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DAUPHIN COUNTY
PENN.
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IN THE COURT OF COMMON PLEAS OF THE 12TH JUDICIAL DISTRICT
DAUPHIN COUNTY, PENNSYLVANIA

U.S. Law Shield of Pennsylvania, : 2015-cv-255
Ex rel. Todd Hoover; and Justin J. McShane, :
Plaintiffs : Civil Action – Equity
v. :
City of Harrisburg; Mayor Eric Papenfuse; : Jury Trial Demanded
Wanda Williams, Sandra Reid, :
Brad Koplinski, Ben Alatt, Jeff Baltimore, : Judge Andrew H. Dowling
Susan Wilson, Shamaine Daniels, :
Harrisburg City Council Members; and :
Chief of Police Thomas Carter, :
Defendants :

Brief in Support of Preliminary Objections

Respectfully submitted,

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Dated: May 11, 2015

I. Procedural History:

This Court granted in part and denied in part Plaintiffs' motion for a preliminary injunction. Specifically, this Court enjoined the minors, emergency, and parks ordinances, and not the reporting and discharge ordinances. Defendants (collectively "Harrisburg") appealed the partial grant to the Commonwealth Court.

Harrisburg filed an application to stay this case pending appeal, which this Court denied. Simultaneously with filing this brief, Harrisburg files an application with the Commonwealth Court to stay these proceedings pending appeal.

II. Facts:

In 1921, Pennsylvania authorized cities to ban unnecessary discharge of weapons. 53 Pa.C.S §3703. In 1931, the Third Class City Code expanded authority for cities like Harrisburg to prevent discharge or concealed carrying. 53 Pa.C.S. §37423. The Code further provides the Mayor discretion, during declared emergencies, to prohibit any activities dangerous to the public peace. 53 Pa.C.S. §36203(e)(3)(iv),(vi). In 2014, the General Assembly re-enacted the Code.

In the meantime, Harrisburg banned unsupervised children from carrying guns outside the home in 1951, gave the mayor discretion to ban guns in public during declared emergencies in 1969, banned discharge in 1971, banned guns in parks in 1991, and required reporting of lost or stolen guns in 2009.

At the center of this litigation, in 1974, Pennsylvania amended the Uniform Firearms Act to prevent municipalities from regulating lawful gun ownership. 18 Pa.C.S. §6120. The UFA also generally bans public carrying during emergencies

and unsupervised children from carrying guns. 18 Pa.C.S. §6107, §6110.1.

A Pennsylvania Department of Conservation and Natural Resources regulation also bans guns in parks. 17 Pa.Code §11.215. In 2008, the UFA was amended to add a statutory exception to the DCNR regulation, allowing the concealed carry of firearms in parks. 18 Pa.C.S. §6109(m.2).

Act 192 of 2014 amended the UFA to add attorney fees for prevailing plaintiffs, automatic standing, and actual damages. Plaintiffs do not allege any likelihood that they will ever engage in any of the following restricted activities: discharging a firearm in the City, carrying a firearm in a park, carrying a firearm during an emergency, possessing a firearm as a child (all Plaintiffs are adults), or failing to report a lost or stolen firearm. Plaintiffs do not allege that Harrisburg has ever used these ordinances to restrict lawful self-defense. To the contrary, Harrisburg did not charge Representative Marty Flynn last year who fired his gun in self-defense.

III. Questions involved:

Does Act 192 violate the Pennsylvania Constitution? Yes.

Have Plaintiffs ever been affected by these ordinances enacted in 1951, 1969, 1971, 1991, and 2009? No.

Did Harrisburg have authority to enact the ordinances?
Yes.

Are the Mayor, City Council members, and Police Chief immune from suit? Yes.

IV. Argument:

A. This lawsuit is founded upon a violation of the Pennsylvania Constitution.

This lawsuit is an illegal attack on the citizens of Harrisburg through an unconstitutional, new statute. Act 192 violates the single subject and original purpose rules in Article III, Sections 1 and 3, of Pennsylvania's Constitution. Legislators tacked these standing and attorney fee provisions onto a bill about mental health records (HB 1243), which died in committee. At the tail-end of the legislative session, legislators took that bill and attached it *verbatim* to a bill about theft of copper wire (HB 80). This is the legislature at its worst, and this Court should not let Plaintiffs elevate a hastily-passed statute over the Constitution. After changing the original purposes of both HB 80 and 1243, the final bill has at least three subjects: firearm lawsuits, mental health records, and theft of copper wire.

The Pennsylvania Supreme Court does not take these constitutional demands as lightly as Plaintiffs would have this Court take them. Let there be no mistake. The Pennsylvania Supreme Court is enforcing these constitutional demands. *See Com. v. Neiman*, 84 A.3d 603 (Pa. 2013) (rejecting broad subjects of judicial code, civil remedies, and judicial remedies, and striking down deficiency judgment bill amended to alter Megan's Law); *Jury Comm'rs v. Com.*, 64 A.3d 611 (Pa. 2013) (rejecting broad subject of powers of county commissioners and striking down statute on farm equipment regulation and eliminating certain jury commissioners); *City of Phila. v. Com.*, 838 A.2d 566 (Pa. 2003) (rejecting broad subject of municipalities and striking down bill regarding citizenship requirements for certain

municipal board members amended to reorganize convention center).

The Commonwealth Court is following suit. *Marcavage v. Rendell*, 936 A.2d 940 (Pa. Commw. 2005), *aff'd*, 951 A.2d 345 (Pa. 2008) (rejecting broad subject of crimes and striking down bill about crop destruction amended to define ethnic intimidation); *DeWeese v. Weaver*, 880 A.2d 54 (Pa. Commw. 2005) (rejecting broad subject of judicial procedure and striking down bill requiring certain sex offenders to provide DNA amended to limit negligence recovery). Under these cases, it is clear that “amending the Crimes Code” is simply too broad a subject to pass muster. In fact, the UFA amendment is not even a criminal provision at all as it alters standing and attorney fee recovery in lawsuits.

In addition, Act 192 stretches standing beyond its breaking point. The Act permits suits by uninjured plaintiffs. Pennsylvania’s Constitution provides that “every man for an injury done him... shall have remedy by due course of law...” Art. I, §11 (emphasis added). While the legislature can expand the scope of injury, the legislature cannot re-define injury as “not injured.” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). The requirement that a plaintiff prove their injury or likely injury is critical to avoid punishing defendants faced with frivolous litigation.

“The purpose of the requirement of standing is to protect against improper plaintiffs.” *Application of Biester*, 409 A.2d 848, 851 (Pa. 1979). A verdict for uninjured plaintiffs violates the very essence of standing. This is even worse when the lawsuits are against municipalities, and, in turn, the taxpayers. Act 192 allows

unaffected gun owners to sue municipalities they have never even entered and never will enter. This directly contradicts the general requirement that plaintiffs prove liability and harm.

These ordinances—adopted in 1951, 1969, 1971, 1991, and 2009—have not injured Plaintiffs in anyway. It is only Act 192's unconstitutional expansion of standing that allows this lawsuit. This Court should protect the taxpayers of Harrisburg from this unconstitutional statute.

B. Plaintiffs lack standing.

Plaintiffs have never suffered as a result of these ordinances—nearly all of have existed for decades and most of which pre-date the fall of Saigon. Plaintiffs will suffer no harm—constitutional, statutory, or otherwise—from these ordinances that have gone without challenge or controversy for a quarter to half a century. This lawsuit wastes judicial resources on questions purely theoretical to Plaintiffs. Plaintiffs essentially ask this Court to engage in an academic exercise.

Plaintiffs have not, as they must, allege a concrete injury that is not speculative. Plaintiffs have alleged any likelihood that:

- 1) Harrisburg will declare an emergency,
- 2) Plaintiffs will discharge guns in the City,
- 3) Plaintiffs will possess guns in City parks,
- 4) Plaintiffs will somehow become unsupervised children, or
- 5) Plaintiffs' guns will be lost or stolen.

In the absence of a prior injury or an injury coming their way, Plaintiffs simply cannot justify judicial involvement.

Accordingly, Plaintiffs lack traditional standing. *NRA v. City of Phila.*, 977 A.2d 78, 81-82 (Pa. Commw. 2009) (*en banc*) (no standing to challenge reporting requirement); *Dillon v. City of Erie*, 83 A.3d 467, 475 (Pa. Commw. 2014) (*en banc*) (same). In *NRA v. Pittsburgh*, the Court explained:

[T]he Individual Appellants have pled that they live in areas where residential burglaries are common, and one has pled that a gun of his was stolen in the past...

One of the Individual Appellants in this case would not be fined under the ordinance unless he had a gun stolen or lost, failed to report it, and was prosecuted for that failure. Because ... the possibility of harm is remote and speculative, Appellants lack standing.

999 A.2d 1256, 1259 (Pa. Commw. 2010).

No Plaintiff has suffered injury at Harrisburg's hands. Most or all of the activities Plaintiffs wish to engage in are illegal under state law. Plaintiffs simply have automatic standing under Act 192, which is unconstitutional. Plaintiffs must know this, which explains why they waited until after Act 192's 2015 effective date to challenge ordinances enacted in 1951, 1969, 1971, 1991, and 2009.

C. The General Assembly has not preempted the field of gun regulation.

There are three types of preemption: express, conflict, and field. *Nutter v. Dougherty*, 938 A.2d 401, 414 (Pa. 2007). The Third Class City Code expressly grants authority to ban discharge and concealed carry. 53 Pa.C.S. §37423. This explicit permission to regulate guns makes clear that the General Assembly has not preempted the entire field of gun regulation, at least not for third class cities.

“Total preemption is the exception and not the rule.” *Council of Middletown Twp. v. Benham*, 523 A.2d 311, 315 (Pa. 1987). *Ortiz v. Com.*, 681 A.2d 152 (Pa. 1996), is not to the contrary. That case dealt with an assault weapon ban. Harrisburg makes two additional arguments inapplicable to and not raised in *Ortiz*: 1) the Third Class City Code authorizes its ordinances, and 2) the UFA does not preempt regulation of unlawful gun possession.

In 2007, the Pennsylvania Supreme Court noted that it has found field preemption “only in the areas of alcoholic beverages, anthracite strip mining, and banking.” *Nutter*, 938 A.2d at 414 (citing *Mars Emergency Med. Servs. v. Twp. of Adams*, 740 A.2d 193, 195 (Pa. 1999)). The Pennsylvania Supreme Court was obviously aware of *Ortiz*. It is hard to believe that the Supreme Court would have left gun regulation off of the short list if the Court considered the field preempted.

Looking to its text, the UFA is clearly limited to regulation of lawful possession, not the entire field:

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.

18 Pa.C.S. § 6120(a) (emphasis added).

Admittedly, the Commonwealth Court has been inconsistent in its application of the UFA since *Ortiz*. In *Minich v. Cnty. of Jefferson*, 869 A.2d 1141 (Pa. Commw. 2005) (*Minich I*), the Commonwealth Court agreed with Harrisburg’s position herein that the UFA only prohibits regulations of lawful gun possession:

[T]he County may not enact an ordinance which regulates

firearm possession if the ordinance would make the otherwise lawful possession of a firearm unlawful. Thus, if the County's ordinance pertains only to the unlawful possession of firearms, i.e., possession "prohibited by the laws of this Commonwealth," then section 6120(a) of the Crimes Code does not preempt the County's ordinance.

Id. at 1143 (five judge panel). The Court reiterated that holding in *Minich v. Cnty. of Jefferson*, 919 A.2d 356, 361 (Pa. Commw. 2007) (*en banc*) (unanimous) (*Minich II*). However, the Court held the opposite in *Clarke v. House of Representatives*, 957 A.2d 361, 364 (Pa. Commw. 2008) (five judge panel), and *Philadelphia*, 977 A.2d at 82 (*en banc*).¹²

However, in this case, Harrisburg makes an additional argument not at issue in any of those cases: the Third Class City Code provisions explicitly prevents field preemption by granting Harrisburg authority to regulate guns. Obviously, the General Assembly did not preempt the field, at least not for third class cities.

D. The ordinances do not violate the Uniform Firearm Act.

1. Discharge:

¹ In *Dillon*, 83 A.3d at 473 (*en banc*), the Court quoted *Clarke's* rejection of Harrisburg's interpretation, but then seemingly endorsed Harrisburg's interpretation: "Based on the foregoing, Section 6120(a) of the Act... precludes the City from regulating the lawful possession of firearms." (emphasis added).

² Judge Smith-Ribner, concurring and dissenting in both *Clarke* and *Philadelphia*, found that *Ortiz* did not squarely address the question of whether a municipality can regulate unlawful gun possession. *Clarke*, 957 A.2d at 366-67. Judge Smith-Ribner noted that the text of the UFA does not support field preemption and the title of the statute is "limitation" on regulations, not prohibition or elimination. *Id.* at 366-70. Judge Smith-Ribner cited the legislative history where the Bill's sponsor declared that it would not affect Philadelphia's ordinance ban on the acquisition of firearms by children or habitual drunkards in "any way, shape or form." *Id.* at 369. See also *Philadelphia*, 977 A.2d at 83-85 (concurring and dissenting).

The Third Class City Code gives Harrisburg explicit authority to prevent discharge and concealed carry:

To the extent permitted by Federal and other State law, council may regulate, prohibit and prevent the discharge of guns and prevent the carrying of concealed deadly weapons.

53 Pa.C.S. §37423 (emphasis added). *See* 53 Pa.C.S. §3703. The legislature just reenacted the Code just last year.

Further, in the landmark case of *D.C. v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court made clear that ordinances that prohibit discharge of guns do not hinder self-defense:

All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties. They are akin to modern penalties for minor public-safety infractions like speeding or jaywalking. And although such public-safety laws may not contain exceptions for self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a "Do Not Walk" sign in order to flee an attacker, or that the Government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him.

Id. at 633-34. In addition, if someone were cited who acted in lawful self-defense, he or she would have the same ability to assert self-defense as people charged under state statutes.

2. Children:

The UFA does not preempt this ordinance because the UFA also prohibits

unsupervised children from having guns in public. 18 Pa.C.S. §6110.1. The UFA only preempts ordinances that regulate the lawful possession of firearms. Because it is illegal for unsupervised children to carry guns in public areas, the ordinance is not preempted. Harrisburg's ordinance does not restrict lawful gun possession because of the state child gun ban.

In ruling on the preliminary injunction, this Court disagreed because of the UFA's hunting exception. Plaintiffs do not demonstrate that Harrisburg enforces the ordinance in a way to restrict hunting. Further, Harrisburg's statutory authority to prohibit discharge under the Third Class City Code gives it authority to prohibit hunting as well and negate the exception.

3. Reporting:

The requirement that persons report a lost or stolen targets the unlawful transfer of firearms (theft and straw purchases). Accordingly, the UFA does not apply. The UFA has two elements:

No county, municipality or township may in any manner regulate

[1] the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components

[2] when carried or transported for purposes not prohibited by the laws of this Commonwealth.

18 Pa.C.S. §6120(a) (emphasis added). A person who loses a firearm clearly does not possess it any longer. So whoever has the gun now, it is not "carried or transported for purposes not prohibited by the laws of this Commonwealth."

In ruling on the preliminary injunction, this Court disagreed with this analysis although this Court ultimately did not resolve whether the UFA preempts the ordinance. Harrisburg believes that the second prong of the statute compels a decision in its favor as the statute requires proof that the gun is (*present tense*) “carried or transported for purposes not prohibited by the laws of this Commonwealth.”

4. Parks:

As explained above, the Third Class City Code permits Harrisburg to “prevent discharge” and “prevent the carrying of concealed deadly weapons.” 53 Pa.C.S. §37423. The only question left is whether Harrisburg can also ban open carry in parks. The Code authorizes Harrisburg to regulate its property and parks, and DCNR bans open carry in parks. Because Harrisburg’s limited restriction on open carry “further[] the salutary scope of the [Uniform Firearms] Act, the ordinance[s] [are] welcomed as an ally, bringing reinforcements into the field of attainment of the statute’s objectives.” *Dep’t of Licenses & Inspections v. Weber*, 147 A.2d 326, 327 (Pa. 1959).

“Where an ordinance conflicts with a statute, the will of the municipality as expressed through an ordinance will be respected unless the conflict between the statute and the ordinance is irreconcilable.” *City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1326 (Pa. 1986). In addition, “where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation with subordinate power to act in the matter may make such

additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable.” *Mars*, 740 A.2d at 195 (Pa. 1999) (quoting *W. Pa. Restaurant Ass'n v. Pittsburgh*, 77 A.2d 616, 619-20 (Pa. 1951)).

Dillon provides support even though the Court held that the UFA preempts Erie’s park ban. The Court noted two valid issues that Erie did not raise:

Not raised by the City is Section 3710 of the Third Class City Code, Act of June 23, 1931, P.L. 932, as amended, 53 P.S. § 38710, which provides, in pertinent part, that the City “shall at all times be invested with the power and authority to adopt suitable rules and regulations concerning the use and occupation of [its] parks and playgrounds by the public generally....” It could be argued that the City may be empowered under that grant of power from the State to regulate the possession of firearms in its parks pursuant to its proprietary power to control conduct that takes place on its property rather than through an ordinance of general application enacted pursuant to its general police powers. Similarly, Section 11.215 of the regulations of the Commonwealth’s Department of Conservation and Natural Resources, 17 Pa.Code § 11.215, generally prohibits “[p]ossessing an uncased device, or uncasing a device, including a firearm, ... that is capable of discharging or propelling a projectile ...” in state parks, subject to a number of enumerated exceptions.

Dillon v. City of Erie, 83 A.3d 467, at n.9 (Pa. Commw. 2014) (*en banc*).

As the Commonwealth Court noted in *Dillon*, third class cities have authority to manage public property and the state bans open carry in parks. 83 A.3d at n.9. Accordingly, Harrisburg’s open carry ban in parks is consistent with, not irreconcilable with, state law. Harrisburg’s statutory authority to regulate its property has at least two sources:

In exercising its discretion to make decisions that further the public interest under terms it deems most beneficial to the city, council shall have the power and authority, subject to any restrictions, limitations or exceptions as set forth in this act, to do any of the following:

(1) ...manage real and personal property.

53 Pa.C.S. §37402.1(a).

The council of each city shall have power to enact, make, adopt, alter, modify, repeal and enforce in accordance with this act ordinances, resolutions, rules and regulations, not inconsistent with or restrained by the Constitution of Pennsylvania and laws of this Commonwealth, that are either of the following:

(1) ...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...

53 Pa.C.S. §37435.

The *Minich II* Court upheld courthouse gun bans due to similar grants of authority:

Section 509(a) of the County Code allows county commissioners to adopt ordinances regulating the affairs of a county. Section 509(c) of the County Code allows county commissioners to prescribe fines and penalties for violations of a "public safety" ordinance. 16 P.S. § 509(c). Here, the County ordinance regulates the affairs of the County, specifically the safety of members of the public who enter the Jefferson County Court House.

Moreover, section 913(e) of the Crimes Code requires that each county make lockers available at a building containing a court facility for the temporary checking of firearms by persons legally carrying the firearms. 18 Pa.C.S. § 913(e). The County ordinance simply implements this provision.

919 A.2d at 361. The Third Class City Code explicitly authorizes Harrisburg's concealed carry ban. The open carry ban manages city property, and cares for and

maintains the peace, safety, and welfare.

Finally, the open carry park ban only restricts unlawful conduct due to the DCNR open carry ban. 17 Pa.Code § 11.215. Although in 2008 the General Assembly created a statutory exception permitting concealed carry in state parks, 18 Pa.C.S. §6109(m.2), the Third Class City Code authorizes Harrisburg to ban concealed carry and thus negate the exception.

5. Emergencies:

Because the Third Class City Code authorizes Harrisburg to prevent discharge and concealed carry, the only question whether Harrisburg can ban open carry during emergencies. During emergencies, the Code specifically allows the Mayor during an emergency to prohibit “any other activities as the mayor reasonably believes would cause a clear and present danger to the preservation of life, health, property or the public peace.” 53 Pa.C.S. §36203(e)(3)(iv),(vi). The emergency ordinance implements this grants of authority, allowing the Mayor to determine whether open carry during an emergency endangers the public. Further, Harrisburg only regulates unlawful conduct because the UFA bans carrying guns during declared emergencies. 18 Pa.C.S. §6107.

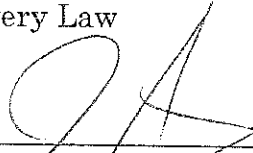
In ruling on the preliminary injunction, this Court found that the UFA preempts this ordinance based upon the UFA’s concealed carry exception. Harrisburg believes that its explicit authorization to ban concealed carry gives it authority to negate the exception.

V. Conclusion:

This Court dismiss this case.

Respectfully submitted,

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Dated: May 11, 2015

Certificate of Service

I certify that on this date, I served a true and correct copy of this filing to:

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