

Nos. A-004443-06T2

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

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SUPERIOR COURT
OF NEW JERSEY

ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, CASO'S GUN-A-RAMA,
INC.,

LISA CASO AND SCOTT BACH

Plaintiffs - Respondents,

v.

THE CITY OF JERSEY CITY, JERRAMIAH HEALY, MAYOR,
THOMAS CORNEY, CHIEF, AND NEW JERSEY ACORN

Defendants - Petitioners.

BRIEF OF AMICUS CURIAE

Appeal from the Superior Court of New Jersey, Hudson County
The Honorable Maurice Gallipoli, Judge Presiding
Case No. HUD-L-3600-06

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I. INTRODUCTION

Since 1917, New Jersey's citizens have been protected by a system of dual regulation, in which the Legislature passes laws creating a baseline level of protection for all citizens and entrusts municipalities with creating more stringent regulations in response to unique local conditions and concerns. See An Act Concerning Municipalities, Ch. 152, 1917 N.J. Laws. Recognizing that gun regulation is an area of unique local concern in which uniformity is not required and local variation may be beneficial, the Legislature expressly included firearms regulation as one of the specified subjects of home rule power. See Report of the Commission to Revise and Codify the Statutes of this State Relating to Cities and Other Municipalities, at 9-10 (N.J. 1917) [hereinafter "Commission Report"]. In the decades since, municipalities have used this power to pass additional restrictions strengthening the state's framework as dictated by local concerns. These ordinances have helped the Legislature fulfill its commitment to firearms safety, which "is unrivaled anywhere in the nation." N.J. Stat. Ann. § 2C:58-2.2. The New Jersey Supreme Court has agreed, upholding firearms ordinances that regulate beyond the baseline of existing state law. See *Township of Chester v. Panicucci*, 62 N.J. 94, 101 (1973).

Notwithstanding the Legislature's express intent to permit municipalities to pass stronger local gun violence prevention ordinances, the trial court held that Jersey City's ordinance limiting handgun purchases to one per month was preempted by state law, reasoning that the Legislature had preempted the entire field of firearms regulation, and that Jersey City's Ordinance conflicted with state law. The trial court's field preemption holding runs afoul of the Legislature's 2003 reaffirmation of home rule and its codification of limited exceptions to that power. See N.J. Stat. Ann. §§ 40:48-1(18), 2C:58-3. The trial court's finding of conflict preemption is in error, as the two statutes do not regulate the same issues - the state law regulates the content of permit applications and forbids municipalities from allowing the purchase of more than one handgun per permit, while the municipal ordinance limits buyers to one handgun per month but does not change the state's permit rule. Compare N.J. Stat. Ann. § 2C:58-3(i) with Jersey City, City Ordinance 06-116 § 163-17(B) (hereinafter "Ordinance"). The court further found that even though the Ordinance regulated a different subject, it served the same purpose as the state statute, therefore triggering conflict preemption. This holding contravened this state's preemption analysis, which permits municipalities to regulate in excess of state law particularly where the ordinances support the state

law's purposes. See, e.g., *Masters-Jersey, Inc. v. Mayor & General Council of Paramus*, 32 N.J. 296 (1960).

Every aspect of the trial court's preemption analysis subverted the Legislature's intent and misread the governing preemption framework. Amicus curiae respectfully submits that it should be reversed.

II. BACKGROUND

In 2005, Jersey City had the most violent crime, and the second highest number of murders, in the State. See U.S. Department of Justice, Federal Bureau of Investigation, Crime In the United States - Violent Crime Data, available at <http://www.fbi.gov/ucr/05cius/> (hereinafter "FBI Crime Data Report"). This fact was all the more remarkable given that in 2005, the State's violent crime rate was over twice the national average. See FBI Crime Data Report; see also Intervener's Brief at 3.

While violent crime increased across the nation during 2005,¹ the increase in Jersey City was disproportionate, as it saw a greater increase in violent crime than any other major New Jersey city. See FBI Crime Data Report. In response, the City Counsel used its authority pursuant to New Jersey Statute

¹ FBI Crime Data Report, Violent Crime Overview.

section 40:48-1.18 to enact tougher measures to protect its citizens from crime and violence, by strengthening the City's firearms ordinances. See Jersey City Ordinance 06-082.² On July 18, 2006, the Ordinance became effective; it prohibited the sale or purchase of more than one handgun within a thirty-day period in Jersey City. See *id.*; see also Jersey City Code, Ch. 163, Art. V, § 163-17.³

Plaintiffs sued, asking the court to invalidate the Ordinance. On January 2, 2007, the court granted the requested

² In response to concerns regarding vagueness, on October 12, 2006, the ordinance was amended and replaced by Ordinance 06-116. That amendment affected none of the issues addressed in this brief.

³ Studies show that handguns sold in transactions in which the same individual purchaser buys more than one handgun in five consecutive business days ("multiple sales") are frequently used in crime. The Bureau of Alcohol, Tobacco and Firearms, found that approximately 20% of all handguns traced to crimes had been transferred to a purchaser in a multiple sale transaction. See Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports (2000) National Report* 52 (2002); Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports (1999) National Report* 37 (2000).

One-gun-a-month laws have resulted in a significant drop in the percentage of "multiple sales" guns traced to crimes. See Douglas S. Weil & Rebecca C. Knox, *Evaluating the Impact of Virginia's One-Gun-A Month Law*, The Center to Prevent Handgun Violence 1, 6 (Aug. 1995) (noting that Virginia had become a primary source for crime guns used in New England; after Virginia adopted a one-gun-per-month law, the percentage of New England crime guns traced to Virginia dropped by 66%).

relief, finding that the Ordinance was preempted and violated equal protection. (Tr. at 46-52.) This brief addresses only the court's ruling regarding preemption, although amicus shares the view that the Ordinance cannot be said to violate equal protection.⁴

**III. THE TRIAL COURT ERRED IN HOLDING THAT
NEW JERSEY LAW PREEMPTS ALL LOCAL GUN REGULATION.**

The trial court concluded that "[t]he legislature clearly intended to create a complete system of law with respect to firearm regulation. The statute directs all aspects of the application, purchase and sale of firearms.... Thus, it can be said and is inferred by me that the legislature intended to preempt municipal gun control legislation." (Tr. at 47.) In so concluding, the trial court ignored the most fundamental component of the "complete system of law" it purported to uphold - the express provision of concurrent municipal regulation.

In *Overlook Terrace Management Corp. v. Rent Control Board*, 71 N.J. 451, 461-62 (1976), the New Jersey Supreme Court

⁴ In so finding, the trial court substituted its judgment about effective policy measures for those of the municipality and, perplexingly, relied upon the fact that a municipality (obviously) cannot regulate beyond its boundaries. The trial court's rationale proves too much - if these were bases for invalidating an ordinance, home rule would cease to exist. Yet, home rule is a cornerstone of New Jersey's legislative system, protected by the Constitution and codified by statute. See N.J. Const. art. IV, § 7, para. 11; N.J. Stat. Ann. § 40:48-1(18).

directed courts to examine the following factors in determining field preemption and conflict preemption recognizing that "it is not enough that the Legislature has legislated upon the subject":

- (1) Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?
- (2) Was the state law intended, expressly or impliedly, to be exclusive in the field?
- (3) Does the subject matter reflect a need for uniformity?
- (4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
- (5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature?

The trial court's preemption holding violates *Overlook Terrace* in five ways: *First*, there is no conflict between the Ordinance and state law (see part III.B). *Second*, the Legislature's enactment of Home Rule demonstrates that the state did not intend its laws to be exclusive (see parts III.A.1-A.2). *Third*, the reaffirmation of the home rule statute indicates that the Legislature determined that there is not a need for uniform firearms laws and, to the contrary, there is a benefit to local variation (see part III.A.1). *Fourth*, the court erred in determining that the Legislature and New Jersey Supreme Court have found that state regulation is so comprehensive as to

preclude the coexistence of municipal regulation, in light of the codification of *limited* exceptions to municipalities' ability to regulate firearms and reaffirmation of Home Rule (see parts III.A.2 and A.3). *Finally*, far from deterring the accomplishment of the Legislature's purpose of reducing the number of handguns that may be purchased, the Ordinance furthers the Legislature's objectives; indeed, the trial court even recognized the similarity of purposes, but mistakenly held that this *supported* preemption (see part III.B).

A. The Legislature Never Intended To Preempt the Field of Firearms Regulation And Has Repeatedly Acted Inconsistently With An Intent to Occupy the Field.

The trial court concluded that the Legislature "clearly intended to create a complete system of law with respect to firearm regulation" as evidenced by the detail with which the statute "directs all aspects of the application [for], purchase and sale of firearms" and "language of the statute itself [which] refers to a, quote, 'strict regulatory scheme,' close quote." (Tr. at 46-47.) However, the court's inference that the Legislature intended to occupy the field was precisely backwards.

1. New Jersey Allows Local Governments to Regulate Firearms.

As crafted by the New Jersey Legislature, the *complete* system of firearms laws incorporates both state and municipal

regulation. Local firearms regulation was considered such an important supplement to state regulation that it was included in the state's seminal home rule statute:

The governing body of every municipality shall have power to make, publish, enforce, amend or repeal ordinances for the following purposes: To regulate and prohibit the sale and use of guns, pistols, firearms and fireworks of all descriptions.

An Act Concerning Municipalities, Ch. 152, 1917 N.J. Laws. This concurrent grant of power successfully responded to competing state and local gun violence prevention demands, and remains in force today, ninety years later. See N.J. Stat. Ann. § 40:48-1(18).

Municipal authority to regulate guns pursuant to the home rule statute is by reinforced by the constitutional provision governing the construction of municipal powers. The New Jersey Constitution specifically provides that:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

N.J. Const. art. IV, § 7, para. 11. By enacting the home rule provision, the Legislature brought gun regulation within the

ambit of the presumption of liberal construction in favor of municipalities.

Under this system, the state Legislature creates a baseline level of regulation. See N.J. Stat. Ann. § 40:48-1(18); see also N.J. Const. art. IV, § 7, para. 11. The home rule statute expressly creates a presumption that municipalities may create additional protections in excess of these statewide minimums. See *id.*; see also *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 528 (1973) ("Home rule is basic in our government. It embodies the principle that the police power of the State may be invested in local government to enable local government to discharge its role as an arm or agency of the State and to meet other needs of the community."). In those cases in which the Legislature wishes to create an exception to home rule, it must make its intent to do so clear enough to override this express statutory language. See *Summer v. Township of Teaneck*, 53 N.J. 548, 554 (1969) ("[A]n intent to occupy the field must appear clearly. It is not enough that the Legislature has legislated upon the subject, for the question is whether the Legislature intended its action to preclude the exercise of the delegated police power." (citations omitted)). See also *Township of Chester v. Panicucci*, 62 N.J. 94, 101 (1973) (affirming municipality's right to adopt a more stringent regulation of gun

use, even though the state had already legislated on the same issue).

The trial court's holding that state law preempts municipal regulation of firearms, notwithstanding the home rule statute and the constitutional presumption favoring home rule, renders the home rule provision regarding firearms meaningless and without effect, in violation of the well-established rule of statutory interpretation that "[c]ourts are to avoid constructions that make statutory provisions redundant or meaningless." *State v. Wright*, 107 N.J. 488, 502 (1987). Indeed, such an interpretation impermissibly reads the home rule statute out of existence.

2. The Legislature Codified Limited Exceptions to the Presumption of Home Rule, Which Would Be Meaningless If the Legislature Had Preempted the Field of Gun Violence Prevention.

The trial court concluded that because section 2C:58-3 "directs all aspects of the application [for], purchase and sale of firearms" the Legislature "clearly intended to create a complete system of law with respect to firearm regulation" which occupied the field of gun violence prevention. (Tr. at 46-47, citing N.J. Stat. Ann. § 2C:58-3 (hereinafter "the Act").) In reaching this conclusion, the court overlooked the text of 2C:58-3 itself.

The text of the Act contains two separate restrictions on local regulation of guns. First, the Legislature expressly precluded the proscription of additional requirements as to the "form or content" of permits:

There shall be no conditions or requirements added to the form or content of the application, or required by the licensing authority for the issuance of a permit or identification card, other than those that are specifically set forth in this chapter.

N.J. Stat. Ann. § 2C:58-3(f) (emphasis added). Second, the same section further provides that no restriction on the number of rifles or shotguns - but not handguns - may be made:

Restriction on number of firearms person may purchase. Only one handgun shall be purchased or delivered on each permit, but a person shall not be restricted as to the number of rifles or shotguns he may purchase, provided he possesses a valid firearms purchaser identification card and provided further that he signs the certification required in subsection b. of this section for each transaction.

Id. at 58-3(i).

"[A]n intent to occupy the field must appear clearly."

Kennedy v. City of Newark, 29 N.J. 178, 187 (1959). "It is not enough that the Legislature has legislated upon the subject, for the question is whether the Legislature intended its action to preclude the exercise of the delegated police power." *Summer*, 53 N.J. at 554. The Legislature has merely legislated; it has not expressed any intent to preclude - indeed, it has expressed an intent not to preclude local regulations.

The restrictions are equally notable for what they did not do. See *DiProsero v. Penn*, 183 N.J. 477, 495 (2005) (applying the canon of *expressio unius est exclusio alterius* and the maxim "an affirmative expression ordinarily implies a negation of any other"). When the Legislature decided to place certain restrictions on municipalities' regulation of guns, it did not enact a broad provision or amend the home rule statute. Nor did the Legislature preclude municipalities from placing tougher restrictions on the time, place or manner of purchase or use of guns, nor the number of handguns that could be purchased in a period of time. Rather, the Legislature enacted limited exceptions to municipal power - no conditions may be added to the form or content of applications nor restrictions placed on the number of rifles or shotguns purchased on a permit - carefully tailored to specific areas of firearms already regulated by the State.

Taken in this context, the error of the trial court's ruling is thrown into sharp relief. The irreducible essence of preemption is determining legislative intent. See *Summer*, 53 N.J. at 554. Here, the Legislature's creation of express, limited exceptions to home rule provides clear evidence of the Legislature's understanding: local gun ordinances are a valid and desired exercise of local power. But rather than recognize this expression, the trial court found that the Legislature

nevertheless intended to occupy the field. If that is so, then both carve-outs to home rule become meaningless - there would be no reason to preclude municipalities from doing something already preempted by the same statute. See *State v. Reynolds*, 124 N.J. 559, 564 (1991) ("A construction that will render any part of a statute inoperative, superfluous, or meaningless, is to be avoided."). Fundamental canons of statutory interpretation require us to give meaning to the Legislature's intent, as expressed through the words of its statutes. See *Hubbard v. Reed*, 168 N.J. 387, 392 (2001) (in construing any statute, a court's "overriding goal must be to determine the Legislature's intent"); *State v. Wright*, 107 N.J. 488, 502 (1987) ("[C]ourts are to avoid constructions that make statutory provisions redundant or meaningless.").

Because the trial court's attempt to discern the intent of the Legislature required it to ignore the Legislature's own words, running afoul of these most basic canons of statutory interpretation, its holding cannot stand.

3. The Recent Re-enactment of the Home Rule Statute Shows That Municipal Regulation Remains Vital To The State's Gun Violence Prevention Framework.

In the firearms context, the Legislature left no doubt about its intent to permit municipal regulation. See N.J. Stat. Ann. § 40:48-1(18). Nevertheless, the trial court held that the Legislature "clearly intended to create a complete system of law

with respect to firearm regulation" because it has created a legal framework that "directs all aspects of the application [for], purchase and sale of firearms." (Tr. at 46-47.) This conclusion is contrary to not only the clear import of the Legislature's limited restrictions upon home rule, but also the Legislature's express reaffirmation of home rule and municipal authority to regulate gun sales.

The most recent amendment to the firearm laws - the statutory provision governing the application, purchase and sale of firearms - was approved on May 5, 2003. 2003 N.J. Advance Legislative Service 73.⁵ As a result, by the summer of 2003, the relevant legal framework was in place.

On August 27, 2003 - just three months later - the Legislature amended the home rule statute. 2003 N.J. Advance Legislative Service 164. Again, the Legislature reaffirmed municipal authority to "regulate and prohibit the sale and use of guns...." N.J. Stat. Ann. § 40:48-1(18). This express reaffirmation of home rule as to firearms directly disproves the conclusion that the Legislature meant to occupy the field of firearms regulation.

⁵ The amendment replaced the term "firearm" with the broader phrase "weapon, explosive or destructive device...."

4. The Legislature's "Strict" Gun Safety Regulations, Effectuated By A "Careful Grid of Regulatory Provisions," Is Not Incongruent With Home Rule Regarding Handgun Regulations.

The final basis for trial court's holding relied upon two characterizations of the gun violence prevention legislation: the statute's reference to itself as a "strict regulatory scheme" and the Supreme Court's reference to the same provision as "a careful grid of regulatory provisions." (Tr. at 46-47 (citing N.J. Stat. Ann. § 2C:58-2.2(a) and *In Re Preis*, 118 N.J. 564 (1990)).) While the second quotation is inapplicable *dicta*, the first - when read in context - actually contradicts the trial court's ruling.

It is clear, when read in context, that the Legislature's reference to a "strict regulatory scheme" refers to the strength and depth of New Jersey's commitment to gun violence prevention legislation, as well as the severe penalties for violation of its provisions. See N.J. Stat. Ann. § 2C:58-2.2 (reprinted for the court's convenience, with emphasis added, as Appendix A). Section 58-2.2 makes clear that New Jersey is committed to creating the highest gun violence prevention standards and strictly enforcing them. It does not indicate any intent to preempt local regulation.

The trial court disregarded the text of the statute and the intent of the Legislature by reading the "strict regulatory

scheme" language out of context. See *Hubbard*, 168 N.J. at 392 (in construing any statute, a court's "overriding goal must be to determine the Legislature's intent"); *New Capitol Bar & Grill Corp. v. Div. of Empl. Sec.*, 25 N.J. 155, 160 (1957) ("to that end, words used may be expanded or limited according to the manifest reason and obvious purpose of the law" (internal quotations omitted)). To interpret this statement of legislative intent favoring innovative and tough gun violence prevention laws as a bar to supplemental regulation is particularly discordant when one considers that municipal ordinances often give rise to the most innovative solutions, serving as a model for their respective states. See *infra*, section IV.

The trial court's reliance on Supreme Court dicta is similarly misplaced. In *In re Preis*, the Supreme Court noted in passing that other courts had "repeatedly referred to New Jersey's gun-control laws as a 'careful grid' of regulatory provisions." *In re Preis*, 118 N.J. 564, 568 (1990) (citing *State v. Ingram*, 98 N.J. 489, 495 n.1 (1985)). The Court did not independently review the statute, nor did it analyze this statement in the preemption context. *Id.* Instead, the Court relied upon an earlier analysis in *State v. Ingram*. But *Ingram* analyzed whether the absence of a permit is an element of carrying a handgun without a permit; the Court was not

confronted with a preemption question. In dicta, the Court remarked that while the Legislature had outlawed "mere possession of certain weapons...[o]ther weapons such as pistols and rifles are subject to a careful grid of regulation." *Ingram*, 98 N.J. at 495 n.1. That dicta did not relate to, and was not intended to resolve, the field preemption inquiry. Nor did it address the statutorily and constitutionally granted power of municipalities to regulate guns as part of the "grid of regulation."

Taken together, there can be no doubt about the Legislature's intent to create a system of regulation under which both the Legislature and local governments regulate firearms. Since then, it has legislated - without exception - in a manner consistent with this background understanding, including codifying exceptions to that statutorily granted authority. Far from undercutting this clear message, the Legislature's reference to its "strict gun control" regime and reaffirmation of New Jersey's unrivaled commitment to gun safety, reinforce its choice to permit dual regulation at the state and municipal levels.

B. No Conflict Exists Between the Local Ordinance and State Law.

A local government may not create an ordinance that conflicts with state law. But no such conflict exists here.

The Ordinance only regulates the frequency with which an individual may purchase, or make application to purchase, handguns.⁶ No New Jersey statute regulates the frequency of purchase of, or frequency of application to purchase, handguns. Because this issue is not regulated by the state, by definition, there can be no conflict between the ordinance and state law.

The court identified two provisions of New Jersey's gun permit law in its conflict preemption analysis:

"Only one handgun shall be purchased or delivered on each permit, but a person shall not be restricted as to the number of rifles or shotguns he may purchase." N.J. Stat. Ann. § 2C:58-3(i).

"There shall be no conditions or requirements added to the form or content of the application, or required by the licensing authority for the issuance of a permit or identification card, other than those that are specifically set forth in this chapter." *Id.* at 58-3(f). [Tr. at 45.]

But the Ordinance does not add to the number of handguns issued per permit. Nor does it modify the form or content of the permit application. Indeed, Jersey City continues to use

⁶ The Jersey City Ordinance precludes gun dealers from selling handguns to any person who has purchased, or made application to purchase, another handgun in Jersey City during the preceding thirty-day period. Ordinance § 163-17(B). To assist in enforcement of this requirement, the purchaser must certify to the dealer in writing that he or she has not purchased, or made application to purchase, another handgun during the preceding thirty-day period - or to certify which of the Ordinance's exemptions applies to the transaction (*i.e.*, the exemption for law enforcement agents). *Id.* at § 163-17(C)-(D).)

the same official handgun permit application, Form STS-33, that is used throughout New Jersey. Nor does the Ordinance result in the licensing authority adding any additional conditions or requirements for the issuance of the permit. In Jersey City, the licensing authority still issues permits based upon the criteria established in 58-3, and no other. The Ordinance operates only at the point of sale - not at the point of permit issuance - and only where the buyer has purchased, or made application to purchase, another handgun in the preceding thirty days. Ordinance § 163-17 (B)-(D).

The trial court misinterpreted the Supreme Court's direction that "local legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow," *Panicucci*, 62 N.J. at 99, to mean that - as here - where the state has not yet passed any regulation with respect to a particular action, the action is therefore allowed by state law, and thus cannot be regulated by the municipality. (Tr. at 46, 47-48.) Applying the trial court's interpretation to *Panicucci* itself yields the wrong outcome: the ordinance would have been struck down, but the Supreme Court upheld the ordinance.⁷

⁷*Panicucci* only stands for the simple proposition that if a state enactment expressly permits a behavior it cannot be outlawed by local law, just as a behavior forbidden by state law cannot be permitted by local law.

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Moreover, if the trial court's analysis were correct, it would mean that a municipality could never adopt an ordinance, as the ordinance would either regulate a topic unregulated by the state (thereby making "illegal" something that is "legal" under state law), or provide supplemental restrictions in an area already

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In *Panicucci* the state law prohibited hunting near schools, but shooting a weapon for non-hunting purposes remained legal because the state statute did not address this issue. *Panicucci*, 62 N.J. at 96-97. The municipal ordinance, which banned any firearm discharge near a school, outlawed acts that were not illegal under state law. *Id.* Applying the trial court's rule, because the Legislature restricted only certain behavior (hunting) and allowed other behavior to remain legal (discharging a weapon for non-hunting purposes), the *Panicucci* ordinance should be preempted because it "expressly forbids what state law allows and it is fatally flawed for that reason." (Tr. at 47.) But the Supreme Court reached the opposite conclusion, upholding the ordinance even though "it is broader in scope than the statute." *Panicucci*, 62 N.J. at 97. See also *Inganamort*, 62 N.J. at 538 ("That the ordinance imposes restraints which the State law does not, does not spell out a conflict between State and local law. On the contrary the absence of a statutory restraint is the very occasion for municipal initiative.")

As in *Panicucci*, the Jersey City Ordinance is broader in scope than the state law, but it does not undermine its goals. Rather, the Ordinance reinforces the state's purpose of restricting the purchase of handguns. For this reason alone, no conflict can be found between the Ordinance and the Act. But the trial court actually found that the similarity of purpose between the ordinance and the state law supported his finding that the Ordinance created a conflict with the law. The court reasoned that "the state government could have limited the number of guns anyone could purchase by limiting the number of permits that any one individual could apply for and get in a particular period of time. They chose not to do that." (Tr. 35; see also Tr. 48.)

regulated by the state (thereby creating rules the state could have implemented) - both of which the trial court says are improper. (Tr. at 35, 45-46, 48.) Common sense, as well as the New Jersey home rule statute and the related Constitutional presumption in favor of municipal regulation, dictates that this cannot be the case.

The law requires that a court identify an actual conflict between the two schemes before invalidating an ordinance. See *Mannie's Cigarette Serv., Inc. v. Town of West New York*, 259 N.J. Super. 343, 348 (App. Div. 1992) (a municipal ordinance should not be invalidated where it would "only facilitate rather than conflict with the State's effort). Applying the proper standard, it is clear that the Legislature restricted handgun purchases to one per permit - while expressly allowing unrestricted rifle and shotgun purchases - to limit access to handguns by New Jersey residents. The state law advances this purpose through the permitting process, while the Ordinance advances it through a point of sale restriction. Compare N.J. Stat. Ann. § 2C 58-3(i), with Ordinance § 163-17(B). The similarity in purposes supports upholding, not invalidating, the Ordinance.

**IV. GIVING BROAD PREEMPTIVE MEANING TO STATE LAWS UNDERMINES THE
LEGISLATURE'S COMMITMENT TO AN
"UNRIVALED" LEVEL OF FIREARM SAFETY.**

In 2002 and 2003, the Legislature revisited the state's gun violence prevention policies, reaffirming that "New Jersey's commitment to firearms safety is unrivaled anywhere in the nation." N.J. Stat. Ann. § 2C:58-2.2(a). The Legislature then recited many of its first-in-the-nation gun safety and control laws, all of which were designed to protect children from accidentally gaining access to and harming themselves or others with guns. *Id.* at § 2C:58-2.2(b). For nearly a century, the Legislature's commitment to gun safety and control has expressly entailed dual regulation by the state and its municipalities. See N.J. Stat. Ann. § 40:48-1(18).

A. Restricting Municipal Authority Will Preclude Development of New Initiatives and Prevent Local Responses to Local Problems - In Contravention of the Legislature's Expressed Statutory Intent.

The Legislature has reaffirmed that it wants to be a leader in the gun violence prevention movement and that this leadership occurs at the state and local level. N.J. Stat. Ann. §§ 40:48-1(18); 2C:58-2.2. Recognizing that municipal regulation is an essential component of progressive gun violence prevention laws, the Supreme Court has held that even though numerous state firearms laws exist, these laws are a baseline of regulation and do not preempt more stringent municipal regulation. See, e.g.,

515 Assocs. v. City of Newark, 132 N.J. 180 (1993) (upholding a Newark ordinance designed to strengthen existing state law by requiring large buildings to hire security guards who must be armed for eight of every twenty-four hours and deferring to local legislative judgment on how to best address the violent crime rate); *Panicucci*, 62 N.J. at 103 (upholding a local ordinance banning discharging firearms near schools).

Indeed, home rule provides many benefits. Local conditions, and therefore local needs, can differ substantially in different parts of the state. The types of regulations that are appropriate and necessary in a city may not be acceptable or sufficient in a rural community. Thus, statewide statutes can reflect a baseline approach, deterring behavior that the Legislature views as being of universal benefit across the State; for example, requiring child safety locks on guns. In contrast, a rule preventing the carrying of a gun into a business establishment other than a gun store may be a necessary and proper rule in a city, but unnecessarily restrictive in a rural community. Home rule solves this problem by permitting each municipality to regulate beyond this baseline, as appropriate for its particular local needs and concerns. See *Inganamort*, 62 N.J. at 528 (recognizing that even if the "evil is of statewide concern, still practical considerations may warrant different or more detailed local treatment to meet

varying conditions or to achieve the ultimate goal more effectively"); *Mack Paramus Co. v. Mayor & Council of Paramus*, 103 N.J. 564, 577 (1986) (stating "not all problems that have generated a concern throughout the State demand uniform and homogeneous treatment at the state level").

Pennsylvania illustrates this dichotomy - and the importance of municipal regulation. Most of Pennsylvania remains rural; these communities derive greater benefits from guns, and often do not face the same degree of gun-related violence, as the state's urban centers. See FBI Crime Data Report, *supra*. In Philadelphia, the situation is radically different; nearly every day, someone is shot to death. *City vs. Country Over Philly Gun Scourge*, ABC News, July 8, 2007, <http://abcnews.go.com/WN/story?id=3356952>. Last year, Philadelphia had more murders than any other city with over a million residents.⁸ As a result, citizens and community leaders

⁸ Andrew Maykuth, *Phila. Leads Big Cities in Murder Rate*, Philadelphia Inquirer, June 5, 2007, at A01. In Philadelphia, the violent crime rate is 1,562 per 100,000 residents. See Department of Justice, Federal Bureau of Investigation, 2006 Preliminary Annual Uniform Crime Report (2007), available at <http://www.fbi.gov/ucr/06prelim/t4ok-wi.htm>, Jersey City had more than 1,205 violent crimes per 100,000 residents. *Id*

With the Jersey City ordinance in effect for half of 2006, Jersey City experienced a decline in the murder rate and a drop in violent crime. *Id.* (murder rate fell from 15.9 murders per

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have consistently lobbied for stronger gun violence prevention laws. But because Pennsylvania expressly prohibits local firearms regulations from taking effect, absent enabling legislation by the state legislature,⁹ Philadelphia officials remain powerless to act. See *Ortiz v. Pennsylvania*, 681 A.2d 152, 156 (Pa. 1996) (striking down a Philadelphia County ban on assault weapons). This problem stresses the importance of a system of dual regulation, which allows municipalities to respond to local conditions without state intervention. Cf. Commission Report, at 8 (N.J. 1917) (noting that the New Jersey Home Rule Act resulted from a need to alleviate the burden on the state Legislature caused by passing different individual ordinances for different cities with different needs).

In addition, because local needs and attitudes vary, home rule encourages the development of different approaches to gun

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100,000 residents in 2005 to 9.17 murders per 100,000 residents in 2006).

⁹ Pennsylvania law provides that "[n]o county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth." 18 Pa. Cons. Stat. Ann. § 6120(a). See also *Philadelphia v. Beretta*, 126 F. Supp.2d 882, 890 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002) ("the power to regulate firearms within the state ... lies exclusively with the state legislature.").

violence prevention. State legislatures are often the beneficiaries of this local experimentation, as they draw upon this array of ideas and experiences in reexamining statewide gun violence prevention laws. For example, in 1996, the city of West Hollywood, California banned junk guns, sometimes called "Saturday Night Specials."¹⁰ By 2000, at least 55 other cities and counties had followed West Hollywood's lead and banned the sale and manufacture of junk guns.¹¹ Following this trend, the State of California banned junk guns effective January 1, 2001. See Senate Committee on Public Safety, Firearms - Restrictions on "Unsafe Handguns," S.B. 15, at 14 (Cal. 1999) (discussing the San Jose ordinance banning junk guns). This local response is precisely the type of regulatory innovation the New Jersey Legislature has expressly stated it wants to foster. See N.J. Stat. Ann. § 2C:58-2.2(b).

B. Recognizing The Benefits of Dual Regulation, Other States Have Created Comprehensive Statutes But Also Permitted Local Regulation, Absent Clear Abrogation of Home Rule.

Many states have home rule systems similar to New Jersey's.

¹⁰ West Hollywood, Cal., Mun. Code § 4122, available at <http://www.weho.org/index.cfm/fuseaction/nav/navid/24> (follow "Municipal Code" hyperlink).

¹¹ See, e.g., Oakland, Cal., Mun. Code §§ 9.36.050-9.36.280, available at <http://municipalcodes.lexisnexis.com/codes/oakland>; Compton, Cal., Mun. Code § 7-4.8, available at <http://www.codedsystems.com/comptoncity.htm>.

In these states, the legislatures enact "baseline" laws, and allow municipalities to enact additional protections that exceed these statewide minimums, based upon local needs or local innovations.

New York provides an example of a system in which guns are "strictly regulated" at the state level, but local regulation is still allowed. Just as New Jersey does, New York requires a license to purchase a handgun and allows only one purchase per permit. N.Y. Penal Law § 400.00. New York also bans assault weapons, requires a permit to carry a handgun, regulates how firearms may be transported, requires dealers to be licensed, prohibits large capacity magazines, requires dealers to record all sales, allows the superintendent of state police to regulate junk guns, and generally prohibits firearm possession by minors.¹² But despite these substantial state restrictions, New York's courts have not deemed this scheme comprehensive or occupying the field of firearm regulation and accordingly allow local governments to regulate firearms. See *Citizens for a Safer Cmty. v. City of Rochester*, 627 N.Y.S.2d 193, 201 (N.Y.

¹² N.Y. Penal Law §§ 265.02(7), 265.10 (assault weapons); § 400.00(2) (permit to carry handgun); § 265.02(4), (regulating transportation); § 400.00(2) (dealer licensure); § 265.00(23) (large capacity magazines); § 400.00(12) (dealers must record sales); § 400.00(12-a) (junk guns); § 265.05 (possession by minors).

Sup. Ct. 1994) ("Clearly the State has not, either directly or indirectly, regulated all aspects of gun possession and use as to time, place and circumstance."). In light of the authority expressly granted to municipalities under the home rule statute, a *fortiori* New Jersey's state regulation should not be deemed to occupy the field.

California's laws, and its courts' interpretations of those laws, are particularly instructive. Like New Jersey, California has stringent state firearms laws, which contain a number of provisions expressly forbidding further local regulation. As a threshold matter, the California courts have held that although there are numerous firearms laws,¹³ they are not intended to occupy the field and therefore do not preempt local regulations. See *Galvan v. Superior Court of San Francisco*, 452 P.2d 930,

¹³ California's laws are quite rigorous and extensive. For example, California prohibits carrying a loaded weapon on one's person or in a vehicle when in a public place; prohibits carrying concealed weapons without a permit; bans assault weapons; requires that all transfers be done through a licensed dealer; prohibits large capacity magazines; prohibits junk guns; requires that dealers record all transfers; prohibits sales to minors; and requires dealers to obtain the purchaser's thumbprint. See Cal. Penal Code § 12031(a)(1) (carrying in public); § 12025 (carrying without a permit); § 12280(a)(1) (assault weapons); §§ 12070(a), 12071(a)(1)(F), 12072 (transfers through licensed dealer); § 12020(a)(2) (large capacity magazines); §§ 12125(a), 12126 (junk guns); § 12076(a)(3) (dealers must record all transfers); § 12072(a)(3) (minors); § 12077(b)(2) - (c)(2) (thumbprint requirement).

937-38 (Cal. 1969) (holding that a local ordinance requiring all guns in San Francisco to be registered did not conflict with state law and the field was not preempted); *Great W. Shows, Inc. v. County of Los Angeles*, 44 P.3d 120, 124-25 (Cal. 2002) (citing *Galvan*, 452 P.3d 930) (upholding a county ordinance prohibiting the sale of guns or ammunition on county property). Indeed, California's courts have concluded that the handful of provisions expressly preempting local regulations of sub-areas of firearms regulation creates an inference that the legislature did not intend to preempt other sub-fields or firearms regulation broadly. See *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 537 (Cal. 1993); *California Rifle and Pistol Ass'n, Inc. v. City of West Hollywood*, 78 Cal. Rptr. 2d 591, 600 (Cal. Ct. App. 1998) (holding that state law did not preempt a local ordinance banning the sale of Saturday Night Specials).

Despite the rigorous gun violence prevention regimes adopted in both California and New York, large cities have passed further restrictions to prevent additional gun violence. In Los Angeles, no person may make application to a firearms dealer to purchase a handgun within 30 days of making a prior application for the purchase of a handgun within California. See Los Angeles, California, Code ch. V, art. 5, § 55.14 (1999). Following the lead of its cities, the State of California

adopted a one-handgun-a-month law, effective January 1, 2000. See Cal. Penal Code § 12072(a)(9)(A). New York City also determined that a similar restriction was necessary to its particular local conditions; however, it went beyond the Jersey City and Los Angeles ordinances, limiting firearm purchases to one every 90 days. See New York, N.Y. Admin Code, § 10-302.1, as amended by Local Law 31 (July 27, 1006). The Jersey City Ordinance, like those of Los Angeles and New York City, is an example of home rule in action, enacted to prevent further gun violence based upon the local conditions facing the city. This Ordinance is precisely the type of regulation the Home Rule Statute protects, allows and encourages.

V. CONCLUSION

The New Jersey Legislature recognized that different municipalities need different gun violence prevention laws. N.J. Stat. Ann. § 40:48-1(18). The Legislature passed the Home Rule Act, including in its provisions the right to regulate guns, to allow municipalities to regulate in light of their particular local circumstances. See Commission Report, at 8 (N.J. 1917). The Legislature has repeatedly reaffirmed its choice of allowing municipal regulation, both through its reaffirmation of home rule as to firearms and through recent legislation codifying discrete exceptions to the cities' home rule power. See N.J. Stat. Ann. § 2C:58-3. The Jersey City

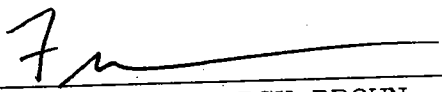
Ordinance does not conflict with, and indeed furthers, the state regime.

The decision of the trial court should be reversed.

DATED: August 24, 2007

Respectfully submitted,

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Appendix A

Findings, Declarations Relative To Sale Of Handguns

a. The Legislature finds:

New Jersey's commitment to firearms safety is unrivaled anywhere in the nation;

New Jersey was the first state to require retail dealers to include, as part of every handgun sale, either a State Police approved trigger lock or a locked case, gun box, container or other secure facility;

To encourage all firearms owners to practice safe storage, the State has waived all sales taxes on trigger locks, firearms lock-boxes and vaults and, under the "KeepSafe" program, offers an instant \$5 rebate to all retail firearms purchasers who buy a compatible trigger locking device along with their firearm;

New Jersey was the first state to require all firearms dealers to prominently display State-provided firearms information and safety warnings;

New Jersey was one of the first states to make parents and guardians statutorily responsible for unwittingly or carelessly permitting minors under their control to gain access to loaded firearms;

New Jersey statutorily prohibits anyone under the age of 18 years from purchasing or otherwise acquiring a firearm and permits such minors to possess or carry a firearm only in a very limited number of strictly defined situations and under the direct supervision of a qualified parent, guardian or instructor;

To enforce this *strict regulatory scheme*, New Jersey imposes harsh penalties, including a mandatory minimum prison term of three years, on anyone who knowingly sells, transfers or gives a firearm to a person under the age of 18 years....
[emphasis added]

b. The Legislature, therefore, declares:

It is within the public interest, and vital to the safety of our families and children, for New Jersey to take the bold

and innovative step of fostering the development of personalized handguns by firearms manufacturers. To accomplish this objective, the Legislature determines that it should enact legislation designed to further enhance firearms safety by requiring that, within a specified period of time after the date on which these new personalized handguns are deemed to be available for retail sales purposes, no other type of handgun shall be sold or offered for sale by any registered or licensed firearms dealer in this State.