IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-990

CITY OF HOLLYWOOD,

PETITIONER,

VS.

COLON BERNARD MULLIGAN,

RESPONDENT.

AMICUS BRIEF OF CITY OF MIAMI, IN SUPPORT OF THE CITY OF HOLLYWOOD

LEAVE OF COURT REQUESTED

ON DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

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IDENTITY AND INTEREST OF AMICUS

The City of Miami, Florida's most populous city, has a strong interest in this case. Miami has a vehicle impoundment ordinance similar in certain ways to the City of Hollywood ordinance declared unconstitutional by the Fourth District Court of Appeal. The Third District, relying on the decision of the Fourth District, held that Miami's ordinance is unconstitutional. *City of Miami v. Wellman*, 29 Fla. L. Weekly D328 (Fla. 3d DCA Feb. 4, 2004); *City of Miami v. Juarez*, 29 Fla. L. Weekly D376 (Fla. 3d DCA Feb. 11, 2004).

SUMMARY OF THE ARGUMENT

The decision of the district court should be quashed.

The district court failed to recognize the authority afforded to municipalities. Municipalities have the authority to rule in an area, unless there is an express statement of preemption. There was no such statement here.

There is no conflict between the state forfeiture act and the vehicle impoundment ordinance, since it is not impossible to comply with both.

ARGUMENT

At one level, this case is a about a municipal ordinance authorizing the impoundment of automobiles. But just as important, this case is about the division of powers between the State government and municipalities. The decision of the Fourth District Court of Appeal does damage to the basic division of governmental authority within our State. The Court should quash the decision of the Fourth District.

I. MUNICIPAL AUTHORITY UNDER OUR SYSTEM OF GOVERNMENT

Municipalities in the United States have long been recognized as possessing significant powers, reflecting the American desire to keep government close to the people. Alexis de Tocqueville noted that "Municipal independence in the United States is . . . . a natural consequence of this very principle of the sovereignty of the people." 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 67 (1945 ed.).

There are many advantages to this "home rule." When government is local, citizens will be more interested in governments. ZIMMERMAN, STATE-LOCAL RELATIONS 25 (2d ed. 1995). Furthermore, "since local citizens have the most detailed knowledge of community problems, employment of this knowledge will result in the most expeditious solution of the problems." *Id*. Empowered local government also allows for a diversity of approaches, and the successful experiments can be adopted by other municipalities. *Id*. Home rule allows local governments to attempt solutions, "free from veto by voters and

elected representatives of other parts of the State who might disagree with the particular approach advanced by the representatives of the locality involved or fail to appreciate the local perception of the problem." *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 275 (Ill. 1984).

In recent years, local governments have been particularly active in the area of law enforcement and maintaining civil order. There is an emerging pattern in which locales are given substantial latitude in addressing local problems. *See* Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1470 (2001). In general, the courts have allowed this local experimentation:

> As a result of such silence and the judicial proclivity to apply preemption narrowly, municipalities enjoy enormous power to legislate against social disorder independent of state jurisdiction. As noted by a leading treatise, "the range of conduct prohibited by ordinances is extremely broad and signifies the importance of municipal control of offenses against the sovereignty of the state, conceiving the municipality to be an arm and agency of that sovereignty."

Id. at 1425-26 (citation omitted).

In particular, courts across the county have generally held that vehicle impoundment programs are within the authority of local governments. In *People v. Jaudon*, 718 N.E.2d 647 (Ill. Ct. App. 1999), the court upheld a vehicle impoundment ordinance, against an argument that the municipal ordinance conflicted with state law. The court noted that if the Legislature believes that the municipality is acting beyond its home rule powers, then the legislature can "keep home rule units in line." *Id*. at 662.

Similarly, a California court found that a vehicle impoundment ordinance did not conflict with state law. *Horton v. City of Oakland*, 98 Cal. Rptr. 2d 371 (Ct. App. 2000).

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Florida follows the general rule favoring local decision-making. The general rule in Florida is that a municipality may exercise powers, unless specifically restricted. This is what the Florida Constitution requires: "Municipalities shall have government, corporate and proprietary power to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law." Art. VIII, § 2, FLA. CONST. This was a change from prior law, which provided that municipalities had only those powers specifically granted. *See City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1280 (Fla. 1983).

This Constitutional provision was if anything *expanded* by statute. In 1973 the Legislature enacted a law providing that it "recognizes that pursuant to the grant of power set forth in § 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except: . . . [a]ny subject ***expressly preempted*** to state or county government by the constitution or by general law." § 166.021(3)(c), Fla. Stat. (emphasis added). The Legislature further instructed that the provisions of the section are

to "be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution." §166.021(4), Fla. Stat. With this statute, "the legislature made clear its intent to allow broad exercise of the home rule powers granted by the constitution." *City of Boca Raton v. Gidman*, 440 So. 2d at 1280.

Yet in this case, the Fourth District refused to acknowledge the general principle favoring home rule, and departed from the general consensus that local governments should be given room to experiment in dealing with local problems. The Fourth District's decision is contrary to the general principles noted on the previous pages, and is contrary to the Florida law on home rule and preemption.

II. NO EXPRESS PREEMPTION OF ORDINANCE BY STATE LAW

The panel opinion creates a new, enormously expanded principle of preemption. If allowed to stand, it will deny municipalities the right to regulate in many areas. Furthermore, this restriction on local authority, while ostensibly the will of the Legislature, has in fact never been expressed by the Legislature.

Based on the principles stated on the previous pages, courts will not easily conclude that a municipality is preempted from an area. "To find a subject matter expressly preempted to the state, the express preemption language must be a specific statement; express preemption cannot be implied or inferred." *Hillsborough County v. Florida Restaurant Association*, 603 So. 2d 587 (Fla. 2d DCA 1992). *Accord Board of*

Trustees v. Dulje, 453 So. 2d 177, 178 (Fla. 2d DCA 1984). "An 'express' reference is one which is distinctly stated and not left to inference." *Florida League of Cities v. Department of Insurance*, 540 So. 2d 850, 856 (Fla. 1st DCA 1989) (quoting *Edwards v. State*, 422 So. 2d 84, 85 (Fla. 2d DCA 1982)). "The mere fact that a state law contains detailed and comprehensive regulations of a subject does not, of itself, establish the intent of the legislature to occupy the entire field to the exclusion of local legislation." 6 MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 21.34, at 335 (3d ed. 1998).

Cases in which the courts have found that municipalities are preempted from legislating in a particular area have, consistent with this law, involved clear statements by the Legislature. For example, in *National Rifle Association v. City of South Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002), the statute in question had a provision entitled "preemption," which provided that "the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition." This was obviously sufficient to preclude the municipality from governing on the subject.

Other cases involved statutes which may not have used the word preemption, but the statutes nevertheless clearly indicated that municipalities were excluded from the subject. One case involved a state statute which provided that certain persons "shall not be subject to zoning by municipal and county authorities." *City of Miami Beach v. Amoco Oil Co.*, 510 So. 2d 609 (Fla. 3d DCA 1987). This was a clear, express statement of preemption.

Similarly, in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989), the statutes, when viewed together, made clear that state law would control. The statute there stated that every "employer" shall be bound by the provisions of Chapter 440, and required every "employer" to provide compensation. The statute by its very terms provided that "employer" included subdivisions of the state. The Supreme Court therefore held that the municipality could not enact an ordinance which contradicted this express statement, noting that "[t]he preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." *Id.* at 254.

What then is the basis for the Fourth District's conclusion that a municipality is expressly preempted from enacting an ordinance on temporarily impounding vehicles used for activities that are a threat to the health, safety and welfare of the City? The Fourth District's holding rests on the following words of the state statute:

> It is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners and lienholders. . . .

§ 932.704(1), Fla. Stat. According to the Fourth District, the preemption is established by the words "law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles." *Mulligan v. City of Hollywood*, 871 So. 2d 249 (Fla. 4th DCA 2003).

We submit that prior case law does not support the conclusion that this language

establishes express preemption. Perhaps the clearest precedent is *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066 (Fla. 3d DCA 1981). In that case the state law provided that its purpose was that "[e]very condominium created and existing in this state shall be subject to the provisions of this chapter." *Id*. 1069. This Court held that there was no express preemption: "Nowhere, either in its statements of purpose or other provisions, does chapter 718 expressly preempt the subject to the state." *Id.*

Another example of language not establishing express preemption is in *Edwards v. State*, 422 So. 2d 84 (Fla. 2d DCA 1982). The statute there stated certain findings of fact: that "uniformity between the Laws of Florida and the Laws of the United States is necessary and desirable for effective drug abuse prevention and control, and . . . it is desirable that the State of Florida exercise more authority over manufacture and distribution of dangerous drugs, and . . . the inconsistencies in penalty provisions of current law demand amendment." The district court acknowledged that these findings of fact lent some support to the express preemption argument, but nevertheless found that it was not clear enough to establish preemption. The municipality was therefore permitted to legislate on the subject.

The Fourth District's finding of preemption was erroneous for two other reasons.

The district court erroneously concluded that the temporary impoundment authorized by the Hollywood ordinance is a "forfeiture," and thus could conceivably be preempted by the Florida Forfeiture Act. Forfeitures are permanent takings by the

government. But the City of Hollywood's ordinances authorizes *temporary impoundments*, not permanent forfeitures. There is a difference between a forfeiture and an impoundment. *See Wilson v. Commonwealth*, 477 S.E.2d 765 (Va. Ct. App. 1996)("A temporary impoundment of a vehicle is not a forfeiture, although it has characteristics."). There are a number of Florida statutes which authorize impoundments of vehicles, and nothing suggests that those impoundments are subject to the Florida Forfeiture Act. *See, e.g.,* § 316.3025(4), Fla. Stat.; § 320.18(1), Fla. Stat.

Furthermore, the Fourth District erred in its conclusion that since the Florida forfeiture act concerns only felonies, then a municipality could seize a vehicle only for a felony. This conclusion completely misunderstands home rule. If the area is not expressly limited by state law, then the municipality is permitted to regulate in the area. Art. VIII, section 2, Fla. Const. Here, since there is no conceivable limitation on vehicle impoundment for misdemeanors, then there is no basis for concluding that the state forfeiture act—which is limited to felonies—has any effect on impoundments for misdemeanors. Indeed, one of the judges on the Fourth District recognized this, noting on rehearing that "[t]he FCFA does not expressly prohibit local government from legislating in the area of forfeitures with regard to misdemeanors. It does not therefore expressly preempt the impoundment ordinance." *Mulligan v. City of Hollywood*, 871 So. 2d at 257 (May, J., specially concurring). We believe that there is no preemption at all, but certainly there could be no preemption on misdemeanors.

The state law lacks the statement of express preemption which is necessary before a municipality is divested of its constitutional right to regulate an area. The decision of the Fourth District should be quashed.

III. NO CONFLICT BETWEEN MUNICIPAL ORDINANCE AND STATE LAW

Even if there is no express preemption by state law, a municipality may still be prohibited from enacting an ordinance on a subject if the ordinance conflicts with state law. "Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation enacted by municipalities may not conflict with state law. If conflict arises, state law prevails." *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1070 (Fla. 3d DCA 1981). *See also Board of Trustees v. Dulje*, 453 So. 2d 177, 178 (Fla. 2d DCA 1984).

"'Conflict' for this purpose is given a very strict and limited meaning." *F.Y.I Adventures v. City of Ocala*, 698 So. 2d 583, 584 (Fla. 5th DCA 1997). "The sole test of conflict . . . is the impossibility of co-existence of two laws. Courts are therefore concerned with whether compliance with a County ordinance requires a violation of a state statute or renders compliance with a state statute impossible." *City of Miami v. Metropolitan Dade County*, 407 So. 2d 243, 245 (Fla. 3d DCA 1981) (quoting *Jordan Chapel Free Will Baptist Church v. Dade County*, 334 So. 2d 661, 664 (Fla. 3d DCA 1976)). *Accord F.Y.I Adventures v. City of Ocala*, 698 So. 2d 583. A municipality may

not impose a penalty in excess of a penalty imposed by state law. *Thomas v. State*, 614 So. 2d 468 (Fla. 1993).

The Fourth District found that the City of Hollywood ordinance conflicts with state law in its procedures:

> Apart from a preemption of the forfeiture area, we also note the ordinance conflicts with FCFA section 932.704(2)-(4) providing for judicial proceedings, instead of an administrative agency, and for jury trials. The ordinance fails to provide for judicial proceedings de novo and a trial by jury. Instead it relegates the important issue of the propriety of the seizure to a municipal agency, thus bypassing the court and jury. Even if the entire area of forfeitures were not preempted by FCFA, the statute would not authorize conflicting ordinances.

Mulligan v. City of Hollywood, 871 So. 2d at 256.

We acknowledge that there are differences between the City of Hollywood's ordinance and the state forfeiture law. Aside from the most obvious—that one authorizes temporary impoundments, and the other permanent forfeitures—there are differences in procedures. But under the strict test for conflict—whether compliance with one law would make compliance with the other law impossible—there is no conflict. It is not impossible for the two laws to co-exist. *City of Miami v. Metropolitan Dade County*, 407 So. 2d 243.

There is no conflict between the state statute and the municipal ordinance which renders the ordinance invalid.

CONCLUSION

The district court decision is contrary to fundamental principles on the apportionment of governmental authority in our state. The decision of the Fourth District should be quashed, and the Court should uphold the constitutionality of the vehicle impoundment ordinance.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was faxed and mailed this 15th day of July, 2004, to Ronald S. Guralnick, Esq., 550 Brickell Avenue, PH1, Miami, FL 33131; and mailed to Daniel L. Abbott, City Attorney, City of Hollywood, 2600 Hollywood Boulevard, Room 407, Hollywood, FL 33020.

We hereby certify that this brief is in Times Roman 14 point, and in compliance with the type requirements of the Florida Rules of Appellate Procedure.

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