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' Memorandum In Support Of Pre-Answer Motion to Dismiss

Comes now The Defendants City of Martinsburg, George Karos, Mark S. Baldwin and Kevin Miller, Defendants in the above-styled action, by and through Counsel, without waiving any defenses as to jurisdiction or service of process, submits this brief in support of its motion to dismiss:

I. PLAINTIFF'S CLAIMS

The City of Martinsburg on by ordinance enacted on August 8, 2008 amended Martinsburg City Code § 545.14 so it now reads:

> (a) No person shall carry or possess a firearm or other deadly weapon, whether carried openly or concealed, 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.
>
> (b) No provision of this section shall apply to those persons set forth in Section 545.03 (c) to (f) while such persons are acting in an official capacity, provided, however, that under no circumstances may any person possess or carry or cause the possession or carrying of any firearm or other deadly weapon on the premises of any primary or secondary educational facility in this State unless such person is a law enforcement officer or he or she has the express written permission of the County School Superintendent.
>
> (c) 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.

Plaintiff is a nonprofit West Virginia Corporation that seeks:

> 1. An order permanently enjoining Defendants, their officers, agents, servants, employees, and all persons in

active concert or participation with them who receive actual notice of the injunction, from enforcing each of the laws, customs, practices, and policies challenged in this action;

2. Declaratory relief consistent with the injunction;

3. Attorney Fees and Costs pursuant to 42 U.S.C. § 1988;

4. Costs of suit; and

5. Any other further relief to which Plaintiff may be entitled as the Court deems just and appropriate.

More specifically, Plaintiff assert that the Section 545.14 of the Code of the City of Martinsburg is , unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment to the *United States Constitution*, unconstitutionally vague in violation of the Due Process Clause of article III, § 10 of the *West Virginia Constitution*, violates the right of an individual to keep and bear arms under the Second and Fourteenth Amendments of the *United States Constitution*, violates the right of an individual to keep and bear arms under Article III, § 22 of the *West Virginia Constitution*, is preempted by state statute and invalid as a matter of state law and is unauthorized by state statute and invalid as a matter of state law

II. ARGUMENT

A. Legal Standards

1. Federal Rule of Civil Procedure 12(b)(1)

The doctrine of standing is an integral component of the case or controversy requirement. *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir.1997). There are three components of constitutional standing: (1) the plaintiff must allege that he or she suffered an actual or threatened injury that is not conjectural or hypothetical, (2) the injury must be fairly traceable to the challenged conduct; and (3) a favorable decision must be likely to redress the

injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The party attempting to invoke federal jurisdiction bears the burden of establishing standing. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Unlike a Rule 12(b)(6) motion, a court is under no duty to accept factual allegations as true for purposes of a motion to dismiss for want of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir. 1986). A court asked to dismiss for lack of jurisdiction may resolve factual disputes to determine the proper disposition of the motion without converting the motion to one for summary judgment. *Land v. Dollar*, 330 U.S. 731, 735 n. 4, 67 S. Ct. 1009, 1011 n. 4, 91 L. Ed. 1209 (1947); *Espinoza v. Missouri Pacific Railroad Co.*, 754 F.2d 1247, 1248 n. 1 (5th Cir. 1985).

Article III of the *United States Constitution* gives federal courts jurisdiction only over "cases and controversies," *U.S. Const. art. III, § 2, cl. 1,* and the doctrine of standing identifies disputes appropriate for judicial resolution. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). A claim is justifiable if the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (quoting Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945)).

Courts have performed this initial inquiry “ensure that the parties have enough of a stake in the case to litigate the issues properly,” for, “[w]ere it otherwise the case, legal questions presented to the a court would be discussed ‘in the rarefied atmosphere of a debating society’ rather than ‘in a concrete factual context conducive to a realistic appreciation of the

consequences of judicial action.'" *Falwell v. City of Lynchburg*, 198 F.Supp. 2d 765, 772 (W.D. Va. 2002) (citing *Piney Run Preservation Assoc. v. County Comm'ners,* 268 F.3d 255 (4th Cir. 2001)).

The Fourth Circuit and Supreme Court have "made it abundantly clear that one challenging the validity of a criminal statute must show a threat of prosecution under the statute to present a case or controversy." *Doe v. Duling*, 782 F.2d 1202, 1205 (4th Cir. 1986) (citing, *inter alia, Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298-99 (1979); *Ellis v Dyson*, 421 U.S. 426 (1975)). The threat of prosecution must be "credible and alive at each stage of the litigation." *Id.* at 1206 (citing *Babbitt,* 442 U.S. at 298; *Ellis*, 421 U.S. at 435.) A plaintiff must allege "more than the fact that state officials stand ready to perform their general duty to enforce laws." *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 501 (1961)). Rather the threat of prosecution must be "both real and immediate." *Id.* (citing *Golden v. Zwickler*, 394 U.S. 103, 109-110 (1969)).

The Fourth Circuit has dismissed cases on standing grounds when Second Amendment rights are implicated. *See Frank Krasner Enters. v. Montgomery County*, 401 F.3d 230 (4th Cir. 2005) (reversing district court and finding gun show promoter and gun show exhibitor did not have standing to challenge statute denying public funding to venues that displayed and sold guns because causation and redressability elements not met). Moreover, gun rights cases are frequently dismissed at the pleading stage when plaintiffs fail to allege sufficient facts to confer standing. *See, e.g. Seegars v. Ashcroft*, 396 F.3d 1248, 1255-56 (D.C. Cir. 2005) (finding, pre-*Heller*, that plaintiffs did not have standing to challenge provisions of District of Columbia's criminal code barring them from registering and lawfully possessing pistols in the District, or maintaining firearms in their homes free of mandates that the be unloaded and disassembled or trigger-locked, because plaintiffs had not shown a threat of prosecution reaching

the required level of imminence); *Navegar, Inc. V. United States,* 103 F.3d 994, 1001 (D.C. Cir. 1997) (no "genuine threat of enforcement" when statute did not identify particular products manufactured by appellants, and "nothing in these portions indicates any special priority placed upon preventing these parties from engaging in specified conduct"); *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 294 (6th Cir. 1997) (individual and association plaintiffs lacked standing to challenge law prohibiting the transfer or possession of semiautomatic assault weapons and large capacity ammunition feeding devices because threat of prosecution was "still abstract, hypothetical, and speculative" and accordingly insufficient to fulfill the standing requirement of Article III); *Mont. Shooting Sports Ass'n v. Holder*, CV-09-147-DWM-JCL, 2010 U.S. Dist. LEXIS 104301, at **36-45 (D. Mont. Aug. 31, 2010) (dismissing claims by individual plaintiff and organization when neither sufficiently alleged concrete, particularized, actual or imminent injuries stemming from threat of federal prosecution hypothetically posed by conflict between federal firearms laws and the Montana Firearms Freedom Act); *Kegler v. United States DOJ*, 436 F. Supp. 2d 1204, 1219-20 (D. Wyo. 2006) (plaintiff lacked standing to seek declaratory judgment of his right to purchase firearms under federal Gun Control Act following expungement of his domestic violence conviction, as he failed to allege a "'credible threat of prosecution' sufficient to establish an Article III injury in fact under even the most generous approach to that inquiry in this circuit"); *Nat'l Rifle Ass'n v. City of Pittsburgh,* 999 A.2d 1256, 1260 (Pa. Commw. Ct. 2010) (affirming trial court's finding that NRA and individual gun owners lacked standing to challenge Pittsburgh ordinance requiring firearm owners to report lost of stolen firearms because plaintiffs did not allege "direct and immediate harm standing requires"); *Nat'l Rifle Ass'n v. City of Philadelphia,* 977 A.2d 78, 81-82 (Pa. Commw. Ct. 2009) (affirming trial court's determination that plaintiffs failed to establish any injury sufficient to confer standing to challenge

Philadelphia's firearm ordinances regarding imminent danger, protection from abuse, and lost or stolen guns).

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

The standing requirement must be satisfied by the organizational plaintiff. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378 (1982). An organizational plaintiff may establish standing to bring suit on its own behalf when it seeks redress for an injury suffered by the organization itself. *See Warth v. Seldin,* 422 U.S. 490, 511 (1975) (explaining that an organizational plaintiff may have standing to sue on its own behalf "to vindicate whatever rights and immunities the association itself may enjoy"). Additionally, an organizational plaintiff may establish "associational standing" to bring an action in federal court "on behalf of its members when: (1) its members would otherwise have standing to sue as individuals; (2) the interests at stake are germane to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members in the suit." *Friends for Ferrell Parkway, LLC v. Stasko,* 282 F.3d 315, 320 (4th Cir. 2002). As to the first requirement, it is well-settled that the law of organizational standing requires plaintiff organizations to make specific allegations that at least one identified member has suffered or would suffer harm. *Summers v. Earth Island Inst.,* 129 S.Ct. 1142, 1151-52 (2009).

2. Federal Rule of Civil Procedure 12(b)(6)

The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency

of a complaint. Fed. R. Civ. P. 12(b)(6). In assessing a Rule 12(b)(6) motion for failure to state a claim, the court must accept the factual allegations in the complaint as true. *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 143 (4th Cir. 1990). The court need not accept legal conclusions. *Evans v. CDX Servs., LLC*, 528 F.Supp. 2d 599, 603 (S.D. W. Va. 2007) (citing *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994)).

B. The Plaintiff has failed to Sufficiently Allege Standing

The West Virginia Citizens Defense League (WVCDL) allegedly has members throughout West Virginia. *Id.* at ¶ 3. Plaintiffs contend that: "WVCDL has members throughout the State of West Virginia, including many members who reside in or frequently visit the City of Martinsburg, and one or more members who are currently employees of the City of Martinsburg.", but they do not allege that any individual member of the organization has suffered any actual injury stemming from the challenged Ordinances. *See id.* at ¶¶ 3-4. As WVCDL's standing necessarily hinges on the standing of any member, *Am. Canoe Ass'n,* 326 F.3d at 517, these allegations are insufficient to adequately allege a case or controversy. *See Summers*, 129 S.Ct. at 1152 ("T]he Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm").

WVCDL bear the burden of establishing the three fundamental standing elements. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). When a defendant raises standing as the basis for a motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction, as the Commissioner did in this case, the district court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg &*

Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). Because the standing elements are "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561 (explaining that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," but in response to a summary judgment motion, "the plaintiff can no longer rest on such 'mere allegations,' [and] must 'set forth' by affidavit or other evidence 'specific facts'" establishing standing (quoting Fed. R. Civ. P. 56(e)).

The standing doctrine, of course, depends not upon the merits, *see Warth*, 422 U.S. at 500, but on "whether the plaintiff is the proper party to bring [the] suit." *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *see Libertad v. Welch*, 53 F.3d 428, 437 n.5 (1st Cir. 1995) ("An analysis of a plaintiff's standing focuses not on the claim itself, but on the party bringing the challenge; whether a plaintiff's complaint could survive on its merits is irrelevant to the standing inquiry."). If a plaintiff's legally protected interest hinged on whether a given claim could succeed on the merits, then "every unsuccessful plaintiff will have lacked standing in the first place." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997). Even though a plaintiff's standing cannot be examined without reference to the "nature and source of the claim asserted," *Warth*, 422 U.S. at 500, our ultimate aim is to determine whether plaintiff has a sufficiently "personal stake" in the lawsuit to justify the invocation of federal court jurisdiction, *see Simon*, 426 U.S. at 38.

The Complaint fails allege any instances where any member of the WVCDL has been arrested, prosecuted, fined, imprisoned, or otherwise sanctioned for violation of any of Martinsburg's ordinances. The WVCDL further has failed to allege any "real and immediate"

threat of such repercussions. *See Duling*, 782 F.2d at 1205. In the absence of such allegations, these claims lack standing and must be dismissed.

The WVCDL has failed to allege that any of its members have attempted to carry or possess a firearm or other deadly weapon, whether carried openly or concealed, 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. Nor have they alleged they have been asked 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.

The Sixth Circuit's decision in *NRA v. Magaw* is squarely on point. There, the court found that individual and association plaintiffs lacked standing to challenge a law prohibiting the transfer or possession of semiautomatic assault weapons and large capacity ammunition feeding devices, reasoning as follows:

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

possibility of criminal sanctions applying does not in and of itself create a case or controversy. The individual plaintiffs have failed to show the high degree of immediacy necessary for standing when fear of prosecution is the only harm alleged. 132 F.3d 272, 293 (6th Cir. 1997) (emphasis added) (citations and quotations omitted). That court dismissed the claims for lack of standing even though plaintiffs there had telephoned authorities, posed a hypothetical question, and received an answer that the subject activity could subject them to federal prosecution. *Id.* at 293. Even in those circumstances, which allege a threat with more credibility than that at issue here, the court found the threat of prosecution to be "abstract, hypothetical, and speculative." *Id.* at 293-94; *see also Duling,* 782 F.2d at 1205; *Seegars,* 396 F.3d at 1255-56; *Mont. Shooting Sports Ass'n,* 2010 U.S. Dist. LEXIS 104301 at **36-45; *Kegler,* 436 F.Supp. 2d at 1219-20.

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

III. 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 29th day of March 2011.

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

By Counsel

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Defendants

Certificate of Service

I, Floyd M. Sayre, III, do hereby certify that on this 29th day of March 2011, I electronically filed the **Defendants' 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:

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