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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

**BRIEF OF AMICUS CURIAE LEGAL COMMUNITY AGAINST VIOLENCE
IN SUPPORT OF PETITION FOR CERTIFICATION**

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I. IDENTITY AND INTEREST OF AMICUS

Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, Legal Community Against Violence ("LCAV") is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV tracks and analyzes firearms legislation, as well as legal challenges to firearms laws. LCAV has special expertise in the area of state preemption of local gun regulations and has assisted municipalities around the country in drafting local firearms ordinances to respond to community needs. The Appellate Division granted LCAV leave to appear as amicus curiae in an order filed September 20, 2007.¹

LCAV submits this brief pursuant to New Jersey Court Rule 1:13-9.

II. SUMMARY OF ARGUMENT

While 41 states have enacted statutes that expressly limit the ability of localities to enact gun laws, New Jersey is one of the few states that has not.² On the contrary, handgun regulation

¹ 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).

² See, e.g., Legal Community Against Violence, Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws, 10-15 (2008), at http://www.lcav.org/library/reports_analyses/RegGuns.entire.report.pdf.

is expressly designated as subject to home rule. N.J.S.A. § 40:48-1(18).³ Under this system of dual regulation, the Legislature passes laws creating a baseline level of protection for all citizens and trusts municipalities to create more stringent regulations in response to local conditions. See An Act Concerning Municipalities, Ch. 152, 1917 N.J. Laws. This system fosters innovation, reinforcing the state's goal of creating firearms safety regulation that "is unrivaled anywhere in the nation." N.J.S.A. § 2C:58-2.2. Recognizing the Legislature's express intent and policy aims, this Court allows local regulation beyond the baseline of state firearms laws. See Twp. of Chester v. Panicucci, 62 N.J. 94, 101 (1973).

Notwithstanding the Legislature's clear, express intent to permit municipalities to pass local gun violence prevention ordinances to supplement state law, the court below held that Jersey City's ordinance limiting handgun purchases to one per person per month was preempted by state law. The lower court's decision has the paradoxical result of treating the New Jersey Legislature's express decision not to enact a firearms preemption law as the enactment of a firearms preemption law.

The court below held that one sentence in a state law, restricting the number of handguns that may be purchased with a

³ N.J.S.A. § 40:48-1(18) provides "[t]he 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[.]"

single permit to one handgun per permit, was an express conflict with a one handgun purchase per month ordinance--even though the state legislation was silent on the number of handguns that could or could not be purchased in a given time period, which is the issue addressed by the local ordinance. Slip. op. at 12. The Legislature is currently debating a one handgun per month law, but the bill does not modify the "conflicting language" cited by the court below. This suggests that the Legislature does not believe that the alleged conflict exists.

The court also incorrectly held that the Legislature intended to preempt municipalities from any regulation of firearms sales, through the state's establishment of a permitting requirement, even though the Legislature expressly granted to municipalities the power to regulate firearms sales, and has not enacted a firearms preemption law.

Given the overarching state policies favoring firearms safety and home rule, a decision that substantially limits the ability of municipalities to promote firearms safety through home rule is, in and of itself, a sufficient reason to grant review. However, the need for review in this case reaches far beyond the regulation of firearms. The lower court's preemption analysis departs significantly from the standards that this Court has established. This departure is striking, as the Legislature has expressly authorized municipal regulation of firearms sales. The opinion below will also add to the confusion evidenced by lower

courts' application of Overlook Terrace Management Corp. v. Rent Control Board of the Town of West New York, 71 N.J. 451 (1976). This Court should grant review in order to provide guidance on both the general Overlook Terrace framework, and to clarify how the framework applies in the special case of express delegations of authority through home rule statutes.⁴

III. ARGUMENT⁵

A. Certification Should Be Granted Because The Opinion Below Creates A Split Of Authority As To The Application Of This Court's Preemption Jurisprudence

Preemption has been a living area of jurisprudence, growing and changing to evolve with new challenges brought over the years. This Court's seminal preemption formulation, set forth in Overlook Terrace, relies upon five factors: (1) the likelihood of conflict; (2) legislative intent that the state law be exclusive; (3) the need for uniformity; (4) comprehensiveness of the state

⁴ This brief addresses only the Appellate Division's ruling regarding preemption, although amicus shares the view that the ordinance cannot be said to violate equal protection. The trial court substituted its judgment about effective policy measures for those of the municipality and, perplexingly, relied upon the fact that a municipality 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, ¶ 11; N.J.S.A. § 40:48-1(18).

Amicus agrees with the lower court that Heller, 128 S.Ct. 2783 has no bearing on the case. Slip. Op. at 3.

⁵ Amicus adopts the summary of facts and procedural history presented by Defendant Jersey City, and Intervenor ACORN.

scheme; and (5) whether the ordinance is an obstacle to the state's policy aims. 71 N.J. at 461-62. Over time, the courts have increasingly departed from analyzing each factor separately, and instead made a single determination as to the Legislative intent. E.g., Bernardsville Quarry v. Borough of Bernardsville, 129 N.J. 221, 230 (1992); Mack Paramus Co. v. Mayor and Council of Borough of Paramus, 103 N.J. 564, 575-78 (1986).

Because the preemption analysis turns upon case-specific and increasingly nebulous subjective assessments, it is difficult for municipalities to determine accurately whether a proposed ordinance is preempted. Municipalities now face increasing, unreasonable pressure not to pass ordinances intended to further state legislative aims, for fear of protracted--and thus costly--litigation. Indeed, the ordinance at issue is expressly within the scope of New Jersey's Home Rule statute, yet has still triggered litigation and appeals to this Supreme Court.

Likewise, the Legislature itself has not received clear direction as to what language it must use to preempt, or shield from preemption, a particular area of state law. For example, with respect to firearms regulation, the Legislature has expressly sanctioned home rule and further stated its intent to be a leader in the field of gun violence prevention--evidencing an intent not to preempt the field of firearms regulation. Yet the court below found otherwise. So too, the Legislature has never adopted a law that would expressly preempt or directly

conflict with a one-handgun-per-month ordinance. Indeed, the one-handgun-per-month legislation that is currently pending in the Legislature adopts the language of the Jersey City ordinance and does not modify any existing statutory language--even though the court below purportedly found a conflict between the two. The current state of the law thus hobbles the Legislature's attempts to effectuate its policy aims with regard to preemption and home rule.

In light of the differing approaches taken by the courts in analyzing preemption, the seemingly disparate outcomes reached, and the resulting lack of clarity provided to both state and local legislators, there is a need for new guidance from this Court. However, in revisiting the framework, this Court has a ready solution: The New Jersey courts have already coalesced around a related test with the same outcome, but with greater predictive power and resulting clarity.

This implicit common approach focuses upon whether a comprehensive state scheme furthers a particular policy goal, or is a careful balancing of competing policy considerations. On the one hand, a statute may simply set a minimum or maximum, creating a statewide baseline. Additional municipal regulations are not an obstacle to or in conflict with the state's policy, but instead further it, because the law was not intended to be exclusive but instead to set a baseline in an area as to which uniformity was not required. See Mack Paramus, 103 N.J. at 576;

Panicucci, 62 N.J. at 102; Kennedy v. City of Newark, 29 N.J. 178, 190 (1959).

On the other hand, a statute may set both a minimum and maximum, or a precise tolerance range within which actors must operate. Such a comprehensive state regulatory framework reflects a careful balancing of competing concerns that set a baseline and ceiling as to regulation. Such an action is presumed to have been intended to be exclusive and to have required uniformity; any municipal regulation by definition is either identical (in which case it has no effect) or it differs--in which case it conflicts with the state law and thus is an obstacle to the state's policy aims. See G.H. v. Twp. of Galloway, 401 N.J. Super. 392 (App. Div. 2008); Tumino v. Long Beach Twp., 319 N.J. Super. 514, 528 (App. Div. 1999).

Under this emerging test, municipalities have been allowed to regulate beyond state statutory baselines if the municipal regulation either furthered state policy or was not expressly prohibited by statute--on the basis that such regulations did not conflict with state law but rather advanced its intent. In contrast, if a court found that the Legislature enacted a comprehensive scheme which carefully balanced countervailing considerations--showing a need for uniformity--then the Legislature is presumed to have intended to occupy the field and the ordinance is preempted. This approach reconciles the existing case law, and simultaneously provides a test that cities can more

easily apply to discern in advance whether a proposed ordinance is valid or preempted. The decision below ignores this trend, creating a split of authority that threatens to undermine this clarity--and the guidance it provides to cities considering more stringent local regulations.⁶

B. Certification Should Be Granted Because This Case Presents The Opportunity To Clarify Overlook Terrace, And Clarify Its Application To Acts Expressly Granting Municipalities The Power To Regulate

1. The Decision Below Erred As To The Weight Given To Constitutional And Statutory Grants Of Home Rule Powers

Pursuant to New Jersey's Constitution, regulatory powers

⁶ Applying this test, the Jersey City ordinance is not preempted by state law. As this Court has noted, the Legislature's intent in passing the Gun Control Law was "to prevent criminals and other unfit elements from acquiring firearms." Burton v. Sills, 53 N.J. 86, 93 (1986). "It is the 'overriding philosophy of our Legislature...to limit the use of guns as much as possible.'" State v. Sima, 142 N.J. Super. 187, 192 (App. Div. 1976), quoting State v. Valentine, 124 N.J. Super. 425, 237 (App. Div. 1973). The Legislature never noted any countervailing interests. Because the Legislature was only setting a baseline level of regulation, additional restrictions by the municipalities are consonant with this intent.

Application of the Overlook Terrace factors supports this conclusion. The Legislature has not expressed an intent to occupy the field of firearms purchases and sales, and there is no conflict between the ordinance and state law. Indeed, state law only regulates the number of handguns that may be purchased per permit, while the ordinance regulates the frequency of handgun purchases and sales. Moreover, the ordinance advances the state policy of firearms safety by preventing bulk handgun sales frequently employed by traffickers to supply criminals. Finally, the Legislature did not engage in any careful balancing of interests, and the ordinance does not upset or frustrate the permitting and licensing framework established by the state.

granted to a municipality must be broadly and liberally construed. N.J. Const. art. IV, § 7, ¶ 11. The ordinance at issue in this case was authorized not only by the general grant of police powers, but also by a further, specific grant of power to "[r]egulate and prohibit the sale and use of guns, pistols, [and] firearms." N.J.S.A. 40:48-2, 40:48-1(18).

Despite the Legislature's express grants of power to municipalities to regulate firearms sales, the court below found that, because "the precise means chosen by the City are not found in state law or regulation," Jersey City was preempted from regulating in the area. Slip. op. at 12, 15. The court further found that the express grant of home rule power to the municipalities to regulate the sale of firearms in excess of the statewide baseline had been impliedly repealed by the state's enactment of robust permitting regulations. Ibid. Thus, the test promulgated by the court below gave no deference to the existence of an express home rule provision, and instead found that a comprehensive regulatory framework existed, the state must again expressly grant municipalities the right to regulate firearms if it intends its regime to be non-exclusive.

In addition, the court considered a factor that has no proper place in any preemption analysis: the "effectiveness" of the municipal ordinance. It held that the ordinance was not per se barred by the conflict that it (erroneously) held existed with the state statute, but instead, to avoid preemption the city must

additionally show "that the ordinance would be effective to promote public health, safety or welfare in Jersey City" if it is to "var[y] the rules of purchase and sale from what they are under the state's comprehensive gun control laws." Id. at 12-13. There is substantial evidence that the ordinance in question promotes safety and thus should have been upheld even under the lower court's novel analysis.⁷ E.g., N.J.S.B. 1174 (2008) (recognizing that one-gun-a-month laws promote safety). However, the court's error was far more fundamental: in substituting its own judgment as to effectiveness in place of that of the legislative branch, the court below violated the constitutionally mandated separation of powers.

The approach taken by the court below starkly contrasts with the deference accorded in Mannie's Cigarette Service, Inc. v. Twp. of West New York, 259 N.J. Super. 343, 346 (1992). In Mannie's, the plaintiffs challenged a municipal ordinance that

⁷ The ordinance's goal is to reduce gun trafficking and gun violence. Because there is no state limitation on the number of guns that an individual may purchase at once, gun traffickers may 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 or Sales of Firearms (2008), at 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).

regulated and licensed coin-operated amusement games, even though the Legislature had granted municipalities "specific, plenary power" to regulate both "places of public amusement... and the machinery and equipment used therein...." Id. at 347. In rejecting the preemption challenge, the court held:

The intention of the Legislature to not occupy the field of amusement game device control has been clearly expressed in [the Home Rule Act] and has been negated in no other. This being so, in the absence of a clear showing of a real, functional conflict between the operation of the municipal ordinance and state law, there is no basis for holding that the Town of West New York is precluded from legislating in the field of amusement or game device control.

Id. at 350. Thus, the court applied a basic presumption in favor of home rule where the ordinance was passed subject to home rule. Under that presumption, if a statutory or constitutional grant of authority to the municipalities exists that covers the subject matter of the proposed ordinance, the city may regulate unless another provision expressly preempted the Home Rule Act.

In contrast, the approach concocted by the appellate court gave no weight to an express grant of home rule power, declaring it "narrowed" (slip. op. at 13), in violation of this Court's instruction that "[c]ourts are to avoid constructions that make statutory provisions redundant or meaningless." State v. Wright, 107 N.J. 488, 502 (1987). This approach places courts in the position of negating not only the express legislative intent of the Home Rule Act, but also the underlying intent to allow innovation through dual regulation. E.g., N.J.S.A. §§ 40:48-

unrivaled anywhere in the nation." N.J.S.A. § 2C:58-2.2(a).⁸ By expressly codifying dual regulation of firearms sales, the Legislature specifically reinforced this commitment by creating a baseline suitable to both urban and rural communities, while allowing those communities to enact gun restrictions appropriate to their particular circumstances. See N.J.S.A. § 40:48-1(18).

This rationale applies even in areas in which states have not articulated an interest in becoming an "unrivaled" leader in a particular area of regulation. Seven other states presently give local jurisdictions broad authority to regulate firearms. Connecticut, Hawaii, Illinois, Massachusetts, and New York have

⁸ "It is the 'overriding philosophy of our Legislature . . . to limit the use of guns as much as possible.'" State v. Sima, 142 N.J. Super. 187, 192 (App. Div. 1976), quoting State v. Valentine, 124 N.J. Super. 425, 237 (App. Div. 1973). New Jersey has made firearm control a priority for many years - with good reason. In 2004, 454 people died from firearm-related injuries in New Jersey. National Center for Injury Prevention and Control, U.S. Centers for Disease Control and Prevention, WISQARS Injury Mortality Reports, 1999-2004, at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html.

In 2005, Jersey City had the second highest number of murders in New Jersey. Jonathan Miller, The Good and Bad of Crime Statistics, N.Y. Times (Aug. 13, 2006). In June 2006, the New York Times reported that violent crime in Jersey City had risen by 8.4 percent that year, a greater increase in violent crime than in any other major city in the State. Michelangelo Conte, Jersey City May Be Getting Violent Crime Impact Team, Jersey Journal (Jul. 3, 2006). Dpa 84-85. That year, 289 murders were committed using a firearm in New Jersey, 270 using a handgun. Department of Justice, Federal Bureau of Investigation, Crime in the United States, 2006, at http://www.fbi.gov/ucr/cius2006/data/table_20.html. New Jersey also had 4,313 robberies committed at gunpoint and 2,609 aggravated assaults committed using a firearm. Id. at Table 21, 22. The ordinance in question was passed in response to these alarming statistics.

strong firearms laws akin to those in New Jersey, but allow local governments to pass additional regulations because there is no express provision preempting these laws.⁹

As states without a strong statement in favor of regulation have allowed for home rule, a fortiori where a state has made such a strong statement--as is the case in New Jersey's firearm laws--the state's regulation should be viewed as a baseline and not a ceiling. This approach, taken by the court in Mannie's, furthers the express intent of the Legislature and, indeed, the Constitution itself. Taking this view, local regulation should be permitted to enhance and inform New Jersey's express desire to lead in the area of firearms regulation. As this Court has noted, the purpose of the State Gun Control Law is "to prevent criminals and other unfit elements from acquiring firearms." State v. Sima, 142 N.J. Super. 187, 192 (App. Div. 1976) (quoting Burton v. Sills, 53 N.J. 86, 93 (1986)). "[T]o that end the Legislature has set up permit and identification requirements and has provided for disqualifications along with suitable inquiry into qualifications and fitness." Ibid. The ordinance here is consistent with "the overriding philosophy of the Legislature...to limit the use of guns as much as possible." State v. Marques, 140 N.J. Super. 363, 366 (App. Div. 1976).

⁹ Legal Community Against Violence, Regulating Guns in America 10-14 (2008), at http://www.lcav.org/library/reports_analyses/RegGuns.entire.report.pdf.

b. The Power of Innovation

Home rule also benefits the Legislature and its policies by allowing municipalities to create innovative laws that address their unique needs, and permits multiple approaches to be simultaneously tested and compared in different localities, rather than requiring the seriatim approach a single legislature must, by definition, employ. This wellspring of innovation allows local laws to serve as experiments and possible examples for future state regulation. Other states with relatively comprehensive state regulation of firearms allow for home rule. In New York, guns are strictly regulated at the state level, including a licensing and one purchase per permit limit. N.Y. Penal Law § 400.00.¹⁰ But despite this comprehensive regulatory scheme, New York courts have not deemed this scheme to be exclusive; accordingly, local governments are permitted to regulate firearms.¹¹

California also has extensive state firearms regulations, and limited statutory preemption of firearms regulation, yet

¹⁰ New York also bans assault weapons and large capacity magazines, § 265.10, requires handgun permits, § 400.00, regulates firearm transport, § 265.02(4), requires dealers to become licensed and record all sales, § 400.00, allows the superintendent of state police to regulate junk guns, § 400.00(12-a), and prohibits firearm possession by minors, § 265.05.

¹¹ See Citizens for a Safer Cmty. v. City of Rochester, 627 N.Y.S.2d 193, 201 (N.Y. 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.").

local governments have adopted over 300 innovative firearm ordinances,¹² providing a catalyst for several new state laws that have been modeled after local ordinances.¹³ This local response is precisely the type of regulatory innovation the New Jersey Legislature has expressly stated it wants to foster. See N.J.S.A. § 2C:58-2.2(b).

The benefit of innovation is not merely conjectural. The Jersey City ordinance itself has served as the model for a substantially similar statewide one handgun per month limitation currently being deliberated in the New Jersey Legislature. N.J.S.B. 1174 (2008). If the Legislature's grant of authority to local governments must be express or specific--as the court below held--it does not allow for innovation and worthwhile developments in the law.

IV. CONCLUSION

Overlook Terrace provided this state's courts with the flexibility necessary to fairly adjudicate emerging preemption cases. But this flexibility has made it difficult for cities to ascertain in advance whether a particular proposed ordinance is preempted or not. A more objective preemption test would provide

¹² See Prevent Handgun Violence Against Kids & Legal Community Against Violence, Communities on the Move 2000: How California Communities are Addressing the Epidemic of Handgun Violence, at http://www.lcav.org/library/surveys_local_ords/com2000.pdf.

¹³ 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).

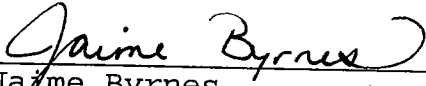
clearer guidance to both the Legislature in drafting state law and to the cities in enacting local regulations, while still allowing the proper result in each case. The rule proposed here has already been tacitly adopted by most courts, but aberrant rulings like the one below highlight the need for intervention by this Court. Indeed, the lower court's decision to ignore the Legislature's express grant of home rule to municipalities with respect to firearms, and further holding that an ordinance must be effective to be valid, cry out for review. The time is ripe to revisit Overlook Terrace.

For the foregoing reasons, Amicus respectfully urges this Court to grant the Petition for Certification.

Dated: January 8, 2009

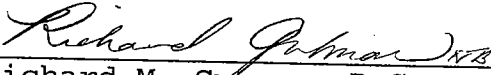
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