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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC12-644

RICHARD MASONE,

Petitioner,

-vs-

CITY OF AVENTURA,

Respondent.
_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

On appeal from the Third District Court of Appeal of the State of Florida

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PREFACE

This is an appeal from a Final Judgment of the Circuit Court in favor of the Petitioner, which was reversed in a 2-1 decision by the Third District Court of appeal, see City of Aventura v. Masone, 89 So.3d 233 (Fla. 3d DCA 2011), review granted, 2012 WL 5991346, Case No. SC12-644 (Nov. 6, 2012).

Plaintiff/Petitioner, Richard Masone, will be referred to as "Petitioner" or "Masone." Defendant/Respondent, City of Aventura, will be referred to as "Respondent" or "the City." A subsequent decision from the Fifth District certified conflict with the Third District, and that case from the Fifth District is also in the briefing stage before this Court, see City of Orlando v. Udowychenko, 98 So.3d 589 (Fla. 5th DCA 2012), review granted, 2012 WL 5991338, Case No. SC12-1471 (Nov. 6, 2012).

The Plaintiffs in each case before this Court are represented by the same appellate counsel, and the arguments in the Initial Brief in this appeal are very similar to the arguments in the Answer Brief filed in Udowychenko, supra. The following designations will be used:

(IB) - Initial Brief on the Merits

(AB) - Answer Brief on the Merits

ARGUMENT

POINT-ON-APPEAL

THE CITY'S ORDINANCE IS UNCONSTITUTIONAL AND UNLAWFUL BECAUSE IT ADDRESSES AT LEAST EIGHT TRAFFIC MATTERS COVERED UNDER CHAPTERS 316 AND 318, AND WHERE THE ORDINANCE IS EXPRESSLY AND IMPLIEDLY PREEMPTED, AS WELL AS IN CONFLICT WITH STATE LAW AND THE FLORIDA CONSTITUTION.

Brief Reply to the City of Aventura's Statement of Facts

The City of Aventura's Statement of Facts contends that Petitioner's Statement of Facts inaccurately stated that a person is only given an "appellate proceedings" before the City's Special Master (AB3). Petitioner believes this is accurate. The City's Code, by definition, allows a vehicle owner to only bring an "Appeal" (IB4, citing the City's Code, Section 2-341, Section 2-345).

The City also contends it is factually inaccurate for Petitioner to state that the City's Special Master lacks discretion to reduce a fine (AB4). The City contends that pursuant to §162.09(2)(c), Fla. Stat. (2008), its Special Masters may reduce fines. The City's argument fails, because (2)(c) is inapplicable to red light traffic tickets. This subsection states in full that, "An enforcement board may reduce a fine imposed pursuant to this section." A Special Master charged with resolving an appeal of a ticketed vehicle owner is not reasonably characterized as

an "enforcement board." See also §162.04(4), Fla. Stat. ("'Enforcement board' means a local government code enforcement board").

The other provisions in §162.09 also do not appear to fit within the red light traffic-camera ordinance. Section 162.09(1) refers to an enforcement board being notified by the "code inspector that an order of the enforcement board has not been complied with by the set time," and also refers to a "repeat violation" that "has been committed"). Section 162.09(2) states that the "enforcement board" can consider three factors in deciding the amount of a fine. Only the third factor appears to fit within the factors that could be relevant to red light traffic tickets issued by the City. A vehicle owner cannot correct this violation. While driving through a red light can cause car crashes, it is dubious that a municipality would be assessing the ticket in that situation. As for prior history, the City's Code already addresses that for red light traffic tickets (IB6, the three-tiered fine system).

The City also states it was improper for Petitioner's Statement of Facts to refer to the City of Orlando's Ordinance. City of Orlando v. Udowychenko, 98 So.3d 589 (Fla. 5th DCA 2012) certified conflict with this case, and this Court accepted both cases for review. The City of Orlando's Ordinance is public record, for which this Court can also take judicial notice, §90.202, Fla. Stat. (6), (10). The Petitioner's Statement of Facts merely cites to the provisions of the City of Orlando's Ordinance, and explains their factual distinctions with the City of

Aventura's. The City does not state that the provisions cited are inaccurate or that it has been prejudiced by the citations.

Argument

The City claims that it is "able to legislate on any subject and in any manner to the same extent as the Florida Legislature, unless such local legislation is expressly preempted by or in irreconcilable conflict with state law" (AB5) (both emphases added). While the City ignored implied preemption within this sentence, the larger issues are much the same.[1] The City continues to improperly frame the constitutional and legal analysis in the instant case. The Legislature has extensively intervened and covered at least eight areas that the City's Ordinance engulfs, in a far different manner. The City was not given the express authority it needed to depart from state law in so many different areas.

In the Initial Brief herein, Petitioner argued (IB11):

[1] The City asks this Court to recede from utilizing implied preemption as a basis to invalidate municipal ordinances (AB19 n.11; 35 n.22). The City makes this request only in footnotes, however. Implied preemption is an important check on the very municipal power that the City believes is almost limitless. This Court utilized this doctrine in Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So.3d 880, 886 (Fla. 2010), and mentioned it in City of Palm Bay v. Wells Fargo Bank, N.A., 2013 WL 2096257 (Fla. May 16, 2013), decided last month. 2013 WL 2096257, at *3 ("[W]e have held 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.") (quoting Barragan v. City of Miami, 545 So.2d 252, 254 (Fla.1989)).

> The Third District [majority] appears to have reasoned that the Legislature was required to state, "No Municipality may utilize a red-light traffic camera as the sole means to charge and adjudicate . . . no municipality may use a City-Appointed special master . . . no municipality may hold vehicle owners strictly liable . . . no municipality may relax the burden of proof below reasonable doubt" and so forth.

This Court recently reiterated that position goes too far in relying on home rule powers to defend municipal ordinances. Last month, this Court held that a city ordinance that established a super priority status for municipal code enforcement liens was preempted by and in direct conflict with the general statutory scheme for priority of rights with respect to real property interests. See City of Palm Bay v. Wells Fargo Bank, N.A., 2013 WL 2096257 (Fla. May. 16, 2013) (not final). This Court recognized the broad home rule powers, but also stated (Id. at *3) (emphasis added):

> [W]e have never interpreted either the constitutional or statutory provisions relating to the legislative preemption of municipal home rule powers to require that the Legislature specifically state that the exercise of municipal power on a particular subject is precluded. Instead, we have held 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." Barragan v. City of Miami, 545 So.2d 252, 254 (Fla.1989). We have also recognized that where concurrent state and municipal regulation is permitted because the state has not preemptively occupied a regulatory field, "a municipality's concurrent legislation

> must not conflict with state law." Thomas v. State, 614 So.2d 468, 470 (Fla.1993).[2]

The City contends that §§316.002 and 316.008, Fla. Stat. (2008) "specifically contemplated that the City could exercise its police powers to address local traffic needs" through the use of security cameras (AB5). The City then adds that this legislation ensures that "such local legislation would not conflict with the remainder of Chapter 316" (AB5). The City goes further in referring to these subsections and its home rule power as clear evidence that that there is neither preemption nor conflict (AB5).

The City reaches conclusions to fit its preferred outcome. However, the City's conclusions are not matched by the underlying facts, statutory language in pari materia with other provisions of Chapters 316 and 318, and the historic context of traffic regulation, enforcement and adjudication in this state. Any statutory license to use security cameras did not, ipso facto, give municipalities the license to so dramatically depart from state law in the name of code enforcement violations.

[2] The City notes that none of this Court's decisions cited by Petitioner found preemption. City of Wells Fargo, supra, obviously is now such an example. The dissent in this case and the Fifth District in Udowychenko correctly found the municipal ordinances are preempted.

Contrary to the City's assertion, the Petitioner does not ignore home rule power. If §§316.002, 316.007 did not exist, the City's arguments might carry some weight. But they do exist, along with the underlying purpose and historical understanding of Chapter 316 and Article V, §1, §20. Section 316.002 emphasize the legislative intent of uniformity for drivers in this State. It prohibits local authorities from passing ordinances that conflict with any provision in Chapter 316. Section 316.007 goes further. It prohibits local authorities from passing any ordinance on a matter covered by the chapter, unless expressly authorized.

The City states that §§316.002, .007 were enacted in 1971, two years before the Legislature adopted §166.021, Fla. Stat. (AB10 n.5). The City does not adequately articulate how the legislative expression of home rule powers diminishes the language in §§316.002, .007, or any matter in Chapter 316. The Legislature had over three decades to amend these subsections before Petitioner was ticketed and adjudicated. The City had over three decades to persuade the Legislature to modify the language of Chapter 316. It did not happen.[3]

The City addresses decisions from this Court on home rule power, the Legislature's displeasure with decisions from this Court leading up to §166.021, Fla. Stat., and this Court's approach after that statute was enacted (AB7-16). Again, though, the Legislature never saw fit to express its displeasure with its own

[3] The persuasion and lobbying happened after challenges like the one in the instant case were brought (IB40, 45-47).

framework for Chapter 316. Municipalities were urged to wait for state intervention before enacting the Ordinances at issue before this Court; the Cities of Aventura and Orlando declined (IB44-45).

The City asserts that its Ordinance merely supplements Chapter 316. The dissent in this case and the Fifth District correctly recognized there is nothing supplementary in these Ordinances. Municipalities did not have "the authority to enforce the state's uniform traffic laws by a totally separate, very different, unapproved method [of enforcement]." Masone, 89 So.3d at 243-244 (Rothenberg, J., dissenting). As the Fifth District explained, "the statute is not silent as to the conduct regulated. It is the same conduct but enforced inconsistently." Udowychenko, 98 So.3d at 597. The City's Ordinance "enforces identical conduct that is covered by" Chapters 316, 318. Id. at 597-98. These ordinances "mimic[] the language of" §316.075(1)(c) and "enforce[] an area of the law that is *covered* within chapter 316." Id. at 598 (italics in original). The Fifth District's emphasis of the word "covered" is traced directly to §316.007.

The City incorrectly compares its Ordinance to that upheld in City of Hollywood v. Mulligan, 934 So.2d 1238 (Fla. 2006) (AB17). The City quotes from the City of Hollywood's Ordinance, in which a vehicle owner would be given written notice of impounding, and the owner could then request a preliminary hearing before a code enforcement officer (AB17).

The City's analogy is mistaken. The forfeiture statute stated that law enforcement agencies "shall utilize" the provisions of the statute when forfeiting contraband articles used in criminal actions (934 So.2d at 1244). This Court concluded that this phrase did not demonstrate express preemption. Id. The statutes in this case are far different, from start to finish. The legislative intent of uniformity was shattered by the City's Ordinance. The Legislature prohibits municipalities from enacting any ordinances on matters covered anywhere in the Chapter. The exceptions under §316.008 cannot be viewed in isolation, as though the City were enacting an ordinance like the City of Hollywood's forfeiture ordinance. See Masone, 89 So.3d at 244 ((Rothenberg, J., dissenting).

The City is also mistaken in its reliance on Mulligan as it concerns a conflict analysis. In Mulligan, this Court rejected the argument that the ordinance was in conflict with the forfeiture statute because it did not share the procedural due process requirements of the statute (934 So.2d at 1247). The procedural requirements in this case are promised by §§316.002, .007. The eight different departures from state law in the City's Ordinance are promised to Petitioner by the Legislature. Petitioner is also entitled to judicial rights cast aside improperly by the City. The forfeiture statute does not match the historical context of the creation of Chapter 316 and the constitutional amendments that guarantee Petitioner these legal and constitutional rights (discussed at IB12-14).

The City contends that the Petitioner's "uniformity arguments" are "substantially similar" to those relied upon by the Fifth District in the firework ordinance cases before this Court. See Phantom of Brevard, Inc. v. Brevard County, 3 So.3d 309 (Fla. 2008) (quashing the Fifth District's decision and finding no conflict between state law and the local ordinances) (AB22 n.15). The City is mistaken, for it again compares statutes which are not comparable.

Chapter 316 "may be known and cited as the 'Florida Uniform Traffic Control Law." Chapter 316 is much more than that, though. As the historical analysis demonstrates, uniformity and consistency were the very reasons for the Chapter, because of the hodgepodge of local ordinances and municipal courts (IB13-14). The City's Ordinance has undermined the purpose of the statute. There are a host of unapproved departures from state law -- on so many matters covered by the Legislature. Also, the differences between the two Ordinances on conflict review before this Court are examples of what the Legislature intended to prevent. The City does not address those significant differences.

The City also compares its Ordinance to the proposed charter amendment regarding the election process in Sarasota County. See Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So.3d 880, 886 (Fla. 2010). The City argues that just as local governments are in the best position to make some decisions for their

localities, local governments are in the best position to enact red light traffic camera ordinances (AB25, citing §316.002).

The analogy is also misplaced in light of the statutory language. The City did not present any evidence it satisfied its burden in §316.002 that it was "required" to pass the Ordinance. Moreover, concerns about red light running is not unique to this municipality, i.e., not of concern "outside" the City. See Udowychenko, 98 So.3d at 599 (noting §316.008's exceptions appear to contemplate only unique situations where a statewide provision is lacking or inadequate).

Also, the Cities of Aventura and Orlando might be in the best position as to where to use red light traffic cameras, but this is not a green light to effect a sea change in traffic enforcement and adjudication in Florida. Municipalities might not have been precluded from using those red light traffic cameras, but use is not the issue before this Court. The issue is the application.

The City's discussion on implied preemption reflects its misunderstanding of use vs. application. The City contends there cannot be implied preemption because the Legislature has given municipalities some authority pursuant to §316.008 (AB36). The issue of implied preemption in the instant case is not about whether municipalities can place red light traffic cameras within their jurisdiction. The issue is not whether municipalities can use those cameras for some purposes. The

issue is whether the municipalities could use those cameras in an enforcement and adjudicatory framework that operates as a separate court system, with eight totally different departures from state law. All for the identical driving conduct as captured under Chapters 316 and 318.

Contrary to the City's argument, the Petitioner has not ignored the beginning statement of §316.008, in subsection (1). Local authorities were given authority in the delegated areas. The Legislature did not give its express authority to the dramatic departures from state law for the identical driving conduct. The express authority is required on any matter covered in §316.008, per the prior subsection's directive. See §316.007. The City's contention that it could dictate how to use red light traffic cameras cannot be reconciled with §316.007. The City needed express authority for its eight departures, and did not get that authority. Cf. City of Palm Bay, 2013 WL 2096257, at *3 (recognizing that the Legislature does not have to specifically state that the exercise of municipal power on a particular subject is prohibited).[4]

[4] The Petitioner believes that his challenge is also supported by the recent dissenting opinion's views in City of Palm Bay, supra. The dissent stated that the issue in that case should have not been whether the Legislature expressly authorized the municipal power, but whether that power had been expressly prohibited. 2013 WL 2096257, at *4 (Perry, Justice, dissenting). The City of Aventura's broad departures in at least eight ways from state law and the Florida Constitution have been expressly (and implicitly) prohibited.

The City also asserts that the right to "regulate" traffic by security devices in §316.008 (1)(w) must include the right to enforce (AB41 n.27). The City tries to infer phrases not written in this subsection. More to the point, §316.007 demands there be express approval for any matter already covered in Chapter 316. Assuming arguendo there were express approval to enforce and adjudicate in some type of municipal forum -- a point Petitioner disagrees with -- there surely has not been express approval to do so, inter alia: (a) for vehicle owners; (b) without also having contemporaneous, personal observation; (c) without a neutral judge or trained hearing officers deciding guilt or innocence; (d) without a reasonable doubt standard; and (e) only through an appellate proceeding.

The City remarks that this Court has, "on more than one occasion, recognized the inherent flexibility municipalities enjoy to structure solutions to local problems, even in the face of an existing statutory scheme" (AB41). The City quotes this Court's language that "municipalities are not dependent upon the legislature for further authorization" to act, and municipalities could employ "supplemental, additional, and alternative" methods than those contemplated in statutes, as long as the methods are not "expressly prohibited" (AB41-42) (cases cited therein).

Each case necessarily rests on the applicable statutory scheme. Once again, there is nothing supplemental or complementary with the City's Ordinance. The

City does not dispute the fact that its Ordinance is a dramatic departure from state law, and it is an unlawful and unconstitutional departure.

The City's discussion of a few departures from state law reveals the Ordinance's flaws. The City states that, "[t]here is no question that Chapter 316 punishes drivers for running red lights, but the notion of punishing owners [as the Ordinance does] is not unheard of" (AB43). The City gives as one example photographic enforcement of toll violations (AB43).

The Petitioner cited this example in his Initial Brief (IB23-24). The legal and constitutional point of significance is that municipalities are not permitted to enact legislation on any matter covered in Chapter 316, absent express authority. Municipalities were not given the express authority to pass an ordinance for vicarious liability because the state had done so in a statute covering other driving conduct. Personal, contemporaneous observation is required for the conduct in question in the instant case.

As to another feature of these ordinances, both the Third District dissenting judge and the Fifth District in Udowychenko recognized that the enforcement and adjudication system by the municipalities is impermissible. See Masone, 89 So.3d at 244, 246 (noting that "the Legislature did not expressly grant municipalities the authority to enforce the same traffic infractions identified and already regulated in

chapter 316 through their own "system of justice.") (Rothenberg, J., dissenting); cited with approval by Udowychenko, 98 So.3d at 593 n.5.

The City claims that because its Ordinance does not address "infractions," it had no reason to ensure review in the first instance by a county court judge or trained civil infraction officer (AB44-45). The City adds that its Ordinance does not address "community service hours," a matter contemplated within Chapter 318 that would result in hearing officers adjudicating the guilt or innocence of citizens charged with driving through red lights (AB45).[5]

The City's argument is another improper attempt to take the identical driving conduct outside of Chapters 316 and 318, and treat it as a code violation akin to a house owner playing music too loud. Petitioner mentioned in the Initial Brief that "calling an apple an orange does not make it one" (IB18), and that is precisely what the City has tried to do.

In this respect, the City contends that the Petitioner's complaints of the hodge-podge of ordinances "amount to the equivalent of a legal tempest in a teapot" (AB45). The City misunderstands Petitioner's challenge. Drivers

[5] It appears the City argues that if its Ordinance had a community service component and if it labeled violations as "infractions," then Petitioner might be entitled to an adjudicatory hearing before a judge. Petitioner does not believe the label used or not used in an Ordinance controls. He was entitled to the protection of an Article V judge in this matter, for a hearing in the first instance, where a reasonable doubt standard had to be utilized.

throughout this state understand there is a law relating to red light traffic signals. Petitioner does not contend drivers have free reign to ignore the law. The issue, once again, is not the use of security cameras, but the application. The Minnesota Supreme Court invalidated a local red light traffic camera ordinance with some similar statutory provision to Florida's, in part because of the matter the City contests is a tempest in a teapot before this Court. See State v. Kuhlman, 729 N.W.2d 577, 583 (Minn. 2007):

> [A] driver must be able to travel throughout the state without the risk of violating an ordinance with which he is not familiar. The same concerns apply to owners. But taking the state's argument to its logical conclusion, a City could extend liability to owners for any number of traffic offenses as to which the [Traffic] Act places liability only on drivers. Allowing each municipality to impose different liabilities would render the Act's uniformity requirement meaningless.

CONCLUSION

For the reasons stated above, this Court should quash the Third District's 2-1 decision in this case, and affirm the Fifth District's ruling in the conflict case, Udowychenko. The Ordinances at issue before this Court are unconstitutional and unlawful, under express and implied preemption, as well as conflict principles.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on June 3, 2013.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Reply Brief on the Merits is Times New Roman 14pt.

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