Received 12/2/2022 5:12:19 PM Supreme Court Eastern District

Filed 12/2/2022 5:12:00 PM Supreme Court Eastern District
19 EAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 19 EAP 2022

STANLEY CRAWFORD, *et al.*

Petitioners-Appellants

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*

Respondents-Appellees

On appeal from the May 26, 2022 Order of the
Commonwealth Court of Pennsylvania at
No. 562 M.D. 2020

BRIEF FOR APPELLEE SENATOR KIM WARD

Anthony R. Holtzman (PA 200053)
Thomas R. DeCesar (PA 309651)
K&L Gates LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507
(717) 231-4500
(717) 231-4501 (fax)
anthony.holtzman@klgates.com
thomas.decesar@klgates.com
Counsel for Appellee Senator Kim Ward,
Interim President pro tempore of the
Pennsylvania Senate

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

By litigating this action, Appellants are hoping for a transfer of venue. They want to move a policy debate about the regulation of firearms from the floor of the General Assembly to the courthouse podium. As the Commonwealth Court aptly stated:

> [O]n an individual and collective scale, all of Petitioners' averments amount to challenges to the democratic nature of the legislative process itself. Notably, Petitioners ignore the fact that Section 6120(a), despite its opposition from certain House and Senate members, is nonetheless a duly enacted law expressing the will, wisdom, and judgment of the General Assembly.

Plurality at 29.

Under the Pennsylvania Constitution, the General Assembly is the body that is charged with deciding policy issues and creating law to govern the Commonwealth. No single senator or representative is able to pass a bill on their own. By its nature, the creation of law involves the balancing and weighing of opinions and viewpoints on a variety of policy questions. To be passed into law, bills must be acceptable to at least a majority of legislators in both houses and the Governor. Bills regarding the regulation of firearms are no different.

The General Assembly has exercised its legislative authority in this arena by enacting various statutes that pertain to firearms. The General Assembly, in particular, enacted the Uniform Firearms Act of 1995, 18 Pa.C.S. § 6100, *et seq.* (the "Uniform Firearms Act"), which regulates various activities that involve firearms,

including their sale, purchase, registration, transfer, possession, loss, and disposal, along with the licensing of firearms dealers. Of course, the right to keep and bear arms is protected under the United States and Pennsylvania Constitutions. In recognition of that protection, the General Assembly determined that Pennsylvania should have a "uniform" set of laws related to firearms. It therefore enacted statutory provisions (the "Preemption Provisions") that prohibit local governments from regulating, in any manner, the lawful ownership, possession, transfer, or transportation of firearms.

Appellants believe that the system of firearm regulation in Pennsylvania, and particularly Philadelphia, would be better if local governments were afforded the power to regulate. They highlight three firearm control ordinances that Philadelphia would potentially put into place, if it were permitted to do so. Of course, numerous members of Pennsylvania's Senate and House of Representatives hail from Philadelphia. These individual legislators, and any other Pennsylvania legislator, may introduce and vote on bills that would accomplish what Appellants seek. In fact, they have done so in the past, but the General Assembly has not enacted any of these measures into law.

Unable to accomplish the changes they prefer through the process that our Constitution requires them to follow, Appellants instead launched this case and are asking the courts to do what they, or their state representatives, could not.

Regardless of which novel arguments Appellants claim to have unearthed or rejiggered, at its core, their case amounts to a policy disagreement: they disagree with the Uniform Firearms Act and the Preemption Provisions; they think that different laws would work better; and, they want the Court to agree with them on policy grounds and give municipalities the ability to pass the local ordinances that they favor. Our Constitution already tells us that Appellants' grievance should be addressed not through the courts, but instead through elections and the legislative process.

In the proceeding below, the Commonwealth Court recognized the various defects in Appellants' case and, in response to the demurrers that Appellees filed, dismissed their claims on the merits, with prejudice. The Commonwealth Court's decision should be upheld on the merits and various other grounds.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Whether the argument that Appellants raise in this appeal but did not raise in their Petition for Review ("Petition") or elsewhere in the proceeding below, namely, that the Commonwealth Court misinterpreted the Preemption Provision at 18 Pa.C.S. § 6120 and misapplied this Court's decision in *Commonwealth v. Ortiz,* is waived and meritless.

2. Whether the Commonwealth Court was correct in dismissing Appellants' substantive due process claim because Article I, Section 1 of the

Pennsylvania Constitution protects citizens from the State but not from each other and does not guarantee a minimal level of safety.

3. Whether the Commonwealth Court was correct in dismissing Appellants' state-created danger "claim" because that claim improperly involves a challenge to generally-applicable statutes and the Petition for Review is otherwise devoid of allegations that, if true, would satisfy any of the elements of the state-created danger exception.

4. Whether the Commonwealth Court was correct in dismissing Appellants' "interference with delegation" claim because the Preemption Provisions preempt local gun control measures and therefore, even if the General Assembly has delegated to municipalities certain "responsibility to address gun violence," the delegation does *not* include any responsibility to enact gun control measures and therefore, by definition, the Preemption Provisions do not interfere with the delegation.

5. Whether the Commonwealth Court's dismissal of Appellants' claims should also be upheld on alternative grounds because the Petition suffers from a slew of procedural and jurisdictional defects, including defects regarding standing, ripeness, justiciability, and *res judicata*.

Suggested answer to each: Yes.

COUNTERSTATEMENT OF THE CASE

Appellants include nine individuals living in Philadelphia and the Pittsburgh area, who have lost relatives to homicide by firearms ("Individual Appellants"). *See* R.56a-69a (Petition ¶¶ 9-18). Twelve of the victims were killed between 1994 and 2018. *Id.* The other Appellants are the CeaseFire Pennsylvania Education Fund ("CeaseFire PA"), a non-profit organization, and the City of Philadelphia ("Philadelphia"). R.70a (Petition ¶¶ 19 & 21). CeaseFire PA's self-appointed, volunteer mission is "to end the epidemic of gun violence…through education, coalition building, and advocacy in support of sensible gun laws and public policies." R.70a (Petition ¶ 20). Philadelphia is a Pennsylvania city of the first class. R.70a (Petition ¶ 22).

Appellees are the Commonwealth of Pennsylvania, the Pennsylvania General Assembly, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Senator Kim Ward, interim President *pro tempore* of the Pennsylvania Senate.[1]

The Preemption Provisions are identified as 18 Pa.C.S. § 6120 (or "Section 6120") and 53 Pa.C.S. § 2962(g) (or "Section 2962(g)"). Section 6120 was originally enacted in 1974, while Section 2962(g) was enacted in 1996. Appellants

[1] On December 2, 2022, Appellee Senator Ward filed an Application for Order of Substitution in this appeal.

allege that these provisions are preventing municipalities from adopting local measures that would reduce gun violence. R.55a (Petition ¶ 6).

Appellants tie all of their claims to assertions regarding an increase in gun violence in Philadelphia over the past several years. They assert that, in Philadelphia, gun violence has been "steadily increasing since at least 2014 and has dramatically worsened in 2020." R.83a (Petition ¶ 49); *see also* R.73a (Petition ¶ 28). Their claims rest on the unsupported proposition that the Preemption Provisions, put into place in 1974 and 1996, respectively, are the *cause* of this recent surge in firearm violence. Appellants provide no explanation for how, decades after they were enacted, the Preemption Provisions caused this phenomenon.

The reality, of course, is that while Appellants blame the Preemption Provisions, they simply ignore a variety of factors that impact the crimes that they describe in their Petition. For instance, they do not identify any individual who used a firearm to commit a gun homicide – in fact, in the Petition, they only obliquely acknowledge the role of the criminals who used firearms to commit the violent crimes at issue. In their opening brief in this appeal ("Appellants' Brief"), moreover, they repetitively refer to a need for protection from "gun violence," as though "gun violence" is something that occurs without the involvement of human beings. What they mean to say (but apparently cannot bring themselves to say) is protection from "violent criminals." They fail to explain whether any criminal who used firearms

had acquired those firearms through legal or illegal means, and whether any of the firearms were lawfully possessed.

Appellants do not address policing strategies that the Philadelphia Police Department, the Pittsburgh Police Department, or any other police department has adopted to target gun crimes and prevent gun violence. Nor do they acknowledge or address any strategies within the criminal justice system of a particular locality which have been adopted and may contribute to criminal activity within that locality.

Appellants allege that, if it were given the choice, Philadelphia would enact three new ordinances, which would set limits on gun sales, require a permit to purchase a firearm (in addition to a background check), and allow for the removal of firearms from someone's possession based on an emergency petition (the "Proposed Regulations"). R.115a-130a (Petition ¶¶ 93-125). Although Appellants favor the Proposed Regulations, which would impose new restrictions on people who lawfully purchase and possess firearms, they do not identify any particular situation in which a lawfully acquired firearm found its way into criminal use. Nor do they explain how the Proposed Regulations would have stopped any of the crimes that they describe. As the Commonwealth Court observed,

> [T]he incidents of gun violence listed and described in the [Petition for Review] were all situations where a private actor committed a private act of violence. As such, the role the [Uniform Firearms Act] played in overall scenarios is entirely imaginative and speculative, because there are multiple, indeed countless, variables that account for—or

> contributed toward—the actual incidents of violence in the unique circumstances of each case[.]

Plurality 29-30.

In short, Appellants' case is based on pretending that there is a direct causal link between the Preemption Provisions and firearms crimes, as if there are no intervening events between the two things.

Similarly, while Appellants favor restrictions on the lawful purchase and ownership of guns, they do not show how the illegal firearms that flood the impacted communities would be seized. In the Petition and their opening brief, they do not give meaningful consideration to the "right of the citizens to bear arms in defense of themselves…[,]" guaranteed by Article I, Section 21 of the Pennsylvania Constitution and the Second Amendment to the U.S. Constitution.

Appellants also ignore that there are differing viewpoints on the efficacy of gun control measures[2] and that reasonable minds can disagree on how best to address this issue while balancing those efforts with a citizens' right to bear arms. Instead, Appellants treat arguments from Pennsylvania legislators and a former Governor,

---

[2] Indeed, according to the Petition, before the Preemption Provisions were enacted, Philadelphia adopted a permit-to-purchase ordinance. *See* R.94a (Petition ¶ 65(e)). And yet, even with that ordinance in place, multiple House members expressed that there were high levels of gun violence in Philadelphia. R.92a-96a (Petition ¶ 65).

who were advocating for local gun control, as facts that must be believed and followed. *See* R.90a-111a (Petition ¶¶ 61, 64-66, 69, 71-75, 77, 80-82, 84-86).

Meanwhile, in their Petition and opening brief, Appellants barely acknowledge the manner in which the Uniform Firearms Act addresses a wide variety of firearms-related issues. The Act governs firearms sale, purchase, registration, transfer, possession, carrying, licensing for concealed carry, licensing of dealers, loss, abandonment, and disposal. 18 Pa.C.S. §§ 6109, 6106, 6111, 6111.4, 6112, 6113, 6116, 6122, 6128. It regulates types of bullets. 18 Pa.C.S. § 6121. It prohibits individuals from carrying firearms in public during public emergencies and prohibits them from altering firearm serial numbers. 18 Pa.C.S. §§ 6107, 6117. It requires law enforcement officials to trace illegally possessed firearms. 18 Pa.C.S. § 6127. It prohibits certain persons from possessing firearms. 18 Pa.C.S. §§ 6105, 6110.1. It even prohibits the carrying of firearms "at any time" on Philadelphia's streets or public property without a license or an exemption from licensing, such as the one for law enforcement. 18 Pa.C.S. § 6108. While Section 6120 is part of the Uniform Firearms Act, the preemption component of the Act is only a small part of the system of firearms regulation.

SUMMARY OF ARGUMENT

This Court should uphold the Commonwealth Court's decision to dismiss Petitioners' claims.

While Appellants argue that *Ortiz* should be overruled and that Section 6120 does not preempt the Proposed Regulations, they failed to raise this argument in their Petition or otherwise make it in the proceeding below – and therefore waived it. This argument, in any event, is meritless because it ignores the language of Section 6120 and the well-settled caselaw in which the statute has been interpreted.

Appellants' claims all fail on the merits. Appellants' substantive due process challenge to the Preemption Provisions fails because it is based on the concept that they have a right to have the government protect them from the acts of third-party, private actors. There is no such right. The Preemption Provisions should therefore be evaluated under rational basis review, a test that they easily pass.

Appellants' state-created danger "claim" likewise fails. The state-created danger doctrine does not apply to generally applicable enactments, like the Preemption Provisions. And the Petition for Review is otherwise devoid of allegations that, if true, would satisfy *any* of the elements of the state-created danger theory, let alone all of them.

Finally, Philadelphia's "interference with delegation" claim is unsustainable. The claim is based on the city's unsupported assertion that the General Assembly

has provided it (and other municipalities) with the responsibility to address gun violence as a "public health" issue. In taking this position, Philadelphia ignores that the Preemption Provisions *preempt* local gun control measures. As a result, any delegation that the General Assembly has made to municipalities does not include any responsibility to enact gun control measures.

Even if the Court does not uphold the Commonwealth Court's dismissal of Appellants' claims on the merits, it should uphold the decision on other grounds, because the Petition is riddled with procedural and jurisdictional defects. In particular:

- the Individual Appellants and CeaseFire PA lack standing to challenge the Preemption Provisions because those provisions regulate only municipalities, not the conduct of individuals or non-profit organizations;
- Philadelphia lacks standing to challenge Section 2962(g) because that provision does not apply to it;
- under the doctrine of *res judicata*, Philadelphia is barred from challenging Section 6120 because the claims that it asserts in the Petition are claims that it asserted (or should have asserted) in prior cases in which final judgments were entered and which, relative to this

one, involved the same subject matter and the same parties (or their privies in interest) who were litigating in the same capacities;

- under the doctrine of ripeness, Appellants' challenges are barred because they are based on speculative contentions that, absent the Preemption Provision, Philadelphia "would" enact or "would have the ability" to enact the Proposed Regulations sometime in the future; and,
- Appellants' challenges are non-justiciable because they are an attempt to have the Court substitute its policy judgment for the General Assembly's policy judgment on the issue of firearm controls.

ARGUMENT

I. Appellants' Argument Regarding *Ortiz* and the Scope of Section 6120 Is Waived and Meritless.

In their opening brief, Appellants' initial argument is that the Commonwealth Court misconstrued this Court's decision in *Commonwealth v. Ortiz*, 681 A.2d 152 (Pa. 1996) ("*Ortiz*") and the pre-emptive scope of Section 6120. Appellants assert that Section 6120 is not a field preemption law that "preempts the entire field of local firearm regulation." Appellants' Brief at 25. Presumably, Appellants are asserting that Section 6120 *does not* preclude the implementation, administration, and enforcement of the Proposed Regulations and that *Ortiz* does not stand for a contrary proposition. But Appellants waived this argument by failing to make it in the proceeding below. Even if the argument was not waived, it lacks merit.

a. Appellants waived their argument.

Because they failed to assert it in the proceeding below, Appellants waived their argument that Section 6120 is not a field preemption statute that would apply to the Proposed Regulations.

In the context of a given appeal, a party has waived any issue that it failed to raise before the lower court. *See, e.g.*, *HIKO Energy, LLC v. Pa. Public Utility Comm'n*, 209 A.3d 246, 262 (Pa. 2019); *City of Pittsburgh v. Pennsylvania Dep't of Transp.*, 416 A.2d 461, 464 n. 7 (Pa. 1980). Here, in their opening brief, Appellants argue that, based on its language, Section 6120 does not preempt the field of local firearm regulation. Appellants' Brief at 24-27. This argument is nowhere to be found in the Petition and, in fact, Appellants otherwise failed to make it anywhere, and in any way, in the proceeding below. *See generally* R.46a-140a (Petition) & Petitioners' Commonwealth Court Brief. Accordingly, it is waived.

In fact, Appellants' new argument runs directly counter to their other arguments and claims in this case. In the Petition, they repeatedly acknowledge that the Preemption Provisions block Philadelphia from enacting and implementing the Proposed Regulations. *See, e.g.*, R.55a, 114a, 120a, 126a, 129a (Petition ¶¶ 6, 91, 101, 113, 123). They explain that, as a result, they are challenging the Preemption Provisions, in hopes of clearing the way for the Proposed Regulations. If the Preemption Provisions did not prohibit Philadelphia from enacting and

implementing the Proposed Regulations, then, according to Appellants' own reasoning, they would enact those ordinances into law and this lawsuit would be unnecessary.

Not only did Appellants fail to raise an argument regarding the construction and meaning of the text of Section 6120—they affirmatively argued before the Commonwealth Court that *they were not raising issues regarding statutory construction at all*. In the brief that they filed with the Commonwealth Court, Appellants stated:

> In *Clarke*, the ultimate issue was a statutory interpretation question, namely, whether certain Philadelphia ordinances fell outside the scope of Pennsylvania's firearms preemption laws, and whether changed circumstances justified reconsideration of the Court's holding in Ortiz. 957 A.2d at 363-64. *In contrast, the ultimate issues here* are whether Pennsylvania's firearms preemption laws violate the state-created danger doctrine and substantive due process guarantees under Article I, Section I of the Pennsylvania Constitution, and the Commonwealth's obligation to maintain order and to preserve the safety and welfare of all citizens.

Petitioners' Commonwealth Court Brief at 43 (emphasis added). As a statement in a brief, this statement "is treated as a judicial admission, which, although not evidence, has the effect of withdrawing a particular fact from issue." *Ciamaichelo v. Independence Blue Cross*, 928 A.2d 407, 413 (Pa. Cmwlth. 2007). *See also* Leonard Packel and Anne Bowen Poulin, Pennsylvania Evidence § 127 (2nd ed. 1999). Accordingly, Appellants' new argument is *directly contrary* to the allegations and arguments that they previously asserted in this case. It cannot be

said, therefore, that Appellants' new argument is simply an amplification of a theory that they asserted previously.

Because Appellants never raised their textual or field preemption arguments in the proceeding below, the Commonwealth Court's Plurality and Dissenting Opinions naturally do not include any discussion of these arguments, which constitute a completely new theory and one that, in the context of this appeal, is waived.

b. Appellants' argument regarding Section 6120's scope is meritless.[3]

Even if Appellants had not waived their argument regarding the scope of Section 6120, the argument is simply wrong. The text of Section 6120, and the decisions in which courts have interpreted it, show that it was intended to preempt local regulations of firearms. This type of field preemption is the clear intent behind Section 6120, which is part of the "*Uniform* Firearms Act."

Section 6120(a) provides: "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)

[3] If the Court determines that Appellants did not waive their argument regarding the scope of Section 6120, Appellee Senator Ward respectfully requests the opportunity to fully brief the issue. In the *Clarke* case, this issue was briefed at length.

(emphasis added). There is no reasonable argument that the Proposed Regulations, if enacted, would not regulate the "lawful ownership, possession, transfer, or transportation" of firearms.

Appellants are wrong that, in this case, the Commonwealth Court "misconstrued" *Ortiz*. First, in *Ortiz*, this Court was explicit in its determination and explained that, in passing Section 6120, "the General Assembly has denied all municipalities the power to regulate the ownership, possession, transfer or possession of firearms[.]" *Ortiz*, 681 A.2d at 155. The Court held that it was an "inescapable conclusion" that Philadelphia's attempt to regulate firearms was preempted. *Id.* In 2019, this Court reaffirmed the holding that it reached in *Ortiz*. *See Commonwealth v. Hicks*, 208 A.3d 916, 926 (Pa. 2019) (acknowledging that "the General Assembly[] reserve[ed] . . . the exclusive prerogative to regulate firearms in this Commonwealth" and citing *Ortiz*).

In a number of other decisions, the Commonwealth Court has expressed the same understanding of *Ortiz*. *See City of Philadelphia v. Armstrong*, 271 A.3d 555 (Pa. Cmwlth. 2022); *Firearm Owners Against Crime v. City of Pittsburgh*, 276 A.3d 878 (Pa. Cmwlth. 2022); *Firearm Owners Against Crime v. Lower Merion Township*, 151 A.3d 1172 (Pa. Cmwlth. 2016); *Dillon v. City of Erie*, 83. A.3d 467 (Pa. Cmwlth. 2014); *National Rifle Ass'n v. City of Philadelphia*, 977 A.2d 78 (Pa. Cmwlth. 2009), overruled on other grounds, *Firearm Owners Against Crime v.*

Harrisburg, 218 A.3d 497 (Pa. Cmwlth. 2019). In fact, even before *Ortiz*, the Commonwealth Court's precedent supported the interpretation of Section 6120 that this Court later adopted. *See Schneck v. City of Philadelphia*, 383 A.2d 227 (Pa. Cmwlth. 1978) ("[Section 6120] clearly preempts local governments from regulating the lawful ownership, possession and transportation of firearms.").

The Commonwealth Court's decision in *Clarke v. House of Representatives*, in particular, is on all fours with its decision in this case. 957 A.2d 361 (Pa. Cmwlth. 2008). As Appellants acknowledged in the proceeding below, unlike in this case, the arguments in *Clarke* centered on the language of Section 6120. In *Clarke*, the Commonwealth Court held that, in view of *Ortiz*, the Preemption Provisions preempted an earlier version of the Proposed Regulations. *Id.* at 365 (earlier version of Proposed Regulations was "clear[ly] preempt[ed]"). This Court affirmed the Commonwealth Court's decision in a *per curium* order. *See Clarke v. House of Representatives*, 980 A.2d 34 (Mem), 602 Pa. 222 (Pa. 2009).

In sum, no court that has addressed this issue has *ever* agreed with the new argument that Appellants have raised in this appeal. This Court's interpretation of Section 6120 in *Ortiz*, and the Commonwealth Court's decisions preceding and following *Ortiz*, are correct. Appellants point to no authority to the contrary and make only a scant, surface-level argument that Section 6120 does not preempt the

field of local regulation of firearm ownership, possession, transfer, and transportation.

Contrary to what Appellants say, moreover, there is no authority for the proposition that a court should re-interpret a statute (here, Section 6120) based on an alleged change in facts—in this case, the alleged "drastic increase in gun violence since *Ortiz*[.]" Appellants' Brief at 27. In fact, courts typically follow the *opposite rule*—holding that a judicial interpretation of a statute essentially becomes part of the statute and acknowledging that if the General Assembly disagrees with the interpretation, it can amend the statute accordingly. *See, e.g.*, *Commonwealth v. Shaffer*, 734 A.2d 840, 844 (Pa. 1999) ("[O]nce this Court interpreted the legislative language contained in the applicable act, our interpretation became a part of the legislation from the date of its enactment. The legislature's failure to clearly set forth its intent in the original act could only be remedied prospectively by the later amendment."); *see also Shambach v. Bickhart*, 845 A.2d 793, 807 (Pa. 2004) ("[S]tare decisis has 'special force' in matters of statutory, as opposed to constitutional, construction, because in the statutory arena the legislative body is free to correct any errant interpretation of its intentions[.]") (J. Saylor, Concurring); *Commonwealth v. Wanamaker*, 296 A.2d 618, 624 (Pa. 1972) ("It is well settled that the failure of the legislature, subsequent to a decision of this Court in construction of a statute, to change by legislative action the law as interpreted by this Court

creates a presumption that our interpretation was in accord with the legislative intendment.") (internal quotation omitted).

Here, the relevant portions of Section 6120 have not changed and there is no valid basis for suggesting that the Court should reinterpret the statute based on an alleged change in facts.

All told, this Court should find that Appellants' new argument about the meaning of Section 6120 is waived and meritless.

II. Appellants Fail to State a Viable Substantive Due Process Claim.

This Court should uphold the Commonwealth Court's dismissal of Appellants' substantive due process claim. Contrary to what Appellants argue, Article I, Section 1 of the Pennsylvania Constitution protects citizens from the ***State*** and not from each other and does not guarantee a minimal level of safety. Appellants are therefore wrong in claiming that the Preemption Provisions restrict a "fundamental right." Because there is no fundamental right at play, rational basis review applies. And the Preemption Provisions easily pass the rational basis test because statewide uniformity in the regulation of firearms is a legitimate governmental goal.

a. The Preemption Provisions do not inhibit a fundamental right.

Appellants misconstrue the nature and scope of their substantive due process rights. The Preemption Provisions do not inhibit a fundamental right and, as a result, are not subject to strict or heightened scrutiny.

This Court has explained that "the requirements of Article I, Section 1 of the Pennsylvania Constitution are not distinguishable from those of the [Due Process Clause of the] 14th Amendment…[therefore] we may apply the same analysis to both claims." *Pa. Game Comm'n v. Marich*, 666 A.2d 253, 255 n.6 (Pa. 1995); *see also Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 600 (Pa. 2013) ("The state and federal due process provisions, *see* PA. CONST. art. I, §§ 1, 9; U.S. CONST. amend. XIV, are 'substantially equivalent' in their protective scope.") (citing *Krenzelak v. Krenzelak*, 469 A.2d 987, 991 (Pa. 1983)).

Appellants' substantive due process claim rests on the incorrect belief that Article I, Section 1 confers on individuals a general right to receive whatever protection from the government that, in their view, they need. Appellants claim to need more firearm control measures, which, they maintain, will protect them from gun violence that criminals commit. Indeed, they say that they are challenging Appellees' "refusal to protect them[.]" Appellants' Brief at 3; *see also id.* at 15 (claiming a "right to seek relief in court for Respondents' egregious refusals to protect them"). But courts have always rejected this type of reasoning—holding

that, under substantive due process principles, individuals do ***not*** have a right to have the government protect them from the actions of private, third party actors.

For instance, in *Johnston v. Township of Plumcreek*, township residents challenged a local ordinance that required them to connect to a township water supply. They argued that connecting to the water supply increased the risk that they would suffer the effects of a terrorist attack on the water system. 859 A.2d 7, 9 (Pa. Cwmlth. 2004). Like Appellants in this case, they claimed that the challenged ordinance abridged their right to life under Article I, Section 1 of the Pennsylvania Constitution. *Id.* The Commonwealth Court rejected the residents' argument, noting that the due process clause "does not guarantee minimal safety for citizens but, rather, protects citizens from overreaching by the state." *Id.* at 13.

Similarly, in *Robbins v. Cumberland County Children and Youth Services*, a child and his adoptive parents sued the local children and youth services agency for failing to protect him from a string of abuses that his biological mother had committed. 802 A.2d 1239, 1242-44 (Pa. Cmwlth. 2002). They based their suit on an alleged violation of substantive due process principles. The Commonwealth Court rejected these claims, noting that "the State has no constitutional obligation to protect individuals from harm inflicted by private actors." *Id.* at 1245; *see also id.* at 1252 (relating to Plaintiffs' claims under Article I, Section 1 of the Pennsylvania Constitution).

In both cases, the Commonwealth Court relied on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), which is the seminal decision in this area. There, the U.S. Supreme Court explained that the Due Process Clause protects people from governmental incursions but does not require the state to protect people from harm that they may experience at the hands of private actors:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression. Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Id. at 195-96 (internal quotation and citations omitted).

In this case, the Commonwealth Court's decision is directly in line with this U.S. Supreme Court precedent and its prior decisions in which it applied that precedent. As the Commonwealth Court concluded in this case, "Petitioners do not possess a general constitutional right to have the government protect them from private acts of violence." Plurality 36; *see also id.* at 18 ("it is generally settled that

there is no constitutional duty on the part of the state to protect members of the public at large from crime") (citing *Martinez v. California*, 444 U.S. 277, 284-85 (1980)).

Perhaps appreciating this point, Appellants attempt to use their opening brief to reframe their claim, stating repetitively that, under Article I, Section I, they have a right to "protect themselves from gun violence by means of local regulations[.]" Appellants' Brief at 16-17; *see also id.* at 28-29 ("Article I, Section 1 includes the right to protect *themselves* from gun violence by means of local regulation") (emphasis in original); *id.* at 31 (same). But Appellants are just engaging in a game of semantics. What they are really saying (semantics aside) is that the Preemption Provisions stop local governments from acting (through "local regulations") to protect citizens from acts of gun violence that are committed by private actors. As explained above, however, the concept of substantive due process "does ***not*** guarantee minimal safety for citizens but, rather, protects citizens from overreaching by the state." *Johnston*, 859 A.2d at 13 (emphasis added); *see also DeShaney*, 489 U.S. at 195 (Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security"). Appellants therefore fail to state a cognizable substantive due process claim.

Appellants are unable to point to any precedent from this Court, or any other court, that supports their substantive due process argument. *See* Appellants Brief at 28-33. Rather, they cite the Commonwealth Court's decision in *Robinson Twp. v.*

Commonwealth, 52 A.3d 463, 482 (Pa. Cmwlth. 2012) ("*Robinson Twp. I*") and Justice Baer's concurrence to this Court's plurality decision in that case. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) ("*Robinson Twp. II*"). But Appellants' attempt to rely on these non-binding decisions falls flat.

In both the majority's decision *Robinson Twp. I* and Justice Baer's concurrence in *Robinson Twp. II*, the substantive due process analysis started with the recognition of a constitutional right that indisputably existed under both the Pennsylvania Constitution and the U.S. Constitution–the right to use and enjoy private property. *See Robinson Twp. I*, 52 A.3d at 482 (discussing the "substantive due process inquiry" that takes place when reviewing zoning ordinances, an inquiry that balances a landowners' right to use its property against the public interest that the applicable exercise of the zoning power seeks to protect). As Justice Baer summarized in his concurrence, *Robinson Township* involved property rights that are well-recognized:

> Pursuant to Article I, Section 1 of the Pennsylvania Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, no person may be deprived of his private property without due process of law. In the early years of the Union, this constitutional guarantee translated into the general notion that a landowner had the right to do as he saw fit with his property. As modern American jurisprudence developed, however that constitutional guarantee developed an important limitation: *sic utere tuo ut alienum non laedas*—so use your own property as not to injure your neighbor's.

Robinson Twp. II, 83 A.3d at 728-29 (Baer, J., Concurring). Both the Commonwealth and the dissenting Justices likewise acknowledged the existence of these property rights, although, unlike the plurality and Justice Baer, they believed that the statute at issue (Act 13) did not unjustifiably infringe on them. *Id.* at 727-28 (summarizing the Commonwealth's position); *id.* at 745 (recognizing the substantive due process rights of landowners) (Saylor, J. Dissenting). The substantive due process issue in *Robinson Twp. I* and *Robinson Twp. II* was therefore ***not*** whether a landowner had an "acknowledged substantive due process right" in the first-place. *Id.* at 728 (Baer, J., Concurring). Rather, the issue was whether Act 13 unjustifiably infringed on the landowners' well-settled substantive due process right to the quiet use and enjoyment of their property. *See id.* at 728-730 (describing scope of dispute).

Here, by contrast, the question is ***not*** whether a particular statute infringes on a fundamental right, but instead whether there is a fundamental right ***at all***. *Robinson Twp. I* and Justice Baer's concurrence in *Robinson Twp. II*, which dealt with an established fundamental right, did not address this question.

The Commonwealth Court accurately summarized the alleged "fundamental right" that underpins Appellants' substantive due process claim: "Petitioners assert a fundamental right to 'defend life and property,' but they couch this purported right as a right to be free from gun violence and a right to have Petitioner City and other

municipalities enact local gun control ordinances." Plurality 36. As explained above, the controlling precedent on this issue is clear—there simply is ***no*** substantive due process right to governmental protection from private acts of violence. Appellants provide no viable basis for straying from this established precedent. Their claim, therefore, is not based on the deprivation of a fundamental right.

b. The Preemption Provisions satisfy rational basis review.

For the reasons noted above, Appellants' substantive due process challenge should be evaluated under rational basis review. The Preemption Provisions, which promote statewide uniformity in the regulation of firearms, readily satisfy this standard.

"When 'general economic and social welfare legislation' is alleged to violate substantive due process, it should be struck down only when it fails to meet a minimum rationality standard, an 'extremely difficult' standard for a plaintiff to meet." *Johnston*, 859 A.2d at 12 (emphasis in original) (quoting *Stern v. Halligan*, 158 F.3d 729, 731 (3d Cir. 1998)). The test, typically referred to as the rational basis test, is "whether the law at issue bears any rational relationship to any interest that the state legitimately may promote[.]" *Id.* (quotation marks omitted). Statutes, moreover, enjoy a strong presumption of constitutionality. *Stilp v. Commonwealth*, 905 A.2d 918, 938 (Pa. 2006).

The Preemption Provisions plainly meet this minimum rationality standard. This Court has already concluded, in *Ortiz*, that the Preemption Provisions serve the legitimate state interest of regulating firearms *uniformly* on a *statewide* basis, rather than enabling municipalities to create a patchwork of regulations in this arena, undermining uniformity and creating the risk that the constitutional right to bear arms would be subject to more restrictions in some parts of the Commonwealth than others.

In fact, in enacting the Uniform Firearms Act, including Section 6120, the General Assembly effectuated a comprehensive and uniform statewide system of firearm regulation. The Uniform Firearms Act addresses not only preemption, but also a variety of other activities that involve firearms, including their sale, purchase, registration, transfer, possession, loss, and disposal. 18 Pa.C.S. §§ 6109, 6106, 6111, 6111.4, 6112, 6113, 6116, 6122, 6128.

Although Appellants have pled a facial challenge to the Preemption Provisions, *see, e.g.*, R. 133a, 135a (Petition ¶¶ 138, 144), their argument on this point is framed as though they are pursuing an "as-applied" challenge. *See Nigro v. City of Philadelphia*, 174 A.3d 693, 699-700 (Pa. Cmwlth. 2017) (noting that "an as-applied attack…does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right"). In particular, Appellants argue that the Preemption

Provisions are invalid as applied to the Proposed Regulations. *See* Appellants' Brief 37-39 (discussing whether "preempting the Proposed Regulations" achieves a valid legislative objective). Petitioners' failure to address the scrutiny issue from a facial perspective is telling: uniformity in the law is clearly a legitimate governmental interest. As the Commonwealth Court correctly observed, "a legislative body's expressed public need for uniformity in an area of legislation, and its decision to invoke and employ the doctrine of preemption to accomplish such uniformity, is one that directly furthers a legitimate governmental interest." *See* Plurality at 30-31 (collecting decisions recognizing uniformity as a legitimate governmental interest).

But, even if Appellants were pursuing an as-applied challenge, the Preemption Provisions would still satisfy the rational basis test. The Proposed Regulations would regulate the purchase of firearms and allow for the removal of firearms from someone's possession based on the allegation of a threat. The General Assembly, however, made the decision to regulate the ownership and possession of firearms at a statewide level so that Pennsylvania citizens who legally purchase and own firearms are treated the same regardless of where they are located within the Commonwealth. The General Assembly ensured, in other words, that there are not more (or fewer) restrictions on the constitutional right to keep and bear arms, depending on where someone is located in Pennsylvania.

As the Commonwealth Court explained, it is eminently reasonable to have a single, uniform system of firearms regulations in Pennsylvania. The constitutional right to keep and bear arms is afforded to all Pennsylvania citizens equally, and it is therefore sensible to have a single and uniform system of regulation that bears upon that right. *See* Plurality 37-39. As the *Ortiz* Court explained in upholding Section 6120, Article I, Section 21 of the Pennsylvania Constitution "does not provide that the right to bear arms shall not be questioned in any part of the commonwealth except Philadelphia and Pittsburgh, where it may be abridged at will, but that it shall not be questioned in any part of the commonwealth." 681 A.2d at 156.

Appellants admit that, if their suit is successful, a multitude of municipalities across Pennsylvania will likely enact their own local firearms control measures. *See* R.114a (Petition ¶ 91, n.93) (identifying pledge from 120 Pennsylvania mayors who are advocating for firearm controls at the local level). That sort of patchwork quilt of firearm regulations is exactly what the General Assembly sought to avoid by preempting local regulations of firearms. Pennsylvania has over 2,500 local units[4] of general government; the General Assembly reasonably does not want it to have 2,500 different rules for gun ownership and gun possession.

[4] Pennsylvania Department of General Services, Pennsylvania Manual Vol. 125, § 6-3 (2021) ("As of 2020, there were 67 counties, 56 cities, 955 boroughs, 2 incorporated town, [and] 1,547 townships . . . .").

In sum, the Commonwealth Court was correct in its analysis of Appellants' substantive due process claim. Citizens do not have a substantive due process right to have the government protect them from private, third-party actors. Rational basis review applies. And the Preemption Provisions satisfy this level of review.

III. Appellants' State-Created Danger "Claim" is Deficient.

Appellants' state-created danger "claim" suffers from multiple deficiencies. In sum, there is no such thing as a state-created danger claim; the state-created danger exception cannot be used to invalidate legislation; and, based on the allegations in their Petition, Appellants otherwise fail to meet any of the elements of the state-created danger exception. The Court should therefore uphold the Commonwealth Court's dismissal of this "claim."

a. There is no state-created danger claim.

The state-created danger "claim" that Appellants assert is not a separate cause of action, but rather an exception to the general rule (discussed above) that, under substantive due process principles, a state cannot be held liable for injuries that a private third-party actor causes. *See, e.g., Johnston*, 859 A.2d at 12-13, 14; *Kneipp v. Tedder*, 95 F.3d 1199, 1204-06 (3d Cir. 1996). Accordingly, while Appellants plead their substantive due process and state-created danger claims as if they are separate from one another, in truth they are the same claim, just cast in different

ways. For this reason alone, this Court should uphold the dismissal of Appellants' state-created danger "claim."

b. The state-created danger exception does not apply to legislation.

The state-created danger exception does not, and cannot, apply to legislation. As the Commonwealth Court has explained, "the 'state-created danger' body of jurisprudence has never been used to nullify a statute or ordinance." *Johnston,* 859 A.2d at 13. Likewise, in this case, the Commonwealth Court acknowledged that it was unaware of any court that has ever applied the state-created danger exception to a statute. *See* Plurality at 18 ("Notably, in their brief, Petitioners have failed to cite a case in a jurisdiction within the United States that refutes the proposition of law and holding enunciated in our decision in *Johnston*. Based upon our own independent research, we have been unable to unearth such a case.").

In their opening brief, Appellants tacitly acknowledge that the state-created danger exception has never been applied to a statute before. Appellants' Brief at 42 (arguing that "the fact that the state-created-danger doctrine *had not* been previously applied to a statute does not mean that it *cannot be*.") (emphasis in original). They point to no valid reason why their proposed application of the theory should be used here. Applying the state-created danger exception to legislation would expand this limited exception to give it broad applicability and transform it into a vehicle for

waging collateral attacks on laws with which litigants do not agree—exactly what Appellants seek to do in this case.

If Appellants' conception of the state-created danger exception was accepted, the bounds of the exception would expand exponentially. Appellants propose no limiting principle to their position and so, presumably, the exception could be applied to any statute, regulation, ordinance, zoning rule, school board policy, or other legislative enactment. Under Appellants' theory, litigants would be permitted to challenge any given legislative enactment, as long as they pleaded that the enactment created an increased risk of danger for a particular group of people. Litigants would begin challenging the environmental, transportation, educational, and public health enactments that they do not like, and courts would be faced with wading into policy disputes across the board.

There is no need to venture down that rabbit hole. Courts have already held, on numerous occasions, that Appellants' conception of the state-created danger exception is far too expansive. As the Third Circuit explained, for example, "[w]hen the alleged unlawful act is a policy directed at the public at large . . . the rationale behind the rule disappears – there can be no specific knowledge by the defendant of the particular plaintiff's condition, and there is no relationship between the defendant and the plaintiff." *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995); *see also Gray v. Univ. of Colorado Hosp. Auth.*, 672 F.3d 909 (10th Cir. 2012) ("a

State's adoption of generally-applicable policies and customs does not foist upon anyone an immediate threat of harm having a limited range and duration. The act of establishing such policies and customs itself does not put any particular individual at substantial risk of serious, immediate, and proximate harm.") (internal citations and quotations omitted). The state-created danger exception only makes sense as a *limited exception*, because the U.S. Constitution is a "charter of negative liberties; it tells the state to let people alone[.]" *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (Posner). The Constitution "does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *Id.* The Pennsylvania Constitution is no different.

The state-created danger exception therefore only applies in limited circumstances, specifically, when the government takes a specific action that exposes an individual or limited group of people to a particular danger. While Appellants may believe that the Commonwealth Court's position on the state-created danger exception "makes little sense," *see* Appellants' Brief at 44, the truth is that the court's position is rooted in well-settled, well-reasoned case law and that, by contrast, no court has ever adopted their position.

c. Appellants fail to meet any of the elements of the state-created danger exception.

Even if the state-created danger exception applied to legislation, Appellants, based on the allegations in their Petition, fail to satisfy any of the elements of the exception.

Under the state-created danger doctrine, the state may be held liable if one of its actions facilitated a third party's commission of harm to an individual plaintiff and:

> (1) the harm ultimately caused was foreseeable and fairly direct;
> (2) the State actor acted in willful disregard for the safety of the plaintiff;
> (3) there existed some relationship between the State and the plaintiff; and
> (4) the State actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Arocho v. County of Lehigh, 922 A.2d 1010, 1023 n.18 (Pa. Cmwlth. 2007) (emphasis and brackets removed); *see also R.W. v. Manzek*, 888 A.2d 740, 743-44 (Pa. 2005) (same).

A quintessential state-created danger case is *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). In that case, a police officer arrested the driver of a car, impounded the car, and left the driver's female passenger alone in a high-crime area at 2:30 a.m. The woman began walking to her home, which was five miles away, but she was picked up by an unknown man, who raped her. *Id.* at 586. She sued the officer. The

Ninth Circuit determined that the plaintiff "raised a genuine issue of fact tending to show that [the officer] acted with deliberate indifference to [the plaintiff's] interest in personal security." *Id.* at 588. The *Wood* case is often cited as a leading example of how the state-created danger doctrine is meant to work. *See, e.g.*, *Manzek*, 888 A.2d at 745 (2005) (citing *Wood v. Ostrander*); *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995) (same); *Robbins*, 802 A.2d at 1247 (same). The reasoning is easily understandable: in taking his affirmative actions, the officer ignored the obvious danger that he was creating for the plaintiff and she suffered an injury that a third-party caused as a foreseeable result.

Appellants' case stands in stark contrast to the example in *Wood*. Contrary to the officer's particularized and targeted actions in *Wood*, Appellants challenge generally applicable statutes that have been in place for over twenty years. Even taking their conclusory allegations as true, there is an extremely tenuous connection, if any, between the Preemption Provisions and the alleged harm. Nor can Appellants show that the Preemption Provisions were enacted with a willful disregard of a known and particularized safety risk or in a way that targets a particular individual or discrete group. *See Mark*, 51 F.3d at 1153 ("The cases where the state-created danger theory was applied were based on discrete, grossly reckless acts committed by the state or state actors using their peculiar positions as state actors, leaving a

discrete plaintiff vulnerable to foreseeable injury."). The Court should therefore uphold the Commonwealth Court's dismissal of this "claim."

i. The alleged harm is not foreseeable and fairly direct

Under the state-created danger theory, the alleged harm must be foreseeable and fairly direct.

Appellants contend that, here, the alleged harm was "foreseeable" because members of the General Assembly were told that the Preemption Provisions would "increase gun deaths and injuries" in certain city neighborhoods, and the harm was "fairly direct" because "[b]ut for the [Preemption Provisions], Philadelphia would enact local gun laws that are known to reduce gun violence." Appellants' Brief at 47. Even if these contentions were true, they are unavailing to Appellants. As the Commonwealth Court correctly observed in *Johnston*, a state may "not be held liable for a risk that affects the public at large." 859 A.2d at 13. While Appellants point to gun violence that has occurred in neighborhoods in Philadelphia, Pittsburgh, and other municipalities, that type of harm is one that anyone who is present in the neighborhoods (or elsewhere) could sustain. Even assuming that Appellants sustained legally cognizable harm (which, as explained below in Argument Section V(a)-(b), they have not adequately alleged), there is nothing to suggest that the General Assembly could reasonably foresee that enacting the Preemption Provisions

would harm them specifically. "The state has to be aware that its actions *specifically* endanger an individual in order to be held liable." *Id*. (emphasis in original).

And, in any event, the alleged impact that the Preemption Provisions have on firearm violence is tangential to the extreme. It rests on a serpentine daisy-chain of events that moves between enactments that the General Assembly put in place twenty years ago to modern-day firearm violence. Rather than face this reality, Appellants simply choose to ignore every gap in the links of the alleged causal chain. *See* Appellants' Brief 46-52. They ignore the role that the police play in enforcing firearms laws, the policing decisions that members of law enforcement make, and the decisions that are made within the criminal justice system that may contribute to criminal activity within a locality. Appellants ignore that their claim is premised on an assumption that, in the absence of the Preemption Provisions, Philadelphia would, in fact, enact their favored ordinances regarding firearms. Their claim also rests on the assumption that the ordinances would have the impact that they predict. Most strikingly, Appellants completely ignore the actions of the criminals who use firearms to harm people. As the Commonwealth Court explained, "the role that the [Preemption Provisions] played in overall scenarios [of gun violence] is entirely imaginative and speculative, because there are multiple, indeed countless, variables that account for – or contributed toward – the actual incidents of violence in the

unique circumstances of each case, including the identity and background of the perpetrator and things such as motive or intent." Plurality at 29-30.

Appellants do not, and cannot, claim that any particular act of firearms-related violence would not have occurred but-for the Preemption Provisions. *Id*. Instead, they point only to increased gun deaths overall, and baldly suggest that the Preemption Provisions caused the increase. *See, e.g.*, Appellants' Brief at 47 (referring generally to the increase in overall number of gun deaths in Philadelphia). But, as the Commonwealth Court correctly concluded, that type of alleged general harm is *exactly* the type that courts have found to be *insufficient* under the state-created danger theory. *See* Plurality at 32; *see also Johnston,* 859 A.2d at 13 (the theory does not apply to "a risk that affects the public at large").

ii. No willful disregard

Appellants are mistaken in contending that the Preemption Provisions reflect a willful disregard for a known and particularized safety risk.

A state acts with "willful disregard" for a plaintiff's safety if it acts with "deliberate indifference" to the plaintiff's safety. *Arocho*, 922 A.2d at 1023 n.18 (quoting *Kneipp*, 95 F.3d at 1208 n.21).

Appellants argue that the General Assembly has acted with willful disregard by "repeatedly disregard[ing] dire warnings from fellow legislators" about adverse outcomes that would allegedly "result from the [Preemption Provisions]."

Appellants' Brief 52. But again, Appellants do not (and cannot) allege that, when it enacted the Preemption Provisions, the General Assembly was aware that its decision would cause harm to them specifically and yet disregarded that point. "The state has to be aware that its actions *specifically* endanger an individual in order to be held liable" and it cannot be held liable for a risk that "is general and not specific to an individual." *Johnston*, 859 A.2d at 13 (emphasis in original).

In truth, on this element of the state-created danger test, Appellants are not advancing a legal argument, but rather a blatant attempt to shift a policy debate from the General Assembly to this Court. The General Assembly is under no obligation to conform to the beliefs of the legislators who Appellants favor—our Constitution provides only that, for a bill to become a law, a majority of the members who are elected to the House and Senate must vote in favor of it. *See* Pa. Const. Art. III, § 4.

While Appellants allege that "Respondents acted with a degree of culpability that shocks the conscience and with deliberate indifference and/or recklessness[,]" R.132a (Petition ¶ 134), they do not allege facts that, if true, would show *how* the General Assembly acted in this manner. On this topic, their allegations and argument are wholly conclusory and argumentative and therefore should not be accepted as true for purposes of preliminary objections. *See, e.g.*, *Christ the King Manor v. Commonwealth*, 911 A.2d 624, 633 (Pa. Cmwlth. 2006) ("unwarranted inferences, conclusions of law, argumentative allegations or expressions of opinion

need not be accepted"). Most importantly, and it cannot be stressed enough, Appellants do not (and cannot) allege that, when it enacted the Preemption Provisions, the General Assembly was aware that its decision would cause harm to Appellants specifically and yet disregarded that point.

iii. Appellants are not members of a discrete class that was subjected to potential harm

For purposes of the state-created danger test, there is no relationship between the State and Appellants. And Appellants are not members of a discrete class of persons who the State's actions subjected to potential harm.

As the Third Circuit explained in *Bright v. Westmoreland County*, the third element of the state created danger test is:

> a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general[.]

719 F.3d 160, 177 (3d Cir. 2013) (internal quotation marks and citations omitted). Here, there is nothing in law or logic to suggest that, in deciding to enact the Preemption Provisions, the General Assembly could reasonably foresee that its decision would cause harm that was unique to Appellants. For that matter, it was not reasonably foreseeable that the decision would cause harm to *anyone*.

Appellants do not claim that the General Assembly could have foreseen that they, in particular, would suffer harm. They contend, instead, that they are members

of a discrete class of persons who were subjected to potential harm. *See* Appellants' Brief 48. But instead of identifying with any specificity a discrete group of individuals who were subjected to potential harm, Appellants refer to a variety of potential groups that are defined largely by their physical location—groups into which some or all of them, or their relatives, or others, might fit. *See id.* at 48 ("communities that bear a hugely disproportionate share of the scourge of gun violence"); *id.* ("Philadelphia and Pittsburgh's poorest, predominantly Black neighborhoods"); *id.* at 50 ("Petitioners … and their specific communities"); *id.* at 51 ("deeply impoverished and/or heavily Black or Hispanic urban neighborhoods"); *id.* ("residents of these high-gun-violence neighborhoods").

Reviewing the array of sub-groups that Appellants identify in their opening brief reveals that, in this instance, the alleged danger is not directed at any particular and discrete class, but rather the public in general. For instance, people who are physically located in "deeply impoverished and/or heavily Black or Hispanic urban neighborhoods," *see* Appellants' Brief at 51, are not a "limited" or "discrete" group of potential plaintiffs, but rather a generalized, open-ended collection of individuals. *See, e.g., Kennerly v. Montgomery County Bd. of Commissioners*, 257 F.Supp.2d 1037, 1044 (S.D. Ohio 2003) (plaintiff does not identify "discrete" group of individuals "merely by naming a more particular sub-class of the public as the group to which the government owed a duty, such as one's 'neighbors.'"). This allegedly

"discrete group" is virtually unlimited, as it would encompass not just residents of the neighborhoods in question, but *any person who travels into or through those neighborhoods*. As the Commonwealth Court correctly noted, "regardless of the racial and/or ethnic background of each of the [Appellants], all of the [Appellants] are still members of the public, and the [Preemption Provisions do] not single them out specially for disparate treatment." Plurality at 32.

Courts have concluded that the following classifications of people ***did not*** constitute "limited" or "discrete" groups of potential plaintiffs: (i) "residents in close proximity of the Armstrong County jail," *see Long v. Armstrong County*, 189 F.Supp.3d 502 (W.D. Pa. 2016), (ii) people who rode on the Southeastern Pennsylvania Transit Authority (SEPTA) trains, *see Crockett v. Southeastern Pa. Transp. Ass'n*, 2013 WL 2983117 (E.D. Pa. June 14, 2013), (iii) police officers who were acting in the line of duty, *see Lipscomb v. Pa. Bd. of Probation & Parole*, 2013 WL 706046 (E.D. Pa. Feb. 27, 2013), and (iv) the "travelers within the vicinity of Methacton High School" after a school-sponsored prom party had ended, *see Watson v. Methacton Sch. Dist.*, 513 F.Supp.2d 360 (E.D. Pa. 2007).

If anything, the "discrete" groups of potential plaintiffs that Appellants identify are significantly broader and more nebulous than various other groups of people that, in prior cases, courts have refused to recognize as "limited" or "discrete" groups of potential plaintiffs. Accordingly, the Court should uphold the

Commonwealth Court's decision and find that the plaintiffs are not members of a discrete class of persons who the state's actions subjected to potential harm.

iv. The States' actions did not render a citizen more vulnerable to danger than if it had not acted at all.

The final element of the state-created danger test is that "State actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur." *Manzek*, 888 A.2d at 44. In addressing this element, Appellants simply argue that the General Assembly undertook an affirmative act by passing a law. *See* Appellants' Brief at 54-55. That argument ignores the applicable standard.

Appellants do not make ***any*** allegations that, if true, would suffice to show that, if the General Assembly had not enacted the Preemption Provisions, the harms that they allege would not have occurred. As explained above, for example, Appellants' state-created danger "claim" is premised on an assumption that, in the absence of the Preemption Provisions, Philadelphia would have enacted their favored ordinances regarding firearms. Their claim also rests on the assumption that the ordinances would have the impact that they predict. They also fully ignore the actions of the criminals who use firearms to harm people. Against this backdrop, it would be pure speculation to say what would have happened if the General Assembly had not enacted the Preemption Provisions.

Simply put, Appellants have not shown that the State's actions rendered a citizen more vulnerable to danger than if it had not acted at all.

IV. The Preemption Provisions Do Not Interfere With Any Statutory Delegation of Duties.

The Court should uphold the Commonwealth Court's dismissal of Philadelphia's claim that the Preemption Provisions improperly interfere with its statutorily-derived duties. Philadelphia claims that, under the Local Health Administration Law and the Disease Prevention and Control Law, it has duties to protect and promote public health and remove conditions that negatively impact public health and that the Preemption Provisions interfere with those duties. This argument is misguided.

Appellants' argument that firearm violence is a "public health" issue and therefore covered by the Local Health Administration Law and the Disease Prevention and Control Act lacks textual support based on the "plain language of the pertinent statutes[.]" Plurality 39. The Local Health Administration Law addresses the organization of local health services. *See* 16 P.S. § 12000, *et seq*. The Disease Prevention and Control Act covers the prevention of communicable diseases. *See* 35 P.S. 521, *et seq*. Neither act contains any reference to firearms. 16 P.S. § 12000, *et seq.*; 35 P.S. 521, *et seq*. Petitioners' argument that these statutes were meant to address firearm controls ignores common sense, attempting to shoehorn firearm

control measures into laws regarding disease prevention and the administration of health facilities.

But, regardless of how "public health" is defined, the simple response to Appellants' claim is that the Preemption Provisions expressly *preempt* local gun control measures. *See* 18 Pa.C.S. § 6120(a); 53 Pa.C.S. § 2962(g). In other words, even if a municipality may "exercise any power or perform any function not denied by [the] Constitution, by its home rule charter or by the General Assembly at any time," *see* Pa. Const. Art. IX, § 2, "home rule municipalities do not enjoy a general power to legislate in a way that contradicts a state statute." *Holt's Cigar Co., Inc. v. City of Philadelphia*, 952 A.2d 1199, 1203 (Pa. Cmwlth. 2008), *aff'd in part, rev'd in part*, 10 A.3d 902 (Pa. 2011). Indeed, "it is obvious that where a statute specifically declares it has planted the flag of preemption in a field, all ordinances on the subject die away as if they did not exist." *Dep't of Licenses and Inspections v. Weber*, 147 A.2d 326, 327 (Pa. 1959).

In this case, the General Assembly, through the Preemption Provisions, has *expressly preempted* local gun control measures and municipalities therefore lack the power to regulate in that arena. Of course, municipalities have power to enforce the criminal provisions of the Uniform Firearms Act. Their police may make arrests for violations. They may prosecute violations of the law. Municipalities,

accordingly, have not been disabled from law enforcement, but only from legislative action, in this field.

Philadelphia contends that the Local Health Administration Law and Disease Prevention and Control Law delegate to municipalities the responsibility to "protect[] and promot[e] the health of the people," and to "prevent or remove conditions which constitute a menace to public health[.]" Appellants' Brief at 56 (quoting 16 P.S. § 12002(a), § 12010(c)). Section 6120, on the other hand, specifically and expressly prohibits municipalities from enacting gun control measures. *See* 18 Pa.C.S. § 6120(a). Because this prohibition is more specific than the generalized delegations, it is controlling here and the more general delegations must give way to it—meaning that the delegated authority does not include the responsibility (or authority) to enact gun control measures to address gun violence. *See* 1 Pa.C.S. § 1933 (when there is irreconcilable conflict between a specific statutory provision and a general one, "the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail"). As the Commonwealth Court noted, this Court concluded in *Ortiz* that "notwithstanding any authority that the General Assembly has bestowed upon the cities to pass legislation, Section 6120(a)

preempted the area of firearm regulation and barred the cities from enacting local firearm laws." Plurality at 41.

The result is that Philadelphia's "responsibility to address gun violence," if any, does *not* include the responsibility (or authority) to enact gun control measures to address gun violence. By definition, therefore, the Preemption Provisions do not "interfere" with any statutory delegation of responsibility to Philadelphia. As a result, Appellants fail to state an "interference with delegation" claim upon which relief may be granted. The Commonwealth Court's dismissal of this claim should be upheld.

V. This Court Should Uphold the Commonwealth Court's Decision on Alternative Grounds.

Although the Commonwealth Court Plurality addressed the merits of Appellants' claims, this Court should uphold the decision even if it disagrees with the Plurality on the merits. *Fitzpatrick v. Natter*, 961 A.2d 1229, 1244 n.17 (Pa. 2008) (Supreme Court may uphold a lower court's decision on alternative grounds). This Court should uphold the dismissal of Appellants' claims because: Individual Appellants and CeaseFire PA lack standing to prosecute the claims; Philadelphia lacks standing to challenge Section 2962(g); *res judicata* bars Philadelphia's challenge to Section 6120; and, the claims are not ripe or justiciable. In sum, the Petition is riddled with incurable defects.

a. Individual Appellants and CeaseFire PA lack standing.

The Individual Appellants and CeaseFire PA do not allege that they sustained any legally cognizable injury as a consequence of the Preemption Provisions, let alone an injury that is actual and non-generalized. As a result, they lack standing to prosecute challenges to these Provisions.

A party has standing to challenge a governmental action when the party's interest in the matter about which it complains is substantial, direct, and immediate. *Wm. Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975). For a party's interest to be substantial "there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *Id.* at 282. The party's interest is "direct" if there is "causation of the harm to his interest by the matter of which he complains." *Id*. And, the party's interest in the matter is "immediate" if there is a "sufficiently close causal connection between the challenged action and the asserted injury." *Id.* at 286.

The Preemption Provisions regulate municipalities by preempting local gun control measures. *See* 18 Pa.C.S. § 6120; 53 Pa.C.S. § 2962(g). The Preemption Provisions do not regulate the conduct of private actors. *Id.* Because the Provisions do not regulate the conduct of Individual Appellants and CeaseFire PA, which are private actors, these parties are not "injured" by the Provisions. Therefore, they lack standing to challenge them. *See also Pittsburgh Palisades Park, LLC v.*

Commonwealth, 888 A.2d 655, 662 (Pa. 2005) (private actors lacked standing to challenge statute that allegedly impacted legislators, not private actors).

Attempting to sidestep this point, Appellants allege that Individual Appellants have each suffered from an incident of gun violence and are members of a demographic group, or sub-group, that faces a higher risk of gun violence than the typical citizen. R.56a-69a (Petition ¶¶ 9-18). The Petition contains allegations of continued grief over the loss of loved ones and fears of future violence.

In the standing context, however, being concerned about gun violence, and even actual harm from it, is not the same as being injured by the *Preemption Provisions* (as opposed to gun violence itself). The Preemption Provisions and the criminals who perpetrate gun violence are not one and the same. The Preemption Provisions do not direct or otherwise cause gun violence. Moreover, being concerned about gun violence that might occur in the future constitutes a speculative and prospective injury, which is not legally cognizable for standing purposes. *Strasburg Assocs. v. Newlin Twp.*, 415 A.2d 1014, 1017 (Pa. Cmwlth. 1980). (finding "no reasonable grounds for standing where interests or injuries are hypothetical in nature").

Appellants separately allege that the Preemption Provisions harm CeaseFire PA by frustrating its mission as an organization and forcing it to divert resources to address the consequences of the Provisions. *See* R.81a-83a (Petition ¶¶ 45-48). But,

Appellants fail to appreciate that a volunteer organization like CeaseFire PA "cannot establish standing simply by virtue of its organizational purpose." *Armstead v. Zoning Bd. of Adjustment of the City of Philadelphia*, 115 A.3d 390, 400 (Pa. Cmwlth. 2015). The Commonwealth Court has explained that "[w]here the organization has not shown that any of its members have standing [individually], the fact that the challenged action implicates the organization's mission or purpose is not sufficient to establish standing." *Allegheny Reproductive Health Ctr. v. Dep't of Human Servs.*, 249 A.3d 598, 606 n.11 (Pa. Cmwlth. 2021) (quotation omitted).

These principles are controlling here. CeaseFire PA has not shown that any of its members have standing individually. Therefore, the fact that the Preemption Provisions implicate its mission or purpose does not give it standing.

Because the Petition is devoid of allegations regarding any legally cognizable injury that the Preemption Provisions visited upon Individual Appellants or CeaseFire PA, those Appellants lack a "direct" interest in the Provisions, *i.e.*, there is no causal connection between the Provisions and any injury they sustained. Similarly, the Individual Appellants and CeaseFire PA do not have an "immediate" interest in the Provisions. Indeed, because there is no causal connection between the Preemption Provisions and any injury that they sustained, that type of connection, by definition, is not "sufficiently close."

b. Philadelphia lacks standing to challenge Section 2962(g).

Philadelphia lacks standing to challenge Section 2962(g). That provision is in Title 53, Part III, Subpart E of Pennsylvania's consolidated statutes. Subpart E "applies to all municipalities except cities of the first class and counties of the first class," *i.e.*, Philadelphia. 53 Pa.C.S. § 2901(b). Appellants acknowledge this fact. R.104a (Petition ¶ 78). Because Section 2962(g) does not apply to Philadelphia, it does not bear upon the city's "interests and functions as a governing entity," which means that, for standing purposes, Section 2962(g) does not result in any legally cognizable injury to the city. *See City of Philadelphia v. Commonwealth*, 838 A.2d 566, 579 (Pa. 2003) (discussing standing of municipalities). There is no causal connection between Section 2962(g) and any injury that Philadelphia has sustained, let alone a "sufficiently close" connection. Therefore, the city lacks a "direct" and "immediate" interest in the provision. *Wm. Penn*, 346 A.2d at 282, 286.

c. *Res judicata* bars Philadelphia's challenge to 18 Pa.C.S. § 6120.

Although Philadelphia might have standing to challenge 18 Pa.C.S. § 6120, the doctrine of *res judicata* precludes it from prosecuting the challenge.

i. Res judicata standard

"The doctrine of *res judicata* is based on public policy and seeks to prevent an individual from being vexed twice for the same cause." *Stevenson v. Silverman*, 208 A.2d 786, 788 (Pa. 1965). A reviewing court should dismiss a pending matter

pursuant to the doctrine of *res judicata* when: (1) the same cause of action was asserted in a prior matter as is asserted in the pending matter, *id.* at 787-88; (2) the same thing was sued upon or for in the prior matter as is sued "upon" or "for" in the pending matter, *id.*; (3) the same parties were involved in the prior matter as are involved in the pending matter, *id.*; (4) the parties were of the same quality or in the same capacity in the prior matter as they are in the pending matter, *id.*; and (5) "a final judgment [was] rendered" in the prior matter, *Shaffer v. Smith*, 673 A.2d 872, 875 (Pa. 1996) (internal quotation omitted). Dismissal of the pending matter "should not be defeated by minor differences of form, parties, or allegations." *Stevenson*, 208 A.2d at 788 (internal quotation omitted).

"*Res judicata* applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action." *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995). "The scope of the merger or bar includes not only matters actually litigated but also all matters that should have been litigated." *Madara v. Commonwealth*, 397 A.2d 1294, 1295 (Pa. Cmwlth. 1979) (internal quotation omitted); *see also McCarthy v. Twp. of McCandless*, 300 A.2d 815, 819 n.2 (Pa. Cmwlth. 1973).

With regard to the third element, the parties involved in the prior matter include not only those named as parties, but also anyone who is privy in interest to those parties. *Stevenson*, 208 A.2d at 788. An individual or entity is privy in interest

to one who was named as a party in the prior matter if the individual or entity's relationship "to the same right of property" that was implicated by the prior matter is "mutual or successive" to that of the named party. *Central Pennsylvania Lumber Co. v. Carter*, 35 A.2d 282, 283 (Pa. 1944).

When it comes to the fourth element, a party is in the same capacity as a party in the prior matter when his legal status in the suit is the same, *i.e.*, his participation is in the same "character." *See Sample v. Coulson*, 9 Watts & Serg. 62, 65, 1845 Pa. Lexis 410 at *6 (1845) ("character…is the important consideration, and is that by which his legal obligations and rights are determined").

ii. Application of res judicata standard

An application of the *res judicata* standard shows that, as to Philadelphia, this Court should uphold the Commonwealth Court's dismissal of the challenge to Section 6120.

First, the same cause of action was asserted in *Clarke*, 957 A.2d 361 and *Ortiz*, 681 A.2d 152, as in this matter. In *Clarke*, two members of the Philadelphia City Council asserted claims "that Section 6120 is unconstitutional because it infringes on the power of Philadelphia to pass and enforce local gun regulations." 957 A.2d at 363. In *Ortiz*, members of Philadelphia's City Council and others asserted claims that Section 6120 was invalid because the General Assembly "may not limit 'the ability to perform the basic administrative functions of a municipal government and

the ability to fulfill a fundamental purpose for which the City government exists.'" 681 A.2d at 155-56.

Philadelphia asserts the same causes of action here. In Counts I and II of the Petition, just like the councilpersons in *Clarke*, Philadelphia asserts that Section 6120 is unconstitutional because it infringes on the city's power to pass and enforce local gun regulations. In taking this approach, Philadelphia invokes the "state-created danger" doctrine and substantive due process principles. In Count III of the Petition, just like the councilpersons in *Ortiz*, Philadelphia asserts that Section 6120 interferes with the city's ability to perform its administrative functions and fulfill the purpose for which the locality exists. In asserting this claim, Philadelphia invokes an "interference with delegation" theory. The challengers, in *Clarke*, invoked the state-created danger doctrine but did not, in *Clarke* or *Ortiz*, invoke general substantive due process principles or the interference with delegation theory. However, dismissal of this matter pursuant to *res judicata* "should not be defeated by minor differences of form…or allegations." *Stevenson*, 208 A.2d at 788 (internal quotation omitted). And Philadelphia's substantive due process and interference with delegation theories could have readily been asserted in *Clarke* and *Ortiz*. *See Balent*, 669 A.2d at 313.

Second, the same thing was sued upon or for in *Clarke* and *Ortiz* as is sued upon or for in this matter. The subject in controversy in *Clarke* and *Ortiz* was the restriction of municipalities' ability to regulate firearms, just as it is here.

Third, the same parties were involved in *Clarke* and *Ortiz* as here because Philadelphia and Appellees were parties in *Clarke* and *Ortiz* or they are in privity with persons who were parties in those cases. Philadelphia is in privity with the councilpersons who were litigants in *Clarke* and *Ortiz*. Philadelphia's relationship to the right that was implicated in *Clarke* and *Ortiz*, *i.e.*, the right (or lack thereof) to regulate firearms, is mutual or successive to that of the councilpersons in those cases. Like them, Philadelphia's role in the regulation of conduct is to adopt ordinances. City Council, in other words, is the body through which Philadelphia adopts its ordinances. As for the Appellees, the General Assembly was a party in *Clarke* and the Commonwealth was a party in *Ortiz*. While Senator Ward and Speaker Cutler were not parties in *Clarke* or *Ortiz*, they are in privity with the General Assembly and the Commonwealth for purposes of the *res judicata* analysis. The reason is that the General Assembly and Commonwealth were sued in *Clarke* and *Ortiz* (and here) for enacting Section 6120. And, here, Senator Ward and Speaker Cutler are being sued because they are leaders of the body that enacted that statute.

Fourth, the parties here are participating in the same capacities as the parties in *Clarke* and *Ortiz*. Philadelphia is litigating this matter in its capacity as a

municipality that disagrees with Section 6120's restriction of its ability to regulate firearms. The councilmembers in *Clarke* and *Ortiz* brought suit as representatives of Philadelphia and did so based on the same grievance. The Appellees were sued here for facilitating Section 6120, as were the General Assembly and Commonwealth in *Clarke* and *Ortiz*, respectively.

Fifth, a final judgment was rendered in *Clarke* and *Ortiz* because, in both cases, the Commonwealth Court entered a final order that disposed of the entire case and ended the litigation on its merits and, in both cases, this Court affirmed the Commonwealth Court's decision.

All told, the doctrine of *res judicata* bars Philadelphia from challenging 18 Pa.C.S. § 6120 for a third time.

d. This matter is not ripe for disposition.

The Counts in the Petition are predicated on the occurrence of events that have not occurred and might never occur. This matter is therefore not ripe for disposition.

Under the ripeness doctrine, "[w]here no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained." *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997). "In deciding whether the doctrine of ripeness bars our consideration of a declaratory judgment action, we consider whether the issues are adequately developed for judicial review and what hardships the parties will suffer if review is delayed." *Twp. of Derry v. Pennsylvania*

Dep't of Labor & Indus., 932 A.2d 56, 57-58 (Pa. 2007) (internal quotations omitted).

Rooted in the first part of this test is the principle that "[o]nly where there is a real controversy may a party obtain a declaratory judgment. A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur . . . or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Gulnac v. South Butler County Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) (internal citations omitted). The same principle applies to injunctions. *See Brown v. Commonwealth*, 673 A.2d 21, 23 (Pa. Cmwlth. 1996) (citing *Gulnac*). Therefore, a court may not issue a declaratory judgment or an injunction with regard to whether a statute that preempts ordinances is constitutional if the ordinances are not even in existence or effective so as to create a live controversy.

In *Mt. Lebanon v. County Board of Elections of the County of Allegheny*, 368 A.2d 648 (Pa. 1977), a municipality filed an action in equity, seeking to enjoin the Board of Elections from placing proposed amendments on an upcoming ballot because, if the amendments were adopted, they would be unconstitutional. The trial court entered the order. This Court reversed and held that courts "should not offer advisory opinions during the deliberative stages of the legislative process." *Id.* at 649-50 (internal quotation omitted). The Court explained that equity does not have

jurisdiction to make a determination regarding the substantive validity or potential effect of legislation that has not (and might never) become operative. This Court concluded: "In the instant case, there was only proposed legislation which, until enacted, affected no one. The instant action was an attempt to obtain an advisory opinion." *Id.* at 650.

Here, the Counts in the Petition are expressly predicated on allegations that, if the Preemption Provisions were not in place, Philadelphia and other municipalities "would" enact or "would have the ability" to enact certain types of gun control ordinances, including the Proposed Regulations. *See, e.g.*, R.114a, 126a, 129a (Petition ¶¶ 91 ("would"), 113 ("would have the ability"), 123 ("would")). Appellants do not identify any ordinance that a municipality has enacted and that a court has not deemed to be unenforceable. While Appellants allege that, without the Preemption Provisions, municipalities "would" enact or "would have the ability" to enact these types of ordinances, the municipalities have not done so and might never do so.

Because the Proposed Regulations and similar, purely conceptual ordinances presently affect no one, a request for a judicial determination concerning the validity of the statutes that preempt them is an attempt to obtain an advisory opinion. Therefore, Appellants' claims are not ripe for adjudication.

e. The Counts in the Petition are not justiciable.

This brief ends at the same place where it began: with the recognition that Appellants are simply asking the Judiciary to don a legislative mantle in a quest to enact particular firearm control measures. The Petition calls for the Court to substitute its policy judgment for the General Assembly's policy judgment with regard to local regulation of firearms. Therefore, the Petition is non-justiciable and this Court should uphold the Commonwealth Court's dismissal of the Petitioners' claims.

The General Assembly may enact a particular piece of legislation unless the U.S. or Pennsylvania Constitution forbids it from doing so. *Luzerne County v. Morgan*, 107 A. 17, 17 (Pa. 1919) ("The legislature may do whatever it is not forbidden to do by the federal or state Constitutions."); *Grimaud v. Commonwealth*, 865 A.2d 835, 847 (Pa. 2005) ("As the Constitution does not regulate the manner in which the legislature approves amendments, no constitutional violation exists."). As this Court has recognized, "[t]he Constitution has given us a list of the things which the Legislature may not do. If we extend that list, we alter the instrument; we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the Legislature possibly could." *Russ v. Commonwealth*, 60 A. 169, 172 (Pa. 1905).

When the General Assembly has the discretion under the U.S. and Pennsylvania Constitutions to decide whether to enact a particular piece of legislation, a court has no authority to interfere with its exercise of that discretion. Doing so violates separation-of-powers principles. *See, e.g.*, *Glenn Johnston, Inc. v. Dep't of Revenue*, 726 A.2d 384, 388 (Pa. 1999) ("policy determinations, however, are within the exclusive purview of the legislature, and it would be a gross violation of the separation of powers doctrine for us to intrude into that arena"); *Commonwealth v. Hicks*, 466 A.2d 613, 615 n.4 (Pa. 1983) ("It is, of course, improper for a court to substitute its policy judgment for that of the Legislature.").

No provision in the U.S. or Pennsylvania Constitution prohibits the General Assembly from enacting the Preemption Provisions. In their Petition, Appellants cite a variety of incidents of violence that took place in Philadelphia and Pittsburgh. Their obvious goal is to tug at the Court's heart-strings and hope that it will agree with their belief that the General Assembly was wrong to reject their preferred firearm controls. But there is no basis in the law for the Court to step into a legislative issue on grounds of alleged "unreasonable preemption" or "unreasonable inaction" by a legislature. There are opposing views, supported by statistical analyses and reputable scholarship, that undermine Appellants' position on gun control. The General Assembly is entitled to give such weight as it sees fit to the entire spectrum of information and opinion available to it.

The Petition represents Appellants' request for this Court to find the General Assembly at fault for exercising its legislative discretion in a manner that they do not like. For this Court to do so would be for it to improperly substitute its judgment for the General Assembly's judgment and violate separation-of-powers principles. The Counts in the Petition are therefore non-justiciable.

CONCLUSION

WHEREFORE, for the reasons stated, Appellee Senator Ward respectfully requests that the Court uphold the Commonwealth Court's decision granting Appellees' Preliminary Objections and dismissing Appellants' claims with prejudice.

Date: December 2, 2022

Respectfully submitted,

K&L GATES LLP

/s/Anthony R. Holtzman

Anthony R. Holtzman
PA 200053
Thomas R. DeCesar
PA 309651
K&L Gates LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507
(717) 231-4500
(717) 231-4501 (fax)
anthony.holtzman@klgates.com
thomas.decesar@klgates.com
Counsel for Appellee Senator Kim Ward, Interim President pro tempore of the Pennsylvania Senate

CERTIFICATE OF WORD COUNT

I hereby certify that, based on the word count feature of Microsoft Word, the foregoing Brief for Appellee Senator Kim Ward complies with the word-count limit described in Pennsylvania Rule of Appellate Procedure 2135(a)(1).

/s/ Anthony R. Holtzman
Anthony R. Holtzman

CERTIFICATION OF COMPLIANCE

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

/s/ Anthony R. Holtzman
Anthony R. Holtzman

CERTIFICATE OF SERVICE

I certify that, on December 2, 2022, I caused the foregoing document to be served via the Court's PACFile System upon all persons registered to receive service in this matter.

/s/ Anthony R. Holtzman
Anthony R. Holtzman