

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**No. 1:CV-11-2228
(Judge Jones)**

HARRIS, *et al.*,

Plaintiffs

v.

CORBETT, *et al.*

Defendants

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR
EMERGENCY TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION**

ELECTRONICALLY FILED

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I. INTRODUCTION AND PROCEDURAL HISTORY

The intentional unequal application of state constitutional provisions designed to prevent the Commonwealth from targeting plaintiffs' municipality for special legislation and plaintiffs' associated individual right to equal representation on the same terms as all other residents of distressed Third Class cities through the enactment of Senate Bill 1151 of 2011 (hereinafter the "Act 47 Amendment") (attached hereto as Exhibit E), which the Commonwealth retroactively imposed only on the City of Harrisburg and which directly and intentionally targets plaintiffs' municipal representation for debasement is a violation of plaintiffs' federal guarantee to equal protection of the laws.

Furthermore, delegation by the General Assembly to defendant Governor Corbett of unfettered legislative authority to decree (or not to decree) the suspension of representative and democratic control over key municipal functions in any distressed Third Class city that rejected the Commonwealth's "Recovery Plan" under Act 47 in accordance with Sections 244 and 246 of Act 47, 53 P.S. § 11701.101 *et seq.*, (hereinafter the "Final Act 47 Plan") and thereafter failed to adopt a plan acceptable to the Commonwealth, is a further violation of plaintiffs' federal equal protection and due process rights. If the Commonwealth desires to alter plaintiffs'

municipal representation, the General Assembly must reclassify either apply the change to all similarly classified municipalities or change Harrisburg's classification.

On February 6, 2012, pursuant to the Act 47 Amendment, defendant Unkovic filed his Recovery Plan with Commonwealth Court, attached hereto as Exhibit A, which if approved, will vest in defendant Unkovic immediate and plenary authority to sell or lease the income producing assets of the City of Harrisburg without the need to first gain the approval of plaintiffs' elected municipal representatives, causing irreparable harm to plaintiffs' right to equal representation in municipal government on terms equal to all other residents of distressed Third Class cities within the Commonwealth.

Commonwealth Court has set a hearing on defendant Unkovic's "Recovery Plan" for Thursday, March 1, 2012. *See* Exhibit G.

In furtherance of defendant Unkovic's plan to sell and/or lease Harrisburg's income producing assets as soon as possible, defendant Unkovic sent out RFPs on February 7th and 10th ("Requests for Qualifications" attached hereto as Exhibits B, C and D) for the sale and/or lease of the following municipal assets: (1) Harrisburg Authority's solid waste incinerator; (2) Harrisburg Authority's water, wastewater and storm water systems; and (3) Harrisburg Parking Authority's assets.

Accordingly, to maintain the status quo pending the resolution of this litigation, plaintiffs move this Court pursuant to Rule 65(a) and (b) for an emergency temporary restraining order and/or a preliminary injunction to prohibit defendants from exercising authority delegated to them by the Act 47 Amendment until the lawfulness of the Act 47 Amendment is finally decided by this Court.

- **Who Cares – We Are All Sick of Harrisburg City Government and They Deserve to be Punished...Right?**

The short (and dispositive) answer is that this Court is required to protect plaintiffs' federal rights without regard to the quality of plaintiffs' municipal representation. Plaintiffs are entitled to the equal application and process afforded by the state constitution to all other residents of distressed Third Class cities within the Commonwealth. There is no "bad government" exception to the Equal Protection and Due Process Clauses of the U.S. Constitution.

The long answer is that media attention surrounding the fiscal crisis in Harrisburg – to which this Court, along with everyone else residing in Central Pennsylvania, has been subjected – has focused almost solely on the perceived and sensationalistic dysfunction of Harrisburg's municipal government. Head-shaking municipal dysfunction just makes for better print and television coverage in a small media market than the more

sophisticated coverage of the mundane underlying issues which have, to a large measure, caused most of the paralysis within Harrisburg's municipal government. In short, the Commonwealth of Pennsylvania has intentionally constrained Harrisburg's municipal government any fiscal room to maneuver. First, the Commonwealth withdrew municipal bankruptcy as an option; then the Commonwealth refused to permit Harrisburg to impose a commuter tax in the Final Act 47 Plan; and the Commonwealth has always refused to authorize a local sales tax. The perceived municipal dysfunction is, in actuality, Harrisburg's understandable and rational refusal to submit and agree to a flawed Final Act 47 Plan that sought to impose virtually 100% of the cost of the incinerator debt on the impoverished citizens of Harrisburg.

It is a fact that the incinerator debt, which is the main cause of the current fiscal crisis in Harrisburg, was jointly guaranteed by both the City of Harrisburg and the Dauphin County Commissioners. Dauphin County provided the required 2nd guarantee before the municipal bonds to upgrade Harrisburg's incinerator could be issued. It is Dauphin County, not Harrisburg, which is mandated by the Commonwealth to provide for the disposal of solid waste within Dauphin County.

At the same time, it has been well reported that the General Assembly openly opposed the imposition of a commuter tax by Harrisburg on the income of non-residents workers within the City of Harrisburg – a tax which would have had a direct impact on the Commonwealth’s own employees. The Final Act 47 Plan submitted by the Commonwealth to Harrisburg City Council for approval was flawed precisely because the Commonwealth put its own and Dauphin County Commissioners’ priorities ahead of Harrisburg’s needs.

The Act 47 Amendment was passed by the General Assembly to remove democratic opposition within the City of Harrisburg, the only remaining obstacle to the Commonwealth and the Dauphin County Commissioners’ plan to impose virtually 100% of the incinerator debt on the impoverished and, largely, minority population of Harrisburg – all in order to protect themselves, their campaign contributors and, the mostly white, suburban constituents that they represent from having to contribute to the incinerator debt. Plaintiffs’ elected municipal representatives refused to submit to the economic and political agenda of outside actors. In retaliation, the Commonwealth passed the Act 47 Amendment to retroactively remove from plaintiffs’ elected municipal representatives the power to oppose the Commonwealth’s agenda. *See* Exhibit F. Such retaliation, and the process

by which it was imposed, is inconsistent with plaintiffs' federal equal protection and due process rights.

- **Receivership & Suspension of Democratic and Representative Control Over Key Municipal Functions is Not Necessary to Solve Harrisburg's Fiscal Problems**

The Commonwealth will argue that the Act 47 Amendment scheme is necessary to solve Harrisburg's economic problems. It is a false argument of no constitutional merit. The Commonwealth has policy options available to it which do not run afoul of state constitutional limits. While the Commonwealth is not required to take any action to address Harrisburg's financial situation, it may not take action that is prohibited under the state constitution. This Court has jurisdiction to adjudicate violations of state law which rise to a violation of federal constitutional rights.

The Commonwealth could, constitutionally, equip Harrisburg (as it has done for all other distressed Third Class cities) with the means to extend its tax base to meet the needs of both creditors and citizens. The Commonwealth's refusal to do so has created a false emergency, of its own making, which does not authorize it to act in a manner which impairs plaintiffs' state and federal rights through the powers delegated to defendants Corbett and Unkovic by the Act 47 Amendment.

II. FACTS & BACKGROUND

Because of the overwhelming debt load resulting from the Harrisburg incinerator, on October 1, 2010, the City of Harrisburg filed a “Request for Determination of Municipal Financial Distress” pursuant to Sections 202 and 203 of Act 47 (hereinafter “Act 47”). On December 15, 2010, the Secretary of Community and Economic Development determined that the City of Harrisburg qualified as a distressed municipality, granting Harrisburg’s admission into the Act 47 process.

The Commonwealth’s Final Act 47 Plan for Harrisburg – the financial recovery plan the Commonwealth was required to submit for the approval of the distressed municipality for the sole purpose of placing the distressed municipality on the path toward fiscal salvation – imposed virtually 100% of the financial burden of the incinerator debt on the taxpayers of the City of Harrisburg without allowing Harrisburg to extend its impoverished tax base. The Commonwealth’s Final Act 47 Plan “for” Harrisburg merely sought to sell and/or lease Harrisburg’s income producing assets, in a virtual fire-sale, without any knowledge as to what those assets were worth, or whether such a course of action would actually provide Harrisburg the economic means to

reach a balanced budget.¹ Accordingly, Harrisburg City Council rejected the Commonwealth's shoddy Final Act 47 Plan and chose to accept the financial penalty imposed under Act 47 for such a refusal – namely, the withdraw of emergency state financial assistance provided to distressed municipalities under Act 47.

Knowing that Harrisburg was not permitted to exit Act 47 without the Commonwealth's approval, the General Assembly passed the Act 47 Amendment authorizing the Governor – on his unfettered discretion, to declare a fiscal emergency in any distressed Third Class city that refused to accept the Final Act 47 Plan or an alternative plan that was acceptable to the

¹ Defendant Unkovic's recovery plan vindicates Harrisburg City Council's rejection of the Commonwealth's Final Act 47 Plan. On page 1 of the Introduction, defendant Unkovic sets forth his methodology that: "Until the actual value of certain assets of the City is determined through a request for proposals and until the exact extent of the structural deficit (the amount by which the City's operating expenses consistently exceed its revenues) are understood, it is not possible to determine exactly what contributions are required from various stakeholders." In contrast, the Commonwealth's shoddy Final Act 47 Plan (as well as the Mayor's plan thrown together under time pressure imposed by the Act 47 Amendment, also rejected by City Council, triggering defendant Corbett's power to declare a fiscal emergency in Harrisburg and the appointment of defendant Unkovic as Receiver) set forth no such fundamental valuation methodology and simply "made assumptions about amounts which could be obtained from the sale or lease of the incinerator and parking facilities." *See* Exhibit A, pp. 1-2.

Commonwealth.² The Act 47 Amendment delegated to the Governor the power to suspend representative control over key municipal functions in such a city and impose, through the appointment of a receiver, direct financial control over the revenue and assets of the city. *See* Exhibit E, Chapter 6, pp. 4-13.

The Act 47 Amendment openly targeted the City of Harrisburg, in retribution for the rejection of the Commonwealth’s Final Act 47 Plan by the democratically elected municipal representatives of Harrisburg. *See* Exhibit F. At the time the Act 47 Amendment was drafted (and continuing to this day), only the City of Harrisburg qualified as a distressed Third Class city that refused to approve the Commonwealth’s Final Act 47 Plan. More precisely, only the City of Harrisburg was denied the opportunity to vote to either submit or avoid the Act 47 Amendment, a situation creating a “class

² Section 602(a) provides clear legislative guidelines establishing what constitutes a “State of Fiscal Emergency.” However, under Section 602(b), once the Governor has determined that a “State of Fiscal Emergency” exists, he is then empowered – at his sole discretion – to either declare, or not declare, a “State Fiscal Emergency within the distressed city.” It is the declaration (and not the mere determination) of a “State of Fiscal Emergency” that triggers the suspension of representative democracy and control over key municipal functions in the distressed municipality. Section 602(b) provides that “the Governor “***may declare a state of fiscal emergency within the distressed city.***” The “***may***” constitutes unfettered discretion, unbounded by any further legislative direction. Therefore, a city which otherwise qualifies for a fiscal emergency under Section 602(a) will only be subject to the provisions of the Act 47 Amendment only upon the Governor’s own whim to pull the “trigger” or not pull the “trigger.”

of one” that no other municipality can ever enter. With Harrisburg trapped in Act 47, the General Assembly passed the Act 47 Amendment to protect their constituents from any extension of Harrisburg’s tax base to include a non-resident commuter tax. *See* Exhibit E, § 609; pp. 12-13. The Act 47 Amendment was passed in such a way as to guarantee that it could be imposed on Harrisburg, and Harrisburg alone, without first gaining the consent of the elected municipal representatives. No other Third Class city is at risk of having the Act 47 Amendment applied to their municipality without first giving their consent (through a vote of the city’s elected representatives).

The Pennsylvania Constitution guarantees plaintiffs that municipal rights granted according to the General Assembly’s municipal classification scheme based on population may not be targeted for unequal treatment. Article III, §20 of the state constitution provides that the Pennsylvania General Assembly shall have the authority to classify cities according to population (only). Article III, §32 of the state constitution prohibits the General Assembly from passing special or local laws that can be provided for by general law and expressly prohibits the General Assembly from passing any special law “regulating the affairs of...cities....” Furthermore, Article IX, §1 further constrains the General Assembly to provide by general

law for local government within the Commonwealth, and that “[s]uch general law shall be uniform as to all classes of local government regarding procedural matters.” PA. CONST. art. IX, §1.

The City of Harrisburg is classified by the General Assembly as a Third Class city. Plaintiffs are all residents of the City of Harrisburg. The kind and quality of municipal representation in the Commonwealth of Pennsylvania is directly tethered to the classification of each municipality. *See* 53 P.S. §§41101, 41401- 41421. Accordingly, plaintiffs are entitled to the same kind and quality of municipal representation as all other residents of Third Class cities within the Commonwealth. The state constitution prohibits the General Assembly from suspending representative control over key municipal function (such as the sale and/or lease of income producing assets) unless the General Assembly imposes the same restrictions on all other Third Class cities, or in the alternative, reclassify Harrisburg’s population as something other than a Third Class city.

Even after taking into account municipalities facing financial difficulty, at minimum, the state constitution prohibits the General Assembly from treating one distressed Third Class city in a different manner than other distressed Third Class cities. The state constitution also protects plaintiffs from the unfettered delegation of legislative power to defendant Corbett to

suspend representative control over key municipal functions through the declaration of a fiscal emergency and the appointment of receiver (defendant Unkovic) in any distressed Third Class city who failed to adopt a Final Act 47 Recovery Plan.

Defendant Unkovic, has released his financial recovery plan. That plan indicates that he intends to sell and/or lease all of the income producing assets of the City of Harrisburg, including the incinerator, as well as the city's parking and water treatment facilities. *See* Exhibits A – D. Whatever the outcome, at the end of the day, defendant Unkovic can walk away from the consequences of his Recovery Plan. Unless the instant motion is granted, plaintiffs, and the citizens of Harrisburg, will be forced to live with the consequences of the Commonwealth's selfish and naked power grab to impose its narrow agenda on Harrisburg for decades to come. Such a result is precisely why the People of Pennsylvania sought to constrain the General Assembly by prohibiting special legislation with regard to municipal governance. *See* PA. CONST. art. III, §§ 20 and 32; art. IX, §1.

III. JURISDICTION

On the face of plaintiffs' complaint, plaintiffs have standing to maintain all of their claims and seek appropriate remedy against defendants.

As this Court is well aware, the United States Supreme Court has established a three-part test for standing which has become a well-worn legal incantation. The “irreducible constitutional minimum of standing” requires the plaintiff to establish:

First...an “injury in fact” – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent,” not “conjectural” or “hypothetical.” Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be “fairly...trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by the favorable decision.”

Sumner v. Earth Island Institute, 505 U.S. 488, 129 S.Ct. 1142, 1148-49 (2009); *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 340-41 (2006); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Marina v. Fisher*, 338 F.3d 189, 202 (3rd Cir. 2003).

A. Injury-In-Fact

“Voters who allege facts showing disadvantage to themselves as individuals have standing to sue.” *Baker v. Carr*, 369 U.S. 186, 205-06 (1962) (citations omitted). In *Baker*, the Court stated:

These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated....*They are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possesses by every citizen to require that the government be administered according to law.*

Id. at 207-08 (citations omitted).

It cannot be disputed that if the Act 47 Amendment is special legislation prohibited by the state constitution, then it is clear that diminishing plaintiffs' municipal representation in contrast to similarly situated residents of other distressed Third Class cities constitutes a fundamental debasement of the equality of plaintiffs' municipal vote. In other words, plaintiffs are "asserting a plain, direct and adequate interest in maintaining the effectiveness of *their* own vote," and not merely the franchise afforded to others. *Id.*

In the instant action, the dilution of the effectiveness of plaintiffs' vote derives from an unequal application of state (constitutional) law prohibiting special legislation with respect to municipal governance. The Supreme Court has stated that the "injury-in-fact" element of standing in such equal protection cases may also be moored to the denial of equal treatment resulting in the barrier to a fundamental right. *Association of Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663-66 (1993).

B. Causation & Redressability

The Act 47 Amendment is the direct and obvious cause of plaintiffs' constitutional injury. Prospective equitable relief is available against defendants. Further, this Court is authorized to enter declaratory relief

against the Act 47 Amendment. Declaratory and injunctive relief will remove the offending debasement to plaintiffs' vote and unequal application of state constitutional provisions and affirm the process established thereunder for the proper classification of municipal governments in Pennsylvania.

IV. ARGUMENT

Plaintiffs are entitled to an emergency temporary restraining order and/or preliminary injunction against defendants' exercise of authority delegated to them by the Pennsylvania General Assembly by the Act 47 Amendment. Plaintiffs are likely to prevail on their claims that the Act 47 Amendment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendments.

A. Standard For Injunctive Relief

Four factors govern the Court's decision whether to issue a preliminary injunction: 1) whether the movant has shown a reasonable probability of success on the merits; 2) whether the movant will be irreparably injured by the denial of the relief; 3) whether granting the preliminary relief will result in greater harm to the non-moving party (i.e., a balancing of the hardships); and 4) whether granting the preliminary relief will be in the public interest. *Allegheny Energy, Inc. v. D.Q.E., Inc.*, 171

F.3d 153, 158 (3rd Cir. 1999) (*citations omitted*). See also *United States v. Commonwealth of Pennsylvania*, 533 F.2d 107, 110 (3rd Cir. 1976). A district court must consider all four elements. *Opticians Association of America v. Independent Opticians of America*, 920 F.2d 187, 191-92 (3rd Cir. 1990). In this case, an analysis of these four factors demonstrates plaintiffs' compelling right to relief.

B. Plaintiffs Are Likely To Succeed On The Merits

Before an injunction will issue, the movant must demonstrate a reasonable probability of eventual success in the litigation. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3rd Cir. 1989). To demonstrate a reasonable likelihood of prevailing, a movant need not establish an absolute certainty of success, only a reasonable probability. *SK&F Co. v. Premo Pharmaceutical Lab. Inc.*, 625 F.2d 1055, 1066-67 (3rd Cir. 1980).

1. Act 47 Amendments Impair Plaintiffs' Federal Equal Protection Guarantees

• Relevant Equal Protection Analysis

The Equal Protection Clause requires that the government treat similarly situated individuals in a similar manner, unless it can demonstrate a proper basis for distinguishing between those individuals. See e.g., *Zobel v. Williams*, 457 U.S. 55, 60 (1982) ("When a state distributes benefits

unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment”). While there have been relatively few cases brought in the federal courts raising equal protection claims based on unequal administration of state created rights, it is nevertheless agreed that a Section 1983 action may be brought for a violation of equal protection when “unequal administration of a state statute” shows “intentional and purposeful discrimination.” *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2nd Cir. 1980); *Moss v. Horning*, 314 F.2d 89, 92 (2nd Cir. 1963) (stating that a Section 1983 action for selective enforcement requires that unequal administration of a state statute coupled with an intentional or purposeful discrimination offends equal protection); *Tartowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir. 1980) (same). The rule is largely grounded in *Snowden v. Hughes*, 321 U.S. 1, 8-9 (1944), where it was held that unlawful administration of a state statute, resulting in unequal application to those who are entitled to be treated alike, is a denial of equal protection if there is shown to be present an element of intentional or purposeful discrimination.

The element of “intentionality” is assumed, when the attack, as here, is on the validity of the statute itself (as opposed to a challenge on the unequal application of a facially neutral statute), since the statute was

written precisely in order to effect the disparate treatment of which plaintiffs complain. *See E & T Realty v. Stickland*, 830 F.2d 1107, 1112, n. 5 (11th Cir. 1987); *see also, Romero v. Brady*, 764 F.Supp. 227, 239 (D. Puerto Rico 1991). Justice Holmes explained in *McFarland v. American Sugar Co.*, 241 U.S. 79 (1916), that a state statute that bristled “with severities that touch plaintiff alone” was arbitrary and a violation of equal protection. *Id.* at 86-87. Therefore, when a statute facially discriminates against certain groups or trenches upon fundamental rights, courts require a closer connection between the statutory classification and the alleged state purpose. *See generally, Plyler v. Doe*, 457 U.S. 202, 216-18 (1982) (plurality) (discussing “intermediate” and “strict” scrutiny).

Similarly, the Pennsylvania Supreme Court has held that the Commonwealth’s attempt to discriminate between identically classified, but failing, government units constitutes an arbitrary distinction. In *Harrisburg School District v. Hickok*, 563 Pa. 391(Pa. 2000), the Commonwealth’s highest court explained that:

“there is no rational basis for treating the school district of Harrisburg differently from other school districts with failed educational systems. Additionally, this court has held that a classification is per se unconstitutional when the class consists of one member and it is impossible or highly unlikely that another can join the class.”

Id. at 397-98.

Articles III Sections 20 and 32 expressly limit the General Assembly's discretion to treat municipalities differently to the classification of municipalities according to population. The state constitution, therefore, expressly prohibits the General Assembly from targeting a single municipality for treatment different from other municipalities similarly classified, based on population (only). PA. CONST. art. III, §§20, 32. Accordingly, with regard to the regulation of municipal affairs, the citizens of Pennsylvania, through the instrument of the Pennsylvania Constitution, have removed from the Pennsylvania General Assembly the discretion to determine what is municipally "different" and what is the municipally "same" for purposes of federal equal protection analysis. *See* PA. CONST. art. III, §§20, 32; *see also, Plyler v. Doe*, 457 U.S. 202, 216 (1982) (explaining that equal protection does not require a state legislature to treat those things that are, in fact or opinion, differently the same, and that the initial discretion to determine what is the "same" and what is "different" lies with the state legislature).

As explained above, and below, municipal representation and voting rights in Pennsylvania are tethered according to municipal classification. The Supreme Court has established that "each and every citizen has an inalienable right to full and effective participation in the political processes"

of the legislative bodies of the Nation, State, or locality as the case may be. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). With respect to voting and other rights related to the electoral process, it is, as Professor Tribe observes, the equality with which they are made available that is crucial. Thus, the Equal Protection Clause guarantees to each citizen a right to equal treatment with respect to voting and the derivative fundamental right to full and effective and equal participation in the political processes of state and local governance. See L. Tribe, *American Constitutional Law*, 737, 992 (1978); *Reynolds*, 377 U.S. at 565 (1964). As the Supreme Court has observed, “this Court has made clear that a citizen has a constitutionally protected right to participate” (not just to cast a vote) “in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

Unjustified or constitutionally prohibited classifications which impair the franchise on equal terms as all other similarly situated individuals violate equal protection. When so fundamental a right as voting is concerned, the courts have not hesitated to conclude that *any conduct which favors the “ins” against the “outs” is impermissible*. For example, a denial of equal protection was found when a state official guaranteed his friends favored positions on the ballot. *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969). In this circuit, the Eastern District of Pennsylvania found the conduct of the

defendant Republican county commissioners in giving their employees the day off to electioneer for the party's endorsed candidates to be a denial of equal protection. *White v. Snear*, 313 F.Supp. 1100 (E.D. Pa. 1970). The *White* Court noted that "a clearer violation of the Equal Protection Clause would be difficult to imagine" because the "effect of defendants' conduct is to favor a certain segment of a political party and to perpetuate its power through an abuse of authority.... By doing so, they discriminate against all other segments and candidates within that party." *Id.* at 1104. And, in *Smith v. Cherry*, 489 F.2d 1098 (1974), the court held that the defendants' scheme to use a sham candidate to shift to themselves the power to select their party's nominee constituted a violation of the equal protection guarantee because it worked "in favor of the ins and against the outs." *Id.* at 1102.

The instant case presents a far clearer example of a violation of plaintiffs' federal right to equal protection than the foregoing precedent. Plaintiffs' elected municipal representatives have been removed from power, over key municipal functions, precisely because they refused to approve the Commonwealth's Final Act 47 Plan that was intended to protect the "ins" of the state and county from any exposure to a commuter tax (a tax routinely included in the Final Act 47 Plans for other distressed Third Class municipalities) and impose on the "outs" of an impoverished city the full

economic burden of a debt jointly guaranteed by Dauphin County and the City of Harrisburg.

In the midst of a financial gang rape of the City of Harrisburg by the Dauphin County Commissioners and the executive and legislative branches of the Commonwealth, when the Harrisburg City Counsel yelled “NO” the Commonwealth proceeded to strip power over key municipal functions from and put a gag in the mouth of plaintiffs’ elected municipal representatives, all in derogation of the state constitution’s express prohibition against special legislation with regard to municipal governance.

- **Application of Equal Protection to Voting and Representation Rights in Pennsylvania**

Because the General Assembly tethers the kind and quality of municipal representation afforded to citizens according to municipal classification, any suspension of representative control over municipal functions by the General Assembly in just one municipality, and not others similarly classified, implicates a debasement and unequal treatment of the right of the citizens in the targeted municipality to equal and effective participation in their municipal government on term equal to all other citizens of municipalities identically classified. Plaintiffs, citizens of Harrisburg, are entitled to vote and be represented by elected municipal

officials with the same power, responsibility and accountability afforded to other electorates of Third Class cities within the Commonwealth.

Chart #1, below, is a graphic representation of the proper application of equal protection analysis to the facts and law of this case. By comparing an obvious violation of the Equal Protection Clause – where citizens of a single voting ward are relegated to voting for a less powerful municipal representative than the voters of other voting wards within the municipality – to the state constitutional requirement at issue in this case that constrains the General Assembly to treat all municipalities within a population classification alike, the manifest violation of the Act 47 Amendment becomes ever more clear. Because the state constitution removes from the General Assembly any discretion to treat municipalities of similar populations differently, this Court must treat each similarly classified municipality as being no different than voting wards within a single city for purposes of equal protection analysis as applied to municipal voting rights in Pennsylvania.

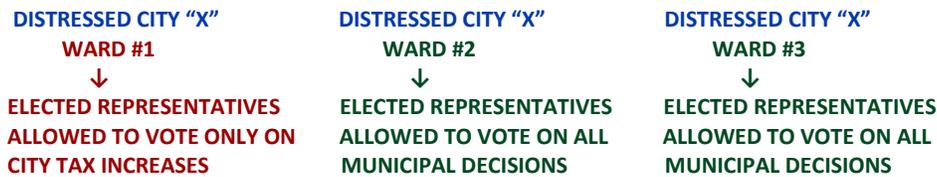
In order to protect themselves, the People of Pennsylvania have seen fit to remove from the General Assembly's any discretion (normally accorded state legislatures for equal protection purposes) to treat municipalities of the same size differently.

Accordingly, with respect to municipal governance, the state constitution affords plaintiffs stronger state and federal equal protection guarantees than in other circumstances.

Chart #1 is as follows:

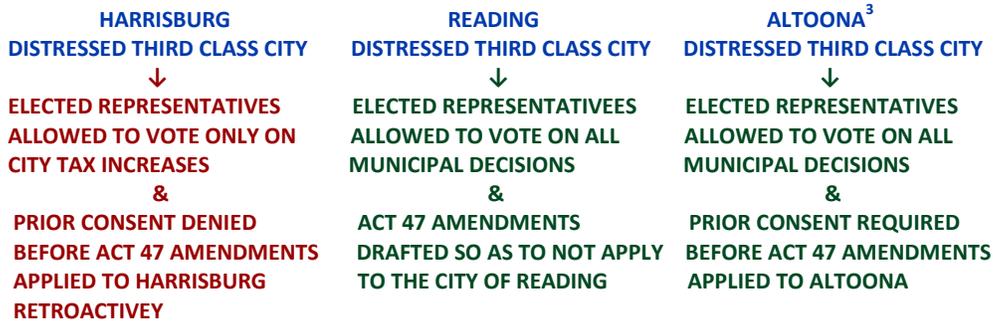
COMPARE SCENARIO #1.....

SCENARIO #1 – UNDISPUTED VIOLATION OF FEDERAL EQUAL PROTECTION: Voters of a single ward within a distressed City are denied the right to vote for a municipal representative with full voting power on the same basis as that granted to other municipal representatives elected from other city wards – because the elected representatives from “Ward #1” refuse to vote for a budget supported by the General Assembly, while the representatives from “Ward #2” and “Ward #3” voted to support the Commonwealth’s preferred budget. Such a scenario is a clear violation of the Equal Protection Clause as articulated by the Supreme Court in *Reynolds v. Sims*. Opposing counsel cannot, in good faith, argue that this scenario does not constitute a violation of federal equal protection guarantees.



.....TO SCENARIO #2

SCENARIO #2 – FACTS OF THE INSTANT CASE: The Pennsylvania Constitution’s prohibition on the General Assembly from treating municipalities classified according to population differently extends the equal protection analysis in Scenario #1, above, to the equal treatment of the voters of all Third Class cities and/or distressed Third Class cities. Equal application of state constitutional law requires this Court to treat each Third Class city, for equal protection purposes, as if each Third Class city were nothing more than a single election ward within a single municipality. This scenario, the instant case, is as manifest a violation of equal protection as Scenario #1, above.



³ The City of Altoona is about to vote to apply to be designated as a distressed municipality under Act 47.

a. The Act 47 Amendment is Special Legislation Prohibited by the State Constitution and in Violation of Plaintiffs’ Federal Equal Protection Right to Equal Application of State Law

The Equal Protection Clause and Article III sections 20 and 32 of the Pennsylvania Constitution may be reviewed simultaneously, for the meaning and purpose of the two are sufficiently similar to warrant like treatment.

Leventhal v. City of Philadelphia, 518 Pa. 233, 240, 542 A.2d 1328, 1332 (1988), citing *Tosto v. Pa. Nursing Home Loan Agency*, 460 Pa. 1, 14, 331 A.2d 198, 204 (1975).

The state constitutional proscription against special legislation was “adopted for the very simple and understandable purpose to put an end to the flood of privileged legislation for particular localities and for private purposes which was common in 1873.” *Haverford Twp. v. Siegle*, 28 A.2d 786, 788 (Pa. 1942). Article III, sections 20 and 32 confine the General Assembly to classify municipalities according to population and provides that all laws passed with respect to such classes shall be deemed general legislation. *See Freezer Storage v. Armstrong Cork Co.*, 382 A.2d 715, 718 (Pa. 1978). Classification “used for the purpose of evading the constitutional prohibition” is void. *Harrisburg School District v. Hickok*,

563 Pa. 391, 397, 761 A.2d 1132, 1136 (Pa. 2000) quoting, *Freezer Storage*, 382 A.2d at 718.

It seems clear that delegation to the Governor to declare a “fiscal emergency” triggering the suspension of representative and democratic control over key municipal functions within Harrisburg was adopted by the General Assembly in an attempt to evade Article III’s prohibition against special laws. If the General Assembly had declared a “fiscal emergency” in Harrisburg and suspended municipal control over the city’s income producing assets, such an enactment would have been too obvious a special law to withstand constitutional challenge under Article III, sections 20 and 32. Delegation, through unfettered discretion, to the governor to accomplish the same end through a “decree” sought to camouflage the underlying legislation as something other than a special law targeting Harrisburg, while at the same time keeping open the possibility that no other distressed Third Class cities, even on the same facts as Harrisburg, will be subjected to the imposition of the Act 47 Amendment. At minimum, legislation that imposes the Act 47 Amendment on Harrisburg must impose, without discretion, the same scheme on any other distressed Third Class city that rejects the Commonwealth’s Final Act 47 Plan. Such evasion of the state constitution is evidence that the Act 47 Amendment is a violation of the constitutional

protection afforded to plaintiffs to prevent their municipality, and their derivative representational rights, from being targeted by special legislation. Further, legislation such as the Act 47 Amendment which leaves the ultimate unfettered decision to the Governor is not rational and is arbitrary on its face in violation of Article III, sections 20 and 32. *See e.g., Defazio v. Civil Service Comm'n*, 756 A.2d 1103 (Pa. 2000). Equal protection demands that uniform treatment be given to similarly situated parties. *Reed v. Reed*, 404 U.S. 71, 76 (1971), quoting *Royston Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Freezer Storage*, 382 A.2d at 718; *Commonwealth v. Kramer*, 378 A.2d 824 (Pa. 1977).

- **The Act 7 Amendment Creates in Harrisburg an Improper “Class of One”**

The Supreme Court of Pennsylvania has consistently held that a classification is *per se* unconstitutional when the class consists of one member and it is impossible or highly unlikely that another can join the class. *Harrisburg School District v. Hickok*, 563 Pa. 391, 397-98, 761 A.2d 1132, 1136 (Pa. 2000) citing, *Harristown Development Corp. v. Dep't of General Services*, 614 A.2d 1128, 1134 n. 9 (Pa. 1992). The Act 47 Amendment treats Harrisburg differently than any other distressed Third Class city because only Harrisburg is denied the right to avoid the suspension of representative and democratic control over key municipal

functions under the Act 47 Amendment. Having entered the Act 47 process under one set of rules, Harrisburg was trapped by an angry General Assembly who imposed, through the delegation of power to defendants Corbett and Unkovic, the Act 47 Amendment without any opportunity for the City of Harrisburg to avoid the new amendment. *See* Exhibit F. Residents of all other distressed Third Class cities have the right, through foreknowledge, to have their elected representatives to either submit or avoid the Act 47 Amendment. No other municipality can have the Act 47 Amendment imposed without the prior consent of the elected representatives of the residents.

b. The Act 47 Amendment is Retaliation Against the Exercise of Constitutional Rights by the Citizens of Harrisburg

The element of “intentionality” is assumed, when the attack, as here, is on the validity of the statute itself (as opposed to a challenge on the unequal application of a facially neutral statute), since the statute was written precisely in order to effect the disparate treatment of which plaintiffs complain. *See E & T Realty v. Stickland*, 830 F.2d 1107, 1112, n. 5 (11th Cir. 1987); *see also, Romero v. Brady*, 764 F.Supp. 227, 239 (D. Puerto Rico 1991).

Nevertheless, it is clear that the Act 47 Amendment was passed because plaintiffs' elected representatives refused to adopt the Final Act 47 Plan favored by the Commonwealth. The purpose and effect of the Act 47 Amendment is to remove democratic opposition to the Commonwealth's agenda with respect to the Harrisburg fiscal crisis.

Such naked and intentional attack on plaintiffs' municipal voting rights constitutes retaliation against the exercise of fundamental constitutional rights sufficient to trigger equal protection concerns. The *LeCair* Court explained that the retaliation requirement is satisfied where selective treatment was based on impermissible considerations such as the intent to inhibit or punish the exercise of constitutional rights. *LeClair*, 627 F.2d at 609-10. Further, *Snowden* makes it clear that intentional discrimination between those similarly situated which is incorporated and built into and proclaimed by statute is prima facie evidence of intentional discrimination for equal protection purposes. *Snowden*, 321 U.S. at 9-10.

2. The Act 47 Amendment Impairs Plaintiffs' Right to Due Process of Law

The Due Process Clause of the Fourteenth Amendment provides that "no person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. AMEND. XIV. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life,

liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" See *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (*emphasis in original; citations omitted*). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

The Supreme Court has established a two-step test for examining procedural due process claims: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon the deprivation were constitutionally sufficient. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (*citations omitted*); *accord, Alvin v. Suzuki*, 227 F.3d 107, 116 (3rd Cir. 2000).

The Third Circuit has emphasized that "[l]iberty interests that trigger procedural due process may be created by state law or by the federal constitution itself." *E.B. v. Verniero*, 119 F.3d 1077, 1105 (3rd Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998), citing *Sandin v. Connor*, 515 U.S. 472 (1995). "Protected interests extend beyond merely freedom from bodily restraint but also...to enjoy those privileges long recognized...as essential to

the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.” *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

While the individual citizen has no federal constitutional right to vote, once the Pennsylvania General Assembly granted the municipal franchise on equal terms to all citizens of Third Class cities, the Commonwealth may not, as the Commonwealth has done in the instant case, by arbitrary and disparate treatment, value one person’s vote in one Third Class city differently from plaintiffs’ vote in the City of Harrisburg, by suspending (via decree) representative and democratic control over key municipal functions in Harrisburg, and not in other financially distressed Third Class cities. “The right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Plaintiffs are entitled to the process established by the state constitution that the only way to alter rights tethered to municipal governance it to either apply any change to all municipalities within a classification equally, or create a new classification based, only, on population. Plaintiffs’ municipal representation cannot be altered because the Commonwealth does not

approve of the decisions made by plaintiffs' elected representatives. *See* PA. CONST. art. III, §§ 20 and 32; art. IX, §1.

Once a protected liberty interest has been identified, the focus shifts to assessing the quality and timing of the process due. The test, first enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), requires this Court to balance three factors: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail.” *Id.* at 334-35; *accord E.B.*, 119 F.3d at 1106-07.

a. Private Interest Affected by Official Action

Plaintiffs' private interest is to elect and be represented by municipal leaders with the same control and responsibility over municipal affairs who answer solely to the voters of Harrisburg, on the same terms as all other residents of distressed Third Class cities. The Act 47 Amendment improperly delegates the authority to classify municipalities from the General Assembly to the Governor, vesting in defendant Corbett the unfettered power to either declare or abstain from declaring a “fiscal

emergency” in distressed Third Class cities that refuse to adopt the Final Act 47 Plan proposed by the Commonwealth under Act 47.⁴ The Pennsylvania Supreme Court has established that where the General Assembly fails to provide standards for guidance, the General Assembly has improperly delegated legislative power. *Blackwell v. State Ethics Comm’n*, 567 A.2d 322 (Pa. 1989). Under the Act 47 Amendment, the ultimate authority delegated to defendant Corbett to declare or abstain from declaring a “fiscal emergency” is unfettered. There are no adequate standards to guide and restrain exercise of the final power to declare a “fiscal emergency” in a distressed Third Class city; such unfettered power is a violation of plaintiffs’ due process rights. *Chambers Dev. Co. Inc., v. Commonwealth ex rel Allegheny City*, 474 A.2d 728, 731-32 (Pa.Cmwltlth.Ct. 1984).

⁴ Section 602(a) provides clear legislative guidelines establishing what constitutes a “State of Fiscal Emergency.” However, under Section 602(b), once the Governor has determined that a “State of Fiscal Emergency” exists, he is then empowered – at his sole discretion – to either declare, or not declare, a “State Fiscal Emergency within the distressed city.” It is the declaration (and not the mere determination) of a “State of Fiscal Emergency” that triggers the suspension of representative democracy and control over key municipal functions in the distressed municipality. Section 602(b) provides that “the Governor “***may declare a state of fiscal emergency within the distressed city.***” The “***may***” constitutes unfettered discretion, unbounded by any further legislative direction. Therefore, a city which otherwise qualifies for a fiscal emergency under Section 602(a) will only be subject to the provisions of the Act 47 Amendment only upon the Governor’s own whim to pull the “trigger” or not pull the “trigger.”

b. Risk of Erroneous Deprivation is Absolute

In the absence of the requested temporary injunction, plaintiffs' right to equal representation will be deprived. Once Harrisburg's assets are sold or leased without City Council approval, plaintiffs' right to equal representation on terms equal to all other residents of Third Class cities will be irreparable diminished.

c. No Governmental Burden

Enjoining defendants from exercising their authority under the Act 47 Amendment and upholding the equal application of state constitutional processes imposes no burden on the Commonwealth. Furthermore, while the Commonwealth has an interest in sound municipal finance, the Commonwealth has systematically and intentionally foreclosed all other options to resolve Harrisburg's financial crisis. The Commonwealth has made a policy choice to ignore constitutional constraint on its power to regulate municipalities within the Commonwealth. The Act 47 Amendment is not necessary to solve Harrisburg's debt problem. The Commonwealth can just as easily unwind the restrictions placed on Harrisburg's ability to maneuver itself and to force all interested (and legally responsible) parties to participate in a broad based plan to solve Harrisburg's fiscal situation.

C. Plaintiffs Will Suffer Irreparable Harm by Defendant Unkovic's Exercise of Authority to Sell/Lease City Assets Under the Act 47 Amendment

The plaintiffs will suffer irreparable harm if the requested preliminary injunction and/or emergency temporary restraining order is not issued. “An injury is deemed irreparable if it cannot be adequately compensated by an award of damages.” *Greyhound Lines, Inc. v. Peter Pan Bus Lines, Inc.*, 845 F.Supp 295, 300 (E.D. Pa. 1994). “In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm that cannot be redressed by a legal or an equitable remedy following trial. The preliminary injunction must be the only way of protecting the plaintiff from harm.” *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3rd Cir. 1989)(internal citations omitted). This court can enjoin government officers “who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected [by] an unconstitutional act, violating the Federal Constitution. *Morales v. TWA*, 504 U.S. 374, 381 (1992).

In the instant case, plaintiffs' right to equal representation and democratic control over key municipal functions on the same basis as all other citizens of distressed Third Class cities within the Commonwealth of Pennsylvania will be irreparably damaged at the point where defendant

Unkovic's exercises his plenary authority under the Act 47 Amendment to sell and/or lease Harrisburg's municipal assets without the prior consent of plaintiffs' elected representatives. Within the next few days defendant Unkovic will begin the process of permanently divorcing Harrisburg's income producing assets from the control of plaintiffs' elected representatives. At the point that Harrisburg assets are permanently divorced from the control of plaintiffs' elected representatives the constitutional Rubicon will have been crossed with respect to plaintiffs' federally guaranteed right to exercise the franchise on an equal basis as all other citizens of distressed Third Class cities within the Commonwealth. The denial of plaintiffs' fundamental rights constitutes irreparable harm. *See Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 245 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

D. The Harm to Plaintiffs Greatly Outweigh Any Alleged Harm to Defendants

While the constitutional harm visited by the Act 47 Amendment upon plaintiffs is real and immediate, any injury claimed by defendants from the issuance of the requested injunctive relief is non-existent. No injury will be inflicted upon defendants if the requested injunctive relief is granted.

Defendants have no personal interest in the exercise of authority granted to defendants under the Act 47 Amendment and can claim no harm if they are

enjoined by this court from exercising that authority. Further, defendants have no personal standing to assert institutional, fiscal or other policy arguments that the Commonwealth might feel compelled or desire to address should the requested relief be granted by this Court. Where defendants can demonstrate no harm in the face of the irreparable injury to plaintiffs' constitutional rights plaintiffs' harm clearly outweighs defendants' non-existent harm.

E. Granting the Restraining Order/Injunction Is In the Public Interest

The Act 47 Amendment runs afoul of rights guaranteed by the Pennsylvania and U.S. Constitution, as well as, state law. The public interest is greatly served by preventing the enforcement of any law that directly violates constitutional provisions. *See Council of Alternative Political Parties v. Hooks*, 121 F.3d 867, 883-84 (3rd Cir. 1997) (stating that “[i]n the absence of legitimate countervailing concerns, the public interest clearly favors the protection of constitutional rights”); *G & V Lounge, Inc. v. Michigan Liquor Control Com’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (stating that “it is always in the public interest to prevent the violation of a party’s constitutional rights”); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 752 (8th Cir. 2008) (stating that protecting constitutional rights is “always in the public interest”); *see also Terminiello v. City of Chicago*,

337 U.S. 1, 4 (1937) (“that government remains responsive to the will of the people and peaceful change is effectuated...is...one of the chief distinctions that sets us apart from totalitarian regimes”).

V. THE COURT SHOULD NOT REQUIRE THE PLAINTIFFS TO POST A BOND.

In the case at bar, no costs or damages can be incurred or suffered by defendants even if they are ultimately adjudged wrongfully enjoined or restrained. The plaintiffs seek only to enjoin defendants from exercising authority granted in violation of rights guaranteed by both state and federal Constitutions. Accordingly, no bond should be required.

VI. CONCLUSION

Plaintiffs are entitled to due process and equal protection of state constitutional provisions which protect their municipal rights from being debased and targeted by the General Assembly on terms not equal to all other residents of similarly classified municipalities. Defendant Unkovic’s imminent plan to sell and lease income producing assets of the City of Harrisburg pursuant to his authority under the Act 47 Amendment, without first gaining the consent of Harrisburg’s elected representatives, threatens irreparable injury to plaintiffs’ right to municipal representation and representative control over key municipal functions on term equal to residents of all other similarly classified and situated municipalities.

Further, the unfettered delegation of legislative authority to declare a fiscal emergency in Harrisburg, but not other similarly situated municipalities, violates plaintiff's due process right to have the General Assembly – and not defendant Governor – to make all municipal classifications within the Commonwealth.

Accordingly, plaintiffs' instant motion to temporarily enjoin defendants from exercising authority delegated to them under the Act 47 Amendments should be granted.

Respectfully submitted,

Date: February 23, 2012

/s/ Paul A. Rossi

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on February 23, 2012, he personally caused to be served upon opposing counsel a true and correct copy of the foregoing brief via the Court's ECF filing system.

Dated: February 23, 2012

U/s/ Paul A. Rossi
Paul A. Rossi, Esq.

CERTIFICATION

Plaintiffs' counsel, Paul A. Rossi, hereby certifies that he was not able to gain opposing counsel's concurrence.

Dated: February 23, 2012
Rossi_____

____U/s/_____*Paul*_____A.

Paul A. Rossi, Esq.

CERTIFICATION

Plaintiffs' legal counsel hereby certifies that the foregoing brief does not exceed the extended word limit of 9,000 words allowed to be filed by this Court. The foregoing body of the brief, including footnotes, is 8,434 words in length. Plaintiffs' counsel relied on MicroSoft Word 2010's word count function in making this Certification.

Dated: February 23, 2012
Rossi

____ U/s/ _____ *Paul* _____ *A.*

Paul A. Rossi, Esq.