SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ALAN J. CHWICK, THOMAS G. FESS, and EDWARD L. BOTSCH Petitioners, vs. LAWRENCE W. MULVEY as Commissioner of the Nassau County Police Department, the NASSAU COUNTY POLICE DEPARTMENT, and the COUNTY OF NASSAU Respondents.	**PETITIONERS' REPLY MEMORANDUM OF LAW** Index No. 13564/2008 Hon. Kenneth A. Davis Return Date: 11/3/08 [Article 78 Review of Nassau County Local Law # 5-2008] **ORAL ARGUMENT REQUESTED**

Petitioners Alan J. Chwick and Thomas G. Fess[1] respectfully submit this Reply Memorandum of Law in further support of their Verified Petition challenging Nassau County Local Law Number 5-2008, as amended, which impermissibly bans the possession of a class of handguns.

I. INTRODUCTION

Respondents raise four substantive arguments in opposition to Petitioners' challenge, none of which is persuasive. First, Respondents concede, as they must, that the state Penal Law contains a comprehensive scheme for regulating handguns, and can only cite to cases regarding regulation of

[1] For reasons discussed herein, Edward L. Botsch is no longer a Petitioner in this proceeding, though the official caption remains unchanged.

things *other than handguns* to argue that the Nassau Handgun Ban is not preempted. Second, Respondents argue that the law is not unconstitutionally vague, and then confirm its vagueness by highlighting contradictory language within the law.

Third, Respondents argue that the Nassau Handgun Ban does not effect an unconstitutional taking of property by ignoring the draconian nature of the law and the undue burdens it imposes on law-abiding gun owners by requiring the forfeiture of valuable property without any compensation or opportunity to sell the banned guns outside the county.

Fourth, Respondents concede that the *Heller* decision is controlling in this case because it applies to firearms "in common use," which include handguns, and because New York courts are bound to follow federal case law on the Second Amendment in enforcing New York Civil Rights Law Article 2, § 4. Respondents then simply ignore the facts that the Nassau Handgun Ban is arbitrary and not narrowly tailored, that no compelling governmental objective has been demonstrated, and that the law does not use the least restrictive means for achieving the stated governmental interest.

Respondents also raise two procedural issues, neither of which has any significant bearing on Petitioners' challenge to the law. The form of the action is not material to this Court's ability to grant Petitioners the requested relief. Respondents cannot challenge that Petitioner Chwick has standing, and are factually and legally incorrect in claiming that Petitioner Fess lacks standing.

Finally, in obvious recognition of the fatal flaws in Local Law 5-2008 (Title 69 of the Miscellaneous Laws of Nassau County), Respondents amended the law in response to this proceeding by enacting Local Law 9-2008. While certain minor deficiencies were cured by the amendments, the Nassau Handgun Ban remains preempted and unconstitutional.[2] In fact, the

[2] The primary bases of the Petition are unaffected by the amendments because all of the core provisions *(continued...)*

changes made to the law only highlight Petitioners' arguments that the law is ambiguous, not narrowly tailored, and is not based on legislative findings sufficient to justify the alleged governmental interest served by the law.

II. PENAL LAW ARTICLES 265 AND 400 BROADLY OCCUPY THE FIELD OF HANDGUN REGULATION AND PREEMPT THE NASSAU HANDGUN BAN.

A. Penal Law Article 265

Respondents argue that the Penal Law touches upon, but does not fully occupy, the field of handgun regulation in New York. Respondents are wrong. Penal Law Article 265 is all-encompassing regarding the regulation of handguns because it starts from the premise that *all* handguns are illegal. *See, e.g.*, Penal Law § 265.01 (illegal to possess an unloaded firearm) and § 265.03 (illegal to possess a loaded firearm). Article 265 then proceeds to enumerate certain exceptions to the general rule that all handguns are illegal to possess. *See* Penal Law § 265.20. Such exceptions include possession by those with special statutory exemptions, such as police officers (§ 265.20 (a) (1) (b)), and those who have been issued a license pursuant to Article 400 (§ 265.20 (3)).

Under New York's statewide regulatory scheme, no person may possess a handgun except under the express exceptions contained within Penal Law Article 265. The Nassau Handgun Ban obviously regulates handguns, a subject matter that is covered entirely by Article 265.

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challenged remain in the revised law. The revisions do not cure the law's preemption or unconstitutionality, and Respondents do not argue that these arguments are mooted by the revised law. In fact, Respondents address the challenges in the Petition as if made against the revised law. For the sake of the Court's convenience and to avoid confusion, Petitioners refer to Title 69 of the Miscellaneous Laws of Nassau County as amended by Local Law 9-2008 as the "Nassau Handgun Ban" or "Title 69" except where more specificity is required.

B. Penal Law Article 400

Respondents concede that Penal Law Article 400 is the exclusive statutory mechanism for licensing handguns in New York. *See* Answer ¶ 97.[3] But they incorrectly assert that the Nassau Handgun Ban does not impose additional limitations or qualifications upon pistol licensees. *Id.*.

An Article 400 pistol license entitles a licensee to possess those pistols that the licensing officer registers to his or her license. *See* Penal Law § 400.00 (7) (licenses must specify the handguns registered to the licensee) and § 400.00 (9) (licensee may apply at any time to licensing officer for amendment of his license to include one or more handguns). The Nassau Handgun Ban is, at its core, a mechanism for the Nassau Police Commissioner, in his capacity as the Article 400 handgun licensing officer, to screen licensees for handguns deemed deceptively colored, deregister them from the license, and seize them. Further, the law effectively denies licensees the ability to amend their licenses to register such handguns in the future, as licensees are entitled to do under Article 400.

Penal Law Article 400 contains explicit restrictions on the types of firearms that may be licensed. A firearm defined as an "assault weapon" or a "disguised gun" may not be licensed. *See* Penal Law § 400.00 (2). Respondents cannot expand that list to include what they call "deceptively colored handguns" because, as Respondents concede, Article 400 is the exclusive statutory mechanism for licensing handguns. Respondents' refusal to register an entire class of handguns not prohibited by Article 400 unlawfully modifies that State statutory mechanism.

[3] Citations to Respondents' Verified Answer and Objections in Point of Law are denoted as "Answer" with the corresponding paragraph number.

C. Respondents' Citied Authorities are Inapposite

Respondents argue that "New York Courts have consistently held that Penal Law Article 265 does not preempt local laws which impose limits on the possession and use of weapons, including firearms." *See* Answer ¶ 98. Respondents should have stopped their assertion at "weapons," because it is demonstrably incorrect as far as "firearms" are concerned. Indeed, Respondents are unable to cite even one case upholding a local law regulating firearms, which is a defined term that includes handguns and excludes ordinary rifles and shotguns. *See* Penal Law § 265.00 (3).

None of the cases cited by Respondents supports their claim that the Nassau Handgun Ban is not preempted because none of the laws reviewed addressed handguns. Instead, each case upheld local laws that regulated rifles, shotguns, knives, imitation weapons and toys – none of which are comprehensively or even extensively regulated by the Penal Law. *See Citizens for a Safer Community v. City of Rochester*, 627 N.Y.S.2d 193, 201 (Sup. Ct. Monroe Co. 1994) (possession and sale of semiautomatic rifles and shotguns; possession and use of imitation weapons); *Grimm v. City of New York*, 56 Misc. 2d 525 (Sup. Ct. Queens Co. 1968) (possession or rifles and shotguns); *People v. Ortiz*, 125 Misc. 26 318 (Crim. Ct., Bronx Co. 1984) (possession or carrying of certain knives in public "without a lawful purpose"); *People v. Judiz*, 38 N.Y.2d 529 (1976) (possession of toy guns).

Respondents are equally unable to support the sustainability of the Nassau Handgun Ban by pointing to any local law in any municipality, town or county that regulates handguns in any way. Proposals for such laws typically wither on the vine. For example, Suffolk County proposed a local law requiring that an applicant for a pistol license satisfactorily complete a firearm safety course prior to issuance of the license. Suffolk sought an opinion from the Attorney General, and was flatly

told that such a local law would be preempted by Penal Law Article 400.00. *See* 1974 N.Y. Op. Atty. Gen. 254. Westchester County later sought to impose the same requirement on license applicants. Westchester followed proper procedures, and had a bill to amend Article 400 introduced in the State Legislature on its behalf. The bill passed the Assembly and Senate, and was eventually signed into law by the Governor. *See* Penal Law § 400.00 (4-b). Nothing prevents Nassau from following the same approach to achieve their stated goal.

D. <u>The Nassau Handgun Ban Interferes with a Statewide Regulatory Scheme</u>

New York State Constitution Article IX, § 2(c), empowers local governments to adopt and amend local laws relating to their property, affairs or government, and also empowers them to adopt local laws relating to enumerated subjects therein whether or not they relate to their property, affairs or government. The regulation of firearms possession is not one of those enumerated subjects.

Municipal Home Rule Law § 10 (1) implements these constitutional provisions. However, in both the Constitution and Municipal Home Rule Law, the granting of the powers to adopt and amend such local laws are preambled by the proviso that such local laws be not inconsistent with the provisions of the Constitution or not inconsistent with any general State law. *See also Wholesale Laundry Bd. of Trade v. City of New York*, 17 A.D. 2d 327, *aff'd* 12 N.Y. 2d. 998 (1963); *People v. Lewis*, 295 N.Y. 42 (1945); *People v. Del Gardo*, 1 Misc. 2d 821 (City Magistrate's Court of New York, Borough of Manhattan, Upper Manhattan Court, 1955); *People v. Kearse*, 56 Misc. 2d 586 (City Court of New York, Syracuse, 1968).

It is beyond the cavil that the Penal Law of the State is a general law that has general application to all of the inhabitants of the State, and it has been specifically so held and applied. *People v. Wilkerson*, 73 Misc. 2d 895 (County Court, Monroe County, 1973), *citing Town of Babylon v. Conte*, 61 Misc. 2d 1055; *People v. Conte*, 64 Misc. 2d 573; *Del Gardo, supra*; *Kearse,*

supra. It is for this reason that courts routinely strike down local laws that impinge upon provisions in the Penal Law. As a very recent example, a local curfew ordinance was struck down as preempted because it provided that a minor under the age of 16 who violates the curfew commits a "violation." That provision is inconsistent with Penal Law § 30.00, which establishes age 16 as the minimum age for criminal responsibility. *Anonymous v. City of Rochester*, 864 N.Y.S.2d 376 (App. Div. 4th Dept. 2008).

The constitutional home rule provision places two firm restrictions on local government's use of the police power. The local government may not exercise its police power by adopting a local law inconsistent with constitutional or general law, and it may not exercise its police power when the Legislature has restricted such an exercise by preempting the area of regulation. *N.Y. State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217 (1987), *citing Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105; *People v. Cook*, 34 N.Y.2d 100, 105-106.

The legislative intent to preempt need not be express. It is enough that the Legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the Legislature, or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area. *N.Y. State Club Ass'n, supra. See also Incorporated Village of Nyack v. Daytop Village, Inc.*, 78 N.Y.2d 500 (1981). Implied preemption occurs where, notwithstanding the absence of an express exemption, State law indicates a purpose to "occupy the entire field so as to prohibit additional regulation by local authorities in the same area." *Robin v. Incorporated Village of Hempstead*, 30 N.Y.2d 347, 350 (1972).

Preemptive intent may also be inferred from the nature of the subject matter being regulated and the purpose and scope of the legislative scheme, including the need for statewide uniformity in a given area. *See Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989);

Consolidated Edison Co. v Town of Red Hook, supra. If local laws were permitted to operate in a field preempted by State law, such laws "would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns." *Jancyn Mfg. Corp. v. County of Suffolk,* 71 NY2d 91, 97 (1987). The Nassau Handgun Ban inhibits uniform operation of the state's broad, general handgun control laws by creating a new category of handguns banned only in one out of 62 state counties.[4]

Where the State Legislature has preempted an entire field, a local law regulating the same subject matter is inconsistent with the State's interests if it either (1) prohibits conduct which the State law accepts or at least does not specifically proscribe; or (2) imposes restrictions beyond those imposed by State law. *Vatore v. Consumer Affairs,* 83 N.Y.2d 645, 649 (1994). The Nassau Handgun Ban fails both prongs of this test for the constitutionality of a local law: the ban prohibits ownership of guns which State law accepts and does not specifically proscribe, and it imposes restrictions on their possession, licensing and registration beyond those imposed in State law. The Nassau Handgun Ban must be struck down as preempted by the Penal Law.

III. THE NASSAU HANDGUN BAN IS UNCONSTITUTIONALLY VAGUE AS WRITTEN AND AS APPLIED.

The term "substantial portion of the exterior surface of a handgun" remains ambiguous. Respondents point to the "either alone or the predominant color" language in Title 69, § 3 (b) as somehow clarifying the "substantial portion" definition. To the contrary, that language draws

[4] As discussed in the Petition, the State Legislature is aware of the issue of colored guns and is actively considering amending the definition of "disguised gun" in the Penal Law to address the issue. *See* Petition ¶ 35. While Respondents correctly note that the bill has not received final passage, they ignore that in failing to make the amendment, the Legislature has tacitly expressed its desire to not yet regulate such guns as a class as part of its general handgun control scheme. The Legislature could also amend the Penal Law to expressly allow localities to regulate colored handguns, but it has not done so either. As it stands, the Nassau law interferes with the State's policy to regulate handguns uniformly throughout the State.

attention to an inherent contradiction in the law, and only makes it more difficult to ascertain just what "substantial portion" means. The "predominant color" language in § 3 (b) conflicts with the definitions of "substantial portion" in § 3 (c).

"Predominant" is undefined in the law and must be given its plain, ordinary meaning. Read in context, "predominant" has an ordinary meaning of "Most common or conspicuous; main or prevalent: *the predominant color in a design.*" Houghton Mifflin Company, *The American Heritage Dictionary of the English Language, Fourth Edition*. In any uniform color scheme with two, three or four colors, at least 25% of the surface is occupied by each color, none of which is "predominant" over the others.[5] However, any one such color would fall within the definition of "substantial portion" in the law, because that term is defined to be as little as 25% of the entire exterior surface of the gun in § 3 (c) (1).

The standard woodland camouflage pattern, like that on Petitioner Fess's Glock pistol, uses four colors in approximately equal amounts. *See* Petition ¶ 7. Three permissible colors (black, green and brown) comprise about 75%, and one banned color (tan) comprises about 25% of the pattern. Tan is not the "predominant color" because it is not the most common, conspicuous or prevalent color. Respondents point to the "predominant color" language" in § 3 (b) of the law to conclude that a gun with a woodland camouflage pattern would not be banned. *See* Answer ¶¶ 89, 116. However, because that pattern contains at least 25% of a banned color, its use on a handgun would bring it within the definition of "substantial portion" in § 3 (c) (1), and thus be considered deceptively colored. The Nassau Handgun Ban is plainly ambiguous because the same color scheme that would be *banned* under the law (because 25%, a "substantial

[5] For example, if a gun was painted red, white, and blue in equal proportions, each color would occupy more than 25% of the surface (*i.e.*, 33%) and no one color would be predominant over the other two.

portion," of its exterior surface is a banned color) would at the same time be *permissible* (because that banned color is not "predominant").

Petitioners further reiterate that the definition of "substantial portion" in § 3 (c) (2) is ambiguous because it could just as easily be read to mean the *entire* exterior surface of either the frame or the slide, or *any portion* of either the receiver or slide. As demonstrated above, nothing about the "predominant color" wording sheds any light on this additional ambiguity.

IV. THE NASSAU HANDGUN BAN EFFECTS AN UNCONSTITUTIONAL TAKING OF PROPERTY.

Respondents mistakenly assert that "the limitations imposed upon an individual's enjoyment of his or her handgun is minimal." . *See* Answer ¶ 109. It is not the case that one may enjoy his handgun as long as he does not "color it in such a manner as would cause it to be mistaken for a toy." *Id.* The law deprives gun owners of any ability to make such a decision.

The Nassau Handgun Ban went into effect without any prior notice to licensees. The brief period during which the law allowed for the alteration of affected handguns to a permissible color has long since passed. The law effects an absolute forfeiture of guns falling within the ban, requiring no action on the part of the owner to "color it" to a banned color. *See* Answer ¶ 109.

The Court may take judicial notice that the value of quality handguns starts in the mid-hundreds of dollars and runs well into the thousands of dollars. Confiscation of such valuable property from innocent, law-abiding citizens without compensation is far from the minor imposition portrayed by Respondents. *See id.* ¶ 110. As discussed below, there are far less restrictive and punitive measures that Nassau could have chosen to effect the same stated goal without depriving honest people of their property without compensation.

V. THE NASSAU HANDGUN BAN IS BARRED BY THE SECOND AMENDMENT AND STATE CIVIL RIGHTS LAW.

Respondents do not dispute that the Second Amendment to the United States Constitution is applicable to a review of the Nassau Handgun Ban. Respondents also concede that the right to keep and bear arms contained in New York Civil Rights Law Article 2, §4 must be interpreted according to controlling federal law, which is embodied in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). *See* Answer ¶ 118. Respondents even concede that handguns are "the preferred weapon of self-defense in this nation." *See id.* ¶ 125. However, Respondents misapplied the relevant constitutional standards to the law being challenged.

A. There is No Evidence that the Nassau Gun Ban Will Achieve the Stated Goals

Respondents have not shown, as they must, a substantial relationship between the burdens imposed on gun owners and the achievement of Nassau's stated objectives. Assuming that Nassau's objective is legitimate and important, the Court must determine whether the requisite direct, substantial relationship between objective and means is present. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). The purpose of requiring that close relationship is to assure that the validity of the law is determined through reasoned analysis rather than through mechanical application of traditional, often inaccurate, assumptions. *Id.* at 725-726.

Respondents have failed to establish that there is a direct, substantial relationship between Nassau's stated objective and the means employed by the law. Nothing in the record shows that colored guns actually cause the problems contemplated by Respondents. The record does not establish that 1) police or the general public are mistaking colored guns for toys; 2) that children are coming into possession of colored guns licensed to adults; or 3) that confiscating

colored guns from licensed adults will reduce accidents or any potential police confusion. The bald assertions by Respondents in support of the law are assumptions lacking the requisite reasoned analysis.

Moreover, the Nassau Gun Ban appears plainly arbitrary, which invalidates the law. *See Ortiz*, 125 Misc. at 325, *citing People v. Bunis*, 9 N.Y.2d 1 (1961). There is nothing in the record that supports the reasons for choosing certain colors for inclusion, nor the reasons for choosing to exclude other colors. The amendment of the law in response to the Petition – without any evidence that the Nassau Legislature evaluated the likelihood that certain colors would or would not be mistaken for toys – shows the whimsical way in which the criteria for gun colors was selected.

There is also nothing in the record to support the claim that there is a "very real danger" that a real handgun might be mistaken for a toy because of its color. *See* Answer ¶ 109. Respondents were unable to cite even one case anywhere in the country where a real handgun was mistaken for a toy because it was "deceptively colored." Instead, the law appears to be based on nothing more than inaccurate assumptions, which have been used notoriously in the past as the basis for laws infringing upon fundamental rights. *See Mississippi Univ. for Women, supra.*

Even as revised, the Nassau Handgun Ban continues to ban real guns that are traditionally colored and common for police and military use, despite purporting to ban only "real guns, [that] when painted with nontraditional handgun colors, resemble toy guns, and can confuse police officers and the general public." Title 69, § 2. For example, the law still bans firearms colored with desert tans, such as the Taurus 24-7 (Petition Exhibit 8-c), the Kimber Desert Warrior (Petition Exhibit 8-f), and the Springfield Armory Model XD (Petition Exhibit 8-g). These

firearms were designed for military and police duty. There is nothing in the record to support the notion that tan is a "nontraditional" color, or that tan guns necessarily resemble toy guns.

B. The Nassau Handgun Ban is not Narrowly Tailored

As discussed in the Petition, *Heller* recognized that possession of handguns is an individual, fundamental right. Respondents do not dispute that because the Nassau Handgun Ban implicates a fundamental right, strict scrutiny is appropriate. Instead, they contend that the law is "narrowly tailored to the compelling governmental objective of preventing serious injury or death from accidental shootings." Answer ¶ 125. But the Nassau Gun Ban cannot be "narrowly tailored" since it does not use the least restrictive means for achieving the stated governmental interest. *See, e.g., People ex rel. Wayburn v. Schupf,* 39 N.Y. 2d 682, 687 (1976) (law impacting a fundamental right may be justified only by the existence of a compelling governmental interest and only if no less restrictive means are available to satisfy that interest).

Respondents failed to demonstrate through the drafting history, or in their Answer to the Petition, that they chose the least restrictive means for preventing confusion between real and toy handguns. Indeed, measures such as a law banning toy guns that look like real guns would have no Second Amendment implications and would achieve the same goal. And as discussed in the Petition, State Assembly Bill A-2868 also demonstrates a less-restrictive method for achieving the same goal. *See* Petition ¶¶ 35, 71.

C. *Heller* Prohibits All Handgun Bans

Respondents' citation to the passage in *Heller* indicating that the Second Amendment does not proscribe all limitations on the right to keep and bear arms is irrelevant to the law being challenged here. *See* Answer ¶ 121. The Nassau Handgun Ban does not prohibit the possession of firearms by felons or the mentally ill, or forbid the carrying of firearms in sensitive places. Instead,

the law absolutely bans a class of handguns, which are firearms that are explicitly protected by the Second Amendment, and by extension, New York Civil Rights Law.[6]

In order to sustain even a limited handgun ban, the burden is on Respondents to demonstrate that the handguns banned are "dangerous and unusual" and not "in common use at the time." *See Heller*, 128 S. Ct. at 2817; *see also* Petition ¶ 63. Respondents acknowledge this (*See* Answer ¶ 122), but failed to meet their burden, or even attempt to do so. Indeed, as discussed and documented in the Petition, guns of various colors are in common use now, and are becoming more common all the time. They are hardly "unusual." And there is no evidence whatsoever in the record that any particular color makes a handgun more dangerous than any other color.

Heller thus offers no support for the constitutionality of the Nassau Gun Ban. To the contrary, the law unconstitutionally bans weapons "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense. *See Heller*, 128 S. Ct. at 2817. That those self-defense weapons may come in different colors for different reasons matters not to the constitutional analysis.

VI. PETITIONER FESS HAS STANDING IN THIS PROCEEDING.

Respondents do not challenge Petitioner Chwick's standing to bring this action. Petitioners' challenge to the Nassau Handgun Ban is therefore properly before the Court, and must be decided on the merits. Petitioners agree with Respondents that Petitioner Botsch is no longer properly part of this proceeding because Local Law 5-2008 was amended to exclude gold-plated handguns, like the one forming the basis of Petitioner Botsch's claim.[7]

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[6] Using Respondents' reasoning, the District of Columbia's law overturned in *Heller* would have been constitutional since it too was not an absolute ban on all handguns, and was only a "limitation" on the possession of a certain class of handguns. The law allowed District residents to possess handguns registered before 1976, and only banned those not so registered. *See Heller*, 128 S. Ct. at 2862.

[7] As discussed above, the amendment of the law to permit gold-plated and brown handguns, without any *(continued...)*

However, Respondents are incorrect in asserting that Petitioner Fess lacks standing. As an initial matter, Respondents are simply wrong in claiming that "he has not appeared in this action either pro se or by counsel." *See* Answer ¶ 89. Petitioner Fess verified the Petition, and the Petition was properly filed and served. He therefore is a party to this proceeding. He is not required to retain counsel, nor is he required to attend oral arguments. He has "appeared" in this action by virtue of being a petitioner, and he has also submitted this Memorandum in Reply along with Petitioner Chwick.

Further, Respondents' allegation that Petitioner Fess lacks standing to maintain his challenge because he has not "suffered either an actual or reasonably imminent harm" (Answer ¶ 92) is specious. As an initial matter, only where there is clear legislative intent negating review will standing be denied. *Matter of Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 10-11, 377 N.Y.S.2d 451 (1975). Respondent has not offered any evidence of such legislative intent, and the large body of reported cases reviewing firearm laws and practices by licensing agents is strong proof that no such legislative intent exists.

Moreover, the Petition carefully explains that the harmful effect at issue is that Respondents are subjecting Petitioner Fess to criminal sanctions for possessing property deemed contraband by the challenged law.[8] It is hard to imagine a greater harmful effect than subjecting a law-abiding citizen to arrest, prosecution, conviction, jail, and fines. Yet that is precisely the position in which

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additional legislative findings about whether gold guns are any less "deceptive" than others, shows the arbitrary nature of the legislation and the lack of any nexus between the colors banned and the alleged governmental interest in banning such handguns.

[8] Respondents' conclusion that Petitioner Fess's camouflage pistol is not prohibited by the Nassau Handgun Ban is not supported by the text of the law. It is entirely unclear as to whether the use of a banned color (tan) on the slide is sufficient to bring the pistol within the scope of the ban. See discussion *supra*, section III.

Respondents have placed Petitioner Fess, and all other owners of certain colored handguns, who either reside in or travel into Nassau County.

Further, the law was enacted without giving any fair notice to licensees or any opportunity for them to transfer or re-color the banned firearms before enactment. As written, the handguns possessed by Petitioners are contraband and must be seized, depriving Petitioners of property without just compensation. That is also very real and reasonably imminent harm.

Importantly, Petitioners Chwick and Fess have standing not only to bring this action on behalf of themselves, but on behalf of all similarly situated persons. C.P.L.R. § 7803 (2) makes available judicial review as to whether an officer such as Respondent Mulvey is proceeding in excess of jurisdiction, and C.P.L.R. § 7803 (3) allows review of actions alleged to be in violation of lawful procedure or affected by an error of law. If upon review the Court determines that Respondent acted or has expressed his intent to act in excess of jurisdiction, in violation of lawful procedure, or because of an error of law with respect to Petitioners, it would be contrary to fundamental concepts of justice for the Court not to declare that this Respondent's practices are also illegal as respects other, similarly situated licensees, and as respects handgun dealers, where the Petitioners have requested declaratory and injunctive relief in addition to review of agency action. The practices challenged in the Petition are countywide practices that are not limited in effect to the Petitioners.

Judicial review of government agency actions is the strongly favored policy adopted by the courts of this State:

> A fundamental tenet of our system of remedies is that when a government agency seeks to act in a manner adversely affecting a party, judicial review of that action may be had. The increasing pervasiveness of administrative influence on daily life on both the State and Federal level necessitates a concomitant broadening of the category of persons entitled to a judicial determination as to the validity of proposed action. In recent years the right to challenge administrative action has been enlarged

> by our court. In doing so, however, we have carefully examined the relevant statutes and precedents, ascertaining the presence or absence of a legislative intention to preclude review. *Only where there is clear legislative intent negating review will standing be denied.*

Matter of Dairylea Coop., 38 N.Y.2d at 10-11 (citations omitted; emphasis supplied). Again, there is no evidence whatsoever of legislative intent to negate judicial review of the challenged law and its enforcement by the Police Department, and Respondent has not alleged any such evidence.

VII. THE FORM OF THE ACTION IS IMMATERIAL TO THIS COURT'S REVIEW.

Even if an Article 78 proceeding were not proper the vehicle for the requested relief, it is well settled that the interests of justice require the Court to convert the action into another form. If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper determination. C.P.L.R. § 103 (c).

As explained by the New York Court of Appeals in a comparable situation:

> Although the petition may be said to be imprecisely drawn and appears to have been conceived as perhaps intended to institute a proceeding under CPLR article 78, both declaratory and injunctive relief are sought. In this circumstance and to allow for the proper prosecution of the action we exercise the authority granted in CPLR 103 (subd [c]) and convert the proceeding into an action for a declaratory judgment—the appropriate vehicle for examination of the constitutionality of legislation.

Boryszewski v. Brydges, 37 N.Y.2d 361, 365 (1975) (citations omitted). Because Petitioners in the matter *sub judice* seek judicial review that includes both personal relief from agency action, and broader relief including a declaration that planned practices are in excess of jurisdiction and violation of law, this Court may convert this proceeding to one for declaratory judgment if it deems it appropriate. Moreover, and notwithstanding any determination regarding Petitioners' request for personal relief, CPLR § 103 (c) directs that the petition for declaratory and injunctive relief "shall

not be dismissed" because of the form of the action, and that the Court "shall make whatever order is required for its proper determination." In fact, the Court of Appeals observed, "No case has been found in which the court failed to come to the plaintiff's rescue by exercising its CPLR 103 (subd [c]) powers of conversion where it was possible to do so." *Press v. County of Monroe*, 50 N.Y.2d 695, 703 (1980).

VIII. CONCLUSION

Local Law 5-2008, as amended, impermissibly bans a class of handguns. The law must be set aside because no county or municipality may regulate handguns other than as expressly allowed by the State Penal Law, which fully occupies the field of handgun possession. Respondents are unable to cite even one case where any local law regulating handguns has ever been sustained. State law clearly preempts the Nassau Handgun Ban.

Respondents have also failed to show that the Nassau Handgun Ban is narrowly tailored, employs the least restrictive means for preventing the alleged problems of colored handguns, and that it is not vague and ambiguous. It also effects the taking of valuable property from law-abiding gun owners without just compensation. The law is unconstitutional as written and as applied.

Petitioners respectfully request that this Court grant the relief requested in the Petition, including declaring that Nassau County Local Law Number 5-2008, as amended, is invalid, nugatory, and unenforceable.

Petitioners also request that this Court assess against Respondents all litigation costs and any fees incurred by Petitioners for consulting with counsel. The fact that Respondents have already modified the original law validates, at the very least, some of the merits of Petitioners'

challenge. Petitioner Chwick pointed out problems with the bill before Respondents enacted it, but his concerns were ignored. *See* Transcript of Proceedings at 37-40, 43-45, 48-49 (attached as Exhibit 9 to the Petition). Respondents should pay for Petitioners' efforts to seek redress for such a poorly drafted, and patently preempted, local law.

Petitioners respectfully request the opportunity for oral argument on the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on October 31, 2008, he caused a true and correct copy of the foregoing Petitioners Reply Memorandum of Law to be sent by mailing same in a sealed envelope, with postage prepaid thereon, via the United States Postal Service, addressed to the last known address of the addressee as follows:

TO:
Nassau County Attorney
One West Street
Mineola, New York 11501
Attn: Ryan Singer, Esquire
Deputy County Attorney

Attorneys for Respondents

Dated: Nassau, New York
October 31, 2008

Alan J. Chwick, *pro se*