

ASSOCIATION OF NEW JERSEY RIFLE  
& PISTOL CLUBS, INC.;  
CASO'S GUN-A-RAMA, INC.;  
LISA M. CASO; and SCOTT L. BACH,

Plaintiffs-Respondents,

vs.

THE CITY OF JERSEY CITY;  
JERRAMIAH T. HEALY, MAYOR OF  
JERSEY CITY; and THOMAS COMEY,  
CHIEF OF POLICE OF JERSEY CITY,

Defendants-Petitioners,

and

ASSOCIATED COMMUNITY  
ORGANIZATIONS FOR REFORM NOW  
(ACORN NEW JERSEY), GREENVILLE  
CHAPTER

Defendant-Intervenor.

**SUPREME COURT OF NEW JERSEY**  
**DOCKET NO: 63385**

ON APPEAL FROM THE SUPERIOR  
COURT OF NEW JERSEY,  
APPELLATE DIVISION

DOCKET NOS.: A-4443-06T2  
A-4708-06T2

CIVIL ACTION

Sat Below:  
Honorable Judges Stern, C.L.  
Miniman and Kestin

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**BRIEF OF AMICI CURIAE LEGAL COMMUNITY AGAINST VIOLENCE, BRADY  
CENTER TO PREVENT GUN VIOLENCE, AND CEASEFIRE NJ**

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## I. IDENTITY AND INTEREST OF AMICI

Legal Community Against Violence ("LCAV"), the Brady Center to Prevent Gun Violence ("Brady Center"), and Ceasefire NJ are non-profit organizations dedicated to reducing gun violence.

Founded by attorneys after an assault weapon massacre at a San Francisco law firm in 1993, LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV has special expertise in the area of state preemption of local gun regulations as a result of its long experience with firearm-related legislation and litigation. LCAV assists municipalities around the country in drafting local firearms ordinances to respond to community needs.<sup>1</sup>

The Brady Center's Legal Action Project is the country's only public interest law firm representing gun violence victims, defending gun laws, and advocating for stronger gun laws. The Brady Center has filed numerous amicus briefs in cases involving the constitutionality, interpretation, and legality of firearms laws, including preemption cases. The Legal Action Project

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<sup>1</sup> As an amicus, LCAV has provided informed analysis of the legal bases for a variety of laws to reduce gun violence. See, e.g., District of Columbia v. Heller, 554 U.S. \_\_\_, 128 S. Ct. 2783 (2008); Klein v. Leis, 795 N.E.2d 633 (Ohio 2003); Great W. Shows, Inc. v. County of Los Angeles, 44 P.3d 120 (Cal. 2002).



successfully represented two New Jersey police officers who were shot with a gun sold to a trafficker in a multiple sale that would have been prohibited by a one handgun a month law.

Ceasefire NJ, through its legislative advocacy, public awareness outreach, and community organizing, has played an important role in creating New Jersey's gun laws.

LCAV, the Brady Center, and Ceasefire NJ submit this supplemental brief pursuant to New Jersey Court Rule 1:13-9.

## **II. STATEMENT OF THE CASE**

The issue before this Court is whether Jersey City's "one handgun per month" ordinance (the "Ordinance") is a proper exercise of Jersey City's broad home rule authority, or whether it is preempted by N.J.S.A. 2C:58-1 et seq. (2009) (the "Firearms License Law" or the "Statute"). In answering this question, the court below ignored the Legislature's explicit grant of authority to municipalities to regulate firearms sales, N.J.S.A. 40:42 et seq. (2009) (the "Home Rule Act"), and held, to the contrary, that the Legislature impliedly intended to preempt the field of firearm sales. Indeed, the court broadly read the Firearms License Law to preempt restrictions on a subject on which the Statute is silent -- the frequency of handgun purchases and sales.

But New Jersey's Constitution and Home Rule Act expressly direct courts to construe statutes to maximize municipal power

and, as a corollary, avoid preempting local ordinances. Amici urge this Court to correct the lower court's failure to follow that mandate.

In addition, the court below looked to the "effectiveness" of Jersey City's Ordinance, thus contradicting this Court's jurisprudence and New Jersey's Constitution. This inquiry was concocted in plain violation of existing law and the New Jersey Constitution.

Amici respectfully submit that this Court should clarify New Jersey's preemption and home rule standards by articulating a rule that allows New Jersey's local governments to enact common sense firearms laws, and to predict when a proposed ordinance oversteps local authority and thus will be preempted. In addition to the benefits such a rule would provide to local governments, it would also reinforce New Jersey's unique values and priorities, as articulated in its Constitution and statutes.

### III. FACTS AND PROCEDURAL HISTORY

Amici curiae adopt the statement of facts and procedural history presented by Intervenor ACORN in its Supplemental Brief on the Merits.

### IV. ARGUMENT

The court below liberally interpreted the state Statute against Jersey City and in favor of preemption. The court compounded this mistake by assuming that the Legislature had an

unstated intent to preempt the field of "firearm purchase and sales" that could trump the Legislature's express grant of authority to municipalities to "[r]egulate and prohibit the sale and use of guns, pistols, firearms[.]" Ass'n of N.J. Rifle & Pistol Clubs v. City of Jersey City, 402 N.J. Super. 650, 659 (App. Div. 2008) ("Order"); N.J.S.A. 40:48-1(18) (2009). The decision below thus violates the Constitution, the Home Rule Act, and this Court's canons of statutory interpretation.

**A. New Jersey's Constitution And Home Rule Act Require Courts To Interpret Statutes In Favor Of Broad Municipal Authority.**

New Jersey's Constitution grants local governments both express and implied powers, and requires liberal construction of statutes in favor of Home Rule:

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, § VII ¶ 11 (emphases added).

The Constitution's home rule mandate is buttressed by the Constitution's express prohibition on state legislation regarding local issues. N.J. Const. art. IV, § VII ¶ 7 (prohibiting the Legislature from passing a general law of "private, special or local character"); ¶ 8 (prohibiting the

Legislature from passing a "private, special or local law" without following special notice requirements); ¶ 9 (removing from the Legislature the power to pass laws of "private, special or local character" on certain topics).

The Home Rule Act articulates the Legislature's approval of municipal authority to regulate firearms: "The governing body of every municipality may make, amend, repeal and enforce ordinances to...[r]egulate and prohibit the sale and use of guns, pistols, firearms, and fireworks of all descriptions." N.J.S.A. 40:48-1(18) (emphasis added); see generally N.J.S.A. 40:42 et seq. The Home Rule Act also reinforces the constitutional rule of construction in favor of municipal authority: "all courts shall construe the same most favorably to municipalities, it being the intention to give all municipalities to which this subtitle applies the fullest and most complete powers possible over the internal affairs of such municipalities for local self-government." N.J.S.A. 40:42-4 (emphasis added).

Jersey City enacted the Ordinance pursuant to the express grant of home rule power to "regulate and prohibit the sale...of guns [and] pistols." N.J.S.A. 40:48-1(18); see Jersey City Code, Ch. 163, Art. V, City Ordinance 06-116, ("Ordinance Supplementing Chapter 163 (Firearms and Weapons): Prohibiting

The Sale Or Purchase Of More Than One Handgun Within A 30-Day Period").

**B. The Legislature's Express Grant Of Home Rule Authority Cannot Be Overcome Except By Specific Statutory Provision Or An Actual Conflict.**

**1. New Jersey's Canons Of Statutory Interpretation Favor Home Rule.**

Legislative intent is the touchstone of the preemption analysis. See, e.g., Twp. of Chester v. Panicucci, 62 N.J. 94, 101 (1973) (noting that the key question is "one of determining the intent of the Legislature"). The Overlook Terrace framework provides guidance in determining legislative intent:

1. Does the ordinance conflict with state law, either through a conflict in policy or operational effect?
2. Did the Legislature intend for the state law to be exclusive in its field?
3. Does the subject matter demonstrate a need for statewide uniformity?
4. Is the state scheme of regulation so pervasive or comprehensive that the state scheme could not coexist with additional municipal regulation?
5. Does the local ordinance act as an obstacle to the realization of the Legislature's purposes?

Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of W. New York, 71 N.J. 451, 461-62 (1976).

Fundamentally, however, legislative intent is determined through the text of the statute, and courts look beyond the statute itself only if the text is not clear. See D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119 (2007); see also

Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 264 (2008) ("we look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen"); accord Manalapan Holding Co. v. Planning Bd. of Hamilton, 92 N.J. 466, 477-78 (1983) (reading two statutes to avoid conflict and thus avoid implied repeal); Swede v. City of Clifton, 22 N.J. 303, 317 (1956) ("[T]here is a presumption...against an intent to effect a repeal of legislation by mere implication.").

Accordingly, where the Legislature has enacted an express directive, that express directive must prevail over speculation about the Legislature's intent. See, e.g., Pizzullo, 196 N.J. at 264. Thus, if the Legislature has expressly committed a particular decision to state or local authorities -- such as through the Home Rule Act -- that express determination must be honored absent an express Legislative statement to the contrary. See O'Connell v. State, 171 N.J. 484, 488 (2002) (the court shall not "rewrite a plainly-written enactment of the Legislature... [or] presume that the Legislature intended something other than that expressed by way of the plain language").

The Courts "'seek to avoid a statutory interpretation that might give rise to serious constitutional questions.'" State v. Johnson, 166 N.J. 523, 540 (2001), quoting Silverman v.

Berkson, 141 N.J. 412, 416 (1995). Instead, the court below interpreted the Firearms License Law broadly, to conflict unnecessarily with the Ordinance and thus with the Home Rule Act.

**2. Jersey City's Ordinance Is A Valid Expression Of  
The City's Home Rule Powers That Does Not  
Conflict With The Firearms License Law.**

The Home Rule Act allows Jersey City, and other New Jersey municipalities, to "[r]egulate and prohibit the sale and use of guns, pistols, firearms...of all descriptions." See N.J.S.A. 40:48-1(18). Jersey City did exactly this in enacting the one handgun per month rule. Its authority to do so can only be overcome by an express statute to the contrary or an actual conflict with state law. Neither exists.

The court below acknowledged that "the precise means [of regulating handgun sales] chosen by [Jersey City] are not found in state law or regulation," but held that "the manner in which [Jersey City's means of regulation] impact on the State law licensing scheme could not be more direct." Order at 12. The court below further held that Jersey City's Ordinance "operationally contradicts the statewide scheme that permits any number of handguns to be purchased with no time limitation as long as the purchaser obtains a separate permit for each purchase." Order at 12. See N.J.S.A. 2C:58-3(f)&(i) . Amici respectfully disagree.

Neither subsection (f) nor (i) of the Statute conflicts with the Ordinance - operationally or otherwise. The Firearms License Law only forbids municipalities from changing the "form or content" of the handgun permit application. N.J.S.A. 2C:58-3(f) (emphasis added). On its face, the Ordinance does not change the "form or content" of the application form; it does not add additional requirements for the licensing authority; it does not affect the validity of gun permits; it does not cause the delivery of more than one handgun per permit, nor does it restrict the number of rifles or shotguns an individual may purchase.

"Operationally," the Ordinance limits the frequency of handgun purchases. This is consistent with the Legislature's "overriding philosophy...to limit the use of guns as much as possible," (State v. Sima, 142 N.J. 187, 192 (App. Div. 1976)), and with the baseline regulation set forth in the Firearms License Law that "[o]nly one handgun shall be purchased or delivered on each permit." N.J.S.A. 2C:58-3(i). As this Court held in Twp. of Chester v. Panicucci, "the quoted prohibitions...are narrow and if the claim of state preemption of the subject is thereby upheld, no municipality could adopt any more stringent regulation...to better protect its citizens." 62 N.J. 94, 101 (1973) (emphasis added). Thus, "[w]hile the local legislation cannot conflict with state law...[a



municipality may], dependent on local conditions and pertinent circumstances, enact more stringent regulation in the field so long as such regulation is not unreasonable." Id. at 102 (emphasis added). That is precisely what Jersey City has done here -- enact a "more stringent regulation" of handgun sales that does not conflict with the State's permitting laws.<sup>2</sup>

Because it can be read and followed in harmony with state law, and in light of the Constitutional requirement that laws be read to favor home rule, the Ordinance is not preempted.

### **3. Jersey City's Ordinance Is Not Preempted by Implication.**

The trial court ruled that there was "a sufficiently strong indication of state legislative intent to preempt the particular area [of]...firearms purchase and sale." Order at 13. But the Legislature expressly granted Jersey City the right to regulate or prohibit the sale of guns. See N.J.S.A. 40:48-1(18). Rather than point to a statute expressly repealing or limiting this grant of power, the court below held that, due to the supposedly

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<sup>2</sup> This conclusion is amply supported by the Legislature's express distinction between handgun sales -- only one per permit -- and sales of rifles and shotguns -- which "shall not be restricted." N.J.S.A. 2C:58-3(i). It is further expressed by the fact that the Legislature did expressly preempt certain local action -- additions to the "form and content" of the application -- but not the local regulation of sales at issue here.

"comprehensive" nature of state firearms regulation, the Legislature must have intended to preempt the field of firearms regulation. Order at 11 ("the ordinance at issue seeks to impose a local standard in a subject matter area that has been rather comprehensively addressed by the State"). It cannot be, however, that the Legislature would expressly grant municipal authority on the one hand, and then take that express authority away by implication. The lower court's holding turns a basic canon of statutory interpretation on its head. See N.J.S.A. 40:48-1(18); Manalapan Holding Co., 92 N.J. at 477-78.

Thus, the lower court's broad construction of the Firearms License Law to find preemption directly conflicts with the Constitution's rule of interpretation: municipal powers must be read broadly and, conversely, limitations thereon must be read narrowly. See Garden State Farms, Inc. v. Bay, 77 N.J. 439 (1978) ("It is recognized, however, because our State Constitution enjoins a liberal construction of legislation in favor of local authority, Art. IV, § 7, para. 11, legislative intent to supersede local powers must clearly be present."). If a statute can be read to either preempt a local ordinance or to permit it, the court must uphold the ordinance under the directive to "liberally" construe municipal powers. See N.J. Const. art. IV, § VII ¶ 11.

Even if the lower court's assessment of the Legislature's implied policy could preempt the Legislature's express directive regarding municipal authority -- which it cannot -- the Statute's and Ordinance's purposes do not conflict. The Firearms License Law's purpose was to effectuate "New Jersey's commitment to firearms safety[, which] is unrivaled anywhere in the nation." N.J.S.A. 2C:58-2.2(a). Jersey City's Ordinance furthers this commitment to safety. Ordinance 06-116.

Finally, not only did the court below wander from the text of the Home Rule Act and the Constitution, but in finding the Ordinance to be preempted, it articulated its own policy considerations. Order at 12 (looking to the Ordinance's supposed "effective[ness] to promote public health, safety or welfare"). Assessment of an ordinance's "effectiveness" has no place in preemption analysis, nor can it have any place in preemption analysis without violating the separation of powers or the Constitution's emphasis on local authority.<sup>3</sup>

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<sup>3</sup> The Ordinance is, however, an effective way to reduce gun trafficking and gun violence. Because the state does not limit the number of guns that may be purchased at once, gun traffickers can buy an unlimited number of handguns to resell in the criminal market. Studies show that handguns sold in multiple sales to the same individual purchaser are frequently used in crime. Indeed, 20% of retail handguns recovered in crime were purchased as part of a multiple sale. Legal Community Against Violence, Restriction on Multiple Purchases

[Footnote continued on next page]

C. This Case Provides An Opportunity To Clarify Preemption Jurisprudence To Increase Its Objectivity And Predictability.

Amici respectfully submit that, where there is an express grant of municipal authority, this Court should clarify New Jersey's preemption analysis by limiting preemption to either express statements of legislative intent to preempt, or actual conflict between local and state law.

If, as here, a local ordinance is based on an express legislative grant of authority, preemption is only appropriate if the Legislature has expressly preempted the specific subject of the ordinance. Otherwise, an express statement by the Legislature of its intent to allow municipalities to regulate in the field could be overcome by a court's subjective belief that the Legislature impliedly meant something different than what is actually said. Rather, the court must give effect to the Legislature's express directive. Thus, only where the express grant of power by the Legislature is superseded by a subsequent express limitation or revocation, or the municipality has passed

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[Footnote continued from previous page]

or Sales of Firearms (2008), available at [http://www.lcav.org/content/multiple\\_purchases\\_sales.pdf](http://www.lcav.org/content/multiple_purchases_sales.pdf). One handgun a month laws have been proven effective at reducing gun trafficking. See Douglas S. Weil & Rebecca C. Knox, Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms, 275 J.A.M.A. 1759 (1996).

a law in actual conflict with state law, is invalidation of the ordinance on preemption grounds proper.

This Court's express articulation of this standard would allow courts, litigants, municipalities and the Legislature to more reliably predict the limits of local authority. The court below in this case found that the Legislature intended preemption despite the Legislature's express approval of municipal-level regulation, and the absence of any statutory authority suggesting intent to limit local rights. This case demonstrates the risk of subjective application of Overlook Terrace's flexible test and misuse of the embedded reference to implied repeal, at the expense of the New Jersey Constitution and Home Rule Act.

**1. Limiting Implied Preemption Will Simplify The Preemption Framework.**

Overlook Terrace's implied preemption analysis has been applied in a variety of ways by lower courts.<sup>4</sup> Although courts

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<sup>4</sup> See, e.g., City of Ocean City v. Somerville, 403 N.J. Super. 345, 358 (App. Div. 2008) ("The Legislature may indicate the intent behind a particular statute not only by its language, but also by its place in the overall 'statutory scheme' and by the scheme's legislative history.") (citations omitted); C.I.C. Corp. v. Twp. of East Brunswick, 266 N.J. Super. 1, 7 (App. Div. 1993) ("In evaluating a state preemption argument in the absence of an expressed preclusion of a municipal authority, a court must carefully examine in detail the actual ways in which the state and municipal ordinances conflict.

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begin their analyses by reciting the Overlook Terrace questions, the weight given to a particular factor can vary from one decision to another.<sup>5</sup> In practice, courts may recite, but then abandon the factors.<sup>6</sup>

As these cases demonstrate, clarification of the Overlook Terrace test would benefit courts and litigants. In many cases, the court does not need to go beyond a determination of express preemption or conflict preemption. In such cases, as described

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The question is, in every practical sense, as much one of fact as one of law.") (quoting Mannie's Cigarette Serv., Inc. v. W. New York, 259 N.J. Super. 343, 348 (App. Div. 1992))

<sup>5</sup> Compare, e.g., Garden State Farms, 77 N.J. at 450 ("A legislative intent to preempt a field will be found either where the state scheme is so pervasive or comprehensive that it effectively precludes the coexistence of municipal regulation or where the local regulation conflicts with the state statutes or stands as an obstacle to a state policy expressed in enactments of the Legislature.") with United Bldg. & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 344 (1982) ("The ultimate question is whether, upon a survey of all interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act." (quoting Summer v. Teaneck, 53 N.J. 548, 555 (1969))), rev'd on other grounds, 465 U.S. 208 (1984).

<sup>6</sup> See, e.g., City of Ocean City, 403 N.J. Super. at 356-57 (naming the five factors but devoting no analysis to any); State v. Crawley, 90 N.J. 241, 249-250 (1982) (same).

below, Overlook Terrace can be applied in harmony with the text and purpose of the Constitution and Home Rule Act.

First, some cases are readily decided based upon an express statement of legislative intent, which makes further preemption analysis unnecessary. E.g., Crawley, 90 N.J. at 243-44 (comparing express statutory preemption with the express grant of municipal power in the Home Rule Act)<sup>7</sup>; Middlesex County Health Dept. v. Middlesex County Utilities, 260 N.J. Super. 588, 590 (App. Div. 1992) ("The statute, by its plain terms, clearly exempts the utilities authority from local regulation.").

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<sup>7</sup> Plaintiffs misinterpreted Crawley below. See Brief of Plaintiffs Association of New Jersey Rifle & Pistol Clubs, Inc. to Appellate Division. Crawley concerned an ordinance that purported to criminalize loitering within a municipality. 90 N.J. at 243. The New Jersey Criminal Code did not criminalize loitering.

The Crawley court relied on the "preemption by exclusion" doctrine to conclude that "[m]unicipal counterparts to Code provisions cannot be allowed as they would defeat 'the express legislative policy of limiting overlapping and redundant provisions from the criminal law.'" 90 N.J. at 251. Thus, a legislative intent to exclude local legislation from areas covered by the Code is inferred. Ibid.

But this case does not present any "overlapping [or] redundant provisions" between the Ordinance and the Firearms Licensing Law -- the former addresses the frequency of handgun sales, while the latter addresses firearms licensing. See Part IV.B.2, supra.

Second, conflict preemption cases can be similarly clear. Either the statute and ordinance contradict each other, or they can coexist. E.g., Mack Paramus Co. v. Mayor of Paramus, 103 N.J. 564, 576 (1986) (finding no preemption because the municipality could comply with both its own ordinance and the statute); Plaza Joint Venture v. Atlantic City, 174 N.J. Super. 231, 242 (App. Div. 1980) (finding preemption because "[t]he conflict between the state legislation and municipal Ordinance...is patent"). As explained in part IV.B.2, supra, the Firearms License Law and the Ordinance coexist without conflict. The Statute addresses the procedures and qualifications for obtaining a handgun permit, but does not directly address the sale of handguns. N.J.S.A. 2C:58-3(f). The Ordinance does not address the right to receive a permit, and instead exclusively regulates the sale of handguns. Ordinance 06-116.<sup>8</sup>

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<sup>8</sup> The Legislature recently debated adopting a law essentially identical to the Ordinance. It did not propose revising any other provision of state law, including the permitting language, in order to accommodate this proposed change. The fact that the Legislature recently proposed adding Jersey City's sale restrictions to the Firearms License Law without changing permitting rules further demonstrates that the Ordinance in no way conflicts with the Firearms License Law as written. See Senate Bill No. 1774 (Dec. 8, 2008).



It is in the cases where the courts find no express or conflict preemption, but instead resort to "implied" preemption analysis, that the application of the Overlook Terrace factors is most challenging and unpredictable. Even where the Home Rule Act does not explicitly grant authority, as it does in this case, the overarching presumption of the Constitution and Home Rule Act still applies to give municipalities the broadest possible power. In light of these authorities, courts applying Overlook Terrace must presume that local ordinances are not preempted. See Mannie's, 259 N.J. Super. at 347; Jersey City Incinerator Auth. v. Dep't of Public Utils., 146 N.J. Super. 243, 254 (App. Div. 1976).

As with the court below, a court analyzing implied preemption may erroneously resort to subjective policy analysis as a means of "finding" legislative intent. E.g., Ocean City, 403 N.J. Super. at 372 ("[T]he Legislature's comprehensive regulation of the field of municipal spending leaves no room for an inference that it has ceded any more authority to a municipality's governing body or its voters than its enactments expressly or necessarily provide."); Chester v. Dep't of Env. Prot., 181 N.J. Super. 445, 451 (App. Div. 1981) (finding preemption based on a "requirement for uniform statewide treatment of th[e] subject matter...reflected in the legislative findings and declaration of policy"); Ass'n of New Jersey Rifle

& Pistol Clubs, 402 N.J. Super. at 656 ("the Legislature's intent in this regard must usually be inferred from the context of its enactment and...a sense that the Legislature intended to occupy the whole subject matter field").

Simply put, where the Legislature has expressly granted authority to municipalities to regulate a certain subject-matter, there is no place for a court to second-guess that regulation based on the court's own subjective policy analysis. Amici respectfully submit that this Court should clarify the test to remove such a subjective and unpredictable element from its preemption jurisprudence.

**2. Federal Courts And Scholars Emphasize The Merits Of Express Preemption.**

The test Amici urge this Court to adopt is in accord with the direction being taken in the federal courts and among scholars toward limited preemption and heavier reliance on express and conflict preemption, rather than the murkier waters of "implied" preemption. See, e.g., Paul Diller, Intrastate Preemption, 87 B.U. L. Rev. 1113, 1117 (2007) (arguing for a limited judicial role in deciding implied preemption questions); Briffault, supra at 265 (arguing that courts should require Legislatures to make preemption express instead of engaging in implied preemption analyses); Stephen Gardbaum, Rethinking Constitutional Federalism, 74 Tex. L. Rev. 795, 828-30 (1996)

(arguing that the U.S. Constitution requires that any field preemption be express). Cf. Crawley, 90 N.J. at 245 ("Application of [implied preemption analysis] presents the judiciary with a difficult task."). It is appropriate for this Court to take notice of this progression in federal preemption doctrine and among scholars. See Overlook Terrace, 71 N.J. at 466-67 (discussing federal case law).

As these authorities have recognized, in contrast to express preemption and conflict preemption, implied preemption typically requires a subjective inquiry. Daniel J. Meltzer, The Supreme Court's Judicial Passivity, 2002 Sup. Ct. R. 343, 365 (2002) (discussing Supreme Court implied preemption cases and calling implied preemption analysis "a range of policy-laden judgments that cannot be accommodated to textual interpretation"). Because of this "range of policy-laden judgments," parties and courts can reasonably disagree as to whether a particular law is preempted, decreasing predictability for lawmakers and local governments and increasing resort to the courts.

"[T]he [U.S. Supreme] Court has grown increasingly hesitant to read implicit field-preemption clauses into statutes." Nelson, supra, at 228 (citing cases); see also Wyeth v. Levine, 555 U.S. \_\_\_, No. 06-1249, slip op. at 17-18 (Mar. 4, 2009) (finding no preemption and rejecting both a claim that a federal

and state statute unavoidably conflicted and that the state statute frustrated the federal policy goal); see also, id. at 31, 37-38 (Thomas, J., concurring in the judgment and discussing Nelson, supra at 235-36) ("[I]mplied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution.").

Further, and consistent with the New Jersey Constitution and the test recommended by Amici, the U.S. Supreme Court has recently articulated a general reluctance to find preemption. For example, if a statute is susceptible to two readings, one that would preempt and one that would not, "courts ordinarily 'accept the reading that disfavors pre-emption.'" Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008) (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 439 (2005)). Similarly, the federal courts hold to the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (cited with approval in Altria Group, 129 S. Ct. at 543; Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1013 (2007)).<sup>9</sup>

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<sup>9</sup> There is no doubt that states may regulate above the minimum floor of firearms safety laws set by the federal government. See, e.g., Printz v. United States, 521 U.S. 898, 919-920

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The instant case amply demonstrates that this subjective approach -- increasingly eschewed by the federal courts but inherent in the Overlook Terrace framework -- can result in a subjective misapplication of preemption. In the area of gun violence, current preemption jurisprudence can have a chilling effect on local action, contrary to New Jersey's policy in favor of strong gun violence prevention. State v. Sima, 142 N.J. Super. 187, 192 (App. Div. 1976) ("It is the overriding philosophy of our Legislature...to limit the use of guns as much as possible.") (quotation omitted).

A narrow preemption doctrine -- such as that urged by Amici and increasingly favored by the federal courts -- serves the needs of all interested constituents: Legislatures have clearer guidance as to how laws will be interpreted, courts can more easily apply the law, and municipalities can more reliably predict whether an ordinance will be preempted, thus avoiding spending scarce resources on litigation.

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(1997) (explaining that firearms regulation is an area where states have sovereignty); Richmond Boro Gun Club v. City of New York, 896 F. Supp. 276, 285 (E.D.N.Y. 1995) aff'd 97 F.3d 681 (2d Cir. 1996) (noting that Congress has not preempted state and local firearms laws); see also Gregg Lee Carter, Gun Control in the United States 168 (2006) ("Federal gun control laws do not preempt those at the state level. Rather, federal laws set the minimum standard for all states.").

**D. The Cases Cited In The Brief Of The National Rifle Association Are Readily Distinguishable From The Instant Case.**

The brief filed by the National Rifle Association ("NRA") spends considerable time and effort building up a straw man on the basis of a few sentences in the LCAV Certification Brief. Brief of Amicus Curiae National Rifle Association ("NRA Brief") at 14-17, citing Brief of Amicus Curiae Legal Community Against Violence in Support of Petition for Certification ("LCAV Certification Brief") at 13-14.

Not only does the NRA's vigorous and lengthy attack on this straw man go well beyond its target, but more importantly, the NRA's characterization of the cases discussed is wrong. In every single case cited in pages 13-17 of the NRA brief, local regulation of firearms was expressly prohibited by the state legislature -- in contrast to New Jersey which expressly permits local regulation of firearms.<sup>10</sup> Furthermore, these cases arose

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<sup>10</sup> See Fiscal v. City and County of San Francisco, 158 Cal. App. 4th 895, 905, 910 (Cal. Ct. App. 2008) (Statute described in Sippel, infra) ("[T]he Legislature has never expressed an intent to preempt the entire field of firearm regulation to the exclusion of local control. The Legislature, instead, has chosen to preempt discrete areas of gun regulation. That state law tends to concentrate on specific areas, leaving unregulated other substantial areas relating to the control of firearms, indicates an intent to permit local governments to tailor firearms legislation to the particular needs of their communities." (citations omitted)); Sippel v. Nelder, 24 Cal.

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App. 3d 173, 177 (Cal. Ct. App. 1972) ("It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision."); Doe v. City and County of San Francisco, 136 Cal. App. 3d 509, 514 (Cal. Ct. App. 1982) (same statute as Sippel, supra, applying to an ordinance held to de facto regulate the licensing of firearms); Dwyer v. Farrell, 193 Conn. 7 (1984) (State statute specifically regulated sales of handguns, C.G.S.A. § 29-31); City of Chicago v. Haworth, 303 Ill. App. 3d. 451, 455-456 (Ill. App. Ct. 1999) ("The power to regulate the private detective, private security, private alarm, or locksmith business shall be exercised exclusively by the State and may not be exercised by any unit of local government including home rule units."); Cherry v. Municipality of Metro. Seattle, 116 Wash. 2d 794, 799 (1991) ("The State of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state...."); Ortiz v. Commonwealth, 545 Pa. 279, 283 (1996) ("No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms...."); Doe v. Portland Housing Auth., 656 A.2d 1200, 1202 (Me. 1995) ("The state intends to occupy and preempt the entire field of legislation concerning the regulation of firearms, components, ammunition and supplies...."); Schneck v. Philadelphia, 383 A.2d 227, 229 (Pa. Cmwlth. 1978) (same statute as Ortiz, supra); Mich. Coal. for Responsible Gun Owners v. City of Ferndale, 256 Mich. App. 401, 413-414 (Mich. App. 2003) ("Unlike some other statutes, [the state Act] does not use language to the effect that the act occupies the whole field of regulation, but rather expressly removes the power of local units of government to regulate in the field."); Nat'l Rifle Ass'n v. City of South Miami, 812 So. 2d 504, 505 (Fla. 2002) ("[T]he Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition..., to the exclusion of all existing and future county, city, town or municipal ordinances and regulations relating thereto."); Montgomery County v. Atlantic Guns, Inc., 302 Md. 540, 543 (1985) ("[A]ll restrictions imposed by the law, ordinances, or regulations of

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in states without express home rule authority in the area of firearms regulation -- again in diametric opposition to this case.

Moreover, in two cases relied on by the NRA, the preempted entities were local agencies, not municipalities. Cherry, 116 Wash. 2d 794 (holding that a municipal employer's authority to prohibit employee's possession of firearms was not preempted); Portland Housing Auth., 656 A.2d 1200 (resolution enacted by local housing authority). Jersey City's authority as a municipality derives directly from the New Jersey Constitution, and the power of an agency, or lack thereof, is irrelevant.

The frailty of the NRA's position is amply demonstrated by its reliance on a straw man, and its further reliance on inapplicable cases to knock that straw man down.

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the political subdivisions on the wearing, carrying, or transporting of handguns are superseded by this Act, and the State of Maryland hereby preempts the right of the political subdivisions to regulate said matters."); Ohioans for Concealed Carry, Inc. v. City of Clyde, 120 Ohio St. 3d 96, 98 (2008) ("No municipal corporation may adopt or continue in existence any ordinance....that attempts to restrict the places where a person possessing a valid license to carry a concealed handgun may carry a handgun concealed."); HC Gun & Knife Shows, Inc. v. City of Houston, 201 F.3d 544, 547 (5th Cir. 2000) ("[A] municipality may not adopt regulations relating to the transfer, private ownership, keeping, transportation, licensing, or registration of firearms, ammunition, or firearms supplies.").



## V. CONCLUSION

New Jersey's Constitution and the Home Rule Act, as well as this Court's decisions, give municipalities great leeway to advance handgun safety, as long as there is no express statement of preemption or actual conflict with state law. There is no such conflict here. Under this Court's test in Overlook Terrace, the Appellate Division erroneously held that Jersey City's ordinance is preempted.

Further, this case presents an opportunity for this Court to clarify existing preemption jurisprudence to avoid aberrant results like the decision under review. Amici submit that courts should focus on the Legislature's actual language -- did the Legislature expressly preempt the ordinance in question, and can a municipality follow both the ordinance and state law.

This proposed test would provide clearer guidance to the Legislature in drafting state law and to localities in enacting ordinances, resulting in reduced litigation and increased prevention and settlement.

Dated: March 24, 2009

Respectfully submitted,

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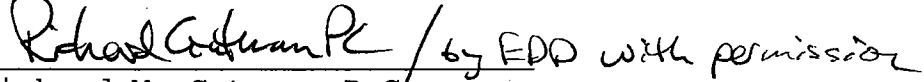
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