

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

FIREARM OWNERS AGAINST	:	
CRIME, ET AL.,	:	
Appellees,	:	
	:	
v.	:	No. 1754 CD 2019
	:	
CITY OF PITTSBURGH,	:	
ET AL.,	:	
Appellants.	:	

**BRIEF OF *AMICUS CURIAE*
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STATEMENT OF INTEREST

Brady is the nation's most long-standing nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and legal advocacy. Over 40 years old, Brady is named in honor of Jim "the Bear" Brady, former White House Press Secretary under President Ronald Reagan, who suffered a serious brain injury when an armed man attempted to assassinate the President. After the shooting, Jim and his wife Sarah led the fight to pass federal legislation requiring background checks for all gun sales. Sarah and Jim spent years navigating the halls of Congress, meeting with legislators across party lines to generate enough votes to pass the "Brady Bill." On November 30, 1993, after seven years of Jim and Sarah's efforts, President Bill Clinton finally signed the Brady Bill into law, requiring Brady Background Checks on all firearm purchases from federally licensed firearm dealers. Since the Brady law was enacted, over 300 million background checks have taken place, and over 3 million firearm sales to prohibited purchasers have been prevented.

Today, Brady works across Congress, courts, and communities, uniting gun owners and non-gun-owners alike, to take action, not sides, to prevent gun violence. In support of that mission, Brady files this brief as *amicus curiae* in support of Appellants.¹

Brady has a substantial interest in ensuring that state and federal laws are not interpreted or applied in a way that would jeopardize the public's interest in

¹ No one other than the *amicus curiae*, its members, or counsel paid in whole or in part for the preparation of this *amicus curiae* brief or authored in whole or in part this *amicus curiae* brief.

protecting individuals, families, and communities from the effects of gun violence. Brady has litigated for gun violence prevention issues in courts in over 40 states and has filed *amicus* briefs in numerous cases involving firearms regulations including *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Hayes*, 555 U.S. 415 (2009) (citing Brady brief), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).²

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Brady adopts Appellants' Statement of the Scope and Standard of Review.

INTRODUCTION AND SUMMARY OF ARGUMENT

On October 27, 2018 a man, armed with an assault rifle and handguns, walked into Pittsburgh's Tree of Life Congregation, a Jewish synagogue, and started shooting.³ When all was said and done, that man had killed 11 people and injured 6 others. This shooting was one of the deadliest incidents of antisemitism in United States history. But it was not the only time assault weapons have killed people in the City of Pittsburgh (hereinafter, "City" or "Pittsburgh"). Indeed, Pittsburgh's Allegheny County has the second highest overall number of gun fatalities of all of Pennsylvania's 67 counties.⁴ For these reasons, the City sought

² More information about Brady can be found on its website at <https://www.bradyunited.org/>.

³ Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, *The New York Times* (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.

⁴ <https://www.countyhealthrankings.org/app/pennsylvania/2019/measure/factors/148/data?sort=desc-3>, last accessed April 29, 2020.

to protect residents from further violence by passing three municipal ordinances that were narrowly designed to: (1) regulate specified uses of assault weapons in any public place within the City; (2) prohibit the use of armor piercing ammunition and large capacity magazines in any public place within the City; and (3) create a process for law enforcement or family members to petition a court to enter an extreme risk protection order for an individual who presents a danger of suicide or of causing extreme bodily injury to another, which order can prohibit that person from possessing or acquiring a firearm.

In the decision under review, the Court of Common Pleas of Allegheny County, Pennsylvania (Civil Division) incorrectly held that the Pennsylvania Uniform Firearms Act (“UFA”), 18 Pa. C.S. §§ 6101-6127, by implication, preempts the entire field of firearms regulation because it is a “comprehensive statute that evidences an intent by the Legislature to preempt the entire field of firearms and ammunition across the state of Pennsylvania.” R. 945a. As a result, the trial court erroneously granted summary judgment, striking down the City’s three municipal ordinances.

The trial court erred by implying field preemption to invalidate the City’s ordinances. The trial court’s decision improperly discounts Pittsburgh’s home rule authority, wrongfully perpetuates the disparate impact with respect to Pittsburgh residents’ exposure to gun violence, and ignores the explicit wording of the UFA that precludes a finding of a clear and explicit legislative intent to preempt the field of firearm regulation.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT CONSIDER HOME RULE

Article IX of the Pennsylvania Constitution of 1968 grants municipalities the “right and power to frame and adopt home rule charters” and provides that “[a] municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.” Pa. Const. art. IX, § 2. In 1996, the General Assembly enacted the Home Rule Charter and Optional Plans Law, 53 Pa. C.S. §§ 2901-3171, which provided that no home rule charter can confer upon a municipality “power or authority” that is either contrary to, limits, or enlarges powers granted by statutes that apply to municipalities. 53 Pa. C.S. § 2962(a).

The Pennsylvania Supreme Court has held that “a home rule municipality’s exercise of legislative power is presumed valid, absent a specific constitutional or statutory limitation.” *Pennsylvania Restaurant & Lodging Assoc. v. City of Pittsburgh*, 211 A.3d 810, 817 (Pa. 2019) (citation omitted). Moreover, “[a]ll grants of municipal power to municipalities governed by a home rule charter . . . shall be liberally construed in favor of the municipality.” 53 Pa. C.S. § 2961. The Supreme Court consistently has found that municipalities get the benefit of the doubt when faced with potential limitations on their home rule:

Accordingly, when we find ambiguity in the scope of municipal authority or the limitations imposed thereon, we must resolve that ambiguity in the municipality’s favor.

Pennsylvania Restaurant & Lodging Assoc., 211 A.3d at 817.

Nevertheless, the trial court here failed to provide *any* deference to Pittsburgh’s home rule authority; to the contrary, the trial court resolved the ambiguity of preemption by implication with respect to the UFA *against* the municipality.

Section 6120 of Title 18 of the Pennsylvania Consolidated Statutes is entitled, “*Limitation* on the regulation of firearms and ammunition” (emphasis supplied) — not “prohibition” or “preemption” on the regulation of firearms and ammunition. In other words, Section 6120 does not explicitly state that it is meant to expressly preempt the field of gun regulation. Instead, it explicitly states that it is a “limitation.” Accordingly, the statute fails to evidence a clearly expressed intent to preempt the field. The Pennsylvania Supreme Court has previously recognized that “the General Assembly has evidenced a clear intent to totally preempt local regulation in only three areas: alcoholic beverages, anthracite strip mining, and banking.” *Hoffman Min. Co. v. Zoning Hearing Bd. of Adams Twp., Cambria City*, 32 A.3d 587, 593 (Pa. 2011). Firearms are not on that list.

The General Assembly used language that cannot support a finding, especially as a matter of law, that it clearly intended the UFA to preempt the field of firearm regulation. Section 6120(a) provides as a “General Rule” that no 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.”⁵

Next, the limitation in section 6120(a) does not set forth a broad prohibition preventing a municipality from regulating all activities relating to firearms, ammunition, or ammunition components. Clearly, the General Assembly could have done that had it so intended. Instead, section 6120(a) explicitly describes the activities that a municipality cannot regulate: the “lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components.” As the City of Pittsburgh explained to the trial court, the General Assembly did not include the word “use” in its list of activities municipalities were precluded from regulating. And, the General Assembly specifically used the word “lawful,” thereby suggesting that unlawful ownership, possession, transfer, or transportation can be regulated.

Finally, the General Assembly restricted the limitation even further when it added “when carried or transported for purposes not prohibited by the laws of this Commonwealth.” Once again, the General Assembly could have simply stated that the limitation applied to a municipality’s ability to regulate firearms and ammunition. It did not. Instead, it added limiting language of “lawful ownership,

⁵ That provision lumps “municipality” in with “county” and “township.” Yet certain municipalities that elect a home rule charter are dissimilar to “counties” and “townships” with respect to their power to legislate. The provision does not differentiate between municipalities in general and home rule municipalities. Thus, the General Assembly’s enactment of this statutory provision could reasonably be understood as referring solely to non-home rule municipalities given the presence of county and township in the same sentence.

possession, transfer, or transportation” and it added further limiting language of “when carried or transported for purposes not prohibited by laws of this Commonwealth.”

The three Pittsburgh ordinances at issue explicitly state that they are not meant to interfere — and, in fact, do not interfere — with lawful ownership, possession, transfer, or transportation of firearms or ammunition. In addition, the three ordinances do not attempt to regulate firearms “when carried or transported for purposes not prohibited by laws of this Commonwealth.” The trial court acknowledged that Ordinances 2018-1218 and 2018-1219 involve “use,” which is not mentioned in section 6120(a): “Ordinance 2018-1218 regulates the *use* of assault weapons in any public space within the City. Ordinance 2018-1219 prohibits the *use* of armor piercing bullets and large capacity magazines in any public place within the City.” R. 943a (emphasis added).

Indeed, the prohibited “uses” are specifically defined as discharging, loading, brandishing to intimidate, pointing at a person, and employing in violation of the law, all geared to regulating illegal use in a public place. In each of the Ordinances, clear exemptions exist for law enforcement, museums, hunting, and most importantly self-defense or the defense of others in a public place. (“Nothing in this Chapter shall be deemed to restrict a person’s ability to use a lawfully possessed firearm for immediate and otherwise lawful protection of a person or another person’s person or property or for lawful hunting purposes.” *See* 1102.04B and 1104.05B.) These ordinances thus do not impinge on the legal ownership, possession, transportation, or transfer of a firearm. The person using an assault

weapon to defend themselves in a public place — an authorized use under the Ordinances — obviously had to have transported the gun there. Moreover, Ordinance 2018-1220 involves a court proceeding and judicial determination that a person poses an imminent risk to themselves or others — another situation that is neither addressed nor covered by the limitation found in section 6120(a).

Nevertheless, the trial court ignored the express wording of section 6120(a) and refused to view the provision in favor of Pittsburgh, a home rule municipality, when it held the UFA preempts “any local regulation pertaining to the regulation of firearms”:

Despite the City’s efforts to avoid the specific preemption set forth in §6120, they are not able to avoid the obvious intent of the Legislature to preempt this entire field. The UFA purports to regulate firearms and ammunition in the Commonwealth whether a person is using, brandishing, carrying or loading them.

* * *

Stated simply, under the doctrine of field preemption, the UFA preempts any local regulation pertaining to the regulation of firearms. The Uniform Firearms Act is a comprehensive statute that evidences an intent by the Legislature to preempt the entire field of firearms and ammunition across the state of Pennsylvania.

R. 944a-945a.

The breadth of the trial court’s holding is astonishing. The trial court completely ignored the explicit confines of the limitation expressed in section 6120(a). Disregarding the express wording of section 6120(a), the trial court instead held that the UFA “purports to regulate firearms and ammunition,” whether that

involves “using, brandishing, carrying or loading them.” R. 944a. This reasoning finds no support in the actual text of section 6120(a). Moreover, the trial court’s focus on what the UFA “purports to regulate” avoids the issue of what the UFA actually places out-of-bounds in terms of local regulation. Where, as here, the General Assembly has expressly limited the extent to which a statute displaces local regulation, a court commits legal error by using the doctrine of implied preemption to extend the preemptive effect of state law beyond what the General Assembly actually specified. *Cf. Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013) (holding that when Congress inserted the phrase “with respect to transportation of property” into the preemption provision of the Federal Aviation Administration Authorization Act, it meant to limit the scope of federal preemption and allow for state law claims that did not involve transportation of property). That is precisely the same mistake, requiring reversal, that the trial court committed here.

Crucially, the fact that the General Assembly has legislated in or occupies the area of firearms does not, standing alone, mean that the General Assembly has explicitly preempted the field. *Kightlinger v. Bradford Twp. Zoning Hearing Bd.*, 872 A.2d 234, 238 (Pa. 2005) (“The state is not presumed to have preempted a field merely by legislating in it. Rather it must be shown that the General Assembly intended to preempt a field in which it has legislated.”) (internal quotation omitted); *see also City of Ocala v. Nye*, 608 So. 2d 15, 17 (Fla. 1992); *People v. Judiz*, 38 N.Y.2d 529, 531-32 (1976) (upholding local ordinance prohibiting possession of an imitation pistol despite a state statute covering the same subject area).

The trial court's holding that "the UFA preempts any local regulation pertaining to the regulation of firearms" (R. 945a) not only ignores the specific wording of section 6120(a) but also contradicts it. The General Assembly could have enacted a statutory provision expressly accomplishing what the trial court believed the legislature intended to do, e.g., that "the UFA preempts any local regulation pertaining to the regulation of firearms." However, the General Assembly did not do this. To the contrary, the General Assembly did not use the term "preempt" but instead used the term "limitation." In addition, the General Assembly did not broadly state that the "limitation" applies to "any local regulation pertaining to the regulation of firearms." Rather, the General Assembly carefully restricted the limitation to "lawful ownership, possession, transfer or transportation of firearms" and further restricted the limitation by stating "when carried or transported for purposes not prohibited by the laws of this Commonwealth."

Finally, the trial court's holding made no mention of the fact that Pittsburgh has adopted a home rule charter and ignored the deference to ordinances promulgated by home rule municipalities in Pennsylvania required by both the state constitution and the Supreme Court.

POINT II

PRECLUDING LOCAL REGULATION VIOLATES PITTSBURGH RESIDENTS' CONSTITUTIONAL RIGHTS

For most of American history, gun regulation at the local level was widely accepted. *See* Blocher, *Firearm Localism*, 123 Yale L.J. 82, 133 (2013) (“local autonomy with regard to gun regulation was the norm throughout most of American history”). Regulations like gunpowder restrictions and bans on concealed weapons, which are tailored to heavily populated areas, have been commonly implemented and upheld as constitutional when challenged. *Id.* at 115-16, 144-45. Not until the 1980s did the National Rifle Association and other gun rights organizations start to advocate for state level preemption laws to prevent local governments from enacting certain kinds of gun control. *Firearm Localism*, 123 Yale L.J. at 133.

There is, of course, a disparity between the impact of gun violence in rural and urban areas that informs the tension between urban gun control initiatives and rural reluctance to embrace them. Pittsburgh’s Allegheny County has the second highest overall number of gun fatalities of all of Pennsylvania’s 67 counties.⁶ Philadelphia County has the highest overall number of gun fatalities.⁷ According to a 2004 study, the most urban counties in the country experienced twice the

⁶ <https://www.countyhealthrankings.org/app/pennsylvania/2019/measure/factors/148/data?sort=desc-3>, last accessed April 29, 2020.

⁷ *Id.*

adjusted firearm homicide rate of the most rural counties.⁸ Children between 15 and 19 were over five times more likely to die from intentional gunshot wounds in the most urban counties than in the most rural counties.⁹

There is also a racial disparity for gun violence; the gun murder rates for African Americans and Hispanics in the state are hugely disproportionate. The 2010 census showed that a much higher percentage of the African American and Hispanic communities reside in Pennsylvania's urban areas, where gun violence is more prevalent: Urban residents of the state were 13.5% African American and 6.8% Hispanic while rural residents were 1% African American and 1.6% Hispanic.¹⁰ The African American and Hispanic communities combined suffer 79% of all gun homicides in Pennsylvania.¹¹

Furthermore, Pittsburgh's ordinances were promulgated, in part, as a response to the hate crime mass shooting at the Tree of Life synagogue, located in

⁸ Branas et al., *Urban–Rural Shifts in Intentional Firearm Death: Different Causes, Same Results*, 94:10 Am. J. of Pub. Health 1750 (Oct. 2004), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448529/pdf/0941750.pdf>, last accessed April 29, 2020.

⁹ Children's Hospital of Philadelphia, *Types of Child Firearm Deaths Different in Rural vs. Urban Areas* (May 25, 2010), <https://www.chop.edu/news/types-child-firearm-deaths-different-rural-vs-urban-areas>, last accessed April 29, 2020.

¹⁰ Pennsylvania State Data Center, *Research Brief: Pennsylvania's Urban and Rural Population*, at 2 (Oct. 11, 2012), https://pasdc.hbg.psu.edu/sdc/pasdc_files/researchbriefs/Urban_Rural_SF1_RB.pdf, last accessed April 29, 2020.

¹¹ Center for American Progress, *Pennsylvania Under the Gun* (May 16, 2016), <https://www.americanprogress.org/issues/guns-crime/reports/2016/05/16/137219/pennsylvania-under-the-gun/>, last accessed April 29, 2020.

the City, which involved an assault weapon. The prevalent use of assault weapons in mass shootings is well known.¹² And the use of such weapons in hate crimes is also known.¹³ Pittsburgh has the right and moral obligation to protect its most vulnerable citizens from mass shootings such as the Tree of Life tragedy and, as set forth above, can do so without running afoul of the limitations on local regulation delineated in section 6120(a).

These statistics clearly demonstrate that residents of urban areas in Pennsylvania, including Pittsburgh, suffer a disproportionate amount of the state's gun violence. The facts concerning the scourge of gun violence in urban areas in Pennsylvania, and the discrepancy in gun violence crime statistics between municipalities like Pittsburgh and the rural portions of Pennsylvania, make clear that the trial court's finding of field preemption perpetuates disparate treatment of Pennsylvania's urban residents and materially lowers habitability protections for those same residents. And, as to hate crimes, a finding of preemption makes it nearly impossible for Pittsburgh to be able to protect its most vulnerable citizens and enforce the state hate crime law currently on the books. Preemption, under

¹² Rockefeller Institute of Government, *Assault Weapons, Mass Shootings, and Options for Lawmakers* (Mar. 22, 2019), <https://rockinst.org/issue-area/assault-weapons-mass-shootings-and-options-for-lawmakers/>, last accessed April 29, 2020; Mother Jones, *Mass Shootings Database, 1982-2020*, <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>, last accessed April 29, 2020.

¹³ Everytown, *Disarm Hate: The Deadly Intersection of Guns and Hate Crimes* (May 13, 2019), <https://everytownresearch.org/disarm-hate/>, last accessed April 29, 2020; The Trace, "It Never Ends": The Tree of Life Massacre and the Role of Guns in hate Crimes (Oct. 29, 2018), <https://www.thetrace.org/rounds/pittsburgh-synagogue-mass-shooting-guns-hate-crimes/>, last accessed April 29, 2020.

these circumstances, is unconstitutional. *See Robinson Twp., Washington County v. Commonwealth of Pennsylvania*, 83 A.3d 901, 980-81 (Pa. 2013).

In *Robinson*, the Supreme Court rejected the General Assembly's attempt to preempt the field of regulating oil and gas operations and held that the law's "requirement that local government permit industrial uses in all zoning districts" posed the "difficulty" that "some properties and communities will carry much heavier environmental and habitability burdens than others." *Id.* at 980. The Court further held:

Imposing statewide environmental and habitability standards appropriate for the heaviest of industrial areas in sensitive zoning districts lowers environmental and habitability protections for affected residents and property owners below the existing threshold and permits significant degradation of public natural resources. The outright ban on local regulation of oil and gas operations (such as ordinances seeking to conform development to local conditions) that would mitigate the effect, meanwhile, propagates serious detrimental and disparate effects on the corpus of the trust.

Id. at 980-81.

Similarly, the impact of imposing statewide standards for gun regulation appropriate for rural counties on urban areas wracked with gun violence lowers the habitability protections for affected residents. Local regulation (such as ordinances seeking to conform gun regulation to local conditions) could mitigate the disproportionate impact of gun violence. Banning such local regulation serves merely to propagate the serious detrimental and disparate effects that afflict the residents of Pittsburgh.

Supporters of preemption argue that imposing statewide standards eliminates the difficulty of complying with different local gun regulations, especially when transporting firearms from one lawful place to another, e.g., from home to a shooting range. However, there are many instances of local rules addressing safety concerns that are not uniform throughout the state, including rules governing traffic and speed limits and the sale and consumption of alcohol. *Firearm Localism*, 123 Yale L.J. at 136. The Pittsburgh ordinances, focused on *specified* potentially unlawful *use* of assault rifles (allowing lawful uses such as self-defense and hunting), armor piercing bullets, and high capacity magazines in public spaces within the City of Pittsburgh only, as well as prohibiting possession in the City only by those adjudicated to be a threat to themselves or to the public, will not cause confusion or difficulty for lawful gun owners.

The City of Pittsburgh faces a disproportionate amount of gun violence measured against the rest of Pennsylvania (save for the City of Philadelphia). Insisting on a uniform approach to gun regulation within the state ignores these realities. The General Assembly has not expressly preempted the field of gun regulation. To imply such preemption propagates “serious detrimental and disparate effects” on the citizens of Pittsburgh in violation of Article I, section 1, of the Pennsylvania Constitution, which guarantees to all of Pennsylvania’s citizens the “indefeasible rights” of “enjoying . . . life,” “possessing . . . property,” and “pursuing . . . happiness.”

CONCLUSION

For the reasons set forth above, *amicus* Brady respectfully submits that the decision of the trial court should be reversed.

Respectfully submitted,

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Dated: April 30, 2020

**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitations of Pa. R. App. P. 531(b)(3) because this brief contains 3,376 words. This brief complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) and 2135(c) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: April 30, 2020

/s/ Howard J. Bashman

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CERTIFICATION OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than nonconfidential information and documents.

Dated: April 30, 2020

/s/ Howard J. Bashman

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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