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COURT OF APPEALS

STATE OF NEW YORK

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HUNTERS FOR DEER, INC.,

Respondent,

-against-

NO. 1

TOWN OF SMITHTOWN,

Appellant.

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20 Eagle Street  
Albany, New York  
January 4, 2022

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Okay. Good afternoon,  
2 everyone. Judge Rivera is appearing remotely. And the  
3 first appeal on this afternoon's calendar is Hunters for  
4 Deer v. the Town of Smithtown.

5 Counsel?

6 MS. JUENGST: Good afternoon, Chief Judge and  
7 Associate Judges. May it please the court, my name is  
8 Jennifer Juengst. I'm an assistant town attorney from the  
9 Town of Smithtown, representing the appellant in this  
10 matter. I'd ask to reserve four minutes on the rebuttal.

11 CHIEF JUDGE DIFIORE: Four minutes?

12 MS. JUENGST: Correct.

13 CHIEF JUDGE DIFIORE: You may.

14 MS. JUENGST: The town's here to ask this court  
15 to reverse the Appellate Division on its decision from  
16 August of 2020. The issue presented here is whether or not  
17 the state occupies entirely the fields of defining what a  
18 firearm is as well as setbacks. Our position is that a  
19 number of issues were made in error in the Appellate  
20 Division's decision.

21 JUDGE GARCIA: Counsel? Counsel?

22 MS. JUENGST: Yes.

23 JUDGE GARCIA: Sorry. Here. Is the town's  
24 position - - - and I just want to understand this. Is it  
25 that you have the authority to do this under the Town Law



1 130(27), which you've defined firearm to include bows and  
2 arrows, or is it that - - - or both, that you have this  
3 residual homeroom - - - home rule authority to do this?

4 MS. JUENGST: Both, Your Honor, in addition to  
5 New York's constitution.

6 JUDGE GARCIA: So why would you need 130(27) if  
7 you have home rule authority? Why would the legislature  
8 pass it?

9 MS. JUENGST: I'm not certain how to answer that,  
10 Judge, why the legislature chose, all the way back in 1966,  
11 to make that a new addition.

12 JUDGE GARCIA: You know, you make me feel very  
13 old, but so - - -

14 MS. JUENGST: Sorry. To - - -

15 JUDGE GARCIA: So but let's say - - - but there  
16 has to be a reason for it. And if the towns - - - the  
17 localities under specific - - -

18 MS. JUENGST: Um-hum.

19 JUDGE GARCIA: - - - circumstances have the  
20 authority to do this already under home rule, why do you  
21 need the Town Law?

22 MS. JUENGST: The town needed to clarify that  
23 given the density of the suburban area of Smithtown and as  
24 it grew since the '60s - - -

25 JUDGE GARCIA: No, I understand why you would



1 want to do it - - -

2 MS. JUENGST: Um-hum.

3 JUDGE GARCIA: - - - and the policy reasons for  
4 doing it. I just don't understand why the legislature  
5 would need to pass the Town Law if you already had the home  
6 rule authority to do it.

7 MS. JUENGST: Your Honor, I really don't have an  
8 answer to why the state legislature decided to enumerate  
9 that at this point. But certainly, the Town of Smithtown  
10 felt it necessary to include it in its town code.

11 JUDGE GARCIA: Let me ask you this, then. Is it  
12 your view that under the home-rule provision, you could go  
13 - - - you could go below 150?

14 MS. JUENGST: Under the home-rule provision - - -

15 JUDGE GARCIA: Like, so if you wanted - - - if  
16 Smithtown decided, look, we have a real deer problem here;  
17 let's go to one hundred yar - - - feet for bows and arrow.

18 MS. JUENGST: Well, first of all, I don't think  
19 the town board would want to - - -

20 JUDGE GARCIA: No, but forget - - - this is  
21 hypothetical. I don't think your town board would do that  
22 either. But hypothetically - - -

23 MS. JUENGST: Okay.

24 JUDGE GARCIA: - - - could you do it?

25 MS. JUENGST: Yes, we believe that we could set



1 it where we wanted to as long as it was more restrictive.  
2 So we couldn't go lower. We - - -

3 JUDGE GARCIA: So that was - - - I'm sorry. That  
4 - - - I wasn't clear.

5 MS. JUENGST: Is that - - -

6 JUDGE GARCIA: That was my question. Could you  
7 go lower? And I think I'm doing it right.

8 MS. JUENGST: No, we would - - - we could only  
9 increase by remaining above to be in a safer zone is what  
10 we consider it.

11 JUDGE GARCIA: Okay. Thank you.

12 MS. JUENGST: Okay. We believe that the  
13 Appellate Division did not make a conscious effort to  
14 consider the differences between the two laws that are  
15 before you now, the Environmental Conservation Law 11-0931  
16 and Town Code Chapter 160, together with the state Town Law  
17 130.

18 They're two very different types of law. The ECL  
19 provisions are crafted and intended for killing deer as  
20 part of the state's management of wildlife, while the town  
21 code, together with Town Law, is intended to protect human  
22 life. So with those vastly different purposes, we believe  
23 that this court will find that there's room to look a  
24 little bit deeper than the Appellate Division did.

25 JUDGE CANNATARO: Well, Counsel, it seems to me



1 that if you look at the history of the amendment to the  
2 ECL, questions of public safety were taken into account  
3 when they made the determination, rightly or wrongly, to  
4 reduce from 500 to 150. So I don't think you can argue  
5 that this is strictly about killing deer. There at least  
6 seems to be some consideration of what a reasonable public  
7 safety limit would be, arguably on a statewide basis.  
8 Would you - - - you don't agree with that?

9 MS. JUENGST: We don't, Judge. We believe if you  
10 look at ECL on - - - in a wholesale version, together with  
11 the specific policy statement and the declaration, is  
12 solely about controlling, and rightly so - - - fulfilling  
13 the - - - taking up the entire field of wildlife management  
14 across the state. However, deers don't exist uniformly  
15 throughout the state. And that's one of the reasons - - -

16 JUDGE CANNATARO: But can we just get back to  
17 people? Because - - -

18 MS. JUENGST: Sure.

19 JUDGE CANNATARO: - - - I seem to recall a  
20 portion of the legislative history with respect to the  
21 amendment talking about how they had come to a conclusion  
22 that firing a long - - - or, you know, shooting a longbow,  
23 you could expect the arrow to fall to the ground at about  
24 150 feet, as opposed to their prior longer length. That  
25 doesn't sound to me like a concern attendant upon killing



1 deer. That sounds like a concern related to whether or not  
2 people are going to get hurt if you set the setback at 150  
3 feet.

4 MS. JUENGST: Respectfully, Judge, we didn't see  
5 it that way.

6 JUDGE CANNATARO: You think it's about killing  
7 deer?

8 MS. JUENGST: We think it's about killing deer  
9 and using a bow. You know, the town took the position - -  
10 -

11 JUDGE RIVERA: Counsel. Counsel. I'm sorry.  
12 I'm on the screen to your left.

13 CHIEF JUDGE DIFIORE: Go ahead, Judge Rivera.

14 MS. JUENGST: Sorry.

15 JUDGE RIVERA: Hi. Yes, hi. Happy New Year.

16 MS. JUENGST: You, too.

17 JUDGE RIVERA: Is it possible that both purposes  
18 are in play? I mean, you seem to posit in response to  
19 Judge Cannataro that they're mutually exclusive. And I  
20 don't understand why that's the case. It seems to me that  
21 any of these setback hunting provisions have, at some  
22 level, a concern about safety, if not safety for someone  
23 outside of the hunting area, certainly for safety about  
24 other hunters. So it - - -

25 MS. JUENGST: Certainly.



1 JUDGE RIVERA: It's possible it can have a dual  
2 purpose, yeah?

3 MS. JUENGST: I believe so. But the ECL is still  
4 strictly focused on safety of hunters and the  
5 accomplishment of the kill. That's what it's about.

6 JUDGE RIVERA: But doesn't your concession now  
7 that it is concern about safety of hunters mean, of course,  
8 that there is - - - in that amendment, as Judge Cannataro  
9 was asking you, there was a consideration about safety, so  
10 - - - right? Isn't that the case? You may think it's only  
11 about hunters, but it is not the case that it's solely  
12 about killing deer, which I think was the back and forth  
13 that you and Judge Cannataro were having.

14 MS. JUENGST: You know, it's difficult to tackle  
15 this question on both the judges' behalfs because the  
16 record that was before the trial-level court as well as the  
17 Appellate Division as well as the legislative history that  
18 you've probably seen here, we didn't find any proof of any  
19 of these assertions about a bow falling before 150 feet, et  
20 cetera, or, you know, why 150 feet is - - - would have been  
21 proven to be safer for the public.

22 The ECL does not address when discharging any  
23 implement creates a hazard for the public. That gap was  
24 left open in the ECL. The state legislator filled it to  
25 the extent it passed Town Law 130(27), and the town closed





1 the door on it by saying, yes, we do agree with the 500  
2 feet. It was in 2012 that we amended it to clarify that we  
3 agreed with the State's position on 500 feet. We weren't  
4 taking a position on hunting.

5 However, you know, most of these cases of  
6 preemption come before you when a locality has amended a  
7 code or passed a new code that conflicts with the state  
8 law. That's not what happened here. The state, for more  
9 than fifty years, had a 500-foot setback rule for both bow  
10 as well as firearm. In 2012, we were missing the 500-foot  
11 mention, so we put it in to clarify because hunting goes on  
12 in Smithtown, but so does, you know, archery, people who  
13 want to practice, et cetera. It wasn't strictly hunting.

14 It was the state that made the change here. It  
15 was the state that decided to reduce the setbacks for  
16 longbow to 150 feet, and it created a new setback where  
17 crossbow was considered. Prior to then, crossbow was  
18 considered so dangerous in New York State, it wasn't going  
19 to be allowed at all. So there is a remarkable lack of  
20 proof put forward by the respondent - - - the respondents  
21 on the appeal below in the trial level as well as the  
22 Appellate Division level.

23 JUDGE RIVERA: Let me ask you, Counsel. Let's  
24 say we agree with you and you're right that the - - -  
25 really, the ECL is only about hunting, and the town is only



1 concerned about public safety. So there's obviously, at  
2 some point, overlap. Does that mean that at a minimum,  
3 even if we would agree with you, that the Town Law can only  
4 apply outside of the hunting context?

5 MS. JUENGST: Well, we didn't want to take a  
6 position on hunting because we left that to the state. But  
7 however - - -

8 JUDGE RIVERA: I understand. But I guess I'm  
9 asking, isn't that the logical - - - sort of isn't that  
10 where we end up if we agreed with you that to the extent  
11 that you're saying the state, of course - - - it's  
12 exclusive to them to deal with hunting and wildlife  
13 management, but that's not the purpose of what we have  
14 done; we're focused on public safety writ large.

15 MS. JUENGST: Um-hum.

16 JUDGE RIVERA: But to the extent there's that  
17 little overlap - - -

18 MS. JUENGST: Um-hum.

19 JUDGE RIVERA: - - - right - - -

20 MS. JUENGST: Right.

21 JUDGE RIVERA: - - - doesn't that mean, then,  
22 that the Town Law cannot apply in the hunting context,  
23 which, in part, would mean wherever hunting is permitted  
24 during the hunting season?

25 MS. JUENGST: Right.



1 JUDGE RIVERA: Is that - - - would you - - -  
2 would you concede that that has to be the logical  
3 conclusion of seeing the laws as you have now argued them?

4 MS. JUENGST: Our position, Judge, is that  
5 there's a conflict there. But we believe that it's not an  
6 impermissible one. We believe it is permitted because at  
7 the end of the day, state government has turned to local  
8 government and said, there's a whole host of things we  
9 would prefer local government take care of, local policing  
10 take care of, because they know the areas; they know the  
11 people. The hunting that goes on is not constrained in any  
12 way. So we have deer now that roam through neighborhoods.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 Counsel?

15 MR. KILLORAN: Hello. If it pleases the court,  
16 my name is Christian Killoran, and I am counsel for the  
17 respondents.

18 Your Honors, we view this case as, essentially, a  
19 clear-cut preemption case. We feel - - - it's our argument  
20 that the state town law does not endow the Town of  
21 Smithtown to regulate the discharge of a bow and an arrow.

22 JUDGE WILSON: So can I stop you there for - - -  
23 over here. Can I stop - - -

24 MR. KILLORAN: Yes, Judge.

25 JUDGE WILSON: - - - you there for a second and



1 go to a different variant of Judge Rivera's question?  
2 Suppose the ordinance here had purported to regulate - - -  
3 let's take an easy case - - - archery ranges only and had a  
4 greater setback, 1,000-foot setback for an archery range.  
5 Is that preempted?

6 MR. KILLORAN: I would say it would be preempted.

7 JUDGE WILSON: That would be preempted as well?

8 MR. KILLORAN: Yes. I would say it would be  
9 preempted.

10 JUDGE WILSON: Even if it's not for hunting. So  
11 what then - - - what preempts it?

12 MR. KILLORAN: Well, because it's clear, at that  
13 point, the rule would be pursuant under municipal home  
14 rule. But the moment municipal homeroom - - - home rule,  
15 excuse me, manifests as a conflict with state law, there is  
16 - - -

17 JUDGE WILSON: What would - - - what would be - -  
18 -

19 MR. KILLORAN: - - - there's essential - - -  
20 there's essentially a conflict.

21 JUDGE WILSON: What is the - - -

22 MR. KILLORAN: And that would occur in that  
23 dynamic.

24 JUDGE WILSON: What is the state law with which  
25 that would conflict?



1 MR. KILLORAN: And that would be the ECL law  
2 because the ECL law does not confine the discharge of a bow  
3 and arrow to hunting. It simply regulates the safe - - -  
4 safe discharge of a bow and arrow. It does not  
5 specifically confine the discharge of that arrow within the  
6 context of hunting.

7 Now, I imagine that there was rationales for why  
8 that is. And it mostly likely had to do with practicing  
9 archery to be more effective in the field and to be more  
10 safe. That would be what I imagine was the logical reason.  
11 But to answer your question, I would say that it would  
12 still be conflicted.

13 JUDGE WILSON: Okay. Thank you.

14 JUDGE SINGAS: Counselor, where does it say  
15 expressly in the ECL or even in the legislative history  
16 that a hunter has the right to use the bow and order - - -  
17 bow and arrow beyond the 150 feet? Would you agree that  
18 it's not expressly said?

19 MR. KILLORAN: Beyond the 150 feet?

20 JUDGE SINGAS: Yes.

21 MR. KILLORAN: Well, it states a baseline  
22 minimum.

23 JUDGE SINGAS: It sets a prohibition.

24 MR. KILLORAN: It makes a prohibition that you  
25 cannot discharge the apparatus within 150 feet or below.



1 JUDGE SINGAS: Right.

2 MR. KILLORAN: So I think it's implied,  
3 therefore, that you are able to shoot it over 150 feet. I  
4 think that is a - - -

5 JUDGE SINGAS: Well, do you think that that's  
6 what our case law and our precedent is saying, that we  
7 should just rely on an implication that is not express?  
8 Isn't our precedent saying exactly the opposite?

9 MR. KILLORAN: No. I think the law is pretty  
10 clear that people are - - - as long as they're licensed,  
11 are able to pursue the tradition of bow hunting in the  
12 State of New York, as long as they do not violate the  
13 setback restrictions, which are, in New York State, 150  
14 feet of a dwelling or thereunder. I think - - -

15 JUDGE SINGAS: But doesn't our case law say that  
16 just because a prohibition is set up, that doesn't mean  
17 that it's permission for other conduct? Haven't we said  
18 that in *People v. Cook and Zakrzewska*? Isn't that exactly  
19 what we were saying, that that authority is too broad, that  
20 your reading is too broad?

21 MR. KILLORAN: No, I don't think we're - - - and  
22 those examples would be for other conduct. I think the law  
23 is specific, again, to the discharge of a bow and arrow.  
24 And I think the ECL is clear that it is legal to discharge  
25 a bow and arrow as long as you do not violate the setback



1 requirements.

2 JUDGE SINGAS: Well, show me where it's clear.  
3 Can you point to something - - -

4 MR. KILLORAN: Well - - -

5 JUDGE SINGAS: - - - that says it's clear that  
6 you can discharge your bow and arrow past 150 feet?

7 MR. KILLORAN: Judge, all I could - - - to do on  
8 that front would be to point to the ECL at large that  
9 regulates the management of wildlife in the State of New  
10 York, which endows New York State residents with the - - -  
11 with the ability to get licenses and to pursue hunting  
12 within the State of New York.

13 JUDGE GARCIA: Counsel, can I ask, maybe, that in  
14 a little bit of a different way, because I think it's  
15 something - - - I have the same kind of concern. And if  
16 you look at our case law, there's support for this. So we  
17 would agree that if the ECL said nothing about bows and  
18 arrows, right, and this local jurisdiction did this, that  
19 would be okay, even though technically, under the state  
20 law, you can discharge your bow and arrow wherever you  
21 want, right? We wouldn't take that to mean, you know, the  
22 city couldn't limit it to 1 to 500 feet, let's say, if the  
23 ECL said nothing. I know it doesn't, but let's assume.

24 MR. KILLORAN: Right. If the the ECL was quiet  
25 on the subject, I - - -



1 JUDGE GARCIA: Right. So I think what we have to  
2 decide is where on this line does the ECL fall in terms of  
3 your point, which is there's a negative implication here  
4 that's strong enough, looking at all of it, that anything  
5 over 150 is okay, or is this the case of more like silence,  
6 and it's not, but - - -

7 MR. KILLORAN: Right.

8 JUDGE GARCIA: - - - that it's more analogous to  
9 silence in that you just can't take from the fact that the  
10 state hasn't said, you know, you can do this over 150. Do  
11 we read that to mean - - - you know, how do we read that -  
12 - -

13 MR. KILLORAN: Well, I - - - I think - - -

14 JUDGE GARCIA: - - - in terms of a limitation?

15 MR. KILLORAN: I think the key point for analysis  
16 is whether or not the action permitted under the local - -  
17 - under the local ordinance eventually manifests in a  
18 conflict with state law. If it does not, then I would say  
19 there would be no conflict preemption. But if it does - -  
20 -

21 JUDGE GARCIA: Right.

22 MR. KILLORAN: - - - I would say that it does,  
23 which is clearly the case here. I mean, there's two - - -

24 JUDGE GARCIA: But let's say, to go back to Judge  
25 Singas' point, there's a case - - - and I'm base - - -





1 Vatore, I think the name is, on cigarette vending machines,  
2 right? So the state has a cigarette vending machine law  
3 that was arguably more restrictive. And then I don't know  
4 what the locality was. I think it was in New York City.  
5 But that was arguably more restrictive in terms of where  
6 and when - - - where you could place these machines than  
7 the city law. And this court concluded that's okay. Why  
8 is this different than Vatore?

9 MR. KILLORAN: Well, if the state law was more  
10 restrictive than the local law - - -

11 JUDGE GARCIA: No. The state said, you know, you  
12 can put them here, but - - - it wasn't feet, but it was - -  
13 - it was less restrictive. I'm sorry if I misspoke.

14 MR. KILLORAN: Okay.

15 JUDGE GARCIA: The local law, in ways, in terms  
16 of placement of these cigarette vending machines, was more  
17 restrictive.

18 MR. KILLORAN: The analysis, I would imagine,  
19 would be the - - - whether or not the local law evidenced  
20 or manifests as a clear conflict.

21 JUDGE GARCIA: But you know - - -

22 MR. KILLORAN: That - - - that - - - that - - -

23 JUDGE GARCIA: But we all agree with that. But  
24 how do we figure that out?

25 MR. KILLORAN: Well, I think if I may use the



1 circumstances in this case, when, in fact, if the local  
2 ordinance was effectuated, what once was clearly legal,  
3 which was the discharge of a firearm as long as the 150  
4 setbacks were honored and respected, was now made illegal.  
5 I think that - - -

6 JUDGE GARCIA: But I could put my cigarette  
7 vending machine - - - I don't know what the rule was, but  
8 let's say I could put my cigarette vending machine next to  
9 a school, you know, under the state law. But now, under  
10 the city law, I can't. Why isn't that the same analogy?

11 MR. KILLORAN: It - - - the analysis - - - and  
12 I'm unfamiliar with the case that you're specifically  
13 referring to, so I'm not sure what factors they considered  
14 about, I guess, the nature or the substance of the  
15 conflict. But I imagine that the court felt that it was  
16 incidental to - - - or not so much being in direct conflict  
17 or significantly in conflict with - - -

18 JUDGE CANNATARO: Counsel?

19 MR. KILLORAN: - - - with the state law.

20 JUDGE CANNATARO: I'd like you to assume for a  
21 second that the rule of Vatore is not to look for a clear  
22 conflict, but rather, to determine whether the local  
23 provision is consistent or not with the larger state  
24 statute.

25 MR. KILLORAN: Yes.



1 JUDGE CANNATARO: And if the rule is consistency,  
2 could you not argue that this rule is consistent with the  
3 ECL provision? I know that 500 and 150 are different. But  
4 the principle behind the ECL is that in order to create  
5 public safety, you need a setback. And the local  
6 consideration, as we heard from counsel, is that Smithtown  
7 is a densely populated suburb, so they need more of a  
8 setback than what the statute provides. I don't know if  
9 that's a conflict. I know it's not the same. But would  
10 you call that a conflict?

11 MR. KILLORAN: I would absolutely call that a  
12 conflict because the boundaries of municipal home rule are  
13 finite, and they can only, essentially, lawfully be placed  
14 up until the outer parameter where there is a conflict. I  
15 think in this particular place, there is a clear conflict  
16 that would be effectuated if the local ordinance was  
17 adopted because - - -

18 JUDGE WILSON: And how do we know that that's not  
19 incidental?

20 MR. KILLORAN: That that is not incidental - - -

21 JUDGE WILSON: Yeah.

22 MR. KILLORAN: - - - to public safety? The  
23 reason - - -

24 JUDGE WILSON: No.

25 MR. KILLORAN: The reason it isn't is because the



1 state, when enacting the ECL - - - and I think it's  
2 contrary to the appellant's argument - - - took into  
3 account the safety considerations. And they went more so  
4 when they adopted the town law because they - - -

5 JUDGE WILSON: No, how do we know - - - I'm  
6 sorry. Maybe you're answering the wrong question or I  
7 asked the wrong question. How do we know it's not  
8 incidental - - - an incidental degradation of what you're  
9 characterizing as the right to hunt?

10 MR. KILLORAN: Well, I think we would have to  
11 analyze the effects of the local ordinance going into  
12 place, which would entirely eviscerate the DEC's ability to  
13 effectively manage wildlife management throughout New York  
14 State because there would be a labyrinth of byzantine  
15 regulations that were implemented. In a location like Long  
16 Island, where Smithtown is located, where there only is, by  
17 the way - - -

18 JUDGE WILSON: But what I'm struggling with is I  
19 think you, correctly, I think, said that when we're  
20 discussing conflict preemption, if the impingement is only  
21 incidental, there's not a conflict. So that's the legal  
22 test we're stuck with. How do we determine in this case  
23 whether it's incidental or not incidental?

24 MR. KILLORAN: Well, I - - - yeah. I believe  
25 that the analysis falls upon whether or not the local



1 ordinance impacts negatively upon the state law and the  
2 degree that it does.

3 I think what might be getting lost in the  
4 analysis, at least from the appellant's paperwork, is  
5 somehow that the state did not consider the safety  
6 considerations when it reduced the setback. And I would  
7 argue to you that clearly, it did. Just an - - - just  
8 analyzing a setback restriction in and of itself is  
9 inherently a safety require - - - a safety ordinance  
10 because why would you have any discharge setback  
11 requirement at all? But if we analyze the memoranda and if  
12 we analyze the transcript and the legislative history of  
13 the 2014 reduction, we'll see that they did take into  
14 account the safety considerations.

15 And more so, the Town Law incorporated the ECL.  
16 And in doing so, they incorporated the definitional  
17 distinctions between a firearm, a bow and arrow, and a  
18 crossbow. And they set different setbacks for each  
19 apparatus. So they were clearly cognizant of the safety  
20 considerations relevant to each respective apparatus.

21 JUDGE SINGAS: And Counsel - - -

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 JUDGE SINGAS: I'm sorry. They set minimums.  
24 They didn't set maximums, correct? So can we really talk  
25 about a conflict if they're not saying this is the maximum?



1 They're saying you can't discharge a bow and arrow less  
2 than 150 feet away. I don't see how another setback beyond  
3 that is in conflict. And shouldn't we ask for better  
4 policies and more explicit language if we're going to say  
5 there's a conflict?

6 MR. KILLORAN: Perhaps so. Asking for more  
7 legislative guidance, perhaps so. However, I do think it  
8 is clear that the ECL contemplates bow hunting and bow  
9 discharge beyond 150 feet.

10 CHIEF JUDGE DIFIORE: Thank you, Counsel.  
11 Counsel, your rebuttal?

12 MS. JUENGST: First of all, the Municipal Home  
13 Rule Law doesn't set a bright-line test on these things.  
14 It's - - - it actually gives local governments some  
15 incredible control over issues like public safety.  
16 Moreover, counsel's describing - - - he's described that we  
17 - - - that everybody should've considered what the effects  
18 will be of the Town's 500-foot setback. Our setback is the  
19 same 500 feet that the state used for over fifty years. So  
20 again, it wasn't the town that changed the rule here. It  
21 was the state.

22 JUDGE GARCIA: But the timing of the conflict  
23 really doesn't matter, does it? I mean, a conflict's a  
24 conflict. If the state came in and decided we want a new  
25 rule, the state legislature, and they said this is the new



1 rule going forward, and it conflicted with this locality's  
2 law, then that law is a conflict now. I mean, it doesn't  
3 matter we were here first, right? That's not home rule - -  
4 -

5 MS. JUENGST: Then every time - - -

6 JUDGE GARCIA: - - - because conflict is the  
7 essence of home rule.

8 MS. JUENGST: Then every time the state is going  
9 to change this rule on behalf of hunters, the town's power  
10 to protect ordinary citizens who are not involved in  
11 hunting - - - the general public, nearby residents of where  
12 this is going on - - - this is not regulated activity  
13 pursuant to areas.

14 JUDGE GARCIA: But that's a different argument,  
15 right? So it's the conflict that's key. And if you are  
16 right in your portrayal of the difference in the laws, it  
17 doesn't matter what the timing is. But if the conflict is  
18 there, it likewise doesn't matter, seems to me, what the  
19 timing of the law is because the state has the authority to  
20 overrule a locality. Even if your law's been in effect for  
21 a hundred years, and they make - - - they want a different  
22 statewide rule, that's a conflict now.

23 MS. JUENGST: Then perhaps the focus should turn  
24 to what the ECL left out. And what they specifically left  
25 out was when it's - - - when discharging anything for any



1 purpose is hazardous to the general public or nearby  
2 residents. We filled that.

3 JUDGE GARCIA: But is the label really - - - so  
4 how far could we go with the labeling? So if there's  
5 clearly kind of a dual purpose here, and you say yes,  
6 hunting, but the reason for the discharge rules in hunting  
7 is safety, as I think Judge Rivera was pointing out, so if  
8 the Town Law now labeled this as well-being, healthfulness,  
9 it's a different statute. It - - - you know, it's aimed at  
10 something else. It's aimed at happiness. Then you could  
11 get out of any conflict by just labeling it something else.

12 And it seems to me the real issue - - - and I'm  
13 not saying which way this cuts at the end of the day in  
14 terms of conflict. I think you've both made very good  
15 points. But is what's the substance of this law? What was  
16 the intent of the legislature, and does that conflict with  
17 what the - - - what the local jurisdiction has done here?

18 MS. JUENGST: I fully agree with you, Judge, that  
19 at the end of the day, you're charged with looking at the  
20 intent of what the legislature wanted to accomplish here.  
21 And our position is the legislature, through ECL,  
22 accomplished ninety-nine percent of what it did was in  
23 favor of hunting, for wildlife management purposes. That  
24 is its stated, explicit, express purpose as it was written.  
25 Nothing in the declaratory provision of ECL says anything



1 about public safety. I believe that's why Town Law was - -  
2 -

3 JUDGE GARCIA: I'm going to ask this because I'm  
4 not sure. But in the ECL, is it only - - - is it - - -  
5 discharge is restricted near what? Near other hunters or  
6 near other facilities?

7 MS. JUENGST: It doesn't say. It only puts these  
8 provisions on - - -

9 JUDGE GARCIA: So it's 150 feet - - -

10 MS. JUENGST: Feet.

11 JUDGE GARCIA: - - - from what?

12 MS. JUENGST: I believe they have identified a  
13 series of locations like a dwelling, a park, an occupied  
14 building.

15 JUDGE GARCIA: So I don't see how that only  
16 applies to hunting and not public safety because you don't  
17 want people shooting arrows in the forest that are going to  
18 go into a school, I guess, is kind of impetus behind some  
19 of that.

20 MS. JUENGST: Exactly. And that's why we did the  
21 same thing under town law.

22 JUDGE GARCIA: So, like, the - - -

23 MS. JUENGST: We identified locations very  
24 similar.

25 JUDGE GARCIA: Right. Isn't that not a great



1 point, though?

2 MS. JUENGST: I guess it depends on which one you  
3 want. Which intent is more important here? Killing  
4 wildlife as a management issue, or is it - - -

5 JUDGE GARCIA: But I don't see how - - -

6 MS. JUENGST: - - - protecting people who live -  
7 - -

8 JUDGE GARCIA: - - - discharging a bow and arrow  
9 near a school has anything to do with killing wildlife.  
10 Like, what you're trying to protect are the people on the  
11 other - - -

12 MS. JUENGST: Are the people.

13 JUDGE GARCIA: - - - side of the wall.

14 JUDGE WILSON: I mean, at a - - -

15 MS. JUENGST: But - - -

16 JUDGE WILSON: - - - very simplistic level, the  
17 legislature gave you the ability for firearms to go to - -  
18 - to diverge, to set a higher setback, and didn't for bows.  
19 And how do you account for that?

20 MS. JUENGST: The - - - we account for that in a  
21 couple of ways, Judge. First off, there was no definition  
22 identified under Town Law 130(27). There was no definition  
23 in the body of a firearm in ECL. You have to look to their  
24 regs at 6 NYCRR 180.3 for a definition of firearm. However  
25 - - -



1 JUDGE WILSON: But the town can't define a banana  
2 as a firearm, right?

3 MS. JUENGST: No, it can't. And that's why I  
4 agree with you. From a technical standpoint, Judge, a  
5 firearm, as we know commonplace, is a gun, a pistol, a  
6 rifle, et cetera. And a bow is a bow, as we know, is a bow  
7 and arrow or crossbow. However, if we don't include them  
8 as a grouping - - - which both the state and the town did.  
9 When you look at their provision, their title is about  
10 possession - - - prohibitions against the use and  
11 possession of firearms. Yet under those, they have  
12 categories. And they include bow - - - longbow and  
13 crossbow with their categories, right alongside with  
14 firearms. So - - -

15 JUDGE CANNATARO: You're saying 6 NYCRR 160  
16 defines longbows as firearms?

17 MS. JUENGST: No, sir. The - - - the state  
18 regulation for ECL only defines a firearm. However, it  
19 only allows it to be applied for Title Elev - - - Article  
20 11 of the ECL, which is the wildlife management provision.

21 JUDGE CANNATARO: Um-hum.

22 MS. JUENGST: So - - -

23 JUDGE CANNATARO: But you - - - there are other  
24 statutory definitions of firearms that also do not include  
25 longbows. As a matter of fact, I would - - - I think



1           you've conceded in your brief there is no statutory  
2           definition of firearms that includes longbows; is that  
3           correct?

4                   MS. JUENGST: Not to our knowledge, there isn't,  
5           Judge. However, if we don't expand the concept of firearm  
6           to include bow, we will have destroyed the purpose of Town  
7           Law 130(27), together with the ability of our local police  
8           to protect citizens.

9                   JUDGE RIVERA: But Counsel, that - - - Counsel,  
10          if I may, that - - - that's my issue. It does seem that  
11          this boils down to the state has made a determination about  
12          what setback still allows for safety, and the town thinks  
13          that that's wrong.

14                   MS. JUENGST: Correct.

15                   JUDGE RIVERA: Right? And as a consequence, you  
16          don't permit what the state has decided is safe because you  
17          just don't think it's safe. And that is the bottom-line  
18          question, which is pretty hard to get around that that is  
19          just a conflict.

20                   MS. JUENGST: Judge, it's - - - this is probably  
21          not the first time in history that we've had a conflict  
22          here, but it's not the type of head-on collision where  
23          we're saying you can't hunt in Smithtown. We haven't done  
24          that.

25                   JUDGE RIVERA: Well, you don't need - - - a



1 conflict doesn't require out-and-out prohibition, absolute  
2 prohibition, right? I mean, that was, in part - - -

3 MS. JUENGST: No.

4 JUDGE RIVERA: - - - my other point about the  
5 overlap.

6 MS. JUENGST: Right, the overlap. We consider  
7 the overlap a reasonable exercise of our power to protect  
8 our citizens. It's viewed - - - some people could use the  
9 word "incidental" to describe it. The state has not proven  
10 that shooting a bow at 500 feet is interfering in any way  
11 with the purpose of the ECL and wildlife management. It's  
12 not required uniformity across the state. The state is  
13 very different from the north regions, the south regions,  
14 Long Island, the Mid-Hudson Valley. These are all very,  
15 very different communities with different density  
16 population problems.

17 JUDGE GARCIA: Counsel, just one last thing. I  
18 know we're out of time. But this case, unlike some others  
19 we've had, the state agency has weighed in here, saying  
20 that it is preempted. How much deference are they entitled  
21 to?

22 MS. JUENGST: As a person representing the town,  
23 I would say - - -

24 JUDGE GARCIA: How about a person representing  
25 the town within the strictures of our case law?



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MS. JUENGST: I would say deference up until the point where - - - where they're wrong and they're violating state law that authorized us to do what we did.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MS. JUENGST: Thank you. Thank you for taking the case.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Cheryl Odom, certify that the foregoing transcript of proceedings in the Court of Appeals of Hunters for Deer v. Town of Smithtown, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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