Received 7/9/2021 10:09:18 PM Commonwealth Court of Pennsylvania

Filed 7/9/2021 10:09:00 PM Commonwealth Court of Pennsylvania
1204 CD 2020

IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

1204 CD 2020

RASHAD ARMSTRONG,

Appellant,

v.

CITY OF PHILADELPHIA,

Appellee,

CEASEFIRE PENNSYLVANIA EDUCATION FUND, *et al.*,

Appellee-Intervenors.

Appellee's Principal Brief

APPEAL FROM THE ORDERS OF MARCH 5, 2020 AND NOVEMBER 12, 2020 OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, TRIAL DIVISION – CIVIL, CASE NO. 191004036

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I. COUNTERSTATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal from the Court of Common Pleas of Philadelphia County pursuant to 42 Pa.C.S. § 762(a).

Appellant appeals a pair of orders from the Court of Common Pleas Civil Trial Division entered (1) on March 5, 2020 granting the Appellee-Intervenors' petition to intervene, and (2) on November 12, 2020, denying Appellant's motion for a permanent injunction.

II. COUNTERSTATEMENT SCOPE AND STANDARD OF REVIEW

An appellate court's review of the grant or denial of a permanent injunction is limited to determining "whether the lower court committed an error of law in granting or denying the permanent injunction." *Kuznik v. Westmoreland Cty. Bd. of Comm'rs*, 902 A.2d 476, 489 (Pa. 2006) (quoting *Buffalo Twp. v. Jones*, 813 A.2d 659, 664 n.4 (Pa. 2002)). The standard of review is *de novo*, and the scope of review is plenary. *Kuznik*, 902 A.2d at 489. The party seeking relief in the form of a permanent injunction "must establish that his right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested." *Id.* (quoting *Harding v. Stickman*, 823 A.2d 1110, 1111 (Pa.Cmwlth. 2003)).[1]

[1] With regard to the question of intervention, it is "well established" that "'intervention is a matter within the sound discretion of the court below and unless there is a manifest abuse of such

In addition, the Court reviews evidentiary decisions for abuse of discretion. *Brady v. Urbas*, 111 A.3d 1155, 1161 (Pa. 2015). A court abuses its discretion where it overrides or misapplies the law, where the judgment is manifestly unreasonable, or where the decision is the result of partiality, prejudice, bias, or ill will. *Id*.

III. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Did the trial court correctly deny Appellant's motion to permanently enjoin the City of Philadelphia from enforcing its Lost and Stolen Firearms Ordinance where Appellant had no clear right to relief, and greater injury would result from granting the relief requested?

Suggested answer: Yes.

Does enforcement against an admitted straw purchaser of an ordinance requiring reporting of the loss or theft of a firearm regulate the "lawful ownership, possession, transfer or transportation" of a firearm?

Suggested answer: No.

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discretion, its exercise will not be interfered with on review.'" *Wilson v. State Farm Mut. Auto. Ins. Co.*, 517 A.2d 944, 947 (Pa. 1986) (quoting *Darlington v. Reilly*, 69 A.2d 84, 85-86 (Pa. 1949)).

Did the trial court properly conduct a full evidentiary hearing and admit relevant evidence to evaluate the injury that would result from granting the relief requested?

Suggested answer: Yes.

Did the trial court properly grant the Appellee-Intervenors' motion to intervene?

Suggested answer: Yes.

IV. COUNTERSTATEMENT OF THE CASE

A. Procedural History

On November 1, 2019, Appellee, the City of Philadelphia ("Philadelphia" or "the City"), filed a complaint against Appellant Rashad Armstrong, a legal resident of the City, for violation of the ordinance at issue, Failure to Report Lost or Stolen Firearm, Phila. Code § 10-838a (the "Ordinance"). RR. 218a-225a. The Ordinance states, in relevant part, that "no person who is the owner of a firearm that is lost or stolen shall fail to report the loss or theft to an appropriate law enforcement official within 24 hours after the loss or theft is discovered." Phila. Code § 10-838a(1). The City enacted the Ordinance as a municipal corporation of the first class of the Commonwealth of Pennsylvania under the Act of April 21, 1949, Pub. L. 665, §1, *et seq*.

A violation of the Ordinance is a Class III violation subject to a maximum penalty of $2,000. RR. 224a. The City sought a civil judgment against Appellant for $2,000 and "such other and further relief as the court may deem just and proper." *Id.* The City did not seek jail time. *Id.; contra* Appellant's Br. at 33. In response, Appellant filed Preliminary Objections to the City's complaint on December 7, 2019. Defs. Prelim. Objs. To Pls. Compl. A little more than a week later, before the City could Answer the Preliminary Objections, Appellant on December 16, 2019 filed the Motion for Permanent Injunction and supporting Memorandum of Law. RR. 30a-64a. On January 16, 2020, Appellee-Intervenors (hereinafter "Intervenors") filed a Petition to Intervene, seeking to participate to oppose Appellant's Motion for Permanent Injunction and Preliminary Objections. RR. 67a–91a.

The Court held hearings on March 5, 2020 and on November 12, 2020, denying Appellant's Motion on the latter date. RR. 305a-339a, RR. 388a-408a. Appellant filed a notice of appeal on November 13, 2020 and a Statement of Matters Complained of on Appeal on November 23, 2020. RR. 411. The Court, the Honorable Judge Edward C. Wright, filed its Opinion on May 20, 2021 pursuant to Pa.R.A.P. 1925, denying Appellant's motion for permanent injunction and granting Intervenors' petition to intervene. May 20, 2021 Opinion, Pa.D.&C. No. 1204 CD 2020 ("Opinion").

B. Factual Background

1. Appellant's History as a Straw Purchaser.

Appellant is a self-proclaimed straw purchaser. For years, he bought guns for persons who could not legally buy them or pass a background check, and who then used these firearms to commit crimes. RR. 214a-215a. As a part of Appellant's guilty plea colloquy resulting in his January 31, 2019 conviction, Appellant admitted to purchasing five firearms between 2015 and 2018: two Rugers, one Sig Sauer, one KelTec P40, and one FNS 40. Jan. 31, 2019 Guilty Plea Tr. 10:20-12:23, RR. 214a. Appellant further admitted that soon after making these purchases, the firearms were no longer in his possession. *Id.* One of the guns was used in a shooting in Philadelphia; three others have been found in the possession of other criminals at the time of their arrests; and a fifth is still on the street. *Id.* That's why Appellant's own attorney called him "the perfect straw purchaser." *Id*. at 15:13-14, RR. 215a. Appellant's flagrantly unlawful conduct in making weapons available for use in crimes is precisely the type of conduct the Ordinance was created to address.[2] The Ordinance does not, as Appellant now argues, "revictimiz[e] a victim." Appellant's

[2] THE CITY OF PHILADELPHIA, *City Files First-Ever Enforcement Action of Lost or Stolen Gun Ordinance*, https://www.phila.gov/2019-11-04-city-files-first-ever-enforcement-action-of-lost-or-stolen-gun-ordinance/ (Nov. 4, 2019) ("'The lack of a mandatory lost or stolen firearms reporting requirement allows straw purchasers to feed guns to criminals and their organizations,' District Attorney Larry Krasner said.") (last accessed July 9, 2021).

Br. at 5-6. Appellant here is no victim, but instead a criminal who circumvents the Commonwealth's laws with impunity.

On January 31, 2019, Appellant entered into a negotiated guilty plea on the charges of Violation of the Uniform Firearms Act – Carrying a Firearm on the Public Streets of Philadelphia (18 Pa.C.S. § 6108) as a misdemeanor of the first degree; Violation of the Uniform Firearms Act – Illegal Sale or Transfer (18 Pa.C.S. § 6111(g)) as a misdemeanor of the second degree; and False Reports as a misdemeanor of the third degree. Jan. 31, 2019 Guilty Plea Tr. 13:6-19, RR. 215a. He was convicted of these charges and sentenced to 7.5 to 23 months of incarceration, followed by two years of probation. *Id.* at 17:9-21, RR. 216a. As a part of his probation, Appellant is prohibited from purchasing firearms under state law. His conviction further disqualifies him from possessing a firearm under federal law. *See* 18 U.S.C. § 922(g)(1).

Regarding the firearms he purchased, Appellant admitted during his plea colloquy that:

(1) The first gun, a 9mm Ruger, was purchased by Appellant on September 10, 2015, and later recovered from another individual during their arrest in Tinicum Township on February 13, 2017;

(2) The second gun, a KelTec P40, was purchased by Appellant on September 21, 2016, and was later used in a shooting in Philadelphia on November 21, 2017;

(3) The third gun, an FNS 40, was purchased by Appellant on June 21, 2017;

(4) The fourth gun, another Ruger, was purchased by Appellant on December 6, 2017, and recovered during the arrest of another individual on May 3, 2018;

(5) The fifth gun, a Sig Sauer, was purchased by Appellant on March 12, 2018, and recovered by the Delaware County District Attorney's Office pursuant to a search warrant for a homicide investigation;

(6) Ten days after the November 21, 2017 shooting involving Appellant's KelTec P40, Appellant falsely reported to Philadelphia Police that the KelTec P40 and the FNS 40 firearms had been stolen in a burglary;

(7) The KelTec 40 was later recovered during the arrest of two men on January 2, 2018, along with two other pistols with obliterated serial numbers;

(8) The FNS 40—the third firearm known to be purchased by Appellant—had not been recovered as of the time of the plea;

(9) In a subsequent statement to police, Appellant admitted that his report that the KelTec P40 and FNS 40 had been stolen was false, and that he had given the KelTec to a man he knew as "Shawn." Appellant did not provide the police with any additional information about Shawn;

(10) Appellant stated to police that he took the Sig Sauer he had purchased to his cousin's house on North Robinson Street in Philadelphia and that the gun was later recovered in that house during the arrest of his brother; and

(11) As to the remaining firearms, Appellant stated that they had been taken by individuals known to him, but that Appellant did not report those firearms stolen.

Jan. 31, 2019 Guilty Plea Tr. 10:20-12:23, RR. 214a.

There is no question that Appellant's conduct violates the Ordinance. Appellant claimed to have known the exact date when he "lost" the second Ruger: April 23, 2018. RR. 209a-210a. But Appellant did not report the firearm lost or stolen within 24 hours of becoming aware of this fact. Rather, in direct violation of the Ordinance, Appellant said nothing for more than two months, and only reported the gun stolen after police recovered it and asked him what had happened to it. At that point, the Ruger had already been recovered during the May 3, 2018 arrest of another individual in Lancaster County. *Compare* RR. 209a-210a and RR. 214a. At

the time the firearm was recovered, the Lancaster Police Department ran the firearm through the National Crime Information Center's database of lost or stolen guns. RR. 223a. It had not been reported either lost or stolen. *Id.*

2. Impact on Philadelphia.

Philadelphia is grappling with a gun violence epidemic. In 2019 alone, 1,435 people were shot in the City, the highest yearly total since 2010.[3] Perpetrators used guns in 2,181 robberies and 2,615 aggravated assaults, a 13 percent increase in assaults over 2018.[4] Guns also fuel Philadelphia's homicide problem. In 2018, the City recorded 353 homicides, the most in a decade.[5] Nationwide, Chicago was the only city with more murders in 2018.[6] And New York, a city less than 100 miles away from Philadelphia and with a population more than five times the size, had only 295 homicides reported.[7] In recent years, firearms were involved in almost 82

[3] Chris Palmer, *Philadelphia Had More Shootings in 2019 and Homicides Stayed High*, Phila. Inquirer (Dec. 30, 2019, 5:00 PM), https://www.inquirer.com/news/philadelphia-crime-levels-2019-shootings-homicides-police-20191230.html (last accessed July 9, 2021); Phila. Police Dep't, Year End 2019 Report on Major Crimes Citywide (2019), https://www.phillypolice.com/crime-maps-stats/ (last accessed July 9, 2021).

[4] Phila. Police Dep't, *supra* n.3.

[5] Rita Giordano & Bethany Ao**,** *Philadelphia Has A Gun Violence Epidemic. What If It Were Treated Like Any Other Contagious Disease?*, Phila. Inquirer (Dec. 2, 2019, 5:00 AM), https://www.inquirer.com/health/gun-violence-murder-victims-public-health-kenney-philadelphia-20191202.html (last accessed July 9, 2021).

[6] Samuel Stebbins, *The Midwest is Home to Many of America's Most Dangerous Cities*, USA Today (Oct. 26, 2019, 7:00 AM), https://www.usatoday.com/story/money/2019/10/26/crime-rate-higher-us-dangerous-cities/40406541/ (last accessed July 9. 2021).

[7] *Id.*

percent of homicides in Philadelphia.[8] Finally, as of September 2017, firearm homicide was the leading cause of death among young black and Hispanic men in the City of Philadelphia.[9]

Pennsylvania's statewide gun laws have failed, despite diligent enforcement efforts by the City, to make a dent in the circulation of illegal firearms in the City. Even as non-firearm violent crime rates remain low, arrests for illegal gun possession continue to grow.[10] Through November 2019, Philadelphia police have arrested 1,584 people for violating the Commonwealth's Uniform Firearms Act ("UFA"), the highest annual total in the last five years.[11] And illegally straw-purchased and trafficked guns make up most of allegedly lost and stolen firearms.[12]

Unfortunately, nobody is immune from Philadelphia's gun violence epidemic, especially not children. In one month in 2019, six of the City's children were shot, five of them fatally.[13] Ten-year-old Semaj O'Branty was shot in the head on his way

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[8] PHILA. DEP'T OF PUBLIC HEALTH, *Deaths and Injuries from Firearms in Philadelphia*, at 1, https://www.phila.gov/media/20181106124821/chart-v2e10.pdf (Sept. 2017).

[9] *Id.* at 2.

[10] Palmer, *supra* n.3.

[11] *Id.*

[12] Garen J. Wintemute, *Frequency of and Responses to Illegal Activity Related to Commerce in Firearms: Findings from the Firearms Licensee Survey*, 19 Injury Prevention, no. 6, (2013), 412–20; Garen J. Wintemute, *Firearms Licensee Characteristics Associated with Sales of Crime–Involved Firearms and Denied Sales: Findings from the Firearms Licensee Survey*, 3 RSF: The Russell Sage Foundation Journal of the Social Sciences, no. 5, 2017, 58–74.

[13] Oona Goodin-Smith & Anna Orso, *Philly Cops are Used to Tragedy. But 6 Kids Shot in a Month Can Crack Their "Emotional Shell,"* Phila. Inquirer (Nov. 8, 2019, 5:10 AM), https://www.inquirer.com/news/philadelphia/philadelphia-police-trauma-children-shot-eap-mental-health-suicide-gun-20191108.html (last accessed July 9, 2021).

home from school, eleven-month-old Yazeem Jenkins was struck four times while riding in his stepmother's car, and two-year-old Nikolette Rivera was shot while being held in her mother's arms in her home—to name only three.[14] These young victims joined the depressing ranks of the more than 100 children shot in the City in 2019.[15] While healthcare providers have "made tremendous progress in [their] systems of care," "the mortality from firearms really hasn't budged." Mar. 5, 2020 Mot. Hr'g Tr. (Nance), 93:17-18, RR. 328a. Among children, "about 12 to 15 percent of firearm injuries end in death once they get to the hospital." *Id.* at 91:12-13, RR. 327a. Firearms are the leading cause behind children landing in a hospital's trauma resuscitation room, and this morality rate is "about four times as high as the next most lethal mechanism" that causes a child to be transferred to the trauma resuscitation room. *Id.* at 91:13-14, RR. 327a. The loss of a child is the grimmest tragedy a family or neighborhood can experience and tests any community's resolve.

But such tragedies are avoidable. And the Ordinance Appellant seeks to enjoin targets one of their key causes: the prevalence and use of illegal firearms—guns either trafficked by straw purchasers or obtained by criminals through theft. Nationwide, approximately 380,000 guns are stolen from individual owners each

[14] *Id.*
[15] Palmer, *supra* n.3.

year.[16] And, unsurprisingly, these guns are frequently used in crime. According to one study, of the 23,000 stolen guns police recovered between 2010 and 2016, the majority were recovered in connection with crimes, including over 1,500 violent crimes such as murder and armed robbery.[17] Even worse, gun thefts are on the rise. From 2006 to 2016, reports of guns stolen from individuals rose almost 60 percent.[18] But most firearms are never even reported missing. Police receive reports for fewer than 240,000 gun thefts each year, suggesting that approximately 40 percent of lost or stolen guns are never reported as such.[19]

The Ordinance attempts to mitigate this issue, as "[t]he sooner that [authorities] know that a gun is reported lost or stolen, the sooner that recovery process can begin. And usually the more successful someone is in recovering that particular weapon before it get into the hands of someone who may use it for illegal means or that results in another shooting . . . ." Mar. 5, 2020 Mot. Hr'g Tr. (Harley), 121:5-12, RR. 335a.

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[16] David Hemenway et al., *Whose Guns are Stolen? The Epidemiology of Gun Theft Victims*, 4 *Injury Epidemiology,* 1 (2017).

[17] Brian Freskos, *Missing Pieces: Gun Theft from Legal Gun Owners is on the Rise, Quietly Fueling Violent Crime*, The Trace (Nov. 20, 2017), https://www.thetrace.org/2017/11/stolen-guns-violent-crime-america/ (last accessed July 9, 2021).

[18] Freskos, *supra* n.17.

[19] *See* Hemenway, *supra* n.16; Freskos, *supra* n.17.

As noted above, straw-purchased and trafficked guns make up the bulk of these allegedly lost and stolen firearms.[20] Straw purchasing—in which a purchaser buys a gun on behalf of another—is the most common channel identified in trafficking investigations.[21] In fact, there are more than 30,000 attempted straw purchases each year.[22] According to the Bureau of Justice Statistics, 40 percent of criminals obtain their firearms from friends or family and another 40 percent obtain their firearms from illegal sources on the street.[23]

The Ordinance squarely targets this problem. Besides aiding the interdiction of illegal firearms, the reporting requirement supports the City's efforts to treat gun violence as a public health crisis rather than purely as a law enforcement issue.[24] In a public health crisis, prevention and early intervention are key to stopping an outbreak before it gets out of control,[25] a goal the Ordinance serves by putting law

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[20] Wintemute, *Frequency*, *supra* n.12, no. 6, (2013), 412–20; Wintemute, *Firearms Licensee*, *supra* n.12, 3 RSF: The Russell Sage Foundation Journal of the Social Sciences, no. 5, 2017, 58–74.

[21] Dep't of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, Following the Gun: Enforcing Federal Laws Against Firearms Traffickers (June 2000).

[22] *See* Wintemute, *Frequency*, *supra* n.12 at 412–20; Wintemute, *Firearms Licensee*, *supra* n.12 at 59.

[23] Caroline Wolf Harlow, Firearm Use by Offenders: Survey of Inmates in State and Federal Correctional Facilities, U.S. Dep't of Justice, Bureau of Justice Statistics Special Report, NCJ 189369, at 1 (Nov. 2001), https://bjs.gov/content/pub/pdf/fuo.pdf (last accessed July 9, 2021).

[24] *See* Office of the Mayor, The Philadelphia Roadmap to Safer Communities 12-13 (2019), https://www.phila.gov/media/20190125102315/The-Philadelphia-Roadmap-to-Safer-Communities.pdf ("Roadmap"), RR. 354a-355a.

[25] *Id.* at 13, RR. 355a.

enforcement on alert immediately when a gun hits the streets—and providing a tool to hold accountable straw purchasers who supply the black market for guns.

V. SUMMARY OF ARGUMENT

Appellant, despite claiming to be a "victim," admits that he perpetrated the very acts—purchasing weapons for criminal use—that have resulted in the deaths of the real victims, *i.e.*, countless City residents. The Court of Common Pleas correctly denied Appellant's outrageous motion to enjoin the City from protecting its residents against such flagrantly unlawful conduct. As the court determined, Appellant cannot establish a clear right to relief because his admitted unlawful conduct prevents him from lawfully owning or possessing firearms and also constitutes unclean hands that preclude him from asking the court for injunctive relief in the first place. The Court also rightly concluded that a greater injury—namely, the injuries and deaths resulting from firearms purported lost or stolen from straw purchasers like Appellant—would result from granting Appellant's motion than from denying it. In doing so, the Court applied the proper test for a permanent injunction rather than preliminary injunction, and committed no error of law. Furthermore, the Court below properly held a full evidentiary hearing on the balance of injuries stemming from a grant or denial of a permanent injunction, including hearing testimony and admitting evidentiary exhibits.

In any event, there is no basis for Appellant's contention that the Ordinance is preempted by 18 Pa.C.S. § 6120(a) or field preemption. Section 6120(a) addresses *only* regulation of "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) (emphasis added). Here, Appellant has admitted to engaging in *unlawful* conduct that is squarely *prohibited* by the laws of this Commonwealth by acting as a straw purchaser—the very conduct that has contributed to the wave of gun violence that is sweeping the City and that the Ordinance addresses. Further, because the Ordinance applies only to lost and stolen weapons, it by definition does not apply to the "ownership, possession, transfer or transportation" of firearms. Since statutory preemption clearly does not apply, Appellant's field preemption argument also fails.[26]

[26] Appellant makes a wholly unfounded demand for sanctions, accusing the City of "committing misdemeanors" against him and calling its defense of the Ordinance "frivolous litigation." Appellant's Br. at 10. He cites Pa.R.A.P. 2742-2744 for support. These Rules do not support sanctions. Rule 2744 allows "damages for delay" if "an appeal is frivolous or taken solely for delay" or if "the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." But Appellant—not the City—took the appeal here, and the City's conduct has in no way been "dilatory, obdurate or vexatious." Furthermore, no other Rule or law supports sanctions against the City. The Court should accordingly disregard Appellant's absurd sanctions demand.

VI. ARGUMENT

A. Appellant Cannot Meet the Standards for a Permanent Injunction.

Appellant fails to meet the standard for a permanent injunction. To justify the award of a permanent injunction, the burden is on the moving party to establish that the "right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and greater injury will result from refusing rather than granting the relief requested." *Kuznik*, 902 A.2d at 489 (quoting *Harding*, 823 A.2d at 1111). An injunction is not a remedy to be taken lightly as it is "an extraordinary remedy that should be issued with caution and 'only where the rights and equity of the plaintiff are clear and free from doubt, and where the harm to be remedied is great and irreparable.'" *Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa.Cmwlth. 2010) (quoting *Big Bass Lake Cmty. Ass'n v. Warren*, 950 A.2d 1137, 1144 (Pa.Cmwlth. 2008)). Here, Appellant failed to meet this high burden, and, in fact, fails to satisfy *any prong* of the injunction standard.

In order to determine whether the requested relief should be granted, it was first necessary for the court below to conduct a full evidentiary hearing relating to the three prongs of the permanent injunction standard. *See, e.g., Pubusky v. D.M.F. Inc*, 239 A.2d 335, 336-37 (Pa. 1968) ("It also is fundamental that all of the parties are entitled to a hearing before [a preliminary injunction] should issue. . . . . While the testimony . . . need not always be as extensive as that at a final hearing, the

litigants should not be deprived of their right to fully cross-examine all adverse witnesses, nor of the opportunity to present testimony which is relevant to the question of whether or not the injunction should issue."). Courts hold full hearings on permanent injunctions because the standards governing this extraordinary form of relief are distinctive and special. *See Big Bass Lake Cmty. Ass'n*, 950 A.2d at 1149 (vacating the lower court's ruling for converting a preliminary injunction hearing into a permanent injunction hearing, and explaining that permanent injunctions require their own separate hearings); *New Milford Twp. v. Young*, 938 A.2d 562, 566 (Pa.Cmwlth. 2007) (same). Given the permanent nature of the relief Appellant seeks, the necessity for a complete presentation of the evidence was heightened even further.

At the hearing, the City presented evidence on the following key factual matters to establish that Appellant has no clear right to relief and to demonstrate the injury that would result if the court had enjoined the City's enforcement of the Ordinance: (1) the absence of any prospective injury to Appellant; (2) the unlawful conduct by Appellant that led to his citation; (3) the City's efforts to combat the increase in gun violence and the comprehensive strategies that the City has put in place to reduce gun violence; (4) statistics on the increase in gun violence in the City and the increase in the number of guns recovered by the Philadelphia Police Department in recent years; (5) the need for law enforcement to have prompt

information about lost and stolen firearms to aid investigations; (6) the increase in gun related injuries over recent years and the burden and stress that increase has placed on healthcare in the City; and (7) the costs associated with treating firearm related injuries and the emotional trauma on gunshot victims, their families, and other patients exposed to the treatment of gun related injuries at the hospital. Mar. 5, 2020 Mot. Hr'g Tr., RR. 305a-339a. Appellant presented no evidence of his own supporting any alleged injuries. All of the City's evidence—and Appellant's lack of evidence—fed into the lower court's decision in properly denying Appellant's motion for permanent injunction.

And even apart from these barriers to injunctive relief, Appellant lacks any valid legal basis for challenging the Ordinance. A review of the statutory language, case law, and legislative history regarding 18 Pa.C.S. § 6120(a) directly contradicts Appellant's statutory and field preemption argument.

1. Plaintiff Cannot Show a Clear Right to Relief.

The court below correctly determined that Appellant lacks a clear right to relief because his admitted firearms violations preclude him from owning or possessing those weapons, and thereby eliminate any likelihood of injury. Those violations also constitute unclean hands foreclosing entry of equitable relief in his favor. Accordingly, Appellant fails to meet the first prong of his burden, and the Motion was properly denied.

a. Appellant Cannot Show a Future Injury.

To obtain a permanent injunction, Appellant must show that "actual and substantial injury is likely in the future." *Joseph v. O'Laughlin*, No. 1706 WDA 2015, 2017 WL 3641351, at *7 (Pa.Super. Aug. 22, 2017) (quoting *Peugeot Motors of Am., Inc. v. Stout*, 456 A.2d 1002, 1008 (Pa.Super. 1983) (internal quotation marks omitted)). Indeed, future injury is "fundamental" to injunctive relief. *Raitport v. Provident Nat'l Bank*, 451 F. Supp. 522, 530 (E.D. Pa. 1978). And "[i]njunctive relief is not available to eliminate a possible remote future injury or invasion of rights." *Jamal v. Commonwealth, Dep't of Corr.*, 549 A.2d 1369, 1371 (Pa.Cmwlth. 1988) (citing *Raitport*, 451 F. Supp. at 530; *Curll v. Dairymen's Coop. Sales Ass'n*, 132 A.2d 271, 274 (Pa. 1957)). As the Pennsylvania Supreme Court has emphasized, "equity ordinarily will not enjoin an alleged harmful act where it is not reasonably certain of occurring." *Curll*, 132 A.2d at 274.

Appellant asserts no injury whatsoever that is reasonably certain of occurring. His conviction for carrying a firearm on the City's streets bars Appellant from possessing a gun under federal law. *See* 18 U.S.C. § 922(g)(1), (g)(9) (barring firearm possession by any person convicted of a crime punishable by more than one year in prison); 18 Pa.C.S. § 6119 (designating a violation of 18 Pa.C.S. § 6108 (street carry) as a first-degree misdemeanor); 18 Pa.C.S. § 106(b)(6) (specifying that a first-degree misdemeanor is punishable by up to five years in prison). And

Appellant does not claim he would lose a gun if he had one, or that someone would steal it. Even if he made such a claim, that injury is remote and not "reasonably certain of occurring." *Curll*, 132 A.2d at 274. Neither is Appellant's belief that he may someday receive a pardon or otherwise regain the rights he relinquishes when he pleaded guilty. Appellant's Br. at 33.

Appellant contends that the current complaint for his *prior* violation of the Ordinance constitutes sufficient "injury" to support an injunction, based solely on Appellant's contention that the Ordinance is unlawful. Appellant's Br. at 30-33. This contention is baseless. As the very authority on which Appellant relies makes clear, an injunction issues to address future, not past, conduct. *In Dillon v. City of Erie*, 83 A.3d 467, 474–75 (Pa.Cmwlth. 2014), the Court rejected an injunction to address *past* conduct, and also rejected entry of an injunction to address *future* enforcement of an ordinance when there was no reason to expect the plaintiff would run afoul of it.

As to the current complaint for Appellant's *past* violation of the Ordinance, his existing legal remedy is obvious and readily available: in response to the civil enforcement action brought by the City, Appellant may assert whatever defenses he has to the complaint.[27] Indeed, because Appellant contends that preemption provides

[27] By contrast, in *Dillon* and other cases Appellant cites, an injunction was deemed appropriate in part because the claimant faced a risk of *future criminal prosecution*. *See, e.g.,*

him with a defense to the City's complaint, the adequacy of Appellant's statutory remedy to seek dismissal of the complaint means that the courts are "*without power to exercise equitable jurisdiction or impose injunctive relief.*" *Commonwealth,, Dep't of Pub. Welfare v. Eisenberg*, 454 A.2d 513, 515–16 & n.9 (Pa. 1982) (emphasis added). Appellant clearly may not use the complaint as a basis for seeking to enjoin *future* enforcement of an Ordinance that he could no longer expect to violate. In any event, the sole basis for Appellant's attempt to avoid a showing of future injury—that the Ordinance is unlawful—is incorrect, as discussed below.

Appellant thus does not, and cannot, claim any future injury which a permanent injunction would forestall, thus precluding injunctive relief. The court below correctly found the same.

b. Appellant's Unclean Hands Foreclose Relief.

Appellant's guilty plea and underlying misconduct, as well as his resulting inability to lawfully carry a firearm, *supra* at p. 6, also bar him from injunctive relief under the "unclean hands" doctrine. Under this rule, "[a] court may deprive a party of equitable relief where, to the detriment of the other party, the party applying for such relief is guilty of bad conduct relating to the matter at issue." *Terraciano v.*

City of Erie v. Nw. Pa. Food Council, 322 A.2d 407, 412 (Pa.Cmwlth. 1974); *Firearm Owners Against Crime*, 151 A.3d at 1174–75. *Pa. PUC v. Israel*, 52 A.2d 317, 321 (Pa. 1947) (defendants prohibited from on transporting passengers); *Bd. of Revision of Taxes, Phila. v. City of Phila.*, 4 A.3d 610, 626–27 (Pa. 2010) (abolishment of petitioners' agency).

Commonwealth, Dep't of Transp., Bureau of Driver Licensing, 753 A.2d 233, 237 (Pa. 2000) (citing *Shapiro v. Shapiro*, 204 A.2d 266, 268 (Pa. 1964)). The unclean hands doctrine is "rooted in the historical concept of [a] court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith." *Shapiro*, 204 A.2d at 268 (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945)). Although the doctrine does "not demand that its suitors shall have led blameless lives," it nonetheless does require "that they have acted fairly and without fraud or deceit as to the controversy in issue." *Jacobs v. Halloran*, 710 A.2d 1098, 1103 (Pa. 1998). "[W]illfull misconduct" is the touchstone of the unclean hands doctrine. *Shapiro*, 204 A.2d at 268.

Here, the record is clear that Appellant has not acted "fairly and without deceit" with respect to the Ordinance. His case is thus indistinguishable from *Vernon v. Borough of Darby*, 428 A.2d 770, 771-72 (Pa.Cmwlth. 1981), where the Commonwealth Court affirmed the denial of a preliminary injunction on the grounds of unclean hands due to the business owner's violation of the ordinance whose enforcement he sought to enjoin. The unclean hands doctrine applies precisely in situations where, like here, a litigant violates a statute or municipal ordinance and then seeks to enjoin enforcement of that ordinance they violated. *See also Jacobs*, 710 A.2d at 1103-04 ("Fyffe-McFadden's dishonesty regarding the identity of the driver of the vehicle constitutes bad faith which is directly relevant to the delay in

prosecution from which she seeks relief. To allow her to benefit from a delay which she in part created is inequitable and will not be permitted.").

Moreover, the doctrine would apply to Appellant based on his prior conduct even if he had not violated the Ordinance. Application of the doctrine does not require the commission of a crime; indeed, it "has nothing to do with the rights or liabilities of the parties." *Capouillez v. Laurel Hill Game & Forestry Club*, No. 797 MDA 2013, 2014 WL 10937478, at *7 (Pa.Super. Apr. 4, 2014). Rather, "the doctrine addresses fairness and is guided by the conscience and the moral sensibilities of the trial court." *Id*. at *8. All that is required is that "the party applying for such relief is guilty of bad conduct relating to the matter at issue," and also that application of the doctrine will not itself cause an inequitable result in the trial court's judgment. *Matenkoski v. Greer*, 213 A.3d 1018, 1028 (Pa.Super. 2019) (quoting *Morgan v. Morgan*, 193 A.3d 999, 1005) (Pa.Super. 2018)).

As before, Appellant seeks an injunction with unclean hands. Even apart from his violation of the Ordinance, he violated the Commonwealth's firearms and public safety laws, then lied about those violations to the police, with respect to the very guns at issue in this case—quintessential "willful misconduct." *Shapiro*, 204 A.2d at 268. And while he now attempts to paint a picture of himself as a mere "victim," Appellant's Br. at 5-6, he in fact callously flouted state and federal law, placing guns in the hands of dangerous criminals. And Appellant nowhere disputes that his hands

are unclean.[28] In good conscience, he cannot now seek equitable relief, as the Court of Common Pleas correctly found. Opinion at 5-9. His unclean hands therefore provide an independent basis to affirm the order below.

2. Greater Injury Will Result by Issuing the Permanent Injunction.

The court below also correctly determined that Appellant cannot satisfy his burden of proving that greater injury will result from denying an injunction than from granting it. *See Kuznik*, 902 A.2d at 505. Appellant put forth zero evidence of harm in the court below, although now argues for the first time of harm from having to pay his lawyer and from missing work to attend his trial. Appellant's Br. at 37. That is insufficient, and indeed waived. Pa.R.A.P. ("issues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Weighing against Appellant's complete lack of injury is the public health and safety of the people of Philadelphia.

[28] Appellant appears to argue that the City also has unclean hands, and that this somehow weighs in favor of granting an injunction. Appellant's Br. at 34. Apart from the fact that the City has done nothing wrong, Appellant's misunderstands the doctrine of unclean hands. "That doctrine is a basis for a court of equity to refuse affirmative relief to either a petitioner or respondent. It is not a basis for a court of equity to grant affirmative relief." *Keystone Com. Props., Inc. v. City of Pittsburgh*, 347 A.2d 707, 709 (Pa. 1975); *accord N. Chester Cnty. Sportsmen's Club v. Muller*, 174 A.3d 701, 707 n.3 (Pa.Cmwlth. 2017) ("The doctrine of unclean hands is a basis only for the denial of equitable relief and cannot support a grant of affirmative relief against the party who acted with unclean hands.").

The evidence of record is overwhelming. The flow of illegal guns to the City's streets threatens the City's well-being daily. Over 1,400 people were shot in 2019 alone, including 100 children. *Supra* at pp. 9–11. Lost and stolen guns are particularly dangerous to Philadelphians because they are frequently used in violent crimes. *Supra* at pp. 11–12. Aside from the incalculable human costs of gun violence, the annual shooting toll in 2018 cost the City about $65 million, borne by City taxpayers in the form Medicaid, public safety, and the criminal justice system budgets.[29] For an individual, a non-fatal firearm-related injury can cost about $46,000 in medical expenses and lost productivity.[30] Gun violence also multiplies its costs over time. After seeing friends and family members gunned down, individuals experience psychological trauma, paranoia, and feelings of despair and helplessness that themselves fuel gang involvement and further violence.[31]

But laws like the Ordinance can make a difference. Mandatory reporting laws have been shown to reduce by as much as 30 percent the likelihood that a lost or stolen gun will later be purchased in-state.[32] And the City has determined that a

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[29] Roadmap at 11.

[30] *Id.*

[31] *Id.*

[32] Daniel W. Webster et al., *Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws*, in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis 109-121, Daniel W. Webster & Jon S. Vernick, eds., The Johns Hopkins University Press, 2013; *see also* Cassandra K. Crifasi et al., *The Initial Impact of Maryland's Firearm Safety Act of 2013 on the Supply of Crime Handguns in Baltimore*, 3 Russell Sage Found. J. of Soc. Sci. 128, 139-40 (2017) (study finding that a similar ordinance in Maryland "appears to have constrained the local supply of illegal handguns in Baltimore").

public health approach to gun violence—involving preventative measures like reporting laws—is a promising effort.[33] Such considerations weigh heavily in the City's favor.

Moreover, public health and safety are important and often-invoked interests in balancing the injuries from a permanent injunction's issuance or denial. Courts have denied permanent injunctions on public safety grounds. *Liberty Place Retail Assocs. v. Israelite Sch. of Universal Prac. Knowledge*, May Term Nos. 02028, 2557 EDA, , 2013 WL 10573668, at *11–12 (Pa.D.&C. Nov. 7, 2013) (denying a permanent injunction request because the party seeking relief did not show that what the protestors complained of posed "a serious threat to public safety and order"), *supplemented sub nom. Liberty Place Retail Assocs. v. Israelite Sch. of Universal Prac. Knowledge*, No. 130502028, 2014 WL 7772268, *1 (Pa.D.&C. Jan. 28, 2014).

The testimony the City presented during the evidentiary hearing illustrated how public safety and health weigh against a permanent injunction. Vanessa Garrett Harley, the Deputy Managing Director for Public Safety and Criminal Justice for the City of Philadelphia, testified that gun violence "was reaching th[e] level" of a public health crisis. Mar. 5, 2020 Mot. Hr'g Tr. (Harley), 105:4-5, RR. 331a. Evincing this claim, Dr. Elizabeth Dauer, an Associate Professor of Clinical Surgery at

[33] Roadmap at 12–13, RR. 354a-355a.

Temple University Hospital, estimated seeing "about a 25 percent increase in the number of trauma victims, and . . . about the same number of increase in gunshot wound victims" over the past few years. *Id.* (Dauer) at 79:6-9, RR. 324a. In addition to the increase in the number of gunshot victims, she has witnessed the severity of patients' wounds worsen "because of change in ammunition that's being used," "result[ing] in much more severe injury." *Id.* (Dauer) at 79:14, 79:18-19, RR. 324a. According to Dr. Michael Nance, Director of the Pediatric Trauma Department at the Children's Hospital of Philadelphia, "of all of the mechanisms of injury that could land a child in a trauma bay, in a trauma resuscitation room, firearms are by far the way of [sic] leading cause." *Id.* (Nance) at 91:9-11. When children suffer gunshot wounds, the results are devastating: "about 12 to 15 percent of firearm injuries end in death once they get to the hospital. That's about four times as high as the next most lethal mechanism that ends up in our trauma bay." *Id.* (Nance) at 91:12-15, RR. 327a.

The impact of this crisis is not felt only by victims, however. The increase in frequency and severity of these injuries can cause traumatic harm to family, care providers, and even other unrelated patients. As Dr. Dauer explained, "any time a gunshot wound victim comes into the trauma bay, it pulls resources from other areas of the hospital. It pulls nurses from the emergency department, doctors from the emergency department, surgeons, and our residents from the operating room. And

it also puts the operating room on hold because they hold an operating room for us in case we need to take a patient emergently." *Id.* (Dauer) at 81:4-11. Because of the nature of this injury, these victims are also more likely to suffer complications that require extended stays in the hospital, which "puts a big strain on [hospital] resources, a big strain on bed availability for other patients that, may need to be admitted to the hospital." *Id.* (Dauer) at 82:12-14.

Permanently enjoining the enforcement of the Ordinance would hinder the City's efforts to combat a threat to its residents' lives and the City's well-being. On the other hand, Appellant suffers *no* injury from the enforcement against him of a valid law he is guilty of breaking. Indeed, he alleged no harm at the trial court, and only now claims to suffer harm by way of attorneys' fees and missed days of work, a claim which is waived. The grave toll taken by gun violence in the City sadly weighs far greater than the mere inconvenience Appellant now alleges to have suffered. It is no surprise that Appellant, having contributed to the gun violence crisis, contends that the impact of such conduct on the City and its residents should not be considered. Appellant's Br. at 34-36. That argument is baseless, and rests on inapposite cases where, unlike Appellant, the party seeking an injunction had proved future injury. *Supra* at p. 20, n.27. The City therefore prevails on the greater injury prong, the court below correctly agreed, and its denial of Appellant's Motion was proper.

3. Appellant's Preemption Arguments Fail.

The court below properly determined that Appellant's inability to show any likely future injury, and the far great injury that the City and its residents would suffer from enjoining the Ordinance, by themselves bar entry of an injunction. But even apart from these dispositive factors, denial of the injunction is proper on the independent grounds that Appellant's sole purported basis for challenging the Ordinance—preemption by state law—has no merit.

a. 18 Pa.C.S. § 6120(a) Does Not Apply.

As a City of the first class, governed by Home Rule Charter, Philadelphia is afforded broad authority in self-governance and to regulate its municipal functions. *Nutter v. Dougherty* ("*Nutter II*"), 938 A.2d 401, 405-06 (Pa. 2007). Any exercise of its home rule authority is entitled to a strong presumption of validity. *See Id*. at 414 ("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."). Given this presumption of validity, and the plain language of Section 6120(a), the Ordinance does not intrude on the Commonwealth's express categories of firearms regulation.

Section 6120(a) provides in full: "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). Section 6120(a) has no application here for two reasons.

First, it expressly applies only to the regulation of specified "*lawful*" actions relating to firearms. Appellant, an admitted straw purchaser who lied to acquire the guns at issue and then allowed criminals to obtain possession of them, engaged in no *lawful* actions with respect to these firearms.

Second, Section 6120(a) does not preempt all laws regarding firearms. Despite other litigants' recent attempts to expand how preemption is applied in Pennsylvania, the plain text of the statute only preempts those that "regulate the lawful *ownership, possession, transfer or transportation* of firearms." 18 Pa.C.S. § 6120(a). The particular Ordinance at issue here does not regulate any of the enumerated actions, but merely requires reporting in circumstances when possession has been deprived.

i. Appellant's Actions Were Unlawful.

Appellant's actions as a straw purchaser were flagrantly unlawful and therefore could not fall within the scope of Section 6120(a). *Minich v. Cty. Of Jefferson*, 869 A.2d 1141, 1144 (Pa.Cmwlth. 2005) (holding that Section 6120 does not apply where "ordinance does ***not*** regulate the ***lawful*** possession of firearms.") Nothing about straw purchasing, the target of the Ordinance, is "lawful." Indisputably, it is illegal under both federal law and Pennsylvania state law to be a

straw purchaser. *See* 18 U.S.C. § 922(a)(6); 18 U.S.C. § 924(a)(1)(A); 18 Pa.C.S. § 6111(g). Moreover, Appellant pled guilty to carrying a firearm on the public streets and the illegal sale or transfer of firearms in violation of the UFA, and to filing false reports. Jan. 31, 2019 Guilty Plea Tr. 13:6-19, RR. 215a. Thus, the actions giving rise to his violation of the Ordinance were unlawful, and therefore not without the scope of Section 6120(a).[34]

In 2013, the Pennsylvania legislature enacted the Bradley Fox law which not only made it a felony of the 3rd degree to purchase a firearm on behalf of another, but upgraded the charge to a felony of the 2nd degree for any subsequent offenses, in addition to imposing a mandatory minimum sentence of 5 years in state prison. *See* 18 Pa.C.S. § 6111(h). Indeed, the Pennsylvania General Assembly has made clear by statute that firearms acquired through "straw purchases" are themselves "illegal firearms" and therefore could *never* fall within the scope of Section 6120(a):

> The General Assembly finds and declares that:
>
> (1) The illegal purchase of firearms throughout this Commonwealth is a threat to public safety and security;
> (2) Urban areas are experiencing increased violence as a result of criminal misuse of firearms. Stemming the flow of these *illegal firearms* through straw purchases will help to curb the crime rate throughout this Commonwealth and increase public safety;

[34] *Minich* has been distinguished where the municipality "does not point to any corresponding provision in the Crimes Code that contains … a blanket ban" on the conduct addressed by the ordinance. *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1177 (Pa.Cmwlth. 2016). Here, no such distinction exists. The specific provision of the Crimes Code addressed above amount to a "blanket ban" on straw purchasing.

18 Pa.C.S. § 6182 (emphasis added).

The Pennsylvania legislature's specific finding that straw purchased guns are illegal and straw purchases should be stopped provides further confirmation that the City may properly enforce the Ordinance. *Id.* "[W]here the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation . . . may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality . . . ." *Nutter v. Dougherty* ("*Nutter I*"), 921 A.2d 44, 50 (Pa.Cmwlth. 2007) *aff'd*, *Nutter II*, 938 A.2d 401 (2007) (quoting *W. Pa. Rest. Ass'n v. City of Pittsburgh*, 77 A.2d 616, 620, (Pa. 1951)); *see also City of Phila. V. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 902 (E.D. Pa. 2000) ("The City may still sue (and the District Attorney may still prosecute) rogue firearms dealers who sell to felons and others unlawfully allowed to possess firearms."). That is exactly what the City has done here. Appellant, as an unlawful straw purchaser, cannot invoke Section 6120's provisions related to *legal* firearms and *lawful* gun ownership, possession, transfer, or transportation to avoid enforcement of the Ordinance.

ii. The Ordinance Does Not Regulate the Lawful Ownership, Possession, Transfer or Transportation of Firearms.

Even apart from Appellant's action as an illegal straw purchaser, his arguments under Section 6120(a) fail because the Ordinance simply does not regulate the lawful ownership, possession, transfer, or transportation of firearms. Rather, the Ordinance merely requires the filing of a report within 24 hours *after* it has been determined that a firearm was lost or stolen. As a result, even as applied to otherwise law-abiding gun owners, the Ordinance does not "regulate the lawful ownership, possession, transfer or transportation of firearms" within the meaning of Section 6120(a).[35] *Cf.*, *e.g.*, *Commonwealth v. Swinton*, No. 0658-2008. Slip op. at 3 (Pa.D.&C. Lancaster Cnty. Crim. Mar. 30, 2009) ("[A] reading of the ordinance clearly indicates it is in no way violative or inconsistent with [Section 6120(a)]. The ordinance deals only with the discharge of firearms. It in no way makes the otherwise lawful possession of a firearm unlawful."); RR 301a-304a.

In interpreting statutory language, a court must be "guided by the sound and settled principles set forth in the Statutory Construction Act, including the primary maxim that the object of statutory construction is to ascertain and effectuate legislative intent." *Commonwealth v. Shiffler*, 879 A.2d 185, 189 (Pa. 2005) (citing

[35] Phila. Code §10-838a, Reporting Requirements for Lost or Stolen Firearm https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-200099 (last accessed July 9, 2021.

1 Pa.C.S. § 1921(a)). As a general rule, "the best indication of legislative intent is the plain language of a statute." *Id.* at 189 (citing *Commonwealth v. Bradley,* 834 A.2d 1127, 1132 (Pa. 2003)). In reading the plain language, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage." *Id.* at 189 (citing 1 Pa.C.S. § 1903(a)).

The Ordinance does not regulate the lawful *ownership* of firearms. Ownership refers to the "use, benefit, possession, control, responsibility for, and disposition" of the property in question. *See Wasilko v. Home Mut. Cas. Co.*, 232 A.2d 60, 62 (Pa.Super. 1967). Once a firearm has been determined to be lost or stolen, the individual required to report under the Ordinance no longer has the opportunity to use, benefit from, possess, control, take responsibility for, or dispose of the firearm.[36]

The Ordinance also does not regulate the lawful *possession* of firearms. Possession is the "exercise of physical control over a corporeal thing, movable or immovable, with the intent to own it." *Possession*, Black's Law Dictionary (11th

[36] To the extent Appellant asserts that the Ordinance "touches upon" gun ownership, the effects are far too minimal or remote to be deemed to "regulate" either of these areas. *See, e.g.*, 93 Op. Att'y Gen. 126, 133 (2008) (Opinion of Maryland Attorney General to City Solicitor for City of Baltimore advising that lost and stolen gun ordinance fell outside of state preemption on firearms). Maryland's preemption statute closely mirrors that of Pennsylvania, and the same logic applies to the Commonwealth's law. *Compare* Section 6120(a) *with* Md. Code Ann., Crim. Law §4-209(a) ("Except as otherwise provided in this section, the State preempts the right of a county, municipal corporation, or special taxing district to regulate the purchase, sale, taxation, transfer, manufacture, repair, ownership, possession, and transportation of: (1) a handgun, rifle, or shotgun; and (2) ammunition for and components of a handgun, rifle, or shotgun.").

ed. 2019). When a firearm is lost or stolen, it is, by definition, not within the possession of the prior owner. "Lost" means "*beyond the possession* and custody of its owner and not locatable by diligent search" *Lost*, Black's Law Dictionary (11th ed. 2019 (emphasis added)), while "steal" means "[t]o take (personal property) illegally with the intent to keep it unlawfully." *Steal*, Black's Law Dictionary (11th ed. 2019). Thus, using these common dictionary definitions, the reporting requirement under the Ordinance applies only after a person has determined he or she specifically does *not* have possession of the firearm.[37] In other words, the Ordinance regulates the very opposite of possession.

The Ordinance also does not regulate the lawful *transfer* or *transportation* of firearms. Loss of a firearm cannot be considered a lawful transfer, because transfer contemplates a deliberate or knowing interaction with a known or identifiable recipient. *Cent. Westmoreland Career & Tech. Ctr. Educ. Ass'n, PSEA/NEA v. Penn-Trafford Sch. Dist.*, 131 A.3d 971, 976 (Pa. 2016) ("There is little doubt that the definition of 'transfer' . . . , 'to carry or take from one person or place to another,' . . . is in accord with the plain meaning of the word . . . ."). In any event, allowing unknown persons to obtain possession or ownership of a firearm would not be a

[37] The Ordinance imposes no obligations whatsoever during the period when an owner retains possession. It contains no qualifications or restrictions for obtaining possession of a firearm posed by the Ordinance. It does not regulate or instruct how an individual is to maintain or store a firearm. It imposes no record-keeping or reporting requirements during any period in which possession is maintained.

"lawful" transfer. 18 Pa.C.S. § 6111. And, as discussed above, the "transfer" of firearms to known indivudals who are prohibited from possessing firearms cannot be deemed a "lawful" transfer. Likewise, theft of a firearm, by definition, cannot involve the lawful transfer or transportation of the firearm. 18 Pa.C.S. § 3921(a) ("A person is guilty of theft if he unlawfully takes . . . movable property of another with intent to deprive him thereof."). The Ordinance imposes no restrictions or requirements of any kind with respect to the lawful "transfer or transportation" of firearms as those terms are commonly understood.

In sum, the Ordinance's requirement to report lost or stolen guns does not regulate any of the *lawful* actions described in Section § 6120(a).

Appellant's arguments to the contrary miss the mark. No court has addressed the facts of an Ordinance like this. *Clarke v. House of Representative*s, 957 A.2d 361 (Pa.Cmwlth. 2008), which Appellant cites for support, dealt with ordinances that would *only* become effective when authorized by the General Assembly. Because it was undisputed that the General Assembly had not authorized the ordinances at issue in *Clarke*, the court sustained preliminary objections that had nothing to do with the question of whether such ordinances would have been preempted by the plain language of § 6120(a). 957 A.2d at 365. There was no discussion or analysis as to whether the lost or stolen gun ordinance in particular fell within the four areas of preemption under Section 6120(a), or whether the conduct

at issue was "lawful" conduct, likely because the petitioners in that case were Philadelphia City Council members, not unlawful straw purchasers.

The other cases cited by Appellant in support of express preemption all concern regulations that fall squarely within the four preempted categories described in § 6120(a). *See Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996) (ban on *possession* of assault weapons); *Firearm Owners Against Crime v. Lower Merion Twp*., 151 A.3d 1172 (Pa.Cmwlth. 2016) (ban on *possession* and discharge of firearms in municipal park without a special permit); *Dillon v. City of Erie*, 83 A.3d 467 (Pa.Cmwlth. 2014) (ban on *possession* of firearms in municipal park); *Schneck v. City of Phila.*, 383 A.2d 227 (Pa.Cmwlth. 1978) (imposing additional requirements for the acquisition and *transfer* of firearms).

Because Appellant's conduct was not *lawful*, and because the Ordinance does not "regulate the lawful ownership, possession, transfer or transportation of firearms" within the meaning of Section 6120(a), there is no express preemption.

b. Field Preemption Does Not Apply.

Appellant's argument that the entire field of firearms regulation has been preempted by the State also lacks merit. As discussed above, the plain language of Section 6120 shows that its scope was carefully defined and does not encompass all types of regulation relating to firearms. Instead, Section 6120 leaves an important

zone of regulation to local authorities. The Ordinance falls squarely within this zone of regulation, and thus is valid and enforceable.

Appellant rests his argument for field preemption on the holding of *Ortiz*, 681 A.2d 152. Appellant's Br. at 14-19. But the Supreme Court of Pennsylvania has repeatedly recognized—in at least three separate cases spanning more than a decade—that there are only four areas where the General Assembly showed a clear intent to completely preempt local regulation. As of 2011, "[t]his Court ha[d] determined that the General Assembly has evidenced a clear intent to totally preempt local regulation in only three areas: alcoholic beverages, antracite strip mining, and banking." *Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Twp.*, 32 A.3d 587, 593 (Pa. 2011) (citing *Hydropress Env't. Servs., Inc. v. Twp. of Upper Mount Bethel, Cnty, of Northampton*, 836 A.2d 918 (Pa. 2003), and *Mars Emergency Med. Servs., Inc. v. Twp. of Adams*, 740 A.2d 193, 196 (Pa. 1999). The Court recently extended this to a fourth area: utility relulgation. *PPL Elec. Util. Corp. v. City of Lancaster*, 214 A.3d 639, 652 (Pa. 2019). Importantly, the Court explained that it was concerned that, should municipalities have the authority to regulate, they "necessarily would exercise that power with an eye toward the local situation and not the best interests of the public at large." *Id*. at 656 (quoting *Duquesne Light Co. v. Upper St. Clair Twp*., 105 A.2d 287, 293 (Pa. 1954)). Here, the Ordinance is *in line* with the "interests of the public at large." But, more to the point, it matters that

the Supreme Court has *not* found preemption here otherwise. The fact that the Court has explicity laid out the areas of total preemption—and pointedly omitted firearms regulation from that list time and again—eviscerates Appellant's claim. The maxim of inclusio unius exclusio alterius thus clearly applies: the inclusion of specific preempted areas implies the exclusion from preemption of other areas that are not listed. *See, e.g.*, *Thompson v. Thompson*, No. 36 WAP 2018, 2020 WL 355372, at *4 (Pa. Jan. 22, 2020).

A closer review of *Ortiz* likewise reveals that Appellant's reliance is misplaced. Contrary to standing for the proposition of field preemption, the Supreme Court's analysis in *Ortiz* confirms that preemption is limited. In *Ortiz*, the Court specifically noted in its legal analysis that "[i]t is undisputed that these ordinances purport to regulate the ownership, use, possession or transfer of certain firearms." 681 A.2d at 154. Should the Court have determined that a field preemption on firearms regulation existed, there would have been no need to determine that the challenged ordiances fell within the specific areas that Section 6120 preempts local regulation. This is also identical to a previous analysis by the Commonwealth Court in *Schneck.* In *Schneck*, the Court cites to the specific areas that Section 6120 preempts and finds that "Philadelphia's ordinance attempts to regulate firearms *in the manner* indicated in the statute as prohibited." 383 A.2d at 230 (emphasis added); *see also Gun Range, LLC v. City of Phila.*, No. 1529 C.D.

2016, 2018 WL 2090303, at *5-6 (Pa.Cmwlth. May 7, 2018) (holding that a Philadelphia zoning ordinance limiting the location of a gun shop was not preempted because it regulated the shop's location, not the ownership, possession, transfer, or transport of firearms under § 6120); *Barris v. Stroud Twp.*, No. 218 C.D. 2016, 2017 WL 5505510, at *2 (Pa.Cmwlth. Nov. 17, 2017) (affirming a lower court ruling that a municipality's ordinance limiting use of property as a private shooting range was not preempted because it regulated the "discharge" of firearms rather than the activities covered under § 6120); *Minich*, 869 A.2d at 1142-44 (holding a county ordinance barring firearms from a county courthouse was not preempted because it did not regulate "lawful" activities under § 6120). The additional analysis in these cases that the ordinances at issue regulated firearms "in the manner" prohibited by the statute would have been unnecessary if a total preemption on firearms regulation existed.

Equally inapt are Appellant's citations to *Commonwealth v. Hicks*, 208 A.3d 916, 926 n.6 (Pa. 2019), and *Commonwealth v. Wanamaker*, 296 A.2d 618, 624 (Pa. 1972). Appellant's Br. at 6, 9, 12. Appellant claims that the Supreme Court announced the state's "exclusive prerogative" to regulate firearms and thus preempt the field of gun regulation in a footnote in *Hicks*. *Id.* at 6, 9. But a candid look at the footnote reveals nothing of the sort. The footnote simply mentions the existence of § 6120, the Supreme Court's interpretation of that provision in *Ortiz*, and notes

the existence of a state statute regulating firearms in Philadelphia, all in the service of summarizing Pennsylvania firearms law generally. *Hicks*, 208 A.3d at 926 n.6. *Hicks* thus merely explains the above authorities: it announces no new rule on firearms regulation. And, as noted, Appellant's reliance on *Ortiz* is misplaced in any event, since *Ortiz* did not address an ordinance like the Ordinance here. Relatedly, Appellant's claim that the General Assembly somehow agrees with the decision in *Ortiz* is nonsensical. Yes, the General Assembly did not amend § 6120 post-*Ortiz*, but this non-amendment in no way reflects the General Assembly's affirmative *agreement* or *disagreement* with *Ortiz*'s holding. Appellant's Br. at 12. *Ortiz* stands for limited preemption. Appellant's citation to *Wanamaker* for the notion of the legislature's silent agreement is therefore inapposite.

Setting aside case law, however, the language and history of Section 6120 also demonstrate the absence of field preemption. The very title of the statute suggests that its intended reach is limited: "§ 6120. *Limitation* on the regulation of firearms and ammunition" (emphasis added). As discussed above, Section 6120(a) only regulates 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. Aside from these four categories, the statute remains silent on other areas of regulation. If the Pennsylvania General Assembly intended to preempt the entire field of firearms

regulation, it certainly could have done so by employing deliberate language. Rather, Section 6120 makes clear in its language alone that the preemption is limited. "When the words of a statute are clear and free from all abiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. §1921(b). "Revewing more generally the UFA," Appellant's Br. at 16, does not support Appellant's argument either. Nowhere in the UFA, despite Appellant citing almost every section, does it state that it preempts the entire field of firearms regulation. That is because it does not.

By contrast, other areas in which the General Assembly has intended field preemption have utilized definitive language to express complete preemption. *See*, *e.g.*, 47 P.S. § 1-104[38] (alcoholic beverages); 52 P.S. § 681.20(c)[39] (anthracite mining); *see also Nutter II*, 938 A.2d at 414 ("With regard to alcoholic beverages and anthracite mining, we noted, the legislation in question expressly stated the legislature's intent that its enactments provide the exclusive source of regulatory law in these areas."). Although Appellant argues that some statutory provisions from the UFA addresing the role of the Pennsylvania State Police are "*substantially similar*

[38] "Except as otherwise expressly provided, the purpose of this act is to prohibit the manufacture of and transactions in liquor, alcohol and malt or brewed beverages which take place in this Commonwealth, except by and under the control of the board as herein specifically provided, and every section and provision of this act shall be construed accordingly . . . ." 47 P.S. § 1-104(c).

[39] "[All coal stripping operations] shall be under the exclusive jurisdiction of the department and shall be conducted in compliance with such reasonable rules and regulations as may be deemed necessary by the secretary . . . ." 52 P.S. § 681.20(c).

to the Anthracite Strip Mining and Conservation Act, 52 P.S. §§ 681.1–681.22, and its regulatory proscription, 52 P.S. § 681.20c, which the Pennsylvania Supreme Court found to result in field preemption in *Harris-Walsh, Inc. v. Borough of Dickson City*, 216 A.2d 329, 336 (Pa. 1966)," Appellant's Br. at 18 (emphasis added), no similarities in fact exist. 52 P.S. § 681.20c confers "exclusive jusisdiction" to the Department of Mines and Minerals. No "similar" language exists in either of the cited regulations relating to the Pennsylvania State Police, in § 6120(a), or elsewhere in the UFA—and Appellant's brief cites to no similar language either. *Harris-Walsh* is thus inapposite. As this Court noted in *Williams v. City of Phila.*, 164 A.3d 576 (Pa.Cmwlth. 2017), *aff'd*, 188 A.3d 421 (Pa. 2018)—distinguishing past preemption cases from the non-preempted ordinance in that case—the statute in *Harris-Walsh* preempted the local law because it "expressly retained exclusive jursidiction" over the entire field of anthracite strip mining, *id.* 164 A.3d at 585 n.15 (citing *Nutter I*, 921 A.2d at 58 n.6). Here, by contrast, no such blanket, express reservation exists, and § 6120(a) instead carves out only "the lawful ownership, possession, transfer or transportation of firearms" as the specific areas of exclusive state concern. *See* 18 Pa.C.S. § 6120(a).

The Pennsylvania Supreme Court has indicated that "absent a clear statement of legislative intent to preempt, state legislation will not generally preempt local legislation on the same issue." *Mars Emergency Med. Servs.*, 740 A.2d at 196. The

decision of the General Assembly to use limited language here affirms that Section 6120 does not preempt the entire field of regulation.[40]

The legislative history of Section 6120 also illustrates the orginal intent to establish a limited preemption. House Bill 861, as first introduced, was entitled "repealing certain municipal or township ordinances or regulations with reference to firearms" and provided that "[e]xcept in cities of the first class, the General Assembly hereby declares that it is occupying the whole field of the regulation of the transfer, ownership, possession, and transportation of firearms . . . ." H.B. 861, Printer's No. 1012, 1973 Gen. Assemb., Reg. Sess. (Pa. 1973). But the General Assembly expressly *rejected* this sweeping language: the bill was later amended to drop the exception for cities of the first class, and most importantly, to eliminate the language "that it is occupying the whole field of regulation." H.B. 861, Printer's No. 3590. Shortly thereafter, the title was also amended to "limiting the regulation of firearms by counties, municipalities or townships." H.B. 861, Printer's No. 3612. The evolution of House Bill 861, and the overt decision to reject the language of occupying the "whole field of regulation" and rebrand the statute as a "limitation," is clear evidence that Section 6120 was never intended to establish a field

[40] Appellant cites "Dillon's Rule" for the truism that municipalities are not sovereigns and that the Commonwealth confers their powers. Appellant's Br. at 26–27. This doctrine affects no issue on appeal. Dillon's Rule does not alter Section 6120's words and legislative history, which carve out specific areas of gun regulation for the Commonwealth and grant the remainder to municipalities, with the latter category covering the Ordinance here.

preemption. *See also Clarke*, 957 A.2d at 368-69 (Smith-Ribner, J., concurring in part, dissenting in part) (discussing the legislative history of Section 6120).

Appellant's selectively-quoted legislative history does not change this conclusion. He cites two *opponents* of the bill, Minority Leader Herbert Fineman and Representative Hardy Williams, to argue that Section 6120 preempted the field even after amendment. Appellant's Br. at 19–20. But the bill's "prime sponsor," Representative Kent Shelhamer, called his colleagues' statements "red herrings" and "smoke screens," rebutting the notion that the entire field would be preempted, and highlighting the bill's limiting clause, saying, "I do not share the minority leader's view on the amendments that were placed in by the Senate, because what the final sentence that was inserted by the Senate says is . . . the state shall preempt this area of gun control for firearms 'when carried or transported for purposes not prohibited by the laws of this Commonwealth.'" Legislative Journal – House, Oct. 2, 1974, H.B. 861 at 6085. Representative Shelhamer was at pains to reiterate this point, adding later, "[t]he bill simply says . . . 'General Rule.-No county, municipality, or township may in any manner regulate' – *listen to this* – 'the lawful ownership, possession or transportation of firearms when carried or transported for purposes not prohibited by the laws of this Commonwealth.'" *Id.* at 6110.

Moreover, legislators clarified their intent with the very purpose of guiding future courts. Representative William Shane put questions to Representative

Shelhamer, asking, "it is reasonable to assume that someone will challenge the Philadelphia gun-registration ordinance in court. Anticipating that possibility, I would like to ask you, as the prime sponsor of this bill, a couple of questions about legislative intent." *Id.* at 6087. Legislators' attempts to clarify the law for future litigation are not only permissible to consider but highly probative pieces of evidence. *Commonwealth v. Snyder*, 560 A.2d 165, 174 n.9 (Pa.Super. 1989).

Representative Shelhamer responded that the bill would not limit authorizations within the Municipal Code for cities to enact their own gun ordinances. "The Home Rule Charter, which gave Philadelphia the right to enact their gun ordinance, is still intact, and, therefore, would not be affected," Representative Shelhamer said. Legislative Journal – House, Oct. 2, 1974, at 6087. Representative Shane made clear that he "hope[d] . . . some judge from Philadelphia, who may have to consider this question, will read this particular dialogue." *Id.* Representative Shelhamer's statements demonstrate that Section 6120 was not a blanket preemption because legislators did not intend to forbid regulation of unlawful conduct or limit municipalities' existing powers under the Municipal Code.

Furthermore, Appellant misleadingly cites legislators' use of the phrase "gun control" to imply that the General Assembly meant to preempt the whole field. *See* Appellant's Br. at 19. To be sure, § 6120(a) has hamstrung local officials in their ability to pass preempted ordinances that would save lives in their communities, but

that again does not establish legislative intent to preempt the *entire field*. Representative Shelhamer used "gun control" as a shorthand for the areas Section 6120 carved out for state regulation ("lawful ownership, possession, transfer or transportation")—not the entire field. Representative Shelhamer, emphasizing for his colleagues the limited nature of the preemption, said the bill would "preempt *this area of gun control* for firearms 'when carried or transported for purposes not prohibited by the laws of this Commonwealth.'" Legislative Journal – House, Oct. 2, 1974, at 6085 (emphasis added).

Courts consistently examine a bill's sponsors and proponents to decipher legislative intent. *Snyder Bros. v. Pa. PUC*, 198 A.3d 1056, 1074 (Pa. 2018) (slip opinion) (sponsor); *D.R.C. Sr. v. J.A.Z.*, 31 A.3d 677, 685 (Pa. 2011) (sponsor); *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 435-36 (Pa. 2006) (proponent). And Section 6120's sponsor, Representative Shelhamer, twice rejected Appellant's interpretation. *See Commonwealth v. Thomas*, 743 A.2d 460, 468 (Pa.Super. 1999) ("Such a result is repudiated by the apparent intention of both of the measure's proponents . . . ."). The Court should consider the interpretation of the bill's proponents, not its opponents.

Finally, Appellant rests his arguments for field preemption on a series of unenacted bills that cannot lawfully inform statutory construction. Appellant argues that the legislative history supports field preemption because of later-proposed,

failed bills that attempted to limit preemption in specified areas of firearm regulation. *See* Appellant's Br. at 20–26. Many of these bills cover areas like possession that Section 6120 already preempts. But, regardless, Appellant is too late. The Statutory Construction Act authorizes consideration of only "contemporaneous legislative history." 1 Pa.C.S. § 1921(c)(7). After-the-fact evidence of legislative intent is irrelevant to the intent behind Section 6120 at its time of passage. Additionally, attempts to clarify preemption or make further municipal authorizations could be the General Assembly's reaction to judicial decisions. And there are numerous known and unknown (or unknowable) reasons why a bill becomes a law (or not). A voluminous record would confront a court trying to determine all these reasons. The General Assembly solved this problem by enacting the contemporaneous-only rule in the Statutory Construction Act.

Moreover, while Appellant lists unenacted bills purportedly showing the General Assembly's belief that "the entire field" of gun regulation is preempted, Appellant's Brief at 20–26, other unenacted bills support the opposite conclusion. House Bill 979 of 2021, for instance, would explicitly preempt the entire field. By Appellant's logic, this measure—which passed the House on June 8, 2021—proves the General Assembly knows that current state law (1) does not preempt the field and (2) does not preempt local ordinances requiring the "reporting of loss or theft of firearms." But House Bill 979, like the bills Appellant cites, has not been enacted

into law, and unenacted bills are not probative of legislative intent. *See, e.g.*, *RPRS Gaming, L.P. v. Pa. Gaming Control Bd.*, No. 377 M.D.2013, 2014 WL 2738426, at *8 (Pa.Cmwlth. June 16, 2014) ("[T]he language in proposed amendments which were supported by only a small number in the General Assembly and which did not pass in either house of the General Assembly are not indicative of the intent of the General Assembly."), *aff'd without opinion*, 111 A.3d 746 (Pa. 2015). The Court should accordingly disregard Appellant's cavalcade of never-enacted bills.

B. The Court of Common Pleas Applied the Correct Test for a Permanent Injunction.

Appellant argues that the Court of Common Pleas "improperly appl[ied] the test for a preliminary injunction" instead of that for a permanent injunction. *See* Appellant's Br. at 36. But fully one-fifth the Opinion addressed the standard for *permanent* injunctions. The Opinion's extensive application of the correct standard allays any purported concern about the Court's questions at the hearing. Any suggestion the Court applied the wrong standard is purely speculative.

C. The Court of Common Pleas Properly Held a Full Evidentiary Hearing, Including Highly Relevant and Admissible Witness Testimony and Exhibits.

1. A Full Evidentiary Hearing Was Required.

The Court correctly held a full evidentiary hearing on Appellant's motion. Courts hold full hearings on permanent injunctions because the standards governing

this extraordinary form of relief are distinctive and special. *See Big Bass Lake Cmty. Ass'n*, 950 A.2d at 1149; *New Milford Twp.*, 938 A.2d at 566. The City's witnesses and exhibits were relevant, non-hearsay evidence going directly to the balance-of-harms inquiry. The Court committed no "abuse of discretion" in admitting this evidence, *see Brady*, 111 A.3d at 1161, and the Court here should affirm and not strike this evidence from the record.

2. The Witness Testimony Was Highly Relevant and Therefore Properly Admitted.

Appellant challenges the admission below of testimony from the City's three witnesses on grounds of relevance. But their testimony was highly relevant to the permanent injunction balance-of-injuries inquiry. The first witness, Dr. Dauer, testified about the burdens that gun violence places on the City's health care system. The second witness, Dr. Nance, testified about the pediatric trauma effects of gun violence on children. And the third witness, Ms. Harley, testified about the City's multi-pronged response to gun violence, which treats gun violence as a public health as well as public safety issue, illustrating the effects this issue has on the City's administrative and policymaking apparatuses.

This evidence was relevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without

the evidence." *Kennedy-Smith v. Milroy Hosp., LLC*, No. 1509 MDA 2016, 2017 WL 4548337, at *10 (Pa.Super. Oct. 12, 2017) (citing Pa.R.E. 401(b)). Additionally, evidence is relevant if it "logically or reasonably tends to prove or disprove a material fact" or if it "affords the basis for or supports a reasonable inference or presumption regarding the existence of a material fact." *Commonwealth v. Henderson*, No. 1155 WDA 2013, 2014 WL 10752242, at *9 (Pa.Super. Dec. 23, 2014). In cases where evidence goes to one prong in a multi-prong test, understanding the prong at issue is "critical to understanding" whether evidence is relevant. *See Burgos v. Philabundance*, No. 02978, 2015 WL 13779948, at *14 (Pa. D. & C., Phila. Cnty. Sept. 14, 2015) (finding that statements in a malicious prosecution suit were relevant to whether criminal proceedings terminated in the plaintiff's favor).

Here, the "fact that is of consequence" to the action is whether "greater injury will result from refusing rather than granting" the injunction, *Kuznik*, 902 A.2d at 489, the third balance-of-harms prong of the test for a permanent injunction. The City argued for a hearing to provide evidence going to this prong, (*see* RR. 189a, Feb. 28, 2020 Def. Phila. Mem. of Law In Opp. To Mot. for Permanent Inj.), and the court below evaluated the witness testimony as going to this prong as well (*see* Opinion at 7). The City's three witnesses spoke directly to this issue, detailing injuries the City's health care system, children, and government policies and

operations suffered due to gun violence. Their testimony made "the existence of" the City's injuries from losing the motion "more probable . . . than it would be without the evidence." *See Kennedy-Smith*, 2017 WL 4548337, at *10. Specifically, Dr. Dauer highlighted the "higher mortality with gunshot wounds" and the effect that increasing frequency of these injuries has on the hospital: "any time a gunshot wound victim comes into the trauma bay, it pulls resources from other areas of the hospital . . . because [these] patients come in dying." Mar. 5, 2020 Mot. Hr'g Tr. (Dauer), 80:23, 81:4-14, RR. 325a. Dr. Dauer also emphasized the "emotional toll and physical toll [the increase in firearm victims] takes on the care providers. It's very hard to constantly have to tell people that their loved one has died. It's very taxing, very emotionally taxing, and it's just not normal." *Id.* (Dauer) at 83:21-25, RR. 325a. Similarly, Dr. Nance spoke to the toll gun violence takes on victims: "[t]here's a tremendous amount of post-traumatic stress in both the child and the families . . . their life's been shattered either with a child that's died, or a child that's permanently injured, or even a non-lethal injury, trivial injury can lead to long-lasting effects, and a patient with physical injuries will carry that burden potentially the rest of their lives." *Id.* (Nance) at 91:19-92:3, RR. 327a. Finally, Ms. Harley, having led listening tours of Philadelphia to speak with its citizens regarding their thoughts on the City's governance, testified that "the one thing that everybody talked about was the proliferation of guns in the city. There were far too many guns on the

street in the city, and they felt like, in some neighborhoods, that almost everybody was carrying one or had one." *Id.* (Harley) at 109:9-14, RR. 332a.

The witnesses' testimony tended to make it more probable that granting the motion would cause more harm than denying it. It was both "logical[]" and a "reasonable inference" for the trial court to find that their testimony went to the balance-of-harms prong. It was certainly no "abuse of discretion" to admit such testimony. *See Brady*, 111 A.3d 1155, 1161 (Pa. 2015); *see also Commonwealth v. Cager*, No. 133 WDA 2020, 2021 WL 1054376, at *4 (Pa.Super. Mar. 19, 2021) ("Appellant has simply failed to surmount the high bar posed by the abuse of discretion standard."). The Court should therefore reject Appellant's arguments and find that the testimony was relevant.

3. The Exhibits Were Relevant, Non-Hearsay Public Records.

Appellant also challenges the admission of the City's exhibits at the hearings. The trial court admitted a press release in which the Mayor called for more gun violence prevention efforts (Mar. 5 2020 Mot. Hr'g, exhibit C-1, RR. 340a-342a) and the official Philadelphia Roadmap for Safer Communities (the "Roadmap"), the City's plan to combat gun violence (Mar. 5 2020 Mot. Hr'g, exhibit C-2, RR. 343a-374a). Appellant charges that the exhibits are irrelevant, hearsay, and that neither

exhibit qualifies for admission under the public records exception to the hearsay rule of Pennsylvania Rule of Evidence 803(8). Appellant's arguments fail on each point.

First, the exhibits are relevant for the same reason City official Ms. Harley's hearing testimony was relevant: it documents the efforts to which the City must go in order to combat an epidemic of gun violence. Appellant cannot get around this reality, instead redefining the standard for relevance and sideways political jabs at the documents themselves. He argues that the exhibits do not "*establish* any probability that any harm" would result from enjoining the Ordinance. Appellant's Br. at 54 (emphases added and omitted)). But that is not the standard for relevance. Relevant evidence has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable," *Milroy Hosp., LLC*, 2017 WL 4548337, at *10, not the ability to "establish" a fact. "Establishing" a fact is an erroneously high standard. The Court should reject this standard and instead evaluate whether official City documents and reports detailing its official municipal gun violence policies "afford[] the basis for or support[] a reasonable inference or presumption" regarding whether the City would be more harmed by the permanent enjoining of the lost-and-stolen Ordinance. *See Henderson*, 2014 WL 10752242, at *9. The witnesses testimonies did, and the exhibits here are admissible for the same reason.

Second, neither exhibit is inadmissible hearsay because both are admissible under the public records exception, as the City argued below. Mar. 5, 2020, Mot. Hr'g. Tr. (Harley), 114-115, RR. 333a. A "record of a public office" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness," if (a) the record "describes the facts of the action taken or matter observed;" (b) "the recording of this action or matter observed was an official public duty;" and (c) "the opponent does not show that the source of the information or other circumstances indicate a lack of trustworthiness." Pa.R.E. 803(8)(A)–(C). The two exhibits here meet all three criteria.

First, the exhibits "describe[]" the Mayor's official pronouncements of the City's gun violence prevention policies as well as "the action taken" by the City, in the form of the gun safety Roadmap detailing the City's policy steps to stop gun violence. Second, recording these actions and pronouncements "was an official public duty" of the City employees who compiled these documents because the documents themselves originate from and were published by the City government. *See* RR.343a-374a (each document, noting itself as a document published by the City). Third, Appellant has not "show[n]" the document's sources "or other circumstances" indicate they are untrustworthy. Instead, he vaguely asserts that the City "controlled" the public listening sessions informing snippets of the Roadmap, and then, giving up, declares the document's sources—"studies, reports, and other

roadmap-type documents" were "biased." Appellant's Br. at 55–56. Appellant made no "show[ing]," however, that the press release or the Roadmap are untrustworthy. He merely suggests as much. These documents in no way differ from other trusted official reports and statements.

D. The Court's Full Evidentiary Hearing Did Not Deprive Appellant of Due Process.

Appellant's due process rights were not violated by the hearing either. Appellant argues, with no basis, that the City, "[i]n essence," "seeks to deprive" Appellant of due process by submitting the exhibits described above, without the opportunity to cross-examine declarants. Appellant's Br. at 55. Setting aside that such a conspiratorial charge that the City actively "seeks to deprive" Appellant of due process is bizarre, it is also unfounded. The public records exception applies "regardless of whether the declarant is available as a witness" to be cross-examined. Pa.R.E. 803. And Appellant was not denied the chance to object to admission of the exhibits. He objected, argued his points, and was overruled. March 5, 2020 Mot. Hr'g. Tr. 106-108; RR. 331a, 114:16-117:21, RR. 334a. In fact, Appellant acknowledged no surprise from the City offering the Roadmap exhibit because it had been included in exhibits to the City's prior-filed memorandum of law. Mar. 5, 2020 Mot. Hr'g. Tr. 114-116, RR. 334a. Appellant has not been denied due process

on any ground he asserts, and the Court should disregard his arguments to the contrary.

Therefore, the Court should affirm the decisions below admitting the witness testimony and exhibits and not strike this evidence from the record.

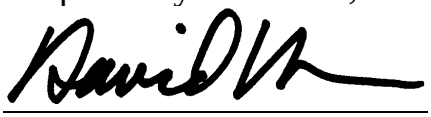
E. The City Adopts the Arguments of the Appellee-Intervenors on the Permissibility of their Intervention.

The Appellee-Intervenors have submitted arguments for their right to intervene in this case. The City adopts those arguments as its own on the question of the Appellee-Intervenors' right to intervene.

VII. CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Common Pleas's denial of Appellant's motion for a permanent injunction.

Respectfully submitted,



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David Newmann

July 9, 2021

Certificate of Compliance

I certify pursuant to Pa.R.A.P. 127(a) 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.

David Newmann

July 9, 2021