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.

REPLY 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 Reply 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).

SUMMARY OF REPLY

Plaintiffs seek to challenge South Charleston City Code §545.15 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 South Charleston Defendants moved to dismiss under FRCP 12(b)(1) on the grounds that Plaintiffs lack standing to pursue the claims against the South Charleston Defendants because the Amended 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. The South Charleston Defendants further moved to dismiss under FRCP 12(b)(6) on the additional grounds South Charleston City Code §545.15 is both

constitutional and statutorily valid and therefore the Complaint fails to state a claim upon which relief may be granted.

Plaintiffs' Response to the South Charleston Defendants' Motion to Dismiss offers nothing to resuscitate the Complaint's mere request for an advisory opinion. Plaintiffs offer two cases for the proposition that somehow the "credible threat of prosecution" standard has been reversed or altered.[1] It has not. 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. See Parts A&B *infra*. Moreover, recent case law from the Fourth Circuit and elsewhere fails to even reference *MedImmune* or *Mobile* in addressing the credible threat of prosecution requirement for standing.[2] 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. *See* cases cited in footnote 3, *infra*. Plaintiffs are requesting at best an advisory opinion based upon hypothetical facts and simply cannot pass the standing test. Binding precedent requires that Plaintiffs' Complaint be dismissed as to the South Charleston Defendants.

The Court can and should dismiss Counts 35 – 37 of Plaintiffs' Complaint purely on lack of Article III standing. To the extent the Court determines to reach the Plaintiffs' substantive arguments about constitutionality and/or statutory validity, such arguments fail to state a claim upon which relief may be granted.

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[1] MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (U.S. 2007); Mobil Oil Corp. v. Attorney Gen. of Virginia, 940 F.2d 73 (4th Cir. Va. 1991).

[2] Rock for Life-UMBC v. Hrabowski, 2010 U.S. App. LEXIS 25800 (4th Cir. Md. Dec. 16, 2010); Montana Shooting Sports Ass'n v. Holder, 2010 U.S. Dist. LEXIS 104301 (D. Mont. Aug. 31, 2010); N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 710 (4th Cir. 1999).

A. *MedImmune* Has No Effect On Standing Analysis.

Contrary to Plaintiffs' assertions – *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 129 (U.S. 2007) is NOT controlling in this case. *MedImmune* did nothing to alter the continuing requirement for standing nor did it disturb existing precedent that requires a Plaintiff to establish a credible threat of prosecution in order establish standing to mount a preenforcement challenge to a criminal statute. See 549 U.S. at n.3. Moreover, *MedImmune* offers nothing new to the standing analysis. Plaintiffs' response attempts to distract the Court with dicta from *MedImmune*, a United States Supreme Court patent case that specifically did not overrule or upset current United States Supreme Court, Fourth Circuit or Southern District of West Virginia case law:

> Where threatened *government* action is concerned, a plaintiff is not required to expose himself to liability before bringing suit to challenge the basis for the threat. His own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

Id. at 766. Notwithstanding that it is *dicta*, the quoted passage, for which there is neither discussion nor citation, effectively states that a party need not violate a law to establish standing to challenge it. Coincidentally, precedent within the Supreme Court, the Fourth Circuit, and this District do not require such extreme action either – such precedent does still require that the plaintiff face a credible threat of prosecution.[3]

[3]Babbitt v. UFW Nat'l Union, 442 U.S. 289, 298 (U.S. 1979) (requiring credible threat of prosecution for standing to mount pre-enforcement challenge); Doe v. Duling, 782 F.2d 1202 (4th Cir. 1985)(one must show a threat of prosecution that is both real and immediate, before a federal court may examine the validity of a criminal statute); Daniel v. Underwood, 1998 U.S. Dist. LEXIS 22290 (S.D. W. Va. Nov. 5, 1998) (citing *Babbitt* to establish standing to challenge the constitutionality of a statute under *Babbitt*, the plaintiffs must allege that they intend to 'engage in a course of conduct arguably affected with a constitutional interest,' that such conduct is proscribed by the statute, and that there exists a credible threat of prosecution for such conduct.").

Moreover, *Babbit* is entirely consistent with the dicta in *MedImmune*:

> When contesting the constitutionality of a criminal statute, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see Epperson v. Arkansas*, 393 U.S. 97 (1968); Evers v. Dwyer, supra, at 204. When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). But "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs."

Babbitt v. UFW Nat'l Union, 442 U.S. 289, 298 (U.S. 1979).

Thus, *Babbitt* and *MedImmune* are in agreement that: (i) a plaintiff need not violate the law to acquire Article III standing; and, (ii) a plaintiff must still establish a credible threat of prosecution.

Now that these two agreed points have been established, Plaintiffs' Response offers no legitimate grounds to find standing. Plaintiffs Mr. Morgan, Mrs. Morgan, Mr. Schulz and Mr. Ellis do not allege any concrete plan whatsoever to take a handgun to any public location within the purview of South Charleston City Code §545.15. Nor have they been specifically threatened with arrest or prosecution in the event they change their mind.

Plaintiffs are essentially asking this Court for an advisory opinion based upon a hypothetical situation which, by their own admission, will never come to pass. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 598 (U.S. 1992) (The purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties.) At best, Plaintiffs indicate that it would be desirable if they could carry a handguns when they visit the locations described in South Charleston City Code §545.15. As stated by the *Lujan Court*: "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. *MedImmune* did not mention *Lujan* much less purport to overrule it as argued by the Plaintiffs.

Perhaps even more noteworthy is the fact that both the Fourth Circuit Court of Appeals and the District Court for the District of Montana have completely ignored *MedImmune* in recent pre-enforcement challenges. See Rock for Life-UMBC v. Hrabowski, 2010 U.S. App. LEXIS 25800 (4th Cir. Md. Dec. 16, 2010); Montana Shooting Sports Ass'n v. Holder, 2010 U.S. Dist. LEXIS 104301 (D. Mont. Aug. 31, 2010).[4]

Although *Rock for Life* was a First Amendment pre-enforcement challenge, the Fourth Circuit nonetheless had the opportunity, with *MedImmune's* ink dry nearly three years, to retreat from the "credible threat of prosecution" standard. Not only does the *Rock for Life* opinion fail to even mention *MedImmune*, it confirms the Supreme Court's stance in *Babbit* and the corresponding "credible threat of prosecution" standard:

> However, fears of enforcement that are "imaginary" or "wholly speculative" are insufficient to confer standing. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). To establish a plaintiff's standing under Article III, the challenged regulation must present a credible threat of enforcement against the party bringing suit. *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999).

Rock for Life, 2010 U.S. App. LEXIS 25800 at 14.[5]

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[4] As noted in the Dunbar Defendants' Memorandum of Law in Support of their Motion to Dismiss, some aspect of this case is on appeal. However, as of the filing of this Reply brief the opinion has not been reversed. The stance of the pending appeal does not detract from the fact that the Montana District Court, given the opportunity to even mention *MedImmune*, chose to disregard it.

[5] It is also noteworthy that the Fourth Circuit has cited *MedImmune* three times on standing. For instance in *Jones v. Sears Roebuck and Company*, 301 Fed. Appx. 276 (4th Cir. 2008), the Court of Appeals stated:

> Declaratory judgment actions must allege disputes that are "real and substantial and admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

Likewise *Montana Shooting Sports* had the opportunity to address *MedImmune*. However, just as the Fourth Circuit chose to do in *Rock for Life*, the Montana District Court failed to even mention *MedImmune* and turned back to the US Supreme Court's "credible threat of prosecution" pre-enforcement challenge standard in *Babbit*. See Montana Shooting Sports, 2010 U.S. Dist. LEXIS 104301 at 32.

MedImmune neither expands nor restricts prior U.S. Supreme Court precedent on the applicable standard for pre-enforcement challenges to criminal statutes. 549 U.S. 118. Plaintiffs need not face arrest – but they still must establish a concrete plan and a credible threat of prosecution and this they cannot do. As set forth more specifically in the South Charleston Defendants' Memorandum of Law in Support of their Motion to Dismiss, Mr. Morgan, Mrs. Morgan, Mr. Schulz and Mr. Ellis are the only Plaintiffs (and specified members of WVCDL) who even attempt to establish a harm as a result of South Charleston City Code §545.15. As such, their lack of standing also prevents WVCDL from acquiring associational standing. See Ohio Valley Envtl. Coalition, Inc. v. Hobet Mining, LLC, 702 F. Supp. 2d 644, 649 (S.D. W. Va. 2010).

B. The Fourth Circuit's Opinion in *Mobile Oil* Likewise Has No Impact on the Standing Analysis.

Plaintiffs next point to *Mobil Oil Corp. v. Attorney Gen. of Virginia*, 940 F.2d 73 (4th Cir. Va. 1991) in an additional effort to further distract this Court from binding precedent. In *Mobile Oil*, Mobil challenged a Virginia statute that sought to regulate petroleum refineries on several constitutional grounds, including federal preemption. Rather than violate the Virginia

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MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 771, 166 L. Ed. 2d 604 (2007).

This admonition applies with equal force in this case. See also Riley v Dozier Internet Law, PC, 371 Fed. Appz. 399 (4th Cir. 2010); Settlers Crossing, L.L.C. v U.S. Home Corporation, 383 Fed. Appx. 286 (4th Cir. 2010).

statute, Mobile complied, suffering concrete pecuniary damage in the process. The District Court below found a lack of standing because Mobile could not establish that the Attorney General would enforce the statute.

On appeal, the Fourth Circuit admonished the District Court for failing to accept as true the injury of pecuniary harm. See id. The Fourth Circuit went on to address the basis for the District Court's opinion but ultimately grounded its decision in the presence of injury coupled with a presumption the statute was intended to be enforced: "Mobil has certainly alleged 'an actual and well-founded fear' that the law will be enforced, and has in fact 'self-censored' itself by complying with the statute, incurring harm all the while." Id at 76. A thorough reading of the standing cases at issue in this matter supply the "credible threat of prosecution" standard in the *absence* of an independent injury capable of establishing standing. The Fourth Circuit's admonishment of the District Court's opinion below and of the Attorney General's arguments were 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 Fourth Circuit's opinion in *Right to Life* makes no mention of *Mobile Oil*. *Id*.[6]

Returning for the sake of clarity to the concept of *injury*, Plaintiffs' only asserted injury is the legal determination they ultimately seek in this lawsuit – that they are being deprived of a

[6] In 2010, in *Rock for Life-UMBC v. Hrabowski*, 2010 U.S. App. LEXIS 25800 (4th Cir. Md. Dec. 16, 2010), the Fourth Circuit likewise made no reference to *Mobil Oil* in reiterating the credible threat of prosecution standard.

Second Amendment (or WV Constitutional) right to bear arms because South Charleston City Code §545.15 is unconstitutional.[7] This argument first requires a finding that South Charleston City Code §545.15 is unconstitutional in order to establish *harm* in order to further establish the standing necessary to argue that South Charleston City Code §545.15 is unconstitutional. At least in *Mobil Oil*, the Plaintiff alleged a pecuniary (and factual) injury distinct and independent of the question of constitutionality of the statute that was the very core of the lawsuit. Id. Moreover, Plaintiffs' stated injury (deprivation Second Amendment rights) is not a factual allegation entitled to a presumption of truth – it is legal conclusion that can only be tested *if* Plaintiffs had standing.

Circular and illogical arguments such as Plaintiffs' are one of the reasons Courts have established a consistent standard that requires establishment of a concrete plan and a credible threat of prosecution to elevate what would otherwise be a request for an advisory opinion into a justiciable case or controversy. Plaintiffs make no allegation in the Complaint of any concrete plan or a specific threat of prosecution. And to eliminate all doubt that the Court is asked for an advisory opinion on a hypothetical set of facts, Plaintiffs confirm that they have no present intention to take a handgun to the various locations described in South Charleston City Code §545.15. See Amended Complaint at ¶205; Plaintiffs' Response to South Charleston Defendants' Motion to Dismiss, at 4.

The Plaintiffs' arguments ignore the well-established Article III standing decisions in *Babbitt supra*, *Doe v. Duling, supra* and this Court's opinion in *Daniel v. Underwood, supra*.

[7] See Plaintiffs' Response at p. 5: "The loss of Second Amendment Freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." It is noteworthy that this purported quote does not exist – It is followed by reference to *Elrod v. Burns*, 427 U.S. 347 that discusses irreparable injury through deprivation of First Amendment rights for purposes of establishing irreparably injury for a preliminary injunction. Plaintiffs would have to acquire standing to obtain adjudication of whether their Second Amendment rights are being infringed in order to establish the injury that they seek to use to establish standing.

Contrary to the arguments of the Plaintiffs, these decisions are still good law, have not been reversed, and serve as binding precedent here. Even taken as true the Plaintiffs' factual allegations do not establish a concrete plan or a credible threat of prosecution and Counts 35, 36 and 37 must be dismissed for lack of Article III standing.

C. South Charleston Properly Enacted §545.15 Pursuant to the Plenary Powers Granted to Municipalities under W. Va. Code 8-12-5.

Plaintiffs' Complaint was extremely non-specific in alleging in Count 37 that South Charleston City Code §545.15 was in violation of statute. Plaintiffs' Response to the South Charleston Defendants' Motion to Dismiss offers nothing of value to support Count 37. First, Plaintiffs' Response fails to show that South Charleston City Code 545.15 is in violation of *any* statute. Second, Plaintiffs essentially (and impermissibly) converted their "ordinance violates statute" argument into a "statute is unconstitutional" claim.

Municipalities received an express grant of plenary powers from the Legislature under Chapter 12, Article 8 W. Va. Code. Specifically, W. Va. Code §8-12-5(16) expressly grants municipalities the authority to: "arrest, convict and punish any individual for carrying about his or her person any revolver or other pistol, dirk, bowie knife, razor, slingshot, billy, metallic or other false knuckles or any other dangerous or other deadly weapon of like kind or character." *Id*.

In addition, W. Va. Code §8-12-5a, which restricted the power of municipalities from regulating the ownership and transport of firearms provides, "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 . . . ." W. Va. Code §8-12-5a.

South Charleston City Code §545.15, enacted in 1994, is grandfathered, and hence, excluded from the prohibition in W. Va. Code §8-12-5a, last amended in 1999. Clearly, South Charleston City Code §545.15 is not in violation of Chapter 8, Article 12.

Moreover, the West Virginia Constitution empowers municipalities to "pass all laws and ordinances relating to its municipal affairs" so long as those laws do not conflict with West Virginia law. W. Va. Const., Art. VI, § 39a. 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. West Virginia Code §8-12-5 provides municipalities with plenary power to "to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome", "to protect and promote public . . . safety . . . and good order," and to "to arrest, convict and punish any individual for carrying about his or her person any revolver or other pistol . . . ." W. Va. Code 8-12-5(13)&(16). Additionally, municipalities are provided with plenary power to maintain and operate public buildings, municipal buildings, city halls, auditoriums, arenas, recreational parks, playgrounds, and other recreational facilities for public use. W. Va. Code 8-12-5(36)&(37).

Plaintiffs' contention that §545.15 is not expressly authorized by these provisions is unfounded in light of the well-established principle that a municipality has "such implied powers as are necessary to carry into effect those expressly granted." Syl. Pt. 1, Brackman's Inc., v. City of Huntington, 27 S.E.2d 71 (W. Va. 1943); see also Syl. Pt. 2, Sparkler v. Teach, 418 S.E.2d 585 (W. Va. 1992) ('A grant of the police power to a local government or political subdivision necessarily includes the right to carry into effect and empowers the governing body to use proper means to enforce its ordinances. Consequently, the power to punish by a pecuniary fine or penalty is implied from the delegation by the legislature of the right to enforce a particular police

power through ordinances or regulations."). The specific prohibition contained in §545.15 is necessary to carry into effect the aforementioned plenary powers which are granted to municipalities.

Apparently dissatisfied with the *express* grant of authority for South Charleston City Code 545.15, Plaintiffs make the curious assertion that the South Charleston ordinance violates W. Va. Code §61-7-14. Plaintiffs' first fundamental flaw is that they reference W. Va. Code §61-7-14 as the "authorizing statute" for the subject ordinance. See Plaintiffs' Response to South Charleston Defendants' Motion to Dismiss, at 9. Clearly, §61-7-14 applies to "landowners" and contains no express grant or restriction with respect to municipal power – otherwise, it would be expected to appear in Chapter 8, Article 12.

Plaintiffs second flaw in this argument is that they have either overlooked or ignored the fact that W. Va. Code §61-7-14 creates a fine/criminal penalty for a person who, upon entering the land of a person (as defined in the statute), either refuses to relinquish their firearm upon request, or refuses to leave with the firearm. South Charleston City Code §545.15 makes no *request* that a person relinquish a firearm after entering affected municipal buildings, parks or recreation areas. Nor does it *request* that they leave with the firearm after entering onto the affected premises. Rather, South Charleston City Code §545.15 prohibits the firearm from entering the property in the first place.

The City of South Charleston does not rely upon W. Va. Code §61-7-14 for its enactment of South Charleston City Code §545.15 and would further contend that W. Va. Code §61-7-14 is not intended to govern municipal ordinances. Alternatively, to the extent this Court finds W. Va. Code §61-7-14 to be in any way relevant to this discussion, the City of South Charleston takes the position that there is no conflict between the statute and South Charleston's ordinance.

Plaintiffs' final flaw reveals the infirmity of their position. Unable to successfully challenge the express grant of municipal authority in Chapter 8, Article 12, coupled with the grandfathered exclusion in W. Va. Code §8-12-5a, Plaintiffs abandon their argument that South Charleston City Code §545.15 is in violation of statute. Instead, the Plaintiffs ultimately claim that is W. Va. Code 8-12-5(16) is unconstitutional:

> In order for this Court to hold that South Charleston City Code §545.15 is authorized by W. Va. Code § 8-12-5(16) and thus valid as a matter of state law, it would have to hold that W. Va. Code § 8-12-5(16), in effect, gives municipalities *carte blanche* to regulate when, where, and by whom firearms may lawfully be carried.

See Plaintiffs' Response to South Charleston Defendants' Motion to Dismiss, at 14. At this point, Plaintiffs statutory violation argument appears abandoned. Rather, Plaintiffs no longer question the legitimacy of South Charleston City Code §545.15, but the constitutionality of W. Va. Code §8-12-5(16). This argument appears nowhere in Plaintiffs' Complaint and should not be entertained by this Court.

Based upon the foregoing, Plaintiffs have failed to state a claim with respect to Count 37 of the Complaint because the City of South Charleston was properly authorized to enact §545.15 pursuant to the plenary powers granted in W. Va. Code §8-12-5, and as further indicated by the grandfather exception in §8-12-5a.

D. South Charleston City Code §545.15 is a Reasonable Restriction on the Right to Keep and Bear Arms Guaranteed in Art. III, §22 of the West Virginia Constitution.

Plaintiffs have offered insufficient evidence to overcome the presumption that South Charleston City Code §545.15 is constitutional as a reasonable restriction on the right to keep and bear arms, guaranteed in Art. III, §22, through the valid exercise of a municipality's plenary power to enact ordinances to protect the safety and welfare of its citizens. See Rohrbaugh, 607

S.E.2d 555, 560 (W. Va. 2004) (noting that courts "accord[] great deference to the legislative process" underlying the enactment of regulations); Perdue v. Ferguson, 350 S.E.2d 555, 560 (W. Va. 1986) (noting that ordinances concerning the public health, safety or welfare are presumed to have been passed in good faith); see also W. Va. Code §8-12-5; see also State of West Virginia v. West Virginia Department of Natural Resources, 488 S.E.2d 376 (W. Va. 1997) (upholding restriction on transportation of loaded firearm was reasonable because it did not infringe upon a sport person's right to keep and bear arms for hunting purposes, but merely regulated the manner in which such weapons could be transported).

Plaintiffs' contention that strict scrutiny should apply to the challenged ordinance is contrary to West Virginia law which follows the majority of jurisdictions in recognizing that the right to bear arms is not unlimited and is subject to reasonable regulation through the valid exercise of the state's police power. See City of Princeton v. Buckner, 377 S.E.2d 139, 146 (W. Va. 1988) (citing with approval authority from numerous other states recognizing reasonable restrictions on the right to bear arms). The Supreme Court of Appeals of West Virginia enunciated this standard in *City of Princeton v. Buckner*, where it concluded that "the individual's right to keep and bear arms and the State's duty, under its police power, to make reasonable regulations for the purpose of protecting the health, safety and welfare of its citizens must be balanced." 377 S.E.2d 139 (W. Va. 1998). The Court further concluded that the State may reasonably regulate the right of a person to keep and bear arms, as guaranteed in W. Va. Const. Art. III, § 22, through the valid exercise of its police power, provided that the regulation does not frustrate the right. See id.

Applying this standard to South Charleston City Code §545.15 reveals that it constitutes a reasonable regulation of the right to keep and bear arms. The subject ordinance is a proper

exercise of a municipality's plenary power to promote public safety and welfare at city buildings, parks and recreation areas, all of which are known to be high traffic areas that a number of people visit for many different purposes. See 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). Plaintiffs even concede that some public buildings have sensitive security considerations that may legitimately warrant the exclusion of weapons from the premises. See Plaintiffs' Response to South Charleston Defendants' First Motion to Dismiss at 22, previously filed herein. The subject ordinance advances this legitimate and narrow local concern by governing conduct only within city buildings, parks and recreation areas and prohibiting certain weapons solely within those boundaries. Prohibiting weapons in these specific areas within the City of South Charleston reduces the possibility of armed conflict and/or accidents and promotes the safety of all the residents who visit these locations.

The restriction does not infringe upon the right to bear arms because it does not regulate the carrying of weapons on one's own premises nor prohibit the carrying of such weapons to and from places where they may be lawfully used, i.e., target shooting clubs and hunting grounds. Plaintiffs further contend that the right to bear arms for the defense of self should extend to public buildings, and that the restriction in §545.15 deprives them of the right to bear arms for that purpose. Yet, the standard enunciated in *Buckner*, and followed by the majority of jurisdictions, does not require the reviewing court to determine the status of the right to bear arms when faced with a challenge to a statute or ordinance regulating the exercise of the right. See Buckner, 377 S.E.2d 139. The question is whether the law at issue constitutes a reasonable exercise of the state's police power, and any determination by this Court as to whether the right

to bear arms guaranteed by Art. III, §22 of the W. Va. Constitution should extend to public buildings is not necessary to make that determination. See id.; see also Robertson v. City of Denver, 874 P.2d 325, 329-30 (Colo. 1994). Although the ordinance may restrict the Plaintiffs' right to bear arms on South Charleston municipal property, it does not sweep unnecessarily broadly so as to frustrate or infringe upon the right to keep and bear arms or constitute an unreasonable exercise of South Charleston's plenary power.

Plaintiffs' contention that the prohibition in §545.15 is futile without extensive security measures in place is also flawed because the standard enunciated in *Buckner* does not require such an analysis. Even assuming that this type of analysis was relevant to determine whether the subject ordinance constitutes a reasonable regulation of the right to keep and bear arms, Plaintiffs' argument fails to consider the penal nature of the subject ordinance which functions to deter potential violators. Furthermore, such extensive security measures would impose an undue financial burden upon the City of South Charleston because it is not equipped, nor could ever be, to screen every weapon carrier who seeks to enter the specified locations so as to ascertain the acceptability (or lack thereof) of their intentions.

Accordingly, this Court should dismiss Count 36 of the Complaint because under the standard enunciated in *Buckner*, South Charleston City Code §545.15 is a reasonable regulation of the right to bear arms pursuant to the proper exercise of a municipality's plenary power.

E. South Charleston City Code §545.15 is Constitutional under the Second Amendment to the United States Constitution.

Plaintiffs have offered no evidence to overcome the presumption that the subject ordinance prohibiting the carrying of firearms in sensitive places, such government buildings and parks, is presumptively lawful under the United States Supreme Court's decision in *Heller*. See 128 S.Ct. 2783 (2008). Plaintiffs even admit that their Second Amendment challenge is at odds

with the recent Fourth Circuit decision in *U.S. v. Masciandaro*, __ F.3d ___, 2011 WL 1053618 (4th Cir. March 24, 2011), which upheld a regulation prohibiting national park patrons from carrying or possessing a loaded weapon in motor vehicle, vessel, or other mode of transportation. Despite Plaintiffs' unconvincing attempt to create uncertainty surrounding this decision, the fact is that *Masciandaro* remains the law in the Fourth Circuit. Although the Court noted that it would be prudent to await direction from the United States Supreme Court as to *Heller's* applicability outside the home, it also found "no reason to expound on where the Heller right may or may not apply outside the home" because "intermediate scrutiny of any burden on the alleged right would lead the court to uphold the National Park Service regulation."[8] See id. at *46-47. This Court should conclude that South Charleston City Code §545.15 survives intermediate scrutiny on similar grounds.

As discussed more fully in the "Memorandum of Law in Support of the South Charleston Defendants' Motion to Dismiss," South Charleston City Code §545.15 is valid under intermediate scrutiny. A regulation may be upheld under an intermediate scrutiny standard 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)).

[8] The Court further advised, "[t]here is simply no need in this litigation to break ground that our superiors have not tread. To the degree that we push the right beyond what the Supreme Court in Heller declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee. . . . It is not far-fetched to think the Heller Court wished to leave open the possibility that such a danger would rise exponentially as one moved the right from the home to the public square." See id. at *48.

South Charleston City Code §545.15 survives intermediate scrutiny because it promotes the City's substantial interest in providing for the safety of individuals who visit and/or make use of city buildings, parks and recreation areas by prohibiting the possession of certain weapons at these locations.[9] See Heller, 128 S.Ct. at 2817 n.26; Masciandaro, 2011 WL 1053618 at *13 (upholding regulation prohibiting park patrons from carrying or possessing a loaded weapon in motor vehicle, vessel, or other mode of transportation) (recognizing that the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks" and citing cases describing government's interest in public safety as compelling).

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 because the prohibition of certain weapons is limited to city buildings, parks and recreation areas. By deterring violence at these "sensitive areas," the subject ordinance assists the citizens of South Charleston in visiting these locations without fear of violence or intimidation. Accordingly, this Court should dismiss Count 37 of the Complaint because South Charleston City Code §545.15 is a permissible

[9] 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.").

restriction on the possession of firearms in "sensitive areas," and does not violate the Second Amendment as applied to Plaintiffs' allegations.

Ten days ago, the Ninth Circuit Court of Appeals issued what is presumably the most recent post-*Heller* decision about the ability of local government to regulate firearms without violating the Second Amendment. Nordyke v. King et al., 2011 U.S. App. LEXIS 8906 (9th Cir. May 2, 2011). In *Nordyke*, local government in Alameda County, California passed a regulation banning gun shows on county property. Id. The Nordykes, along with others, challenged the ordinance on a number of constitutional grounds, including Second Amendment grounds. Id.

The Ninth Circuit was asked to determine not only whether the ordinance was constitutional but what standard of scrutiny applied. The Ninth Circuit determined that classification of a constitutional right as "fundamental" did not automatically trigger strict scrutiny:

> the Supreme Court does not apply strict scrutiny to every law that regulates the exercise of a fundamental right, despite language in some cases suggesting the contrary. Instead, in a variety of contexts, the Court applies mere rational basis scrutiny to laws that regulate, but do not significantly burden, fundamental rights. *Cf. Casey, 505 U.S. at 873* ("Not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right.").

Id at 20. The Ninth Circuit held that only regulations which **substantially burden** the right to keep and to bear arms trigger heightened scrutiny under the *Second Amendment*. Id. at 22 (emphasis in bold supplied). Most notably, the Ninth Circuit determined that deprivation of government property to facilitate exercise of a constitutional right is unlikely to substantially burden that right: "Finally, a regulation is particularly unlikely to impose a substantial burden on a constitutional right where it simply declines to use government funds or property to facilitate the exercise of that right." Id. at 27. The Ninth Circuit ultimately determined that "The Proposed

Second Amended Complaint, therefore, does not allege sufficient facts to state a *Second Amendment* claim capable of surviving a motion to dismiss." Id. at 28.

Here, the City of South Charleston has declined to supply certain South Charleston municipal buildings, city parks and recreation areas to facilitate the exercise of such rights. Consistent with *Nordyke*, South Charleston City Code §545.15 is particularly unlikely to impose a substantial burden on the exercise of Second Amendment rights. To be clear, South Charleston City Code §545.15 does not prohibit guns within South Charleston City limits, it merely declines to provide municipal property for those that wish to possess guns. For the same reasoning used by the Ninth Circuit in *Nordyke*, Count 35 of Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

Finally, 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.

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

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.

CERTIFICATE OF SERVICE

I, W. Michael Moore, hereby affirm that May 12, 2011, I caused the foregoing REPLY IN SUPPORT OF THE SOUTH CHARLESTON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT to be served on the following attorneys with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James M. Mullins, Esq.
The Law Offices of James M. Mullins, Jr., PLLC
101 North Kanawha Street, Suite 401
Beckley, West Virginia 25801

Benjamin L. Bailey, Esq.
Ricklin Brown, Esq.
BAILEY & GLASSER
209 Capitol Street
Charleston, WV 25301

Webster J. Arceneaux, III, Esq.
Lewis, Glasser, Casey & Rollins, PLLC
P.O. Box 1746
Charleston, West Virginia 25326

/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
mmoore@moorebiserlaw.com

adeligne@moorebiserlaw.com