

Challenging Pennsylvania's Firearm Preemption Law as a Public Health Danger: The Case of Philadelphia

Sami Jarrah, Benjamin Geffen, Giselle Babiarz, Benjamin Hartung, Amy Cook, and Megan Todd

Keywords: Preemption, Violence Prevention, Gun Violence, Policy Evaluation, Legal Analysis

Abstract: Firearm violence has soared in American cities, but most states statutorily preempt municipal firearm regulation. This article describes a unique collaboration in Philadelphia among elected officials, public health researchers, and attorneys that has led to litigation based on original quantitative analyses and grounded in innovative constitutional theories and statutory interpretation.

Introduction

Firearm violence is an urgent public health problem. Mortality from firearm injuries has increased recently, particularly since the COVID-19 pandemic began, erasing progress made since the early 1990s.¹ In Philadelphia, Pennsylvania, as in many U.S. urban centers, the burden of firearm mortality has disproportionately fallen on young Black men.² In 2021, the fatal shooting rate among Black men in Philadelphia was 129 per 100,000 population, nearly four times the citywide rate (33 per 100,000).³

Firearm regulation is an evidence-based approach to reducing firearm mortality. Some studies indicate that an 11% reduction in gun deaths could be achieved

by implementing a more restrictive gun policy regime.⁴ However, Pennsylvania has explicitly prohibited — in legal terms, “preempted” — municipalities from enacting or enforcing local regulations related to firearms. With the benefit of a novel analysis quantifying the large number of lives that local firearm regulations could save, Philadelphia has embarked on a collaborative legal effort to reclaim its power to protect residents from firearm violence.

Quantifying the Effect of Preemption on Firearm Mortality

Quantifying the effect of preemption on firearm mortality is a key component of Philadelphia's challenges to preemption. Following past literature,⁵ epidemiologists from the Philadelphia Department of Public Health trained a multivariate regression model, using 2001–2020 data from 50 states, to estimate the relationship between firearm mortality and the number of firearm regulations. We relied on data from CDC WONDER⁶ and Boston University's Firearm State Laws database⁷ and controlled for demographic characteristics including unemployment and poverty rates, and population composition by race/ethnicity and age group.

Together with policy surveillance experts from the Center for Public Health Law Research at Temple University (CPHLR), we adapted CPHLR legal epidemiology methods to identify firearm-related ordi-

Sami Jarrah, M.P.H., is a Vice Dean at the Columbia University Mailman School of Public Health. **Benjamin Geffen, J.D.**, is a Senior Attorney at the Public Interest Law Center. **Giselle Babiarz, M.P.H.**, is a Research and Data Scientist at the Philadelphia Department of Public Health. **Amy Cook, J.D.**, is a Senior Law and Policy Analyst at Temple University Center for Public Health Law Research. **Benjamin Hartung, J.D.**, is a Public Policy Advisor at the Philadelphia Department of Public Health. **Megan Todd, Ph.D.**, is Chief Epidemiologist at the Philadelphia Department of Public Health.

nances that could have existed in a hypothetical Philadelphia not subject to preemption by the Pennsylvania legislature. We searched legislative records and compiled legal text for ordinances between 2001 and 2020 that were related to firearms, firearm accessories, and ammunition. This list was extensive because, despite preemption, Philadelphia City Council continued to pass ordinances addressing firearms. Many ordinances included trigger language keeping the ordinance from taking effect until authorized by Pennsylvania's legislature. Next, attorneys and law students performed an iterative process of coding and quality control to categorize the ordinances by subject using MonQcle, a software application from CPHLR. We identified 26 ordinances that could have been enforceable in Philadelphia but for preemption. This approach assumes (1) the 26 ordinances passed by Council would be identical in our hypothetical, un-preempted Philadelphia, and (2) no successful legal challenges to these ordinances.

Finally, we used our model to estimate firearm mortality based on the number of firearm ordinances that existed in Philadelphia between 2001 and 2020, and to estimate mortality based on the number of firearm regulations that could have existed in our hypothetical, un-preempted Philadelphia over the same period. Our model estimated that 541 firearm deaths, or 1.8 deaths per 100,000 population per year, could have been prevented if Philadelphia had been able to pass and enforce firearm ordinances.

New Partnerships Among Public Health Practitioners, Elected Officials, and Attorneys

Given this context of high levels of morbidity and mortality associated with firearm violence, government leaders in Philadelphia have pursued a three-pronged strategy to confront Pennsylvania's preemption law.

First, the City of Philadelphia, through its Departments of Public Health and Law, convened a team of policy experts, epidemiologists, and partnership strategists. That team formalized a partnership across City departments and with the Public Interest Law Center, a non-profit organization that uses impact litigation to promote civil rights in Pennsylvania. Through strategy meetings and legal analyses, the team identified litigation approaches for challenging Pennsylvania's preemption statute. Further, the Public Health Department characterized in detail the harms Philadelphia residents suffer because of preemption of firearm regulation.

Second, senior officials in City departments obtained the support of elected officials, including principally

Mayor James F. Kenney and City Council President Darrell L. Clarke. After a series of briefings, and galvanized by surging firearm violence, these leaders became strong supporters of litigation.

Finally, the team invited broader participation, first of like-minded non-profit entities, and later of other governmental entities across the state. CeaseFirePA, a non-profit organization advocating for firearm violence prevention measures, joined the coalition. Hogan Lovells U.S. L.L.P., a major private law firm, provided *pro bono* legal support. Once litigation was underway, national gun-safety organizations filed *amicus* briefs. Other *amici* included numerous Pennsylvania municipalities; doctors who treat gun-violence victims in Philadelphia hospitals; and the International Municipal Lawyers Association.

With public-health evidence in hand and a diverse coalition, Philadelphia filed an enforcement action under a long-dormant firearm ordinance in November 2019, and then a challenge to the constitutionality of Pennsylvania's preemption statute in October 2020.

Legal Challenges to Pennsylvania's Preemption Statute

At first glance, carveouts in the text of Pennsylvania's firearm preemption statute appear to leave room for a variety of local ordinances:

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.⁸

However, a series of decisions by the intermediate-level Commonwealth Court has effectively rewritten the statute to magnify its preemptive force:

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.⁹

Two appeals arising from Philadelphia's coalition efforts challenge this status quo. In *Crawford v. Commonwealth*, Philadelphia and ten relatives of gun homicide victims contend that the preemption statute violates the state constitution by blocking Phila-

Philadelphia from enacting three types of ordinances: (1) a requirement for a permit to purchase a firearm, (2) a limit of one firearm purchase per month, and (3) procedures for extreme risk protection orders. All three types of interventions are empirically proven to reduce gun violence.¹⁰ The lawsuit asserts that the preemption statute amounts to a “state-created danger” that violates substantive due process by exposing residents of high-crime neighborhoods to gun violence, and it seeks to enjoin enforcement of the statute. A plaintiff

to revisit the issue, and Philadelphia’s petition for allowance of appeal is pending in that court.

Several other active lawsuits likewise focus on the text of the preemption statute. After a 2018 mass shooting at a synagogue, Pittsburgh banned the use of assault weapons and large-capacity magazines in certain public places. The Commonwealth Court rejected Pittsburgh’s argument that regulating the “use” of firearms falls outside “ownership, possession, transfer or transportation” and is thus not preempted.

A plaintiff alleging a state-created danger must prove four elements: (1) the harm was foreseeable and fairly direct, (2) a state actor acted with a degree of culpability that shocks the conscience; (3) the plaintiff was a foreseeable victim or member of a discrete class of persons at risk; and (4) the state actor affirmatively exposed the plaintiff to the risk.

alleging a state-created danger must prove four elements: (1) the harm was foreseeable and fairly direct, (2) a state actor acted with a degree of culpability that shocks the conscience; (3) the plaintiff was a foreseeable victim or member of a discrete class of persons at risk; and (4) the state actor affirmatively exposed the plaintiff to the risk. The Commonwealth Court dismissed the case by a 3–2 vote in May 2022, holding, *inter alia*, that the state-created-danger doctrine cannot be used to invalidate legislation.¹¹ The Pennsylvania Supreme Court heard oral argument on appeal in September 2023.

While *Crawford* is a constitutional challenge, another lawsuit reflects an effort to enforce gun violence prevention measures the statute arguably does not preempt. In *City of Philadelphia v. Armstrong*, Philadelphia seeks to enforce an ordinance requiring the owner of a firearm to report its loss or theft to the police within 24 hours. A gun recovered at a crime scene is frequently traced back to a straw purchaser who, when contacted by authorities, falsely claims the gun had been lost or stolen. Reporting requirements neutralize this cover story and have a proven record of decreasing the availability of black-market firearms.¹² Philadelphia argues in *Armstrong* that its reporting requirement is not preempted because it does not regulate “ownership, possession, transfer or transportation” of firearms. The trial court agreed with the City, but the Commonwealth Court reversed.¹³ A concurring opinion urged the Pennsylvania Supreme Court

However, three concurring judges urged the Pennsylvania Supreme Court to reconsider the holding.¹⁴ As in *Armstrong*, Pittsburgh’s pending petition to appeal asks the Pennsylvania Supreme Court to overturn Commonwealth Court precedents that have converted the textually limited preemption statute into a “field preemption” statute that eradicates all local power to regulate firearms.

Two other active cases test the scope of preemption in Pennsylvania. The Commonwealth Court upheld a Philadelphia ordinance prohibiting the manufacture, sale, and transfer of 3D-printed firearm components, finding that the preemption statute covers “firearms, ammunition [and] ammunition components” but not “firearm component parts.”¹⁵ A petition for allowance of appeal is pending in the Pennsylvania Supreme Court. The other case involves a Philadelphia executive order banning firearms in recreation centers and playgrounds. The trial court initially rejected Philadelphia’s argument that the preemption statute does not apply when the City acts in its capacity as a property owner, but on procedural grounds the Commonwealth Court has remanded the case for further consideration.¹⁶

Conclusion

Most states preempt local firearm regulations. Philadelphia’s recent experience shows that preemption’s impact on mortality can be quantified using public-health analytical techniques; that challenges to preemption can generate broad coalitions including local

officials, outside attorneys, and advocacy organizations; and that numerous statutory and constitutional legal theories are available to challenge preemption's stranglehold on local public-safety measures. The outcome of litigation in Pennsylvania remains uncertain, but regardless of how these cases resolve, public health experts and legal practitioners in other preemption states should consider Philadelphia's efforts as a model.

References

1. C.A. Rees et al. "Trends and Disparities in Firearm Fatalities in the United States, 1990-2021," *JAMA Network Open* 5, no. 11 (2022): 1-15.
2. Rees et al., *supra* note 1; M. Todd and A. Scheeres, 2022: "Excess Mortality from Non-COVID-19 Causes During the COVID-19 Pandemic in Philadelphia, Pennsylvania, 2020-2021," *American Journal of Public Health* 112, no. 12 (2022): 1800-1803.
3. *PhilaStats*, Philadelphia Department of Public Health, available at <<https://philadelphiapublichealth.shinyapps.io/philastats/>> (last visited Nov. 21, 2023).
4. P. Sharkey and M. Kang, "The Era of Progress on Gun Mortality: State Gun Regulations and Gun Deaths from 1991 to 2016," *Epidemiology* 34, no. 6 (2023): 786-792; T.L. Schell et al., "Changes in Firearm Mortality Following the Implementation of State Laws Regulating Firearm Access and Use," *Proceedings of the National Academy of Sciences* 117, no. 26 (2020): 14906-14910.
5. Eric W. Fleegler et al., "Firearm Legislation and Firearm-Related Fatalities in the United States," *JAMA Internal Medicine* 173, no. 9 (2013): 732-740.
6. *Underlying Cause of Death, 1999-2020 Request*, Centers for Disease Control and Prevention, available at <<http://wonder.cdc.gov/ucd-icd10.html>> (last visited Nov. 21, 2023).
7. M. Siegel, *State Firearm Laws Database, 1991-2020*, *State Firearms Laws*, available at <<https://mail.statefirearmlaws.org/>> (last visited Nov. 21, 2023).
8. 18 Pa. Cons. Stat. § 6120(a); see also 53 Pa. Cons. Stat. § 2962(g) (applicable to local governments other than Philadelphia).
9. E.g., *Clarke v. House of Representatives*, 957 A.2d 361 (Pa. Commw. Ct. 2008); *NRA v. City of Phila.*, 977 A.2d 78 (Pa. Commw. Ct. 2009).
10. E.g., B. Kalesan et al., "Firearm Legislation and Firearm Mortality in the U.S.A.," *Lancet* 387, no. 10030 (2016): 1847-1855; D.S. Weil & R.C. Knox, "Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms," *JAMA* 25, no. 22 (1996): 1759-1761; A.J. Kivisto & P.L. Phalen, "Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981-2015," *Psychiatric Services* 69, no. 8 (2018): 855-862.
11. 277 A.3d 649 (Pa. Commw. Ct. 2022).
12. E.g., C.K. Crifasi et al., "The Initial Impact of Maryland's Firearm Safety Act of 2013 on the Supply of Crime Handguns in Baltimore," *RSF: The Russell Sage Foundation Journal of the Social Sciences* 3, no. 5 (2017): 128-140.
13. 271 A.3d 555 (Pa. Commw. Ct. 2022).
14. *Firearm Owners Against Crime v. City of Pittsburgh*, 276 A.3d 878 (Pa. Commw. Ct. 2022) (*en banc*).
15. *Gun Owners of Am. v. City of Phila.*, A.3d, 2024 WL 648720, No. 1069 CD 2022 (Pa. Commw. Ct. Feb. 16, 2024).
16. *Gun Owners of Am. v. City of Phila.*, 308 A.3d 401 (Pa. Commw. Ct. 2024).