IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM DRUMMOND, et al.,	)	Civil Action No. 18-1127-MJH
	)	
	)	**MEMORANDUM OF POINTS**
Plaintiffs,	)	**AND AUTHORITIES IN REPLY TO**
	)	**DEFENDANTS' OPPOSITION TO**
v.	)	**PLAINTIFFS' MOTION FOR**
	)	**PRELIMINARY INJUNCTION**
ROBINSON TOWNSHIP, et al.,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs William Drummond, GPGC LLC, and Second Amendment Foundation, Inc., respectfully submit their Memorandum of Points and Authorities in Reply to Defendants' Opposition to Motion for Preliminary Injunction.[1]

Dated: October 31, 2018

Respectfully submitted,

/s/ Alan Gura
Alan Gura (VA Bar No. 68842)
Gura PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314
703.835.9085/Fax 703.997.7665
Admitted pro hac vice

/s/ James H. McCune
James H. McCune (PA Bar No. 19852)
/s/ K. Bradley Mellor
K. Bradley Mellor (PA Bar No. 61363)
Bowles Rice
1800 Main Street, Suite 200
Cannonsburg, PA 15317
724.514.8938/Fax 724.514.8954

Attorneys for Plaintiffs

[1]This brief responds to Defendants' errata 15-page opposition, which replaced their initially-filed, overlong 25 page brief.

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SUMMARY OF ARGUMENT

The bulk of Defendants' opposition merely repeats their arguments in support of their motion to dismiss. Plaintiffs will not burden the Court with a second copy of their brief opposing that motion, which explains why they have, in fact, stated valid claims for relief.

Beyond the pleading stage dispute, however, Defendants offer very little. In particular, they completely ignore—and the Court should treat the arguments as conceded—Plaintiffs' submission that the outcome here is controlled by the Township's losses in the Court of Common Pleas. Whether the Greater Pittsburgh Gun Club, with its rifle range and operating at a profit, harms the community has been decisively answered at trial: *no*. Again, the state court's considered judgment on the matter is not nothing.

And beyond the previous litigation's outcome, Defendants do not attempt to carry their burden of showing why Plaintiffs' rights should be restricted. No evidence or argument is offered as to why a complete ban on rifle shooting on Plaintiffs' 265 acres is necessary, why Plaintiffs' profitability would impact any land use, or why the Club's status of being allowed to operate as of right should be revoked. Defendants offer no evidence or argument because there is no evidence, no argument, that could sustain their misconduct. In any event, it was for Defendants to choose whether and how to defend themselves, and they have largely abdicated that role.

The injunction is not mandatory, but prohibitory. Like all litigation that challenges a new legal enactment, it seeks to restore the status quo ante. Because the Plaintiffs are suffering irreparable harm, and considering the balance of the equities, an injunction should issue.

ARGUMENT

I. PLAINTIFFS SEEK A PROHIBITORY, NOT MANDATORY INJUNCTION.

"[A] mandatory injunction . . . requires a responsible party to" take action, while "a prohibitory injunction restrain[s] the party from further action." *Trinity Indus.* v. *Chi. Bridge & Iron Co.*, 735 F.3d 131, 139 (3d Cir. 2013). As Defendants aptly note, courts are more inclined to order a party to stop doing something, rather than to take some positive action. But the mandatory/prohibitory distinction is not always clear or useful. And in any event, the essential character of this motion is that it seeks to prohibit the Defendants' enforcement of restrictions. The issuance of permits is only the logical outcome of ceasing negative enforcement, and it is not even technically required in order to grant Plaintiffs relief.

The Third Circuit has cautioned that courts should not place excessive weight on the mandatory/prohibitory distinction:

> [I]t is sometimes difficult to distinguish between a mandatory injunction and a prohibitory one. An order requiring that Company X cease discharging pollutants into the river could be interpreted as a prohibitory injunction. It might also be perceived as a mandatory injunction because such an injunction would have the effect of forcing the Company to transport the wastes elsewhere. While the terms "mandatory" and "prohibitory" may, in general, be useful terms of art for some purposes, if they are to be used as definitional terms which limit the power of States, then they have little utility.

Penn Terra, Ltd. v. *Dep't of Environmental Resources*, 733 F.2d 267, 278 n.12 (3d Cir. 1984). Plaintiffs would submit that these "terms of art," however useful, do not limit this Court's authority.

This case supplies a good example of the distinction's limits. The Court should begin with the text of the motion itself, which asks it "to preliminarily enjoin Defendants Robinson Township and Mark Dorsey from enforcing Robinson Township Zoning Ordinance Sections 311(D) and 601, and Table 208A, against their operation and enjoyment of the gun club located at 920 King Road, Bulger, Pennsylvania 15019; and further commanding that Defendants issue forthwith all permits

necessary for the operation of said gun club to which William Drummond would be entitled in the absence of the Township's adoption of Ordinance 1-2018." Motion, Dkt. 17. This tracks the Complaint's language, whose first two paragraphs praying for relief seek to enjoin enforcement. The third relief paragraph seeks to command the issuance of permits, but only "to which [Drummond] was entitled under the status quo ante introduction of Robinson Township Ordinance 1-2018." Complaint, Dkt. 1, at 20.

Whatever its merit, the standard for so-called "mandatory" injunctions (as opposed to "prohibitory" ones) requires first identifying the status quo ante. But from what point in time is the status quo measured when plaintiffs seek to enjoin a new legislative enactment? Legislation is inherently reactive, and Defendants fail to explain why this Court must assume that the "status quo" began with the challenged provisions' enactment. Were that the case, all actions seeking to enjoin a law would be subject to more restrictive preliminary injunction standards.

The Gun Club has been around for fifty years, operating largely as Drummond would operate it. An injunction would not change the status quo ante—*Defendants* changed the status quo when they adopted the challenged regulations, and Plaintiffs sued upon those regulations' implementation. For purposes of considering whether to apply a "mandatory" standard, the "status quo" clock, if it is set at all, ought to be set at the state of affairs that preceded the Township's initiation of this controversy. Issuance of the necessary permits should flow naturally from enjoining the operation of the provisions that bar that issuance. And even if the Court were to refrain from positively requiring the permits to issue, if it would enjoin Defendants from enforcing the challenged provisions then logically the Plaintiffs would be free to operate. That much the Court could clarify without directly forcing the Defendants to do anything.

II. PLAINTIFFS HAVE STATED VALID CLAIMS FOR RELIEF FROM INJURY TO THEIR CONSTITUTIONAL RIGHTS AND THE CONSTITUTIONAL RIGHTS OF THEIR CUSTOMERS AND MEMBERS.

Plaintiffs' opposition to the motion to dismiss fully responds to Defendants' arguments that a claim has not been stated. That brief is before the Court and there is no need to ceremonially repeat it here.

III. DEFENDANTS DO NOT ATTEMPT TO CARRY THEIR BURDEN IN JUSTIFYING THE CHALLENGED PROVISIONS.

Defendants' opposition does not respond to the fact that a state court has already adjudicated the Gun Club's safety and compatibility with neighboring uses.

Defendants' opposition does not attempt to explain why the challenged regulations satisfy any form of heightened scrutiny under the Second Amendment test of *United States* v. *Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

That the laws cannot be justified is therefore conceded. *See, e.g. Cook* v. *West Homestead Police Dept*., 2017 U.S. Dist. LEXIS 65614 at *10 (W.D. Pa. May 1, 2017); *Bracey* v. *Rendell*, 2014 U.S. Dist. LEXIS 131072 at *50 (W.D. Pa. July 15, 2014).

IV. DEFENDANTS DO NOT CONTEST THAT THE VIOLATIONS OF CONSTITUTIONAL RIGHTS CAUSE IRREPARABLE HARM.

Defendants do not deny that violations of constitutional rights cause irreparable harm, justifying preliminary injunctive relief. They argue only that "[i]n the absence of exceptional circumstances, economic loss does not qualify as irreparable harm," relying on *Minard Run Oil Co*. v. *U.S. Forest Serv*., 670 F.3d 236, 255 (3d Cir. 2011). *See* Def. Opp., Dkt. 30, at 13.

Defendants' reading of *Minard* is incomplete. "As a *general* matter, a *purely* economic injury, compensable in money, cannot satisfy the irreparable injury requirement, but an exception exists where the potential economic loss is so great as to threaten the existence of the movant's

business." *Minard*, 670 F.3d at 255 (internal quotation marks and citations omitted). "Additionally, where interests involving real property are at stake, preliminary injunctive relief can be particularly appropriate because of the unique nature of the property interest." *Id.* at 256 (internal quotation marks and footnote omitted). This case plainly falls within that exception, even if the rule applied. Defendants have shuttered Plaintiffs' business, and the dispute relates to an interest in real property.[2]

But the rule does not apply, because constitutional rights are also at stake. This is not a case of mere economic injury. Defendants do not dispute that the violation of constitutional rights is considered to be an irreparable harm warranting immediate injunctive relief, they merely fall back on their perfunctory position that Plaintiffs lack rights. Defendants do not deny that they are presently preventing the Plaintiffs from operating the Greater Pittsburgh Gun Club.

If Plaintiffs have suffered an injury to their fundamental constitutional rights—and they have—then irreparable harm follows, even if financial compensation is later available.

V. DEFENDANTS HAVE FAILED TO CONTEST THAT THE BALANCE OF EQUITIES WEIGHS AGAINST THEM.

As Defendants claim, courts indeed hold "that a municipality's interest in attempting to preserve the quality of urban life . . . must be accorded high respect." Def. Opp., Dkt. 30, at 15 (internal quotation marks omitted).

Did the Court of Common Pleas not afford Robinson Township's interest high respect, in nonetheless holding that this interest is not impacted by the Greater Pittsburgh Gun Club?

This was adjudicated. And again, Defendants have no answer to that fact.

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[2]These are not the only exceptions. For example, copyright infringement may be remedied with money damages, but a showing of infringement presumptively demonstrates irreparable harm as well. *Video Pipeline, Inc*. v. *Buena Vista Home Entm't, Inc*., 342 F.3d 191, 206 (3d Cir. 2003). No rule holds that irreparable harm can exist only where money damages are unavailable.

CONCLUSION

Defendants should be preliminarily enjoined from enforcing the challenged provisions.

Dated: October 31, 2018

Respectfully submitted,

/s/ Alan Gura
Alan Gura (VA Bar No. 68842)
Gura PLLC
916 Prince Street, Suite 107
Alexandria, VA 22314
703.835.9085/Fax 703.997.7665
Admitted pro hac vice
Attorneys for Plaintiffs

/s/ James H. McCune
James H. McCune (PA Bar No. 19852)
/s/ K. Bradley Mellor
K. Bradley Mellor (PA Bar No. 61363)
Bowles Rice
1800 Main Street, Suite 200
Cannonsburg, PA 15317
724.514.8938/Fax 724.514.8954

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2018 a copy of the foregoing brief was electronically served upon all parties by filing the same with the Clerk of Court using the CM/ECF system and forwarding to all counsel of record.

/s/ Alan Gura
Alan Gura