Note : The "Case Number" Format is Type-Year-Number, Ex: AR-02-000123
*If New Filing, Please Leave the "Case Number" Blank.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

COVER SHEET

Plaintiff(s)

Firearm Owners Against Crime
Firearms Policy Coalition, Inc.
Firearms Policy Foundation
Matthew Boarderly
Saadyah Averick
Fred Rak

Vs

Defendant(s)

City of Pittsburgh
Mayor William Peduto
Councilman Bruce Kraus
Councilman Corey O'Connor
Councilman R. Daniel Lavelle
Councilwoman Deb Gross
Councilwoman Erika Strassburger
Councilman Ricky Burgess

Case Number : GD - 19 - 5330

Type of pleading :
Reply Brief

Code and Classification :

Filed on behalf of
Firearms Owners Against Crime, et al.

(Name of the filing party)

☑ Counsel of Record
☐ Individual, If Pro Se

Name, Address and Telephone Number :
Joshua Prince
Civil Rights Defense Firm, P.C.
646 Lenape Road
Bechtelsville, PA 19505
610-845-3803

Attorney's State ID : 306521

Attorney's Firm ID :

Save Form | Print Form | Clear Entire Form

Joshua Prince, Esquire
Civil Rights Defense Firm, P.C.
646 Lenape Road
Bechtelsville, PA 19505
888-202-9297 ext 81114
610-400-8439
Joshua@CivilRightsDefenseFirm.com

**IN THE COURT OF COMMON PLEAS OF ALLEGHNEY COUNTY
PENNSYLVANIA – CIVIL DIVISION**

FIREARM OWNERS AGAINST CRIME, *et al*.,	:	
Plaintiffs	:	
v.	:	CIVIL ACTION NO. GD-19-005330
CITY OF PITTSBURGH, *et al*,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Plaintiffs Firearm Owners Against Crime ("FOAC"), Firearms Policy Coalition, Inc. ("FPC"), Firearms Policy Foundation ("FPF"), Saadyah Averick, Matthew Boardley and Fred Rak by and through their attorney, Joshua Prince, Esq., hereby file this memorandum of law in opposition to Defendants' motion for summary judgment and in support of their motion for summary judgment.

I. ARGUMENT

A. Standing

Contrary to Defendants' contention that the individual Plaintiffs [1] – with the exception of Plaintiff Rak – have failed to establish standing (Def. Brief at 20), as reflected in the Complaint, Plaintiffs' Answer to New Matter, and their Interrogatories, all Plaintiffs have established standing pursuant to the Declaratory Judgment Act and as taxpayers. As Plaintiffs addressed in their Brief in Support of their Motion for Summary Judgment at 12-13, the Declaratory Judgments Act provides that courts of this Commonwealth have the power to "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." 42 Pa.C.S. § 7532. The purpose of the Act is "to curb the courts' tendency to limit the availability of judicial relief to only cases where an actual wrong has been done or is imminent." *Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 607 Pa. 527, 541 (2010)(citing *Kariher's Petition,* 284 Pa. 455, 463–64, (1925)). In this vein, pursuant to 42 Pa.C.S. § 7541(a), the Act is for the

[1] As Plaintiffs informed the Court and as Defendants have correctly noted in their brief (Def. Brief at 18), the organizational Plaintiffs rely upon the standing of their individual Plaintiff members and to the extent any individual Plaintiff has standing, so do the organizational Plaintiffs.

stated purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and *is to be liberally construed and administered*." (emphasis added). Thus, standing under the Declaratory Judgment Act is not synonymous with traditional standing for torts or other forms of litigation. Even if it were, a public threat of enforcement is enough to demonstrate "the ripening seeds of a controversy sufficient to support judicial review." *Wecht v. Roddey*, 815 A.2d 1146, 1150 (Pa. Cmwlth. 2002) (holding that a county coroner's public statements in opposition of newly adopted regulations were enough evidence of the "inevitability of litigation" to confer standing). [2] In this matter, Defendants concede that they intend to enforce the Ordinances. Def. Answer ¶ 104. Regardless, in addition to Declaratory Judgment Act and traditional standing, Plaintiffs have also established taxpayer standing.

i. Ordinance 2018-1218

Pursuant to Ordinance 2018-1218 and the definition of "use" specific to "Assault Weapons" contained therein, all Plaintiffs have established standing to challenge the law.

---

[2] *See*, *Arsenal Coal Co. v. Com., Dep't of Envtl. Res.*, 505 Pa. 198, 210 (1984)(declaring where a plaintiff sought pre-enforcement review of a challenge to a regulation of a state administrative agency that "the asserted *impact* of the regulations in the instant case is sufficiently direct and immediate to render the issue appropriate for judicial review." (emphasis added)).

See also, *Harris-Walsh, Inc. v. Borough of Dickson City*, 216 A.2d 329, 331 (Pa. 1966); *Firearm Owners Against Crime v. Lower Merion Twp.,* 151 A.3d 1172, 1180, fn 10 (Pa. Cmwlth. 2016)*, appeal denied, 642 Pa. 64, 169 A.3d 1046 (2017); Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa. Cmwlth. 2013); *City of Erie v. Northwestern Pennsylvania Food Council*, 322 A.2d 407, 411-12 (Pa. Cmwlth. 1974)(holding that "[t]his traditional [of standing] prerequisite to the issuance of an injunction is not applicable where as here the Legislature declares certain conduct to be unpermitted and unlawful."). Where no other avenue of *adequate* recourse exists, a plaintiff may seek equitable relief from the courts. *Harris-Walsh*, 216 A.2d at 331. Requiring an individual to wait to challenge a policy, regulation or rule's validity until *after* enforcement of it is *not* considered "adequate." *Id*

The definition of "use" for purposes of 2018-1218 is set forth in § 1102.02. [3] *See also*, Def. Brief at 4-5. While, unlike some of the definitions of "use" for Ordinance 2018-1219, it does exempt "possession, ownership, transportation or transfer" of an Assault Weapon, it explicitly includes, "*but is not limited* to: 1. Discharging or attempting to discharge an Assault Weapon; Loading an Assault Weapon with Ammunition; brandishing an Assault Weapon; Displaying [4] a loaded Assault Weapon; Pointing an Assault Weapon at any person; and Employing an Assault Weapon for any purpose prohibited by the laws of Pennsylvania or the United States." (emphasis added).

In relation to the individual Plaintiffs, Defendants concede that Plaintiff Rak has established standing to challenge 2018-1218. *See*, Def. Brief at 4, 17, fn. 6. Thus, as a result and at a minimum, it is undisputed that Plaintiffs Firearm Owners Against Crime, Firearms Policy Coalition, Firearms Policy Foundation and Mr. Rak have standing to challenge 2018-1218.

Nevertheless, although such is sufficient for invalidating 2018-1218 pursuant to Plaintiffs' claims, Plaintiffs Boardley and Averick have also established standing for challenging 2018-1218. Specifically, Mr. Boardley declared, *inter alia*, that

[3] To the extent Defendants claim, as they did in *Anderson, et al. v. City of Pittsburgh, et al.*, GD-19-005308, that "use" requires both "use" generally, PLUS "use" as defined by the Ordinances (Def. Brief in *Anderson, et al.*, at 11), such is directly contradicted by the text of the Ordinances, which does not require general, plus specific use. *See*, 1 Pa.C.S. §§ 1903(a), 1921(b).

[4] Display is to "make visible," "to show or exhibit" or "to reveal". *See*, *Dictionary.com*, available at https://www.dictionary.com/browse/display. *See also*, *Mariam-Webster.com* defining "display" as "to put or spread before the view." Available at https://www.merriam-webster.com/dictionary/display.

[redacted]

In relation to Plaintiff Averick, he declared, *inter alia,*

[redacted]

[redacted]

* * *

Accordingly, all Plaintiffs have established Declaratory Judgment Act standing to challenge 2018-1218.

ii. Ordinance 2018-1219

Pursuant to Ordinance 2018-1218 and the varying definitions of "use" to each specific item regulated (*i.e.* "Armor Penetrating Ammunition," "Large Capacity Magazines," and "Rapid Fire Devices"), all Plaintiffs have established standing to challenge the law.

1. Armor Penetrating Ammunition

Pursuant to § 1104.02, while "use" exempts "possession, ownership, transportation or transfer" of "Armor Penetrating Ammunition", it explicitly includes, "*but is not limited* to: 1. Discharging or attempting to discharge by means of a Firearm; and Loading it into a Firearm or magazine."

Once again, Defendants concede that Plaintiff Rak has established standing to challenge 2018-1219 and thus, it is undisputed that Plaintiffs Firearm Owners Against Crime, Firearms Policy Coalition, Firearms Policy Foundation and Mr. Rak have standing to challenge 2018-1219. *See*, Def. Brief at 17, fn. 6.

Nevertheless, although such is sufficient for invalidating 2018-1219 pursuant to Plaintiffs' claims, Plaintiffs Boardley and Averick have also established standing for challenging 2018-1219. Specifically, Mr. Boardley declared, *inter alia*, that he

In relation to Plaintiff Averick, he declared, *inter alia*, that he

2. Large Capacity Magazines

Pursuant to § 1104.03, while "use" exempts "possession, ownership, transportation or transfer" of "Large Capacity Magazine", it explicitly includes, [5] "1. Employing it to discharge or in attempt to discharge Ammunition by means of a Firearm; 2. Loading it with Ammunition; 3. Fitting or installing it into a Firearm; 4. Brandishing it with a Firearm; 5. Displaying it with a Firearm while loaded; and 6. Employing it for any purpose prohibited by the laws of Pennsylvania or of the United States."

As discussed *supra*, Defendants concede that Plaintiff Rak has established standing to challenge 2018-1219 and thus, it is undisputed that Plaintiffs Firearm Owners Against Crime, Firearms Policy Coalition, Firearms Policy Foundation and Mr. Rak have standing to challenge 2018-1219. *See*, Def. Brief at 4, 17, fn. 6.

[5] Unlike the definition of "use" found in other sections of 2018-1219 *(e.g.* the very prior section, 1104.02) and 2018-1218, for purposes of this definition of "use" for "Large Capacity Magazines," Defendants have not included the language "but is not limited to."

Nevertheless, although such is sufficient for invalidating 2018-1219 pursuant to Plaintiffs' claims, Plaintiffs Boardley and Averick have also established standing for challenging 2018-1219. Specifically, Mr. Boardley declared, *inter alia*, that he

[redacted]

[redacted]

[redacted]

[redacted]

[6] [redacted]

[redacted]

In relation to Plaintiff Averick, he declared, *inter alia*, that he

[redacted]

[7] Which is capable of accepting detachable magazines that have a capacity of more than 10 rounds of ammunition, for which the slide completely encircles the barrel and prevents the user's hands from being burned.

3. Rapid Fire Devices

Pursuant to § 1104.04, *unlike all the other definitions of* "use" found in §§ 1102.02, 1104.02, and 1104.03, it does *not* exclude possession, ownership, transportation or transfer of Rapid Fire Devices. Thus, the mere possession, ownership, transportation or transfer of a Rapid Fire Device is prohibited by 1104.04.

[redacted] Even if, *arguendo*, the mere ownership, possession and transport of a Rapid Fire Device did not constitute use, "the act or practice of employing something" [8] constitutes use and there is no dispute that Plaintiff Boardley installed the binary trigger into his AR-15 and that it is in use.

In relation to Plaintiff Averick, he declared, *inter alia*, that he desires

[8] https://www.merriam-webster.com/dictionary/use

[redacted]

* * *

Accordingly, all Plaintiffs have established Declaratory Judgment Act standing to challenge 2018-1219.

iii. Ordinance 2018-1220

As set forth in 1107.04, D., "[i]n determining *whether grounds exist to issue an Extreme Risk Protection Order*, the Court shall consider evidence of the following factors and the recency of any behaviors or events: 1. Suicide threats or attempts. 2. Threats or acts of violence or attempted acts of violence. 3. Domestic abuse, including any violation of a protection from abuse order, under 23 Pa. C.S. Ch. 61. 4. Cruelty to animals under 18 Pa. C.S. Ch. 55 Subch. B (relating to cruelty to animals) or a similar law in another state. 5. Abuse of controlled substances or alcohol, or any criminal offense that involves controlled substances or alcohol. 6. Unlawful or reckless use, display or brandishing of a Firearm. 7. Recent acquisition or attempted acquisition of a Firearm. 8. The possession, use or control of a Firearm as a part of the respondent's employment. 9. Any additional information the Court finds to be reliable, including a statement by the respondent." (emphasis added).

Thus, "grounds exist to issue an Extreme Risk Protection Order" based merely upon the "recent acquisition or attempted acquisition of a Firearm" or "the possession, use or control of a Firearm as a part of the respondent's employment;" thereby resulting in the exercise of a constitutional right – the Right to Keep and Bear Arms – being a basis to strip that individual of that exact same constitutional right.

In relation to Plaintiff Boardley, he declared that he

> fears being subjected to an extreme risk protection order and being divested of his firearms and licenses, merely because of the exercise of his U.S. and Pennsylvania constitutional rights – *i.e.* purchasing of a firearm – within the past 180 days, as a result of Defendants statements that they will enforce the enacted Proposals.

And that he

> fears being subjected to an extreme risk protection order and being divested of his firearms and licenses, merely because of his possession, use, and control of firearms for employment, as a result of Defendants statements that they will enforce the enacted Proposals.

Compl. ¶¶ 188, 189. [redacted]

In relation to Plaintiff Averick, he declared that he

> fears being subjected to an extreme risk protection order and being divested of his firearms and licenses, merely because of the exercise of his U.S. and Pennsylvania constitutional rights – *i.e.* purchasing of a firearm – within the past 180 days, as a result of Defendants statements that they will enforce the enacted Proposals.

Compl. ¶ 202.

Lastly, in relation to Plaintiff Rak, he declared that he

> fears being subjected to an extreme risk protection order and being divested of his firearms and licenses, merely because of the exercise of his U.S. and Pennsylvania constitutional rights – *i.e.* purchasing of a firearm – within the past 180 days, as a result of Defendants statements that they will enforce the enacted Proposals.

Compl. ¶ 214.

As Defendants admit in their Answer, ¶ 104, that they intend to enforce all of the Ordinances, including 2018-1220, and "grounds exist" for issuance of an "Extreme Risk Protection Order" solely based upon Plaintiffs' recent acquisition of a firearm or use of a firearm in the context of his employment, all Plaintiffs have established Declaratory Judgment Act standing to challenge it.

iv. Taxpayer Standing – All Ordinances

In addition to Declaratory Judgment Act standing, the individual Plaintiffs, and therefore the organizational Plaintiffs, have established taxpayer standing.

The Pennsylvania Supreme Court in *Price v. Philadelphia Parking Authority* established that, "a taxpayer may seek to enjoin the wrongful or unlawful expenditure of public funds." *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 326 (Pa. 1966). Just nine years later, the Pennsylvania Supreme Court established the controlling authority for the question of taxpayer standing in *William Penn Parking Garage v. City of Pittsburgh*. The Pennsylvania Supreme Court in *William Penn* re-affirmed *Price* holding that, "a taxpayer is permitted to sue in order to prevent waste or illegal expenditure of public funds." *William Penn Parking Garage v. City of Pittsburgh*, 464 Pa 168, 194 (Pa. 1975). The Pennsylvania Supreme Court also held that "a taxpayer may seek to enjoin the wrongful or unlawful expenditure of public funds *even though he is unable to establish any injury other than to his interest as a taxpayer*." *Price v. Philadelphia Parking Authority*, 422 Pa. at 326 (emphasis added). Shortly thereafter, the Pennsylvania Supreme Court would declare that "[a]lthough many reasons have been advanced for

granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts." *In re Biester*, 487 Pa. 438, 445 (1979).

Contrary to Defendants contention, nothing within the Court's precedent permitting a taxpayer to sue in order to prevent waste or illegal expenditure of public funds requires a taxpayer to aver or show anything beyond the fact that he/she is a taxpayer, that there is some cognizable harm to a taxpayer, and that there is a wrongful or unlawful use of public funds relating to that harm. There is no dispute that the individual Plaintiffs are taxpayers (Compl. ¶¶ 176, 191, 204), who are being threatened with the enforcement of the challenged ordinances (Def. Answer ¶ 104), and whereby the Defendants have and continue to expend public funds in relation to the unlawful ordinances.

Even if, *arguendo*, Plaintiffs had to show the criteria proposed by Defendants, Plaintiffs would be entitled to taxpayer standing as: (1) individuals cited for violations of ordinances, do not generally have the inclination or ability to spend tens of thousands of dollars challenging such ordinances, when the fine, in comparison, is very minimal; (2) the Ordinances benefit the Defendants as a revenue generating scheme and permitting them to impose their political beliefs upon the residents of Pittsburgh; and therefore, Defendants are not inclined to challenge their own enactments; (3) judicial relief is appropriate, where, as discussed *infra*, the Pennsylvania Supreme Court in *Ortiz*, pursuant to Article 1, Section 21 and 18 Pa.C.S. § 6120 already declared that municipalities may not regulate firearms and ammunition; (4) there are no other available channels for challenging the Ordinances, other than criminal prosecution, which is not

required for an individual to challenge an enactment; [9] and, (5) Plaintiffs are best suited for challenging the Ordinances, as they have the requisite resources and experience necessary to challenge the unlawful Ordinances.

Accordingly, individual Plaintiffs, and therefore the organizational Plaintiffs, have taxpayer standing to challenge the unlawful expenditure of public funds in relation to the enforcement, prosecution and defense of these unlawful ordinances.

B. *The Ordinances Are Unlawful*

For the reasons set-forth *ad nauseum* in Plaintiffs' Brief in Support of Their Motion for Summary Judgment, which, for brevity, the Plaintiffs incorporate by reference herein, the Defendants Ordinances are unlawful. Plaintiffs will merely respond to the newly raised issues by Defendants.

i. Defendants Lack The Power To Regulate, In Any Manner, Firearms and Ammunition

The Defendants contend that pursuant to 53 P.S. § 23131 and 53 P.S. § 3703, they are authorized to regulate firearms consistent with the enacted Ordinances (Def. Brief at 21-23); however, the fail to advise this Court of the Rules of Statutory Construction and even if, *arguendo*, the Rules of Statutory Construction did not apply, the extremely limited grant of power provided by those code sections.

First, 53 P.S. 23131, was enacted by the General Assembly in 1901, March 7, P.L. 20 and 53 P.S. 3703 was enacted by 1921, May 10, P.L. 430. In comparison, 18 Pa.C.S. § 6120 was enacted by the General Assembly in 1974, Oct. 18, P.L. 768 and most recently

[9] *See*, fn. 2.

amended in 1999, Dec. 15, P.L. 915. Similarly, 53 Pa.C.S. § 2962 was enacted by the General Assembly in 1996, Dec. 19, P.L. 1158.

As provided for by Pennsylvania's Statutory Construction Act, "the statute latest in date of final enactment shall prevail." 1 Pa.C.S. § 1936. In this matter, as Section 23131 was enacted in 1901 and Section 3703 was enacted in 1921, they are both invalidated by the enactments of Section 6120 in 1974 (and thereafter amended in 1999) and Section 2962 in 1996.

Second, with the enactment of the Uniform Firearms Act ("UFA"), 18 Pa.C.S. § 6101, *et seq*., in 1972, pursuant to 1 Pa.C.S. § 1971(b), Sections 23131 and 3703 would have been repealed, as they relate to firearms and ammunition. Section 1971(b) specifically provides,

> Whenever a general statute purports to establish a uniform and mandatory system covering a class of subjects, such statute shall be construed to supply and therefore to repeal pre-existing local or special statutes on the same class of subjects.

Third, no enactment of the General Assembly can invalidate the "inviolate" [10] "right of the citizens to bear arms in defense of themselves" as specified in Article 1, Section 21 of the Pennsylvania Constitution and the Pennsylvania Supreme Court has already held that municipal regulation of firearms is preempted by Article 1, Section 21 in *Ortiz v. Commonwealth,* 545 Pa. 279, 287 (1996)(declaring that pursuant to Article 1, Section 21, the "regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation."). Furthermore, consistent with the Pennsylvania Supreme Court's holding in *Commonwealth v. Wanamaker*, 450 Pa. 77, 89

[10] *See*, Article 1, Section 25 of the Pennsylvania Constitution.

(1972), "the failure of the legislature, subsequent to a decision of this Court in construction of a statute, to change by legislative action the law as interpreted by this Court creates a presumption that our interpretation was in accord with the legislative intendment."

Fourth, even if, *arguendo*, this Court were to ignore the dictate of the Pennsylvania Supreme Court and the Statutory Construction Act, Sections 23131 and 3703 do not authorize Defendants to regulate firearms and ammunition as provided for in Ordinances 2018-1218, 2018-1219 and 2018-1220. Specifically, at most, Section 23131 permits Defendants to "regulate, prevent and punish the discharge of firearms… in the streets, lots, grounds, alleys, or in the vicinity of any buildings"; [11] however, the Commonwealth Court has already ruled in *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172 (Pa. Cmwlth. 2016), *appeal denied*, 642 Pa. 64, 169 A.3d 1046 (2017) and *Dillon v. City of Erie*, 83 A.3d 467 (Pa. Cmwlth. 2014) that a municipality cannot regulate discharge, pursuant to Article 1, Section 21 and 18 Pa.C.S. § 6120. Moreover, the Commonwealth Court in *Firearm Owners Against Crime v. Lower Merion Twp.* explicitly held that a municipality may not regulate even on its own property. 151 A.3d at 1180. Even if, *arguendo*, this Court were to ignore the binding precedent, the Ordinances at issue, as discussed in Plaintiffs' Brief in Support of Their Motion for Summary Judgment and *supra*, regulate *far* more than the discharge or

[11] Although 23131 also mentions a putative ability to regulate the "carrying of concealed deadly weapons," this would have been repealed, to the extent it covered firearms, by the enactment of 18 Pa.C.S. § 6109. Furthermore, any such proscription would violate the explicit holding of the U.S. Supreme Court finding that the definition of bear arms is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *D.C. v. Heller*, 554 U.S. 570, 584 (2008)(*citing Muscarello v. United States*, 524 U.S. 125, 143 (1998)).

carrying of concealed weapons [12] "in the streets, lots, grounds, alleys, or in the vicinity of any buildings" [13] and therefore are unlawful pursuant to Article 1, Section 21 and Section 6120.

In turning to 53 P.S. § 3703, the Ordinances yield the same fate, as it too only authorizes the regulation of "discharge of firearms in or into the highways and other public places thereof" and the Ordinances neither limit their application to "in or into the highways and other public places thereof" nor to merely discharge.

Accordingly, neither Section 23131 nor 3703 provide Defendants with any authority to enact or enforce the Ordinances.

ii. Regulating "Use" Is Preempted

As Defendants acknowledge, albeit hidden in a footnote, the Pennsylvania Supreme Court in *Ortiz*, 545 Pa. at 283, and the Commonwealth Court in *Dillon*, 83 A.3d 470, have already ruled that "use" of firearms and ammunition is preempted. [14, 15] Def. Brief at 34, fn. 13. In fact, in *Ortiz*, the Pennsylvania Supreme Court reviewed the Defendants' 1993 Ordinance, which explicitly prohibited in Section 607.08, *inter alia*,

---

[12] *See e.g.*, Section 1104.02 regulating the loading of Armor Penetrating Ammunition into a magazine, Section 1104.03 regulating the loading of a Large Capacity Magazine and all of Ordinance 2018-1220 implementing the issuance of Extreme Risk Protection Orders.

[13] *See e.g.*, 1104.03, C., defining "public place" as including "streets, parks, open spaces, public buildings, public accommodations, businesses and other locations to which the general public has a right to resort."

[14] Interestingly, although the Defendants argue that the General Assembly did not intend to regulate "use," they do not explain, if that is the General Assembly's understanding or intent, why numerous bills have been offered in the General Assembly *to permit* municipalities to regulate, *inter alia*, "use", as addressed by Plaintiffs' Brief in Support of Their Motion for Summary Judgment at 21-25.

[15] Defendants fail to advise the Court that the Commonwealth Court also addressed the "use" of "assault weapons," "large capacity magazines" and "accessories" in *Nat'l Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 79, 83 (Pa. Cmwlth. 2009), where the court reviewed, *inter alia*, the City of Philadelphia's enacted Bill No. 080033 and found such to be preempted. A copy of Bill No. 080033 is attached hereto as Exhibit B.

the "use" of any "contraband weapon, accessory or ammunition." A copy of Ordinance 30 of 1993, which Defendants submitted as Exhibit B to their Motion for Summary Judgment in GD-94-1499, is attached hereto as Exhibit A. The definition of "contraband weapons, accessories and/or ammunition" is found in Section 607.01(h), where it specifies that such includes, *inter alia*, any "assault weapon," "large capacity ammunition belt" and "device, accessory or ammunition." Act 30 also defined "Ammunition," [16] "Assault Weapon," [17] and "Large Capacity Ammunition Belt."[18] As discussed further *infra*, as the Pennsylvania Supreme Court has already ruled not only is the regulation of "use" preempted, but so to is the regulation of ammunition, assault weapons, large capacity feeding devices and devices and accessories, as well as, divestiture of firearms from someone posing a risk of harm, the Defendants' argument is without merit.

Interestingly, an issue not addressed by the Defendants and which undermines their argument that the PA Supreme Court did not decide whether "use" is prohibited (Def. Brief at 34, fn. 13), is their argument relating severability. Def. Brief at 40. Specifically, Defendants contend that if any provision is found unlawful, only that provision should be held unlawful and not the entire enactment. In review of Ordinance 30 of 1993, Section 607.15 contained a severability provision. *See*, Exhibit A. Thus, Defendants find themselves in an untenable position of either having to admit that the Pennsylvania Supreme Court did in *Ortiz* address the "use" provision of Ordinance 30 – as otherwise, if municipalities could regulate "use," the Court would have merely severed

[16] 607.01(e).
[17] 607.01(f). Interestingly, almost every single firearm that was labeled as an "Assault Weapon" in Act 30 of 1993, is found in the Defendants' current definition of an "Assault Weapon" found in Section 1102.01.
[18] 607.01(k).

the unlawful provisions and allowed the "use" portion to remain – or that there is no ability to sever unlawful provisions.

Moreover, while the Defendants attempt to claim that to the extent there is any ambiguity in Section 6120, that ambiguity must inure to their benefit (Def. Brief at 26), they fail to address the fact that (1) Section 6120 and the legion of binding precedent is explicitly clear that it preempts all regulation of firearms; (2) Article 1, Section 21 is also explicitly clear, and is upon which the PA Supreme Court rendered the *Ortiz* decision; and, (3) even if, *arguendo*, Article 1, Section 21 and Section 6120 were ambiguous, since the Defendants have enacted criminal ordinances, any ambiguity or vagueness, pursuant to 1 Pa.C.S. § 1928(b)(1) and the rule of lenity, must be decided in the Plaintiffs' favor, consistent with the binding legion of precedent. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 (1992)(holding that the rule of lenity even equally applies to civil provisions that are part of a criminal enactment).

iii. Regulations Similar/Identical To Defendants' Ordinances Were Already Held Unlawful by the Pennsylvania Supreme Court

In *Ortiz*, the Pennsylvania Supreme Court addressed and struck down, pursuant to Article 1, Section 21 and Section 6120, substantially similar, and in many regards identical, regulations of the City as a result of the enactment of Ordinance 30 in 1993. 681 A.2d at 154. As discussed *supra*, these included regulations on "assault weapon," "large capacity ammunition belt" and "device, accessory or ammunition." *See*, Exhibit A,

Section 607.01(h). [19] Accordingly, as the Defendants are acutely aware, the Supreme Court has already ruled that they lack the power to regulate, as they have done in Ordinances 2018-1218 and 2018-1219. Furthermore, even in relation to the extreme risk protection provision of Ordinance 2018-1220, this type of regulation by the City of Philadelphia was previously ruled preempted by the Commonwealth Court, and affirmed by the Pennsylvania Supreme Court, in *Clarke v. House of Representatives*, 957 A.2d 361, 362-364 (Pa. Cmwlth. 2008)(declaring that, *inter alia*, that Bill 040312 that permits "a firearm can be confiscated from someone posing a risk of harm" is preempted) aff'd sub nom. *Clarke v. House of Representatives of the Com.*, 602 Pa. 222 (2009).

Much to the chagrin of the Defendants, the legion of precedent is clear – the Pennsylvania General Assembly reserved "the exclusive prerogative to regulate firearms in this Commonwealth." *Commonwealth v. Hicks*, 56 MAP 2017, 2019 WL 2305953, at *5, fn 6 (Pa. May 31, 2019); *see also*, *Ortiz*, 545 Pa. at 287 (holding that the "regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation"); *Clarke*, 957 A.2d at 364 (holding that the regulation of anything involving firearms is that "which the General Assembly has assumed sole regulatory power").

Nevertheless, they attempt to argue that the Child Access and Extreme Risk Protection provisions of 2018-1220 are lawful, in defiance of the *Clarke* holding. Def.

[19] As such, Defendants' argument that it may regulated magazines and rapid fire devices (Def. Brief at 26-28) is without merit, since the Supreme Court has already ruled that such regulations are unlawful, as otherwise, as discussed *supra*, the Court would have severed the unlawful provisions and allowed the regulation of ammunition feeding devices and other devices and accessories to stand.

Brief at 28 - 34. Even setting the *Clarke* decision aside, the Defendants cannot explain how 2018-1220 does not regulate the "possession" and "transfer" of firearms, as Plaintiffs addressed in their Brief in Support of Their Motion for Summary Judgment at 31-32. In relation to Section 1106.02, it criminalizes and regulates where a "Firearm custodian" allows a minor to gain access to (*i.e.* possession and transfer) and use of a firearm. [20] Similarly, Section 1107.01, *et seq.*, addresses the forced relinquishment (*i.e.* possession and transfer) of firearms in relation to the issuance of an extreme risk protection order.

iv. There Exists No Viable Self-Defense Exception

Contrary to Defendants' claims that the Ordinances permit use of the regulated items for purposes of self-defense (Def. Brief at 6, 24), the enacted exemptions do not provide for viable self-defense uses. First and foremost, Ordinance 2018-1220 does not provide for any self-defense exemption; thereby violating the dictate of *Heller* that self-defense is at the core of the Second Amendment. Second, the exemptions (Sections 1101.05, 1102.04, 1104.05) only address the use of a "lawfully possessed Firearm" – which regulate "possession" of firearms in direct defiance of Section 6120 – and, contrary to Defendants' assertion, do not grant exception to the use of "Armor or Metal Penetrating Ammunition," "Large Capacity Magazines," or "Rapid Fire Devices," as the exemptions only apply to a "Firearm," which is defined in Section 1101.01 and does not include those items. Third, the provisions only permit exemption where the otherwise

[20] Defendants humorously contend that this provision does not "regulate" firearms (Def. Brief at 30) but acknowledge it "imposes a fine on those who irresponsibly store firearms." Forcing an individual to choose between either being fined or complying with a provision is the regulation of that activity. Even more humorous is the fact that such is wholly supported by Defendants' own quoted definition to "Regulate" being "[t]o control (an activity or process) esp. through the implementation of rules." Def. Brief at 30.

prohibited "Firearm" is being used for "*immediate* and otherwise lawful protection of a person[] or another person[] or property or for lawful hunting purposes." Thus, an individual, who is carrying and displaying a loaded "Firearm" with a "Large Capacity Magazine" in public for purposes of his/her own lawful protection of him/herself and others, would not be entitled to any of the exemptions, as "Large Capacity Magazines" are not exempt and there is no "immediate" use, as the "Firearm" is being carried and displayed as a protective and preventive measure.

C. The General Assembly Has Occupied the Entire Field of Firearms Regulation

Contrary to Defendants' argument (Def. Brief 34-38), as discussed at length in Plaintiffs' Brief in Support of Their Motion for Summary Judgment at 14-25, the General Assembly has occupied the entire field of firearms regulation, as recently reaffirmed by the Pennsylvania Supreme Court in *Hicks*, discussed *supra*.

While Defendants make much out of the fact that the Pennsylvania Supreme Court did not list the express preemption of Article 1, Section 21 and Section 6120 in *Hoffman Min. Co. v. Zoning Hearing Bd. Of Adam Twp., Cambria Cty.*, 612 Pa. 598, 609 (2011) (Def. Brief at 34), such misses the mark, as the Court was only listing those areas of the law, where they found that "field preemption" existed. As the Supreme Court already found that Article 1, Section 21 and 18 Pa.C.S. § 6120 constitute "express preemption" in *Ortiz*, it was unnecessary to additionally list the UFA as constituting field preemption in *Hoffman Min. Co*.

Furthermore, contrary to the Defendants' statement that "[i]t has been more than twenty years since the Pennsylvania Supreme Court has addressed this state's firearms

preemption laws" (Def. Brief at 38), as discussed *supra*, less than two months ago, the Pennsylvania Supreme Court in *Hicks* reaffirmed that the General Assembly reserved the "the exclusive prerogative to regulate firearms in this Commonwealth."

D. <u>*No Right To Sever*</u>

Although Defendants are correct that there is a general right to severance of an unlawful provision, Defendants fail to address that *all* the enacted provisions are in violation of Article 1, Section 21 and Section 6120 and therefore, there is nothing left to stand. Even if, *arguendo*, this Court were to find that some provision is not unlawful, the right to severance is not absolute and there is no right to severance, pursuant to 1 Pa.C.S. § 1925, where, after the void provisions are excised, the remainder of the act is incapable of execution. As held by the Pennsylvania Supreme Court in *Genkinger v. City of New Castle,* 368 Pa. 547, 554 (1951)

> If the part which is unconstitutional in its operation, is independent of, and readily separable from, that which is constitutional, so that the latter may stand by itself, as the reasonable and proper expression of the legislative rule, it may be sustained as such; but *if the part which is void is vital to the whole,* or other provisions are so dependent upon it, and so connected with it, that it may be presumed the legislature would not have passed one without the other, the whole statute is void.

In this matter, even if, *arguendo*, this Court found that one provision was lawful, due to all the provisions being vital to the whole and connected therewith, the Ordinances in their entirety must be struck down. [21]

[21] *See*, *Protz v. Worker's Compensation Appeal Board (Derry Area School District),* 639 Pa. 645, 665-66 (2017)

E. Defendants' Signage Regulates Possession and Transport of Firearms

While Defendants contend that they are not bound by 18 Pa.C.S. § 913(d), as it only applies to counties, they fail to address the fact that Plaintiffs raised this as a preemption issue (Pltf. Brief at 32-34), as the Defendants were unlawfully regulating the possession and transport of firearms and ammunition at the City-Council building by erecting the sign. Thus, Defendants cannot escape the fact that the sign regulates, *inter alia*, the possession and transport of firearms and ammunition, as explicitly prohibited by Article 1, Section 21, and Sections 6120 and 2962.

F. None of the Defendants Are Entitled To Immunity

Contrary to Defendants' contention (Def. Brief at 46-47), none of the Defendants are entitled to any form of immunity and even if, *arguendo*, they were, that immunity would be unconstitutional based upon Article 1, Section 11 of the Pennsylvania Constitution and the legion of precedent.

First, in Defendants' New Matter ¶¶ 3-4, and as addressed in Plaintiffs' Answer to Defendants' New Matter, they admitted that the councilmembers were acting "in their individual capacities" and therefore, since they were not acting in their "official capacities," would not be entitled to any form of immunity.

Second, even if the Defendants were entitled to "legislative immunity" as the Defendants claim, as Defendants acknowledge, it is strictly a common law doctrine, which has never been enacted by the General Assembly, and therefore, it would be unconstitutional pursuant to Article 1, Section 11 of the Pennsylvania Constitution.

Specifically, the Pennsylvania Supreme Court previously held in *Dorsey v. Redman*, 626 Pa. 195, 209 (2014) that pursuant to Article 1, Section 11 of the

Pennsylvania Constitution that the "Constitution neither prohibits nor grants immunity to the Commonwealth, but vests authority in the General Assembly to determine the matters in which the government shall be immune."

Article 1, Section 11, of the Pennsylvania Constitution provides:

> All courts shall be open, and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. *Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct*. (emphasis added).

In analyzing the Political Subdivision Tort Claims Act ("PSTCA"), the Pennsylvania Supreme Court previously held that the Pennsylvania Constitution authorized the immunity for political subdivisions under the PSTCA through Article 1, Section 11, because it specifically declares that "[s]uits may be brought against the Commonwealth in such manner and in such cases *as the Legislature may by law direct*." *Carroll v. York Cty.*, 496 Pa. 363, 366-67, (1981)(emphasis added). The Court then further declared that "the conferring of tort immunity upon political subdivisions is within the scope of the Legislature's authority pursuant to Article I, Section 11." *Id*.

More recently, in *Dorsey*, 626 Pa. at 209, the Court reaffirmed that *only* the General Assembly is empowered by the Commonwealth's Constitution to "determine the matter in which the government shall be immune." The Court continued, "our Court has recognized that the Legislature is the *exclusive* body with authority to confer immunity upon political subdivisions" and that "[t]hus, the breadth of immunity enjoyed by local agencies is ultimately for legislative, rather than judicial, determination." *Id*. (*citing City of Phila. v. Gray,* 534 Pa. 467, 474 (Pa. 1993))(emphasis added).

Accordingly, legislative immunity is unconstitutional, pursuant to Article I, Section 11, as the General Assembly never enacted legislative immunity; rather, as acknowledged by Defendants, legislative immunity is a judicially created immunity. Therefore, as the legion of precedent supports, since the Legislature, pursuant to Article 1, Section 11, is the exclusive body with authority to confer immunity on entities within the Commonwealth, Plaintiffs contend that legislative immunity is unconstitutional and therefore, Defendants are not entitled to it.

II. ORAL ARGUMENT

In the event this Court desires oral argument on these issues, the undersigned respectfully informs the Court that he is currently scheduled for a jury trial August 6-9th, an all day hearing on August 22nd, and to be away on a pre-planned vacation from September 6-16th.

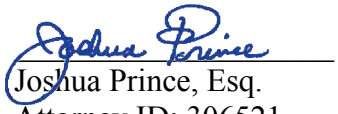
III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Honorable Court deny Defendants' Motion for Summary Judgment and grant Plaintiffs' Motion for Summary Judgment, after finding the City of Pittsburgh in violation of the aforementioned statutory and constitutional provisions and granting relief consistent with that requested in the Complaint, including, (1) declaring that the City of Pittsburg lacks the authority to regulate, in any manner, firearms and ammunition, (2) enjoining the City of Pittsburgh from regulating, in any manner, firearms and ammunition, (3) declaring that 2018-1218, 2018-1219, and 2018-1220 violate the aforementioned statutory and constitutional provisions, (4) enjoining the enforcement of 2018-1218, 2018-1219, and

2018-1220 and requiring their removal from any publication, whether tangible or electronic, (5) declaring that the erected signage violates 18 Pa.C.S. §§ 913, 6120, (6) requiring that the erected signage be removed, and (7) enjoining Defendants from re-erecting signage that does not comport with 18 Pa.C.S. § 913.

Respectfully Submitted,

Date: July 30, 2019



Joshua Prince, Esq.
Attorney ID: 306521
Civil Rights Defense Firm, P.C.
646 Lenape Rd
Bechtelsville, PA 19505
888-202-9297
610-400-8439 (fax)
Joshua@civilrightsdefensefirm.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing and the exhibits related thereto are being provided via email and US Mail on July 30, 2019 to:

Yvonne Hilton, Esq.
Department of Law
313 City-County Building
Pittsburgh, PA 15219-2453
yvonne.hilton@pittsburghpa.gov
etirschwell@everytown.org
wtaylor@everytown.org
john.doherty@pittsburghpa.gov
wendy.kobee@pittsburghpa.gov
KIverson@carlsonlynch.com

Joshua Prince, Esquire

Dated: July 30, 2019