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.

REPLY BRIEF OF PETITIONERS

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DISCUSSION

The gist of the City's arguments is that it has the right to do whatever it wants to do as long as it declares something to be a public nuisance and decides to abate it. The first part of the City's Brief argues that "Home Rule" allows the City to trump the State's Uniform Traffic Law. To do this, it turns the concept of home rule on its head and conflates the test used for preemption with a rational basis test. Next, the City insists that its municipal court has jurisdiction over civil matters, even though municipal courts clearly lack subject matter jurisdiction in civil matters. Finally, the City argues that it can change its enforcement mechanism "at any time," a position which only underlines the arbitrariness of its position.

I. RESPONSE TO THE CITY'S ISSUE I (Preemption)

The City places great weight on the degree of deference this Court ought to give the City's local legislation and uses deference to frame its discussion. Judicial deference, however, has no place in a preemption analysis. The contested ordinances either conflict or they do not conflict, even if one starts with the presumption that local legislation is valid. Moreover, whether the ordinance satisfies a rational basis test is not an issue in this proceeding[1]. If the ordinances conflict with state law, the ordinances are void. If the ordinances are void, their underlying merits are irrelevant.

In support of the City's argument that its own helmet ordinances are constitutional, the City relies on two "anti-cruising" cases. The first is from the Wisconsin Court of Appeals. The second is from the United States Court of Appeals for the Third Circuit applying Pennsylvania law. See Brandmiller v. Arreola, 525 N.W.2d

[1] A large part of the City's brief, and the bulk of the materials it included in the Appendix, is devoted to evidencing WHY the City chose to enact the ordinances. While interesting, it is completely irrelevant to the legal issue presented for this Court's decision.

353 (Wis. Ct. App. 1994); Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990). These cases, however, do not apply. Both address the rights to travel and privacy and whether a municipality's ordinance designed to limit "cruising"—passing the same point repeatedly on the same street within a designated period—violate these constitutional rights. These issues, however, are not relevant here. These cases have nothing to do with preemption.

S.C. Code Ann. § 5-7-30 (2004) establishes, in part, the powers conferred on municipalities. This section provides that municipalities may enact laws that do not conflict with the Constitution or the general law of this State. The City is correct that these powers may include the right to regulate "streets, markets, law enforcement, health, and order if necessary and proper to preserve either the security, general welfare and convenience of the municipality or to preserve health, peace, order, and good government in it." (Respondent's Brief pp. 12-13). However, the City may only exercise these powers if they do not conflict with state law. This is the basis of preemption. This is why a municipality cannot exercise these powers if they are "inconsistent with the Constitution and general law of this State[.]" S.C. Code Ann. § 5-7-30 (2004).

The City asks this Court to flip "home rule" on its head, turning the State traffic laws into the functional equivalent of the Articles of Confederation with respect to traffic laws: a patchwork of inconsistent local ordinances, no meaningful central authority, where uniformity means nothing. The City mischaracterizes the effect of home rule as it has evolved here. South Carolina is a legislative home rule state, one where the State retains supreme legislative power.[2] This means that the powers enjoyed by local

[2] By contrast, the City seems to argue incorrectly that South Carolina is a constitutional home rule state, where the constitution serves as the basic source of local government power and imposes limits on legislative control. Jenny Anderson Horne, "Counties and Municipalities Given Broad Power to Raise Revenue," 48 S.C. L. Rev. 175, 180-81 (Autumn 1996).

governments flow from the Legislature. This is why Article VIII of the South Carolina Constitution allocates power to the General Assembly to provide for the "structure, organization, powers, duties, functions, and the responsibilities" of counties and municipalities. S.C. Const. Art. VIII, §§ 7, 9 (emphasis added); Horne, *supra* note 1, at 180-81 (examining differences between constitutional home rule and legislative home rule). In other words, municipalities have broad powers to act, but only if they act consistently with the State's law. Charleston v. Jenkins, 243 S.C. 205, 208, 133 S.E.2d 242, 243 (1963) (citing S.C. Code Ann. § 47-61 (1962)). Their power is not absolute. McCoy v. York, 193 S.C. 390, 294, 8 S.E.2d 905, 907 (1940) (municipalities may exercise police power, but exercise of the power is subject to limitations).

The City is wrong when it argues that the General Assembly has been "silent" on the motorcycle helmet law. As the Petitioner's Brief demonstrates, the General Assembly's current version of the state motorcycle helmet law removed a once-mandatory requirement that all adults over the age of twenty-one wear a helmet. This is not "silence," as the City argues. A more reasonable interpretation is that further explanation by the General Assembly was not necessary because the whole point of removing the restriction in the first place was to give motorcycle riders a choice, once they met the requisite age. Legislative action of this type—where legislative history confirms the removal of a restriction—cannot be read as the kind of "silence" that would allow the City to alter the choice the Legislature intended to create, especially when the choice forms part of a uniform law.

The inescapable problem with the City's position is that the General Assembly's helmet statute falls within a statutory scheme that mandates statewide uniformity. See

South Carolina State Ports Authority v. Jasper Co., 368 S.C. 388, 402, 629 S.E.2d 624, 631-32 (2006). The title of the Uniform Act Regulating Traffic on Highways makes this clear under any level of preemption analysis, express or implied. The act is uniform to eliminate local government variances. To underline the importance of uniformity, the Legislature included a built-in express preemption clause: "The Provisions of this chapter shall be . . . uniform throughout this State . . . and no local authority shall enact any ordinance, rule or regulation unless expressly authorized herein." S.C. Code. Ann. § 56-5-30 (2006 & Supp. 2008).

The City's helmet ordinance does not fall within any "expressly authorized" exception. In fact, the only time local government may adopt additional traffic regulations is if they do not conflict with the Act, and in the limited circumstances permitted by S.C. Code Ann. § 56-5-930 (2006[3]). Insofar as section 56-5-930 relates to the placing and maintaining of traffic-control devices on state highways and does not relate to helmets, the express exception provision of the Uniform Act Regulating Traffic on Highways does not apply. Furthermore, the City's reliance on S.C. Ann. § 56-5-4210 (2006) on page 17 of its Brief is misplaced in that the quoted portion relates to a portion of the uniform law that addresses a vehicle's size, weight, and load. This Code section has nothing to do with helmets. The rest of the City's discussion is irrelevant because it addresses purported "beneficial effects," the discussion of which has no place in a

[3] ". . . No local authority shall place or maintain any traffic-control devices upon any state highway without having first obtained the written approval of the [State] Department of Transportation." S.C. Code Ann. § 56-5-930.

preemption analysis. Additionally, the City's standing arguments do not apply. [4] Therefore, the City's helmet ordinance is preempted by State law.

II. RESPONSE TO THE CITY'S ISSUES II AND III (The Municipal Court's Lack of Subject Matter Jurisdiction & the City's Ever-Changing Enforcement Mechanism)

Even though the City changes its position every time the City faces a legal challenge, the City cannot rewrite history to breathe life into a set of ordinances, including the helmet ordinance, which have been flawed from the beginning. The City's enforcement mechanism is not entirely separate from the City's helmet ordinance (or its other anti-motorcycle ordinances). The City passed the helmet ordinance and its other anti-motorcycle ordinances with the intent to adjudicate them before an illegal administrative hearing panel, presumably because its own Municipal Court lacked subject matter jurisdiction to hear the cases in the first place. Moreover, the City's argument is surprising, especially in that civil cases do not fall within the class of cases the City's Municipal Court can hear. Compare S.C. Code Ann. § 14-25-45 (Supp. 2008) ("[Municipal courts] shall have no subject matter jurisdiction in civil matters.") with City of Myrtle Beach Municipal Court Website, http://www.cityofmyrtlebeach.com/court.html (last visited Nov. 19, 2009[5]) (municipal court hears only criminal cases). In fact, the City's Website provides, "The Municipal Court is the judicial body responsible for adjudicating criminal misdemeanor offenses involving city ordinances and state statute[s]. This includes traffic offenses and property crimes $1,000 or less."

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[4] The City's argument on page 21 of its Brief that the Petitioners do not have standing to challenge all of the conflicts in the City's helmet law lacks legal support. Petitioners each stand charged with a violation of the City's helmet law. See note 3, Brief of Petitioners. Therefore, they have standing to raise any conflict in support of their preemption argument. The City's argument is akin to saying that because the Petitioners were not wearing helmets at the time of their stop that they are barred now from challenging any aspect of the helmet ordinance. This assertion is absurd.

[5] Since the City has the ability to change the content of its website at will, Petitioners have archived the current version of the City's website as of the date of this brief.

Here, the City has not charged the Petitioners with the commissions of any crime that would trigger the subject matter jurisdiction of its Municipal Court. Instead, the City first charged them with "administrative infraction violation notices" designed to be adjudicated by an illegal administrative hearing tribunal, then unilaterally "converted" the notices to "ordinance summonses." (App. p. 106, lines 10-11; p. 107, line 5; p. 109, line 23). The City contends the charges against Petitioners are civil, not criminal. (App. pp. 86-88). Now, the City changes course again, arguing in its Brief at page 24 that it can try these cases wherever it wants to, including Circuit Court where it can "invoke equitable remedies" because it is trying to "abate a public nuisance and not regulate traffic." This admission, however, is at odds with the City's earlier arguments on page 18 of its Brief that it was trying to regulate traffic. These conflicting positions do not make any sense. They undermine the stability the rule of law is supposed to create.

Finally, in terms of the effect of the City's unconstitutional attempt to vest the City's Municipal Court with subject matter jurisdiction that it cannot have, and whether an enforcement mechanism that is tied to the helmet ordinance (and related ones) can be severed, Petitioners rely on their arguments in their Brief. If the City cannot find an appropriate venue in which to adjudicate its helmet law that was tied to an illegal enforcement mechanism in the first place, this Court should not allow it to stand. Joytime Distributors & Amusement Co., Inc. v. State, 338 S.C. 634, 648, 528 S.E.2d 647, 654 (1999) (if the legislative body cannot show that it would have passed the law without the unconstitutional portion, the unconstitutional portion cannot be severed).

CONCLUSION

For the reasons stated, this Court should hold that the City's helmet ordinance is void because State law preempts it. Second, this Court should find that the City's municipal court lacks subject matter jurisdiction to adjudicate violations of the helmet ordinance and issue a writ of prohibition to prevent the City's enforcement in municipal court. 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,

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