IN THE SUPREME COURT OF FLORIDA

Case No.: SC04-990
L.T. CASE NO.: 4D02-3626

CITY OF HOLLYWOOD,

Petitioner,

vs.

COLON BERNARD MULLIGAN,

Respondent.

BRIEF OF AMICI, CITY OF DANIA BEACH, FLORIDA, AND CITYOF WEST PALM BEACH, FLORIDA, IN SUPPORT OF PETITIONER, CITY OF HOLLYWOOD

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

Respectfully submitted,
EDWARD G. GUEDES, ESQ.
HARRIET R. LEWIS
WEISS SEROTA HELFMAN PASTORIZA
GUEDES COLE & BONISKE, P.A.
Suite 420
2665 South Bayshore Drive
Miami, Florida 33133
Telephone: (305) 854-0800

Counsel for Amici, City of Dania Beach, Florida, and City of West Palm Beach, Florida

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SUMMARY OF ARGUMENT

Amici, the City of Dania Beach, Florida, and the City of West Palm Beach, Florida (collectively, the "Cities), both have in their respective municipal codes vehicle impoundment ordinances that are substantially similar, though not identical to, the Hollywood ordinance at issue in this petition ("Hollywood Ordinance"). Accordingly, the Cities concur with and join in the arguments presented by petitioner, City of Hollywood ("Hollywood"). However, because Hollywood's brief is dedicated exclusively to a preemption analysis under Florida law, the Cities respectfully advise the Court that the Fourth District's conclusion that the Hollywood Ordinance is preempted by the Florida Contraband Forfeiture Act, sections 932.701, *et. seq*., Florida Statutes ("FCFA"), is contrary to the mainstream analysis nationwide on the same issue.

The Hollywood Ordinance, by its very terms, provides a different remedy for different criminal conduct than the FCFA. It provides for temporary impoundment of motor vehicles involved in certain misdemeanor crimes. In contrast, the FCFA provides for permanent forfeiture of motor vehicles (along with a transfer of the vehicle's title to the seizing agency) that are involved in the commission of certain felonies. Nowhere in the FCFA does the Legislature unequivocally express that

municipalities are preempted from imposing other penalties for other forms of misconduct.

In other jurisdictions that have considered the interplay of comparable impoundment ordinances with state forfeiture statutes, the courts have uniformly concluded that because municipal governments may need to locally regulate conduct not expressly reserved to the state through legislation, they are not preempted by state forfeiture laws from regulating and penalizing conduct outside the scope of state forfeiture laws.

ARGUMENT

WHERE A MUNICIPAL ORDINANCE REGULATES AND PENALIZES CONDUCT THAT FALLS OUTSIDE THE SCOPE OF STATE FORFEITURE LAWS, SUCH ORDINANCES MAY PROPERLY PROVIDE FOR THE IMPOUNDMENT OF VEHICLES.

A. Local Regulation of Criminal Conduct.

Appellate courts in other jurisdictions have repeatedly recognized that municipalities are often called upon locally to regulate criminal conduct when the state legislature fails to provide sufficient regulation or penalization of such conduct. For example, in *City of North Charleston v. Harper*, 410 S.E.2d 569 (S.C. 1991), the South Caroline Supreme Court considered a municipal ordinance that regulated the possession of marijuana and hashish and mandated a 30-day sentence. *Id.* at 570. While the court struck down the ordinance on the grounds that it restricted the sentencing discretion conferred on judges by state statute, it nonetheless observed that "more stringent regulation [of criminal conduct] often is needed in cities than in the state as a whole." *Id.* at 156. So long as that regulation is not "inconsistent or irreconcilable" with state law, it will be upheld. *Id.*

Similarly, in *City of Detroit v. Qualls*, 454 N.W.2d 374 (Mich. 1990), the Michigan Supreme Court considered a local ordinance that regulated storage of fireworks. *Id.* at 377. While the state legislature had enacted a statute that

permitted retailers to store "reasonable amounts" of fireworks, the municipality imposed harsher restrictions. The court began its analysis by noting:

> The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements…. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.

Id. at 385. The court further observed that "portions of a field not covered by state law are open to local regulation, and that where the nature of the regulated subject matter calls for regulation adapted to local conditions, supplementary local regulation will be upheld, even where the activity is in fact not local but statewide." *Id.* at n. 42. This construction of the preemption issue, the court noted, "allows a municipality to recognize local conditions and enact rules and regulations peculiarly adapted to such conditions." *Ibid*; S*ee also Gluck v. County of Los Angeles*, 93 Cal.App.3d 121, 133, 155 Cal.Rptr. 435, 441 (Cal. Ct. App. 2d Dist. 1979) (addressing ordinance that permitted impoundment of news racks, court noted that if there is a local interest in further regulating conduct, the law "favors the validity of the local ordinance against an attack of state preemption.")

B. <u>Non-preemption of Local Impoundment Ordinances</u>.

While there appears to be a limited body of case law specifically addressing the unique circumstances at issue in this case, in whatever case law there is,

preemption is the exception rather than the rule when it comes to local ordinances that provide for the impoundment of vehicles involved in criminal conduct not addressed by state forfeiture laws. To that extent, the Fourth District's decision deviates from the mainstream of legal analysis with respect to this issue.

As Hollywood has correctly argued, the Hollywood Ordinance addresses the temporary impoundment of vehicles involved in misdemeanor offenses, whereas the FCFA addresses the permanent forfeiture of vehicles used in the commission of felonies. As such, the scope of the FCFA neither extends to nor preempts the regulation of conduct envisioned by the Hollywood Ordinance. Courts in other jurisdictions have analyzed this interplay between local regulation of criminal conduct that falls outside the scope of state forfeiture laws and those same forfeiture laws and reached results diametrically opposed to the Fourth District's.

For example, in *Grinberg v. Safir*, 694 N.Y.S.2d 316 (Sup.Ct. 1999), the court considered a New York City ordinance that allowed for the seizure *and* forfeiture of vehicles driven by intoxicated individuals. *Id.* at 319-320. After noting that the ordinance in question had been adopted pursuant to New York's Municipal Home Rule Law, *Id.* at 320, the court considered whether the municipal ordinance was preempted by a state statute governing forfeiture of vehicles used as instrumentalities in crimes. The court rejected the preemption argument in large part based on its observation that "[t]he state forfeiture law [citation omitted] does not

apply to petitioner, who is not charged with a felony." *Id.* at 321. *See also Property Clerk of N.Y. City Police Dept. v. Ferris*, 568 N.Y.S.2d 577, 579 (Sup. Ct. 1991) (state forfeiture scheme is completely different than one in municipal code).

In *Horton v. City of Oakland*, 98 Cal.Rptr.2d 371 (Ct. App. 1st Dist. 2000), the court was faced with a preemption challenge to the City of Oakland's ordinance that allowed for actual forfeiture of vehicles involved in solicitation of prostitution or acquisition of controlled substances. *Id.* at 372. The State of California, though, had enacted a comprehensive forfeiture statute that addressed "drug-related asset forfeiture" and allowed for forfeiture of vehicles "used as an instrument to facilitate the manufacture of, or possession for sale or sale of [specified amounts of drugs]…." *Id.* at 374. The owner of the municipally forfeited vehicle argued that the state statute "reflects a legislative intent that drug asset forfeiture procedures be uniform throughout the state, and that the Oakland ordinance is therefore…preempted…." *Ibid.*

The court rejected the preemption argument and stated:

> The state statutory scheme is silent with regard to vehicles used by drug *buyers*. [footnote omitted] Oakland has included such vehicles in its nuisance abatement program in response to the concerns of its residents. Thus, the Oakland ordinance covers an area untouched by statewide legislation. [footnote omitted] As a result, it cannot be said that the state law "clearly indicates" that

> the nuisance caused by drug *buyers* has become "exclusively" a matter of state concern, nor that the state law indicates a "paramount state concern" about that nuisance that "will not tolerate further or additional local action." [citations omitted] "The general fact that state legislation concentrates on specific areas, and leaves related areas untouched" has been held to demonstrate "a legislative intent to permit local governments to continue to apply their police power according to the particular needs of their communities in areas not specifically preempted."

Id. at 374-75 (emphasis in original).[1]

A similar conclusion was reached in *People v. Jaudon*, 718 N.E.2d 647 (Ill. App. 1999), where the court construed a City of Chicago ordinance that allowed for the impoundment of vehicles found to contain illegal weapons pending an administrative adjudication relating to assessment of a fine, as well as towing and storage costs. *Id.* at 651-52. The vehicle owner challenged the Chicago ordinance on the grounds that it was preempted by a state statute that conferred authority on judges to release items seized pursuant to an arrest. *Id.* at 660.

[1] / The *Horton* court also echoed the notion that when state legislation does not address a particular concern, "it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements." *Ibid.*

After noting the broad home rule powers of the city to enact the ordinance and "regulate for the protection of the public health [and] safety," *Id.* at 661, the court rejected the preemption argument and concluded as follows:

> Local governments can enact their own solutions to various problems of local concern, even in the face of less stringent or conflicting State regulation, provided the State's expression of interest in the subject as evidenced by its statutory scheme does not amount to an express attempt to declare the subject to be one requiring exclusive State control. [citations omitted]
>
> Here, it is apparent that there is no preemption by the State because there is no specific or express statement within [the state statutes] declaring the State's exclusive exercise of dominion over property seized at the time of arrest or, more particularly, property seized relative to an arrest for unlawful possession of a firearm.

Ibid.

In the foregoing cases, courts in New York, California and Illinois have refused to strike down local impoundment and forfeiture ordinances on the grounds of preemption where the purported preemptive state statutes did not unequivocally reserve the regulation of the particular criminal conduct to the state. In this case, it is fairly clear that the FCFA does not address the impoundment of vehicles involved in the commission of offenses delineated in the Hollywood Ordinance. Instead, the FCFA regulates the permanent forfeiture of vehicles involved in felonies. Given the broad home rules powers conferred on Florida municipalities

and the requirement that any preemption of such power be explicit and not implied, it cannot be said that the FCFA preempts the Hollywood Ordinance. *Tribune Co. v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984) (emphasizing that the Florida Constitution requires "a more restrictive application of the preemption doctrine, precluding preemption and leaving 'home rule' to municipalities unless the legislature has expressly said otherwise."); *see also City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 201 (Fla. 1985) ("The Florida Constitution and the statutes thus imbue the City with the state's full police powers…except those powers *expressly* preempted") (emphasis in original).

The Fourth District's conclusion regarding preemption of local home rule ordinances is contrary to the mainstream analysis of this particular issue nationally and unnecessarily so.[2] The Hollywood Ordinance has the salutary effect of ensuring that vehicles used in the commission of certain crimes are temporarily removed from the possession of those charged with the crimes and imposes a penalty in the form of a fine for criminal conduct that has particularly local effects. Such an ordinance cannot be said to be in conflict with or preempted by the FCFA.

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[2] / The Third District Court of Appeal recently reached a similar contrarian conclusion in *City of Miami v. Wellman*, ___ So.2d ___, 29 Fla. L. Weekly D328 (Fla. 3d DCA 2004). However, the *Wellman* decision is premised almost entirely on the analysis set forth in the Fourth District's decision below.

CONCLUSION

It is comfortably beyond peradventure that the doctrine of preemption must be strictly construed when its application affects a municipality's exercise of its home rule powers. As such, the FCFA must expressly and unequivocally reserve to the State all forfeiture and impoundment matters in order for the statute to preempt the Hollywood Ordinance. This conclusion is consistent with the body of case law from other jurisdictions cited in this brief which recognizes the importance of local regulation of criminal misconduct and refuses to find preemption of such local regulation except under the unusual situation where the local regulation is irreconcilable with and superseded by state statute. Accordingly, the Cities respectfully request that the Court grant the instant petition and reverse the Fourth District's decision below.

Respectfully submitted,
WEISS SEROTA HELFMAN PASTORIZA
GUEDES COLE & BONISKE, P.A.
2665 South Bayshore Drive, Ste. 420
Miami, Florida 33133
Telephone: (305) 854-0800

By:_____
EDWARD G. GUEDES
FLA. BAR NO. 768103
HARRIET R. LEWIS
FLA. BAR NO. 331015
Counsel for Amici, City of Dania Beach,

Florida, and City of West Palm Beach, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via facsimile and U.S. Mail this __ day of July, 2004, upon Ronald S. Guralnick, Esq. (Counsel for Respondent), 550 Brickell Avenue, PH 1, Miami, Florida 33131; and Daniel L. Abbott, Esq., City Attorney (Counsel for Petitioner), 2600 Hollywood Boulevard, Hollywood, Florida 33020.

_____
EDWARD G. GUEDES

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was prepared using Times New Roman, 14-point font as required by the Florida Rules of Appellate Procedure.

_____
EDWARD G. GUEDES