

To Be Argued By:  
ROBERT P. FIRRIOLO  
Time Requested: 15 Minutes

---

---

**New York Supreme Court**  
**APPELLATE DIVISION—SECOND DEPARTMENT**

---

---

In the Matter of  
ALAN J. CHWICK and THOMAS G. FESS,

*Petitioners-Appellants,*

EDWARD L. BOTSCH,

*Petitioner,*

—against—

LAWRENCE W. MULVEY, as Commissioner of the Nassau County  
Police Department, the NASSAU COUNTY POLICE DEPARTMENT,  
and the COUNTY OF NASSAU,

*Respondents-Respondents.*

**DOCKET NO.**  
**2009-1468**

---

**REPLY BRIEF FOR PETITIONERS-APPELLANTS**

---

ROBERT P. FIRRIOLO  
DUANE MORRIS LLP  
1540 Broadway  
New York, New York 10036-4086  
(212) 692-1091

*Attorneys for Petitioners-Appellants*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	2
Point I THE NASSAU HANDGUN BAN IS PREEMPTED .....	2
A. The Nassau Handgun Ban expressly conflicts with state law.....	2
B. The Nassau Handgun Ban is invalid for inconsistency.....	4
C. The Nassau Handgun Ban is expressly preempted. ....	9
D. The State Penal Law occupies the field of handgun regulation. ....	10
Point II THE SECOND AMENDMENT AND NEW YORK CIVIL RIGHTS LAW PROHIBIT ANY FORM OF HANDGUN BAN.....	18
A. <i>Heller</i> applies to all handgun bans, not only “complete” handgun bans.....	18
B. Handguns are protected by the Second Amendment regardless of color.....	19
C. Strict scrutiny is the proper standard of review.....	21
D. The Nassau Handgun Ban cannot survive strict scrutiny.....	23
CONCLUSION .....	26

## TABLE OF AUTHORITIES

### Constitutions

U.S. Constitution, Privileges and Immunities Clause .....	22
U.S. Constitution, Second Amendment.....	Passim

### Federal Cases

<i>Corfield v. Coryell</i> , 6 Fed. Cas. 546 (Circuit Court, E.D. Penn. 1823)...	22-23
<i>District of Columbia v. Heller</i> , 554 U.S. ___, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 2008 U.S. LEXIS 5268, 76 U.S.L.W. 4631 (2008).....	18-22
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982) .....	23
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938).....	22

### New York State Cases

<i>Albany Area Builders Ass'n v. Town of Guilderland</i> , 74 N.Y.2d 372 (1989).....	11
<i>City of New York v. Job-Lot Pushcart</i> , 88 N.Y.2d 163 (1996) .....	3
<i>DJL Restaurant Corp. v. City of New York</i> , 96 N.Y.2d 91 (2001).....	3
<i>Jiovon Anonymous v. City of Rochester</i> , 13 N.Y.3d 35 (2009).....	2, 11, 22
<i>New York State Club Assn. v. City of New York</i> 69 NY2d 211 (1987).....	2-5, 10-11
<i>People ex rel. Darling v. Warden of City Prison</i> , 154 A.D. 413 (1st Dept. 1913) .....	14
<i>People v. Kearse</i> , 289 N.Y.S.2d 346 (Syracuse City Ct. 1968).....	16-17
<i>Vatore v. Commissioner of Consumer Affairs of City of New York</i> , 83 N.Y.2d 645 (1994).....	2-3, 8, 11
<i>Wholesale Laundry Bd. of Trade v. City of New York</i> , 17 A.D.2d 327 (1962).....	3

**Federal Statutes**

18 U.S.C. 923.....6

**New York State Statutes**

1905 Laws of NY, ch. 92, § 2.....14

1911 Laws of NY, ch. 195, § 1.....14

Civil Rights Law Article 2, § 4 .....18

Penal Law Article 265 ..... Passim

Penal Law Article 400 ..... Passim

Penal Law § 265.00 .....15

Penal Law § 265.00 (10).....13

Penal Law § 265.10 (7).....12

Penal Law § 265.20 .....12, 13, 15

Penal Law § 400.00 (1)(f).....12

Penal Law § 400.00 (3).....13

Penal Law § 400.00 (4-b) .....13

Penal Law § 400.00 (5).....13

Penal Law § 400.00 (6)..... 9-11

Penal Law § 400.00 (7).....5, 7, 13

Penal Law § 400.00 (9).....14

Penal Law § 400.00 (10).....13

Penal Law § 400.00 (11).....14

Penal Law § 400.00 (12).....5, 14

Penal Law § 400.00 (14).....14

**Federal Regulations**

15 C.F.R. § 1150.3(a) .....25

27 C.F.R. § 478.11 .....6

**Miscellaneous**

Brief in Opposition by the Nassau County Attorney on behalf of  
Respondent in *Maloney v. Rice*, U.S. Sup. Ct. No. 08-1592 (filed Aug.  
28, 2009) ..... 19-20

New York State Police website: “Firearms: Pistol Permit Bureau -  
New York State repository since 1936”  
(<http://www.troopers.state.ny.us/firearms/>).....5

## **INTRODUCTION**

Respondents cannot justify the many errors made by the court below, each of which separately requires reversal. The court below erroneously held that the Nassau ban on “deceptively colored handguns” does not conflict with existing State law enactments. To the contrary, the local law directly conflicts with the statewide validity of Penal Law licenses so as to inhibit the operation of the Penal Law’s statewide regulatory scheme for handgun licensing, registration of handguns, and the licensing of gunsmiths and dealers. The Penal Law expressly preempts such impingement upon the statewide validity of licenses by a local law.

The court below also incorrectly held that the Nassau Handgun Ban does not infringe upon a preempted field. It could not cite to any case upholding a local handgun restriction. Respondents are similarly unable to do so because the Penal Law establishes a comprehensive regulatory scheme for handgun prohibition and licensing. It was reversible error for the court to look for an irrelevant State regulatory scheme covering all weapons when one clearly exists for handguns.

The court below also failed to consider properly Petitioners’ Second Amendment and New York Civil Rights Law challenge to the local law. It failed to: 1) analyze an infringement of a fundamental right; 2) apply any elevated standard of review; or 3) make Respondents carry their burden of establishing that the law is constitutional. This too was reversible error on all counts.

## ARGUMENT

### Point I

#### THE NASSAU HANDGUN BAN IS PREEMPTED

A. The Nassau Handgun Ban expressly conflicts with state law.

It would be hard to fathom a local law that more directly conflicts with State law than does the Nassau Handgun Ban. The local law says it is illegal for all Article 400 licensees to possess in Nassau certain guns that are legal for those licensees to possess under the Penal Law. The local law effectively nullifies the exemptions for illegal possession in Penal Law Article 265 by making Article 400 licenses invalid with respect to those guns. Nassau's local law thus inhibits the operation of the State's general laws by rendering Article 400 licenses nugatory in Nassau, and it also conflicts with the statewide registry of legal handguns maintained by the State Police.

Respondents wrongly assert that the "express conflict" or "inconsistency" prong of the preemption doctrine is inapplicable when a local law goes beyond State law by prohibiting something allowed, but not required, under State law, citing *New York State Club Assn. v. City of New York*, 69 N.Y.2d 211 (1987) and *Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 N.Y.2d 645 (1994). Brief for Respondents-Respondents ("Resp. Br.") at 10-11. The cases do not support Respondents' contention, and it has been rejected by the Court of Appeals. See *Jiovon Anonymous v. City of Rochester*, 13 N.Y.3d 35, 51-52 (2009),

discussed in Appellants' main brief at 18-19. Respondents also cite incompletely the Court of Appeal's explication in *New York State Club Assn.* of its earlier "inconsistency" holding in *Wholesale Laundry Bd. of Trade v. City of New York*, 17 A.D.2d 327 (1962).

*Wholesale Laundry* held that "where the extension of the principle of the State law by means of the local law results in a situation where what would be permissible under the State law becomes a violation of the local law, the latter law is unauthorized." 17 A.D.2d at 330. That holding is still the law in New York when the local law interferes with the operation of the State law. The Court of Appeals more recently explained that a local law is inconsistent with general law where the local law prohibits what would have been permissible under State law or imposes prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws. *New York State Club Assn.* 69 N.Y.2d at 217, 221. *See also Vatore*, 83 N.Y.2d at 649. Appellate authority post-dating *New York State Club Assn.* still holds that local legislation may be found "inconsistent" where there is a direct conflict with a State statute. *See, e.g., DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 95 (2001); *City of New York v. Job-Lot Pushcart*, 88 N.Y.2d 163, 169-70 (1996).

As discussed in Appellants' main brief and in the following section, the Nassau Handgun Ban is inconsistent with the Penal Law because it prohibits

permissible conduct under State law, and it interferes with the Penal Law's scheme of statewide handgun registration, and the statewide validity of licenses for possession, dealing, and gunsmithing of handguns.

Moreover, with respect to inconsistency, there need not even be an express conflict between State and local laws to render a local law invalid. *New York State Club Assn.*, 69 N.Y.2d at 217. The Court of Appeals made clear that conflict preemption exists where the Legislature has "evinced a desire that its regulations should pre-empt the possibility of varying local regulations" either explicitly or impliedly. *New York State Club Assn.*, 69 N.Y.2d at 217, 221-22. Both the explicit preemption language and the facts supporting field preemption (discussed in section D, *infra*) leave no room for doubt that the State Legislature intended that the Penal Law would preempt the possibility of varying local regulations.

B. The Nassau Handgun Ban is invalid for inconsistency.

The Nassau Handgun Ban is obviously inconsistent with State law. It prohibits what is permissible under State law. It is illegal under the local law for a Nassau firearm licensee to possess in his or her own home certain handguns that are legal to possess under State law. It is illegal under the local law for firearm licensees from other State counties to possess certain handguns that are legal to possess under State law when the licensees are present in or traveling through Nassau. It is illegal under the local law for State licensed firearm dealers to possess

certain handguns that are legal to possess under State law when the dealers are present in or traveling through Nassau. It is illegal under the local law for State licensed gunsmiths to possess certain handguns that are legal to possess under State law when the gunsmiths are present in or traveling through Nassau. These inconsistencies *alone* require invalidation of the local law. *New York State Club Assn.*, 69 N.Y.2d at 218 (“A finding of inconsistency alone would require invalidation of Local Law No. 63”).

It is also obvious that the Nassau Handgun Ban impermissibly inhibits the operation of the State’s general laws, *i.e.*, the Penal Law. *See New York State Club Assn.*, 69 NY2d at 217. Four basic examples of how the local law works clearly illustrate this interference with the Penal Law.

First, Petitioner Chwick is a Nassau resident with a valid Article 400 license to possess handguns. His pink Kel-Tec handgun is registered with the State Police<sup>1</sup> and on his license.<sup>2</sup> It is lawful under the Penal Law for him to possess his pink pistol in his home in Nassau, at shooting ranges in Nassau, or indeed anywhere

---

<sup>1</sup> All firearm transactions must be reported to the State Police. Penal Law § 400.00 (12). The State Police Pistol Permit Bureau holds records of every legal handgun transaction that takes place in the State and is a repository for the mandated “records of transaction” that accompany sales by gun dealers or between private citizens. Source: New York State Police website, “Firearms: Pistol Permit Bureau - New York State repository since 1936” (<http://www.troopers.state.ny.us/firearms/>), accessed Feb. 2, 2002.

<sup>2</sup> “Such license shall specify the weapon covered by calibre, make, model, manufacturer’s name and serial number.” Penal Law § 400.00 (7).

else in the State other than New York City. The Nassau local law directly interferes with the rights conferred by the Penal Law by criminalizing Mr. Chwick's possession in Nassau. The local law also conflicts with the registry of handguns maintained by the State Police, which considers his pink handgun to be legally possessed.

Second, the Penal Law authorizes a licensed firearm dealer in Nassau to maintain colored handguns in inventory, and sell them to law-enforcement officers and Article 400 licensees. The dealer is also authorized by State law to purchase colored handguns from these individuals. The local law directly interferes with the rights conferred by the Penal Law by criminalizing the dealer's possession of, and commerce in, colored handguns.

Third, a licensed gunsmith in Nassau is authorized by the Penal Law to receive colored handguns from any lawful possessor in the State<sup>3</sup> to perform engraving, customizing, refinishing or repairs. The local law directly interferes with the rights conferred by the Penal Law by criminalizing the gunsmith's possession of, and commerce in, colored handguns.

Fourth, consider a woman residing in Suffolk County with a purple handgun registered to her Suffolk-issued license. The Penal Law gives her the right to

---

<sup>3</sup> A State licensed gunsmith may also receive shipments of handguns from anywhere in the country as long as the gunsmith is licensed by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives and complies with federal law. *See generally*, 18 U.S.C. 923; 27 C.F.R. § 478.11.

lawfully possess her purple handgun at a competition held at a Nassau shooting range. The local law directly interferes with the right conferred by the Penal Law by criminalizing her possession when she enters Nassau.

If the Nassau Handgun Ban is not preempted, the implications for interference with the general law's statewide licensing and registration scheme are dire and far reaching. It is virtually certain that other counties will begin enacting their own local handgun bans and regulations.<sup>4</sup> This will create a regulatory crazy quilt, leaving licensees who believed they had a *statewide* license open to myriad criminal charges by simply traveling from one county to another. While each county-issued license says on its face that it is not valid in New York City,<sup>5</sup> there is no warning that it is not valid in Nassau, or in any other county passing its own local ban in the future. Licensees will eventually need a regularly updated guidebook to the local laws in each county in the State that restricts or invalidates their license rights in order to avoid fines and incarceration.

---

<sup>4</sup> For example, a bill similar to the Nassau Handgun Ban was introduced into the Suffolk Legislature in 2008. Suffolk County Resolution No. 1506-2008 ("A Local Law To Prohibit Deceptively Colored Handguns"). Appellants understand that action on this bill has been tabled pending resolution of this action.

<sup>5</sup> The form of county-issued licenses is set by the State Police pursuant to Penal Law § 400.00 (7) and states, "This license is issued under the following conditions: . . . 2. If issued outside of New York City, not valid to carry a weapon in New York City unless approved by the police commissioner of that city."

The Legislature certainly did not create the statewide regulatory scheme envisioning that 56 counties and New York City would be allowed to create a hodgepodge of 57 sets of different handgun laws, each with its own penalties, each nullifying the statewide handgun license, and each potentially causing conflicts that degrade the integrity of the State's registry of legal handguns.

The important public policy goals of ensuring that handgun laws continue to be clearly defined and fairly implemented require preservation of: 1) the Penal Law's uniform definition of legal and illegal handguns; 2) the accuracy and integrity of the State registry of legal handguns; 3) the statewide validity of Article 400 licenses; and 4) the uniform, statewide scheme for prohibition of handguns, and the exemptions thereto. These four prongs of the State handgun regulatory scheme are essential to prevent arbitrary or inconsistent enforcement, or a chilling effect on licensees who do not know what actions are punishable depending on their location.

The chaos that would ensue from allowing local handgun laws is doubtless why the State Legislature created such a comprehensive, detailed regulatory scheme for handguns. In *Vatore*, the Court of Appeals found that where, as here, a local law is inconsistent because it imposes greater restrictions than does State law, "the dispositive issue is whether the Legislature in enacting [the State law] intended to preempt the field of regulation ... thereby precluding any further local

regulation in this area.” 83 N.Y.2d at 649. The Penal Law’s detailed, statewide scheme of handgun prohibition, licensing and registration, and the express preemption of local laws pertaining to the licensing of firearm possession, dealers, and gunsmiths, makes the Legislature’s intent to preempt manifest.

C. The Nassau Handgun Ban is expressly preempted.

It is not inconsistency alone that requires invalidation of the Nassau Handgun Ban. The Legislature’s intent to preempt local regulation of the validity of licenses could not be more explicit: “Any license issued pursuant to this section shall be valid notwithstanding the provisions of any local law or ordinance.” Penal Law § 400.00 (6). The Nassau Handgun Ban violates this explicit preemption by nullifying the validity of licenses for possession and dealing of firearms, and gunsmiths, with respect to certain handguns permitted by State law.

Respondents wrongly argue that the Legislature only intended to preempt local laws regarding the “*licensing of individuals.*” Resp. Br. at 13 (emphasis in original). The express preemption does apply to procedures, rules, and qualifications for the issuance of licenses. However, and as Respondents necessarily concede, the express preemption also extends to the *validity* of licenses statewide. Resp. Br. at 12 (“an individual licensed to own firearms in one county of the state must be considered licensed to own firearms in all counties.”) The validity

of a license is equivalent to lawful possession under Article 265, and a law that preempts invalidation of a license necessarily preempts a ban on possession.

Respondents' concession that the Penal Law's express preemption extends to the validity of licenses is fatal to their case because the local law nullifies licenses from other counties with respect to colored handguns when the licensees enter Nassau. That is, under the Nassau Handgun Ban, an individual licensed in one county of the State is *not* considered licensed in Nassau when he or she possesses a colored handgun. The local law thus violates the express preemption contained in Penal Law § 400.00 (6).

D. The State Penal Law occupies the field of handgun regulation.

Respondents completely fail to contest the fact that no local law banning any kind of handgun, or even restricting the validity of state handgun licenses, has *ever* been sustained by a New York court. This simple fact, considered with the fact that State law has banned handgun possession without a license for over 100 years, is strong evidence that State law occupies the field of handgun regulation and local handgun laws are preempted. The State's Legislature and Courts apparently recognize this fact and, until now, localities have respected it.

The police power conferred by the constitutional home rule provision is preempted: 1) where a local law is inconsistent with constitutional or general law; and 2) when the Legislature has preempted the area of regulation. *New York State*

*Club Assn.*, 69 N.Y.2d at 217. 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 the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area. *Id.* See also *Jiovon Anonymous*, 13 N.Y.3d at 51-52 (2009).

Preemptive intent may be inferred from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme. *Vatore*, 83 N.Y.2d at 650. For example, in *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372 (1989), the detailed provisions of State law explicitly limiting the amount of taxation for highway purposes and the manner of expenditure of such funds constituted a preemptive legislative scheme grounded in the need to safeguard the public fisc without distinction between localities. *Vatore*, 83 N.Y.2d at 650, citing *Albany Area Bldrs.*, 74 N.Y.2d at 378-379. Similarly, the broad and detailed regulation of handguns – places and manners of possession, disposal, licensing, registration, dealing, gunsmithing, and recordkeeping – constitute a preemptive legislative scheme grounded in the need to have statewide uniformity of handgun laws and penalties without distinction between localities.<sup>6</sup>

---

<sup>6</sup> The only locality where licenses are not valid is New York City, unless the license is issued within that city. Penal Law § 400.00 (6). That explicit exemption is yet another demonstration of the Legislature's intent to reserve to itself the power to modify the scope of statewide applicability of handgun laws and statewide validity of licenses.

Respondents are simply wrong to assert that preemption of firearm laws is narrow and limited to “licensing of individuals who wish to possess handguns.” Resp. Br. at 11. In fact, both Penal Law Article 265, regulating handgun possession, and Article 400, regulating the licensing of handgun possession, the registration of handguns, the licensing of dealers, and the licensing of gunsmiths, contain numerous exceptions for localities that establish conclusively that the State Legislature intended to reserve to itself the power to regulate all aspects of handguns. These exceptions show that localities and the State Legislature have traditionally recognized that the Penal Law must address any local variation in law bearing upon both the possession and licensing of handguns, as well as practices followed by dealers and gunsmiths. For example:

- One is required to first notify the state police when disposing of a firearm, except in New York City, Nassau and Suffolk, where one must notify a different authority. Penal Law § 265.10 (7).
- Some localities are granted differing requirements for how a person may voluntarily surrender a handgun to the authorities exempt from the crime of illegal possession. Penal Law § 265.20 (a)(1)(f).
- New York City required a special exemption to allow it to regulate the transportation of handguns into the city by federally licensed firearm

manufacturers differently than does the rest of the State. Penal Law §§ 265.20 (9-a), (b).

- While the “licensing officer” throughout the state is a judge or justice of a court of record, there are exceptions naming the police commissioners in New York City, Nassau and western Suffolk, and the sheriff in eastern Suffolk, the licensing officer in those localities. Penal Law § 265.00 (10).
- Westchester required amendments to the Penal Law to allow it to impose completion of a firearm safety course as a prerequisite for issuance of a firearm license. Penal Law §§ 400.00 (1)(f), (4-b).
- New York City, Nassau, Suffolk and Westchester required special authorization to make licenses issued in those localities renewable, as compared with the lifetime licenses issued by other counties. Penal Law § 400.00 (10).
- New York City was required to obtain explicit authorization to issue license applications different from the rest of the State. Penal Law §§ 400.00 (3), (7).
- Nassau, Suffolk and New York City were required to have explicit authorization to file granted applications differently from the rest of the State [Penal Law § 400.00 (5)], to issue amendments to licenses

differently from the rest of the State, [Penal Law § 400.00 (9)], and to revoke licenses differently from the rest of the State [Penal Law § 400.00 (11)].

- Different recordkeeping requirements for gunsmiths in Nassau, Suffolk and New York City required explicit authorization by the State Legislature. Penal Law § 400.00 (12).
- Nassau, Suffolk and New York City required explicit authorization by the State to charge licensing fees different from the rest of the State. Penal Law § 400.00 (14).

It is irrational and historically inaccurate to attempt to separate the prohibitions on firearm possession in Penal Law Article 265 with the licensing scheme in Article 400. At their inception, the State's laws banning handgun possession and licensing were unified. *See, e.g.*, 1905 Laws of NY, ch. 92, § 2, at 129-30; 1911 Laws of NY, ch. 195, § 1, at 443 (codifying Penal Law § 1897, ¶ 3); *see also People ex rel. Darling v. Warden of City Prison*, 154 A.D. 413, 423 (1st Dept. 1913) (“The Legislature assumed that the obligation to procure the permit would be a most effective preventive to the possession of such weapon by the criminal classes.”)

While the latest major revision to the Penal Law physically separated weapons crimes and licensing into Articles 265 and 400, respectively, those

articles remain inextricably intertwined to this day, and form two essential parts of the same regulatory scheme for handguns. For example, Article 265 contains the definitions that apply throughout Article 400. *See* Penal Law § 265.00 (“As used in this article and *in article four hundred*, the following terms shall mean and include:”) (emphasis supplied). Article 265 contains exemptions that apply to holders of Article 400 licenses. *See* Penal Law §§ 265.20 (3), (9-a). And Article 265 allows an Article 400 licensee to possess the pistols of another licensee when both are present at a qualified shooting range. *See* Penal Law § 265.20 (7-a).

The Article 400 licensing scheme could not exist, and its terms would remain undefined, but for the existence of Article 265. Similarly, numerous exemptions and provisions in Article 265 are meaningless without the existence of Article 400 licenses. That the Legislature at some point needed to move the prohibition laws and licensing laws into separate but interrelated articles is evidence only that the handgun regulatory scheme had, over time, grown increasingly intricate and detailed – not that prohibition and licensing had become separate schemes. Indeed, the fact that the Legislature could not completely separate them – each article heavily depends upon and refers to the other – shows that the two articles together form the unified scheme for regulating handguns into which local laws may not intrude.

Given the detailed, comprehensive nature of the Penal Law's scheme for regulating handguns, Respondents are again left only with the irrelevant argument that courts have upheld local regulation of "weapons" banned by Article 265. What Respondents tellingly cannot assert is that any State court has ever upheld a local *handgun* regulation. This is because, while Article 265 generally prohibits the possession of various *weapons*, it is only with respect to *handguns* (and arguably, since 2000, "assault weapons") that the State has enacted a comprehensive and detailed regulatory scheme.

Finally, Respondents are incorrect that *People v. Kears*e, 289 N.Y.S.2d 346 (Syracuse City Ct. 1968), a decision invalidating a local handgun law as preempted, is somehow "outdated" and did not find field preemption. Resp. Br. at 16. As an initial matter, *Kears*e clearly involved conflict preemption, since the Syracuse law banning handgun possession by licensees conflicted with the express preemption language in the State licensing statute. There is nothing in subsequent conflict prohibition cases inconsistent with the holding in *Kears*e that makes its holding outdated. Indeed, there is no reason not to believe that the court would have found that the Syracuse law inhibited the operation of the State's general laws, had that standard been relevant at the time.

However, the *Kears*e court also found field preemption. The court held that the Syracuse law was preempted because "the Council of the City of Syracuse was

without power to *prohibit* the carrying or possessing of a firearm *legally licensed* by the State of New York and no such exception is made in the ordinance.” 289 N.Y.S.2d at 352 (emphasis in original). Had there only been a conflict between the terms of the local law and State law, the court could not have reasonably found that the local legislature was powerless to pass any law prohibiting the carrying or possession of licensed handguns. Instead, the local government was broadly “without power” to prohibit licensees from possessing handguns necessarily because the field of handgun regulation is occupied by the State.

Similarly, the Nassau legislature was without power to enact any prohibition on handgun possession that applies to Article 400 licensees. In doing so, Nassau impermissibly legislated in an area that the State has reserved to itself.<sup>7</sup> Allowing Nassau to criminalize any handgun possession by licensees would be a radical encroachment on the State’s regulatory scheme for handguns and open the floodgates for similar local laws that would eviscerate the uniform statewide regulatory structure.

A finding of preemption by this Court is essential to preserve the integrity of the statewide handgun regulatory scheme in the Penal Law.

---

<sup>7</sup> While Nassau may not criminalize handgun possession for licensees, it may still restrict the ability of licensees to possess colored handguns. For example, acting in his administrative discretion as licensing officer, the Nassau Police Commissioner could arguably limit the place of licensees’ possession of colored handguns to their homes and at shooting ranges, so as to avoid the claimed potential confusion with a toy gun by a police officer during a street encounter.

## Point II

### **THE SECOND AMENDMENT AND NEW YORK CIVIL RIGHTS LAW PROHIBIT ANY FORM OF HANDGUN BAN**

A. *Heller*<sup>8</sup> applies to all handgun bans, not only “complete” handgun bans.

The Nassau Local Law cannot possibly be considered constitutional, founded, as it is, on the theory specifically rejected in *Heller* as inconsistent with the Second Amendment – that common firearms might be banned based merely on the government’s assessment that their possession is not in the public interest. It is simply irrelevant for the purpose of constitutional analysis that, as Respondents argue, the local law “is nothing approaching a complete ban.” Resp. Br. at 21.

*Heller* may have considered the Second Amendment in context of a statute that effectively constituted a complete handgun ban, but nothing in its reasoning limited its holding only to complete bans. Instead, protection of handguns under the Second Amendment attaches as long as the banned guns are not more “dangerous and unusual” than other handguns. *Heller*, 128 S. Ct. at 2817.

Respondents further argue that the ban is something less than it is: “the local law merely regulates [handguns’] appearance.” Resp. Br. at 21. The law does not “merely regulate appearance,” as if by operation of law a gun changes its color in

---

<sup>8</sup> *District of Columbia v. Heller*, 554 U.S. \_\_\_, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 2008 U.S. LEXIS 5268, 76 U.S.L.W. 4631 (2008). Respondents do not contest that *Heller* is applicable in New York through New York Civil Rights Law Article 2, § 4.

accordance with the government's desires. And nothing in the record supports the notion that changing the color of a gun is within the skills or means of the average licensee. What the local law does is declare that possession of certain types of handguns protected by the Second Amendment is absolutely banned.

The Nassau Handgun Ban plainly prohibits possession in the home of a subset of the protected class of arms known as handguns in violation of the Second Amendment. As discussed below, it is immaterial for Second Amendment purposes whether the ban is based on appearance or some other criteria, as long as the banned handguns are not more "dangerous and unusual" than other handguns.

B. Handguns are protected by the Second Amendment regardless of color.

Respondent Nassau County has itself recently taken the exact same position before the Supreme Court of the United States that Appellants take in this case. When considering whether a ban is allowed by the Second Amendment, "The key to the constitutional analysis is whether the arms in question are 'in common use' and are 'typically possessed by law abiding citizens for lawful purposes.'" Brief in Opposition by the Nassau County Attorney on behalf of Respondent in *Maloney v. Rice*, U.S. Sup. Ct. No. 08-1592 (filed Aug. 28, 2009) ("*Maloney* Brief") at 11.<sup>9</sup>

Nassau correctly asserts in *Maloney* that "weapons 'in common use' fall within the Second Amendment's protection," *Maloney* Brief at 13, and that

---

<sup>9</sup> Available at [http://www.scotusblog.com/wp-content/uploads/2009/09/08-1592\\_bio.pdf](http://www.scotusblog.com/wp-content/uploads/2009/09/08-1592_bio.pdf).

handguns are protected by the Second Amendment because “handguns are a weapon in common use.” *Id.* at n. 10. Nassau’s position before the Supreme Court correctly treats handguns as a class, without distinction between variations in color or other criteria, since the Supreme Court made no such distinction in *Heller*.

Nassau cannot now argue here that some handguns are not in common use because of their color. It is not part of the record in this case, not a legislative finding, and not properly subject to judicial notice. Such a position would also conflict with the position taken by Nassau in *Maloney*.

In *Heller*, the Supreme Court – which was doubtless aware that handguns come in a variety of configurations, sizes, and colors – did not find that handguns as a class are “dangerous and unusual weapons,” or “sophisticated arms that are highly unusual in society at large,” such that a ban on their possession would pass constitutional muster. 128 S. Ct. at 2817. Handguns are protected under the Second Amendment as a class of arms that cannot be banned either in whole or in part – even if Nassau takes the position here that some of them are excessively dangerous because of their color.

The Second Amendment would not prohibit a ban on weapons which do not meet the historic legal definition of “arms” as used in the Second Amendment – “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” *Heller*, 128 S. Ct. at 2791 (citing 1 A New and

Complete Law Dictionary (1771); N. Webster, American Dictionary of the English Language (1828) (reprinted 1989)). But handguns of any color squarely fit within this historic legal definition of protected “arms,” and are thus protected.

Appellant Chwick’s pink pistol may not fit within Respondents’ criteria for permissible handguns, but according to the United States Supreme Court, it fits within the Second Amendment.

C. Strict scrutiny is the proper standard of review.

Respondents argue that strict scrutiny is not necessarily the proper standard of review, but they cannot contest that *Heller* requires an elevated standard of review and that the court below failed to review Appellants’ Second Amendment challenge to the local law under any form of elevated standard. In fact, the court below failed to analyze *at all* whether the Nassau Handgun Ban is unconstitutional because it infringes a fundamental right, which was raised in the Petition. R59-60, 233-236. This failure alone warrants reversal of the decision below and remand for review of the statute under a proper standard of review, if the law is not invalidated on other grounds.

Although *Heller* did not announce a specific standard of review for cases raising Second Amendment concerns, the Supreme Court did conclude that “[b]y the time of the founding, the right to have arms had become fundamental for English subjects.” *Heller*, 128 S. Ct. at 2798 (citation omitted). The Supreme Court

thus specifically rejected rational basis as the standard of review for Second Amendment claims, and strongly suggested that the standard of review would be a rigorous one:

Obviously, [rational basis] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.

*Heller*, 128 S. Ct. at 2818 n. 27 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938)).

While Respondents point to lower State court decisions that have touched upon Second Amendment challenges, they do not claim that any of those decisions squarely confronted the issue of an Equal Protection challenge to a law claimed to violate a fundamental right. And Respondents conveniently ignore that the New York Court of Appeals requires that laws impacting fundamental rights – which the United States Supreme Court in *Heller* said includes the right to possess handguns – is subject to strict scrutiny. *See, e.g., Jiovon Anonymous*, 13 N.Y.3d at 45 (an adult’s right to freedom of movement “is fundamental and an ordinance interfering with the exercise of such a right would be subject to strict scrutiny.”) Though freedom of movement has long been found to be within the ambit of the Privileges and Immunities Clause of the Constitution, *Corfield v. Coryell*, 6 Fed.

Cas. 546 (Circuit Court, E.D. Penn. 1823), it is no more fundamental than the right to keep and bear arms explicitly protected by the Second Amendment.

Federal law is in accord that strict scrutiny is appropriate where the law challenged interferes with a fundamental right, and the burden is on Respondents to prove the law can withstand strict scrutiny. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (“classifications that . . . impinge upon the exercise of a ‘fundamental right’” are presumptively unconstitutional unless the government can demonstrate that the law satisfies strict scrutiny (footnote omitted)). Respondents failed to meet their burden both before the court below and again here.

D. The Nassau Handgun Ban cannot survive strict scrutiny.

Respondents argue – almost in passing, and unconvincingly – that the Nassau Handgun Ban could survive strict scrutiny. Respondents claim that the law must be “narrowly tailored” because “it does not ban all guns . . . but lists a narrow and carefully considered list of deceptive colors that would cause handguns to be easily confused with toys.” Resp. Br. at 24-25. Respondents’ contention is factually deficient.

First, there is nothing in the record to support the claim that a real handgun in a banned color is any more likely to be confused with a toy than a real handgun

in an exempt color.<sup>10</sup> Next, there is nothing in the record to support the notion that the colors listed in the ban were “carefully considered” by the Nassau legislature. In fact, the lack of any careful consideration is shown by the legislature’s changing of the local law to remove brown, blued and gold-plated handguns upon the filing of the underlying Petition.<sup>11</sup>

Respondents would have this Court believe that the mere allegation of facts in the Petition was sufficient to outweigh the Nassau legislature’s “careful consideration” of the colors listed in the local law. Instead, the rapid amendment in the face of a legal challenge (including a stipulated injunction on enforcement, R9, 214-217) shows that the original list of colors was, at best, ill-considered and, at worst, arbitrary. The bill enacting the revised local law even concedes that the law as originally written carelessly applied to “certain types of handguns . . . which are unlikely to be mistaken for toys, and which therefore should be permitted.” R207.

Finally, Respondents do not even attempt to affirmatively meet their burden of establishing that the Nassau Handgun Ban uses the least restrictive means of

---

<sup>10</sup> Respondents misstate the record when they claim that the Nassau Handgun Ban was based on a legislative finding that “real guns could easily be mistaken for toys because they were painted in nontraditional, *usually bright colors*.” Resp. Br. at 5 (emphasis supplied). In fact, the record shows that the Nassau legislature simply equated “non-traditional handgun colors” with toys, R71, and the definition of “deceptively colored handgun” (R72, 207) does not address “bright colors” in any way.

<sup>11</sup> The Petition was filed on July 23, 2008 (R37) and the law was amended less than two months later on September 22, 2008 (R206).

accomplishing the stated goal. So, they instead point to the less-restrictive New York City law banning toys that look like real guns, and claim that it “does not address the confusion generated by the converse – real guns that look like toy guns – and so does not accomplish the same goal.” Resp. Br. at 25. But the Nassau law does not accomplish that goal either because real guns cannot readily be confused with toys, regardless of the guns’ color.

Toy guns are required by federal law to have a permanently affixed blaze orange plug inserted in the barrel. *See* 15 C.F.R. § 1150.3(a). Real guns do not have blaze orange plugs in their barrels (and would not work particularly well if they did). Thus, a real gun that is colored pink or purple obviously differs significantly from a toy gun because the real gun lacks the blaze orange plug. A law like the New York City toy gun law, in conjunction with the federal law, would achieve the same goals as sought by the Nassau Handgun Ban, and do so by less restrictive means. The local law thus fails strict scrutiny.

## CONCLUSION

The court below made numerous, consequential errors of law, and also failed to properly evaluate Petitioners' constitutional challenge. The judgment of the court below should be reversed.

Respectfully submitted,

---

Robert P. Firriolo  
Duane Morris LLP  
1540 Broadway  
New York, NY 10036-4086  
(212) 692-1091

Attorney for Petitioners-Appellants

**CERTIFICATE OF COMPLIANCE WITH 22 NYCRR § 670.10.3(f)**

The foregoing brief was prepared on a computer using Times New Roman Font, 14 point size for text, 12 point size for footnotes, with double spaced text except as to quotations more than two lines long, headings and footnotes, which are single-spaced. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 5,554, as counted by the word processing program.