Supreme Court more recently and clearly explained:

> where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

*MedImmune*, 549 U.S. at 128-29. *MedImmune* is particularly important not only for its recency and clarity regarding pre-enforcement challenges to government actions, but the fact that significantly broadened the federal courts' jurisdiction to hear declaratory judgment actions between purely private actors who sought to test their legal rights before actually taking actions that might affect their respective legal rights and obligations. As the Dunbar Defendants admit that no one has ever been prosecuted for violating Dunbar City Code §545.13, Dkt. 19 at 3, the Dunbar Defendants' admission serves only to underscore, for the purposes of standing, the credibility of the threat conveyed by the signs described in Dunbar City Code §545.13(c), which are posted at the entrances to every city building and park covered by the ordinance.

Per the advice of the 4th Circuit in *Mobil Oil* and the Supreme Court in *MedImmune*, Plaintiffs "prefer 'official adjudication to public disobedience.'" *National Rifle Ass'n v. Magaw*, 132 F.3d 272, 287 (6th Cir. 1997) (*quoting* 13A, Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3532.5, at 183-84 (2d ed. 1984)).

> Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.

*Mobil Oil*, 940 F.2d at 75. A challenge to a firearms prohibition is justiciable where "the plaintiffs wish to engage in conduct plainly prohibited on the face of the allegedly

unconstitutional statute." *Coalition of New Jersey Sportsmen v. Whitman*, 44 F.Supp.2d 666, 673 n.10 (D. N.J. 1999), *aff'd*, 263 F.3d 157 (3d Cir.) (mem.), *cert. denied*, 534 U.S. 1039 (2001).

Although it could be argued that no individual plaintiff suffers a legally-cognizable injury once he or she leaves a Dunbar city building or park and is no longer subject to the challenged ordinance, repetitive injuries do not evade judicial review. *See, e.g., Roe v. Wade*, 410 U.S. 113, 125 (1973); *Bolton*, 410 U.S. at 187-88.

There is no reason to dispute that Plaintiffs' injuries in this action are fairly traceable to the challenged conduct, as the Dunbar Defendants' threatened enforcement of Dunbar City Code § 545.13 is the entire basis of this action. Nothing in this action is based upon "the independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560-61 (*quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)).

It is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision[,]" *id.* (*quoting Simon*, 426 U.S. at 38, 43) (internal citation and quotation marks omitted), because an injunction against the challenged ordinance will relieve all Plaintiffs from the burdens of the ordinance. Conversely, if this Honorable Court sees fit to deny injunctive relief but instead grants a declaratory judgment declaring the challenged ordinance unconstitutional or void under state law, such relief would also redress Plaintiffs' injury because the judgment would clearly signal to the Defendants and the local courts that the ordinance is unenforceable.

WVCDL is a plaintiff in this action on behalf of its members under its "associational standing," under which

> An association has standing to sue on behalf of its members when: (1) at least one of its 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) ("OVEC II"); *see also Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002) (citations omitted).

In their pending motion to dismiss, the Dunbar Defendants seriously contest only whether WVCDL has alleged that its members meet the first element of associational standing—whether "its members would have individual standing to sue in his or her own right[.]" *OVEC II*, 702 F. Supp. 2d at 649. The Dunbar Defendants do not attack the truthfulness of the factual statements in the complaint. The Dunbar Defendants do not dispute that "the interests [WVCDL] seeks to protect are germane to its purpose," *OVEC II*, 702 F. Supp. 2d at 649, nor do they advance any argument that "there is [a] need for the direct participation of individual [WVCDL] members in the action." *Id.*

At this time, this Court need not address whether the other plaintiffs have standing to sue. In cases where plaintiffs seek injunctive and declaratory relief, so long as "at least one individual plaintiff . . . has demonstrated standing," a court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n. 9 (1977); *see also Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981). Only if one or more plaintiffs "obtains relief different from that sought by [Mrs. Morgan and WVCDL (through its associational standing on behalf of Mrs. Morgan),] whose standing has not been questioned," must this Court address the other plaintiffs' standing to bring suit. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 402 n.22 (1982).

## III. PLAINTIFFS HAVE STATED CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

Counts 38 through 40 of Plaintiffs' First Amended Complaint allege claims upon which relief can be granted by this Honorable Court. "[T]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (internal quotation marks, alterations, and citation omitted). When ruling on a Rule 12(b)(6) motion, the court must "accept the well-pled allegations of the complaint as true," and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," meaning the court could draw "the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. ___, ___, 129 S.Ct. 1937, 1949 (2009). The purpose of the pleading requirements is threefold: first, "early disposition of inappropriate complaints"; second, "provid[ing] criteria for defining issues for trial"; and third, which is most significant to the present case, assuring the defendants have received "adequate notice of the nature of a claim being made against [them]." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009).

Because the operative provisions of Dunbar City Code § 545.13 and South Charleston City Code § 545.15 challenged in this action are practically identical and the arguments made by the Dunbar Defendants, Dkt. 19, are virtually identical to those made by the South Charleston defendants, Dkt. 22, Plaintiffs' counterarguments are also identical. Thus, Plaintiffs spare this

Honorable Court and opposing parties and counsel the redundancy of restating their arguments here and instead incorporate by reference their arguments in Dkt. 26, Part III.

Furthermore, for the purposes of Plaintiffs' constitutional challenges in Counts 38 and 39 of their First Amended Complaint, Plaintiffs add that Dunbar City Code § 545.13 has practical application only against law-abiding adults who are otherwise in full compliance with federal and state gun laws. This fact is underscored by the Dunbar Defendants' admission that they have never prosecuted anyone for violating Dunbar City Code § 545.13. Dkt. 19 at 3. As Dunbar City Code § 545.13, by design, affects only the most law-abiding, law-abiding citizens have complied with it and, if the Dunbar Defendants' admission is accurate, if there have been incidents of criminal activity involving weapons in Dunbar city buildings or parks, the offenders obviously were prosecuted under State or Federal laws carrying penalties far more severe than 30 days in jail and/or a $500 fine.

The offensiveness of Dunbar City Code § 545.13 is underscored by the fact that, if upheld, it will deprive the decent, law-abiding people of this state, including the individual plaintiffs and other WVCDL members, of any means of self-defense if confronted by a criminal in a city-owned building or park.

> Based upon information available to me, the defendants do not maintain any laws, customs, practices, or policies providing for the security of any city-owned buildings, parks, or other public property to which . . . Dunbar City Code § 545.13 is applicable, under which individuals who enter places where . . . Dunbar City Code § 545.13 prohibits carrying deadly weapons are required to submit to security screenings and adequate security measures are maintained to detect and interdict the unlawful conveyance of deadly weapons into those premises. Consequently, the laws, customs, practices, and policies of the Defendants challenged in this action provide no actual protection of any individuals present in city-owned buildings, parks, or other public property to which . . . Dunbar City Code § 545.13 is applicable, as there are no adequate security measures in place to reliably detect and apprehend individuals violating the ordinance.
>
> The Defendants have no affirmative legal duty to guarantee the personal safety of individuals in locations where . . . Dunbar City Code § 545.13 prohibits carrying

> weapons, nor would any of them be subject to any liability for any personal injuries or death suffered by any individual who is the victim of a crime in any location where . . . Dunbar City Code § 545.13 prohibits carrying weapons and was unable to defend him- or herself because he or she was disarmed in compliance with the ordinance.

E.L. Morgan Dec. ¶¶ 20, 22. The Dunbar Defendants further deprive Plaintiffs of the means of self-defense beyond the walls of the affected buildings and the city parks' property lines:

> Based upon information available to me, the Defendants maintain laws, customs, practices, and policies that do not provide any means for individuals to temporarily check and store weapons in a secure storage facility prior to entering any premises where . . . Dunbar City Code § 545.13 prohibits carrying weapons.

E.L. Morgan Dec. ¶ 21.

For the foregoing reasons, Plaintiffs respectfully submit that they have stated in Counts 38 through 40 of their First Amended Complaint claims upon which relief can be granted.

## IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Honorable Court deny the Dunbar Defendants' pre-answer motion to dismiss and direct the Dunbar Defendants to answer Plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P. 12(a)(4)(A). Alternatively, Plaintiffs request leave to file a further Amended Complaint should this Honorable Court find any insufficiency in their First Amended Complaint.

Dated this 2nd day of May, 2011,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 2, 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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