

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 1

MICHAEL DIACK,

Appellant.

20 Eagle Street
Albany, New York 12207
January 05, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

KATHY MANLEY, ESQ.
KINDLON SHANKS AND ASSOCIATES
Attorneys for Appellant
74 Chapel Street
Albany, NY 12207

KENNETH L. GARTNER, ESQ.
LYNN, GARTNER, DUNNE & COVELLO, LLP
Attorneys for Respondent
330 Old Country Road
Suite 103
Mineola, NY 11501

Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: And we're going to
2 start with number 1, People v. Diack. Is that the
3 right way to pronounce it?

4 MS. MANLEY: I believe it's [Dee-ack].

5 CHIEF JUDGE LIPPMAN: [Dee-ack]? Close
6 enough. Okay. Go ahead, counsel. Do you want any
7 rebuttal time?

8 MS. MANLEY: I'd like to reserve two
9 minutes for rebuttal, Your Honor.

10 CHIEF JUDGE LIPPMAN: Two minutes for
11 rebuttal. You're on. Go ahead.

12 MS. MANLEY: May it please the court, my
13 name is Kathy Manley, and I represent Michael Diack.

14 Counties and municipalities are preempted
15 by state law where there's either a conflict between
16 what the state law allows and what - - -

17 CHIEF JUDGE LIPPMAN: What about the - - -

18 MS. MANLEY: - - - the - - - the local laws
19 - - -

20 CHIEF JUDGE LIPPMAN: - - - level ones
21 counselor? What - - - what is - - - what is done now
22 about the level ones? And why are the local counties
23 preempted from doing something that is not
24 particularly addressed in regard to level one?

25 MS. MANLEY: Well, it - - - it is addressed

1 in regard - - -

2 CHIEF JUDGE LIPPMAN: Tell us how.

3 MS. MANLEY: - - - to level - - -

4 CHIEF JUDGE LIPPMAN: Tell us how, and how
5 that preempts?

6 MS. MANLEY: - - - ones. The state
7 probation and parole regulations apply to almost all
8 level ones whose - - - under supervision, whose - - -

9 CHIEF JUDGE LIPPMAN: But there's not a
10 particular residency, right?

11 MS. MANLEY: It is a residence. It's a - -
12 -

13 CHIEF JUDGE LIPPMAN: On a one?

14 MS. MANLEY: A 1,000-foot rule on anyone
15 who has a minor victim. And that's what is always
16 put forth as the - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
18 in the - - - in the most general terms, there aren't
19 residency restrictions on one without some of these
20 conditions, right?

21 MS. MANLEY: It applies - - -

22 CHIEF JUDGE LIPPMAN: Some of these
23 circumstances?

24 MS. MANLEY: Well - - -

25 CHIEF JUDGE LIPPMAN: So - - - so assume

1 you're dealing with level one, and there's not one of
2 the circumstances that - - - whether it be a minor
3 child, probation, whatever it might be. Why can't
4 the county do local legislation regarding those level
5 one people and residency?

6 MS. MANLEY: Okay. Well, I would say that
7 that run counter - - - runs counter to state policy
8 in that the state has studied this extensively and
9 passed these regulations and said that - - -

10 CHIEF JUDGE LIPPMAN: Even - - - are you
11 arguing that it's a conflict or that it violates
12 preemption in that the state has taken over the
13 field?

14 MS. MANLEY: I would say both, Your Honor.
15 I - - -

16 CHIEF JUDGE LIPPMAN: Where's - - - on the
17 first part, the conflict - - - where's the conflict?

18 MS. MANLEY: The conflict would be that the
19 state - - - I would say that the state has chosen to
20 allow people who are not under supervision or do - -
21 - don't have a minor victim, or don't - - - you know,
22 don't fall within the locational restrictions under
23 the state, that the state has chosen to say that
24 under its policy of wanting to protect the public and
25 facilitate reentry, that it's not appropriate to have

1 residence restrictions on those people. And there's
2 no evidence that it makes anyone safer. There's
3 actually evidence - - -

4 JUDGE PIGOTT: Could it have said that in
5 some way - - -

6 MS. MANLEY: - - - to the contrary.

7 JUDGE PIGOTT: - - - fashion, or form,
8 before eighty villages, towns, counties, decided that
9 they were going to put these restrictions in?

10 MS. MANLEY: Ex - - - excuse me? I missed
11 the first part of that.

12 JUDGE PIGOTT: Well, there - - - according
13 to your opponent, there's about eighty communities -
14 - - maybe you put it in your brief, too - - - that
15 have done one or the other of these things. The
16 state has taken no action to say they're wrong. They
17 continue, I guess, to proliferate. Can't that be
18 some evidence that the state has no interest in the
19 level ones?

20 MS. MANLEY: I would say no, that it's not
21 up to the state to say that preemption - - - I mean,
22 the state hasn't - - - the state has expressly said
23 that preemption applies in terms of what it said in
24 the regulations, coming out and saying that it's - -
25 - this is an issue to be addressed by the state's

1 coordinated and comprehensive approach, and that it's
2 not appropriate for any one community to bear an
3 inappropriate burden in housing registered sex
4 offenders, because another community attempted to
5 shift responsibility onto other areas.

6 JUDGE READ: So your main argument's field
7 preemption?

8 MS. MANLEY: Field preemption is - - - is a
9 big part of my argument. I also think conflict
10 preemption applies.

11 JUDGE READ: It can't be both?

12 MS. MANLEY: It can be both. It can
13 definitely be both.

14 JUDGE READ: It can be both?

15 MS. MANLEY: And I - - - I believe it is
16 both. I believe - - - because if there can be a
17 conflict and there can also be an intent to occupy
18 the field, and I think we do have both here, these -
19 - - the language in those regulations, I would say,
20 is basically an express preemption.

21 CHIEF JUDGE LIPPMAN: Let's - - - let's
22 talk about from a policy perspective that on the one
23 hand, you have the - - - your argument that you want
24 to have these people close to services or education
25 or whatever it might be, that they need to be close

1 to. And if you have the local counties restricting
2 where they can live, it may work against that general
3 philosophy. On the other hand, where there's no
4 express prohibition, do the counties have a right to
5 be concerned about what they view - - - and - - - and
6 I understand your argument that it may not in the end
7 - - - but just safer communities - - - don't the
8 counties, or do they, have the right to say that gee,
9 for the safety of our citizens, we want to restrict
10 where offenders can - - - can live? Isn't there a
11 conflicting policy on both sides?

12 MS. MANLEY: Well - - -

13 CHIEF JUDGE LIPPMAN: Or is it that - - -
14 or is it that your policy is what matters, because
15 you've preempted the field?

16 MS. MANLEY: Well, I would say yes, the
17 state has preempted the field. There's a very
18 comprehensive and detailed scheme of sex offender
19 management, and this - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but no express
21 prohibition against - - -

22 MS. MANLEY: Well - - -

23 CHIEF JUDGE LIPPMAN: - - - this?

24 MS. MANLEY: There - - - I would say the -
25 - - the regulation language is basically an express

1 prohibition. But even if it weren't to be construed
2 that way, there is an intent to occupy the field
3 based on the comprehensive scheme. And the counties
4 can't just go - - - it's - - - it's counter to what
5 the state - - - the state's rules are - - -

6 JUDGE PIGOTT: Well, look at - - - look at
7 the Nyack case involving the - - - the drug place.
8 The state took the position that - - - that drug
9 rehabilitation center - - - they don't have to comply
10 with the zoning laws. We said they do. And - - -
11 and we said that because the - - - the town or
12 village or county, you know, has certain interests
13 that may not exactly match what - - - what the state
14 wants to do, but as long as it does no harm, they
15 should honor it. Where's the harm here?

16 MS. MANLEY: Well - - - well, I think that
17 case is distinguishable in several ways from the
18 situation here. I think there's a distinction
19 between zoning, regulating land use, where localities
20 have a strong ability under the Municipal Home Rule
21 Law and the cases to regulate the growth and shape of
22 their communities. And here we're talking about
23 people, not land use. It's not a zoning case. So
24 that's one distinction. Preemption is less often
25 found in zoning cases.

1 Also, in the Nyack case, there was a
2 statement that the word "comprehensive" being used by
3 the state was not enough to show an intent to occupy
4 the field. But here we have much more than that. We
5 have these probation and parole regulations. We have
6 re - - - residence restrictions in a number of
7 instances where the state felt it was appropriate,
8 both probation, parole, homelessness - - - which is
9 an interesting example - - -

10 JUDGE READ: So your - - - your argument
11 would be where - - - where the state hasn't required
12 it, they considered it and rejected the need for it.

13 MS. MANLEY: I believe so, especially
14 looking at the language of the regulations and some
15 of the other things that the state's done, such as
16 the civil confinement laws. So - - - and that goes
17 to the policy argument too. If somebody is - - - has
18 a mental abnormality such that they cannot control
19 their sexual misconduct, then they can be civilly
20 confined or placed under strict and intensive
21 supervision which can and does, often, include
22 residence restrictions.

23 So I would argue that for that small
24 minority of people who need that, that that is
25 available under the state law - - -

1 CHIEF JUDGE LIPPMAN: You agree that ones
2 are differences than thr - - - twos and threes?

3 MS. MANLEY: Yes, ones are different than
4 twos and threes. And - - -

5 CHIEF JUDGE LIPPMAN: But not different
6 enough that they're outside the - - - your argument
7 is not different enough that they're outside the
8 scheme the - - - the state's comprehensive package
9 here? Is that - - -

10 MS. MANLEY: Well, I don't think it would
11 make any sense to say that these very harsh residence
12 laws in a county or a town or a village only apply to
13 level ones and don't apply to those who might need
14 them more who are a higher level of sex offender. So
15 I think the state has looked at it and - - - and said
16 in their, you know, regulations that it should only
17 apply to people under supervision, which is when you
18 may need this the most, when you're, you know, just
19 coming out of prison, you - - - if you've
20 successfully completed supervision, you're less
21 likely to need it.

22 But the appellate term decision would say
23 that okay, for people under supervision, the 1,000-
24 foot rule in the state law applies. But once they've
25 successfully completed supervision, then these often

1 harsher laws under the county or the town or the
2 village kick in, and it might be a 2,000-foot rule;
3 it might be a quarter-mile rule - - -

4 JUDGE PIGOTT: Well, of course their answer
5 to that - - -

6 MS. MANLEY: - - - it varies a lot. They
7 overlap.

8 JUDGE PIGOTT: - - - their answer to that
9 is that the state has its interest in the ones and
10 twos, and once it lets go of them, that doesn't mean
11 we're stuck with them. We - - - we, the county,
12 town, or village, you know, can impose then what we
13 want to do, which is the 1,000, 2,000 or 500 feet - -
14 - foot rule.

15 MS. MANLEY: Well, I think there's a lot of
16 problems with that. As one example, in - - - when
17 Schenectady County instituted its - - - I believe it
18 was a 2,000-foot rule, it's been since invalidated.
19 It pushed people into certain corners of the county,
20 including, I believe, the Village of Scotia, and then
21 Scotia went ahead and passed a harsher law to push
22 people back out of there. And people - - - you know,
23 so these laws are used - - - without any evidence
24 that they protect anybody, they're used to push
25 people and banish people from whole communities, and

1 you get this kind of "not in my backyard" thing where
2 they push people into another community, and then
3 that community wants to press - - - pass a harsher
4 law. So it's - - - it's just a big problem.

5 CHIEF JUDGE LIPPMAN: Thanks, counselor.
6 Appreciate it.

7 Counsel?

8 MR. GARTNER: Kenneth Gartner; Lynn,
9 Gartner, Dunne & Covello, appellate counsel to
10 Carnell Foskey, Nassau County Attorney, for the
11 People of New York, respondent.

12 CHIEF JUDGE LIPPMAN: Counselor, given the
13 last point that we were talking about, is it workable
14 to let every county have different distances that you
15 have to stay away from or you can't be closer than,
16 when you have the state certainly exercising a great
17 deal of thought and interest in what to do with one,
18 twos, and threes, and under what conditions there
19 should or should not be residency restrictions? Is
20 this workable that we say, well, if there's one
21 little corner of this that's not addressed, the - - -
22 the locality can - - - can address it? Can that
23 work, in regard - - -

24 MR. GARTNER: Well - - -

25 CHIEF JUDGE LIPPMAN: - - - to this? Let -

1 - - let's talk about the bigger preemption rather
2 than the conflict issue. The state has a - - - a
3 plan to deal with this. Why is it okay - - -

4 MR. GARTNER: Okay, well - - -

5 CHIEF JUDGE LIPPMAN: - - - for the
6 counties to each do their own thing?

7 MR. GARTNER: Okay. I mean, first of all,
8 there are actually 117 localities that was cited as
9 having enacted these things. And, you know, there
10 has been no reaction by the state to this. The - - -

11 JUDGE PIGOTT: Well, I don't think a lot -
12 - - I mean, I could be proven wrong on this, but I
13 doubt that a lot of deep thought went into passing
14 these, and I can't imagine a legislator wanting to
15 vote against one.

16 MR. GARTNER: Okay.

17 JUDGE PIGOTT: And - - - and so the
18 reaction to - - - to having them passed is one thing.
19 But when you - - - when you think about it, if - - -
20 if you've got a - - - let's have a family, you know,
21 and a - - - the father, for one reason or another,
22 gets caught up in a - - - in a level one, such as
23 what happened here, he's got to move. He's got to
24 sell his house. He's got to move his kids. He's got
25 to move his family because the town or village that

1 he's in says you're within a 1,000 feet of a school
2 or a park, so you can't live in your house.

3 MR. GARTNER: Well, there's no question
4 that if a specific law enacted by a municipality or a
5 locality were challengeable on Constitutional grounds
6 or other grounds because it was overbroad - - - I
7 know there's been discussion about the fact that it's
8 felt that New York City, that they - - - you know,
9 everyone is herded into one small area. I know that
10 right now there's a case - - - there was a decision
11 on August 28th by Judge Patricia Chen in the Eastern
12 District, Wallace v. New York, in which there's a
13 broad-based challenge to a number of residency laws
14 being placed.

15 But that's not really the issue here. The
16 issue here is simply the issue of preemption. And I
17 know that in the - - - that in the Wallach v. Town of
18 Dryden case, which this court recently decided, since
19 the briefs here were completed, which involved a
20 supersession clause - - -

21 JUDGE READ: That was a zoning case, wasn't
22 it?

23 MR. GARTNER: It was - - - that was a
24 zoning case, but - - -

25 JUDGE READ: Why doesn't that make a big

1 difference?

2 MR. GARTNER: Excuse me?

3 JUDGE READ: Why doesn't that make a big
4 difference?

5 MR. GARTNER: Well, it - - -

6 JUDGE READ: Zoning has always been a
7 matter of local control and interest, as we said.

8 MR. GARTNER: And yet zoning isn't
9 mentioned in Article 9, Section 2 of the New York
10 State Constitution, which provides for the municipal
11 home rule powers of counties, localities,
12 municipalities. It - - - that as long as it falls
13 within the ambit of the - - - the home rule powers,
14 these localities are allowed to enact things, unless
15 they're preempted by the state.

16 Now, I haven't done a detailed review, but
17 from my look at all the cases in which preemption was
18 found in which there was not a supersession clause -
19 - - so right away the state isn't saying we want to
20 supersede, we want to preempt, and we're looking
21 through tea leaves to try to find whether the state
22 has intended to do it - - -

23 JUDGE READ: It's pretty comprehensive net
24 of tea leaves, isn't it? As your - - -

25 MR. GARTNER: Okay, but - - -

1 JUDGE READ: - - - opponent pointed out - -
2 -

3 MR. GARTNER: Right. But in each of those
4 cases, it's more akin to what Judge Breitel addressed
5 in Wombat Realty v. State, involving the Adirondack
6 Park Agency, where he said this was something in
7 which the state enacted a comprehensive scheme at a
8 single legislative session to fill the field, and
9 we're far - - -

10 JUDGE PIGOTT: But take a look - - - I
11 mean, the correction law, the mental hygiene law, the
12 penal law, the executive law, the social services
13 law, they've spoken on this issue in almost every
14 area that you can think of that would affect the
15 particular individual, and in this case, sex
16 offender. And it - - - the argument can and has been
17 made, that's pretty comprehensive.

18 And - - - and for the localities to then
19 say, well, after you do everything you do, we're
20 going to do something more - - -

21 MR. GARTNER: Well - - -

22 JUDGE PIGOTT: - - - and we're going to
23 say, if you want to live in Jefferson County, which
24 doesn't have any of these rules, that's fine with us.
25 But you're not going to be - - - you're not going to

1 come to our county and be within a certain area.

2 MR. GARTNER: But as this court pointed out
3 in both People v. Cook and Village of Nyack, the mere
4 fact that they didn't prohibit the - - - something
5 like this, doesn't mean that there's a conflict. So
6 there's no conflict preemption, because you have a
7 land - - -

8 CHIEF JUDGE LIPPMAN: But there's no
9 invitation either to - - - are you interpreting that
10 by not specifically prohibiting it, they're in
11 effect, inviting each county to do whatever they want
12 to do?

13 MR. GARTNER: Well, unless - - - unless - -
14 - yes, unless if there's field preemption - - - if
15 you field preemption, then of course, they can't do
16 it. But People v. Cook and Nyack said, if you simply
17 say that by not prohibiting - - - that by not
18 prohibiting it, they've allowed it, you're going way
19 too far, and you're in effect, eviscerating the home
20 rule constitutional right of municipalities that - -
21 -

22 JUDGE ABDUS-SALAAM: Is there field
23 preemption here - - - why isn't there field
24 preemption here, as - - - as - - -

25 MR. GARTNER: Excuse me?

1 JUDGE ABDUS-SALAAM: - - - has been - - -
2 why isn't there field preemption here? As been said,
3 there - - - this is a pretty comprehensive scheme.

4 MR. GARTNER: Okay. I mean, because again,
5 as - - - Judge Breitel went to pains in the Wombat
6 Realty to say it was a single legislative enactment -
7 - - a comprehensive enactment - - -

8 JUDGE READ: So if there's a single - - -

9 MR. GARTNER: - - - of a single session.

10 JUDGE READ: - - - if there's a single
11 enactment that makes it more likely to be field
12 preempted than if there're several statutes?

13 MR. GARTNER: I think - - - I think that
14 when you have four different pieces of legislation
15 enacted over a thirteen-year period by four different
16 legislatures, in none of which - - - although the
17 legislature knows how to write supersession clauses -
18 - - did they include one, and in none of which did
19 they address residency in these types of situations.
20 In none of them did they address it.

21 The - - - that in cases they said, okay,
22 that in certain - - - in certain instances where you
23 have sex offenders meeting certain criteria, that
24 there have to be certain restrictions placed, while
25 they're on parole and while they're on the - - - or

1 while they're on probation - - -

2 JUDGE PIGOTT: But that doesn't get you
3 back to what Ms. Manley was talking about with
4 respect to homeless - - - that no thought went into
5 this with respect to them - - - with respect to the
6 developmentally disabled, who may be required to be
7 in a particular facility, but can't be if - - - if
8 these zoning laws apply?

9 I thought of and I didn't research
10 thoroughly, youthful offenders. I mean, it - - - it
11 says even if you're adjudicated, it doesn't say
12 "convicted", do you have to move if your son's a
13 level one, because you - - - you know, the house that
14 you've owned for twenty years is next to the park? I
15 guess the answer is yes, depending on what part of
16 the state you live in?

17 MR. GARTNER: I mean, that - - - that may
18 be a possibility in some cases. But again, the
19 question is, this may be an area that's ripe for
20 state legislative enactment, but thus far, the state
21 hasn't legislated in this area, and I don't think - -
22 - let's put it - - - if you put it to vote in the
23 legis - - -

24 CHIEF JUDGE LIPPMAN: But there's a theory
25 behind the legislation that we have so far, and the

1 theory is this balance between protecting the - - -
2 the public and yet at the same time understanding
3 that these people have to be near services and
4 whatever else - - - employment, whatever it might be.

5 Isn't that - - - putting aside the
6 particular legal niceties, isn't there a picture here
7 that's quite evident as to what the state is trying
8 to do and where they think that - - - that they need
9 to have a hard and fast residency requirement - - -

10 MR. GARTNER: I - - -

11 CHIEF JUDGE LIPPMAN: - - - and where they
12 don't, because of this balance? So - - - so when you
13 look at the big picture from the most visceral point
14 of view, you know, nobody ever preempts the field, if
15 you're going to say that there's - - - there's one
16 little nook and cranny which you didn't specifically
17 prohibit, and therefore we're going to fill it - - -
18 don't you run that danger that - - - that where there
19 is, let's say for the sake of argument, an obvious
20 prescription that the - - - the legislature and the
21 state has laid out, aren't we going to eviscerate all
22 - - - all of these kinds of areas where - - - where
23 we've really - - - common sense would tell you that
24 the field is preempted?

25 MR. GARTNER: I - - - I don't think so,

1 Your Honor. I think that each of the state
2 legislations was aimed at a specific area that came
3 to their attention, that first they enacted SORA.
4 Then they enacted SARA (ph.). Then they enacted
5 SOMTA. Then they enacted Chapter 568 of the laws.
6 And each of these was addressing a discrete matter
7 that had become a matter of some urgency for the - -
8 - the state.

9 In none of these cases, were they giving an
10 overall view towards taking over and filling out the
11 field and conducting the type of deep thought that
12 we're talking about that - - - that - - - for
13 instance, when they enacted the restriction that said
14 that - - - that someone who has - - - whose victim
15 was under eighteen, who's a level three, can't go
16 within 1,000 feet of a school, they weren't even
17 thinking about residency. They were saying, keep
18 these people away from the schools, but they weren't
19 thinking about residency specifically, at all.

20 And I think that in times like - - - again,
21 in the Wombat Realty, with the Adirondack Park
22 Agency, where they were able to say, here the state
23 meant to fill the field, they wanted to preempt the
24 zoning requirements of all these municipalities - - -

25 CHIEF JUDGE LIPPMAN: Yeah, but as Judge

1 Read indicated, isn't zoning a very different issue?

2 MR. GARTNER: Well, yeah, but - - - but
3 again, that's an a - - - that's an area where even
4 zoning was preempted because the state - - - and
5 despite the absence of the supersession clause - - -
6 carefully created an entity and a structure that was
7 going to - - - that was meant to preempt all of the
8 development within the Adirondack Park area.

9 Here you have four separate pieces of
10 legislation enacted over a thirteen-year period, by
11 four separate legislatures. Each of these pieces of
12 legislation aimed to - - - you know, it was almost
13 like putting your finger in the dike as - - - as the
14 leak springs.

15 JUDGE PIGOTT: Well, if you go - - - if you
16 go back to your 117, and use my probably bad example
17 of somebody's son - - - child being a level one and
18 they having to move because of their child, it just
19 strikes me that when - - - when most of the studies
20 show that a lot of the - - - a lot of the sex abuse
21 and things that happen, happen inter-familially, and
22 on the computer, I mean, moving - - - moving them,
23 you know, out of their house and having them sell,
24 and the kids having to get new schools, all because
25 Junior got on the computer and did some - - - did

1 some bad things, doesn't make sense. And - - - and
2 but that's what your legislation says. That's what -
3 - - that's what the zoning thing - - -

4 MR. GARTNER: And I'm saying that - - -
5 that might pose a constitutional issue. But I don't
6 believe that it's a preemption issue.

7 JUDGE PIGOTT: You're saying it's not
8 raised in this - - -

9 MR. GARTNER: Yes.

10 JUDGE PIGOTT: - - - in this - - - okay.

11 CHIEF JUDGE LIPPMAN: Okay. Thanks
12 counsel.

13 MR. GARTNER: Thank you.

14 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

15 MS. MANLEY: Thanks. The state does
16 clearly have a comprehensive scheme. And the fact
17 that it was - - - there were different pieces of it
18 passed at different times, I would say, shows even
19 more strongly that it's a very comprehensive scheme.
20 It covers all of sex offender management.

21 Even back when SORA was passed in 1995, at
22 that time, the legislative history stated that it was
23 a balanced and comprehensive approach because - - -

24 JUDGE ABDUS-SALAAM: But counsel, wouldn't
25 it be easy for the legislature to say expressly that

1 we are prohibiting people from living in certain
2 areas, no matter what level they are required - - -
3 whatever level they're required to register, one, two
4 or three? Wouldn't that just be easy for the
5 legislature to do?

6 MS. MANLEY: I don't - - - that might be
7 easy. But I think it would be inappropriate, because
8 when the agen - - - when the agencies studied this,
9 they found out that that would be counterproductive.
10 They don't want to have residence restrictions for
11 everybody.

12 And just - - - just very recently, the
13 Association for Treatment of Sexual Abusers came out
14 with a report in, I believe, August 2014 or perhaps
15 more recently, saying that sex offender residence
16 restrictions do not reduce sexual offending or
17 increase community safety, and that they actually
18 cause more problems than they solve.

19 And the cases - - - People v. Cook is
20 distinguishable, because in that case they stated
21 there's no need for statewide uniformity, and what
22 was happening there is - - - was - - - with the local
23 laws was not contrary to state policy, and here I
24 think it clearly is, based on the language in the
25 probation and parole regulations. It - - -

1 JUDGE PIGOTT: But wouldn't those be
2 arguments for the legislature? In other words,
3 regardless of what we do, if we upheld the laws here,
4 and the legislature didn't like our decision, it
5 could fix it.

6 MS. MANLEY: It could. But I mean, that's
7 not how the preemption argument works. Very often
8 this court has found preemption when there's - - -
9 even if there's not an express statement when - - -
10 such as in the Con Edison case, where the state
11 evinced an attempt to preempt the field, and also in
12 the Lansdowne case, that was a conflict case where
13 the - - - there was a cabaret, as to whether they
14 could be closed at 4 a.m. or 4:30. The state said
15 they could be open until 4:30 and then the locality
16 said - - - or the - - - the locality said 4 o'clock.
17 Anyway, there was a conflict there. And I believe
18 that applies here as well as field preemption.

19 CHIEF JUDGE LIPPMAN: Okay. Thanks
20 counsel. Thank you both.

21 (Court is adjourned)

22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Michael Diack, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: January 12, 2015