Frank J. Lavery, Esquire
Pennsylvania Bar No. 42370
Joshua M. Autry, Esquire
Pennsylvania Bar No. 208459
225 Market Street, Suite 304
P.O. Box 1245, Harrisburg, PA 17108-1245
(717) 233-6633 (phone)
(717) 233-7003 (fax)
flavery@laverylaw.com
jautry@laverylaw.com
Attorneys for Defendants

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,	:
Susan Wilson, Shamaine Daniels,	:
Harrisburg City Council Members; and	:
Chief of Police Thomas Carter,	:
Defendants	:

Defendants' Post-Hearing Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction

Respectfully submitted,

Lavery Faherty

Frank J. Lavery, Esquire
Pennsylvania Bar No. 42370
Joshua M. Autry, Esquire
Pennsylvania Bar No. 208459
225 Market Street, Suite 304
P.O. Box 1245, Harrisburg, PA 17108-1245
(717) 233-6633 (phone)
(717) 233-7003 (fax)
flavery@laverylaw.com
jautry@laverylaw.com
Attorneys for Defendants

Dated: February 11, 2015

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I. Procedural History:

This Court held a hearing on Plaintiffs' request for a preliminary injunction. During the hearing, Plaintiffs cited legal authorities and made arguments not in their filings. Defendants file this post-hearing brief to address these legal positions.

II. Statement of the Facts:

At the hearing, Plaintiffs did not put forth any evidence, maintaining that they do not have to because of Act 192. Accordingly, Plaintiffs have not demonstrated that any likelihood that they will ever engage in any of the following prohibiting activities: discharging a firearm, 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 claim that the ordinances change the status quo; to the contrary, Act 192 changes the status quo. Harrisburg barred unsupervised minor possession outside the home in 1951, possession in public during an emergency (Mayor discretion) in 1969, discharge in 1971, possession in a park in 1991, and failure to report loss or theft in 2009.

Plaintiffs presented no evidence that Harrisburg has ever used these ordinances to restrict lawful self-defense. To the contrary, Harrisburg notoriously did not to charge Representative Marty Flynn last year who fired his gun in self-defense.

III. Questions involved:

Do Plaintiffs misstate the preliminary injunction standard? Yes.

Would an injunction against ordinances enacted in 1951, 1969, 1971, 1991, and 2009, change the status quo? Yes.

Can Plaintiffs escape the unconstitutionality of Act 192? No.

Did Plaintiffs demonstrate a need to enjoin any of the longstanding ordinances? No.

Are the individual Defendants immune from suit as high officials? Yes.

IV. Plaintiffs did not demonstrate any need for a preliminary injunction:

A. This lawsuit is a façade.

The Plaintiffs could not with a straight face name a single way these ordinances affect them. Plaintiffs tried to claim that the ordinances prevent hunting, but could not name a single place they would like to (and could legally) hunt within the City limits.[1] Plaintiffs then tried to argue that the ordinances will prevent them from defending themselves, but this claim is a joke.

Does the Court think that Harrisburg's ordinance deterred Representative Marty Flynn? Doubtful. While one could theorize a person who is *so* law abiding that he would take a bullet to avoid a municipal fine, it is doubtful that any of the Plaintiffs are this theoretical man.

---

[1] Since the hearing, undersigned counsel has learned that there *is* one place where the Commonwealth permits hunting within the City limits, namely duck hunting over the river. However, Plaintiffs—perhaps also unaware of this until now—have not demonstrated that they are duck hunters. More importantly, the City permits the lawful hunting of ducks. Accordingly, none of the ordinances restrict lawful hunting in any way.

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. This lawsuit is much ado about nothing, and this Court should not let Plaintiffs change the status quo by enjoining ordinances—nearly all of have existed for decades and most of which pre-date the fall of Saigon. As mentioned in our Motion to Stay, "These ordinances were enacted in 1951, 1969, 1971, 1991, and 2009. Given the fact that Plaintiffs have waited to challenge these ordinances for anywhere from five years to sixty-four years, a few months won't hurt them."

B. "[A] preliminary injunction is a harsh remedy…."[2]

Plaintiffs seek to dodge the "likelihood of success" requirement. Plaintiffs do not even attempt to defend Act 192, perhaps a tacit admission that they are on the losing side of this one. But the requirement that a plaintiff prove their likelihood of success is critical to avoid punishing defendants faced with frivolous litigation. Indeed, in this case, Plaintiffs face substantial hurdles *even if Act 192 is upheld* as the Third Class City Code specifically permits Harrisburg to prohibit the discharging or concealed carrying of guns, the reporting ordinance does not restrict possession of a firearm, and it is already illegal to carry in parks in Pennsylvania, in a city during a state of emergency, and for children to carry guns without supervision.

Contrary to the Plaintiffs' representations at the hearing, the Pennsylvania Supreme Court has unanimously and recently recognized that review of the legal issues at hand is necessary to know whether to issue a preliminary injunction:

> The Commonwealth Court had to assess whether Brayman was likely to prevail on the merits in order to determine whether a decree should issue preliminarily enjoining PennDOT from utilizing the challenged procurement methods. *See Summit Towne Ctr.*, 573 Pa. at 647, 828 A.2d at 1001. This necessitated an evaluation of whether the Code authorized the use of that method, which, in turn, required the court to review the relevant statutory provisions in an attempt to discern the scope of the powers held by procuring agencies. *See Brayman*, No. 527 M.D. 2008, slip op. at 13 (characterizing the "central issue" as "whether PennDot is authorized under the Procurement Code to utilize the 'Best–Value' process to

[2] *Credit Alliance v. Phila. Minit-Man Car Wash*, 301 A.2d 816, 818 (Pa. 1973) (unanimous).

> award contracts....”). *See generally Small v. Horn*, 554 Pa. 600, 609, 722 A.2d 664, 669 (1998) (observing that state administrative agencies are creatures of the Legislature and may only exercise those powers that are conferred upon them by statute). The court could not have performed that task without applying the relevant statutory provisions, based upon a proper understanding of their meaning, to the facts as developed at the hearing.
>
> We acknowledge that there is an arguable tension between this need to construe the statute as a means of determining a likelihood of prevailing on the merits, and the preliminary nature of the hearing. However, this Court has previously endorsed a trial court's actions in construing legislative enactments where doing so is necessary to determine whether a preliminary injunction is warranted, *see Verardi v. Borough of Sharpsburg*, 407 Pa. 246, 249, 180 A.2d 6, 8 (1962); *cf. Success Against All Odds v. DPW*, 700 A.2d 1340, 1350 (Pa.Cmwlth.1997) (“[A]t this stage of the proceedings, addressing a demurrer, a definitive legal ruling on the interpretation of the statutory language is now required ....”), and we see nothing improper in the Commonwealth Court's approach here.

Brayman Const. Corp. v. Com., 13 A.3d 925, 939-40 (Pa. 2011) (unanimous).

Permitting Plaintiffs to dodge all legal questions and obtain an injunction just because they filed suit would justify an injunction in nearly every, single equity case, and it would unfairly prejudice defendants by creating a double-standard. Harrisburg is being attacked by an unconstitutional, new statute that changes the status quo.

If anyone should obtain an injunction, it is the City and their officers to protect these longstanding ordinances. Accordingly, Defendants attach a proposed order enjoining the enforcement of Act 192 in case this Court feels that it must issue an injunction at this early stage. However, Defendants believe that no preliminary

injunction should issue to anyone, and that this Court should stay the case until the Commonwealth Court reaches its *en banc* decision on Act 192. For this reason, Defendants also attach their preferred order that would defer consideration of the motion for a preliminary injunction until after the stay is lifted.

C. Plaintiffs misstate the law.

Plaintiffs do not need an injunction. For starters, their right to relief is far from clear. *See Anglo-Am. Ins. v. Molin*, 691 A.2d 929 (Pa. 1997) (6-0 decision, one Justice not participating) (preliminary injunction inappropriate in declaratory action because insured's right to relief unclear). Indeed, Act 192 is unconstitutional, and Plaintiffs will lose.

Plaintiffs claim they only need to create a legal question to obtain an injunction. They are wrong. In fact, the cases they cite would support a preliminary injunction *for Defendants* to enjoin Act 192. A preliminary injunction is an extreme remedy preserved for situations in which a party will suffer greatly if the Court lets the other party take an action while a case is pending:

> Since a preliminary injunction is somewhat like a judgment and execution before trial, it will only issue where there is an urgent necessity to avoid injury which cannot be compensated for by damages and should never be awarded except when the rights of the plaintiff are clear.

Herman v. Dixon, 141 A.2d 576, 577 (Pa. 1958) (unanimous).

As will be explained below, the *SEIU* case cited by Plaintiffs does not shy away from this principle. As Plaintiffs will suffer no harm—constitutional, statutory, or otherwise—from these ordinances, their injunction motion, like the

lawsuit in general, wastes this Court's time and energy. *See Sameric Corp. v. Goss*, 295 A.2d 277, 279 (Pa. 1972) ("[A]ppellee has failed to show any urgent necessity to avoid an irreparable injury. Indeed, it has failed to show any injury at all."). Rather, the line of cases cited by Plaintiffs show an element of prudence and caution: when a party is about to drop the hammer on another party, the Court should preserve the status quo while determining complex legal issues. This case does not fall within that line of cases because Act 192 radically and unconstitutionally changed the legal landscape under which the ordinances have existed unchallenged for an extensive period of time. If anything should be enjoined while this litigation is pending, it is Act 192.

Plaintiffs rely upon *SEIU Healthcare v. Com.*, 104 A.3d 495 (Pa. 2014). In *SEIU*, the Pennsylvania Department of Health sought to close twenty-six health centers in violation of 71 P.S. § 1403(c)(1), which requires legislative approval to close a health center. The Pennsylvania Supreme Court found that the plaintiffs had a clear right to relief and that "it is clear that such action will reduce the number of Centers and the level of public health services in direct contravention of the plain language of Section 1403(c)(1)." *Id.* at 508-09.

Further, the Court found that the preliminary injunction maintained the status quo, by preventing new executive action to the plaintiffs' detriment:

> [W]e can discern no harm in maintaining the status quo which has existed since at least 1995, in conformity with the clear legislative mandate. … [T]he grant of the requested injunctive relief will restore the parties to their status as it existed before the DOH attempted to close the twenty-six Centers and eliminate the twenty-six nurse

consultant positions.

Id. at 509.

Notably absent here is any recent or imminent action by Harrisburg. Unlike the Department's impending closure of twenty-six health centers in *SEIU*, Harrisburg enacted these ordinances anywhere from five to sixty-four years ago. Plaintiffs have not demonstrated that the ordinances will affect them in any way, shape, or form without the injunction. Unlike in *SEIU*, the statute relied upon by plaintiffs is new and changed the status quo. Act 192 gave any gun owner the ability to sue for attorney fees whether an ordinance has or will ever affect them. These longstanding ordinances are the status quo; Act 192 is new. Act 192's unprecedented expansion of litigation and access to courts for sue-happy uninjured plaintiffs flies in the face of the age-old requirement that a plaintiff demonstrate an interest in the litigation (other than merely having political opinions contrary to the government sued).

Plaintiffs' position is two-fold: they don't like the ordinances, and they would like some attorney fees for taking the time to express their political opinion. Plaintiffs neither demonstrate that any of these ordinances have ever affected them in the lengthy history that most of these ordinances have been on the books, nor can plaintiffs demonstrate that any of these ordinances ever will affect them a single time over the rest of their lives. To put it simply, cases like this are an abundant waste of judicial and municipal resources that forces this Court to rule on legal questions that are purely theoretical to the plaintiffs.

Digging deeper confirms the fly in Plaintiffs' ointment. *SEIU* relies on the

case of *Fischer v. Dep't of Pub. Welfare*, 439 A.2d 1172 (Pa. 1982). In *Fischer*, the Commonwealth Court granted a preliminary injunction to enjoin enforcement of a (then) new statute that restricts public assistance of abortion while the case proceeded to determine whether the statute violated the Pennsylvania Constitution. In that case, time was of the essence for the plaintiffs, who were impoverished women with pregnancy complications, and "a refusal of the injunction would have endangered the health of indigent women who required medically necessary abortions…" *Id.* at 1173-74. *See also id.* at 1174 & n.4.

Naturally, the women had anywhere from nine to zero months to obtain relief, and the longer the Court waited to grant the injunction, the later the women could obtain relief. Further, delayed relief could have increased their medical complications and endangered the women even if they obtained relief while still pregnant. Indeed, for multiple women, it was pregnancy itself that endangered their lives, not the possibility of birth, rendering each day without relief their possible last day. *Id.* at n.4.

The Supreme Court noted, "There is also no question that the injunction did no more than to restore the status quo as it existed before the challenged act." *Id.* at 1174. In this case, however, Act 192 changes the status quo, permitting plaintiffs to sue without injury. Harrisburg and its officials challenge this Act as violations of the single subject rule and original purpose rules in Pennsylvania's Constitution (it was added onto bills relating to mental health records and theft of copper wire), and as in violation of the Pennsylvania Constitutional restriction on standing to only

those injured.

Act 192 allows unaffected gun owners to sue municipalities they have never even entered and never will enter. This expansion of standing flies in the face of the general requirement in any lawsuit that the plaintiff prove liability and *harm*. While the General Assembly can expand the scope of what it means to be injured, it cannot re-define injury as "not injured." This case is simply nothing like *Fischer*. If *Fischer* supports any preliminary injunction in this case, it would be to *enjoin Act 192* and preserve the status quo, not to enjoin ordinances that have gone without challenge or controversy for a quarter to half a century.

The Supreme Court in *Fischer*, in turn, relied upon *Valley Forge Historical Soc. v. Washington Mem'l Chapel*, 426 A.2d 1123 (Pa. 1981). In *Valley Forge*, the Valley Forge Historical Society faced eviction and obtained a preliminary injunction to prevent eviction until the Court ruled upon their right to stay on the property. The Court recognized that eviction of the Valley Forge Historical Society could harm or risk loss for the historical artifacts related to Valley Forge that the society kept in their on-site museum. *Id.* at 1128. The Court also recognized "the public's interest to view artifacts which are part of its historical heritage, particularly in their intended and natural setting Valley Forge." *Id.* at 1129. While the Supreme Court recognized that "speculative considerations cannot form the basis for issuing a preliminary injunction," the Court recognized that "the status quo sought to be altered has continued undisturbed for more than sixty years…" *Id.*

This Court can see a theme in this line of cases. In each case, the injunction

preserved the state of things. In each case, the plaintiffs demonstrate a significant harm if the injunction did not issue. In each case, the defendants did not argue that an injunction or the statutory basis for an injunction would violate the Constitution.

These cases are in stark contrast to this case. If the Plaintiffs have *any* interest at all in this litigation, it is purely speculative. The Plaintiffs have not shown that they have been or will be affected by any of these longstanding ordinances. There can be little doubt that these ordinances are the status quo; Act 192 and its radical expansion of standing is the change at issue here.

D. Plaintiffs did not prove any actual or imminent injury.

Plaintiffs have not, as they must, shown a "concrete" injury that is not speculative to justify a preliminary injunction. *Summit Towne Ctr. v. Shoe Show*, 828 A.2d 995, 1002-03 (Pa. 2003) (citing *Novak v. Com.*, 523 A.2d 318, 320 (Pa. 1987) (rejecting speculative considerations as legally sufficient to support preliminary injunction); *New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383, 1387 (Pa. 1978) (plurality) (concluding that preliminary injunction granted in that case was improper because record failed to indicate "actual proof of irreparable harm"); *Credit Alliance*, 301 A.2d at 818 (unanimous) (trial court properly denied preliminary injunction where no showing made of necessity to avoid immediate and irreparable harm); *Sameric Corp.*, 295 A.2d at 279 (rejecting speculative considerations offered in support of preliminary injunction)).

Because Plaintiffs failed to present any evidence at all, they have not shown that any of these ordinances will ever affect them. They have not shown any

likelihood that:

1) Harrisburg will declare an emergency,

2) Plaintiffs will discharge guns in the City,

3) Plaintiffs will possess a guns in a City park,

4) Plaintiffs will somehow become unsupervised children with guns, or

5) Plaintiffs' guns will be lost or stolen.

In the absence of any injury coming their way, Plaintiffs will not suffer in the slightest by the denial of an injunction.

E. Plaintiffs can't drown out the noise.

Act 192 violates the single subject and original purpose rules of the Pennsylvania Constitution. The Act also violates the standing provision in the Constitution by permitting suits by uninjured plaintiffs—even if they have never stepped foot in the municipality they want to bring to court. Plaintiffs do not attempt to defend Act 192 of 2014, which they need for standing and attorney fees. Instead, Plaintiffs claim that the constitutionality of Act 192 is just background noise. But this is one screaming baby that Plaintiffs won't ignore on their flight.

As detailed in our principal brief, legislators tacked these standing and attorney fee provisions on a bill about mental health records, which died in committee. At the tail-end of the legislative session, legislators then took that dead bill and attached it to a bill on the theft of copper wire. This is the legislature at its worst, and this Court should not let Plaintiffs elevate a hastily-passed statute over the Constitution.

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 e.g., Com. v. Neiman,* 84 A.3d 603 (Pa. 2013) (rejecting broad subjects of "amendments to Title 42," "refining civil remedies or relief," and "judicial remedies and sanctions" and striking down statute that began as bill to alter deficiency judgment procedures after execution sale of real property and was amended to make changes to Megan's Law); *Jury Comm'rs v. Com.,* 64 A.3d 611 (Pa. 2013) (rejecting subject of "powers of county commissioners" and striking down statute that regulated surplus farm equipment as well as allowed certain counties to eliminate position of Jury Commissioner); *City of Phila. v. Com,* 838 A.2d 566 (Pa. 2003) (rejecting broad subject of "municipalities" and striking down statute which originally addressed citizenship requirements for board members of local business improvement district authorities, and which was amended to, among other things, reorganize the Pennsylvania Convention Center).

And 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 statute that began as bill relating to crime of crop destruction, but amended to also define crime of ethnic intimidation); *DeWeese v. Weaver,* 880 A.2d 54 (Pa. Commw. 2005) (rejecting broad subject of "judicial procedure" and striking down statute that required certain sex offenders to provide DNA, and was amended to limit recovery for acts of negligence under doctrine of

joint and several liability).

In addition, Act 192 dramatically stretches standing beyond its breaking point. The Pennsylvania Constitution provides that "every man *for an injury done him* in his lands, goods, person or reputation shall have remedy by due course of law…" Pa. Const. art. I, § 11 (emphasis added). While the legislature can expand or limit the scope of injury, the legislature cannot define injury as "not injured." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

The Pennsylvania Supreme Court has explained the importance of limiting suits to injured Plaintiffs:

> The purpose of the requirement of standing is to protect against improper plaintiffs. K. Davis, *Administrative Law Text* s 22.04 (3rd ed. 1972). A plaintiff, to meet that requirement, must allege and prove an interest in the outcome of the suit which surpasses "the common interest of all citizens in procuring obedience to the law." *Wm. Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 281 (1975). To surpass the common interest, the interest is required to be, at least, substantial, direct, and immediate. *Wm. Penn, supra*.

Application of Biester, 409 A.2d 848, 851 (Pa. 1979).

A preliminary injunction to uninjured plaintiffs violates the very essence of standing. This is even worse when the lawsuits are against municipalities, and, in turn, the taxpayers. These ordinances—adopted in 1951, 1969, 1971, 1991, and 2009—are the status quo. It is Act 192's unconstitutional expansion of standing that changes the status quo. If any injunction must issue, it should be to protect the City and its officers from Act 192.

F. Plaintiffs could not show that the ordinances violate the Uniform Firearm Act.

1. Children:

Plaintiffs attack on the minor possession ordinance, an ordinance now sixty-four years old, does not pass the laugh test. The ordinance prohibits unsupervised children from packing heat outside their homes. It is hard to think of a more reasonable restriction on firearms than this.

Moreover, Plaintiffs are not children. As adults, it would be physically impossible for them to be present when their child violates the ordinance as their very presence as adults automatically makes the child's possession supervised.

The fact that Plaintiffs fight for the rights of children to carry weapons in public without adult supervision shows how extreme Plaintiffs will go in their search for attorney fees, and how little will dissuade them from wasting this Court's time. The fact that Plaintiffs seek a preliminary injunction against this ordinance is even more baffling.

In any event, even if the Plaintiffs were a band of armed, unsupervised children on Second Street, their attempts would fail because 18 Pa.C.S. § 6110.1 also prohibits children from having guns without adult supervision. Plaintiffs erroneously said at the hearing that the Uniform Firearm Act prevents municipalities from regulating *unlawful* possession of firearms. The fact that Plaintiffs carry this blatantly wrong understanding of the law sheds light on why they challenge so many ordinances, and why their challenges are doomed to fail.

Contrary to Plaintiffs' thoughts on what the law might be, the Uniform

Firearm Act only preempts ordinances that regulate the *lawful* possession of firearms:

> 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). Because it is illegal for unsupervised minors to carry guns in public areas, the ordinance is not preempted.

In *Minich I*, the Commonwealth Court recognized that the UFA does not preempt ordinances regulating *unlawful* conduct:

> In other words, the 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.

Minich v. Cnty. of Jefferson, 869 A.2d 1141, 1143 (Pa. Commw. 2005) (emphasis in original) (*Minich I*).

Applying this principle, in *Minich II*, the Commonwealth Court *en banc* held that Jefferson County could bar firearms in courthouses:

> 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.

Minich v. Cnty. of Jefferson, 919 A.2d 356, 361 (Pa. Commw. 2007) (*en banc*) (*Minich II*).

This case is like *Minich*, and Plaintiffs have failed to demonstrate that the ordinance prohibits anything otherwise *lawful*. Plaintiffs argued that the ordinance must fail because it prohibits a child from carrying a "flobert rifle." But this Court's analysis of Plaintiffs' silly argument can be simple: 1) if a flobert rifle is a firearm, then Pennsylvania law doesn't let children have them anyway, and 2) if a flobert rifle is not a firearm, then there is no preemption anyway because the Uniform *Firearm* Act only restricts municipal regulations of firearms.

2. Discharge:

Harrisburg has clear authorization to prohibit discharge firearms citywide, as it has for forty-three years. Plaintiffs conveniently overlook the Third Class City Code, which gives Harrisburg explicit authority to prevent the discharge of firearms and carrying of concealed weapons:

> 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. *See also* 53 Pa.C.S. § 3703 (permitting all cities to prohibit discharge of guns in highways and public places). The Third Class City Code clearly permits the ordinances that prohibit discharge in parks and citywide. Notably, the

General Assembly just reenacted the Third Class City Code (originally enacted in 1931) just last year without altering this grant of authority.

Plaintiffs also have presented no evidence that they will discharge a gun anywhere or be affected by the ordinance in any way. Accordingly, they lack standing to challenge this ordinance. Nor would an injunction keep the status quo. Harrisburg has prohibited the discharge of weapons since 1971. Plaintiffs should be honest with this Court: they wish to change the status quo, not hold to it.

3. Loss and theft reporting:

The requirement that persons report a lost or stolen gun does not regulate the lawful possession of firearms. Indeed, the ordinance specifically targets the *unlawful* transfer of firearms (stealing and straw purchases). Accordingly, the Uniform Firearm Act does not apply.

In addition, the Uniform Firearm Act does not apply to ordinances unless they affect carrying or transporting of firearms for a lawful purpose:

> 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). 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." Nor does this reporting requirement restrict the original possessor's ability to lawfully obtain a new firearm.

Further, Plaintiffs lack standing to challenge the ordinance. The Commonwealth Court has now on three occasions in the last five years held that plaintiffs lacked standing to challenge similar reporting requirements because they could not prove that a firearm would be lost or stolen. *Dillon v. City of Erie*, 83 A.3d 467, 475 (Pa. Commw. 2014) (*en banc*); *NRA v. City of Pittsburgh*, 999 A.2d 1256, 1259-60 (Pa. Commw. 2010); *NRA v. City of Phila.*, 977 A.2d 78, 81-82 (Pa. Commw. 2009). Here, Plaintiffs did not even try to demonstrate standing, and fail because of that.

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 prohibition on discharge in parks is clearly permissible for this reason. In addition, Harrisburg's restrictions on carrying firearms in public parks obviously prevents persons from carrying concealed deadly weapons, which § 37423 allows the City to do. The only question left is whether Harrisburg can also restrict persons who *openly* carry. Preventing the open carrying guns works to prevent discharge, and accordingly is authorized by § 37423.

Harrisburg can find more support from *Dillon v. City of Erie*, 83 A.3d 467, at n.9 (Pa. Commw. 2014) (*en banc*), even though the Commonwealth Court held in that case held that the Uniform Firearm Act preempts Erie's prohibition of firearms in parks. However, the Court noted that Erie did not raise two valid arguments in favor of a city's ability to regulate firearms:

> 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.

Id. We will not make the same mistake in this case. Harrisburg, a Third Class City, clearly has the authority to regulate firearms in parks *and* firearms are illegal in parks anyway.

A preliminary injunction is not appropriate against his ordinance either because Plaintiffs have not demonstrated that they will suffer in the slightest without an injunction. Further, this restriction has been the status quo in Harrisburg for nearly a quarter of a century without question or controversy. Only two things of relevance have changed in that timespan: expanded standing to plaintiffs and the financial incentive of attorney fees to sue. It is the hastily and unconstitutionally adopted Act 192 that alters the status quo. If any injunction is necessary, it is to enjoin that piece of recent legislation to protect municipalities from a landslide of unprecedented litigation across this Commonwealth by plaintiffs

who have suffered nothing and will suffer nothing.

5. Emergencies:

As previously explained, the Third Class City Code authorizes Harrisburg to *prevent* the discharge of firearm and the concealed carry of firearms. Further, in the case of emergencies, 53 Pa.C.S. § 36203(e)(3)(iv),(vi) specifically allows the Mayor of a Third Class City during an emergency to prohibit the sale of any goods the Mayor designates and "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."

Ordinance § 3-355.2, enacted in 1969, implements these grants of authority. Subsection A allows the Mayor to declare an emergency that prohibits the sale or transfer of firearms and ammunition, the display of firearms and ammunition in a store, and the possession of rifles and shotguns in public places. Subsection (B)(8) allows the Mayor during a declared emergency to prohibit the public possession of firearms.

First, it should be noted that no business sales firearms or ammunition within the City limits. Obviously, the prohibition on the display in a store targets looting during an emergency and is to protect stores. To the extent the ordinance goes further and allows the Mayor to prohibit possession of firearms in public places, the Third Class City Code authorizes the City to ban the concealed carrying of firearms. 53 Pa.C.S. § 37423. The only question is whether the Code also authorizes the prohibition of *open* carrying during an emergency. Defendants

believe that it does because, the Third Class City Code authorizes the Mayor in an emergency to take reasonable measures to protect the public safety. 53 Pa.C.S. § 36203(e)(3)(iv),(vi).

This ordinance also only regulates unlawful conduct because 18 Pa.C.S. § 6107 prohibits public carrying of firearms during a declared emergency. Moreover, Plaintiffs have no standing to challenge this ordinance because they have no expectation of a declared emergency. Nor would enjoining a forty-five year old ordinance preserve the status quo; rather, Plaintiffs wish to turn back the clock in Harrisburg. This Court should not do so at the beginning of the litigation.

G. Plaintiffs did not show the liability of any individual Defendant.

Plaintiffs have not demonstrated that the Mayor, City Council, or Chief of Police have ever harmed them or ever will. Nor have the Plaintiffs defeated high official immunity. The Commonwealth Court has recently reiterated:

> The common law doctrine of "high official immunity" insulates "high-ranking public officials" from all statements made *and acts* taken in the course of their official duties.

Feldman v. Hoffman, 2014 WL 7212601, at *3 (Pa. Commw. Dec. 19, 2014) (reporter citation not yet available) (emphasis added).

City Council, the Mayor, and Chief of Police are all clearly high officials:

> Absolute immunity has been extended to **township supervisors**, deputy commissioner of public property and city architect, state Attorney General, **mayor, borough council president**, county attorney, city revenue commissioner, city comptroller, district attorney, and Superintendent of the Parole Division of the Board of Probation and Parole. *See Lindner*, 677 A.2d at 1198–99 (listing cases). It has also been extended to a **state police**

> **captain** in charge of a local troop, *Schroak v. Pennsylvania State Police*, 26 Pa.Cmwlth. 41, 362 A.2d 486 (Pa.Cmwlth.1976); the executive directors of intermediate school unit, *Azar v. Ferrari*, 898 A.2d 55 (Pa.Cmwlth.2006); and **borough council members**. *Hall v. Kiger*, 795 A.2d 497 (Pa.Cmwlth.) [(*en banc*)], *appeal denied*, 572 Pa. 713, 813 A.2d 846 (Pa.2002).

Feldman, 2014 WL 7212601, at *4 (emphasis added). *See also Id.* at *6 (coroner); *Durham v. McElynn*, 772 A.2d 68, 70 (Pa. 2001) (unanimous) (assistant district attorney); *Lindner v. Mollan*, 677 A.2d 1194, 1195 (Pa.1996) (**mayor**);*Osiris Enterprises v. Borough of Whitehall*, 877 A.2d 560, 567 (Pa. Commw. 2005) (**borough council members**); *Appel v. Twp. of Warwick*, 828 A.2d 469, 472 (Pa. Commw. Ct. 2003) (*en banc*) (**township supervisor**); *Sommers v. Stork*, 18 Pa. D. & C.4th 452, 455 (Com. Pl. 1992), *aff'd*, 160 Pa. Cmwlth. 696, 635 A.2d 1132 (1993) (**mayor** of Third Class City entitled to immunity).

H. Comment on disqualification

Plaintiffs argue that disqualification is unnecessary because they have automatic standing under Act 192, and that there is no conflict. Defendants point out that Plaintiffs recent offer to drop the case without attorney fees was short-lived (less than 24 hours) and reactionary to the disqualification motion. Previously, Attorney-Plaintiff McShane had represented the opposite in his widely publicized press conference (that he would actually continue the case even if the ordinances were repealed, causing a "significant financial hit" on Harrisburg through an attorney fee petition).

Defendants additionally note that, if Act 192 is struck down, all Plaintiffs (including Attorney-Plaintiff McShane) will have to testify to show standing,

creating the Rule 3.7 problem. If Act 192 is upheld, then the conflict of interest issue remains as the attorney fee provision will stick around.

The difference (as to the conflict of interest) in this case is simple and comes directly from Attorney-Plaintiff McShane's previous publically expressed desire to seek a result contrary to his clients' best interests but in his own. That public statement is what separates this case from run-of-the-mill litigation.

V. Conclusion:

This Court should deny the preliminary injunction.

Respectfully submitted,

Lavery Faherty

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Frank J. Lavery, Esquire
Pennsylvania Bar No. 42370
Joshua M. Autry, Esquire
Pennsylvania Bar No. 208459
225 Market Street, Suite 304
P.O. Box 1245, Harrisburg, PA 17108-1245
(717) 233-6633 (phone)
(717) 233-7003 (fax)
flavery@laverylaw.com
jautry@laverylaw.com
Attorneys for Defendants

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Certificate of Service

I certify that on February 11, 2015, I served a true and correct copy of this filing via U.S. First Class mail, postage prepaid, and by e-mail addressed as follows:

Justin J. McShane, Esquire
Michael Antonio Giaramita, Jr., Esquire
The McShane Firm, LLC
3601 Vartan Way, 2nd Floor
Harrisburg, PA 17110
justin@themcshanefirm.com
mgiaramita@themcshanefirm.com

_____
Aimee L. Paukovits
Legal Secretary to Frank J. Lavery, Esquire