IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY PENNSYLVANIA – CIVIL DIVISION

LAURENCE JOSEPH ANDERSON, SCOTT MILLER, ROBERT REINHOLD OPDYKE, and MICHAEL A. WHITEHOUSE,

Plaintiffs,

v.

CITY OF PITTSBURGH, WILLIAM PEDUTO, in his official capacity as Mayor of the City of Pittsburgh, and PITTSBURGH CITY COUNCIL,

Defendants.

CASE NO. GD-19-005308

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Filed on behalf of all Defendants

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I. Preliminary Statement

As this Court is well aware, on October 27, 2018, a gunman entered the Tree of Life Synagogue in the Squirrel Hill neighborhood of Pittsburgh, Pennsylvania. Armed with an assault rifle and three semi-automatic pistols, he opened fire on worshipers. According to reports, he went to the synagogue to kill Jewish people. Eleven people were killed; six were injured, including four police officers. As is often the case after this sort of horrific mass shooting, citizens of the affected and surrounding communities demanded common sense gun reforms. After extensive public discussion and debate, the City of Pittsburgh passed three Ordinances aimed at preventing future gun violence.

At the heart of Plaintiffs' claim is the assertion that the City lacks all power to regulate firearms. The City submits that this is not so. Cities in the Commonwealth are not completely powerless to take steps to protect their residents from gun violence. Pittsburgh's elected leaders found that gun violence "presents a significant and undeniable public safety risk" and "both the City and the Commonwealth have a moral imperative to take lawfully available steps to reduce" it. Ordinance 2018-1219 § 1104.10(A)(1) (the "LCM Ordinance" or "Ordinance"). Neither the General Assembly nor the Pennsylvania Supreme Court has ever expressly said or held cities are completely powerless to so act; to the contrary, and as discussed below, cities like Pittsburgh have been expressly granted certain powers relating to and supporting firearms regulation. This Court should confirm that within certain spheres a city may take reasonable steps to protect its residents from the epidemic of gun violence.

Only one portion of one ordinance is challenged in this lawsuit—Ordinance 2018-1219 (the "LCM Ordinance" or "Ordinance"). Unlike past city firearms ordinances, and cognizant that state preemption laws constrain (but do not eliminate) its ability to act in the firearms space, the

City Council limited the LCM Ordinance to regulating only the "use" of "any large capacity magazine" ("LCM") "in any public place within the City of Pittsburgh." *Id.* § 1104.03(A). As the City Council found, and like its companion ordinances, the LCM Ordinance provides an additional and important tool for law enforcement in the City of Pittsburgh to use to investigate or intercede in a potentially lethal situation and, perhaps, prevent another tragedy. And it does so without impeding on anyone's constitutional rights: the Ordinance carefully carves out using a firearm for lawful self-defense or defense of another, *id.*, § 1104.05(b), and imposes no limitations on using ammunition magazines of 10 rounds or fewer.

Plaintiffs claim that the Ordinance is preempted by State law, naming as Defendants the City of Pittsburgh, Pittsburgh City Council, and Mayor Peduto, in his official capacity (collectively the "City" or "Defendants"). Plaintiffs rushed into court, filing this lawsuit on the day the Ordinance was signed by the Mayor. In their haste to file, they challenge an ordinance unwritten: Plaintiffs claim that the LCM Ordinance "ban[s] the public possession and transportation of loaded standard-capacity firearm magazines." Anderson Compl. ¶ 1. This is wrong.

Properly read, the Ordinance does not prohibit the conduct Plaintiffs claim it does—and in fact does not prohibit any conduct that Plaintiffs intend to engage in in the future or have engaged in in the past. Plaintiffs' case is premised on the erroneous assumption that the Ordinance prohibits the mere *carrying* of a firearm loaded with an LCM. It does not. Instead, the Ordinance much more narrowly prohibits only the *use* of an LCM—or the *use* of a firearm loaded with an LCM—in public places in Pittsburgh.

As a result, there is no genuine dispute between the parties and Plaintiffs do not have standing to challenge the LCM Ordinance. Because Plaintiffs' past and intended future conduct

with respect to LCMs does not violate the Ordinance, they suffer no injury from it, and no Plaintiff has reason to believe enforcement awaits in his future. This case should be dismissed in its entirety for lack of standing.

To be clear, the City's position is not that the Ordinance is unreviewable by the courts, but instead that the Ordinance is not reviewable in this pre-enforcement challenge by Plaintiffs who have failed to come forth with any evidence to show they will personally be impacted by it. In due course, should a person be cited or stopped based on a violation or possible violation of the Ordinance or come forth with a genuine injury, there will be a full opportunity for someone who has actually been impacted to argue that the Ordinance is preempted.

But even if the case is not dismissed on the dispositive threshold issue of standing, it is the City—*not* Plaintiffs—that should be granted summary judgment on the merits. The City validly enacted the Ordinance pursuant to express powers granted by the General Assembly to "regulate," "prohibit," and "prevent" unnecessary discharges of firearms in public places. 53 Pa. C.S. § 23131; 53 Pa. C.S. § 3703. No prior firearms case, so far as Defendants are aware, has ever addressed the extent of a City's *express* and *affirmative* powers to regulate firearms.

The Ordinance, moreover, only prohibits the "*use*" of LCMs in "public places." LCM Ordinance § 1104.03(A). It is carefully crafted to comply with Pennsylvania's preemption laws, which by their plain text only prohibit municipalities from regulating four specific things: the *ownership, possession, transfer, or transportation* of firearms, ammunition and ammunition components. 18 Pa. C.S. § 6120; 53 Pa. C.S. § 2962. A regulation on "use" is distinct from any of these four categories of preempted regulation, and is defined in the Ordinance expressly to make clear that it "does not include possession, ownership, transportation or transfer." *Id.* LCM Ordinance § 1104.03(A). To the extent prior decisions from Pennsylvania appellate courts have

suggested the state's firearms preemption laws sweep more broadly than their plain text, those statements are either dicta or are in error and should be reconsidered.

For all of these reasons, Plaintiffs' motion for summary judgment should be denied and the City's cross-motion for summary judgment should be granted.

II. Background

A. The LCM Ordinance

The single ordinance challenged in this lawsuit, Ordinance 2018-1219, regulates the "use" of "any large capacity magazine" "in any public place within the City of Pittsburgh" (the "LCM Ordinance"). *Id* § 1104.03(B). "Use," "large capacity magazine," and "public place" are all defined terms.[1] The Ordinance defines "use" of LCMs to include:

1. Employing it to discharge or in attempt to discharge ammunition by means of a firearm;
2. Loading it with ammunition;
3. Fitting or installing it into a firearm;
4. Brandishing it with a firearm;
5. Displaying it with a firearm while loaded; and
6. Employing it for any purpose prohibited by the laws of Pennsylvania or of the United States.

Id.

But the LCM Ordinance expressly states that "use" "does not include possession, ownership, transportation or transfer," *id.*, the only four categories expressly preempted by the General Assembly. *See* 18 Pa. C.S. § 6120; 53 Pa. C.S. § 2962. Each listed example of use must

[1] The two other Ordinances, as well as the LCM Ordinance, are being challenged in the parallel action *Firearm Owners Against Crime, et al. v. City of Pittsburgh, et al.*, No. GD-19-005330 (filed Apr. 9, 2019).

be read bearing in mind two general principles: (1) that the listed categories are a subset of "use" and must be read in light of that word's meaning, and (2) that those examples must be construed so as not to regulate "possession, ownership, transportation or transfer" of a firearm.

A "large capacity magazine" is defined as 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."[2] LCM Ordinance § 1104.01(D) "Public place" "include[s] streets, parks, open spaces, public buildings, public accommodations, businesses and other locations to which the general public has a right to resort, but does not include a private home or residence or any duly established site for the sale or transfer of firearms or for firearm training, practice or competition." *Id.* § 1104.03(C).

Separately, and unchallenged in this case, the LCM Ordinance contains a conditional "Prohibition of Large Capacity Magazines" that prohibits ownership, possession, transfer, and transportation of LCMs. *Id.* § 1105.02. This provision of the LCM Ordinance is no more than a call-to-action; it is set to take effect only upon "action of the Pennsylvania General Assembly or the Pennsylvania Supreme Court that has the effect of authorizing" the provision. *Id.* § 1105.06. The public use of armor or metal penetrating ammunition and rapid fire devices is also regulated by the ordinance (but not challenged in this case). *Id.* §§ 1104.02(A); 1104.04(A).

The LCM Ordinance also contains carve-outs for self-defense and hunting: "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's or another person's person or property

[2] A firearm "magazine," as defined by the NRA, is "[a] spring-loaded container for cartridges that may be an integral part of the gun's mechanism or may be detachable." Glossary, National Rifle Association Of America, Institute For Legislative Action (July 12, 2019, 10:56 PM), https://www.nraila.org/for-the-press/glossary/. And a "cartridge" is "[a] single, complete round of ammunition." *Id.*

or for lawful hunting purposes." *Id.* at § 1104.05(B). Law enforcement officers, too, are exempt. *Id.* at § 1104.05(A).

B. Plaintiffs' Firearm Practices

The four Plaintiffs in this case are firearm owners with concealed carry permits. Anderson Interrogs. 1, 7 (attached hereto as Ex. A); Miller Interrogs. 1, 7 (attached hereto as Ex. B); Opdyke Interrogs. 1, 7 attached hereto as Ex. C); Whitehouse Interrogs. 1, 7 (attached hereto as Ex. D). Each Plaintiff owns an LCM. Ex. A, Anderson Interrogs. 1-2; Ex. B, Miller Interrogs. 1-2; Ex. C, Opdyke Interrogs. 1-2; Ex. D, Whitehouse Interrogs. 1-2.

According to their interrogatory responses, before leaving their homes with their pistols, Plaintiffs load their LCMs with ammunition and install the magazine into their pistols; they do not load their magazines or pistols in public. Anderson Interrog. 6; Miller Interrog. 6; Opdyke Interrog. 6; Whitehouse Interrog. 6.

All of the Plaintiffs state that they carry their firearms concealed at times in public places in the City of Pittsburgh. Ex. A, Anderson Interrogs. 4-5; Ex. B, Miller Interrogs. 4-5; Ex. C, Opdyke Interrogs. 4-5; Ex. D, Whitehouse Interrogs. 4-5. Two Plaintiffs, Anderson and Opdyke, state that they also sometimes carry firearms that are visible to others. Ex. A, Anderson Interrogs. 4-5; Ex. B, Miller Interrogs. 4-5. Plaintiff Opdyke says he openly carries his firearm "when his clothing choice d[oes] not make concealed carry feasible." Ex. C, Opdyke Interrog. 5. Plaintiff Anderson states that he carries his gun in a holster that is visible to others on his way to work, as well as when he is working as a security guard. Ex. A, Anderson Interrogs. 4-5, Decl. of Laurene Anderson, Exhibit 3 to Plts. Br.

C. Procedural History

Plaintiffs filed this suit on the day the LCM Ordinance was signed by the Mayor. *See* Compl., *Anderson et al. v. City of Pittsburgh*, et al., No. GD-19-005308 (filed Apr. 9, 2019) ("Anderson Compl."). The two-count Complaint seeks a declaration that the portion of the LCM Ordinance detailed above is invalid and unenforceable because, Plaintiffs allege, it is preempted by State law (and an accompanying injunction). *See* Anderson Compl. ¶¶ 43-57.

III. Summary Judgment Standard

Summary judgment is appropriate "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense" and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. No. 1035.2(1). "[A] court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party . . . .[;] judgment [must be] clear and free from doubt." *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007).

IV. Plaintiffs' Suit is Non-Justiciable

A. Law of Standing

"A party seeking judicial resolution of a controversy in this Commonwealth must, as a prerequisite, establish that he has standing to maintain the action." *Nye v. Erie Ins. Exch.*, 470 A.2d 98, 100 (Pa. 1983). Plaintiffs bear the burden of proof to establish their standing to bring suit. *See Nat'l Rifle Ass'n v. City of Philadelphia*, No. 1472, 2008 WL 3819269, at *2 (Pa. Com. Pls. Ct. 2008) (Greenspan, J.) ("plaintiffs must establish standing" to challenge ordinances

claimed to be preempted in an action for declaratory and injunctive relief), *aff'd*, 977 A.2d 78, 81–82 (Pa. Commw. Ct. 2009) (*en banc*).[3]

"The keystone to standing . . . is that the person must be negatively impacted in some real and direct fashion." *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005). "[P]laintiffs cannot rest on a potential harm, they must allege an actual harm." *Nat'l Rifle Ass'n v. City of Philadelphia*, 2008 WL 3819269, at *2-5.

Applying these general principles in a trio of firearm ordinances preemption challenges, the Commonwealth Court has held that a plaintiff's possibility of harm is "remote and speculative" where the record does not show that they intend to engage in conduct that is prohibited by the challenged ordinance. *Nat'l Rifle Ass'n v. City of Pittsburgh*, 999 A.2d 1256, 1259 (Pa. Commw. Ct. 2010). And when a plaintiff's claimed harm is remote and speculative, the court has dismissed the lawsuits, or specific claims within those lawsuits.

In *National Rifle Association v. City of Philadelphia*, No. 1472, 2008 WL 3819269 (Pa. Com. Pl. July 1, 2008), the court dismissed the plaintiffs' challenge to three separate gun ordinances for lack of standing. First, the court found that plaintiffs lacked standing to challenge an ordinance that required reporting of a lost or stolen firearm within 24 hours because they could not show a likelihood that their guns would be lost or stolen. *Id.* at *3-5. Second, it found that the plaintiffs could not establish standing to challenge a law that kept guns out of the hands of persons with a history of committing domestic abuse because none of the plaintiffs were

[3] The trial court opinion was adopted by the Commonwealth Court. *See Nat'l Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 81–82 (Pa. Commw. Ct. 2009) ("Because we agree with the trial court's determination that the Plaintiffs failed to establish any injury sufficient to confer standing with respect to these three Ordinances, we affirm and adopt that portion of the opinion of then Judge Jane Cutler Greenspan, entered in *National Rifle Association v. City of Philadelphia*, 2008 WL 5210185 (April Term, 2008, No. 1472, filed June 30, 2008")).

subject to a domestic abuse firearms-relinquishment order and there was no indication that they were likely to be subject to one in the future. *Id.* at *5. Finally, the plaintiffs' challenge to an ordinance requiring relinquishment of firearms for those posing an imminent threat was dismissed for lack of standing since no plaintiff established that he was a threat to himself or others. *Id.* at *5-6.

A few years later in *Nat'l Rifle Ass'n v. City of Pittsburgh*, 999 A.2d 1256, 1259 (Pa. Commw. Ct. 2010), the Commonwealth Court reiterated and extended these principles when dismissing a suit challenging a Pittsburgh ordinance requiring reporting of lost or stolen guns. The plaintiffs had "never violated the ordinance [and] d[id] not allege that they would disobey the ordinance if one of their guns [were] lost or stolen." *Id.* Finally, *Dillon v. City of Erie*, 83 A.3d 467, 475 (Pa. Commw. Ct. 2014), dismissed another challenge to an ordinance requiring reporting of lost or stolen guns, again on standing grounds, because there was "no allegation that Dillon ha[d] lost his firearm or [would] lose his firearm in the future, and there [wa]s no indication that [the ordinance] [would] ever be applicable to him."

The Commonwealth Court has also rejected several alternative standing arguments in the firearms preemption context, holding that standing is not conferred where plaintiffs claim an "ordinance impermissibly burdens their right to bear arms . . . [or] as a violation of a statute, is hardship per se." *Nat'l Rifle Ass'n v. City of Pittsburgh,* 999 A.2d at 1259.

B. Plaintiffs have not met their burden of establishing standing because they do not "use" LCMs in public places in the City of Pittsburgh and there is no reasonable prospect of them facing enforcement from the Ordinance.

Based on the undisputed record, no Plaintiff will be harmed by the Ordinance. Through interrogatories, Plaintiffs were asked to state whether they have used or intend in the future to use LCMs in public places in the City of Pittsburgh, as defined in the Ordinances. Plaintiffs'

undisputed interrogatory responses list four different purported uses of LCMs—none of which are prohibited by the Ordinance. Accordingly, they have not established standing to bring this lawsuit.

First, each Plaintiff stated that he carries a firearm concealed on his person and fitted with an LCM. Ex. A, Anderson Interrogs. 6-7; Ex. B, Miller Interrogs. 6-7; Ex. C, Opdyke Interrogs. 6-7; Ex. D, Whitehouse Interrogs. 6-7. Nothing in the LCM Ordinance prohibits such conduct—the possession and transportation of a weapon are expressly excluded from the Ordinance's scope, and that necessarily includes simply carrying the weapon (whether concealed or openly). *See* LCM Ordinance § 1104.03 ("[U]se does not include possession, [or] transportation").

Second, each Plaintiff points to the fact that he will "load" ammunition into an LCM and "install" the LCM into his firearm "in his home." Ex. A, Anderson Interrog. 6; Ex. B, Miller Interrog. 6; Ex. C, Opdyke Interrog. 6; Ex. D, Whitehouse Interrog. 6. But this is also conduct entirely consistent with the Ordinance. Plaintiffs are mistaken in their claim "[i]t is impossible to carry a firearm" fitted with an LCM because loading the magazine and fitting it into a firearm is prohibited. Compl. ¶ 32. They fail to appreciate that loading or fitting a magazine into a firearm is only prohibited if done in a *public place*. LCM Ordinance § 1104.03(C). ("[P]ublic place . . . does not include a private home or residence."). There is nothing that restricts them from continuing their current practice of loading their firearms with LCMs in non-public places, such as their homes, and then taking their loaded firearm with them into public places. *See id.*

Third, two Plaintiffs, Anderson and Opdyke, carry firearms that are visible to others at times. Ex. A, Anderson Interrogs. 4-5; Ex. C, Opdyke Interrogs. 4-5.[4] Simply openly carrying a weapon, without more, is also not "use" of a firearm. Plaintiffs may point to the fact that the Ordinance lists "display" of an LCM as an example of "use" that is prohibited. But "displaying" a weapon fitted with an LCM, as listed by the Ordinance, has to be understood in the context of, and as an example of, "using" the weapon.

The United States Supreme Court case *Bailey v. United States,* 516 U.S. 137 (1995), is instructive in understanding the meaning of "use" in the firearms context. 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 Court explained, does not include simple possession of a firearm, or merely carrying one. *Id.* at 147-48.

Applying *Bailey*'s teaching here, the five enumerated LCM "uses" in the Ordinance, including display, must be read to require some form of "active employment" to fit within the Ordinance's prohibition. Simply carrying a firearm—concealed or openly, and even if loaded and fitted with a LCM—without actively employing that weapon is not "display" as read in context.[5] None of the Plaintiffs state that they do more with their weapon in public than carrying it in a way that can be seen by others. Without more, that is not "actively employing" the firearm, and therefore it is not "use" of the firearm within the meaning of the Ordinance.

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[4] Two Plaintiffs, Miller and Whitehouse, do not carry firearms openly in Public Places in the City of Pittsburgh. *See* Miller Interrog. 6; Whitehouse Interrog. 6.

[5] While there is overlap between display of a firearm and brandishing a weapon, they are not the same. "Brandishing," as defined in the Ordinance, requires intent "to intimidate" "regardless of whether the Firearm is directly visible to that person." LCM Ordinance § 1104.03(D). One can actively display a weapon without brandishing it, by waving it without intent to intimidate; and one can brandish a weapon without displaying it, by holding it menacingly in a jacket pocket.

Finally, each Plaintiff states that he would discharge his firearm fitted with an LCM in self-defense if needed, and some Plaintiffs say they would do so in defense of another. Ex. A, Anderson Interrogs. 6(A); Ex. B, Miller Interrogs. 6(A); Ex. C, Opdyke Interrogs. 6(A); Ex. D, Whitehouse Interrogs. 6(A). But again, Plaintiffs fail to reckon with the Ordinance's limited reach: discharge of a firearm fitted with an LCM for the purposes of lawful self-defense and defense of others is expressly permitted by the Ordinance. LCM Ordinance § 1104.05(B) ("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's or another person's person or property . . . .").

Two Plaintiffs, Opdyke and Whitehouse, claim that the Ordnance will force them to purchase an additional firearm magazine. *See* Decl. of Robert Reinhold Opdyke, Exhibit 4 to Pls. Br; Decl. of Michael A. Whitehouse 18, Exhibit 5 to Pls. Br. This is based on a misunderstanding of the Ordinance. The Ordinance does not prohibit LCMs; it regulates their public use. Since there is no conduct in which these Plaintiffs intend to engage that conflicts with the Ordinance, there is no reason they would need to purchase an additional magazine. This assertion does not confer standing.

In sum, and based on the undisputed evidence, no Plaintiff has met his burden of showing that something he intends to do or has done in the past is or would be prohibited by the Ordinance. Plaintiffs do not need to change their conduct to comply with the Ordinance. Plaintiffs thus have not suffered "actual present harm or a significant possibility of future harm" from the Ordinance. *Nat'l Rifle Ass'n* v. City of Philadelphia, 2008 WL 3819269 at *3. They cannot "credibly argue that they fear the threat of prosecution under" the LCM Ordinance. *Id.* at *4-5. For all these reasons they have not established standing and their lawsuit should be

dismissed. *See also Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 8 A.3d 866, 874 (Pa. 2010) ("[J]udicial system requires a real or actual controversy before it will embrace a matter for review and disposition").

V. The LCM Ordinance is a valid exercise of the City's expressly granted powers and police powers and is not preempted by state law.

Even if the Court were to find Plaintiffs have met their burden of establishing standing, summary judgment should still be entered in favor of the City. Three independent reasons support the City's power to regulate the public use of LCMs: (1) the City has been expressly granted powers to regulate firearms to prevent unnecessary discharge in public places, and the Ordinance, which prohibits discharge of a firearm fitted with an LCM as well as uses that make a discharge more likely, fits within these powers; (2) the LCM Ordinance's limitation to regulating only the "use" of an LCM falls outside the plain text of the firearms preemption laws in Pennsylvania—which are limited to only regulations of ownership, possession, transportation, or transfer of a firearm—and thus the City may pass the Ordinance under its police powers; and (3) the plain language of the preemption provisions make clear they only apply to "firearms, ammunition or ammunition component[s]" and not to firearm "components" or "accessories" such as LCMs.

A. There is a presumption of validity that attaches to Ordinances passed by the City of Pittsburgh—a home rule municipality with constitutionally vested police power.

The Pennsylvania Constitution grants home rule cities broad powers: "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. The City of Pittsburgh—a city of the second class by statutory designation, 53 Pa.C.S. § 2901, *et seq.*,—adopted a home rule charter that broadly bestows "all home rule

powers"; it "may perform any function and exercise any power not denied by the Constitution [or] the laws of Pennsylvania." Pittsburgh Home Rule Charter, art. 1, § 101.

Courts "begin with the view" that an act of a home rule municipality "is valid . . . [and] resolve ambiguities in favor of the municipality." *Delaware Cty. v. Middletown Twp.*, 511 A.2d 811, 813 (Pa. 1986); *Nutter v. Dougherty*, 938 A.2d 401, 414 (Pa. 2007) ("We cannot stress enough that a home rule municipality's exercise of its local authority is not lightly intruded upon, with ambiguities regarding such authority resolved in favor of the municipality."); *Ziegler v. City of Reading*, 142 A.3d 119, 131 (Pa. Commw. Ct. 2016) ("To the extent the City's powers under the Code are ambiguous, any ambiguities regarding home rule authority must be resolved in favor of the municipality."); *cf. City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1326 (Pa. 1986) ("Where an ordinance conflicts with a statute, the will of the municipality as expressed through an ordinance will be respected unless the conflict between the statute and the ordinance is irreconcilable.").

In addition, through constitutional amendment and statutory decree, Pennsylvania has granted home rule municipalities general police powers. *See Devlin v. City of Philadelphia*, 862 A.2d 1234, 1248 (Pa. 2004) ("[T]he City generally has authority to enact anti-discrimination laws pursuant to its police powers."); *W. Pa. Rest. Ass'n v. City of Pittsburgh*, 77 A.2d 616, 621 (Pa. 1951) (recognizing a city's police powers to regulate for the health and safety of the population).

B. The City of Pittsburgh has express authority to regulate firearms—this grant of power must be read in concert with the firearms preemption statutes.

Plaintiffs emphasize that the State has preempted certain categories of firearms ordinances, but ignore that the General Assembly has also expressly granted authority to the City of Pittsburgh to regulate, prevent and punish the discharge of firearms in public places.

Pittsburgh has statutory authority (1) "to regulate, prevent and punish the discharge of firearms, rockets, powder, fireworks, or any other dangerous, combustible material, in the streets, lots, grounds, alleys, or in the vicinity of any buildings; . . . " 53 Pa. C.S. § 23131; and (2) "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," 53 Pa. C.S. § 3703.

That said, the City of Pittsburgh of course recognizes that the State legislature has also restricted a city's ability under certain circumstances to regulate firearms through two overlapping statutes: (1) "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," 18 Pa. C.S. § 6120(a); and (2) "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." 53 Pa. C.S. § 2962(g).

In reconciling these statutes, one important rule is that "[a]ll grants of municipal power to municipalities governed by a home rule charter under [the Home Rule and Optional Government Plan], whether in the form of specific enumeration or general terms, shall be *liberally construed in favor of the municipality*." 53 Pa. C.S. § 2961 (emphasis added). Additionally, the statutes granting and restricting Pittsburgh's power to regulate firearms must be read in harmony and construed to avoid conflict. 1 Pa. C.S. § 1932(b) ("Statutes in pari materia shall be construed together, if possible, as one statute."); *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."); *In re Borough of Downingtown*, 161 A.3d 844,

871 (Pa. 2017) ("[W]e are obliged to construe the [two statutes] in harmony, if possible, so as to give effect to both.").

There is no inherent conflict between these State firearms statutes. The plain text of the two preemption statutes is limited to four enumerated spheres—ownership, possession, transfer and transportation. *Cf. Ortiz v. Com.*, 681 A.2d 152, 155 (Pa. 1996) ("The General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or possession of firearms."). Outside of these categories, the City has authority to regulate firearms, *see Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002) ("under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters"), with particular deference given when it acts pursuant to expressly granted authority "to regulate or to prohibit and prevent" the public discharge of weapons in public places.

C. The LCM Ordinance, limited as it is to regulating "use" of an LCM in public places, fits within the City's expressly granted powers; because it does not regulate ownership, possession, transfer, or transportation, it is a valid exercise of municipal power.

The LCM Ordinance fits squarely within the City's expressly granted authority to "regulate," "prohibit," and—most importantly—"prevent" "the unnecessary firing and discharge of firearms in or into the highways and other public places." 53 Pa. S. § 3703; *see also* 53 Pa. S. § 23131. And contrary to Plaintiffs' arguments, the Ordinance—circumscribed as it is to regulating only "use" in "public places"—does not conflict with the preemption statutes, which expressly constrain only the regulation of possession, ownership, transportation, and transfer.

The use of the word "prevent" in the two statutes expressly granting cities power with respect to unnecessary firing and discharge of firearms in public places means that the City may do more than simply prohibit or punish public discharge. "Prevent" means "[t]o stop from

happening; to hinder or impede." *Black's Law Dictionary* (11th ed. 2019). When Smokey the Bear tells us "[o]nly you can *prevent* forest fires," he is attempting to stop the forest fire *before* it starts. *Smokey The Bear: About the Campaign*, THE AD COUNCIL, https://smokeybear.com/en/smokeys-history/about-the-campaign (July 12, 2019 10:14 AM). So too here, the City of Pittsburgh has the power to pass ordinances narrowly focused on *stopping* the discharge and firing of certain dangerous weapons in public places before it happens.

Regulating "use" of an LCM in "public places" reduces the likelihood of—and thereby "prevents"—dangerous discharges of a weapon. The City found that LCMs present "unacceptable and needless public safety risk," and that the use of LCMs "result[] in a higher number of fatalities and injuries during mass shootings and other serious crimes, including murders of police officers." LCM Ordinance § 1104.10(C). Preparatory actions such as pointing, brandishing, and actively displaying a gun loaded with an LCM, or loading or installing an LCM in a public place, may indicate or lead to firearm discharge. Limiting use of an LCM, and restricting these preparatory actions, is thus the sort of harm reduction measure that a City may undertake to *prevent* unnecessary discharge.[6]

The Ordinance, moreover, only applies in "public places," tracking the language of the affirmative grants of power. *See* 53 Pa. S. § 3703; *see also* 53 Pa. S. § 2313. Inside one's home, or in other non-public places, the LCM Ordinance does not restrict a firearm owner's ability to use his or her weapon. And even in public places, the Ordinance expressly permits use of firearms for lawful self-defense. LCM Ordinance § 1104.05(B).

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[6] In an analogous context, the Commonwealth Court noted that, notwithstanding the firearms preemption laws, "[i]t could be argued that the City may be empowered under [an affirmative] grant of power from the State to regulate the possession of firearms in its parks pursuant to its proprietary power to control conduct that takes place on its property . . . ." *Dillon v. City of Erie*, 83 A.3d 467, 473 n.1 (Pa. Commw. Ct. 2014).

What is more, the LCM Ordinance does not regulate in any of the four specific spheres occupied under the plain text of the General Assembly's preemption laws and is therefore a valid exercise of the City's police powers. The text is dispositive of the preemption issue:

Preemption Statute 18 Pa. C.S. § 6120	Preemption Statute 53 Pa. C.S. § 2962	LCM Use Definition §1104.03(B)
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.	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."	For purposes of this Section, ***"use"*** of a large capacity magazine ***does not include possession, ownership, transportation or transfer.*** "Use" of a large capacity magazine shall include: 1. Employing it to discharge or in attempt to discharge ammunition by means of a firearm; 2. Loading it with ammunition; 3. Fitting or installing it into a firearm; 4. Brandishing it with a firearm; 5. Displaying it with a firearm while loaded; and 6. Employing it for any purpose prohibited by the laws of Pennsylvania or of the United States.

As noted above, "use" of a firearm requires that it be "actively employed," *Bailey*, 516 U.S. at 147, and does not extend to simple possession, ownership, transfer, or transportation of a firearm. It does not apply to a person who is merely carrying a firearm—whether concealed or openly—without more. To find that the LCM Ordinance is preempted by State law would be to extend the preemption statutes beyond their text.[7]

Finally, to the extent that there is any ambiguity in the interpretation of the Ordinance or statutes, the court must resolve it in favor of the City. *Delaware Cty.*, 511 A.2d at 813 ("[W]e resolve ambiguities in favor of the municipality."). The Ordinance's express limitation so as not

[7] Indeed, an earlier version of the Use Ordinances contained prohibitions that expressly included "carrying". *See* Compl., *Firearm Owners Against Crime, et al. v. City of Pittsburgh, et al.*, No. GD-19-005330 Ex. D § 629.03. After much deliberation, the City Council pulled back from enacting this "carry" proscription, limiting the ordinances to the much narrower "use" regulation.

to reach any of the preemption categories coupled with its tethering to the City's express powers requires a finding that the City has the power to pass such a measure.

D. Firearms magazines are neither firearms, ammunition, or ammunition components and thus fall outside the ambit of the preemption statutes.

A further reason supports upholding the regulation of LCMs: both state preemption statutes are expressly limited to "firearms, ammunition or ammunition component[s]," 18 Pa. C.S. § 6120; 53 Pa. C.S. § 2962 (preemption limited to "firearms"), but LCMs do not fit within any of these three categories.

First, a firearm magazine is not ammunition or a component of ammunition, as Plaintiffs baldly assert without any explanation. *See* Pls. Br. at 8. Ammunition is placed into a magazine—a magazine is not a *component* part of ammunition, under any construction of the word "component." *See* Component, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/component (July 15, 2019 12:23 PM)("One of the parts of a system, process, or machine."). Components of ammunition include bullets, casings, powder, and primer; not the magazine into which ammunition is loaded. *See Components*, Winchester.com, https://winchester.com/Products/Ammunition/Components.

Second, a firearm magazine is not a "firearm." Section 6120 defines firearm, by cross reference, as "any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive; or the frame or receiver of any such weapon." 18 Pa. C.S. § 5515. "Frame" and "receiver," undefined by Pennsylvania law, are synonyms defined under federal law as "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." 27 C.F.R. § 478.11. This does not include the magazine, which is often detachable from the firearm.

The words of the preemption statutes are dispositive. When state legislatures want to preempt with respect to "firearm components" or "firearm accessories," they can and do expressly say so. *See, e.g.*, Ky. Rev. Stat. Ann. § 65.870 ("No existing or future [local government entity] may occupy any part of the field of regulation of the manufacture, sale, purchase, taxation, transfer, ownership, possession, carrying, storage, or transportation of firearms, ammunition, *components of firearms*, components of ammunition, *firearms accessories*, or combination thereof.").[8] The Pennsylvania legislature, by contrast, has not seen fit to preempt regulation of firearm "components" and "accessories." Where the text of a statute is clear, as it is here, the courts have no power to add words or expand a law's reach through judicial decision-making. *Com. v. Segida*, 985 A.2d 871, 875 (Pa. 2009) ("We may not add words or phrases in construing a statute unless the added words are necessary for a proper interpretation, do not conflict with the obvious intent of the statute, and do not in any way affect its scope and operation."); *see also Atcovitz v. Gulph Mills Tennis Club, Inc.*, 571 Pa. 580, 589, 812 A.2d 1218, 1223 (2002) ("under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters")

In sum, the LCM Ordinance is not preempted for the additional reason that it does not, even at the threshold, fall under the ambit of the preemption statutes, which by their plain text only apply to the regulation of "firearms, ammunition [and] ammunition component[s]," 18 Pa. C.S. § 6120; 53 Pa. C.S. § 2962.

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[8] *See also* Ala. Code § 13A-11-61.3 ("[T]he Legislature hereby occupies and preempts the entire field of regulation in this state touching in any way upon firearms, ammunition, and firearm accessories to the complete exclusion of any order, ordinance, or rule promulgated or enforced by any political subdivision of this state."); La. R.S. 40:1796 ("No governing authority of a political subdivision shall enact . . . any ordinance or regulation more restrictive than state law concerning in any way the sale, purchase, possession, ownership, transfer, transportation, license, or registration of firearms, ammunition, or *components of firearms* or ammunition. . . .").

VI. Contrary to Plaintiffs' claims, the General Assembly has not occupied the entire field of firearms regulation.

Plaintiffs' argument that the General Assembly has preempted "all regulation of firearms and ammunition," Pls. Br. at 3, falls short. While there may be broad dicta in some of the cases, Plaintiffs seek to go one step further—having this court hold that an ordinance that expressly *does not* regulate possession, ownership, transportation, and/or transfer is preempted. This Court should not take Plaintiffs' invitation to rewrite the preemption laws.

This section proceeds in three parts: (1) it shows that the text and structure of the firearms preemption statutes do not evince field preemption; (2) it catalogues and categorizes the Pennsylvania appellate courts' prior Section 6120 decisions, showing that each case concerns an ordinance dealing with the possession, ownership, transportation, and/or transfer, unlike the Ordinance here; and (3) it addresses the inconsistency in the firearms preemption cases and why this Court need not and should not follow dicta from prior cases.

A. The text and structure of the firearms preemption statute do not evince field preemption.

The text of the firearms preemption statutes does not show an intent to preempt the entire field of firearms regulation. To begin, the Supreme Court has made clear 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 Cty.*, 32 A.3d 587, 595 (Pa. 2011). Firearms is not one of them.

The two preemption statutes, 18 Pa. C.S. § 6120 and 53 Pa. C.S. § 2962, are express, but as noted above, carefully limited to four categories of ordinances. "[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)).

Had the General Assembly intended to occupy the entire field of firearms regulation, it could and would have said so. *See Hoffman Min. Co.*, 32 A.3d at 605–06 (2011) ("Had the General Assembly intended to assume total responsibility and authority over local land use management and planning as they apply to surface mining, the wording of the Surface Mining Act would surely have reflected such an intent."); *Nutter*, 938 A.2d at 413–14 (2007) ("[T]he General Assembly's silence as to campaign contribution limits did not manifest its desire to prevent such limits from being applied, but rather its desire to leave the field open to locally tailored restrictions such as those contained in the Ordinance . . . ."); *Pa. Waste Indus. Ass'n v. Monroe Cty. Mun. Waste Mgmt. Auth.*, 80 A.3d 546, 560 (Pa. Commw. Ct. 2013) ("[T]he Legislature intended that other municipal action may be tolerated if not inconsistent with the provisions and purposes of Act 101. Thus, the express preemption language of Act 101 does not contemplate field preemption.").

Recognizing the limits of Section 6120, the Commonwealth Court has rejected firearms preemption challenges at least twice. *See Minich v. Cty. 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 *5 (Pa. Commw. Ct. May 7, 2018) (upholding a zoning regulation affecting the location of gun shops). Field preemption could not be found without overruling these cases.

Finally, complete field preemption would be inconsistent with the City's express grants of authority to regulate, prevent and punish the discharge of weapons in public places (53 Pa. C.S. § 3703 and 53 Pa. C.S. § 2313) as described above. *See Waste Mgmt. of Pennsylvania, Inc.*

v. Com., Dep't of Envtl. Prot., 107 A.3d 273, 280 (Pa. Commw. Ct. 2015) ("Field preemption is not applicable because counties and municipalities have roles in implementing [the recycling Act's] goals and purposes."); *see also* Municipal Control Over Hunting, 17 Op. Att'y Gen. 64 Pa. D. & C.2d 233, 236–37, 1974 WL 377832 (1974) ("It appears clear from [53 PS §§23131, 3703, 37403(26)] that most cities are given the right to control to a certain extent the discharge of weapons subject to prevailing State law."); *Dillon v. City of Erie*, 83 A.3d 467, 473 (Pa. Commw. Ct. 2014) ("It could be argued that the City may be empowered under [an affirmative] grant of power from the State to regulate the possession of firearms in its parks pursuant to its proprietary power to control conduct that takes place on its property . . . .").

In sum, the text and structure of firearms preemption in Pennsylvania belie any claim that the state legislature has preempted the entire field relating to firearms. The text of the preemption statutes is controlling. 1 Pa. C.S. § 1921 ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). Firearms preemption only limits regulation of the "ownership," "possession," "transfer" or "transportation" of "firearms" and "ammunition or ammunition components." 18 Pa. C.S. § 6120; 53 Pa. C.S. § 2962.

B. No firearms preemption case has ever expressly held that preemption extends beyond the four categories regulated by the statutes: ownership, possession, transportation and transfer of firearms.

No firearms preemption case has addressed an ordinance like the one challenged here, narrowly and exclusively limited to the "use" of an LCM. The cases can be categorized as follows: First, the Commonwealth Court has held that ordinances regulating the *transfer* of firearms are preempted. For example, in *Schneck v. City of Philadelphia*, 383 A.2d 227, 229 (Pa. Commw. Ct. 1978), the court held preempted an ordinance stating "no person shall acquire or

transfer any firearm in the City . . . (nor) outside of the City, which is brought into the City, unless application has been made to, and license obtained from, the Department (of Licenses and Inspections)." Another ordinance regulating *transfer* was held preempted in *Nat'l Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 80 (Pa. Commw. Ct. 2009) (finding preempted an ordinance that "prohibit[ed] any person when purchasing a handgun from acting as a straw purchaser and prohibit[ed] the purchase of more than one handgun within any thirty-day period, except for any person who is not a straw purchaser").

Second, the Courts have found blanket prohibitions on *possessing* and *owning* certain types of guns invalid. *See Ortiz*, 681 A.2d at 156 (Pa. 1996) (finding a prohibition on *owning* and *possessing* assault weapons preempted); *Nat'l Rifle Ass'n v. City of Philadelphia*, 977 A.2d at 78 (finding preempted an ordinance that "prohibit[ed] the *possession*, sale and transfer of certain offensive weapons . . . ." (emphasis added)).

Third, the Commonwealth Court has held that ordinances regulating the *possession* of weapons in certain areas, like parks, were preempted. In *Dillon*, 83 A.3d at 473 (Pa. Commw. Ct. 2014), an ordinance "regulating the possession of firearms in its parks" was found to be preempted. And a similar ordinance, described by the court as a "broad proscription against *carrying* or discharging any kind of firearm in a park absent a 'special permit,'" i.e., possessing or transporting a firearm in the park, was found preempted in *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1177 (Pa. Commw. Ct. 2016).

To the extent that these prior Section 6120 opinions discuss issues beyond or extraneous to the courts' holdings, the statements are dicta that is not binding on this Court. "Dictum" is "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision." *Program Admin.*

Servs., Inc. v. Dauphin Cty. Gen. Auth., 874 A.2d 722, 729 (Pa. Commw. Ct. 2005), *aff'd*, 593 Pa. 184, 928 A.2d 1013 (2007) (quoting *City of Lower Burrell v. City of Lower Burrell Wage & Pol'y Comm.*, 795 A.2d 432, 437 n.7 (Pa. Commw. Ct. 2002)). And "[j]udicial dictum is not binding authority." *Id.*; *Commonwealth v. Romero*, 183 A.3d 364, 399 (Pa. 2018) (declining to follow U.S. Supreme Court dictum even though it was recited "in several later cases").

All of these ordinances—unlike the LCM Ordinance's narrow "use" only proscription—regulated in at least one of the categories where the preemption statutes expressly say they cannot: possession, ownership, transport, and/or transfer. These cases are not controlling.[9]

C. This Court should not follow dicta from prior cases to alter the clear meaning of the statute.

Far from an "unbroken chain of precedents," Pls. Br. at 6, as Plaintiffs claim, the cases are inconsistent and utilize imprecise dictum. This Court should not expand the reach of the firearms preemption statute.

As an initial matter, decisions from the Commonwealth Court are in direct conflict with one another. In *Minich*, 869 A.2d at 1141, the Commonwealth Court, reversing the lower court, upheld a county ordinance requiring every person entering a building housing a court facility to be subject to search for a firearm. *Id.* The court held that since it was *unlawful* to bring a gun to a court facility—and Section 6120 is limited to preempting only regulation of *lawful* firearms conduct—the ordinance was not preempted. *Id.* at 1144. That decision is in direct conflict with

[9] While two of these prior decisions involved ordinances that included "use" limitations among a range of prohibited conduct (*see Ortiz* 681 A.2d at 154; *Dillon*, 83 A.3d at 470), because the ordinances in each of those cases also reached conduct expressly protected by Section 6120 (in *Ortiz*, the "ownership, use, possession or transfer" of certain firearms, and in *Dillon*, the "use or possession of firearms in City parks"), the courts in those cases had no occasion to—and did not—expressly decide whether a prohibition on "use" alone would run afoul of the preemption law.

Nat'l Rifle Ass'n v. City of Philadelphia, 977 A.2d at 82–83. There, the City of Philadelphia argued that a straw purchaser ordinance was not preempted "[b]ecause the underlying activity the City [sought] to regulate [wa]s unlawful." Noting that its decision was "unfortunate[]," and without citing or overruling *Minich*, the court held that Section 6120 preempted regulation of *unlawful* and *lawful* firearms transfers. *Id.* at 82-83. There is no reasonable way to reconcile these decisions.

Several passages in dictum, relied on by Plaintiffs to argue that preemption's scope extends beyond the statutes' words, merit additional explanation. First, Plaintiffs cite dictum from *Ortiz*, 681 A.2d at 156 (1996): "[the] regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation." *Id.* Although this dictum has been relied on by courts in the past, it should be understood in context.

First, the challenge in *Ortiz* was not over the *scope* of Pennsylvania's preemption provision, but about that statute's validity. The cities claimed that a home rule municipality could not be deprived of its ability to protect its citizens from gun violence; that firearms were a matter of local concern only and not statewide concern. *Id.* at 155-56. It was in this context that the Court held that the General Assembly had the power to pass Section 6120, noting that "the General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or [transportation] of firearms." *Id.* at 155. This was the holding of the case; everything else was dicta. And here, unlike in *Ortiz,* the issue is not whether the General Assembly may preempt firearms regulation, but about the breadth of the General Assembly's proscriptions.

Second, *Ortiz's* dictum must be read in light of the ordinance's broad sweep in that case. The ordinance at issue in *Ortiz*, as Plaintiffs note, "*banned* certain types of assault weapons." *Id.*

at 154 (emphasis added); Pls. Br. at 5. Careful analysis of the statute's reach was not required in that case; it was "undisputed" that the ordinance regulated "ownership" of certain firearms. *Id.* *Ortiz's* statements should thus not be read as defining the scope of Section 6120.[10]

A second case, *Clarke v. House of Representatives of Com.*, 957 A.2d 361 (Pa. Commw. Ct. 2008), *aff'd sub nom. Clarke v. House of Representatives of the Com.*, 980 A.2d 34 (Pa. 2009), also merits further explanation. In that case, Philadelphia passed seven ordinances that were set to take effect "only when authorized by the General Assembly, and it [wa]s undisputed that the General Assembly ha[d] not done so." *Id.* at 365. An individual city council member nonetheless filed suit seeking a declaration that the ordinances were not preempted. *Id.* The City was not party to the suit and took the position that the dispute was not justiciable. Brief for the City of Philadelphia as Amicus Curaie, *Clarke v. House of Representatives of Com.*, 2009 WL 7025955 (Pa. Jan 20, 2009). The Commonwealth Court held that "the very terms of the Ordinances would preclude [] granting the relief requested" because the ordinances were not in effect and were not set to take effect. *Clarke*, 957 A.2d at 365.[11]

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[10] Similarly, Plaintiffs cite a recent footnote in a case decided by the Pennsylvania Supreme Court about searches and seizures. *See Commonwealth v. Hicks*, No. 56 MAP 2017, 2019 WL 2305953, at *5 n.6 (Pa. May 31, 2019). Explaining the open carry regime in the Commonwealth, that footnote refers to the "General Assembly's reservation of the exclusive prerogative to regulate firearms in this Commonwealth," citing to *Ortiz*. *Id.* This passing reference to firearms preemption should not be afforded weight: preemption was not at issue in that case and it should be taken for what it was, passing dicta in a footnote.

[11] The Supreme Court's per curiam affirmance of the *order* in *Clarke*, without adopting the opinion of the Commonwealth Court, has no precedential value. *Com. v. Tilghman*, 543 Pa. 578, 590-91, 673 A.2d 898, 904 (1996) ("Unless we indicate that the opinion of the lower tribunal is affirmed per curiam, our order is not to be interpreted as adopting the rationale employed by the lower tribunal in reaching its final disposition. Furthermore, even where this Court should affirm on the opinion of the lower Court, the per curiam order is never to be interpreted as reflecting this Court's endorsement of the lower court's reasoning in discussing additional matters, in dicta, in reaching its final disposition.").

Nevertheless, without differentiating between the seven ordinances, the Commonwealth Court stated that the ordinances were not "not materially different from those presented in *Schneck* and *Ortiz*," and were thus preempted. *Clarke*, 957 A.2d at 364. But everything other than the justiciability decision was "academic and advisory only." *Gulnac by Gulnac v. S. Butler Cty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) ("The trial court's decision on standing ended this case. The complaint should have been dismissed."). Any statements in *Clarke* about the merits of the non-justiciable dispute before the Court there are accordingly textbook dicta. *City of Lower Burrell*, 795 A.2d at 437 (explaining that statements in a prior Commonwealth Court case were in dictum and "not binding precedent" because they concerned the merits of a case that was dismissed for lack of subject matter jurisdiction); *Mt. Lebanon v. Cty. Bd. of Elections of Allegheny Cty.*, 368 A.2d 648, 650 (Pa. 1977) ("Since an alternative, nonconstitutional ground existed and was discussed, the statement in question was not only dictum, but dictum that flew in the face of existing case law and proper appellate procedure.").

This dictum need not be—and should not be—used to alter or expand Pennsylvania's preemption statutes and thereby intrude on a municipality's powers. To hold that the LCM Ordinance is preempted would be to extend the preemption statutes beyond their plain words. And it would run counter to the constitutional delegation of powers between the State and local governments. Pa. Const. art. IX, § 2 ("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."); *Nutter*, 938 A.2d at 414 (2007) ("We cannot stress enough that a home rule municipality's exercise of its local authority is not lightly intruded upon, with ambiguities regarding such authority resolved in favor of the municipality.").

Finally, to the extent that any of the above passages from these cases can be read not as dictum but as providing a rule of law that extends the firearms preemption statutes beyond their plain words, these cases should be reconsidered. It has been more than twenty years since the Pennsylvania Supreme Court has addressed this state's firearms preemption laws. In that time, the Commonwealth's cities—bearing the brunt of the gun-violence epidemic—have been severely limited in their ability to protect their residents because a statute has been mis-read and over-read. The City of Pittsburgh respectfully submits that now is the time for the courts of this State to take a fresh look.

VII. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment should be granted and Plaintiffs' motion for summary judgment should be denied. The Stay of Enforcement of Ordinance 2018-1219 should be lifted.

Date: July 15, 2019

Respectfully Submitted

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s/ *Yvonne S. Hilton*
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