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

West Virginia Citizens Defense League, Inc.,

Plaintiff,

v.

City of Martinsburg, *et al.*, Defendants

Civil Action No. 3:11-cv-5-JPB

(Bailey, C.J.)

Plaintiff's Memorandum of Law in Support of

Plaintiff's Motion for Preliminary Injunction and

Plaintiff's Motion to Test Sufficiency of Certain Defenses

The Plaintiff, West Virginia Citizens Defense League, Inc. (hereinafter "WVCDL"), by and through its undersigned counsel, respectfully submits the following in support of its motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65 and its motion to test the sufficiency of the Defendants' first defense of failure to state a claim upon which relief can be granted, alleged in the Defendants' answer to WVCDL's First Amended Complaint.

> A plaintiff seeking a preliminary injunction must establish that [1] he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Winter v. Natural Resources Defense Council, 555 U.S. 7, 20 (2008) (citations omitted); *see also Real Truth About Obama, Inc. v. Federal Election Comm'n*, 575 F.3d 342, 345 (4th Cir. 2009) (*quoting Winter*), *vacated on other grounds*, 130 S.Ct. 2371 (2010), *reinstated in pertinent part*, 607 F.3d 355 (4th Cir. 2010).

I. Plaintiff is Likely to Succeed on the Merits and Has Stated Claims Upon Which Relief Can be Granted.

"[T]he Supreme Court in *Winter*, recognizing that a preliminary injunction affords relief before trial, requires that the plaintiff make a clear showing that it will likely succeed on the merits at trial." *Real Truth About Obama*, 575 F.3d at 346.

In response to WVCDL's original Complaint—which alleged 6 separate and distinct grounds on which Martinsburg City Code § 545.14 violates the United States Constitution, the West Virginia Constitution, and West Virginia statutory and common law—the Defendants filed a pre-answer motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6), alleging lack of subject-matter jurisdiction (standing) ***and*** failure to state a claim upon which relief may be granted, [Doc. 12], and a memorandum of law in support of their pre-answer motion to dismiss, [Doc. 13]. The Defendants fully briefed their arguments concerning their motion to dismiss for lack of subject-matter jurisdiction (standing), but did not brief the alleged failure to state a claim upon which relief may be granted. WVCDL responded by fully briefing its arguments pertaining to both the standing challenge and the alleged failure to state a claim. The Defendants replied only with regard to the question of standing. This Court denied the Defendants' motion to dismiss for lack of subject-matter jurisdiction, [Doc. 16], but did not rule on the Defendants' motion to dismiss for failure to state a claim upon which relief may be granted. Subsequently, WVCDL filed its First Amended Complaint, [Doc. 25], to which the Defendants filed an answer, [Doc. 26]. The filings of the amended complaint and answer have rendered moot the Defendants' pre-answer motion to dismiss for failure to state a claim upon which relief may be granted. Despite the primarily legal nature of WVCDL's claims and the significant amount of factual development in the First Amended Complaint and the Defendants' answer thereto, the

Defendants did not present any dispositive motions pertaining to the First Amended Complaint.[1] Because of the primarily legal nature of WVCDL's claims and the high probability that at least some of these claims have fully ripened for dispositive rulings that could fully dispose of this case favor of WVCDL, WVCDL has, contemporaneously with this motion for a preliminary injunction, filed a motion to strike certain defenses in the answer as insufficient under Fed. R. Civ. P. 12(f) and/or test the sufficiency of the Defendants' alleged defense of failure to state a claim pursuant to Fed. R. Civ. P. 12(i). WVCDL will also soon file a motion for partial judgment on the pleadings or, in the alternative, summary judgment. The Defendants have yet to make any substantive argument in defense of the statutory validity and constitutionality of Martinsburg City Code § 545.14 and should be required to state their case in defense of this ordinance if they intend to defend it.

A. Martinsburg City Code § 545.14 is preempted and void as a matter of state law.

Martinsburg City Code § 545.14, which was first enacted in 2005 and amended into its current form in 2008, First Amended Complaint, [Doc. 25], (hereinafter "FAC") ¶ 44; Defendants' Answer to the Plaintiff's First Amended Complaint, [Doc. 26], (hereinafter "Ans.") ¶ 44, is clearly void as a matter of state law because it is preempted by statute or, in the alternative, not affirmatively authorized by the Legislature by law.

> The provisions of section five of this article notwithstanding, neither a municipality nor the governing body of any municipality may limit the right of any person to purchase, possess, transfer, own, carry, transport, sell or store any

[1] In all fairness, the Defendants had a very narrow window of opportunity to file any such motions before this Court entered its original Order of Abstention, [Doc. 27]; [Doc. 30] (amended order), as the notices of electronic filing indicate that the Defendants' answer was filed at 9:42 AM EDT on September 6, 2011, and this Court's original Order of abstention was filed at 4:44 PM EDT the same day.

> revolver, pistol, rifle or shotgun or any ammunition or ammunition components to be used therewith nor to so regulate the keeping of gunpowder so as to directly or indirectly prohibit the ownership of the ammunition. Nothing herein shall in any way impair the authority of any municipality, or the governing body thereof, to enact any ordinance or resolution respecting the power to arrest, convict and punish any individual under the provisions of subdivision (16), section five of this article or from enforcing any such ordinance or resolution: *Provided*, That any municipal ordinance in place as of the effective date of this section shall be excepted from the provisions of this section: *Provided, however*, That no provision in this section may be construed to limit the authority of a municipality to restrict the commercial use of real estate in designated areas through planning or zoning ordinances.

W.Va. Code § 8-12-5a (1999); FAC ¶ 42; Ans. ¶ 42.[2]

"When a provision of a municipal ordinance is inconsistent or in conflict with a statute enacted by the Legislature the statute prevails and the municipal ordinance is of no force and effect." Syllabus Point 1, *Vector Co. v. Board of Zoning Appeals of City of Martinsburg*, 155 W.Va. 362, 184 S.E.2d 301 (1971).

> A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If ***any*** reasonable doubt exists as to whether a municipal corporation has a power, the power ***must*** be denied.

Syllabus Point 2, *State ex rel. City of Charleston v. Hutchinson*, 154 W.Va. 585, 176 S.E.2d 691 (1970) (emphasis added). "As a general rule of statutory construction, if several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature." Syllabus Point 2, *State ex rel. Department of Health and Human Resources v. West Virginia Public Employees Retirement System*, 183 W.Va. 39, 393 S.E.2d 677 (1990).

The West Virginia Supreme Court of Appeals has long recognized that municipalities derive their power from the Legislature and are subject to its strict control of their actions.

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[2] The reference to "the effective date of this section" in the first proviso of W.Va. Code § 8-12-5a was enacted as part of the most recent amendments to that section, which were enacted by the West Virginia Legislature as part of 1999 W.Va. Acts Ch. 290, which took effect on June 1, 1999, and thus "the effective date of this section" should be read as "June 1, 1999." FAC ¶ 43; Ans. ¶ 43.

> Municipalities are but political subdivisions of the state, created by the Legislature for purposes of governmental convenience, deriving not only some, but all, of their powers from the Legislature. They are mere creatures of the Legislature, exercising certain delegated governmental functions which the Legislature may revoke at will. In fact, public policy forbids the irrevocable dedication of governmental powers. The power to create implies the power to destroy.

Booten v. Pinson, 77 W.Va. 412, 421, 89 S.E. 985, 989 (1915). In other words,

> [m]unicipalities are creatures of the State who draw their powers from the law which creates them; therefore, if a [municipal ordinance] conflicts with either our Constitution or our general laws, the [ordinance], being the inferior law, must fail.

Marra v. Zink, 163 W.Va. 400, 404, 256 S.E.2d 581, 584 (1979) (*citing Vector Co. v. Board of Zoning Appeals of City of Martinsburg, supra*). "A municipal corporation possesses no inherent police power. It has only such regulatory authority as has been expressly or impliedly delegated to it by the Legislature." Syllabus Point 1, *State ex rel. Kelley v. City of Grafton*, 87 W.Va. 191, 104 S.E. 487 (1920).

> A municipal corporation is a creature of the State, and can only perform such functions of government as may have been conferred by the Constitution, or delegated to it by the law-making authority of the State. It has no inherent powers, and only such implied powers as are necessary to carry into effect those expressly granted.

Syllabus Point 1, *Brackman's Inc., v. City of Huntington*, 126 W.Va. 21, 27 S.E.2d 71 (1943).

The West Virginia Supreme Court of Appeals has long construed municipal powers with the most exacting scrutiny under which it maintains a strong presumption against the recognition of any power claimed by a municipality, which the municipality bears a heavy burden to overcome.

> Municipalities have no inherent power with regard to the exercise of the functions of their government. Such power depends ***solely*** upon grants of power by Acts of the Legislature, and the Legislature may at any time modify, change or withdraw any power so granted by general law in conformance with the provisions of the Constitution, Article VI, Section 39(a).

Syllabus Point 2, *State ex rel. Alexander v. County Court of Kanawha County*, 147 W.Va. 693, 130 S.E.2d 200 (1963) (emphasis added).

> A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If ***any*** reasonable doubt exists as to whether a municipal corporation has a power, the power ***must*** be denied.

Syllabus Point 2, *State ex rel. City of Charleston v. Hutchinson, supra* (emphasis added).

"The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syllabus Point 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984). Neither the Municipal Code of West Virginia, nor any other provision of the West Virginia Code, whether enacted before or after 1999, provides a more specific measure that can be construed to limit the preemption statute under *Trumka*. When the Legislature enacted the preemption statute, it made no exception for regulating firearms in municipal buildings. The only exceptions it created were a grandfather clause for existing ordinances and an exception for planning or zoning ordinances. W.Va. Code § 8-12-5a. *See also*, Phil Kabler, *Pro-gun bill likely to win*, Charleston Gazette, Jan. 19, 1999, at A1.

> In the interpretation of a statute, the legislative intention is the controlling factor; and the intention of the legislature is ascertained from the provisions of the statute by the application of sound and well established canons of construction.

Syllabus Point 2, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999). "The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syllabus Point 8, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953); *see also* Syllabus Point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature."). "Interpreting a statute presents a purely legal question subject to

our *de novo* review on which neither party bears the burden of proof." Syllabus Point 1, *West Virginia Human Rights Commission v. Garretson*, 196 W.Va. 118, 468 S.E.2d 733 (1996).

The combination of the preemption statute and the strong presumption against the recognition of assertions of municipal authority provide a clear, unambiguous state policy against the enactment of any form of municipal ordinance restricting where, when, how, or by whom firearms may be purchased, possessed, transferred, owned, carried, transported, sold or stored. "Where the words of a statute are plain, free of ambiguity, conveying a plain intent, there is no room for construction by a court, but only for obedience to the legislative will." Syllabus Point 1, *Kelley & Moyers v. Bowman*, 68 W.Va. 49, 69 S.E. 456 (1910).

> When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.

Syllabus Point 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, supra*.

> When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.

Syllabus Point 1, *State ex rel. Fox v. Board of Trustees of the Policemen's Pension or Relief Fund of the City of Bluefield, et al.*, 148 W.Va. 369, 135 S.E.2d 262 (1964). "Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent." Syllabus Point 1, *Ohio County Commission v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983).

The application of the preemption statute against Martinsburg's ordinance is supported by the history of the preemption statute and municipal actions predating the preemption statute. Between 1993 and 1996, the cities of Charleston, South Charleston, and Dunbar enacted

ordinances prohibiting the possession of firearms and other weapons on city-owned property.[3] The City of Charleston also enacted in 1993 ordinances heavily regulating the sale of handguns.[4] The Legislature was aware of these ordinances at the time it enacted the preemption statute and passed the preemption statute specifically to protect West Virginia gun owners from the expansion of these types of ordinances to other municipalities. "When viewing legislative actions, the substance of the act complained of, instead of its simple form, directs the ensuing analysis." *Napier v. Napier*, 211 W.Va. 208, 212, 564 S.E.2d 418, 422 (2002). The substance of the act complained of when the Legislature enacted the preemption statute was the threat of the proliferation of local ordinances throughout the state restricting firearms where the restricted actions were otherwise lawful under federal and state law. In 1999, the Legislature chose to protect West Virginia gun owners from a patchwork quilt of local gun laws by driving a wooden stake through the heart of whatever sources of legal authority any municipality may have had to enact any ordinance limiting the right of a person to purchase, possess, transfer, own, carry, transport, sell or store any firearm. W.Va. Code § 8-12-5a (1999). Martinsburg's ordinance is a "direct, explicit attempt by the city to regulate an area that the State has preempted." *Longwell v. Hodge*, 171 W.Va. 45, 50, 297 S.E.2d 820, 825 (1982) (citation omitted).

For the foregoing reasons, WVCDL respectfully submits that Martinsburg City Code § 545.14 is preempted and void as a matter of state law or, in the alternative, it lacks appropriate affirmative statutory authorization by the Legislature under West Virginia's statutory and common law regarding the powers of municipalities.

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[3] WVCDL and several of its individual members are challenging these ordinances on other grounds independent of the preemption law. *See generally, West Virginia Citizens Defense League, et al., v. City of Charleston, et al.*, Civil Action No. 2:11-cv-48 (S.D. W.Va. filed Jan. 24, 2011).

[4] *Id.*

B. Martinsburg City Code § 545.14 is unconstitutional under the West Virginia Right to Keep and Bear Arms Amendment.

Assuming *arguendo* that Martinsburg City Code § 545.14 is valid as a matter of state statutory and common law, it is an overly broad ordinance that violates the right of WVCDL's members to keep and bear arms under W.Va. Const. Art. III, § 22.

> Article III, section 22 of the West Virginia Constitution was approved by the voters of this State on November 4, 1986, and succinctly states: "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."

State ex rel. City of Princeton v. Buckner, 180 W.Va. 457, 459, 377 S.E.2d 139, 141 (1988).

In its analysis of facial challenges to laws implicating an individual's right to keep and bear arms under W.Va. Const. Art. III, § 22, the West Virginia Supreme Court of Appeals, at a time when the Second Amendment to the United States Constitution was neither regarded as an individual right nor applicable to the states, *id.* at 460 n. 6, 377 S.E.2d at 142 n. 6, held that the First Amendment overbreadth doctrine is applicable to laws implicating the right to keep and bear arms and that the court would not attempt to judicially reform or salvage an overbroad law.

> An "overbroad" law, as that term has been developed by the United States Supreme Court, is not vague, or need not be. Its vice is not failure to communicate. Its vice may be clarity. For a law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make a law as "broad" and inclusive as it chooses unless it reaches into constitutionally protected ground. The clearer an "overbroad" statute is, the harder it is to confine it by interpretation within its constitutionally permissible reach.

Id. at 462, 377 S.E.2d at 144 (citation omitted).

> The facts in this case are uncontroverted. On March 10, 1987, a municipal police officer in the City of Princeton, in Mercer County, stopped a vehicle and arrested the driver for driving under the influence of alcohol. After searching the driver, the policeman discovered a .22 caliber automatic pistol inside the driver's jacket pocket. The driver was then asked to produce a license allowing him to carry such

> a weapon, and he subsequently advised the police officer that he did not have such a license.

Id. at 458-59, 377 S.E.2d at 140-41. Less than two years later, after the Legislature reformed West Virginia's gun laws in light of *Buckner*, the court affirmed the constitutionality of W.Va. Code § 61-7-3 (1989) (requiring license to carry a *concealed* weapon), holding that

> Article III, Section 22 of the West Virginia Constitution gives a citizen the constitutional right to keep and bear arms; however, there is no corresponding constitutional right to keep and bear ***concealed*** deadly weapons.

Syllabus Point 1, *Application of Metheney*, 182 W.Va. 722, 391 S.E.2d 635 (1990) (emphasis added). Had the court chosen to apply the general rule of facial challenges articulated in *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 691, 408 S.E.2d 634, 641 (1991) ("The challenger must establish that no set of circumstances exists under which the legislation would be valid; the fact that the legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."), and its federal counterpart, *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."), it clearly would have decided *Buckner* differently, as the unnamed drunk driver was carrying his pistol inside his coat pocket, which was obviously concealed and thus outside the specific protections of W.Va. Const. Art. III, § 22, as construed in *Metheny*. Likewise, the court could also have held that W.Va. Const. Art. III, § 22 does not protect the right of a person to carry a loaded pistol while under the influence of alcohol, as the legislative analysis and advertising materials promoting the Right to Keep and Bear Arms Amendment stated that the Amendment did not protect "carrying arms while intoxicated[.]" James W. McNeely, *The Right of Who to Bear What, When, and Where—*

West Virginia Firearms Law v. The Right-to-Bear-Arms Amendment, 89 W.Va. L. Rev. 1125, 1149, 1180-81 (1987) (article cited with approval extensively in *Buckner*).[5]

W.Va. Const. Art. III, § 22, at its core, protects "the decent people of this state from being disarmed." McNeely, 89 W.Va. L. Rev. at 1143, 1178. It "guarantee[s] that a person may exercise the choice to have arms to lawfully and effectively resist violent criminal aggression against self, family, or home." *Id.* at 1178. This guarantee is not confined to the home or other narrowly-defined, purely private areas. *See State ex rel. City of Princeton v. Buckner, supra*.

Martinsburg City Code § 545.14 has practical application only against law-abiding adults who are otherwise in full compliance with federal and state gun laws. A violation of Martinsburg City Code § 545.14 is punishable, at most, by a $1,000 fine and up to 30 days in jail. This penalty is no deterrent to a criminal. W.Va. Code § 61-7-3 prohibits carrying a concealed weapon without a license. Possession of a firearm by a prohibited possessor such as a convicted felon, drug addict, illegal alien, involuntarily committed person, person adjudicated as a mental defective, person subject to certain domestic violence protective orders, or person who has been convicted of certain domestic violence-related offenses, regardless of whether the firearm is carried openly or concealed, is generally prohibited by both State and Federal law. 18 U.S.C. §§ 922(g) and 924(a)(2); W.Va. Code § 61-7-7. Federal and State laws also prohibit minors from carrying a handgun, either openly or concealed, in most public places. 18 U.S.C. §§ 922(x) and 924(a)(6); W.Va. Code § 61-7-8. W.Va. Code § 61-7-11 prohibits a person from "carry[ing], brandish[ing] or us[ing any deadly] weapon in a way or manner to cause, or threaten, a breach of the peace." W.Va. Code § 61-7-12 prohibits any person from "wantonly perform[ing] any act

[5] Although W.Va. Code § 20-2-57b prohibits hunting while under the influence without regard to type of hunting equipment used, no West Virginia state law currently restricts or prohibits the possession or carrying of firearms or other weapons on the basis of intoxication. Thus, West Virginia's courts have not been required to address this issue.

with a firearm which creates a substantial risk of death or serious bodily injury to another[.]" In every case, any violation of any of these laws is punishable far more severely than a violation of Martinsburg City Code § 545.14. As most WVCDL members whose interests are stake in this action, including Mr. Thomm, have concealed handgun licenses, it must be noted that

> [legislative] auditors and [West Virginia State Police Deputy Superintendent Steve] Tucker said they were unaware of an instance when an officer was confronted by someone licensed to carry a concealed weapon. "Anecdotally, concealed weapon permit holders are law-abiding citizens that we generally don't have as defendants in criminal cases," Tucker said.

Lawrence Messina, *Troopers Say Manpower Lacking*, Charleston Gazette, Nov. 19, 2008, at A1. For these reasons, Martinsburg City Code § 545.14 is a direct attack on the core right of the decent people of this state to be armed.

As a law implicating a fundamental individual right—the absolute core of an individual's fundamental right to keep and bear arms for purposes of self-defense under W.Va. Const. Art. III, § 22—Martinsburg City Code § 545.14 is subject to strict scrutiny under the West Virginia Constitution. "If the challenged [law] affects the exercise of a fundamental right . . . , the law will not be sustained unless the [government] can prove that the classification is necessary to the accomplishment of a compelling state interest." *Appalachian Power Co. v. State Tax Dep't*, 195 W.Va. 573, 594, 466 S.E.2d 424, 445 (1995) (citations omitted); *see also Board of Educ. of County of Kanawha v. West Virginia Bd. of Educ.*, 219 W.Va. 801, 807, 639 S.E.2d 893, 899 (2006) ("the strict scrutiny test is required when the law or governmental action at issue impinges upon a fundamental right"). "[I]t is clear that . . . the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty[,]" *McDonald v. City of Chicago*, 561 U.S. ___, ___, 130 S.Ct. 3020, 3042 (2010), and "this right is deeply rooted in this Nation's history and tradition." *Id.* at ___, 130 S.Ct. at 3036 (internal quotation marks and citation omitted).

The offensiveness of Martinsburg City Code § 545.14 is further highlighted by the fact that, if upheld, it will deprive the decent, law-abiding people of this state, including WVCDL's members, of any means of self-defense if confronted by a criminal in a city-owned building.

Martinsburg City Code § 545.14 prohibits the possession or carrying of firearms in not only city office buildings, but also many other buildings such as rest facilities in city parks, city-owned housing, and other public buildings that are not used primarily for performing the official business of the City of Martinsburg. However, the Defendants deny Plaintiff's characterization of any such buildings as "non-sensitive." *See* FAC ¶ 33; Ans. ¶ 33; E-mail from Floyd M. Sayre, III, to James M. Mullins, Jr., Sep. 7, 2011, 4:13 PM (hereinafter "Sayre e-mail").

The Defendants do not maintain in any building covered by Martinsburg City Code § 545.14, other than Martinsburg City Hall, any security measures under which individuals entering the building are required to pass through metal detectors or submit to other security screenings designed to detect and interdict the possession or carrying of firearms in violation of Martinsburg City Code § 545.14. The Defendants have alleged that metal detectors are in place at Martinsburg City Hall but no other buildings covered by Martinsburg City Code § 545.14. However, the precise nature of the security measures in place at Martinsburg City Hall and the adequacy of those measures for the purpose of protecting against the unauthorized possession or carrying of firearms have not been fully established. *See* FAC ¶ 34; Ans. ¶ 34; Sayre e-mail.

> The Defendants have no affirmative legal duty to guarantee the personal safety of individuals in buildings where Martinsburg City Code § 545.14 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 building where Martinsburg City Code § 545.14 prohibits carrying weapons and was unable to defend him- or herself because he or she was disarmed in compliance with the ordinance.

Declaration of Arthur Thomm, II, [Doc. 14-1], ¶ 18.

The Defendants further deprive WVCDL's members of the means of self-defense beyond the walls of the directly affected buildings: 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 buildings where Martinsburg City Code § 545.14 prohibits carrying weapons. FAC ¶ 35; Ans. ¶ 35.

Contrary to alarmist assertions that Defendants might try to offer, WVCDL does not take the absolutist position that W.Va. Const. Art. III, § 22 requires the government to allow the bearing of arms by literally anyone, anywhere, any time.

> The West Virginia 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 do 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."

Syllabus Point 4, *State ex rel. City of Princeton v. Buckner*, *supra*.

Independent of its ongoing litigation efforts, WVCDL has pursued and continues pursuing legislative measures to reflect its views of what are just and reasonable laws. However, the types of laws WVCDL prefers are obviously far more narrowly-tailored than Defendants prefer. WVCDL strongly believes an individual's right to self-defense should extend to all public buildings owned or controlled by state and local government agencies and other publicly-owned property. It has long been a settled matter of law that an individual has no specific right to police protection. The last potential, meaningful right that an individual has to protect him- or herself from a criminal attack is the right to self-defense and the means to do so. When seconds count, the police are only minutes away. So-called "gun-free zones" generally amount to little more than criminal protection zones that instill a false sense of security in unsuspecting members

of the public and provide criminals and deranged lunatics a free fire zone for the duration of the police response time.

WVCDL also recognizes that some public buildings—such as court facilities, *see* McNeely, 89 W.Va. L. Rev. at 1149, 1180—have sensitive security considerations that may legitimately warrant the exclusion of weapons from the premises. However, without metal detectors, armed guards, and other meaningful, adequate security measures (similar to airports and federal courthouses), attempting to prohibit carrying weapons is a futile task, as criminals will carry regardless of any signs or additional criminal charges. As the proponents of the West Virginia Right to Keep and Bear Arms amendment stated:

> There is no social interest in preserving the lives and wellbeing of criminal aggressors at the cost of their victims. The only defensible policy society can adopt is one that will operate as a sanction against unlawful aggression. The police have no duty to protect the individual. *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981) (en banc). One court reduced this principle of law to the succinct comment that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).
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> The . . . guarantee is a victims' rights measure. It will guarantee that a person may exercise the choice to have arms to lawfully and effectively resist violent criminal aggression against self, family, or home.

McNeely, 89 W.Va. L. Rev. at 1177-78. For these reasons, WVCDL has advocated legislation, based in part upon Col. Rev. Stat. § 18-12-214(4) (2003), that would authorize any state or local government agency—including Defendants—to restrict or prohibit the possession or carrying of weapons in a "secure restricted access area" of any public building where specified security measures are in place. *See generally*, 2011 W.Va. House Bill 3125; 2011 W.Va. Senate Bill 543; WVCDL, *West Virginia Gun Owner Protection Act of 2011*, http://www.wvcdl.org/WVCDLbills/WVGOPA2011.html (last accessed Sep. 27, 2011). Unfortunately, at this time, even if Defendants adopted or wanted to adopt the proposed security

measures outlined in proposed W.Va. Code § 61-7-11c of HB 3125 and SB 543 at all public buildings covered by Martinsburg City Code § 545.14, they lack appropriate statutory authorization to do so for the reasons stated in Part I.A., *supra*. Thus, this type of option is beyond this Court's power to grant in this action.

For the foregoing reasons, WVCDL respectfully submits that Martinsburg City Code § 545.14 is unconstitutional under the West Virginia Right to Keep and Bear Arms Amendment.

C. Martinsburg City Code § 545.14 is void for vagueness.

In a creative attempt to do an end run around West Virginia's municipal gun control preemption law, *see* Part I.A., *supra*, Defendants have drawn themselves into a corner filled with legal quicksand by enacting and enforcing an ordinance that is unconstitutionally vague. At issue is subsection (c) of the ordinance, which provides:

> Any person carrying or possessing a firearm or other deadly weapon in any building owned, leased or under the care, custody and control of the City of Martinsburg or any political subdivision of the City of Martinsburg who refuses to temporarily relinquish possession of such firearm or other deadly weapon, upon being requested to do so, or to leave such premises, while in possession of such firearm or other deadly weapon, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for each offense and, in the discretion of the Police Court Judge, may be placed in jail for a term not to exceed thirty (30) days, or both.

Martinsburg City Code § 545.14(c). This subsection prescribes a criminal penalty for possessing or carrying a firearm in a Martinsburg city building. However, this penalty is only applicable if the person in possession of a firearm "refuses to temporarily relinquish possession of such firearm or other deadly weapon, upon being requested to do so, or to leave such premises, while in possession of such firearm or other deadly weapon[.]"

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of (those) freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes omitted); *see also Williams v. West Virginia University Bd. of Governors*, ___ F.Supp.2d ___, 2011 WL 830620 at *7-*8 (N.D. W.Va. 2011) (Bailey, C.J.) (discussing extensively the void-for-vagueness doctrine). Martinsburg City Code § 545.14 meets none of these basic due process protections.

The West Virginia Supreme Court of Appeals follows similar standards for determining whether a law is void for vagueness under the Due Process Clause of W.Va. Const. Art. III, § 10.

> A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.
>
> Statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute.

Syllabus Points 1-2, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

For the foregoing reasons, WVCDL respectfully submits that Martinsburg City Code § 545.14 is void for vagueness.

Based upon the arguments it has previously submitted, WVCDL has established that it is likely to succeed on the merits.

II. Plaintiff's Members are Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief.

WVCDL is entitled to the preliminary injunction sought because, in the absence of preliminary injunctive relief, WVCDL's members will suffer the irreparable injury of the deprivation of their individual, constitutionally-protected right to keep and bear arms by the Defendants. A plaintiff seeking a preliminary injunction must "make a clear showing that it is likely to be irreparably harmed absent preliminary relief." *Real Truth About Obama*, 575 F.3d at 347.

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). In the context of an alleged violation of Second Amendment rights, a plaintiff's claimed irreparable harm is "inseparably linked" to the likelihood of success on the merits of plaintiff's Second Amendment claim. *Cf. WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) ("in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits of plaintiff's First Amendment claim") (*citing Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 254-55 (4th Cir. 2003)).

> 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).

Adopting the reasoning of *Chester* and *Elrod*, the U.S. Court of Appeals for the Seventh Circuit recently held in *Ezell v. City of Chicago*, ___ F.3d ___, 2011 WL 2623511 (7th Cir. July 6, 2011), that the deprivation of an individual's right to keep and bear arms fulfills the irreparable harm element of preliminary injunctive relief.

In this case, WVCDL has already presented the declaration of Arthur Thomm, II, in which he describes in detail his regular visits to a certain building where the Defendants are prohibiting him from exercising his right to keep and bear arms. [Doc. 14-1]. For these reasons, WVCDL members have suffered, are suffering, and will continue to suffer irreparable harm in the absence of preliminary relief.

III. The Balance of Equities Tips in Plaintiff's Favor.

The balance of equities tips in WVCDL's favor because of the strong public policy presumption under West Virginia constitutional and statutory law in favor of an individual's right to keep and bear arms for self-defense. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24 (*citing Munaf v. Green*, 553 U.S. 674, 689-90 (2008)). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id.* (*quoting Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)).

W.Va. Const. Art. III, § 22, at its core, protects "the decent people of this state from being disarmed." McNeely, 89 W.Va. L. Rev. at 1143, 1178. It "guarantee[s] that a person may exercise the choice to have arms to lawfully and effectively resist violent criminal aggression against self, family, or home." *Id.* at 1178. This guarantee is not confined to the home or other narrowly-defined, purely private areas. *See State ex rel. City of Princeton v. Buckner, supra*.

> There is no social interest in preserving the lives and wellbeing of criminal aggressors at the cost of their victims. The only defensible policy society can adopt is one that will operate as a sanction against unlawful aggression. The police have no duty to protect the individual. *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981) (en banc). One court reduced this principle of law to the succinct comment that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).
>
> The . . . guarantee is a victims' rights measure. It will guarantee that a person may exercise the choice to have arms to lawfully and effectively resist violent criminal aggression against self, family, or home.

Id. at 1177-78. Additionally, by enacting the preemption statute, which provides individuals additional protection of their individual right to keep and bear arms beyond the outer limits of the constitutional protections of W.Va. Const. Art. III, § 22, the Legislature left no doubt that municipalities are not entitled to weave a patchwork quilt of varying local gun laws among the 232 municipalities statewide.

IV. A Preliminary Injunction is in the Public Interest.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982) (*quoted in Winter*, 555 U.S. at 24 (*quoted in Real Truth About Obama*, 575 F.3d at 347)). In this case, the same arguments WVCDL cites in Part III, *supra*, for its argument that the balance of equities tips in its favor likewise show that the requested preliminary injunction is in the public interest. WVCDL incorporates those srguments by reference.

V. Injunction Bond.

WVCDL requests that this Court set an injunction bond of zero or a nominal sum, as enjoining the enforcement of Martinsburg City Code § 545.14 will not cause the Defendants any demonstrable economic harm.

> The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c).

> This rule is mandatory and unambiguous. *District 17, UMWA v. A & M Trucking, Inc.*, 991 F.2d 108, 110 (4th Cir. 1993). Although the district court has discretion to set the bond amount "in such sum as the court deems proper," it is not free to disregard the bond requirement altogether. In view of the clear language of Rule 65(c), failure to require a bond upon issuing injunctive relief is reversible error. *Id.*

Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 (4th Cir. 1999).

> In fixing the amount of an injunction bond, the district court should be guided by the purpose underlying Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order. The amount of the bond, then, ordinarily depends on the gravity of the potential harm to the enjoined party:
>
> > [T]he judge usually will fix security in an amount that covers the potential incidental and consequential costs as well as either the losses the unjustly enjoined or restrained party will suffer during the period he is prohibited from engaging in certain activities or the complainant's unjust enrichment caused by his adversary being improperly enjoined or restrained.
>
> 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2954, at 292 (2d ed. 1995). Where the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly. In some circumstances, a nominal bond may suffice. *See, e.g., International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir. 1974) (approving district court's fixing bond amount at zero in the absence of evidence regarding likelihood of harm).

Id. at 421 n. 3.

VI. Conclusion.

For the reasons stated above, WVCDL respectfully requests that this Honorable Court enter an order granting the preliminary injunction described in Plaintiff's Motion for Preliminary Injunction.

Dated this 28th day of September, 2011,

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Certificate Of Service

I hereby certify that on September 28, 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 participant:

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