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IN THE SUPREME COURT OF PENNSYLVANIA

No. ____

FIREARM OWNERS AGAINST CRIME, ET AL.,
Appellees,

v.

CITY OF PITTSBURGH, ET AL.,
Appellants.

DEFENDANTS' PETITION FOR ALLOWANCE OF APPEAL

On appeal from the May 27, 2022 Order of the Commonwealth Court of Pennsylvania 1754 CD 2019, affirming the October 29, 2019 Order of the Court of Common Pleas of Allegheny County, Nos. 19-5330.

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INTRODUCTION

On October 27, 2018, a gunman armed with an assault rifle and three semi-automatic pistols entered the Tree of Life Synagogue in the Squirrel Hill neighborhood of Pittsburgh. As the Court is aware, the result was tragic. He opened fire on worshipers, murdering 11 people and injuring six others, including four police officers. This tragedy sparked public discussion and debate. What common sense gun-safety reforms could the City implement that might prevent horrific mass shootings and other needless gun violence? The citizens demanded that the City act, to the extent it could, to save lives. Through its democratically elected leaders, the City enacted ordinances aimed at doing just that (the "Ordinances"). Together they prohibit the "use" of large capacity magazines and assault weapons in public places—except for self-defense or hunting—and penalize those whose negligent gun storage practices lead to a minor harming someone through use of their firearm.[1]

This case presents the question of whether these municipal laws are preempted, and, indeed, whether municipalities retain any power to enact public safety laws pertaining to firearms.

This is an issue of great public significance. The "first duty" of municipalities in the Commonwealth is "to protect their people," and "gun violence presents a

[1] The City is not seeking review of the Commonwealth Court's decision as to the "extreme risk protection" provision of the Ordinance 2018-2020 ("CAP"), CAP §§ 1107.4-1107.13, so it is not discussed.

significant and undeniable public safety risk" in Pennsylvania. R.127a. In addition to their home rule power, the General Assembly explicitly granted local governments authority to "regulate," "prevent," and "punish" the unnecessary discharge of "firearms" in public places. 53 P.S. §§ 23131, 3703. With this authority, municipalities have the power—and the obligation—to "honor their own constituents' justified demands for protection." R. 129a. But local governments need guidance from this Court as to how to exercise their authority to protect the public from gun violence consistent with the state's preemption laws.

Two preemption statutes, by their plain language, prevent local governments from regulating the "ownership, possession, transfer, or transportation of firearms." 18 Pa.C.S. § 6120(a); *see also* 53 Pa.C.S. § 2962(g) (same four categories) (together the "Firearms Preemption Statutes"). The City limited the operative portions of its Ordinances to avoid impinging these four preempted categories. It regulated only the "use" of particularly dangerous firearms in public places and by minors. Though the City desired to enact more sweeping prohibitions on possessing or transporting assault weapons and large capacity magazines, it hewed to the statutory text of the four specific preemption areas.

Even so, the Commonwealth Court concluded that these narrowly crafted Ordinances were invalid. In its view, the "regulation of firearms is an area where legislative activity is vested singularly and absolutely in the General Assembly of the Commonwealth," even outside the four enumerated categories of "ownership,

possession, transfer, and transportation." *Firearm Owners Against Crime v. City of Pittsburgh*, __ A.3d __, __ (Pa. Commw., No. 1754 C.D. 2019, filed May 27, 2022) ("Op.") at 11. In reaching this sweeping holding, the lower court relied on a single out-of-context sentence from this Court's decision in *Ortiz v. Commonwealth*, stating that "the General Assembly, not city councils, is the proper forum" for firearms regulation. 681 A.2d 152, 156 (Pa. 1996). Giving the General Assembly exclusive authority to regulate firearms eliminates local governments' affirmative authority to prevent firearm discharge under 53 P.S. §§ 23131, 3703, and expands the preemption statutes well beyond their text. The Commonwealth Court here nonetheless relied on *Ortiz*'s expansive dictum to create field preemption and expressly invalidate 53 P.S. §§ 23131, 3703.

Ortiz has spawned a conflict between statutory text and lower court precedent; it is time that the Court clarify *Ortiz* and end the confusion. Indeed, three of the seven judges below "urge[d]" this Court "to either overturn or rein in the reach of *Ortiz*." *See Firearm Owners Against Crime v. City of Pittsburgh*, __ A.3d __, __ (Pa. Commw. Ct., No. 1754 C.D. 2019, filed May 27, 2022) (Ceisler, J., concurring and dissenting, joined by Cohn Jubelirer, P.J. and Wojcik, J.) (CDO) at 7. That opinion recognized what this Court should take this case to correct: i.e., that the case law interpreting and applying *Ortiz* has transformed Pennsylvania's firearm preemption regime into something unrecognizable when compared to the statutes' actual text. In another case recently decided by the Commonwealth Court, Judge Leadbetter also wrote separately to state

that she "would urge our Supreme Court to reconsider the breadth of the *Ortiz* doctrine and allow for local restrictions narrowly tailored to local necessities." *City of Philadelphia v. Armstrong*, 271 A.3d 555, 569 (Pa. Commw. Ct. 2022) (Leadbetter, J. dissenting). A petition for allowance of appeal is currently pending before the Court in that case. In yet another case that is being appealed before this Court, *Crawford v. Commonwealth*, No. 562 M.D. 2020, 2022 WL 1792829, at *20 (Pa. Commw. Ct. May 26, 2022), the same trio of concurring and dissenting judges here wrote separately to, in part, express their view that this Court should revisit *Ortiz*.

This Court has not considered the scope of the Firearms Preemption Statutes for over 25 years. In that time—and even in the time since the Tree of Life shooting in Pittsburgh—the tragic "use" of assault weapons and large capacity magazines has continued, such as in recent mass shootings at a supermarket in Buffalo, New York,[2] at an elementary school in Uvalde, Texas,[3] and in Philadelphia just this month where a large capacity magazine was used to shoot into a crowd.[4] Local governments, moreover, continue to struggle to address the daily beat of gun violence. It has never been a more urgent time for this Court to answer the important legal question presented in this

[2] Craig Whitlock, David Willman, and Alex Horton, *Massacre suspect said he modified Bushmaster rifle to hold more ammunition*, Washington Post (May 15, 2022).
[3] Eric Levenson, et al., *Uvalde school shooting suspect was a loner who bought two assault rifles for his 18th birthday*, CNN (May 27, 2022).
[4] Chris Palmer, Suspect in custody following South Street shooting, The Philadelphia Inquirer (June 6, 2022), available at https://www.inquirer.com/news/live/philadelphia-shooting-south-street-victims-suspects-20220606.html.

petition.

OPINIONS BELOW

The opinion of the Commonwealth Court, 1754 CD 2019, issued on May 27, 2022, is reported but not yet released for publication *Firearm Owners Against Crime v. City of Pittsburgh*, No. 1754 C.D. 2019, 2022 WL 1698851, at *1 (Pa. Commw. Ct. May 27, 2022); a concurring and dissenting opinion was also issued. Both Opinions are attached at Appendix A. The opinion of the Court of Common Pleas, No. 19-5330 (Oct. 29, 2019), is attached at Appendix B.

ORDER IN QUESTION

The Commonwealth Court's order is included as part of Appendix A. The Court concluded that "the ordinances contravene section 6120(a) of the UFA and are invalid and unenforceable because they intrude into an area of regulation that is reserved exclusively to the General Assembly." Op. at 2. The opinion and order were signed by Judge Patricia A. McCullough.

QUESTION PRESENTED FOR REVIEW

Does Pennsylvania law—which states that municipalities may not regulate the lawful "ownership, possession, transfer or transportation" of firearms, 18 Pa.C.S. § 6120 and 53 Pa.C.S. § 2962(g)—preempt the entire field that "touches upon or relates" to firearm regulation such that municipalities may not enact gun safety ordinances even when they do not regulate the "ownership, possession, transfer or transportation" of firearms?

The majority answered this question in the affirmative.
This Court should answer it in the negative.

STATEMENT OF THE CASE

In response to the horrific mass shooting at the Tree of Life Synagogue and dozens of other tragic shootings each year, the City had a "moral imperative to take lawfully available steps to reduce gun violence." R. 184a. Accordingly, on April 2, 2019, the Pittsburgh City Council passed multiple Ordinances aimed at curbing gun violence within its borders. On April 9, 2019, the Mayor signed them into law.

I. The statutory scheme underlying the Ordinances.

In passing these Ordinances, the City recognized that the governing statutory scheme both grants municipalities affirmative authority to regulate firearms within their borders and restricts the scope of such authority.

As to its power to enact these Ordinances, Pittsburgh relied first upon its Home Rule Charter, under which it has authority to "perform any function and exercise any power not denied by the Constitution [or] the laws of Pennsylvania." R. 316a. Further, the City recognized that the General Assembly had explicitly granted Pittsburgh the authority to "regulate, prevent, and punish" the unlawful and unnecessary discharge of firearms in two separate statutes. *See* 53 P.S. § 23131 (granting municipalities the power "to regulate, prevent and punish the discharge of firearms, . . . in the streets, lots, grounds, alleys, or in the vicinity of any buildings."); 53 P.S. § 3703 (granting municipalities the power "to regulate or to prohibit and prevent . . . the unnecessary

firing and discharge of firearms in or into the highways and other public places thereof, and to pass all necessary ordinances regulating or forbidding the same and prescribing penalties for their violation."). And it recognized that the power to "prevent" meant it could go further than merely regulating or punishing the actual discharge of firearms.

The City also recognized that this authority was constrained by two Pennsylvania statutes preempting local laws that regulate the "ownership, possession, transfer and transportation of firearms." R. 185a. Specifically, 18 Pa.C.S. § 6120(a), the preemption provision in the Uniform Firearms Act (UFA), states 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.

Likewise, 53 Pa.C.S. § 2962(g) places a limit on the authority of home-rule municipalities, like Pittsburgh, stating: "A municipality shall not enact any ordinance or take any other action dealing with the regulation of the transfer, ownership, transportation or possession of firearms."

Without state preemption, the City would have gone further and prohibited the purchase and possession of assault weapons and large capacity magazines—the same types of devices used to mass murder the worshipers at Tree of Life. But it did not do that. Instead, it opted to enact two types of local laws: (1) more modest reforms that would not regulate the "ownership, possession, transfer, and transportation of firearms," and would be effective 60 days after enactment, and (2) broader reforms that

would not be effective unless and until the state preemption statutes changed. With this dual approach, the City acted to protect its residents while fulfilling "its responsibility to respect governing law." R. 185a.

II. The City enacts three Ordinances limiting firearm "use."

The three operative Ordinances that the City enacted aim at curbing the use of particularly dangerous firearms and firearm accessories that can easily cause mass carnage and reducing the often-tragic use of firearms by young people.

A. The Assault Weapons Ordinance.

Ordinance 2018-1218—the Assault Weapons Ordinance—regulates the "use" of an "Assault Weapon," like an AR-15, in "any public place within the City of Pittsburgh," which includes "streets, parks, open spaces, public buildings, public accommodations, businesses and other locations to which the general public has a right to resort." Ordinance 2018-1218 ("AW") § 1102.02.

The definition of "use" includes but is not limited to the following: "(1) Discharging or attempting to discharge an Assault Weapon; (2) Loading an Assault Weapon with Ammunition; (3) Brandishing an Assault Weapon; (4) Displaying a loaded Assault Weapon; (5) Pointing an Assault Weapon at any person; and (6) Employing an Assault Weapon for any purpose prohibited by the laws of Pennsylvania or of the United States." *Id.* § 1102.02(C).

Because "use" requires, at a minimum, some "active employment" of a firearm, simply carrying an assault weapon—concealed or openly, loaded or unloaded—does not violate the Assault Weapon Ordinance. R. 696a-97a. (quoting *Bailey v. United States*, 516 U.S. 137, 147 (1995)). Openly carrying or transporting an assault weapon is not "actively" displaying it or brandishing it, so it does not come within the definition of "use" and is not prohibited. Nor do the Ordinances even prohibit all uses; there is no restriction on using these firearms and accessories for hunting, recreation, or self-defense. AW § 1102.04(B). There is no restriction on use in one's home, another private location, a gun store, or a shooting range. AW § 1102.02(B). Rather, the definition of "use" is carefully crafted only to target potentially dangerous uses of firearms that occur in public places, and to fall outside of the scope of state preemption. Indeed, the Ordinance explicitly carves the four preempted categories out of its definition of "use," ameliorating any concern that the Ordinances tread upon the preempted areas. AW § 1102.02(C) (""use' . . . does not include possession, ownership, transportation or transfer.").

Lastly, in addition to regulating the use of assault weapons, Ordinance 2018-1218 includes a separate section that prohibits: (1) possession of weapons that are not firearms (*e.g.*, bazookas, bombs, booby traps, and grenades), *see* AW Ordinance § 1101.02(A); (2) publicly carrying facsimile firearms, *see id.* § 1101.03; and (3) the unlawful public discharge of firearms, *see id.* § 1101.04.

B. The Large Capacity Magazine Ordinance.

Ordinance 2018-1219—the Large Capacity Magazine Ordinance ("LCM")—regulates the "use" of "Large Capacity Magazines" in "public places" in Pittsburgh. LCM § 1104.03(A). Adopting the same definition of "use" and "public places" as the Assault Weapons Ordinance, this Ordinance extends the same limitations (and exceptions) described above with respect to assault weapons to large capacity magazines. LCM § 1104.03(C). A firearm magazine is a "spring loaded-container for cartridges"—essentially, where the ammunition goes—and it may either be fixed in the firearm or detachable. Glossary, NRA-ILA, https://www.nraila.org/for-the-press/glossary/ (last visited June 17 , 2022). A "Large Capacity Magazine," as defined by the Ordinance, is any "firearm magazine, belt, drum, feed strip or similar device that has the capacity of, or can be readily restored or converted to accept, more than 10 rounds of ammunition." LCM § 1104.01(D).

Along with large capacity magazines, this Ordinance also prohibits the use in public places of (a) "Armor or Metal Penetrating Ammunition"—specific ammunition designed "primarily to penetrate a body vest or a body shield," and (b) "Rapid Fire Devices"—parts designed to "accelerate substantially the rate of fire" of a firearm (including bumpstocks). *Id.* §§ 1104.01(B), (F), 1104.02, 1104.04.

C. The Child Access Prevention Ordinance.

Ordinance 2018-1220, the Child Access Prevention Ordinance ("CAP"), is targeted at keeping firearms out of the hands of children by imposing fines on adult firearm custodians whose negligent storage practices lead to a minor obtaining and

using their firearm to cause harm. Specifically, the CAP Ordinance imposes a fine up to $1,000 upon a firearm's custodian if a "minor gains access to and uses the Firearm" and the custodian "knew or reasonably should have known that the minor was likely to gain access" to it. CAP § 1106.02(A). There can be no violation of the provision unless the minor "use[s]" the firearm, which is defined the same as above and, again, specifically exempts "possession, ownership, transportation or transfer." *Id.* § 1106.02(B). The CAP provision contains several safe harbors, exempting firearm owners from liability if they responsibly store their weapons—by, for example, keeping the firearm in a locked box or secured with a trigger lock. *Id.* § 1106.02(C). Nor does the CAP fine apply if the minor obtained the firearm while it was being "carried on the person of the Firearm's custodian" or was within his or her proximity. *Id.*

D. Severability Provisions.

Each section within each of the three Ordinance contains a severability provision that states in relevant part:

> "Severability is intended throughout and within the provisions of this Article XI: Weapons. If any section, subsection, sentence, clause, phrase, or portion of this Article XI: Weapons is held to be invalid or unconstitutional by a court of competent jurisdiction, then that decision shall not affect the validity of the remaining portions of this Chapter or this Article XI: Weapons."

AW §§ 1101.09, 1102.07, 1103.07; LCM §§ 1104.09, 1105.07; CAP §§ 1106.06, 1107.19.

III. Procedural History

Two groups of plaintiffs filed lawsuits challenging the Ordinances on the day the mayor signed them into law, both seeking a declaration that several portions of the Ordinances were preempted by 18 Pa.C.S. § 6120(a) and 53 Pa.C.S. § 2962(g).[5] By agreement and order, the Ordinances' effective dates were stayed during the pendency of the litigation. R. 362a-64a.

Upon cross motions for summary judgment, the Court of Common Pleas (Allegheny County) invalidated all three Ordinances in their entirety without a discussion of severance, holding that the state had "sole regulatory power" over "anything involving firearms." R. 944a-45a.

The Commonwealth Court affirmed. The court concluded that the case law interpreting and applying Section 6120(a) of the UFA essentially foreclosed the City's arguments. Op. at 10. "[T]he underlying precept from these cases," the opinion concluded, "is that the regulation of firearms is an area where legislative activity is vested singularly and absolutely in the General Assembly of the Commonwealth." Op at 11. The lower court rejected the City's argument that the Second Class City Code granted it powers to regulate firearms, finding that Section 6120 should be "construed to repeal

[5] The City has filed a second petition for review in the companion case to this one, *Anderson v. City of Pittsburgh*, 1754 C.D. 2019, which challenged only the Large Capacity Magazine Ordinance. The *Anderson* case, while narrower than this case in scope, raises the same fundamental issue, and the Court should take that case as well to be decided alongside this one.

both section 3 of the Second Class City Code and section 3703 of the Act." Op. at 24. On this basis, the court struck down the "operative provisions" of the Ordinances. Op. at 26. The Opinion went one step further, however, and invalidated the Ordinances writ large, even though only certain provisions of the Ordinances were challenged in the lawsuit and other were inoperative. Op. 26-27 n.17. The Majority found that the City had waived these arguments, despite a full section in its opening and reply brief dedicated to them. *Id.*

Judge Ceisler filed a concurring and dissenting opinion joined by President Judge Cohn Jubelirer and Judge Wojcik. *See* CDO. That opinion concluded that "the scope of preemption in the field of firearms regulation has been defined by our courts in an unjustifiably broad manner . . . ." CDO at 1. Reading the statutes closely, the opinion explained that "[b]etween the precise language of the preemption statutes and that of the two statutes authorizing local regulation of firearms usage, I must conclude that the General Assembly has not preempted the field of local firearms regulation," but that the "straightforward reading cannot carry the day because of the current state of our case law." CDO at 4-5. Thus, the CDO concurred that the operative provisions of the Ordinances were invalid under the caselaw. The three Judges, however, "urge[d] our Supreme Court to either overturn or rein in the reach of *Ortiz*." CDO at 7. The Opinion disagreed with the majority's severability analysis and would have severed the non-operative provisions from the remainder of the Ordinances. CDO at 8.

REASONS FOR ALLOWANCE OF APPEAL

This Court should allow the appeal because it presents questions of substantial importance that are matters of first impression for this Court. Pa. R.A.P. § 1114(b).

First, the case presents a question of substantial public importance, as municipalities across the state need to know what authority they have to protect their citizens from gun violence. *See* Pa. R.A.P. § 1114(b)(4).

Second, and relatedly, the expansive decision of the lower court to extinguish all municipal power to regulate in the field of firearms regulations warrants review because it raises separation of powers concerns. It is the Legislature, and not the courts, that gets to extinguish municipal power through preemption and courts are not to find that the historic powers of localities to protect public safety are preempted unless the General Assembly's mandate is clear. Because the lower court departed from and went well beyond the text of the preemption provisions and expressly nullified statutes granting municipal authority over firearms, this Court should be wary that it improperly overstepped. *See* Pa. R.A.P. § 1114(b)(4).

Third, the expansive lower court decisions appear to be based on dictum from the Court's decades-old decision in *Ortiz*. The Court should clarify *Ortiz* and confirm that municipalities may regulate the "use" of firearms in public places within their borders—an issue of first impression. *See* Pa. R.A.P. § 1114(b)(3).

I. The scope of municipal authority to regulate firearms is a recurring issue of significant and urgent importance to public health and safety.

This Court should allow the appeal so that local governments know what authority they have to protect their citizens from gun violence. As gun violence plagues Pennsylvania's cities, local officials want to enact evidence-based gun safety measures to protect their constituents. The lower court decision ties their hands completely. It impinges on the ways local democratically elected leaders can pursue public safety, preventing even modest and narrowly tailored reforms like the Ordinances. That presents an issue of public importance.

After the mass murder at the Tree of Life Synagogue, local constituents demanded action to confront the destruction caused by assault weapons, large capacity magazines, and rapid-fire devices. As the City Council concluded, the use of assault weapons "results in a higher number of fatalities and injuries during mass shootings and other serious crimes, including murders of police officers." AW § 1101.10(A)(3). Quite simply, assault weapons and firearms fitted with large capacity magazines or rapid-fire devices can "fire more rounds . . . with greater destructive capacity" in less time—a "tragic truth [that] has been proven and re-proven in mass shootings around the country, including on October 27, 2018, at the Tree of Life synagogue in Pittsburgh." *Id.* Such devices are particularly dangerous "in a crowded urban jurisdiction." *Id.* Further, the City determined that even if it could not totally ban these devices, imposing liability "on those who would use [these devices] in public spaces" would still enhance public safety, particularly by "allowing police officers to intercede earlier and deter future tragedies." *Id.*

The Tree of Life tragedy also shone a spotlight on the problem of gun violence plaguing Pittsburgh and the Commonwealth more generally, especially when it came to children. The City found that in the five years preceding the Ordinances, "a child or teen under the age of 18 was killed by gunfire in Pennsylvania every 6 days, on average." CAP § 1106.07(A)(5). It recognized that millions of children in America live in homes with at least one gun that is loaded and unlocked. *Id.* § 1106.07(A) (10). The result can be fatal. *Id.* . § 1106.07(A)(8). Among the victims are children who "gain access to a gun and unintentionally shoot themselves or someone else," and the even greater number of children "die by suicide performed with a gun." *Id.* The City searched for solutions, and consulted research compiled by the RAND Corporation showing the efficacy of child access prevention laws in reducing unintentional firearm injuries and a meta-analysis showing that reducing child access to firearms reduces youth suicides. *Id.* § 1106.07(A)(11).

The Ordinances reflect how Pittsburgh, within the confines of the existing statutes, chose to best protect its residents from senseless gun violence. Other localities may make other determinations based on their unique composition and elected leadership. But the lower court's decision removed that policy choice from the City, and from all cities in the Commonwealth.

Pittsburgh is not alone in being stifled by the Firearms Preemption Statutes. There are two other cases that raise similar concerns over these laws currently before this Court. The first is a petition for allowance of appeal by the City of Philadelphia

from a Commonwealth Court decision striking down one of its firearms ordnances. *See Petition for Allowance of Appeal* i*n City of Philadelphia v. Armstrong*, 81 EAL 2022 (Mar. 16, 2022). The second involves a group of individuals and the City of Philadelphia challenging the Firearms Preemption Statutes on constitutional grounds. *See Crawford v. Commonwealth of Pennsylvania,* No. 562 M.D. 2020, 2022 WL 1792829 (Pa. Commw. Ct. May 26, 2022). In the *City of Philadelphia* case, an amicus brief joined by eleven municipalities, including Pittsburgh, explained the importance of local control of firearms to cities in the Commonwealth. *See Brief of Amici Curiae County and Local Governments and The Pennsylvania Municipal League in Support of The City of Philadelphia's Petition for Review*, *City of Philadelphia v. Armstrong*, 81 EAL 2022 (Mar. 16, 2022). This Court should take this case to address this pressing and recurring issue that is affecting many of the Commonwealth's cities and citizens.

II. The lower court opinion raises separation of powers concerns because it limits local power beyond constraints imposed by the General Assembly.

The Commonwealth Court's decision also merits review because it completely extinguishes local authority over firearm regulation, thereby reaching beyond the text of the state's preemption statutes and effectively eviscerating the General Assembly's affirmative grant of authority to local governments to "prevent" unlawful discharge of firearms. This raises substantial separation of powers concerns, because it is the Legislature, not the judiciary, that preempts local laws. And a court's decision to invalidate an entire field of local health and safety laws when the Legislature itself has

not called for field preemption deserves review to ensure that the judiciary has not overstepped.

A. The lower court's opinion departs from the text of the statute.

As this Court often repeats, the first step in interpreting a statute is to examine its plain language. *Pennsylvania Rest. & Lodging Ass'n v. City of Pittsburgh,* 211 A.3d 810, 822 (Pa. 2019). When that language is clear, as here, the inquiry "begins and ends with the plain language of the statute," *id.*, as courts have no power to "add words" or expand a statute's "scope and operation" through the guise of statutory interpretation. *Commonwealth v. Segida,* 985 A.2d 871, 875 (Pa. 2009).

The plain texts of the firearm preemption statutes are clear—they preempt four categories of firearms regulation: (1) ownership; (2) possession; (3) transfer and (4) transportation. Section 6120(a) states: "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." *See also* 53 Pa.C.S § 2962(g) (repeating same four categories). Based on the plain language, then, local governments cannot regulate in the four enumerated areas, but outside of those four areas, local governments retain their power.

General Assembly could have stated it was preempting the entire field—it did not. "[A]lthough one is admonished to listen attentively to what a statute says[,] one must also listen attentively to what it does not say." *Pilchesky v. Lackawanna Cty.*, 88 A.3d

954, 965 (Pa. 2014) (quoting *Commonwealth v. Johnson*, 26 A.3d 1078, 1090 (Pa. 2011)). Neither of the statutes preempts local firearm "use" ordinances, though they could have, as many other states across the country have expressly done.[6] And the four included categories matter—because "inclusion of a specific matter in a statute implies the exclusion of other matters." *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002).[7]

The Ordinances at issue in this case involve only the "use" of firearms and not any of the preempted categories. Both the Assault Weapons Ordinance and the Large Capacity Magazine Ordinance regulate only the "use" of various firearms, ammunition, and non-firearm weapons or accessories (e.g., rapid fire devices and LCMs). One can still own, possess, transfer (i.e., purchase, sell, give, or lend) or transport (open or concealed) any of these highly dangerous devices.[8] Likewise, the CAP Ordinance is not

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[6] State statutes explicitly preempting local laws that regulate the "use" of firearms include: Ariz. Rev. Stat. § 13-3108; Ala. Stat. § 29.35.145(a); Me. Rev. Stat. 25 § 2011(2); Mo. Stat. § 21.750(2); Mont. Code § 45-8-351(1); N.H. Rev. Stat. § 159:26(I); Okla. Stat. Section 21 § 1289.24(B); Ore. Rev. Stat. § 166.170; Tenn. Code Ann. § 39-17-1314(a); Utah Code § 53-5a-102(6); and Wis. Stat. § 66.0409(2).

[7] The Commonwealth Court noted that Section 6120 uses the phrase "in any manner," when describing the prohibition on the local regulation of firearms. Op at 22. But this phrase is cabined by the four categories, "ownership, possession, transfer, and transportation." The phrase "in any manner" does not expand the preemption law beyond those categories; it simply creates total preemption within that limited sphere.

[8] The plain language of the preemption statutes is limited in yet another way overlooked by the lower court: they preempt only law governing "firearms, ammunition or ammunition components." 18 Pa.C.S. § 6120(a); *see also* 53 Pa.C.S. § 2962(g) (listing only firearms). Large capacity magazines and rapid-fire devices (like bumpstocks) are

triggered unless a minor "uses" a firearm. CAP § 1106.02(A)(1). To the extent that the CAP provision incentivizes responsible storage of firearms, that subject, too—storage—is not preempted by state law (as compared to many other state laws that do expressly preempt with respect to "storage").[9]

The atextual nature of the Commonwealth Court's decision is particularly concerning because the result is to quash the power of local government to legislate for the health and safety of its residents—something only the Legislature can do. *See Pennsylvania Rest. & Lodging Ass'n*, 211 A.3d at 816-17. The police power Pittsburgh holds is "fundamental" because it enables the City, through its elected leaders, "to respond in an appropriate and effective fashion to changing political, economic, and social circumstances"—like the tragedy at Tree of Life and the crisis of gun violence—

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not any of those. They are accessories that may be removed from a firearm. Hence, they are not the firearm itself, ammunition, or a "component"—i.e., a "part" or "ingredient"—of the ammunition; it is the place where the ammunition goes. Thus, the Large Capacity Magazine Ordinance falls even further outside the scope of the state's preemption statutes.

[9] Numerous other states expressly preempt local regulations related to firearms storage, in addition to ownership, possession, and other categories. *See, e.g.*, Ariz. Rev. Stat. § 13-3118(A) (preempting local laws "relating to the possession, transfer or storage of firearms"); Idaho Code § 18-3302J(2) (no locality may "regulate[] in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of firearms"); Ind. Code § 35-47-11.1-2 (barring local regulation of "the ownership, possession, carrying, transportation, registration, transfer, and storage of firearms"); Ky. Rev. Stat. § 65.870(1) (same with respect to the "manufacture, sale, purchase, taxation, transfer, ownership, possession, carrying, storage, or transportation of firearms"); Nev. Rev. Stat. Ann. § 268.418(1)(b) (declaring the "regulation of the transfer, sale, purchase, possession, carrying, ownership, transportation, storage, registration and licensing of firearms" within the "exclusive" domain of the Legislature"). But Pennsylvania has not.

"and thus to maintain its vitality and order." *Id.* at 817. That power is enshrined in the Commonwealth's Constitution. *See* Article IX, § 2. Thus, courts are to "begin with the view" that an act of a home rule municipality "is valid," and they must "resolve any ambiguities in favor of the municipality." *Delaware Cty. v. Middletown Twp.*, 511 A.2d 811, 813 (1986).

The lower court did the opposite. It read the Firearms Preemption Statutes as "transcending the simple acts of 'ownership, possession, transfer or transportation.'" Op. at 21. It rejected "textually based arguments," as it noted the Commonwealth Court had done in other cases. Op. at 19. For example, in the recent decision in *City of Philadelphia v. Armstrong*, the Commonwealth Court again rejected that Section 6120 is limited by the phrase "when carried or transported," even though the text of the law makes clear it is so limited. 271 A.3d 555, 563 (Pa. Commw. Ct. 2022). In *Nat'l Rifle Ass'n v. City of Philadelphia*, the court eliminated the word "lawful" from Section 6120, writing that "[u]nfortunately . . . while we may agree with the City that preemption of 18 Pa.C.S. § 6120(a) appears to be limited to the lawful use of firearms by its very terms," it was bound by precedent to not give effect to that term. 977 A.2d 78, 82 (Pa. Commw. Ct. 2009) (emphasis in original), overruled on other grounds by *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497 (Pa. Commw. Ct. 2019).

The statutes have been divorced from—and expanded well beyond—their text. Rather than correcting mistaken interpretations of the statutes, the Commonwealth Court here pushed the bounds of *stare decisis* past its limits by arguing that judicial gloss

and dictum, even that of a lower court, "become[s] part of section 6120(a) itself." Op. at 23.[10] This reasoning changed the substantive scope and thrust of the statute. That is not just an error, it is a violation of the separation of powers and the Commonwealth's Constitution.

B. The lower court's opinion nullifies local authority to "prevent" the unlawful discharge of firearms within municipal borders granted under 53 P.S. §§ 3703 and 23131.

Reaching beyond the text of the preemption statutes, the lower court held "the regulation of firearms is an area where legislative activity is vested singularly and absolutely in the General Assembly of the Commonwealth." Op at 11. The court also expressly held that Section 6120, "must be construed to repeal both section 3 of the Second Class City Code and section 3703 of the Act." Op. at 24. This eviscerates the authority of local governments to act to "prevent" the unlawful discharge of firearms

[10] The lower court struck down the Ordinances in their entirety and did not sever portions of the Ordinances that were inoperative or not even challenged in this lawsuit. Op. at 26-27 n.17. The court found that the City's severability arguments were "deficient and underdeveloped," and it therefore "waived" these arguments. *Id.* That was error; the City devoted an entire section in its opening brief and reply to this argument. As an alternative basis, the lower court went on to state that severance would not be appropriate because "it cannot be presumed the City would have enacted" the Ordinances without the portions that were actually challenged. Op. at 26-27 n.17. As the City explained in its briefing before the Commonwealth Court, the Ordinances' severance provisions are quite broad, stating that any invalid "section, subsection, sentence, clause, phrase, or portion" that is invalid should not "affect the validity of the remaining portions" of the Ordinances. AW §§ 1101.9, 1102.07; 1103.07; LCM §§ 1104.09, 1105.07; CAP §§ 1106.06, 1107.19. What is more, the lower court opinion ran afoul of the "presumption in favor of severability where a statute contains a severability clause." *Commonwealth, Dep't of Educ. v. First Sch.*, 370 A.2d 702, 706 (Pa. 1977).

as delegated in 53 P.S. §§ 23131, 3703. It is a significant issue of public importance if localities retain that authority, and a serious separation of powers concern if the judiciary improperly eliminated it through the doctrine of implied repeal.

In the absence of explicit field preemption language, the Pennsylvania Supreme Court has mandated a stringent bar for implying field preemption. *Hoffman Mining Co., Inc. v. Zoning Bd. of Adams Twp.,* 32 A.3d 587, 593 (Pa. 2011). The Pennsylvania Supreme Court demands "clarity" "because of the severity of the consequences" of finding field preemption—extinguishing all local democratic power "in that area." *Id.* Thus far, this "Court has determined 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." *Id.* The lower court's opinion effectively adds "firearms" to this list, which warrants this Court's review.

Here, far from evincing "clear intent" to preempt the "entire field," the General Assembly granted local governments express authority "to regulate, prevent and punish the discharge of firearms" in the public areas within their borders. 53 P.S. § 23131; *see also id.* § 3707 (granting power "to regulate or to prohibit and prevent . . . the unnecessary firing and discharge of firearms" in public places). The Ordinances fall squarely within this expressly delegated power to *prevent* the discharge of firearms. The word "prevent" means "to stop from happening; to hinder or impede." Prevent, *Black's Law Dictionary* (11th ed. 2019). The Legislature thus granted municipalities power to pass ordinances focused on stopping the unnecessary firing of firearms in public places

before there are unnecessary deaths and injuries. In the face of this statute, it is wrong to say that the Legislature's "clear intent" was to preempt the entire field.

Regardless, the Commonwealth Court's decision adopted the plaintiffs' view that these statutes were "repeal[ed]." Op. at 24-25. They were not, explicitly or implicitly. "[R]epeal by implication is carefully avoided by the courts." *Carroll v. Ringgold Educ. Ass'n*, 680 A.2d 1137, 1142 (Pa. 1996). And the doctrine is only applicable if "two or more statutes enacted finally by different General Assemblies *are irreconcilable*." 1 Pa.C.S. § 1936 (emphasis added).

To be sure, local government authority to "prevent" firearm discharge is not unlimited. It must be harmonized with the preemption statutes. *In re Borough of Downingtown*, 161 A.3d 844, 871 (Pa. 2017) ("[Courts are] obliged to construe the [statutes] in harmony, if possible, so as to give effect to both."). But that is easily done: localities can take steps to prevent the unlawful and unnecessary discharge of firearms as long as they do not regulate the ownership, possession, transfer, or transportation of firearms. Reading the statutes together, as they must be read, local governments are not left with broad power over firearms, but neither are they completely handcuffed.

The lower court did not reconcile the statutes, even though they can be easily harmonized, instead finding that the statutes "cannot be squared" with one another. Op. at 24. The lower court's extreme step of holding that an entire field of regulation is preempted, and hence that 53 P.S. §§ 23131 and 3707 are *impliedly* repealed, usurped the traditional law-making function of the General Assembly and warrants review. *See*

Carroll v. Ringgold Educ. Ass'n, 680 A.2d 1137, 1142 (Pa. 1996) ("[S]tatutes should be construed in harmony with the existing law, and repeal by implication is carefully avoided by the courts.").

III. This case presents a question of first impression regarding the scope of firearms preemption law.

It has been more than 25 years since this Court has addressed the Commonwealth's firearm preemption laws head on, and it has never addressed the validity of modest reforms that, as here, govern only firearm "use." In that time, some lower courts have taken language from *Ortiz*—which addressed a different question—and misapplied it to various local firearms regulations. But others have not, leaving conflicting decisions in the Commonwealth Court. It is time for this Court to clarify *Ortiz* and address firearms preemption in this new context.

A. This case provides the Court with an opportunity to correct the line of Commonwealth Court cases misapplying this Court's precedent in *Ortiz* that has created a split of authority between lower courts.

The Court should take this case to "overturn or rein in" its prior decision in *Ortiz*, as three judges on the Commonwealth Court suggested it do. CDO at 7. The Commonwealth Court concluded that *Ortiz* held that the state preempted the entire field of firearms regulation. Op. at 29-30. That is wrong, and it is not the only lower court to make that mistake. The single statement of dictum from *Ortiz* that these courts rely on is: "'[R]egulation of firearms is a matter of concern in all Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is

the proper forum for the imposition of such regulation.'" Op. at 11, 21, 30 (quoting *Ortiz*, 681 A.2d 152, 156 (Pa. 1996)). Taken in isolation, this may sound like a declaration of field preemption. But in context, it is not.

Ortiz considered municipal laws that purported to "regulate the ownership of so-called assault weapons," despite the State's then newly modified preemption statute—Section 6120. *Id.* at 154-55. Critically, the assault weapons ban in *Ortiz* "undisputed[ly]" fell within the *scope* of § 6120, but Philadelphia and Pittsburgh challenged the *validity* of Section 6120. *Id.* at 154. The cities argued that the Legislature had no power to pass a firearm preemption statute because a home-rule municipality could not be deprived of its ability to protect its citizens from violence. *Id.* at 155-56. That alone was at issue.

The Court reasoned that because firearm ownership is constitutionally protected, firearm legislation is a proper subject of statewide legislation and, as the plaintiffs oft-quote, "the General Assembly, not city councils, is the proper forum" for regulation regarding "ownership of firearms." *Id.* at 156. In context, *Ortiz* stands for the proposition—not at issue here—that the Commonwealth's Firearm Preemption Statutes are valid and not a violation of home rule. The Court neither considered whether the scope of preemption extended beyond the statute's text nor identified the requisite "clear[] evidence" that the Legislature intended field preemption. *See Hoffman Mining*, 32 A.3d at 593. Neither was at issue.

Nevertheless, some courts, as in this case, improperly use this sentence out-of-context to stand for the idea that city halls can *never* touch firearms. *See, e.g.*, *FOAC v.*

Lower Merion Twp., 151 A.3d 1172, 1176 (Pa. Commw. Ct. 2016); *Dillon v. City of Erie*, 83 A.3d 467, 472-73 (Pa. Commw. Ct. 2014); *NRA v. City of Philadelphia*, 977 A.2d 78, 83 (Pa. Commonw. Ct. 2009). In *Clarke v. House of Representatives*, the Commonwealth Court cited the *Ortiz* dictum for the proposition that "binding precedent" has "made clear" that firearms regulation "is an area of statewide concern over which the General Assembly has assumed *sole* regulatory power." 957 A.2d 361, 364 (Pa. Commw. Ct. 2008) (emphasis added). Another court lamented that while it "may agree" that the language of the preemption statutes did not dictate field preemption, it was bound by *Ortiz*. *See NRA v. City of Philadelphia*, 977 A.2d at 82.[11]

On the other hand, some cases suggest that *Ortiz* does not stand for such a sweeping proposition. The Commonwealth Court, for example, has rejected firearms preemption challenges and upheld local regulation of firearms at least twice—holdings that are incompatible with field preemption. *See, e.g.*, *Minich v. Cnty. of Jefferson*, 869 A.2d 1141 (Pa. Commw. Ct. 2005) (upholding an ordinance designed to keep guns out of court facilities); *Gun Range, LLC v. City of Philadelphia*, No. 1529 C.D. 2016, 2018 WL 2090303, at *6 (Pa. Commw. Ct. May 7, 2018) (upholding a zoning regulation affecting the location of gun shops). The lower court briefly discussed *Minich* here, but it did not

[11] A footnote in this Court's decision in *Commonwealth v. Hicks* likewise cites *Ortiz* in referring to the "General Assembly's reservation of the exclusive prerogative to regulate firearms in this Commonwealth." 208 A.3d 916, 926 n.6 (Pa. 2019). But that case was about the legality of searches and seizures and cited *Ortiz* only in noting that firearms licensing laws are prescribed by state law, not municipal ordinances. It did not address preemption; the footnote is passing dicta.

give an account of how it could be reconciled with its field preemption holding, instead distinguishing it from this case. Op. at 16-18. Thus, despite the sweeping language in the lower court opinion, there is still inconsistency in the law.

The Court should use this opportunity clarify *Ortiz* and resolve the conflict as to whether the General Assembly has preempted the "entire field" of firearms regulation.

B. This Court has never addressed whether the UFA preempts local ordinances restricting firearm "use."

Not only does this case present an opportunity to resolve whether the Legislature has preempted the field, it also presents a novel type of local gun regulation to consider. This Court has never addressed a local law that, like the Ordinances at issue here, is narrowly and exclusively limited to the "use"[12] of firearms and accessories.

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[12] The Commonwealth Court found that the City "attempt[ed] to circumvent the preemptive scope of section 6120(a) of the UFA," and defined "use" to "expressly exclude[] the 'possession, ownership, transportation or transfer' of an assault weapon or firearm with a large capacity magazine." Op. at 21. But the lower court went on to say that the Ordinances "affect 'ownership' and/or 'possession' of firearms." This discussion was not relevant to its holding, however, because it found that Section 6120 "transcend[ed] the simple acts of 'ownership, possession, transfer or transportation' and encompass[ed] the actual 'use' or 'discharge' of firearms." Op. at 21-22.

"Use," in the firearms context is a distinct concept from "possession" or "ownership." *Bailey v. United States*, 516 U.S. 137 (1995), is instructive in understanding the meaning of "use" in the Ordinances. Applying common dictionary definitions, the *Bailey* Court held that for a firearm to be "used" it needed to be "actively employed." *Id.* at 147. "Use," the U.S. Supreme Court explained, does not include simple possession of a firearm, or merely carrying one. *Id.* at 147-48. The Pennsylvania General Assembly, moreover, has included both "use" and "possession" in the same statute. *See* 18 Pa.C.S. § 6105: ("A person who has been convicted of an offense enumerated in [this] subsection . . . shall not *possess, use*, control, sell, transfer or manufacture or obtain a license to *possess, use*, control, sell, transfer

The last case this Court heard about Section 6120, *Ortiz*, (as explained fully above) considered whether local home-rule governments could pass ordinances that "regulate the *ownership* of so-called assault weapons." *Id.* at 154-55. This "undisputed[ly]" fell within the scope of § 6120," because it expressly regulated ownership. *Id.* at 154. The ban on assault weapons in *Ortiz* also contained the word "use" in it, but the case did not analyze whether a "use" limitation on its own—as the Assault Weapons and Large Capacity Magazine Ordinances do here—would be preempted. 681 A.2d at 155.[13] This Court, therefore, has never addressed the issue presented in this appeal and has indeed never squarely addressed the scope of the Firearms Preemption Statutes.

Before this case, moreover, Commonwealth Court precedent only addressed ordinances that fell within the statutes' preempted categories: ***ownership*** and ***possession***, *see NRA v. Philadelphia*, 977 A.2d at 80, 82 (invalidating local assault weapons ordinance that "prohibit[ed] the possession, sale and transfer of certain offensive weapons."); ***transfer***, *see Schneck v. City of Philadelphia*, 383 A.2d 227, 228-29 (Pa. Commw. Ct. 1978) (invalidating ordinance stating that "no person shall acquire or transfer any firearm in the City" without a license); *NRA v. City of Philadelphia*, 977 A.2d

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or manufacture a firearm in this Commonwealth.") (emphasis added). If "possession" included "use" as the Commonwealth Court suggested, this would be a redundancy.

[13] No party in *Ortiz* argued that the ordinance should be severed to leave only the "use" ban in effect, likely because the severability clause in that case did not allow for severing single words or phrases, but required severing the entire provision together.

at 82 (local ordinance banning straw purchases preempted by state law), and ***transportation***, *see Dillon v. City of Erie*, 83 A.3d at 473 (Pa. Commw. Ct. 2014) (invalidating an ordinance "regulating the possession of firearms in parks"); *FOAC v. Lower Merion Twp.*, 151 A.3d at 1177 (invalidating locality's "broad proscription" against carrying or discharging any kind of firearm without a permit). The lower court was wrong to the extent that its opinion can be read to suggest prior cases had already addressed "use" and "discharge" in the context of preemption. Op. at 21. The lower court opinion went one step further in this case than it had before.

The Ordinances, therefore, present this Court with a question of first impression that is also of great importance to local governments confronting gun violence.

CONCLUSION

For all these reasons, the Court should grant allowance of appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

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Dated: June 27, 2022

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I certify that this brief complies with Pa. R.A.P. 1115(f) because it includes 7,988 words, calculated using the word count feature of Microsoft Word, excluding the parts expected by Pa. R.A.P. 1115(g).

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CERTIFICATE OF SERVICE

I, Wendy Kobee, certify that on June 27, 2022, the foregoing brief was served on the following counsel for the parties via first class mail, which satisfies the requirement of Pa.R.A.P. 121:

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