THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

George Jensen Aakjer, III, et al.,

Petitioners,

v.

City of Myrtle Beach, and City of Myrtle Beach Municipal Court,

Respondents.

BRIEF OF PETITIONERS

Desa Ballard, S.C. Bar No. 498
Law Offices of Desa Ballard
226 State Street
West Columbia, SC 29169
Tel: (803) 796-9299
Fax: (803) 796-1066
E-mail: desab@desaballard.com

James Thomas McGrath, S.C. Bar No. 3828
Law Offices of Tom McGrath
P.O. Box 5424
Richmond, VA 23220-0424
Tel: (804) 355-7570
Fax: (804) 353-3962
E-mail: tom@tommcgrathlaw.com

Attorneys for Petitioners

TABLE OF CONTENTS

Table of Authorities iii
Statement of Issues on Appeal 1
Statement of the Case 1
Facts 2
Arguments

1. THE CITY'S LOCAL HELMET ORDINANCE CONFLICTS WITH THE STATE'S UNIFORM TRAFFIC LAW 3

2. THE CITY'S MUNICIPAL COURT LACK SUBJECT MATTER JURISDICTION 12

3. THE CITY CANNOT SEVER AN UNCONSTITUTIONAL ENFORCEMENT MECHANISM FROM ITS HELMET ORDINANCE 14

Conclusion 17

TABLE OF AUTHORITIES

CASES

Am. Petroleum Inst. v. S.C. Dep't of Rev.,
382 S.C. 572, 577-78, 677 S.E.2d 16, 19-20 (2009) 15-17

Beachfront Entertainment, Inc. v. Town of Sullivan's Island,
379 S.C. 602, 666 S.E.2d 912 (2008) 4-5, 8

Denene, Inc. v. City of Charleston,
352 S.C. 208, 574 S.E.2d 196 (2002) 10-11

Emery v. City of Myrtle Beach,
4:08-cv-03351-TLW-TER (D.S.C. filed Oct. 2, 2008) 1

Foothills Brewing Concern, Inc. v. City of Greenville,
377 S.C. 355, 600 S.E.2d 264 (2008) 4-5, 8, 10-11

Henderson v. Evans,
268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) 15

Law v. City of Spartanburg,
148 S.C. 229, 146 S.E. 12 (1928) 4-5

Little v. Town of Conway,
171 S.C. 27, 171 S.E. 447 (1933) 4-5

Mayes v. Paxton,
313 S.C. 109, 437 S.E.2d 66 (1993) 6

Nat'l Ass'n for the Advancement of Colored People, Inc., et al. v. City of Myrtle Beach, et al., 4:03-cv-01732-TLW (D.S.C. filed May 20, 2003) 3

New S. Life Ins. Co. v. Lindsay,
258 S.C. 198, 187 S.E.2d 794 (1972) 14

Pa. Nat'l Mut. Cas. Ins. Co. v. Parker,
282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984)..... 4-5

Shank v. City of Myrtle Beach,
4:08-cv-03770-TLW (D.S.C. filed Nov. 13, 2008) 1

S.C. Dep't of Transp. v. First Carolina Corp. of S.C.,
369 S.C. 150, 631 S.E.2d 533 (2006) 7

Town of Hilton Head Island v. Fine Liquors, Ltd.,
302 S.C. 550, 397 S.E.2d 662 (1990) 4-5, 10

CONSTITUTIONS & STATUTES

S.C. Const. art. V, § 1 14
S.C. Const. art. VIII, § 14 ..... 5, 10
S.C. Code Ann. § 1-11-300 (2005) 10
S.C. Code Ann. § 12-21-5040 (2000) 10
S.C. Code Ann. § 12-37-30 (2000) 10
S.C. Code Ann. § 14-25-45 (Supp. 2008) 13, 14, 16-17
S.C. Code Ann. § 15-38-65 (2005) 10
S.C. Code Ann. § 15-53-140 (2006) 10
S.C. Code Ann. § 19-5-510 (1976) 10
S.C. Code Ann. §§ 26-3-10 to 26-3-90 (2007) 10
S.C. Code Ann. § 27-19-390 (2007) 10
S.C. Code Ann. § 36-9-521 (2003) 10
S.C. Code Ann. § 43-5-620 (1976) 10
S.C. Code Ann. § 43-7-50 (1976) 10
S.C. Code Ann. § 44-96-220 (2002) 10
S.C. Code Ann. § 46-631 (1962) 5-6
S.C. Code Ann. §§ 56-1-5 to 56-1-3400 (2006 & Supp. 2008) 9
S.C. Code Ann. §§ 56-5-2910 to 56-5-3000 (2006 & Supp. 2008) 9
S.C. Code Ann. § 56-5-30 (2006) 3-4, 8, 10
S.C. Code Ann. § 56-5-3660 (2006) 5-6, 7
S.C. Code Ann. § 56-5-3670 (2006) 11
S.C. Code Ann. § 56-5-3680 (2006) 11
S.C. Code Ann. § 56-5-3690 (2006) 7, 11-12
S.C. Code Ann. § 56-5-4010 (2006 & Supp. 2008) 9
S.C. Code Ann. §§ 56-5-4410 to 56-5-5150) (2006 & Supp. 2008) 10
S.C. Code Ann. § 56-5-5015 (2006) 9
S.C. Code Ann. § 56-5-5020 (2006) 9
S.C. Code Ann. §§ 56-5-5310 to 56-5-5810 (2006 & Supp. 2008) 9
S.C. Code Ann. § 56-5-6410 (2006) 9
S.C. Code Ann. § 56-5-6510 (2006) 9
S.C. Code Ann. § 58-17-2720 (1976) 10
S.C. Code Ann. § 59-5-68 (2004) 10
S.C. Code Ann. § 59-31-30 (2004) 10
S.C. Code Ann. § 59-39-100 (2004) 10
S.C. Code Ann. § 62-7-631 (1987) 10

REGULATIONS & ORDINANCES

S.C. Code Ann. Regs. 38-151 (Supp. 2008) 11-12

Myrtle Beach, S.C., Municipal Code, art. I, § 13-1 16-17
Myrtle Beach, S.C., Ordinance 2008-64 (Sept. 23, 2008) 6-7, 11-12
Myrtle Beach, S.C., Ordinance 2008-71 (Sept. 23, 2008) 14-15
Myrtle Beach, S.C., Ordinance 2009-25 (April 28, 2009) 14-15, 16

OTHER AUTHORITIES

Jean Hoefer Toal et al., Appellate Practice in South Carolina 272 (2d ed. 2002) 14

STATEMENT OF ISSUES

I. DOES THE CITY'S LOCAL HELMET ORDINANCE CONFLICT WITH THE STATE'S UNIFORM TRAFFIC LAW?

II. DOES THE CITY'S MUNICIPAL COURT LACK SUBJECT MATTER JURISDICTION?

III. CAN THE CITY SEVER AN UNCONSTITUTIONAL ENFORCEMENT MECHANISM FROM ITS HELMET ORDINANCE?

STATEMENT OF THE CASE

Forty-nine Petitioners, listed individually in the caption above, initiated this action in the Supreme Court's original jurisdiction on May 7, 2009, seeking a declaratory judgment that certain ordinances enacted by the City of Myrtle Beach violate South Carolina law. Petitioners also seek a writ of prohibition prohibiting the City, either by way of an administrative hearing tribunal or the municipal court, from adjudicating alleged violations of the ordinances, or from transferring jurisdiction over the alleged offenses to its municipal court.[1] On June 12, 2009, this Court granted the petition for original jurisdiction, and consolidated this case for purposes of oral argument with a related matter, BOOST a/k/a Business Owners Organized to Save Tourism and Bart Viers.[2]

---

[1] After being apprised of the filing of the present action in this Court, the municipal court has taken the adjudication of these matters under advisement and indicated to counsel that neither he nor his clients need appear until this matter is finally decided. The City, however, continues to try to enforce the ordinances pending this Court's determination of this action. (App. p. 90).

[2] Related lawsuits in the U.S. District Court for the District of S.C. (Florence Div.) include Shank v. City of Myrtle Beach, 4:08-cv-03770-TLW (filed Nov. 13, 2008) and Emery v. City of Myrtle Beach, 4:08-cv-03351-TLW-TER (filed Oct. 2, 2008). Shank and Emery appear to focus on the illegal prior restraint aspects of the City's new ordinances and seek damages for economic losses arising from the City's promotion, marketing, and operating restrictions on the plaintiffs' marketing and tourism businesses. The parties in Shank entered a stipulation of dismissal on June 10, 2009. Emery is still pending.

FACTS

On or about September 23, 2008, the City passed a series of fifteen ordinances for the purpose of stopping motorcycle rallies, whether inside or outside the City. (App. pp. 6-7; pp. 9-10; pp. 11-18; pp. 52-54; pp. 55-57; pp. 64-70). Myrtle Beach, S.C., Ordinances 2008-57, 2008-64, and 2008-68 (and others) were passed to (1) declare these rallies as public nuisances and to impose financial and criminal penalties on any entity that promoted or advertised the rallies in or around the City, (2) regulate sound from exhaust systems and impose EPA labeling requirements, and (3) require motorcycle riders to wear helmets. (App. pp. 1-10). The ordinances apply year-round. *Id*.

In order to adjudicate most of these ordinances, the City created a special trial court in violation of state constitutional law, presumably because no other existing court would enforce them. (App. pp. 64-70). The City revoked the hearing tribunal only after the Chief Justice advised them of its illegality. (App. pp. 71-78; pp. 83-84). Petitioners come before this Court following their stops by the City's law enforcement officers for refusing to wear a helmet while operating their motorcycles. The City has issued to each of the Petitioners a document of some type that purports to "charge" them with a violation of one or more of the ordinances.[3] (App. p. 82) They challenge the validity of

[3] At the time of the conduct which forms the basis for the "charge", the Myrtle Beach police issued to each Petitioner a document entitled an "administrative infraction notice." (App. p. 82). By stipulation with the City, the Appendix contains only a sample of the 49 infraction notices; all are identical except for identifying information. Each was issued on February 28, 2009. Thereafter, when the City unilaterally transferred the cases to the municipal court, a new charging document, called an "ordinance summons" was issued and the City attempted to serve the summonses on the individual Petitioners. (App. pp. 86-88; p. 89; p. 98, line 21--p. 99, line 8; p. 104, line 8--p. 105, line 6; p. 105, line 16--p. 107 line 1; p. 110 line 16--p. 111, line 7).

the helmet law and the means by which the City has chosen to adjudicate violations of this law.[4] These facts are undisputed.

ARGUMENTS

The City's helmet ordinance is void because it conflicts with state law and is therefore preempted. In addition, a writ of prohibition is necessary to prohibit the City's municipal court from attempting to exercise subject jurisdiction when it has none. It is not necessary for the Court to set aside the City's illegal "administrative hearing system" as requested in the Petition for Original Jurisdiction. The City has now revoked the ordinance that established this system and "converted" the adjudication of the helmet ordinance, among others, over to its municipal court. (App. p. 71-78; pp. 86-88; p. 103, lines 2-14; p. 104, lines 3-7; p. 106, lines 7-11; p. 107, line 16--p. 108, line 6). The administrative hearing system's underlying illegality, however, permeates the City's entire anti-motorcycle scheme and cannot be severed from the helmet ordinance.

I. THE CITY'S LOCAL HELMET ORDINANCE CONFLICTS WITH THE STATE'S UNIFORM TRAFFIC LAW.

This matter arises from a municipality's attempt to circumvent state law under the overbroad guise of trying to stop a public nuisance. (App. pp. 1-18). It involves motorcycle helmets, but has broader implications, including the appropriate scope of a municipality's powers in areas where South Carolina's General Assembly requires uniform law, specifically S.C. Code Ann. § 56-5-30 (2006) (regulations governing traffic

---

[4] The latest anti-motorcycle scheme represents a second bite at the same apple for the City. The first attempt resulted in claims of improper racial motivations, claims the City ultimately settled with the NAACP on February 6, 2006. See Nat'l Ass'n for the Advancement of Colored People, Inc., et al. v. City of Myrtle Beach, et al., 4:03-CV-01732-TLW (D.S.C. filed May 20, 2003).

on highways shall be uniform in nature, and in all political subdivisions and municipalities; no local authority shall enact any ordinance in conflict with state provisions, absent express consent).

The precise issue is whether the City can require motorcycle riders to wear helmets, notwithstanding the Legislature's decision to give them a choice. The answer is no. Moreover, "[t]hat which is authorized by the Legislature, within the strict scope of its constitutional power, cannot be a public nuisance." Law v. City of Spartanburg, 148 S.C. 229, 235, 146 S.E. 12, 14 (1928). Petitioners' refusal to wear a helmet and to drive a motorcycle within the City's limits, therefore, cannot be a nuisance as a matter of law.

Although the Court should presume valid the laws of municipalities as a starting point, the presumption falls away when a municipality's law conflicts with areas of the law where the legislature has acted. Such is the case here. Under the rules governing preemption, given a conflict between a state and local law, state law controls. E.g. Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 600 S.E.2d 264, 267 (2008); Beachfront Entertainment, Inc. v. Town of Sullivan's Island, 379 S.C. 602, 605, 666 S.E.2d 912, 914 (2008).

Even as this Court's most recent jurisprudence has focused on legislative silence as a means of permitting local action, to the extent legislative silence is present here, the facts, law, and legislative policy require a different outcome. Compare Foothills Brewing Concern, Inc., 377 S.C. 355, 600 S.E.2d 264; Beachfront Entertainment, Inc., 379 S.C. 602, 666 S.E.2d 912, and Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 553, 397 S.E.2d 662, 664 (1990) (all finding legislative silence as an invitation for localities to act) with Law v. City of Spartanburg, 148 S.C. 229, 233-35, 146 S.E. 12, 13

(1928) ("That which the state authorizes, directs, requires, licenses, or expressly permits[,] a municipality is powerless to prohibit."); Little v. Town of Conway, 171 S.C. 27, 31, 171 S.E. 447, 448 (1933) (defining the maxim "*expressio unius est exclusio alterius*" as the specification of one thing precludes the inference of another); and Pa. Nat'l Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 555, 320 S.E.2d 458, 463 (Ct. App. 1984) ("[T]he enumeration of particular things excludes the idea of something else not mentioned.").

The test for determining when a local law impermissibly conflicts with state law requires a court to make a two-part inquiry: (1) Did the local government have the power to enact the ordinance, and, (2) if so, is the ordinance consistent with South Carolina's Constitution and laws of this state? E.g., Beachfront Entertainment, Inc., 379 S.C. at 605, 666 S.E.2d at 913-14. Here, the City did not have the power to enact ordinances on matters that are already governed by, and therefore preempted by, state law. To this extent, it also conflicts with the Constitution and laws of this State. S.C. Const. art. VIII, § 14. Specific conflicts between State's and the City's laws are demonstrated below.

In 1980, the South Carolina General Assembly amended S.C. Code Ann. § 56-5-3660 (2006) to require motorcycle riders under the age of twenty-one to wear a helmet. The law previously required all riders to wear helmets, and failure to comply constituted a misdemeanor. The former law provided:

> **Helmets to be worn by operators and passengers; authority of Department.** It shall be unlawful for any person to operate or ride upon a two-wheeled motorized vehicle unless he wears a protective helmet of a type approved by the South Carolina State Highway Department. Such a helmet must be equipped with either a neck or chin strap and be reflectorized on both sides thereof. The Department is hereby authorized to adopt and amend regulations covering the types of helmets and the

> specifications therefore and to establish and maintain a list of approved helmets which meet the specifications as established hereunder.

S.C. Code § 46-631 (1962) (emphasis in original). (App. p. 119). By contrast, the current law provides:

> **Helmets shall be worn by operators and passengers under age twenty-one; helmet design; list of approved helmets.** It shall be unlawful for any person under the age of twenty-one to operate or ride upon a two-wheeled motorized vehicle unless he wears a protective helmet of a type approved by the Department of Public Safety. Such a helmet must be equipped with either a neck or chin strap and be reflectorized on both sides thereof. The department is hereby authorized to adopt and amend regulations covering the types of helmets and the specifications therefore and to establish and maintain a list of approved helmets which meet the specifications as established hereunder.

S.C. Code Ann. § 56-5-3660 (2006) (emphasis in original). The 1980 amendment of the 1967 helmet law (App. pp. 121-122), therefore, gave riders over the age of twenty-one a choice, as this Court has already decided. See Mayes v. Paxton, 313 S.C. 109, 437 S.E.2d 66 (1993) (Harwell, C.J.) (finding legislature intended not to extend helmet requirement to motorcyclists 21 years of age or older). In addition, section 56-5-3660 describes what kind of helmet these riders must wear, specifically that the helmet be approved by the South Carolina Department of Public Safety, not a local government like the City of Myrtle Beach.

The City, however, by adopting Ordinance 2008-64 (App. pp. 52-54), takes away the right to choose that the General Assembly created in 1980. Myrtle Beach, S.C., Ordinance 2008-64 (all riders must wear helmets). In addition, the City attempts to circumvent the requirements promulgated by the Department of Public Safety by adopting helmet specifications that conflict with those adopted by the State. Myrtle Beach, S.C., Ordinance 2008-64, Sec. 14-226 (Sept. 23, 2008) (listing the City's special

motorcycle helmet standards). (App. pp. 52-54). Furthermore, complying with the City's ordinance requires a violation of state law in that the City expects riders to wear helmets that the State has not approved. See S.C. Code Ann. § 56-5-3690 (2006) (unlawful to sell or distribute helmets not approved by the Department of Public Safety). This end-run around state law highlights the absurdity of the City's local ordinance scheme. Furthermore, approving the City's ordinance here would set a dangerous precedent by encouraging other communities to enact a patchwork of local travel standards under the auspices of public nuisance law. See Myrtle Beach, S.C., Ordinance 2008-64, Sec. 14-227 (Sept. 23, 2008) (violation of the helmet ordinance amounts to a public nuisance). (App. p. 54).

The plain language of South Carolina's helmet law, the best evidence of legislative intent, makes clear the conflict between the General Assembly's version and the different standard adopted by the City. E.g., S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 369 S.C. 150, 153-54, 631 S.E.2d 533, 535 (2006) ("A statute's language must be construed in light of the intended purpose of the statute."). As to motorcycle riders over the age of 21, the state's uniform law gives riders the right to choose to wear a helmet. The City's local helmet law takes this right away. Compare S.C. Code Ann. § 56-5-3660 (riders over the age of 21 have a choice) with Myrtle Beach, S.C., Ordinance 2008-64 (Sept. 23, 2008) (riders over the age of 21 do not have a choice). (App. pp. 52-54).

Moreover, the conflict between the state and local helmet law becomes crystal clear by examining the state helmet statute's position within its overall legislative scheme. First, the Legislature places its state helmet law within Title 56, South

Carolina's collection of statutes which govern motor vehicles and their use throughout the state. Second, the state helmet law is placed within the "Uniform Act Regulating Traffic on Highways." It is a uniform law. As evidence of the high premium the Legislature has placed on uniformity, S.C. Code. Ann. § 56-5-30 (2006 & Supp. 2008) provides: "The provisions of this chapter shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance, rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein." (emphasis supplied).

Stated another way, without legislative permission in the area of traffic regulation, the City cannot act. Whether it may act in other entirely different areas, such as smoking or land use, is irrelevant because the Legislature has not found it necessary in those areas to make uniformity a legislative goal. Representative examples include Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008) and Beachfront Entertainment, Inc. v. Town of Sullivan's Island, 379 S.C. 602, 666 S.E.2d 912 (2008) (both upholding the power of local government to act in areas where legislature left the issue open and did not identify uniformity as important state goal).

Imagine the chaos if municipalities could change otherwise uniform traffic laws from one municipality to the next. Allowing the City to do so here will do this, and open the door for other communities to inject uncertainty into the law. The City can no more mandate a local helmet requirement in violation of State law than it can alter any other form of uniform state law. Although the list is not exhaustive, the City's special helmet ordinance, if allowed to stand, will encourage local governments in the name of public nuisance to:

- raise or lower the age and requirements for who can obtain a driver's license and where he or she can drive (but see S.C. Code Ann. §§ 56-1-5 to 56-1-3400 (2006 & Supp. 2008) (establishing uniform licensing requirements));
- toughen DUI laws in areas with large concentrations of bars (but see S.C. Code Ann. §§ 56-5-2910 to 56-5-3000 (2006 & Supp. 2008) (establishing uniform DUI laws));
- mandate additional restrictions on vehicle requirements for height, weight, and load in areas with a high volume of pedestrian traffic (but see S.C. Code Ann. § 56-5-4010 (2006 & Supp. 2008) (establishing uniform height, weight, and load restrictions));
- create new local requirements for the condition or disposition of vehicles (but see S.C. Code Ann. §§ 56-5-5310 to 56-5-5810 (2006 & Supp. 2008) (establishing uniform requirements that govern the condition or disposition of vehicles));
- outlaw window tinting in high crime zones (but see S.C. Code Ann. § 56-5-5015 (2006) (establishing uniform requirements for sunscreen devices));
- mandate higher (or lower) local motor vehicle emission standards for mufflers because of local concerns about global warming in coastal counties (but see S.C. Code Ann. § 56-5-5020 (2006) (establishing uniform muffler requirements));
- create stricter (or eliminate altogether) safety standards for child passenger restraint systems (but see S.C. Code Ann. § 56-5-6410 (2006)) and safety belts (but see S.C. Code Ann. § 56-5-6510) (2006)) (both establishing uniform requirements for child passenger restraint systems and safety belts); or

- establish new requirements for motor vehicle lighting equipment in areas of a county prone to darkness or fog (but see S.C. Code Ann. §§ 56-5-4410 to 56-5-5150 (2006 & Supp. 2008) (establishing uniform lighting requirements)).[5]

To hold otherwise would violate established law. S.C. Code Ann. § 56-5-30 (2006) (traffic laws shall be uniform; no local authority shall enact any law in conflict therewith without express authorization); Town of Hilton Head Island, 302 S.C. at 553, 397 S.E.2d at 664 (local governments cannot act where legislative intent shows otherwise).

Uniform acts require broad consistency—one law—not *ad hoc* local action. By its statutory language creating a uniform act and prohibiting local governments from doing anything to interfere with the State's authority over highways, the Legislature did not intend to carve out exceptions for local governments to alter its helmet statute, or it would have granted them the power to do so. Id. If the Legislature had done so, it would have engaged in a futile act because the clarity that uniform motor vehicle and helmet laws provide would evaporate. Foothills Brewing Concern, Inc., 377 S.C. at 363, 660 S.E.2d at 268 (legislature does not engage in futile acts) (citing Denene, Inc. v. City of

[5] If successful, the City of Myrtle Beach's actions will encourage other local governments to tailor other uniform state laws to their own special needs under the sweeping guise of finding a "public nuisance that affects public economy," just as Myrtle Beach has done in its special ordinances governing the regulation of motorcycles. Other than interfering with the uniform traffic laws set out above, other potential disruptive examples include, but are not limited to: S.C. Const. art. VIII, § 14 (uniform statewide criminal laws); S.C. Code Ann. § 1-11-300 (2005) (uniform cost accounting and reporting systems); S.C. Code Ann. § 12-21-5040 (2000) (uniform system of stamps, labels, or other indicia for controlled substances); S.C. Code Ann. § 12-37-30 (2000) (uniform assessment rules for property taxes); S.C. Code Ann. § 15-38-65 (2005) (uniform contribution among tortfeasors); S.C. Code Ann. § 15-53-140 (2006) (uniform civil remedies); S.C. Code Ann. § 19-5-510 (1976) (uniform business records as evidence); S.C. Code Ann. §§ 26-3-10 to 26-3-90 (2007) (Uniform Recognition of Acknowledgments Act); S.C. Code Ann. § 27-19-390 (2007) (uniform disposition of unclaimed property); S.C. Code Ann. § 36-9-521 (2003) (uniform form for written financing statements); S.C. Code Ann. § 43-5-620 (1976) (uniform system of information clearance and retrieval); S.C. Code Ann. § 43-7-50 (1976) (uniform payments for professional services under State Medicaid Program); S.C. Code Ann. § 44-96-220 (2002) (uniform revenue collection and enforcement methods); S.C. Code Ann. § 58-17-2720 (1976) (uniform rates and service for railroads); S.C. Code Ann. § 59-5-68 (2004) (uniform education grading scale); S.C. Code Ann. § 59-31-30 (2004) (uniform textbook selection); S.C. Code Ann. § 59-39-100 (2004) (uniform diplomas); and S.C. Code Ann. § 62-7-631 (1987) (uniform investing rules).

Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002)). This is exactly why the Legislature took away the power of local governments to tamper with uniform traffic regulations on state highways in the first place: The State requires uniformity. The City's interpretation, regardless of its motives and in light of this context, does not make any sense.

The City further compounds the problem created by the helmet conflict by adding another layer of conflict between the City's new special protective eyewear requirement and state law. (App. pp. 52-54). Although state law requires motorcycle riders under the age of twenty-one to wear some form of protective eyewear, state law requires only that one choose between goggles or a face shield and, in any event, limits this requirement to riders under twenty-one. S.C. Code Ann. § 56-5-3670 (2006) (riders under the age of twenty-one must wear goggles or a face shield). Moreover, state law provides that if one operates a motorcycle with a wind screen, the provisions of section 56-5-3670 do not apply. S.C. Code Ann. § 56-5-3680 (2006). In other words, if one rides a motorcycle with a windscreen, regardless of age, one need not wear goggles or use a face shield at all. Id. The City, however, takes away this choice for all motorcycle riders in Myrtle Beach: All riders must wear protective eyewear. Myrtle Beach, S.C., Ordinance 2008-64, § 14-224 (Sept. 23, 2008). (App. pp. 52). Therefore, motorcycle riders in Myrtle Beach face conflicting laws.

The City creates even more conflicts with state law by creating a Catch-22, this time setting a special set of "safety helmet minimum standards" based on federal law, even though state law makes it illegal for one to sell or distribute helmets, goggles, or face shields not approved by South Carolina's Department of Public Safety. Compare

Myrtle Beach, S.C., Ordinance 2008-64, § 14-226 (helmets in Myrtle Beach must comply with Federal Motor Vehicle Safety Standard No. 218) with S.C. Code Ann. § 56-5-3690 (2006) (South Carolina sets the standards) & S.C. Code Ann. Regs. 38-151 (Supp. 2008) (setting specific state requirement of USA Standard #Z90.1-1966). Furthermore, as a practical matter, the City's law makes it impossible to demonstrate compliance without a facility to test helmets, or with existing state law that makes it unlawful to sell or distribute any helmets, goggles, or face shields that the Department of Public Safety has not approved. See S.C. Code Ann. § 56-5-3690 (2006) ("It shall be unlawful to sell, offer for sale or distribute any protective helmets, goggles, or face shields . . . unless they are of a type and specification approved by the Department of Public Safety and appear on the list of approved devices maintained by the Department.") Because of these multiple layers of conflicts, the only reasonable conclusion is that the State's helmet law preempts the City's ordinance.

II. THE CITY'S MUNICIPAL COURT LACKS SUBJECT MATTER JURISDICTION.

The City's attempt to convert jurisdiction from its illegal administrative hearing system to its municipal court must fail. In line with its "moving target" philosophy, the City's response is apparently to keep "tweaking" (the City's term) its ordinances every time someone raises a legal shortcoming. (App. pp. 19-51; pp. 62-63; pp. 71-81; p. 129, lines 12-18 and 22-25; pp. 131, line 2--p. 133, line 1; p. 134, lines 5-25). This is hardly the purpose that the rule of law is designed to serve. For example, according to a letter received from the City Attorney, the City has rescinded the first set of notices issued to Petitioners and "converted" them to a second document called an "Ordinance Summons,"

purporting to unilaterally vest jurisdiction over these matters in the Myrtle Beach Municipal Court. (App. pp. 86-88). There are at least two fatal problems with this unilateral "reassignment": (1) lack of subject matter jurisdiction and (2) the City's inability to sever its original unconstitutional hearing tribunal from its overall legislative scheme. This Section will address lack of subject matter jurisdiction. Section III will address severability.

After the Chief Justice issued the memorandum of March 23, 2009, pointing out to the City that the administrative hearing tribunal was unconstitutional (App. pp. 83-84), the City purported to simply "transfer" jurisdiction to enforce the ordinances to the Municipal Court. (App. pp. 86-88)[6]. Additionally, the City issued new "Ordinance Summons" to each of the Petitioners, which it attempted to serve on the Petitioners by mailing copies to their attorney. Id. The issuance of the new "Ordinance Summons" was a transparent attempt to have the municipal court obtain jurisdiction when it clearly did not already have jurisdiction. Petitioner's counsel refused to accept service of the "Ordinance Summonses;" thus, whatever "jurisdiction" the Municipal Court has over Petitioners is based on the unilateral transfer of the matters to that Court by the City. (App. p. 91; p. 97, line 6--p. 98, line 1).

The City has acknowledged that the ordinances are "civil" in nature, not criminal. (App. p. 106, lines 10-11; p. 107, line 5--p. 109, line 23). The Municipal Court has no "civil" jurisdiction. S.C. Code Ann. § 14-25-45 (Supp. 2008). The City claims that the Supreme Court's memorandum declaring administrative courts to be unconstitutional

[6] The City Attorney also unilaterally "determined that each of these cases. . . shall be the subject of a jury trial." (App. p. 86). The authority for mandating a jury trial for an administrative infraction has yet to be defined by the City.

"grants" jurisdiction to the municipal court. (App. p. 102, lines 3-7; p. 103, lines 2-14; p. 106, lines 7-11; p. 107, line 16--p. 108, line 6; p. 109, lines 6-11). The City's assertion is ridiculous. Municipal courts have only such jurisdiction as is provided by the General Assembly. S.C. Const. art. V, § 1 ("The judicial power shall be vested in a unified judicial system which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.") The General Assembly has provided for Municipal Courts, and clearly provided that they have no civil jurisdiction. S.C. Code Ann. § 14-25-45 (Supp. 2008). The Supreme Court's memorandum of March 23, 2009, did not confer jurisdiction in any court. Therefore, a writ of prohibition is proper. E.g., New S. Life Ins. Co. v. Lindsay, 258 S.C. 198, 199-200, 187 S.E.2d 794, 795-96 (1972); Jean Hoefer Toal et al., Appellate Practice in South Carolina 272 (2d ed. 2002).[7]

III. THE CITY CANNOT SEVER AN UNCONSTITUTIONAL ENFORCEMENT MECHANISM FROM ITS HELMET ORDINANCE.

The next problem with the City's position—lack of severability—prevents it from separating its illegal enforcement mechanism (either the initial administrative hearing tribunal, which is illegal, or its municipal court, which lacks subject matter jurisdiction) from the ordinances the City designed it to enforce. First, the original administrative hearing system is so intertwined with the enforcement of the ordinances and their expressly titled "administrative" nature that any attempt to cure the illegal process by

[7] As noted in these authorities, a writ of prohibition, which is an ancient remedial writ, is designed to prohibit lower courts from acting outside of their jurisdiction, or to prevent the improper assumption of jurisdiction on the part of any tribunal and to prevent "some great outrage" upon the principles of settled law and procedure that has occurred or is about to occur.

repealing the illegal court fails to cure the unconstitutional nature of the related ordinances. See Myrtle Beach, S.C., Ordinance 2008-71 (Sept. 23, 2008) (App. pp. 64-70) (establishing illegal administrative hearing tribunal), repealed by Myrtle Beach, S.C., Ordinance 2009-25, § 1 (Apr. 28, 2009) (App. p. 71) (repealing illegal administrative tribunal by replacing it with a court that lacks subject matter jurisdiction).

In other words, the City's administrative hearing system forms an inextricable part of its entire motorcycle ordinance scheme such that the adjudicative function cannot be severed from the regulatory function. See Am. Petroleum Inst. v. S.C. Dep't of Rev., 382 S.C. 572, 577-78, 677 S.E.2d 16, 19-20 (2009) (detailing problems with legislative "log-rolling" and severability of unconstitutional provisions from other portions of legislative scheme). To allow severance of the offending provision here—either an illegal court or one without subject matter jurisdiction—would usurp the traditional role of the Legislature and this Court because doing so would require this Court to rewrite the City's statute and create a new enforcement scheme that the City's officials never considered. See Henderson v. Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) ("it is not the province of this Court to perform legislative functions"). A plain reading of the ordinance's explanation, captions, and text makes this clear.

For example, the best evidence of the City's regulatory intentions is located in the City's public explanation concerning the timing and effect of its new ordinances: "Ordinance 2008-71 establishes an administrative process to handle infractions, as specified in Ordinances 2008-61 [administrative process infraction related to accommodations restrictions], 2008-62 [administrative process infraction related to consumption of alcohol], 2008-63 [administrative process infraction related to use of

parking lots and chairs], 2008-64 [administrative process infraction related to helmets and eyewear], 2008-65 [administrative process infraction related to parking of trailers], 2008-66 [administrative process infraction related to convenience store security], and 2008-67 [administrative process infraction related to juvenile curfew]." (emphasis & brackets added). (App. pp. 6-7). The City cannot separate the ordinances from an illegal adjudication process because the illegal nature of process pervades a substantial portion of its entire legislative scheme. Am. Petroleum Inst., 382 S.C. at 577-78, 677 S.E.2d at 19-20 (entire scheme void where intrinsic portion declared void).

Lack of severability is further illustrated by the inextricable connections and dependence between the ordinances and the City's illegal administrative hearing process. Their plain language makes this clear. It appears that most of the titles and text for each ordinance listed above provide that violation of the ordinance is an "administrative infraction" (emphasis added), even though the City later struck out references to this classification and replaced it with "misdemeanor." Myrtle Beach, S.C., Ordinance 2009-25 (Apr. 28, 2009) (App. pp. 71-75; pp. 79-81. Petitioners find no evidence that the City has yet to re-classify the helmet violation from an "infraction" to a "misdemeanor," but the City has issued so many amendments, Petitioners may have lost track. If Petitioners are correct, the current helmet violation is still an "infraction" with no court within which it may be adjudicated.

Any effort by the City to save its flawed scheme by "converting" ordinance violations to the municipal court is nothing but a sham because the municipal court does not have subject matter jurisdiction either for the same reasons discussed above. S.C. Code Ann. § 14-25-45 (Supp. 2008) ("[Municipal courts] shall have no jurisdiction in

civil matters."); City of Myrtle Beach Municipal Code, Art. I, § 13-1 ("The Myrtle Beach Municipal Court is established pursuant to S.C. Code 1976, § 14-25-5 et seq., for the trial and determination of all criminal cases within its jurisdiction.") (emphasis added). For these reasons, any ordinance tied to the enforcement mechanism is void. Am. Petroleum Inst., 382 S.C. at 577-78, 677 S.E.2d at 19-20 (entire scheme void where intrinsic portion declared void).

CONCLUSION

For the reasons stated, this Court should hold that the City's helmet law is void because State law preempts it. Second, this Court should find that the City's municipal court lacks subject matter jurisdiction to adjudicate this dispute and should issue a writ of prohibition to prohibit the City or its municipal court from adjudicating any matters related to alleged violations of Ordinance 2008-64, codified at Section 14-224-227 (App. pp. 52-54). Finally, should the Court find that the unconstitutional administrative hearing tribunal cannot be severed from the City's overall anti-motorcycle scheme, it should hold that the helmet ordinance, and related ordinances, are void on this ground as well.

Respectfully submitted,

September 23, 2009

Desa Ballard, S.C. Bar No. 498
Law Offices of Desa Ballard
226 State Street
West Columbia, SC 29169
Tel: (803) 796-9299
Fax: (803) 796-1066
E-mail: desab@desaballard.com

James Thomas McGrath, S.C. Bar No. 3828
Law Offices of Tom McGrath
P.O. Box 5424
Richmond, VA 23220-0424
Tel: (804) 355-7570
Fax: (804) 353-3962
E-mail: tom@tommcgrathlaw.com

Attorneys for Petitioners