

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
AT MARTINSBURG

**WEST VIRGINIA CITIZENS DEFENSE**

**LEAGUE, INC.**, a West Virginia nonprofit  
corporation,

Plaintiff,

Civil No.: 3:11-cv-00005-JPB

**CITY OF MARTINSBURG**, a West Virginia  
Municipal Corporation;

**GEORGE KAROS**, personally and in his official  
capacity as the Mayor of the City of  
Martinsburg;

**MARK S. BALDWIN**, personally and in his  
official capacity as the City Manager of the  
City of Martinsburg; and

**KEVIN MILLER**, personally and in his  
official capacity as the Chief of Police of  
the City of Martinsburg,

Defendants

**Defendants' Reply Memorandum In Support Of Pre-Answer  
Motion to Dismiss**

Defendants City of Martinsburg, George Karos, personally and in his official capacity as the Mayor of the City of Martinsburg, Mark Baldwin, personally and in his official capacity as the City Manager of the City of Martinsburg and Kevin Miller, personally and in his official capacity as the Chief of Police of the City of Martinsburg (collectively "Defendants"), by their

attorneys, respectfully submit this Reply in further support of their Pre-Answer Motion to Dismiss Plaintiffs' Complaint.

### **I. PLAINTIFFS LACK STANDING.**

Plaintiffs seek to challenge Martinsburg City Code § 545.14 on the grounds that it violates their federal and/or state constitutional right to bear arms or that it is otherwise in violation of state statute. The Defendants moved to dismiss under FRCP 12(b)(1) on the grounds that Plaintiffs lack standing to pursue the claims against the Defendants because the Complaint ("Complaint"), even accepted as factually true, fails to allege a concrete plan or a credible threat of prosecution necessary to establish Article III standing.

Plaintiff's Response to the Defendants' Pre-Answer Motion to Dismiss offers two cases for the proposition that somehow the "credible threat of prosecution" standard has been reversed or altered. Review of the cited cases reveals that they do nothing to change the standard which appears in precedent from the United States Supreme Court, the Fourth Circuit Court of Appeal and this Court. Moreover, recent case law from the Fourth Circuit and elsewhere fails to even reference *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). or *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 76 (4th Cir. 1991), in addressing the credible threat of prosecution requirement for standing. The applicable test for standing to mount a pre-enforcement challenge to a criminal ordinance remains unchanged in the Supreme Court, the Fourth Circuit and this Court. Plaintiffs are requesting at best an advisory opinion based upon hypothetical facts and simply cannot pass the standing test. Binding precedent requires that Plaintiff's Complaint be dismissed.

The Plaintiff's reliance on *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 76 (4th Cir. 1991), is misplaced. The Plaintiff incorrectly states that the 4th Circuit rejected *Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1986). On appeal, the Fourth Circuit found fault with the District Court's failure to accept as true the injury of "pecuniary harm". The Fourth Circuit's admonishment of the District Court's opinion below and of the Attorney General's arguments was unnecessary once the Fourth Circuit found "injury" and furthermore, although *Doe v. Duling*, *supra* was distinguished as containing an older statute, the Fourth Circuit made no effort to overrule it. Moreover, the Fourth Circuit, eight years after *Mobile Oil* chose to reiterate precisely the same "credible threat of prosecution" standard set forth in *Duling* in *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (To establish a plaintiff's standing under Article III, the challenged regulation must present a credible threat of enforcement against the party bringing suit).

The Plaintiff's stated that neither it nor any of its members have violated Martinsburg City Code 545.14 nor have they been threatened with prosecution under the code.

Further the Plaintiff has alluded that the Supreme Court established a new standard for standing in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). *MedImmune* neither expands nor restricts prior U.S. Supreme Court precedent on the applicable standard for pre-enforcement challenges to criminal statutes. Plaintiffs need not face arrest – but they still must establish a concrete plan and a credible threat of prosecution and this they failed to plead. As set forth more specifically in the Defendants' Memorandum of Law in Support of their Pre-Answer Motion to Dismiss, the Plaintiff's members lack of standing also prevents WVCDL from acquiring associational standing. See Ohio Valley Env'tl. Coalition, Inc. v. Hobet Mining, LLC, 702 F. Supp. 2d 644, 649 (S.D. W. Va. 2010).

Extending their implausible analytical leaps even further, Plaintiffs posit that the “loss of Second Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Plaintiffs ostensibly rely on *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010), for the notion that First and Second Amendment cases employ the same standing analysis. However, *Chester* was *not* a case about standing, and announced the standard of review *only* in the context of reviewing the merits of a law that supposedly burdened constitutionally-protected conduct. *See Chester*, 628 F.3d at 682. As such, Plaintiff’s reliance on cases concerning the standard of review when First Amendment rights are at issue is inappropriate, and there is no basis on which to apply this standard.

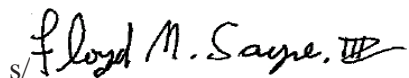
## II. CONCLUSION

For the forgoing reasons, the Defendants City of Martinsburg, George Karos, Mark S. Baldwin and Kevin Miller respectfully request that the Court dismiss the Plaintiff’s complaint with Prejudice.

Respectfully submitted this 16th day of May 2011.

**CITY OF MARTINSBURG**, a West Virginia Municipal Corporation;  
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**MARK S. BALDWIN**, personally and in his official capacity as the City Manager of the City of Martinsburg; and  
**KEVIN MILLER**, personally and in his official capacity as the Chief of Police of the City of Martinsburg

By Counsel

s/ 

Floyd M. Sayre, III (WVSB 4342)  
BOWLES RICE MCDAVID GRAFF & LOVE LLP  
Attorneys for Defendants  
101 South Queen Street  
Martinsburg, West Virginia 25401  
Telephone: (304) 264-4226  
Facsimile: (304) 267-3822  
Email: [ksayre@bowlesrice.com](mailto:ksayre@bowlesrice.com)

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Defendants

**Certificate of Service**

I, Floyd M. Sayre, III, do hereby certify that on this 16th day of May 2011, I electronically filed the **Defendants' Reply Memorandum In Support Of Pre-Answer Motion to Dismiss** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant:

James M. Mullins, Jr, Esquire  
Mullins Law Office, L.C.  
101 North Kanawha Street  
Suite 401  
Beckley, West Virginia 25801

*s/ Floyd M. Sayre, III*

Floyd M. Sayre, III (WVSB 4342)  
BOWLES RICE MCDAVID GRAFF &  
LOVE LLP  
Attorneys for Defendants  
101 South Queen Street  
Martinsburg, West Virginia 25401  
Telephone: (304) 264-4226  
Facsimile: (304) 267-3822  
Email: [ksayre@bowlesrice.com](mailto:ksayre@bowlesrice.com)

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