

DEFENDANTS

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**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS'
PRELIMINARY OBJECTIONS TO PLAINTIFFS' AMENDED COMPLAINT**

In 1974, the Pennsylvania state legislature enacted 18 Pa.C.S. § 6120 ("Section 6120"), limiting the powers of local governments to regulate firearms. Today, the main provision of the statute is substantially similar to the original version. It has remained identical since 1988. Since then, local governments have been forbidden from regulating the ownership, possession, transfer or transportation of firearms **in any manner**.

As a practical matter, Section 6120 promotes uniformity of law throughout the Commonwealth. More importantly, because firearms regulation is matter of statewide concern, it is the General Assembly's responsibility, and sole prerogative to fashion these regulations. Accordingly, Pennsylvania courts have consistently taken a very basic approach in interpreting Section 6120, finding that it has broad preemptive effects. Defendants, however, insist upon disregarding the boundaries commanded by Section 6120, and seek to have Plaintiffs' cause of action dismissed. Instead, they would have this Court overcomplicate the issues and impermissibly second-guess binding authority.

Parties raising preliminary objections carry a heavy burden. Preliminary objections are sustained only when it is entirely clear that a Plaintiff's Complaint is defective, and there exists no probability of success as pled. Because Plaintiffs' cause of action is consistent with binding authority, and Defendants' Ordinances are preempted by Section 6120, we submit this Brief in Opposition to Defendants' Preliminary Objections pursuant to Rules 1028 and 1029 of the Pennsylvania Rules of Civil Procedure. In accordance with the same, we ask that this Court overrule Defendants' Preliminary Objections in total.

Facts

U.S. Law Shield of Pennsylvania, LLC (“U.S. Law Shield”) is a membership organization specifically geared toward those who lawfully own, possess and use firearms, as its chief purpose is to protect its members who lawfully use firearms from erroneous legal proceedings. Holding regular educational seminars, U.S. Law Shield additionally provides its members with information regarding the lawful use, possession, ownership, transfer and transportation of firearms. Its membership presently consists of over 1,000 residents of this Commonwealth, all of whom —upon information and belief— are eligible to possess firearms under state and federal law.

Specifically, Relator Todd Hoover is a member of U.S. Law Shield who is eligible to possess firearms under state and federal law. Relator Hoover recently retired from a decorated career with Pennsylvania State Police, ultimately attaining the rank of corporal. At present, Hoover is the Program Director of U.S. Law Shield of Pennsylvania, additionally working as a firearms instructor.

Plaintiff Bruno, while a member of U.S. Law Shield, has brought his claims as an individual. Bruno recently retired from his position as an investigator at the Office of the Pennsylvania Attorney General, and is currently a Pennsylvania State Constable. He conducts business in the City of Harrisburg on an extremely regular, if not daily basis. As a Pennsylvania State Constable, Plaintiff Bruno is eligible to carry a firearm under 18 U.S.C.A. § 926B (Law Enforcement Officers Safety Act) and 18 Pa.C.S. § 6106(b)(1). Even further, he has earned, and currently holds a valid Pennsylvania License to Carry Firearms. As required by the foregoing qualifications, Bruno is eligible to own and possess firearms under state and federal law. Accordingly, he owns firearms and lawfully carries and uses firearms on a daily basis.

Procedural History

On January 13, 2015, Plaintiff initiated this action by way of verified Complaint in this Court. Todd Hoover has served as Relator in this cause of action. Relator Hoover is additionally the program director of U.S. Law Shield of Pennsylvania. Although Justin McShane initially joined as an individual, he has since voluntarily discontinued his claims without prejudice. With permission of this Court by way of Stipulated Order, Plaintiffs amended their complaint on March 17, 2015, joining John Bruno as an individual Plaintiff.

The Complaint challenges the validity of six (6) of the Codified Ordinances of Harrisburg (the “Ordinances”): § 10-301.13 B, C (the “Park Ordinance”); § 3-355.2 A(1)-(3), B(8) (the “Emergency Ordinance”); § 3-345.1 (the “Minors Ordinance”); § 3-345.4 (the “Lost and Stolen Ordinance”); § 3-345.2 (the “Discharge Ordinance”); and § 3-345.99 (the “Criminal Penalties Ordinance”). In contending that the Ordinances are unlawful per 18 Pa.C.S. § 6120, the Complaint seeks injunctive relief, declaratory judgment, attorney fees, costs, expenses, and any other relief this Court deems just and equitable.

Plaintiffs filed a Motion for Preliminary Injunction on January 30, 2015, seeking to enjoin Defendants from enforcing the Ordinances. This Court held a hearing on the Motion on February 6, 2015. On February 25, 2015, this Court granted Plaintiffs’ Motion as to the Park Ordinance, the Emergency Ordinance and the Minors Ordinance. The Preliminary Injunction was denied as to the Lost and Stolen Ordinance and the Discharge Ordinance.

On or about April 6, 2015 Defendants filed Preliminary Objections to Plaintiffs’ Amended Complaint. Defendants have requested that the Amended Complaint be dismissed with prejudice, alleging that Plaintiffs fail to state a claim under the Uniform Firearms Act, Plaintiffs

have failed to show standing, Act 192 is unconstitutional, Defendants lack personal involvement, and Defendants are entitled to high official immunity.

By way of Order dated May 1, 2015, this Court set a hearing on Defendants' Preliminary Objections to take place on May 27, 2015. This Court further ordered that any and all briefs in support of, or opposition to Defendants' Preliminary Objections be filed on or before May 11, 2015.

Standard of Review

It is well established that "preliminary objections should be sustained and a complaint dismissed only in cases which are clear and free from doubt." *Schott v. Westinghouse Elec. Corp.*, 436 Pa. 279, 291 (1969) (citing *Legman v. Scranton School District*, 432 Pa. 342 (1968); *Todd v. Skelly*, 384 Pa. 423 (1956); *Gardner v. Allegheny County*, 382 Pa. 88 (1955)). Exclusively falling into this narrow category are "cases that clearly and without a doubt fail to state a claim for which relief may be granted" because "the complaint is clearly insufficient to establish the pleader's right to relief." *Allegheny Cnty. v. Com.*, 507 Pa. 360, 372 (1985) (citing *Firing v. Kephart*, 466 Pa. 560, 563 (1976)); *Schott v. Westinghouse Electric Corp.*, 436 Pa. 279 (1969) (additional citations omitted). The Supreme Court of Pennsylvania has held that, "[t]he question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Shafer Elec. & Const. v. Mantia*, 96 A.3d 989, 994 (Pa. 2014) (citing *Lord Corp. v. Pollard*, 548 Pa. 124 (1997)). Accordingly, for the purposes of preliminary objections, all well-pleaded averments of material fact, and "every inference fairly deducible from those facts" are considered admitted as true. *Allegheny Cnty. v. Com.*, 507 Pa. at 372. Therefore, if relief could be granted *under any theory of law* based upon the complaint,

preliminary objections in the nature of a demurrer should be rejected. *Allegheny Cnty. v. Com.* at 372 (citing *Packler v. State Employment Retirement Board*, 470 Pa. 368, 371 (1977)) (Emphasis added).

Even when the tremendous burden demanded by preliminary objections is met, “where a trial court sustains preliminary objections on their merits, it is generally an abuse of discretion to dismiss a complaint without leave to amend.” *Harley Davidson Motor Co. v. Hartman*, 296 Pa. Super. 37, 42 (1982). Only in rare instances, where amendment would be futile, is dismissal appropriate. *Id.* Accordingly, “the right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully.” *Otto v. American Mutual Insurance Company*, 482 Pa. 202, 205 (1978). If it is possible for the pleading to be cured by amendment, “a court may not enter final judgment, but must give the pleader an opportunity to file an amended complaint . . . [t]his is not a matter of discretion with the court but rather a positive duty.” *Framlau Corp. v. Delaware Cnty.*, 223 Pa. Super. 272, 276 (1972) (citing *Stevens v. Doylestown Bldg. and Loan Assoc.*, 321 Pa. 173 (1936); *Winters v. Penna. R. Co.*, 304 Pa. 243 (1931)). As a result, dismissal without leave to amend is rarely appropriate even when sustaining preliminary objections.

Because Local Governments are Prohibited from Regulating the Ownership, Possession, Transfer or Transportation of Firearms in Any Manner, Plaintiffs Have Adequately Stated a Claim under 18 Pa.C.S. § 6120

For over forty years, Pennsylvania law has restricted local governments from regulating firearms. As written today, 18 Pa.C.S. § 6120 (“Section 6120”) states, in pertinent part:

(a) General rule.--No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.

Although the statute is self-explanatory, binding precedent confirms that the preemptive effect of Section 6120 is very broad in scope. In interpreting Section 6120, the Commonwealth Court has taken a very basic approach, holding that “this statute clearly preempts local governments from regulating the lawful ownership, possession and transportation of firearms.” *Schneck v. City of Phila.* 383 A.2d 227, 229-230 (Pa. Cmwlth. 1978). The Commonwealth Court’s basic approach is consistent with that of the Supreme Court of Pennsylvania, which has held that “the General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or possession of firearms” *Ortiz v. Com.*, 681 A.2d 152, 155 (Pa. 1996). In *Ortiz*, the Court ultimately concluded that “regulation of firearms is a matter of concern in all of Pennsylvania . . . the General Assembly, not city councils, is the proper forum for the imposition of such regulation.” *Id.* at 156.

Recently, the Commonwealth Court has used strong language confirming the broad authority afforded by Section 6120. Particularly, it has reasoned that “Section 6120(a) preempts all firearm regulation.” *Dillon v. City of Erie*, 83 A.3d 461 (Pa.Cmwlth. 2014). In *Clarke v. House of Representatives*, the Commonwealth Court reached a consistent finding, and the Supreme Court of Pennsylvania went on to affirm its decision. 957 A.2d 361 (Pa. Commw. Ct. 2008) *aff’d sub nom. Clarke v. House of Representatives of the Com.*, 980 A.2d 34 (2009). In that case, the Commonwealth Court reviewed seven ordinances. The ordinances included a requirement for the reporting of lost or stolen firearms; limitation of handgun purchases per month/prohibiting straw purchases and sales; requirement of a special license to acquire a

firearm in Philadelphia or bring a firearm to Philadelphia; requirement for annual renewal of gun licenses; confiscation of firearms from those who pose a risk; prohibition of “assault weapons;” and requirement for reporting of ammunition sales. *Id.* at 362.

The Commonwealth Court found that each of the ordinances sought “to regulate firearms—an area that both Section 6120 and binding precedent have made clear is an area of statewide concern over which the General Assembly has assumed sole regulatory power.” *Id.* at 364. The holding is consistent with over two decades of binding authority, as Pennsylvania courts have been hesitant to uphold local firearms regulations of any kind.

The Regulation of Firearms is an Issue of Statewide Concern and Any Powers Granted by the Third Class City Code are Limited by the Legislature

Defendants cite numerous provisions of the Third Class City Code, contending that these provisions grant the authority beyond the stark limitations imposed by Section 6120. However, the Supreme Court of Pennsylvania has already determined that this is not the case. By its own terms, the powers granted in the Third Class City Code must give way to acts of the General Assembly dealing with matters of statewide concern. In pertinent part, the Third Class City Code provides:

Notwithstanding the grant of powers contained in this act, no city shall exercise powers contrary to or in limitation or enlargement of powers granted to the city by acts of the General Assembly which are:

...

(2) Applicable in every part of the Commonwealth.

(3) Applicable to all the cities of the Commonwealth.

53 Pa.C.S. § 41305.

Specifically, in *Ortiz*, the Supreme Court of Pennsylvania held that Section 6120 limits authorities granted through city codes. See *Ortiz*, 681 A.2d 152. While directly addressing the powers granted to cities of the first class, the limitations contained **precisely the same language as provided in the Third Class City Code**. The Court found the limitation applicable, holding that “18 Pa.C.S. § 6120, the act limiting municipal regulation of firearms and ammunition, applies in every county” and “regulation of firearms is a matter of concern in all of Pennsylvania” *Ortiz*, 681 A.2d at 156.

Because the General Assembly’s act, through Section 6120, is a matter of statewide concern, its limitations apply to Defendants notwithstanding the powers granted by the Third Class City Code. Thus, the powers conferred by the Third Class City Code cannot infringe upon areas within the scope of Section 6120.

Binding Authority Confirms that the Preemptive Effects of Section 6120 are Not Limited to Unlawful Conduct

Although Defendants contend that “the UFA only preempts ordinances that regulate lawful possession of firearms,” the Commonwealth Court has expressly held otherwise. Defendants’ *Preliminary Objections to Plaintiffs’ Amended Complaint* ¶ 20. While the court entertained Defendants’ assertion in *Minich v. Cnty. of Jefferson*, more recently, the Commonwealth took a decidedly opposite approach in *National Rifle Association v. City of Philadelphia*.

In *NRA v. Philadelphia*, the court was presented with this precise issue. While the City of Philadelphia asserted that through Section 6120 “the General Assembly intended only to preclude local regulation of *lawful* activity,” the Court disagreed. *Nat’l Rifle Ass’n v. City of Phila.*, 977 A.2d 78, 82-83 (Pa. Cmwlth. 2009). The Commonwealth Court relied upon “the

crystal clear holding of our Supreme Court in *Ortiz*, that, ‘the General Assembly has [through enactment of § 6120(a)] denied all municipalities the power to regulate the ownership, possession, transfer or [transportation] of firearms’” *Id.* (emphasis in original) (quoting *Ortiz*, 681 A.2d 152 (1996)). Consequently, the preemptive effect of Section 6120 prohibits local governments from enacting, maintaining or enforcing **any regulation** with respect to the ownership, possession, transfer or transportation of firearms.

Defendants are Preempted from Enacting Laws Regulating the Concealed Carry of Firearms as the Third Class City Code Authority is Limited by Section 6120

Defendants further contend that “[t]he Third Class City Code gives Harrisburg explicit authority to prevent. . . concealed carry.” *Defendants’ Preliminary Objections to Plaintiffs’ Complaint* ¶ 17. Beyond the discussion above addressing the general limitations imposed upon the Third Class City Code, this is contrary to the present state of the law. Specifically, Defendants rely upon 53 Pa.C.S. § 37423, which reads: “**To the extent permitted by Federal and other State law**, council may . . . prevent the carrying of concealed deadly weapons.” (emphasis added).

The statute particularly recognizes that prevention of concealed firearms is an area protected by state and federal law. In fact, the version of the statute enacted in 2014 **added** the language “to the extent permitted by Federal and other State law.” Naturally, this recognition confirms that this grant of authority cannot reach beyond the laws and protections established by the state legislature. It is indisputable that the carry of firearms, concealed or otherwise, falls within the scope of authority Section 6120 has reserved for the General Assembly. Furthermore, 18 Pa.C.S. § 6109 explicitly implements the requirements necessary to acquire a Pennsylvania

License to Carry Firearms, which grants a citizen the ability to lawfully carry a concealed firearm. As a result, the Third Class City Code does not provide local governments with the authority and power to ban the concealed carry of firearms when the same is permitted under state law.

Defendants may argue that this interpretation would render Section 37423 meaningless. However, local governments may regulate the carrying of “concealed deadly weapons” *other than firearms*. The General Assembly did not use the term “gun” or “firearm” in this purported grant of authority. Because Section 6120 solely restricts the regulation of firearms and ammunition, there is room for regulation of other concealed weapons. Moreover, Pennsylvania’s License to Carry Firearms as constructed in 18 Pa.C.S. § 6109 grants its holders the ability to lawfully conceal firearms, but not other weapons. Unlike the concealed carry licenses issued in other states, which grant the ability to carry several types of concealed weapons (*e.g.* Florida, Delaware, Idaho, Iowa, and others), the Pennsylvania License to Carry Firearms does not extend beyond firearms. As a result, State law does not permit cities of the Third Class, such as Defendant City of Harrisburg, to regulate the concealed carry of firearms.

Binding Authority Dictates that Activities Beyond “Carry” and “Transport” are Preempted

Defendants argue that the preemptive effects of Section 6120 only apply to activities involving the carry or transport of firearms. However, the Commonwealth Court has already held to the contrary. In *Clarke v. House of Representatives*, Petitioner Clarke argued that “Section 6120’s qualifying phrase ‘when carried or transported’ leaves room for municipalities to regulate any uses of firearms which do not involve carrying or transporting them.” 957 A.2d 361, 364

(Pa. Cmwlth. 2008) *aff'd sub nom. Clarke v. House of Representatives of the Com.*, 602 Pa. 222, 980 A.2d 34 (Pa. 2009). The Commonwealth Court disagreed, relying on the “broad and unqualified language” in *Ortiz*, and the ultimate holding in *Schneck*. *Id.* Furthermore, the Court noted that the ordinances struck down in both *Ortiz* and *Schneck* were “not qualitatively different” than the ordinances at issue in *Clarke*. *Id.* Consequently, as per binding authority, Section 6120 preempts regulation beyond activity involving carry or transport.

The Ordinances Regulate Conduct Not Prohibited by the Laws of this Commonwealth

At the very least, it is well-settled that “the General Assembly has [through enactment of § 6120(a)] denied all municipalities the power to regulate the ownership, possession, transfer or [transportation] of firearms.” *Nat'l Rifle Ass'n v. City of Phila.*, 977 A.2d 78, 82 (Pa. Commw. Ct. 2009) (quoting *Ortiz* at 155). Assuming *arguendo* that Section 6120 were strictly limited to the preclusion of ordinances which reach beyond existing State laws, Plaintiffs’ claims remain sufficient. As set forth below, the contested Ordinances distinctively regulate conduct which is not prohibited by the laws of this Commonwealth.

The Regulation on State Parks Does Not Apply to City Parks, and Additionally Provides an Exception for those with a License to Carry Firearms

Contrary to Defendants’ assertion, Plaintiffs are permitted to carry firearms in city parks under Pennsylvania law. There is no law at the state level which prohibits firearms in city parks. However, Defendants insinuate that city parks in Harrisburg should be regulated in the same manner as state parks, asserting that “state regulations ban guns in parks anyway.” *Defendants’ Preliminary Objections to Plaintiffs’ Amended Complaint* ¶ 32.

At the state level, there is no law prohibiting Plaintiffs from carrying firearms in parks. Rather, there is a regulation which addresses carrying firearms in State parks. By its own designation, Chapter 11 of Title 17 of the Pennsylvania Code strictly applies solely to **State parks**. 17 Pa. Code § 11.202.

State parks are further defined by Chapter 11:

State park—

(i) An area under the jurisdiction of the Department acquired or administered as a park under section 303 of the act (71 P. S. § 1340.303) or designated or administered as a park under section 302(a)(12) of the act (71 P. S. § 1340.302(a)(12)).

(ii) The term includes:

(A) A State park.

(B) A State park preserve.

(C) A parkway.

(D) A conservation area as defined in § 44.1 (relating to defined) that is administered and managed by the Department's Bureau of State Parks.

(E) A State Park Natural Area as defined in § 17.2 (relating to State Parks Natural Area definition).

(F) An environmental education center administered by the Department's Bureau of State Parks.

(G) State park waters under § 11.203 (relating to State park waters).

17 Pa. Code § 11.201.

The definition encompasses seven areas which constitute state parks. None of these reference city parks, whether or not they accept state funding. While Defendants additionally argue that they are under a "perpetual legal duty to comply with DCNR regulations," this argument is erroneous. First, any alleged contractual obligation, or condition on funding is inappropriate for Defendants' preliminary objections, as it has provided no evidence of the same. Additionally, Defendants are legally unable to accept funding contingent upon violating State law. Public policy could not permit local governments to evade the General Assembly's limits on municipal authority through a mere agreement. Finally, the DCNR regulations apply solely to

state parks, and Defendants could comply with the regulations without prohibiting firearms in city parks.

Moreover, even in State parks, this very regulation doesn't apply to those with a License to Carry Firearms. The authority on state parks comes from 18 Pa.C.S.A. § 7506. Section 7506 confers authority upon the Department of Environmental Resources, Pennsylvania Game Commission and Pennsylvania Historical and Museum Commission to "promulgate rules and regulations governing conduct . . . on Commonwealth property within the jurisdiction of that agency." These rules must be reasonably related to promotion of "the welfare, safety or protection of those persons using such property" and must be "consistent with existing law." *Id.*

In accordance with Section 7506, the Pennsylvania Code regulates the carry of firearms in state parks. Specifically, 17 Pa. Code § 11.25(4) provides:

The following activities are prohibited without written permission of the Department . . . [p]ossessing an uncased device, or uncasing a device, including a firearm . . . except as provided in paragraph (2) [related to hunting] or (7) [related to target shooting], or except in the owner's building on a leased campsite, in the owner's residence, or in the owner's vehicle or trailer.

However, **18 Pa.C.S. 6109 (m.2) specifically provides that certain individuals are exempt from these limitations.** It reads:

(m.2) Inconsistent provisions.--Notwithstanding the provisions of section 7506 . . . and regulations promulgated under that act, a firearm may be carried as provided in subsection (a) by:
(1) a law enforcement officer whose current identification as a law enforcement officer shall be construed as a valid license to carry a firearm; or
(2) any licensee.

As per the explicit exemptions for licensees granted in Section 6106(m.2), the prohibitions of 17 Pa. Code § 11.25 do not apply to those with a valid Pennsylvania License to Carry Firearms, such as Relator Hoover and Plaintiff Bruno. Therefore, even though the regulation does not apply to city parks, Defendants' argument must fall shy under any

interpretation because the Ordinance is still more restrictive than the regulation imposed on State parks.

Because the Third Class City Code is Limited when the General Assembly Acts on Matters of Statewide Concern, It Does Not Provide Authority to Regulate Firearms in City Parks

In efforts to justify the Parks Ordinance, Defendants rely upon the vague authorities granted in the Third Class City Code through 53 Pa.C.S. §37435 and 53 Pa.C.S. § 37402.1(a). However, as asserted above, the powers granted in the Third Class City Code must give way to acts of the General Assembly dealing with matters of statewide concern. Thus, as held in *Ortiz*, the provisions cited by Defendants are unequivocally subject to the limitations of Section 6120.

Beyond this general principle, the statutes cited expressly recognize their limitations. Under 53 Pa.C.S. § 37402.1(a), the powers to “Purchase, hold, use and manage real and personal property” are “**subject to any restrictions, limitations or exceptions as set forth in [the Third Class City Code].**” (Emphasis added). As previously stated, the authorities conferred by the Third Class City Code are limited by acts of the General Assembly which deal with matters of statewide concern. On its face, this grant of authority recognizes that it is limited by these bounds, and does not intend to reach beyond the same.

Further, 53 Pa.C.S. §37435 faces restrictions beyond those of statewide concern. The law grants city councils the power to enact and enforce ordinances “necessary for the proper management, care and control of the city . . . and the maintenance of the peace, good government, safety and welfare of the city.” However, it is expressly limited to those ordinances “not inconsistent with or restrained by the Constitution of Pennsylvania and laws of this Commonwealth”

Because the General Assembly assumes sole regulatory authority on matters of statewide concern, Defendants cannot use authorities granted by the Third Class City Code to engage in conduct prohibited by 18 Pa.C.S. § 6120. Namely, the powers granted in Sections 37435 and 37402.1 do not allow Defendants to ban firearms in city parks.

The Emergency Ordinance Has No Exception for Those with a License to Carry Firearms, and Therefore Regulates Conduct Which is Lawful under the Laws of the Commonwealth

Similar to carrying firearms in parks, under state law, it is entirely lawful for licensees to carry firearms during a state of emergency. Defendants claim that “the UFA bans carrying guns during declared emergencies.” *Defendants’ Preliminary Objections to Plaintiffs’ Amended Complaint* ¶ 41. However, the Pennsylvania Crimes Code addresses conduct prohibited during a state of emergency in 18 Pa.C.S. § 6107:

- (a) General rule.**--No person shall carry a firearm upon the public streets or upon any public property during an emergency proclaimed by a State or municipal governmental executive unless that person is:
- (1) Actively engaged in a defense of that person's life or property from peril or threat.
 - (2) Licensed to carry firearms under section 6109 (relating to licenses) or is exempt from licensing under section 6106(b) (relating to firearms not to be carried without a license).

The statute plainly provides an exception for those who are licensed to carry firearms. Consequently, in accordance with the laws of this Commonwealth, licensees —such as Relator Hoover and Plaintiff Bruno— may lawfully carry firearms during an emergency proclaimed by a state or municipal government. The Emergency Ordinance acts as a complete ban, and provides no exception for licensees. Defendants argue that the powers granted in 53 Pa.C.S. § 36203(e)(3)(iv), (vi) allow them to ban firearms in the interest of life, health, property or the public peace. But again, this grant of authority is limited by the very terms of the Third Class

City Code, as the General Assembly has acted, and it involves the regulation of firearms, which is a matter of statewide concern. Contrary to Defendants' assertion, the Emergency Ordinance does in fact prohibit conduct which is otherwise lawful under the laws of this Commonwealth.

Because the Minors Provides No Exception for Lawful Hunting or Trapping, It Regulates Otherwise Lawful Activity

Defendants additionally assert that "it is illegal for unsupervised children to carry guns in public areas." *Defendants' Preliminary Objections to Plaintiffs' Complaint* ¶ 23. However, this is a mischaracterization of state law. State law prohibits unsupervised individuals under 18 years of age from possessing or transporting a firearm in the Commonwealth, *unless* they are "lawfully hunting or trapping in accordance with 34 Pa.C.S." 18 Pa.C.S. § 6110.1. The Ordinance provides no exception, and prohibits minors engaged in lawful hunting or trapping from transporting firearms. Even under the narrowest reading of 18 Pa.C.S. § 6120, it is clear that the Ordinance's complete ban regulates the possession and transport of firearms beyond those of the Commonwealth.

The Lost and Stolen Ordinance Imposes a Duty on Firearms Owners, Thus Regulating Firearms Ownership Beyond the Laws of This Commonwealth

Defendants additionally assert that the Lost and Stolen Ordinance is not preempted by Section 6120 because it does not affect activities involving carry or transport of firearms. *Defendants' Preliminary Objections to Plaintiffs' Amended Complaint* ¶ 26. However, this argument has been rejected by the Commonwealth Court. In light of the Supreme Court of Pennsylvania's "broad and unqualified language" in *Ortiz*, the Commonwealth Court has

previously rejected the argument that Section 6120 only preempts carry or transport. *Clarke*, 957 A.2d at 364.

Section 6120 preempts the regulation of “*ownership, possession, transfer or transportation* of firearms” in any manner. (Emphasis added). In placing an affirmative duty on firearms owners, the Lost and Stolen Ordinance regulates the ownership of firearms. The Ordinance reads “[a]ny person who is the owner of a firearm that is lost or stolen shall report the loss or theft of that firearm to an appropriate local law enforcement official within 48 hours after discovery of the loss or theft.” *Codified Ordinances of Harrisburg*, Chapter 3-345 § 3-345.4. By its own terms, the Ordinance specifically applies strictly to firearms owners, and strictly applies to the scope of firearm ownership, and not merely possessors. Because of the Ordinance, an affirmative duty is necessarily affixed to firearms ownership which is not otherwise imposed by the state legislature.

The Commonwealth Court has previously found that an ordinance mandating firearms owners to report lost or stolen firearms was preempted by Section 6120, and the Supreme Court of Pennsylvania affirmed its decision. *Clarke*, 957 A.2d at 364. In its reasoning, the Court noted that such ordinances “seek[] to regulate firearms — an area that both Section 6120 and binding precedent have made clear is an area of statewide concern over which the General Assembly has assumed sole regulatory power.” *Id.*

Furthermore, in *NRA v. Pittsburgh*, the Commonwealth Court considered a similar ordinance. 999 A.2d 1256 (Pa. Cmwlth. 2010). Unfortunately, the Commonwealth Court did not reach a holding with respect to whether the ordinance violated the Section 6120 because it dismissed the claim for lack of standing. While the Court suggested that the ordinance likely did not infringe upon the plaintiffs’ constitutional rights to bear arms, and that the requirement did

not necessarily constitute an inventory of firearms, it did not evaluate the ordinance as it relates to Section 6120.

Judge Brobson's dissent insinuated—in conformity with *Clarke*—that such an ordinance does in fact violate Section 6120. The majority of Judge Brobson's dissent focused on standing, opposing the “insurmountable obstacle to pre-enforcement review” with respect to Pittsburgh's Lost and Stolen Ordinance:

In essence, the majority posits that the only person who may lodge a pre-enforcement challenge to a criminal ordinance is a person who *in a verified pleading filed with a court of law*, either (a) admits that he or she has already violated the ordinance in question or (b) commits to violating the law. I disagree that this is or should be the state of the law in this Commonwealth when it comes to challenging the facial validity of legislation at any level of government.

Nat'l Rifle Ass'n v. City of Pittsburgh, 999 A.2d 1256, 1261 (Pa. Commw. Ct. 2010) (Brobson, J. dissenting) (emphasis in original).

Judge Brobson also recognized that “lost or stolen” ordinances *do* regulate the ownership of firearms. He reasoned: “[t]he ordinance is self-executing and imposes a new reporting requirement on a defined class of residents of the City of Pittsburgh—firearms owners.” *Id.*

Similarly, Harrisburg's Lost and Stolen Ordinance is deliberately tailored toward firearms owners. The ordinance bestows an additional duty upon firearms owners, which is directly related to their firearm ownership. As a result, in Harrisburg, firearm ownership is inextricably bound to a duty which is not otherwise imposed by the laws of this Commonwealth. In accordance with the holding reached in *Clarke* and Judge Brobson's dissent in *NRA v. City of Pittsburgh*, the Lost and Stolen Ordinance not only falls within the scope of Section 6120, but plainly violates it.

Because Defendants Have Not Directly Challenged Plaintiffs' Claim Based on the Discharge Ordinance, and the Unlimited Scope of the Discharge Ordinance Goes Beyond Defendants' Authority Under the Third Class City Code, the Claim Must Proceed

Defendants did not raise a preliminary objection to Plaintiffs' cause of action based on the discharge ordinance. Accordingly, Plaintiffs' cause of action based on the discharge ordinance must proceed. Despite the fact that Defendants do not directly challenge the discharge ordinance through their preliminary objections, they cite the Third Class City Code provision addressing discharge of firearms. Even if the mere mention of this statutory provision were sufficient to constitute a challenge to Plaintiffs' cause of action, it would remain insufficient to succeed.

Much like the other contested ordinances, the Discharge Ordinance is distinguishable from State law. Pennsylvania law provides numerous regulations on the discharge of firearms, many of which are found in the Game Code), and one of which is found in the Crimes Code. See 34 Pa.C.S. §§2505-2508; 18 Pa.C.S. § 2707.1. As asserted in Plaintiffs' Amended Complaint, none of the laws individually, nor all of them combined, amount to a complete ban on discharge as provided by Harrisburg's Discharge Ordinance.

The Third Class City Code additionally provides guidance regarding discharge of firearms. Accordingly, 53 Pa.C.S. § 37423 reads: "**To the extent permitted by Federal and other State law**, council may regulate, prohibit and prevent the discharge of guns" (emphasis added). As expressly stated, this authority is only provided to the extent permitted by State law, significantly limiting the powers granted. The extent permitted by State law is found in 53 P.S. § 3703, which expressly permits local governments to "regulate or to prohibit and prevent . . . *the unnecessary firing and discharge of firearms* in or into the highways and other

public places thereof.” 53 P.S. § 3703 (emphasis added). Absent this express grant to regulate *unnecessary* discharge, local governments are powerless to impose further regulations.

Even considering this particular grant of authority, Defendants remain subject to the Third Class City Code’s limitations regarding matters of statewide concern. Thus, city ordinances must remain compliant with acts of the General Assembly regarding discharge of firearms. Assuming *arguendo* that *unnecessary discharge* of firearms were a matter of local concern, discharge in self-defense is undoubtedly a matter of statewide concern. Under Article 1 Section 21 of the Pennsylvania Constitution, “the right of the citizens to bear arms in defense of themselves and the State shall not be questioned.” Firearms are constitutionally protected *in the specific context of self-defense*. Accordingly, the Supreme Court Pennsylvania has previously decided that regulation of constitutionally protected rights are matters of statewide concern. As a result, Defendants lack the authority to enforce an absolute ban on discharge, and must abide by the preemptive effect of Section 6120.

As Statutorily Conferred by 18 Pa.C.S. § 6120, Plaintiffs Have Standing

As a mechanism to promulgate compliance with 18 Pa.C.S. § 6120, the state legislature has provided citizens with means to challenge non-compliant regulations. Under Section 6120, as amended by Act 192:

A person adversely affected by an ordinance, a resolution, regulation, rule, practice or any other action promulgated or enforced by a county, municipality or township prohibited under subsection (a) or 53 Pa.C.S. § 2962(g) (relating to limitation on municipal powers) may seek declaratory or injunctive relief and actual damages in an appropriate court.

The law further defines “person adversely affected” to include:

Any of the following:

- (1) A resident of this Commonwealth who may legally possess a firearm under Federal and State law.
- (2) A person who otherwise has standing under the laws of this Commonwealth to bring an action under subsection (a.2).
- (3) A membership organization, in which a member is a person described under paragraph (1) or (2).

These provisions of 18 Pa.C.S. § 6120 took effect as law in this Commonwealth on January 5, 2015, and remain in effect at the date of this filing. As properly pled in the Amended Complaint, Plaintiff U.S. Law Shield is a membership organization, which consisted of approximately 827 members at the time of filing. Amended Complaint ¶ 1. Membership has since increased to over 1,000 members. All of its members are residents of this Commonwealth, and upon information and belief, may legally possess a firearm under Federal and State law. *Id.* Specifically, Relator Hoover is a resident of this Commonwealth who may legally possess a firearm under Federal and State law. *Id.* at ¶¶ 2, 23.

Similarly, Plaintiff Bruno has properly pled standing under 18 Pa.C.S. § 6120. Plaintiff Bruno is a resident of this Commonwealth who may legally possess a firearm under Federal and State law. Amended Complaint ¶¶ 3, 24. Consequently, Plaintiffs have standing to bring this action, and have properly pled the same.

Defendants Cannot Meet the Burden Required to Prove that Act 192 is Unconstitutional

Defendants additionally assert that the amendments of Act 192 are unconstitutional. However, well-settled precedent establishes that laws passed by the General Assembly are afforded a strong presumption of constitutionality. *Pennsylvania State Ass'n of Jury Comm'rs v. Com.*, 64 A.3d 611, 618 (Pa. 2013). In accordance with this presumption, a law will only be found unconstitutional "if the party challenging the law can prove that it clearly, palpably and

plainly violates the Constitution." *Nixon v. Dep't of Pub. Welfare*, 576 A.2d 385, 398 (Pa. 2003). All doubts and inferences are to be resolved in favor of finding a statute to be constitutional. *Commonwealth v. Hendrickson*, 724 A.2d 315, 317 (Pa. 1999).

Accordingly, a party who attacks the constitutionality of a statute bears a very heavy burden of persuasion to demonstrate that the statute plainly violates the Constitution. *Commonwealth v. Barud*, 681 A.2d 162, 165 (Pa. 1996). The Commonwealth Court has addressed this burden in the particular context of an alleged defect in enactment, noting "[t]his burden is particularly weighty where, as here, the challenge is not to the substance of the law but to the procedure by which it was enacted, an issue which implicates the delicate relationship between the legislative and judicial branches." *DeWeese v. Weaver*, 824 A.2d 364, 369 (Pa. Commw. Ct. 2003).

This Court has previously declined to determine the constitutionality of Act 192, noting that "[t]he Commonwealth Court is the appropriate forum to resolve this constitutional question." Opinion (Deciding on Preliminary Injunction) at 3. Irrespective of that determination, Defendants have failed to surmount the heightened burden required of preliminary objections, coupled with the legislation's significant presumption towards constitutionality. Defendants provide three brief paragraphs describing their account of the procedure in which the General Assembly enacted Act 192.

Plaintiffs Need Not Plead Any Further Injury, as Pennsylvania Law Allows for Statutorily Proscribed Standing

Defendants further contend that Act 192 "directly contradicts the general requirement that plaintiffs prove liability and *harm*." *Defendants' Preliminary Objections to Plaintiffs' Amended Complaint* ¶ 14 (emphasis in original). Because Defendants fail to provide a citation of

the authority upon which they rely, Plaintiffs are uncertain as to the alleged basis for this assertion. The Supreme Court of Pennsylvania has recognized that “the Pennsylvania Constitution has no counterpart to Article III’s ‘case or controversy’ requirement.” *In re Hickson*, 573 Pa. 127, 136 N. 5 (2003). The Court has further recognized this distinction in the context of statutorily proscribed standing. *Hous. Auth. of Cnty. of Chester v. Pennsylvania State Civil Serv. Comm’n*, 556 Pa. 621 (1999). In that case, the Court held that “if a statute properly enacted by the Pennsylvania legislature furnishes the authority for a party to proceed in Pennsylvania’s courts, the fact that the party lacks standing under traditional notions of our jurisprudence will not be deemed a bar to an exercise of this Court’s jurisdiction” *Id.* at 632. Although that particular case solely addressed the powers of the Supreme Court of Pennsylvania and the Commonwealth Court, the reasoning for the Court of Common Pleas is analogous. The Court reasoned, “[s]ignificantly, the drafters of the Pennsylvania Constitution did not restrict this Court’s jurisdiction to matters in which a ‘case’ or ‘controversy’ has been presented, as did Article III of the federal Constitution.” *Id.* at 631-32. Identically, there is no Constitutional mandate that the Court of Common Pleas face a “case or controversy” as required in Article III. Rather, Article IV grants the Court of Common Pleas “unlimited original jurisdiction in all cases except as may otherwise be provided by law.” In granting a statutory right to pursue a cause of action, Act 192 does not exceed any bounds of the Pennsylvania Constitution or Pennsylvania jurisprudence.

Holding the Exclusive Means to Repeal and Enforce the Ordinances, Each Defendant is Sufficiently Involved through Enforcing and Upholding the Same

Moving forward, Defendants assert that Plaintiffs have not demonstrated that “the Mayor, Chief, or Council Members have harmed them.” *Defendants’ Preliminary Objections to*

Plaintiffs' Amended Complaint ¶ 42. Defendants offer support for their objection stating that all took office after enactment of every ordinance other than the reporting ordinance. *Id.* at ¶ 43.

However, [t]he legislative power of every city shall be vested in a council composed of the mayor and council members.” 53 Pa.C.S. § 36002. Included in these powers is the power to repeal ordinances. See 53 Pa.C.S. § 36040. Plaintiffs’ claim for relief is not limited to the enactment of the contested Ordinances. Rather, Plaintiffs’ Complaint specifically alleges that Defendants are responsible for the enactment, upholding, enforcement and failure to repeal the Ordinances at issue.

As properly pled, Defendant Mayor Papenfuse is the policymaker of the City of Harrisburg and maintains decision-making authority over Defendant City of Harrisburg’s practices through his role on City Council. Similarly, Defendants listed as members of City Council —Wanda Williams, Sandra Reid, Brad Koplinski, Ben Alatt, Jeff Baltimore, Susan Wilson, and Shamaine Daniels— share with Mayor Papenfuse the exclusive means for upholding and failure to repeal the Ordinances. See 53 Pa.C.S. § 36002; 53 Pa.C.S. § 36040. Any action to repeal or otherwise abrogate the contested Ordinances is solely within their discretion. *Id.* Finally, Defendant Thomas Carter as Chief of Police is responsible for enforcing the unlawful ordinances. Absent voluntary repeal, Defendant Chief Carter’s duties include enforcing the Ordinances unless and until the Court holds otherwise. Despite Defendants’ contention, Defendants’ lack of personal involvement in the enactment of the Ordinances has no bearing on Plaintiffs’ cause of action.

Because this Action Seeks Equitable Relief to Remedy Unlawful Conduct, Defendants are Not Entitled to High Official Immunity

Lastly, Defendants contend that they are entitled to high official immunity for their actions. As the matter at hand seeks injunctive and declaratory relief, the common law defense of high official immunity does not apply.

While Defendants assert that Plaintiffs' claims against Defendants Mayor Papenfuse, City Council Members, and Chief Carter are barred by high official immunity, there is no authority suggesting that high official immunity insulates officials from relief other than civil damages. Although Defendants rely on *Feldman v. Hoffman*, that case specifically involved claims for conversion and intentional infliction of emotional distress, for which the plaintiffs sought damages. 2014 WL 7212601 (Pa. Commw. Dec. 19, 2014). In *Feldman*, the Court relied upon *Lindner v. Mollan* in its reasoning, stating that high official immunity "is unlimited and exempts a high public official **from all civil suits for damages** arising out of false defamatory statements and even from statements or actions motivated by malice" 544 Pa. 487 (1996) quoting *Montgomery v. City of Philadelphia*, 392 Pa. 178, 182-83 (1958) (emphasis added). In *Lindner*, the Court further explained the purpose of high official immunity, which solely focused upon preventing slander and libel based civil actions for damages:

Absolute privilege is designed to protect the official from the suit itself, from the expense, publicity, and danger of defending the good faith of his public actions before the jury. And yet, beyond this lies a deeper purpose, **the protection of society's interest in the unfettered discussion of public business and in full public knowledge of the facts and conduct of such business**

Lindner at 491 quoting *Montgomery* (emphasis added).

This case deals with neither slander nor libel, and Plaintiffs do not seek monetary damages. Rather, this cause of action seeks injunctive and declaratory relief in efforts to compel

Defendants to comply with existing State law. Based primarily, if not exclusively on issues of law, this lawsuit does not subject Defendants to the concerns alleviated by high official immunity. Consequently, allowing this lawsuit to proceed would have no bearing on Defendants' unfettered discussion of public business, or their ability to act in the interest of society. Instead, this action merely seeks to ensure that Defendants act within the bounds of the law.

Conclusion

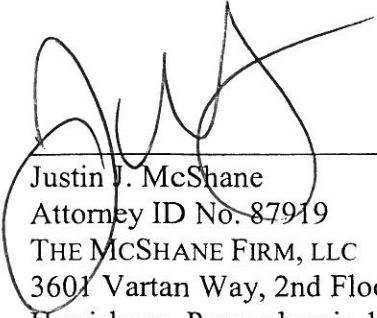
In raising preliminary objections, Defendants bear a heavy burden which they cannot meet. To succeed, they must necessarily show that the law says with certainty that no recovery is possible. In spite of this Court's previous findings that Plaintiffs have demonstrated a clear right to relief and a likelihood of success on the merits of their claims, Defendants ask this Court to find *with certainty* that success is *impossible*. Binding authority dictates that Plaintiffs' claims are sound. Like the ordinances struck down in *Schneck, Ortiz, and Clarke*, each of the ordinances unlawfully "regulate firearms—an area that both Section 6120 and binding precedent have made clear is an area of statewide concern over which the General Assembly has assumed sole regulatory power." *Clarke*, 957 A.2d at 364.

The Pennsylvania Supreme Court and the Commonwealth Court have consistently taken a basic approach in interpreting Section 6120. The General Assembly may regulate firearms, and local governments cannot, *in any manner*. Defendants attempt to overcomplicate this basic approach by re-introducing arguments which have been repeatedly rejected. We ask that this Court look past this tactic. Accordingly, we respectfully request this Court overrule Defendants' Preliminary Objections in total.

WHEREFORE, in light of the reasons set forth above, Plaintiffs respectfully request that this Court overrule Defendants' Preliminary Objections to Plaintiffs' Amended Complaint in total, and allow this action to proceed accordingly.

Respectfully submitted,
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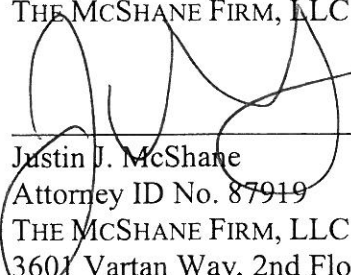
CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Brief in Opposition to Defendants' Preliminary Objections, was sent via electronic mail and United States Mail, postage prepaid on this 11th day of May 2015, to all known counsel of record listed below:

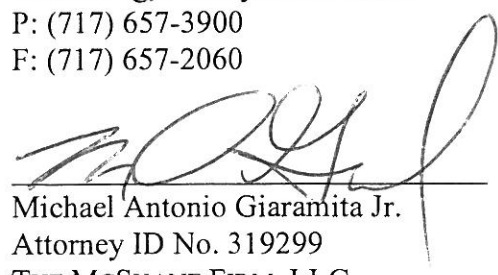
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