IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

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

Plaintiffs,

vs.

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

Defendants.

CIVIL DIVISION

No. GD-19-005308

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

Filed on Behalf of Plaintiffs, Laurence Joseph Anderson, Scott Miller, Robert Reinhold Opdyke, and Michael A. Whitehouse

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COURT OF COMMON PLEAS

COUNTY OF ALLEGHENY, PENNSYLVANIA

CIVIL ACTION – EQUITY

LAURENCE JOSEPH ANDERSON, et al., Plaintiffs, v. CITY OF PITTSBURGH, et al., Defendants.	Case No. GD-19-005308

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

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The City of Pittsburgh's summary judgment brief should be recognized for what it is: a stunning retreat by the city's lawyers in the face of overwhelming legal authority establishing that the city is powerless under Pennsylvania law to regulate firearms and ammunition. The city faults Plaintiffs for "rush[ing] into court" to "challenge an ordinance unwritten," Pittsburgh Br. 2, yet it was Defendants who held a signing ceremony and press conference on the day this suit was filed touting the ordinance's supposed public safety benefits and the city's ambitious legal strategy for defending it. But now Defendants say that their ordinance is, in effect, a nullity. It is perfectly lawful under the ordinance, Defendants insist, to carry a loaded firearm anywhere in the city with a magazine of any size so long as gun owners do not load their magazines in public or wave them around. Pittsburgh says that one does not "display" a firearm under the ordinance when he carries it publicly and in plain view and that one does not "use" a firearm under the ordinance when he keeps it on his person for self-defense. Whatever the merits of these claims about the meaning of the ordinance as a matter of statutory interpretation, Plaintiffs will not dispute them.[1] But if the Court dismisses this case on standing grounds, it should do so in an opinion that makes clear that it accepts Pittsburgh's extraordinarily narrow interpretation of its own ordinance—an interpretation that as a practical matter imposes virtually no restrictions on the rights of Pittsburgh gun owners.

I. The Court cannot dismiss this case on standing grounds without endorsing Pittsburgh's position that the ordinance allows gun owners to carry loaded guns with magazines of any size.

Defendants contend that this case should be dismissed on standing grounds because Plaintiffs do not intend to engage in any conduct that the ordinance forbids. Pittsburgh Br. 9–13.

[1] In Pennsylvania, the Rules of Statutory Construction may be applied to local ordinances. *Trigona v. Lender*, 926 A.2d 1226 (Pa. Commw. Ct. 2007). The Rules provide that the Legislature "intends the entire statute to be effective and certain." 1 PA. C.S. § 1922.

As Defendants admit, the summary judgment record establishes that one or more of the Plaintiffs have or would use magazines capable of holding more than ten rounds in four ways:

(1) Loading a magazine with more than ten rounds and installing it into a firearm at home;

(2) Carrying a loaded firearm with a magazine containing more than ten rounds concealed in public;

(3) Carrying a loaded firearm with a magazine containing more than ten rounds openly and in plain view in public; and

(4) Discharging a firearm with a magazine containing more than ten rounds in public for lawful self-defense or defense of others.

The lynchpin of Defendants' standing argument is that the ordinance prohibits *none* of these uses; Defendants do not suggest that dismissal on standing grounds would be appropriate if the ordinance did not permit both the concealed and open carry of so-called "large capacity" magazines in public places throughout Pittsburgh. To the extent that the Court dismisses this case on standing grounds, it should issue an opinion that expressly adopts Defendants' narrow interpretation of the ordinance in explaining the basis for its standing analysis. Defendants have offered no other theory on which Plaintiffs would lack standing to sue, and dismissing the case on this basis would ensure that Pittsburgh will be estopped from advancing a different interpretation in the future.[2]

II. Regulation of firearms and ammunition is an area of statewide concern over which the General Assembly has assumed sole regulatory power.

A. Pittsburgh is powerless to regulate firearms and ammunition under binding precedent.

[2] Plaintiffs contacted Defendants about the possibility of settling this case by jointly asking the Court to enter a consent decree that would prohibit the city from abandoning in the future the narrow interpretation of the ordinance set forth in Defendants' brief. Defendants were unwilling to agree to such a consent decree, and this fact makes it all the more important that the Court explain in any order dismissing this case on standing grounds that its standing analysis depends on Defendants' narrow interpretation of the ordinance. Such an order of dismissal would be binding on the city in future litigation as a matter of collateral estoppel.

The first question any court must ask when deciding a legal issue is whether controlling precedent dictates the answer. That is especially so for lower courts and in statutory interpretation cases, where faithful adherence to precedent and stare decisis play an especially important role. Yet it is not until over two-thirds of the way into Defendants' brief that they begin to grapple with the many cases in which the Pennsylvania Supreme Court and the Commonwealth Court have addressed the meaning of the key statutory provision at issue here, 18 Pa. C.S. § 6120; *see* Pittsburgh Br. 23–29. Defendants' reticence to discuss the case law is understandable, for the cases state unequivocally that the authority "to regulate firearms" is "an area of statewide concern over which the General Assembly has assumed sole regulatory power." *Clarke v. House of Representatives of Commw.*, 957 A.2d 361, 364 (Pa. Commw. Ct. 2008), *aff'd*, 602 Pa. 223, 980 A.2d 34 (2009) (mem.); *accord Ortiz v. Commonwealth*, 545 Pa. 279, 287, 681 A.2d 152, 156 (1996).

When Defendants finally turn to the precedents, they ask the Court to throw overboard as "imprecise dictum" almost everything the Pennsylvania courts have written about the meaning of Section 6120 over the last four decades. *See* Pittsburgh Br. 25. For the reasons explained below, Defendants' descriptions of the holdings of the most important cases are wrong and contrary to precedent. But Defendants' argument fails even if the Court accepts their characterization of the cases. Dicta or not, this Court should not disregard the repeated statements of Pennsylvania's appellate courts directly addressing the disputed issues in this case. As Judge Colville explained for this Court when rejecting an argument similar to the one Defendants advance, dicta is "highly persuasive authority" when it provides a "clear expression" of the views of a majority of the Pennsylvania Supreme Court "as to what they believe the law should be with respect to issues that they recognize are repeatedly and regularly presented to the trial courts." *Whiteman v. 84 Lumber*

Co., No. GD12-020809 (Nov. 6, 2013), Exhibit 1; *see also Geiger v. Pennsylvania R. Co.*, 30 Pa. D. & C 107, 110–11 (Philadelphia Ct. Common Pleas 1937) ("[W]e prefer to follow the dicta of the Supreme Court until that court tells us that it did not mean what it said.").

In any event, a ruling that Pittsburgh's ordinance is not preempted would be contrary to the *holdings* of numerous cases that are binding on this Court. The seminal firearms preemption case is *Ortiz*, in which the Pennsylvania Supreme Court struck down Philadelphia and Pittsburgh ordinances that purported to regulate, among other things, the "use . . . of certain firearms." 545 Pa. at 283. In holding that Section 6120 preempted those ordinances, the *Ortiz* Court pointed to the Pennsylvania Constitution's protection of gun rights and explained that because "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.* at 287. Defendants insist that it was unnecessary for the *Ortiz* Court to speak so broadly; because the ordinances at issue regulated not only "use" but also "ownership," the Court could have held them to be invalid without addressing whether local governments retain any authority to regulate firearms. Pittsburgh Br. 26–27. But this account of *Ortiz* does not explain why the Pennsylvania Supreme Court struck down the ordinances in their entirety rather than leaving the restrictions on "use" in place. And regardless, "it is not only the result but also those portions of the opinion necessary to that result by which [lower courts] are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). *Ortiz* articulated the scope of preemption under Section 6120 and applied Section 6120 to the ordinances before it. The Court's articulation of the provision's scope was an essential step in its reasoning and is properly understood as part of the case's holding.

Defendants are on no firmer footing when they argue that "the challenge in *Ortiz* was not over the *scope* of Pennsylvania's preemption provision, but about the statute's validity." Pittsburgh Br. 26. The plaintiffs in *Ortiz* sought a declaratory judgment that the Philadelphia and Pittsburgh ordinances at issue were valid notwithstanding Section 6120. Had those ordinances not fallen within the scope of Section 6120, there would have been no occasion to rule on the statute's validity. The conclusion that the ordinances were covered by Section 6120 was thus an essential premise of the Pennsylvania Supreme Court's decision in *Ortiz*.

Furthermore, whatever the correct reading of *Ortiz* itself, the Commonwealth Court has since adhered, as a matter of binding precedent, to that decision's "broad and unqualified language," *Clarke*, 957 A.2d at 364, treating that language as reflecting the case's "crystal clear holding," *Nat'l Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78, 82 (Pa. Commw. Ct. 2009); *see also Gun Range, LLC v. City of Philadelphia*, No. 1529 C.D. 2016, 2018 WL 2090303, at *6 (Pa. Commw. Ct. May 7, 2018) (unpublished) (citing *Ortiz* for the proposition that "[o]ur Supreme Court has *held* that matters of the ownership, possession, transfer, or transportation of firearms, *and their use* for personal protection . . . are not the proper subjects of regulation by municipalities" (emphases added)). The Commonwealth Court's reading and application of *Ortiz* is itself precedential, and this Court should refuse to deviate from the unequivocal teaching of the appellate precedents on this subject.

Even more implausible than the Defendants' treatment of *Ortiz* is their suggestion that the Commonwealth Court's holding in *Clarke* should be understood as resting solely on justiciability grounds. *See* Pittsburgh Br. 27–28. In *Clarke*, a member of the Philadelphia City Council sued for a declaratory judgment that several ordinances enacted by that city were not preempted. The Commonwealth Court rejected the plaintiff's suit on the merits, explaining that Pennsylvania's

local governments are powerless to regulate firearms under Section 6120. 957 A.2d at 364. In three sentences at the end of its opinion, the Commonwealth Court went on to explain that in any event the plaintiff was not entitled to a declaratory judgment because the ordinances at issue expressly stated that they would only take effect if the General Assembly enacted authorizing legislation that it had not passed. *Id.* at 365. But as the Commonwealth Court also observed, after the case was argued but before it was decided, Philadelphia had adopted additional ordinances that required no authorizing legislation but were otherwise substantially similar to some of the Philadelphia ordinances that were before the Court. *Id.* at 362 n.4. Given this context, the Commonwealth Court's extended discussion of the merits of the plaintiff's claims should be understood as an explanation for its decision to dismiss the case with prejudice rather than giving the plaintiff leave to amend the complaint. This Court should decline the Defendants' invitation to transform *Clarke*'s three-sentence, drive-by discussion of ripeness into the only precedential part of the opinion.

In an effort to counter the many cases in which Pennsylvania's appellate courts have invalidated local firearms regulations, Defendants also point to *Minich v. City of Jefferson*, 869 A.2d 1141 (Pa. Commw. Ct. 2005), which upheld a local prohibition on bringing firearms into courthouses. But as Defendants themselves recognize, the fulcrum on which *Minich* turned was the fact that carrying firearms in courthouses was *already illegal* under Pennsylvania law. *See* Pittsburgh Br. 25; 18 PA. C.S. § 6120(a) (preempting local regulation of "the *lawful* ownership, possession, transfer or transportation of firearms" (emphasis added)). Defendants never suggest that all of the conduct covered by the ordinance at issue here is unlawful under Pennsylvania law, and *Minich* is therefore inapposite. Defendants say that *Minich* recognizes greater local authority to regulate firearms than does the Commonwealth Court's more recent decision in *NRA v. City of*

Philadelphia, 977 A.2d at 82–83. But even if the Court agrees with Defendants that the two cases conflict, there is no reason to resolve the conflict in this case. However Pittsburgh's ordinance is interpreted, it plainly prohibits conduct that is not already unlawful under Pennsylvania law.

B. Pennsylvania's courts have correctly interpreted the Commonwealth's firearms preemption statutes.

In an analysis that is almost entirely divorced from controlling precedent, Defendants contend that Pennsylvania's local governments retain broad discretion to regulate the "use" of firearms notwithstanding preemption of local regulation of firearms "ownership, possession, transfer or transportation." While Defendants are wrong for the reasons explained below, it bears emphasis at the outset that their argument depends on their extraordinarily narrow interpretation of the ordinance. If "use" under the ordinance included public possession, then the ordinance would plainly "regulate ... possession ... of firearms." 18 PA. C.S. § 6120(a). As with Defendants' standing argument, their argument on the merits depends on accepting an interpretation of the ordinance that allows Pittsburgh gun owners to carry loaded magazines of any size in public.

In asking the Court to limit the scope of preemption under Section 6120, Defendants make much of two other statutes that give local governments statutory authority to "regulate" and "prevent" the "discharge of firearms." 53 PA. STAT. § 23131; 53 PA. STAT. § 3703; *see* Pittsburgh Br. 14–15. The complete answer to these provisions is that they were on the books when the appellate courts decided *Ortiz* and the other cases discussed above, which definitively speak to the scope of preemption under Section 6120. Indeed, the statutes Defendants cite were enacted decades before the General Assembly first preempted local firearms regulation in 1974. *See* Act of Oct. 18, 1974, P.L. 768. Rather than following the Defendants' heroic efforts to reconcile the provisions by dramatically limiting the scope of preemption under Section 6120, the Court should give effect

to the more specific and more recently enacted statute. Whatever the scope of Pittsburgh's authority to "prevent" the discharge of firearms within its boundaries, it cannot impose regulations that burden the right of Pittsburgh gun owners to lawfully carry firearms for self-defense.

Defendants also place great emphasis on cases that resolve ambiguities about a city's home-rule authority in favor of the local government. *See* Pittsburgh Br. 13, 15–16. But there is no ambiguity here. "[T]he Constitution of Pennsylvania requires that home rule municipalities may not perform any power denied by the General Assembly," and "the General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or possession of firearms." *Ortiz*, 545 Pa. at 283. The Supreme Court's decision in *Nutter v. Dougherty*, 595 Pa. 340, 938 A.2d 401 (2007), does not suggest otherwise. As the Commonwealth Court explained in *Clarke*, *Nutter* is a campaign finance regulation case, and "the Election Code does not contain language of explicit preemption like that of the Firearms Act." 957 A.2d at 364. "[T]he *Nutter* decision is neither controlling nor even particularly informative in the present context." *Id.*

C. Pittsburgh regulates firearms and ammunition when it regulates ammunition magazines.

Defendants are also wrong when they argue that Pittsburgh is free to regulate ammunition magazines because they do not qualify as "firearms, ammunition or ammunition components." 18 PA. C.S. § 6120(a); *see* Pittsburgh Br. 19–20.

As an initial matter, it is important to recognize the implications of Defendants' argument. If Defendants are correct that Pittsburgh is free to regulate ammunition magazines, then it can ban them outright—even though most modern firearms are designed to be operated with magazines and some will not fire without them. *See* Rick Hacker, *Magazine Disconnect*, AMERICAN RIFLEMAN (Sept. 11, 2015), https://bit.ly/2Mkn7Fb. And if a magazine ban is permissible on the theory that a magazine is not itself a "weapon which is designed to . . . expel any projectile by the

action of an explosive; or the frame or receiver of any such weapon," 18 PA. C.S. § 5515, then what is to stop Pittsburgh from outlawing triggers, firing pins, and gun barrels on the same theory? The General Assembly plainly intended to preempt such local regulations when it enacted Section 6120 and 53 PA. C.S. § 2962(g), and to hold otherwise would effectively render these statutes a dead letter. It follows that even if Defendants are correct that a magazine is itself neither a "firearm" nor an "ammunition component," local regulation of magazines nevertheless conflicts with and stands as an obstacle to the purpose of these statutes. At most, Defendants' argument suggests that the Court should strike down Pittsburgh's ordinance under the heading of "obstacle" rather than "express" or "field" preemption.

Regardless, the better view is that the General Assembly has expressly preempted Pittsburgh's ordinance. Under Section 6120(a), the question is whether the ordinance "regulate[s] . . . firearms, ammunition or ammunition components[.]" 18 PA. C.S. § 6120(a). Pennsylvania's other firearms preemption statute is worded even more broadly, forbidding all local ordinances that "*deal with* the regulation of the transfer, ownership, transportation or possession of firearms." 53 PA. C.S. § 2962(g) (emphasis added) (cleaned up). Pittsburgh's ordinance plainly "deal[s] with" the regulation firearms, as Defendants tacitly admit elsewhere in their brief when they argue that the ordinance's purpose is to prevent "unnecessary firing and discharge of *firearms* in public places." Pittsburgh Br. 16 (emphasis added). Having promoted the ordinance both publicly and in its brief as a gun safety measure, Defendants should not be heard to argue that the ordinance does not deal with the regulation of firearms.

This analysis is buttressed by a point Plaintiffs made in their opening brief but to which Defendants never respond: when Section 6120 forbids local-government interference with the lawful possession and transportation of "firearms," it includes the lawful possession and

transportation of *loaded* firearms. *See* 18 PA. C.S. § 6106 (making clear that concealed carry license authorizes the carrying of loaded firearms, by providing that unloaded firearms may be carried in certain circumstances without a license); *id.* § 6102 (defining "loaded" firearm). When Pittsburgh prevents gun owners from loading their firearms in the manner that is most conducive to self-defense, it is plainly regulating firearms. For similar reasons, the ordinance also regulates "ammunition and ammunition component[s]" under Section 6120. Restrictions on the use of ammunition magazines restrict how ammunition can be used and therefore regulate ammunition.

Finally, in listing firearms, ammunition, and ammunition components in the statute, it is evident that the General Assembly meant to prohibit local regulation of everything that is essential to the safe and effective operation of modern firearms. Although Plaintiffs believe that the ordinance regulates "firearms, ammunition, and ammunition component[s]" without regard to whether magazines *themselves* fit into any of those three categories, if the Court disagrees it should treat magazines as either an integral component of a firearm or as an "ammunition component." Defendants propose a narrow interpretation of "ammunition components," but the phrase is broad enough to encompass magazines. In sum, the Court should refuse to read into the statutes the General Assembly enacted a loophole that would render them all but meaningless.

CONCLUSION

The Court should grant Plaintiffs' summary judgment motion and deny Defendants' summary judgment motion.

Respectfully submitted,

Date: July 29, 2019

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CERTIFICATE OF SERVICE

This is to certify that a copy of the within Brief in Opposition to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment has been delivered via Email to all known counsel of record this 29th day of July, 2019, as follows:

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