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

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

Respectfully submitted,

Lavery Faherty

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Dated: February 5, 2015

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I. Procedural History:

Plaintiffs bring this claim under Act 192 of 2014, which amended the Uniform Firearm Act (18 Pa.C.S. ¶ 6120) to permit uninjured firearm owners to sue any municipality for a firearm ordinance not in compliance with Section 6120 and to recover attorney fees. Plaintiffs now seek a preliminary injunction. For numerous valid and substantial reasons, Defendants oppose this request.

II. Statement of the Facts:

Plaintiffs claim to be gun owners and an association of gun owners. Plaintiffs *do not* claim that they have ever or will soon fire a gun within the City limits in violation of any of the ordinances. Nor do they claim an expectation that the Mayor will soon declare an emergency, which would restrict firearms in the City. Plaintiffs are not minors and it would be physically impossible for Plaintiffs (all adults) to be with an unsupervised minor, so the ordinance prohibiting unsupervised minors from having guns has no applicability to Plaintiffs. Additionally, Plaintiffs do not claim that they have lost a gun or had a gun stolen or that they have stolen gun in Harrisburg, so the ordinance requiring owners to report loss or theft has never applied to them.

III. Questions involved:

> Have Harrisburg's ordinances injured Plaintiffs in any way over the last sixty-four years? No.
>
> Do the ordinances infringe any of Plaintiffs' rights? No.
>
> Do the uninjured Plaintiffs have common law standing to sue? No.

> Does the statute conferring standing, Act 192 of 2014, violate the Constitution because the standing provision was added to an unrelated bill on theft of minerals in contravention of the single subject and original purpose rules? Yes.
>
> Does Act 192 unconstitutionally give standing to uninjured plaintiffs? Yes.
>
> Does Harrisburg have statutory authority to regulate firearms as a Third Class City? Yes.
>
> Does Harrisburg regulate the lawful possession of firearms? No.
>
> Did any of the individual Defendants enact any ordinance regulating the possession of firearms? No.
>
> Are the individual Defendants immune from suit as high officials? Yes.

IV. Plaintiffs will lose

A. Plaintiffs cannot meet the preliminary injunction standard.

In *Perrotto Builders, Ltd v. Reading School Dist.*, the Commonwealth Court recently summarized preliminary injunction requirements:

> First, the injunction must be necessary to prevent immediate and irreparable harm. Second, greater injury would result from not granting the injunction and the grant of an injunction must not substantially harm an interested party. Third, the injunction will restore the parties to the *status quo ante, i.e.,* their position before the alleged wrongful conduct. Fourth, the moving party must be likely to prevail on the merits. Fifth, the injunction must be reasonably suited to stop the harm. Finally, the moving party must prove that the injunction would not adversely affect the public interest. Failure to satisfy any one of these requirements bars the preliminary injunction, making it unnecessary for the court to address the other injunction requirements.

Perrotto Builders, Ltd v. Reading School Dist., -- A.3d --, (Pa. Commw. Ct. 2015).

Turning to those elements, Plaintiffs will suffer no immediate injury. In fact, Plaintiffs have not suffered any injury at all under these longstanding ordinances. 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.

Plaintiffs must present "concrete evidence demonstrating actual proof of irreparable harm." *Greenmoor, Inc. v. Burchick Const. Co.*, 908 A.2d 310 (Pa. Super. Ct. 2006). The claim of immediate harm "cannot be based solely on speculation and hypothesis." *Id.* "Moreover, for purposes of a preliminary injunction the claimed harm must be ***irreversible*** before it will be deemed irreparable." *Id.* Plaintiffs will suffer no injury, much less an irreversible one. Indeed, if Plaintiffs' injury is irreversible, then we are too late for them as these ordinances apparently harmed them somewhere from five to sixty-four years ago.

Plaintiffs suffer nothing as they have no rights at stake under the Pennsylvania or U.S. Constitutions. Both Constitutions, as explained in more detail below, permit the reasonable regulation of firearms. Plaintiffs can cite no legal authority for their position (that *any* firearm regulation violates the Second Amendment or Pennsylvania's right to bear arms) because no Judge or Justice agrees with them.

For now, it is worth noting that the U.S. Supreme Court cases in *Heller* and *McDonald* struck down complete bans on handguns. Harrisburg's ordinances do not come close to that. Indeed, as will be explained in more detail, the U.S. Supreme

Court cited Philadelphia's ban on the discharge of guns as a longstanding reasonable restriction. There can be little doubt that Courts would find the same regarding Harrisburg's.

Indeed, even if the ordinance were applied to someone who can assert self-defense, that person would be able to raise the defense under the state and federal Constitutions and under 18 Pa.C.S. § 505. Nothing in the ordinances abolishes the common law or statutory defense. Plaintiffs cannot cite this Court to a single instance of the ordinances being applied to deny one of the Plaintiffs' their right to defend themselves. Nor is there any reason to believe that now Harrisburg will start applying the ordinances in such a way and start enforcing the ordinances against people who discharge their weapons in self-defense.

Second, immediate repeal of ordinances—most of which have been on the books for decades—will substantially harm the citizens of Harrisburg. The ordinances encourage lawful behavior, and the theft reporting ordinance encourages cooperation with law enforcement that helps them find the unlawful citizens.

Third, the injunction does not restore the *status quo*. The *status quo* is that these ordinances, many of which pre-date the Uniform Firearm Act, have worked no harm that Plaintiffs can cite. Plaintiffs cannot explain a single instance that any of these well-intentioned statutes has changed their lives.

Fourth, Plaintiffs will lose. To show that they are likely to win, Plaintiffs "must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest…" *Summit Towne Centre v. Shoe Show of*

Rocky Mount, 828 A.2d 995 (Pa. 2003). As explained below, Plaintiffs fail to show any harm, any cause of action, any right to relief, and certainly any "manifest" wrong.

Fifth, an injunction can't stop the harm because there is none. Finally, as explained above, the injunction will work to the public detriment. Plaintiffs must meet all six elements, but they fail at every turn.

B. Plaintiffs have no rights at stake.

Harrisburg would like to, first and foremost, put a stop to Plaintiffs' assertion that the ordinances infringe on their "rights." The law is clear that these ordinances are reasonable restrictions that do not infringe on the right to bear arms in any way.

"Like most rights, the right secured by the Second Amendment is not unlimited." *D.C. v. Heller*, 554 U.S. 570, 626 (2008). "[T]he right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'" *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626). Accordingly, the Second Amendment "does not imperil every law regulating firearms." *Id.*

Pennsylvania courts have agreed that "the right to bear arms is not unlimited; it may be restricted in the exercise of police power for the good order of society and protection of citizens." *Perry v. State Civil Serv. Comm'n*, 38 A.3d 942, 955 (Pa. Commw. 2011). The Pennsylvania Supreme Court has explained, "While the right to bear arms enjoys constitutional protection, like many other

constitutional rights, it is not beyond regulation." *Lehman v. PSP*, 839 A.2d 265, 273 (Pa. 2003). "Courts have clearly held that the right to bear arms may be restricted in the exercise of the police power, among other things, for the protection of the citizens." *Tsokas v. Bd. of Licenses & Inspections Review*, 777 A.2d 1197, 1201 n.2 (Pa. Commw. 2001). As is the case here, "restrictions are a proper exercise of police power if they are intended to protect society." *Morley v. City of Philadelphia Licenses & Inspections Unit*, 844 A.2d 637, 641 (Pa. Commw. 2004).

Under the clear federal and state precedents, Harrisburg does not infringe on the right to bear arms. Harrisburg's longstanding ordinances are reasonable restrictions, and the Plaintiffs failure to point to any harm highlights how the ordinances protect the public without hindering the right to bear arms.

The *Heller* Court explained that the right to bear arms leaves ample room for reasonable firearm regulation:

> From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. *See, e.g.*, Sheldon, in 5 Blume 346; Rawle 123; Pomeroy 152–153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. *See, e.g., State v. Chandler*, 5 La. Ann., at 489–490; *Nunn v. State*, 1 Ga., at 251; *see generally* 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places

> such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.
>
> n. 26 We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

554 U.S. at 626-27 & n. 26. "[T]hese longstanding limitations are exceptions to the right to bear arms." *In re Keyes*, 83 A.3d 1016, 1025 (Pa. Super. 2013) (quoting *U.S. v. Marzzarella*, 614 F.3d 85, 91-92 (3rd Cir.2010)). The Third Circuit has also held that such longstanding restrictions on firearms do not implicate the right to bear arms at all. *Drake v. Filko*, 724 F.3d 426, 434-35 (3d Cir. 2013).

Perhaps most on point, the *Heller* Court defended founding era ordinances in Philadelphia and other cities that barred discharge of a weapon within city limits:

> 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.

Heller, 554 U.S. at 633-34.

The Third Circuit has held that, even *if* the Second Amendment applies outside the home, New Jersey's requirement that citizens demonstrate a justifiable need to carry a firearm in public would not violate such a right. *Drake*, 724 F.3d at

432. Indeed, the Third Circuit noted that, historically, many states banned public carrying of weapons—whether *open* or concealed. *Id.*

Harrisburg's ordinances resemble such longstanding ordinances that fall outside the scope of the right to bear arms. The ordinances that restrict firearms age from twenty-three to sixty-four years in age. The only more recent ordinance (five years old) does not restrict the carrying or use of firearms at all, but simply required owners to report loss or theft. The older ordinances do not infringe on the right to bear arms in any way, shape, or form.

Even if the right to bear arms were applicable, the Superior Court held that the Pennsylvania and U.S. Constitution requires courts to review new and novel firearm regulations that implicate the right to bear arms under intermediate, not strict, scrutiny. *Com. v. McKown*, 79 A.3d 678, 689-90 & n. 9 (Pa. Super. 2013). For new and novel restrictions, the Third Circuit likewise applies intermediate scrutiny, explaining the standard:

> [T]he government's asserted interest must be more than just legitimate but need not be compelling. It must be "significant, substantial, or important." *Marzzarella*, 614 F.3d at 98 (internal quotation marks and citations omitted). Additionally, "the fit" between the asserted interest and the challenged law need not be "perfect," but it must be "reasonable" and "may not burden more [conduct] than is reasonably necessary." *Id.*

Drake, 724 F.3d at 436.

Under this standard, Harrisburg "has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety." *Id.* at 437. Accordingly, the only question is whether the ordinances reasonably fit that need. *Id.* There can be

little doubt that they do. The ordinances restrict discharge in public areas and bar possession only in parks and otherwise in public only in emergencies. The theft reporting ordinance harms the right to self-defense in no way (unless one is in the business of stealing firearms, of course).

Further, all of these ordinances apply outside the home and in public, still permitting everyone to defend their hearth and home. The U.S. Supreme Court rejected DC's complete handgun ban because it prohibited the plaintiffs from defending themselves in their homes. In *Chicago*, the Supreme Court explained its "central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

Post-*Heller*, "It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home." *Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013). "Outside of the home, however, we encounter the 'vast terra incognita'…" *Id.* (quoting *U.S. v. Masciandaro*, 638 F.3d 458, 475 (4th Cir.2011)).

> The Third Circuit recognized that, historically, firearm possession in public has been more regulated than in the home:
>
> Rather than discussing whether or not the individual right to bear arms for the purpose of self-defense articulated in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) "extends beyond the home," it may be more accurate to discuss whether, in the public sphere, a right similar or parallel to the right articulated in Heller "exists." Firearms have always been more heavily regulated in the public sphere so, undoubtedly, if the right articulated in Heller does "extend beyond the home," it most certainly operates in a different manner.

Id. at n. 5. Accordingly, the Third Circuit held that strict scrutiny should be reserved for restrictions that infringe on the core of the Second Amendment, that is self-defense within one's home. *Id.* at 436. Obviously, such is not the case here. Indeed, it appears Plaintiffs do not even live in Harrisburg.

Under state law as well, the ordinances pass with flying colors. The Superior Court has upheld restrictions on transfers of firearms:

> [T]he statute Appellant challenges here, 18 Pa.C.S.A. § 6106, only restricts an unlicensed person from carrying a firearm hidden on his person or carrying a loaded firearm in a vehicle. This provision does not prohibit a person from owning a firearm or from carrying a firearm, nor does it proscribe the transportation of a firearm in a vehicle. The statute requires only that the firearm be unloaded during transport in a vehicle and not be concealed on an unlicensed person's body. Here, the statute is limited; there is no sweeping ban as was the case in *Heller*. …
>
> We point out that neither the Second Amendment to the United States Constitution, nor the Pennsylvania Constitution, bestows on any person the right to carry a concealed firearm or transport a loaded firearm in a vehicle.

McKown, 79 A.3d at 689-90. In any event, the Court held that the statute would survive under either heightened scrutiny as well. *Id.* at n.9.

Likewise, the Commonwealth Court has held that a government employer can discipline an employee who brings a firearm to work. *Perry*, 38 A.3d at 955. The Commonwealth Court *en banc* also rejected a challenge to an ordinance barring firearms within a courthouse:

> Here, the County has limited the right to bear arms for the protection of citizens using the courthouse. Thus, the County's

> ordinance does not violate Article I, Section 21 of the Pennsylvania Constitution.

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

Under these cases, Harrisburg has an interest in protecting the public. It has adopted reasonable restrictions to do so. Plaintiffs' failure to cite *any* harm to result from these restrictions shows that Harrisburg's ordinances have not failed us or proved unworkable in any way.

C. Plaintiffs lack standing to sue.

1. Plaintiffs lack traditional standing.

Plaintiffs' lack of traditional standing, which required proof of an injury, plays directly into their failure to meet the preliminary injunction standard, which also requires an injury as explained above. None of the Plaintiffs have been affected by any of the ordinances. Nor do the Plaintiff show this Court that any "particular, concrete injury" is coming their way due to the ordinances. Plaintiffs simply do not like the ordinances and would like some attorney fees.

Prior to Act 192 of 2014, the Commonwealth Court held:

> [T]hey must [] allege a particularized, concrete injury to themselves which is causally traceable to the complained-of action by the defendant and which may be redressed by the judicial relief requested. Additionally, the line of causation between the alleged illegal conduct and injury cannot be too attenuated.

NRA v. City of Phila., 977 A.2d 78, 81 (Pa. Commw. 2009).

Under *NRA v. Philadelphia*, it is clear that Plaintiffs lack standing. In that case, the Commonwealth Court held that the NRA lacked standing to challenge a

reporting requirement for lost or stolen firearms—similar to one of the ordinances Plaintiffs challenge. 977 A.2d at 81-82

In *NRA v. Pittsburgh*, the NRA pled a little more, but still not enough:

> The only difference between the facts in *Philadelphia* and the pleadings in this case are that three of the 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. These differences are insufficient to confer standing. …
>
> 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, as in Philadelphia, the possibility of harm is remote and speculative, Appellants lack standing.

NRA v. City of Pittsburgh, 999 A.2d 1256, 1259 (Pa. Commw. 2010). The Court concluded that the NRA could not assert hardship *per se* by violation of the Uniform Firearm Act because hardship *per se* still requires proof of standing.

The Commonwealth Court further rejected "the proposition that the right to bear arms precludes a legal responsibility to report stolen firearms." *Id.* at 1260. The Commonwealth Court also refuted the NRA's argument that gun owners would have to conduct inventories:

> However, this interpretation is contrary to the plain language of the ordinance. In fact, the ordinance only requires reporting within twenty-four hours of the *discovery* of the loss, not the loss itself, creating no affirmative duty to inventory firearms. Therefore, the ordinance creates no burden on Appellants' current behavior, and this argument fails.

Id. (emphasis in original). Since then, the Commonwealth Court held *en banc* that a plaintiff lacked standing to challenge a similar reporting requirement for lost or stolen firearms. *Dillon*, 83 A.3d at 475.

Plaintiffs lack standing, in part, because most or all of the activities they wish to engage in are illegal under state law as explained above as explained in more detail below. Further, and more importantly, Plaintiffs cannot assert any expectation of an actual or imminent injury. Plaintiffs do not claim a practice of regularly firing guns within the City limits. Nor are there any children among the Plaintiffs who would like to carry a gun without an adult present. None of Plaintiffs have lost firearms within the City limits or had any firearm stolen. Plaintiffs also cannot claim that a declared emergency is coming their way.

In the event that Plaintiffs actually violated or needed to violate one of these ordinances, they could seek relief and claim an injury. But no Plaintiff has suffered any injury at the hands of Defendants. Plaintiffs simply are gun owners that claim expanded standing under Act 192 of 2014.

Plaintiffs must know this, which explains why Plaintiffs waited until after Act 192's effective date in January 5, 2015, to challenge ordinances enacted in 1951, 1969, 1971, 1991, and 2009. Even the most recent ordinance has lived half a decade without challenge from Plaintiffs or anyone else.

2. Act 192 of 2014 is their only hope.

In an attempt to expand standing, Act 192 of 2014 states that a person adversely affected includes, not only those with common law standing, but also "A

resident of this Commonwealth who may legally possess a firearm under Federal and State law." 18 Pa.C.S. § 6120(b)(definition of "person adversely affected")(1). Act 192 also added a fee-shifting provision to plaintiffs who bring lawsuits. 18 Pa.C.S. § 6120(a.3), (b)(definition of "reasonable expenses").

However, Act 192 is unconstitutional as it violated the single subject rule, Art. III, Sec. 3, and original purpose rule, Art. III, Sec. 1, of the Pennsylvania Constitution as explained below.

a. HB 80 retained its original purpose for twenty-one months.[1]

Some background is necessary. On June 18, 2013, HB 80 underwent a minor technical amendment in the House Judiciary Committee, as reflected in HB 80 (PN 2066). HB 80 (PN 2066), Reg. Session 2013-14 (Ex. C). The Senate Judiciary Committee subsequently amended the Senate version of HB 80 on June 24, 2014, to add a section amending 18 Pa. C.S. ¶ 3503(b.1), resulting in HB 80 (PN 3831). HB 80 (PN 3831), Regular Session of 2013-14, June 24, 2014 (Ex. D). The Senate further amended the bill on its third consideration on October 6, 2014, to add a definition for "secondary metal" to 18 Pa. C.S. ¶ 3503(d), resulting in HB 80 (PN 4248). HB No. 80 (PN 4248), Regular Session of 2013-14, Oct. 6, 2014 (Ex. E) at 2. Throughout the amendments to HB 80 that resulted in PNs 2066, 3831, and 4248, HB 80 remained limited to the subject of creating criminal penalties for the theft of

[1] Much of the sections on Act 192's constitutionality under the single subject and original purpose rules comes from the Petitioners' application for summary relief before the Commonwealth Court (Ex. A to our motion to stay). Petitioners' brief above is well-written and cogent. Undersigned counsel both apologizes for plagiarism and, to the extent the work is copied, thanks the Petitioners for sharing their hard work.

secondary metals; its purpose remained as stated in the sponsorship memo (*compare* Ex. C, D, and E. *with* Ex. B at 1); and it made no mention of, and had no relation to, authorizing membership organizations or gun advocates to sue municipalities over firearm ordinances.

b. Advocates sought to advance the amendments the Uniform Firearm Act at issue through HB 1243, a bill that died in committee.

While HB 80 circulated through the General Assembly, a distinct bill, HB 1243, was also under consideration. HB 1243, a bill with no relation to HB 80, was introduced into the General Assembly and referred to the House Committee on the Judiciary on April 23, 2013, as HB 1243 (PN 1585). Unlike HB 80, HB 1243 concerned the gun possession rights of persons with mental health issues, and it was entitled "AN ACT Amending Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, in firearms and other dangerous articles, further providing for persons not to possess, use, manufacture, control, sell or transfer firearms and for Pennsylvania State Police." HB 1243, PN 1585 Exhibit "F") at 1.

On September 23, 2014, the House amended HB 1243, resulting in HB 1243, (PN 4179), to add the provision at the core of this dispute, an amendment to the Uniform Firearm Act (18 Pa. C.S. ¶ 6120), granting sweeping new rights to gun advocates to enter the courts and challenge municipal legislation whether affected by the ordinances or not. HB 1243, (PN 4179), Regular Session 2013-14, Sep. 23, 2014 (Ex. G). Section 6120 generally limits the ability of municipalities to regulate gun ownership. HB 1243 (PN 4179) would give gun owners the ability to sue

municipalities for firearm regulation whether injured or not and give attorney fees to prevailing plaintiffs. Ex. G at 6-7. The House passed HB 1243 on October 6, 2014, and sent it to the Senate, where it was assigned to the Senate Judiciary Committee and ultimately died in Committee.

c. Advocates of the amendments the Uniform Firearm Act at issue moved the language into an unrelated bill (HB 80) in a last-ditch effort.

On October 15, 2014, with HB 1243 stalled in committee, proponents in the Senate of the firearms legislation proposed, and the Senate adopted, Amendment A10397, which merged language from HB 1243 into HB 80. Amendment A10397 (Ex. H) at 1-3. Following passage of Amendment A10397, HB 80 became HB 80 (PN 4318), Regular Session 2013-14 Oct. 15, 2014. HB 80 (PN 4318), Regular Session 2013-14, Oct. 15, 2014 (Ex. I). Reflecting its new hybrid nature, this final version of HB 80 was given a new title:

> Amending Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, in burglary and other criminal intrusion, further providing for the offense of criminal trespass; defining the offense of theft of secondary metal; prescribing penalties; and, in firearms and other dangerous articles, further providing; for Pennsylvania state police and for-limitation on the regulation of firearms and ammunition.

HB 80 (PN 4318), Regular Session of 2013- 14, Oct. 15, 2014, Ex. I at 1.

Except for the correction of the word "paragraphs" to "paragraph," the text of the Uniform Firearm Act amendment newly-added to HB 80 was a *verbatim* copy of the amendment contained in the failed HB 1243 (PN 4179). Amendment

A10397 also amended HB 80 to add other provisions from HB 1243 relating to the handling by the Pennsylvania State Police of mental health records of those disqualified from possessing a firearm.

As amended, HB 80's contents included legislation relating to at least three topics: criminal penalties for the theft of secondary metals, mental health records, and creating a cause of action against municipalities who enact firearm regulations. As amended, HB 80 had no single purpose. The bill's original purpose was to protect the residents of the Commonwealth against secondary metal theft. The final bill had multiple disparate objectives including the unprecedented creation of a new private right of action for damages, injunctive relief, and attorneys' fees against municipalities that engage in the prohibited regulation of firearms or ammunition.

After a slow twenty-one month stroll through the General Assembly up to that point, HB 80 passed quickly. The Senate passed the final version of the bill the very next day, on October 16, 2014, returned the bill to the House, and then adjourned. The House concurred in the Senate amendments, passed the bill on October 20, 2014, and then adjourned.

On November 5, 2014, the House of Representatives reconvened, and Samuel H. Smith, as the presiding officer of the House of Representatives, signed the version of HB 80 that had been passed by the House on October 20, 2014. The next day, Lieutenant Governor Cawley, as the presiding officer of the Senate, opened a Senate session and signed the version of HB 80 that had been passed by the Senate on October 16,2014. Governor Corbett signed HB 80, PN 43 18 on the afternoon of

November 6, 2014, and it is now known as Act 192. By its terms, Act 192 became effective 60 days after the Governor's signature, on January 5, 2015.

d. Act 192 violates the single subject and original purpose rules.

For these reasons, Act 192 violates the single subject and original purpose rules under Article III to the Pennsylvania Constitution.

In challenging the constitutionality of Act 192, Defendants bear the burden of establishing that Act 192 "clearly, palpably and plainly" violates the Constitution. *PAGE v. Commw.,* 877 A.2d 383,393 (Pa. 2005) (citing *Pa. Sch. Bds. Ass'n v. Commw. Ass'n of Sch. Adm 'rs,* 805 A.2d 476, 479 (Pa. 2002)). Article I, Sections 1 and 3 are "mandatory directives governing the manner of passing legislation . . . and not mere general guidelines[.]" *Marcavage v. Rendell,* 888 A.2d 940,944 (Pa. Commw. 2005), *aff'd* ,951 A.2d 345 (Pa. 2008) (citing *City of Phila. v. Commw.,* 838 A.2d 566,58 1 (Pa. 2003)). Accordingly, the Supreme Court has held that while some deference to the legislature is due, "the countervailing concern is our mandate to insure that government functions within the bounds of Constitutional prescription." *Consumer Party of Pa. v. Commw.,* 507 A.2d 323,333 (Pa. 1986).

Justice Saylor, writing for the Supreme Court in *City of Philadelphia,* stated:

> We may not abdicate this responsibility under the guise of our deference to a co-equal branch of government. While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within Constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear Constitutional violation.

City of Phila. v. Com, 838 A.2d 566, 581 (Pa. 2003); *see also Washington v. DPW,* 71 A.3d 1070, 1077 (Pa. Commw. 2013) ("These rules [Article III] are a cornerstone of our democratic process").

While a high burden, Defendants have met it here. In the seminal *City of Philadelphia* decision in 2003, the Pennsylvania Supreme Court made clear that the legislative branch must abide by the single subject and original purpose provisions of the Pennsylvania Constitution. Act 192 violates both of these requirements because the law began as a bill setting penalties for the theft of secondary metals, but was passed with unrelated legislation granting rights of standing to gun membership organizations and regulating mental health records. Act 192 reaches far beyond the original uncontroversial purpose of HB 80 and indeed seeks to invade the province of the courts by changing traditional notions of aggrievement as a prerequisite for standing. Act 192 clearly and palpably violates the single subject and original purpose requirements of the Pennsylvania Constitution.

The "original purpose" and "single subject" requirements and were enacted during the 1874 reforms to the Pennsylvania Constitution to reign in rampant legislative corruption. PAGE, 877 A.2d at 394. At the time, the legislature routinely engaged in practices which were repugnant to good government, including last-minute consideration of legislation, the mixing of unrelated substantive provisions in omnibus bills, arbitrary favoritism and a practice known as "log rolling" in which a single bill incorporating "a variety of distinct and independent subjects[, . . .] intentionally disguising the real purpose of the bill," or "embracing in one bill,

several distinct matters, none of which singly could obtain the consent of the legislature," is passed. *See City of Phila.,* 838 A.2d at 586 (citing Charles W. Rubendall II, *The Constitution and the Consolidated Statutes,* 80 DICK. L. REV. 1 18, 120 (1975)).

The framers of Article III sought "to place restraints on the legislative process and encourage an open, deliberative and accountable government." *Pa. AFL-CIO ex rel. George* v. *Commw.,* 757 A.2d 917,923 (Pa. 2000). "These constitutional provisions seek generally to require a more open and deliberative state legislative process . . . that addresses the merits of legislative proposals in an orderly and rational manner." *City of Phila.,* 838 A.2d at 589. The single subject rule is particularly important because "a bill addressing a single topic is more likely to obtain a considered review than one addressing many subjects." *Id.* at 586.

The single subject rule and the original purpose rule work in tandem to jointly serve these policy objectives. As the Supreme Court has noted:

> In practice, Article III's dual requirements . . . are interrelated, as they both act to proscribe inserting measures into bills without providing fair notice to the public and to legislators of the existence of same.

Id. Put another way, they are designed to prevent "sneak legislation." *Pa. State Lodge* v. *Commw.,* 692 A.2d 609,615 (Pa. Commw. Ct. 1997).

In the watershed *City of Philadelphia* ruling, decided in 2003, the Court criticized the trend to permit broad subjects under the single subject rule:

> [I]t has resulted in a situation where germaneness has, in effect, been diluted to the point where it has been assessed according to whether the court can fashion a

> single-over-arching topic to loosely relate the various subjects included in the statute under review.

838 A.2d at 587.

After expressing its disapproval, the Court went on to reassert the judiciary's critical role in preserving constitutional order:

> We believe that exercising deference by hypothesizing reasonably broad topics is appropriate to some degree ... There must be limits, however, as otherwise virtually all legislation, no matter how diverse in substance, would meet the single subject requirement. ... In that event, Section 3 would be rendered impotent to guard against the evils it was designed to curtail.

Id.

In *City of Philadelphia*, the Court struck down Act 230 of 2002, a 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. The Commonwealth attempted to defend the statute by linking these provisions as all relating to the common subject of "municipalities." The Court conceded that all of the provisions of Act 230 could, on some level, be considered to be related to municipalities, but found that was not enough to pass constitutional muster: "Significantly however, there is no unifying subject to which all of the provisions of the act are germane." *Id.* at 589.

This Court has also been diligent in carrying out its constitutional duty to ensure that Article III is followed by the legislature. In *Marcavage*, the Court struck down under Article III, Section 1, a statute that began as a bill relating to the crime of agricultural crop destruction, but when passed included provisions defining the

crime of ethnic intimidation. The proponents of the law asserted that the single purpose of the bill was "amending the Crimes Code," a justification which was soundly rejected. *See Marcavage,* 936 A.2d at 193 ("to conclude that the General Assembly could initiate a piece of legislation in the context of the Crimes Code and rely on this concept as a unifying justification for amendments to bills under the Crimes Code that have no nexus to the conduct to which the original legislation was directed would stretch the Supreme Court's meaning of 'reasonably broad terms'").

Indeed, since 2003, both this Court and the Supreme Court have been far more skeptical of claims of germaneness. *See DeWeese v. Weaver,* 880 A.2d 54 (Pa. Commw. 2005) (rejecting subject of "judicial procedure" and striking down statute that required incarcerated felony sex offenders to provide DNA samples, and was amended to limit recovery for acts of negligence under doctrine of joint and several liability); *Com. v. Neiman,* 84 A.3d 603 (Pa. 2013) (rejecting 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); *Pa. State Ass'n of Jury Comm'rs v. Commw.,* 64 A.3d 61 1 (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).

In summary, the Supreme Court and Commonwealth Court have made it clear that the single subject and original purpose requirements are real and

mandatory and that the courts will strike down legislation that violates these requirements. Cases cited prior to the 2003 reassertion of these principles in *City of Philadelphia* are of minimal, if any, relevance to the analysis. The correct place to start and end the analysis is with the *City of Philadelphia* decision and its progeny.

e. Act 192 has multiple subjects.

Act 192 has, at a minimum, three subjects: theft of secondary materials, the maintenance of mental health records, and a cause of action against municipalities who enact firearm ordinances. The circumstances under which these subjects joined a single bill highlights the divergence between the subject matters.

HB 1243, for 17 months to the day, dealt with mental health records. Then on September 23, 2014, it was amended to add the provisions at issue here that amend the Uniform Firearm Act to permit suits by firearm owners without injury and allow attorney fees to prevailing plaintiffs. When HB 1243 then stalled in committee, HB 1243's provisions were tossed into HB 80—a bill that for twenty-one months dealt only with theft of secondary materials—in the final hours of the legislative session with a looming change in the Governor's office. HB 80 then promptly passed and was signed into law.

The courts have expressed a heightened degree of skepticism in relation to such last minute legislation, which commentators have called "stealth legislation." *City of Phila.*, 838 A.2d at 574-75. Judge Colins, writing for the Commonwealth Court, chose the quieter epithet "24 hour legislation," but he was quite clear that "it is exactly such 24 hour legislation that the Constitutional amendments of 1874

were meant to prohibit." *Id.* at 575 (citing *Phila. v. Commw.*, No. 45 MD 2003,26 (Pa. Commw. Feb. 19,2003) (opinion accompanying preliminary injunction order)).

Here, HB 80 was a non-controversial bill about the theft of copper-wire for all but the last few hours of its existence. It was only as members were packing their belongings for break that the extremely controversial gun amendment was added. Judge Colins could have been writing about this case when he wrote for the Commonwealth Court in City of Philadelphia:

> Unfortunately, the public had no indication that such radical changes in governance were being contemplated despite the fact that, as noted, the taxpayers will be footing the bill for all of this. Pennsylvania is one of the few states that has incorporated, via its Constitution, restraints upon the Legislature's ability to propose and pass legislation without public notice. The foregoing scenario is exactly what the framers of the [1874] Constitution meant to prevent.

Id.

Act 192 represents just the sort of last minute, hurried legislation, that Article III was designed to prevent. Assessing criminal penalties for the theft of copper wire has absolutely nothing to do with private rights of action for gun membership organizations or mental health records. The multiple provisions in Act 192 are not part of a scheme to accomplish a single general purpose as required by the Pennsylvania Constitution and must be struck down.

It is true that all parts of Act 192 amend provisions of the Crimes Code, but the similarity ends there. The controversial amendments at the heart of this dispute create a private right of civil action against municipalities and are not even criminal provisions. As indicated in *Marcavage*, the general subject of "amendments

to the Crimes Code" is plainly overbroad, and Act 192, which meshes criminal and civil provisions is even broader. Other than the formality that the amended provisions are contained in Title 18, the theft of secondary metals, mental health records, and firearm litigation legislation have nothing to do with each other. If the Court were to hold otherwise, any two criminal provisions would be related to each other, and, for that matter, any two civil provisions would be related to each other. There would be nothing left of the single subject rule.

The courts have summarily rejected that position. It is well established that that "having all amendments apply to a single codified statute does not, in itself, satisfl the single-subject rule." *Washington*, 71 A.3d at 1082 (citing *DeWeese*, 880 A.2d at 58, n.10). In *Neiman*, the Supreme Court wrote, "merely because all of the various components of Act 152 amended 'Title 42,' this does not establish its compliance with Article III Section 3 ." 84 A.3d at 613.

In analyzing Section 3 challenges, far more is required than simply looking at the number assigned to a codified title by the Legislative Reference Bureau. As the Supreme Court admonished in *Payne*, and has repeatedly reaffirmed, *any* two subjects may be linked if "the point of view be carried back far enough." 31 A. at 1074. *See also Neiman*, 84 A.3d at 612; *Jury Comm 'rs*, 64 A.3d at 61 9. The standard is not whether some tenuous link exists between two parts of a statute, but whether the subjects in question can "reasonably be deemed to pertain only to [a] single topic[.]" *City of Phila.*, 838 A.2d at 590. The subjects in question must have a "proper relation to each other" and "fairly constitute parts of a scheme to

accomplish a single general purpose." *De Weese v. Weaver*, 824 A.2d 364,370 (Pa. Commw. 2003) (emphasis added).

In *City of Philadelphia* and *Jury Commissioners*, the Supreme Court held that the subjects "municipalities" and "powers of County Commissioners" were each too broad. This reluctance to embrace extremely broad unifying principles is consistently emphasized by the cases. For example, in *Neiman*, the court, in rejecting each of the competing proffered unifying themes of "refining civil remedies or relief' and "judicial remedies and sanctions," wrote:

> [Tlhe proposed unifying subjects for Act 152 offered by the Commonwealth ("refining civil remedies or relief ') and the General Assembly ("judicial remedies and sanctions") are far too expansive to satisfy Article III, Section 3, as such subjects are virtually boundless in that they could encompass, respectively, any civil court proceeding which could be brought in the courts of this Commonwealth, and any power of the judiciary to impose sanctions on, or order the payment of damages by, a party to civil litigation. We therefore decline to endorse such broad suggested topics, as they would have the effect of "rendering the safeguards of [Article III,] Section 3 inert."

84 A.3d at 613 (emphasis in original) (quoting *PAGE*, 877 A.2d at 395).

"Crimes" is at least as broad a topic as is any of "municipalities" or "refining civil remedies or relief' or "judicial remedies and sanctions." The Pennsylvania Crimes Code covers literally hundreds of crimes, from retail theft to homicide. It is perhaps the broadest area of the law in all of Purdon's. There is no support for the proposition that making amendments to two provisions in the Crimes Code, in and of itself, is sufficient to squeeze them into a constitutionally mandated "one subject."

In fact, there is no single topic of legislation here, and the amendments do not even relate solely to crimes. Criminalizing the theft of secondary metals is certainly criminal legislation, but in what sense does granting a private right of action to gun membership organizations against municipalities relate to crimes at all? Any fair reading of the law is that it combines a criminal provision with a civil provision and is not directed to a single legislative topic.

If the Court were to accept such a subject as single, the single subject rule would be swallowed whole. Being convicted of a crime also can affect the right to vote, to hold public office, to receive state benefits, to have custody of children, to work in certain professions, to maintain immigration status and other matters. It is difficult to imagine an effective and enforceable single subject rule where a simple link to the Crimes Code is, without more, enough to pass constitutional muster in the face of a single subject challenge.

Finally, the public notice requirement of Article III, Section 3 demands that the relationship of two provisions to each other be plain on the face of the legislation and not held in secret by the members of the legislature who control the legislative process. Analysis of the single subject requirement is not a parlor game in making post hoc, abstruse connections. In *De Weese,* the Commonwealth Court held that to survive a challenge, two provisions must have a "proper relation to each other, which fairly constitute parts of a scheme to accomplish a single, general purpose." 824 A.2d at 370 (emphasis added). The court then pointed out that, while the claim that obtaining DNA from felons could be said to "relate to the business of the

courts" which was the alleged single-subject of the law, the "main purpose of the bill was to assist in the investigation and apprehension of criminals." *Id.* (emphasis added). Thus, the court made clear that it was not interested in playing theoretical mind games, but rather intended to look at the actual purpose of each provision to see if there were a true nexus.

Here, it is obvious that despite ex post facto wordplay, the purpose of introducing the original bill, HB 80, which only created criminal penalties for theft of secondary metals, was never, in any way, about affecting gun rights. The Legislator Respondents' arguments are sophistry, conjured up after-the-fact to link together two subjects that it never occurred to anybody would be, could be, should be or are linked.

f. The firearm legislation has changed the purpose of two bills.

As with Section 3's mandate that legislation contain a single-subject, the courts' interpretation of the original purpose rule has evolved over the years. In 2005, the Supreme Court in PAGE, the Court set a new standard:

> This verbiage certainly suggests a comparative analysis, that is, some form of comparison between the "original" purpose and a final purpose to determine whether an unconstitutional alteration or amendment has occurred so as to change the original purpose of the bill. It also suggests an aim broader than just ensuring that the title and contents of the final bill are not deceptive, but also includes a desire for some degree of continuity in object or intention.

877 A.2d at 408.

This Court applied the new standard shortly thereafter in *Marcavage.* In that case, the petitioners challenged Act 143 of 2002, which began as a bill to amend the

Crimes Code to add the crime of agricultural crop destruction. The bill was later amended to add the crime of ethnic intimidation. After being arrested and charged under the ethnic intimidation statute, the petitioners challenged Act 143 under various provisions of Article III. The respondents argued that the bill had not varied from its original purpose, which was to amend the Crimes Code. The Court soundly rejected the argument, declared the law unconstitutional under Section 1 and stated:

> [T]o conclude that the General Assembly could initiate a piece of legislation in the context of the Crimes Code and rely on this concept as a unifying justification for amendments to bills under the Crimes Code that have no nexus to the conduct to which the original legislation was directed would stretch the Supreme Court's meaning of 'reasonably broad terms.

Marcavage, 936 A.2d at 193.

HB 80's original purpose (adding penalties for theft of copper-wire) has nothing to do with expanding access to courts for firearm advocates. Nor did HB 1243's original purpose (mental health records). Even if the legislators caught wind of what was in the bill before voting (which is questionable), there can be no doubt that the general public had no time to become aware of HB 80's new purpose in time to comment. Article III is designed to protect from deceptive practices not only individual legislators, but also the public. That is why adding major amendments on less than 24 hours notice on the last day of a legislative session has always been viewed skeptically by the courts. *See, e.g., City of Phila.,* 838 A.2d at 575 ("it is exactly such 24 hour legislation that the Constitutional amendments of 1874 were meant to prohibit").

Any fair reading of Act 192 as passed reveals two wholly unrelated parts, each a stranger to the other in concept, and joined only in a marriage of political convenience. Further, this was a shot-gun marriage, rushed through at the last possible moment in an effort to sneak a bill, which had gained absolutely no traction as a free-standing bill, into the law books as the lights were being turned out on the legislative session. Act 192 started with one purpose and was hijacked by the gun lobby for a different purpose.

Act 192 is unconstitutional and must be struck down.

g. Act 192 unconstitutionally expands standing to uninjured plaintiffs.

Under Act 192, *any* firearm owner can sue *any* municipality that has an ordinance barring firearms and recover attorney fees for doing so. Under Act 192, it does not matter whether the ordinance ever has, will, or even could apply to a plaintiff. Nor would it matter if the ordinance pre-dated the Uniform Firearm Act and was never applied.

Act 192 extends access to courts 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."

The Pennsylvania Supreme Court has explained the importance of this limitation 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).

As the U.S. Supreme Court has held, "Statutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Although the Pennsylvania Supreme Court has not yet had an opportunity to apply *Lujan*'s sound reasoning to the state constitution, there is reason to believe that it would do so.

In *Com. v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267 (Pa. 2010), the Pennsylvania Supreme Court held that a party lacked standing to sue under the standing provisions in the Commonwealth Attorneys Act. Justice Saylor dissented, arguing that the Pennsylvania Constitution controlled, and that the legislature cannot limit an injured party's right to sue. *Id.* at 278-82. The Majority did not address this issue because the Majority did not believe any party raised the issue. *Id.* at n.7.

Justice Saylor's reasoning, which the *Janssen* Majority did not question, applies equally here. The injury requirement for a lawsuit works both ways. The Constitution guarantees that an injured plaintiff has access to the courthouse, but

the Constitution does not permit the filing of non-sense lawsuits challenging laws by persons that the laws do not affect.

This is particularly true here. Plaintiffs challenge ordinances enacted in 1951, 1969, 1971, 1991, and 2009 that went unquestioned for five to sixty-four years. Most of these ordinances pre-date the Uniform Firearm Act, and all of the ordinances pre-date the Act 192 amendments. Now, Harrisburg has been hit with two lawsuits and who knows how many attorneys are chomping at the bit to uncover similar longstanding ordinances across the state.

These are the kind of lawsuits that do not serve the public good. Under Act 192, it does not matter whether the ordinance affects a plaintiff in the slightest—opening the door to all sorts of litigation that was patently frivolous just 30 days ago. Attorney-Plaintiff McShane's public comments shed light on his motives:

> McShane said he also plans to sue for attorney and legal fees, which is allowed under the new law. ***He would not commit to dropping the lawsuit if the city repeals its ordinances.*** …
>
> Harrisburg could take a serious financial "hit" by the lawsuit, McShane said, adding that the city will determine the extent of the hit through the lengths it chooses to defend the gun ordinances.

"Major financial hit' looming for Harrisburg, says legal defense group suing over firearm ordinances," Patriot News, Jan. 13, 2015 (Motion to Disqualify Ex. A & at www.pennlive.com/midstate/index.ssf/2015/01/harrisburg_sued_gun_ordinances.html) (emphasis added).

The expansion of lawsuits to uninjured plaintiffs will overly burden municipalities and officials and violate *their* rights to be free from suit when they

have not actually harmed anyone. Indeed, the Attorney-Plaintiff appears to have made it his goal to burden the taxpayers of Harrisburg with funding his law practice through a serious financial hit.

Ultimately, Act 192 places an unfair burden on municipalities and their officers. In doing so, it violates the Pennsylvania Constitution.

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

1. Harrisburg has authority to regulate firearms.

None of these ordinances violate the Uniform Firearm Act (18 Pa.C.S. § 6120). For starters, the legislature has explicitly given cities the authority to regulate firearms:

> The cities of this Commonwealth be, and they are hereby, authorized to regulate or to prohibit and prevent … the unnecessary firing and discharge of firearms in or into the highways and other public places thereof, and to pass all necessary ordinances regulating or forbidding the same and prescribing penalties for their violation.

53 Pa.C.S. § 3703. As a Third Class City, Harrisburg has an additional grant of authority:

> 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. Under these statutes, Harrisburg has clear authority to prohibit and prevent the discharge of firearms. All of Harrisburg's ordinance further this purpose.

The Third Class City Code plainly permits the ordinances that "regulate" and "prohibit" discharge (§ 3-345.2 and § 10-301.13(c)). The ordinances regulate

possession work to "prevent discharge." For the parks ordinances, Harrisburg additionally has authority to regulate its parks. 53 Pa.C.S. § 3181.

In *Dillon v. City of Erie*, 83 A.3d 467, at n.9 (Pa. Commw. 2014) (*en banc*), the Commonwealth Court held that Section 6120 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.

Likewise, as to the emergency ordinance, 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 an 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." Under this statute, Harrisburg had authority to create reasonable restriction to protect the public from looting during emergencies.

Ultimately, Plaintiffs completely ignore the Third Class City Code, which is their downfall. While the Uniform Firearm Act might limit other municipalities, the General Assembly has explicitly given Harrisburg the authority to regulate firearms. Notably, this authorization both pre- and post-dates the Uniform Firearm Act. The General Assembly first enacted the enabling legislation for third class cities to regulate firearms in 1931 and then again in 2014 when renumbering the section.

The General Assembly has not forgotten its grant of such authority, and nor should this Court.

2. Harrisburg only prohibits the *unlawful* possession of firearms.

The Uniform Firearm Act only prohibits ordinances that regulate the *lawful* possession and transfer of firearms, which none of these ordinances do. Harrisburg's ordinances regulate unlawful conduct.

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

> Section 6120(a) of the Crimes Code provides that "[n]o county ... may in any manner regulate the *lawful* ... possession ... of firearms ... when carried ... for purposes *not prohibited by the laws of this Commonwealth*." 18 Pa.C.S. § 6120(a) (emphasis added). 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:

> 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*).

More recently, as noted above, in *Dillon,* the Commonwealth Court, sitting *en banc*, noted that firearms are illegal in parks (although Erie failed to raise and preserve the issue). 83 A.3d at 473 n.9. Under *Dillon*, the parks ordinances could not possibly limit *lawful* conduct.

Turning to each ordinance in question, Plaintiffs challenge:

1) § 3-345.2 that bars discharge of firearms except at approved firing ranges [Ord. No. 16-1971]. As explained above, as a Third Class City, Harrisburg can prohibit the discharge of firearms.

2) § 10-301.13(b) that bars using or possessing a firearm in a park [Ord. No. 34-1991]. This ordinance only regulates unlawful conduct because possession of firearms on state parks is forbidden unless for hunting or at a designated firing range. 17 Pa. Code § 11.215(4). *See Dillon*, 83 A.3d at n.9 (acknowledging statewide prohibition on firearm possession at parks). Hunting on state parks is only allowed on designated areas. 17 Pa. Code § 11.215(2)(ii). There are no designated hunting areas in Harrisburg, and there are no firing ranges on park property.

3) § 10-301.13(c) that bars shooting in or into a park [Ord. No. 34-1991]. This ordinance only regulates unlawful conduct because 34 Pa.C.S. § 2508(a)(2) also prohibits discharge of a firearm at a park. *See Dillon*, 83 A.3d at n.9.

4) § 3-345.1 that bars minors from having firearms outside a home unless accompanied by an adult. [Ord. No. 132-1951]. This ordinance only regulates unlawful conduct because 18 Pa.C.S. § 6110.1 prohibits minors from possessing a firearm without adult supervision unless lawfully hunting. As mentioned above, there are no hunting grounds in Harrisburg.

5) § 3-345.4 that requires firearm owners who report lost or stolen firearms within 48 hours of discovery [Ord. No. 4-2009]. This regulation is not barred by the Uniform Firearm Act because it does not regulate the lawful *possession* of firearms. Someone who steals a gun does not *lawfully* possess it, and someone who loses a gun does not *possess* it at all. The reporting ordinance is not only abundantly reasonable, but also does not fall within the Uniform Firearm Act's scope.

6) § 3-355.2(A) that 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 [Ord. No. 68-1969]. This ordinance only

regulates unlawful conduct because 18 Pa.C.S. § 6107 further prohibits public carrying of firearms during a declared emergency.

7) § 3-355.2(B)(8) that allows the Mayor during a declared emergency to prohibit the public possession of firearms [Ord. No. 68-1969]. This ordinance only regulates unlawful conduct because 18 Pa.C.S. § 6107 further prohibits public carrying of firearms during a declared emergency.

As is clear, these ordinances are eminently reasonable. Harrisburg has a strong interest in protecting the people within its borders. It is no surprise that Harrisburg's longstanding ordinances have gone anywhere from five to sixty-four years without challenge.

E. Plaintiffs fail to prove the liability of any individual Defendant.

1. The individual Defendants did not cause any harm to Plaintiffs.

It is initially denied that *all* Defendants have participated in the enacting, maintenance, and enforcing of these ordinance. None of the individual defendants were in office when Harrisburg enacted the first six ordinances that Plaintiffs challenge. Only three Council members were in office when Harrisburg enacted the seventh and final ordinance in 2009. But that ordinance only requires a firearm owner to report loss or theft; it does not regulate the possession of firearms in any way. Plaintiffs make the wild guess that the individual Defendants had something to do with enacting the ordinances that restrict firearms, and they guessed wrong.

2. The individual defendants are immune from suit.

The City Council members, the Mayor, and the Chief of Police are all entitled to 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).

There are no outer limits to this immunity:

> [T]he doctrine of absolute privilege for high public officials, as its name implies, 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*, provided the statements are made or the actions are taken in the course of the official's duties or powers and within the scope of his authority, or as it is sometimes expressed, within his jurisdiction. … [It 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.

Lindner v. Mollan, 677 A.2d 1194, 1195 (Pa.1996) (emphasis added), *recently quoted in Feldman*, 2014 WL 7212601, at *4.

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). The *Feldman* Court had "no difficulty in concluding that the Montgomery County Coroner is a high-ranking official." *Id.* at *6.

There are plenty of other cases as well granting high official immunity to government officers like the individual Defendants in this case. *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).

In *Linder*, the Supreme Court emphatically held:

> There is no more important local public official than a mayor. He exercises the entire executive power of the borough or municipality and works closely with the city council on a wide range of social and economic policy issues. …
>
> As Mayor, Appellee routinely makes significant public policy decisions, and is accountable to the voting public. Exercising significant policy-making functions as the most important public official in the Borough of Yeadon, Appellee clearly qualifies as a "high public official" under the criteria established in Montgomery.

677 A.2d at 1198-99. The Mayor's status as a high official is undeniable.

As is the Police Chief's status as a high official. It is of no matter that the Police Chief answers to the Mayor. The Pennsylvania Supreme Court *unanimously* held that courts must give high official immunity to assistant district attorneys:

> Assistant district attorneys, however, are essential to district attorneys in fulfilling responsibilities of their high

> public offices, to wit, in carrying out the prosecutorial function. To subject assistant district attorneys acting on behalf of the district attorney to liability would deter all but the most courageous and most judgment-proof from vigorously performing their prosecutorial functions, and would inevitably result in criminals going unpunished. *See Matson, supra*. The fact that assistant district attorneys, unlike their principal, the district attorney, are not known for policy-making functions is not pivotal to the immunity determination. As we noted in *Lindner*, 544 Pa. at 496, 677 A.2d at 1198, the "high public official" umbrella of immunity has in many instances been extended to a wide range of public officials whose policy-making roles were not salient. While it is often the case that "high public officials" have policy-making functions, that is not the sole or overriding factor in determining the scope of immunity. Rather, it is the public interest in seeing that the official not be impeded in the performance of important duties that is pivotal. That interest dictates that assistant district attorneys be immune from suit.

Durham v. McElynn, 772 A.2d 68, 70 (Pa. 2001). Like assistant district attorneys, the Chief of Police is essential to the administration of justice. To expose him to litigation and liability for enforcing the law would contravene the purpose of high official immunity. Further, the Chief is undeniably a high official under *Schroak v. PSP*, 362 A.2d 486 (Pa.Cmwlth.1976), which gave high official immunity to a state police captain.

High official immunity applies to all causes of action, even in the face of improper allegations. In *Osiris Enterprises*, the Commonwealth Court found borough council members absolutely immune for a vote to declare the plaintiff-corporation a non-responsible bidder, even if the council members acted arbitrarily and capriciously in doing so. 877 A.2d at 567-69. Accordingly, Plaintiffs have about a zero percent chance of prevailing against the individual defendants.

V. Conclusion:

This Court should deny the preliminary injunction.

Respectfully submitted,

Lavery Faherty

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Certificate of Service

I certify that on February 5, 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:

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