

In the
Supreme Court of Ohio

JOHN MARICH, *et al.*, : Case No. 2006-1827
: :
Plaintiffs-Appellees, : :
: : On Appeal from the
v. : : Summit County
: : Court of Appeals,
BOB BENNETT : : Ninth Appellate District
CONSTRUCTION CO., *et al.*, : :
: : Court of Appeals Case
Defendants-Appellants. : : No. 23026
: :

**MERIT BRIEF OF *AMICUS CURIAE*
OHIO ATTORNEY GENERAL MARC DANN
IN SUPPORT OF NEITHER PARTY**

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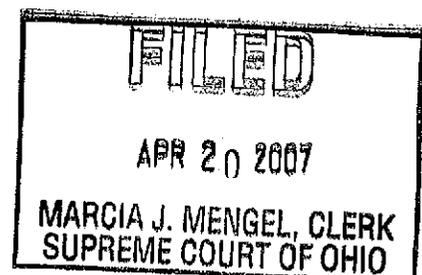


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INTRODUCTION

This case asks whether a city may enact an ordinance that purports to give a blanket exemption to a generally-applicable state statute that limits the size of vehicles on Ohio's public roads and streets. The Attorney General, as *amicus*, urges the Court to answer that question "no," and to hold that the state scheme trumps the local ordinance. Indeed, compared to the Court's recent cases involving conflicts between state and local laws, this case is an especially strong one for favoring the state law, as the state law here expressly allows cities to grant exemptions—as long as they do so case-by-case, and not in the across-the-board manner that the City of Norton seeks to do here. That is, R.C. 5577.05 prohibits hauling a load wider than 102 inches on any public road, but R.C. 4513.34 allows a city to "issue a special permit in writing" authorizing a load wider than this statutory maximum. The latter statute allows cities to give such special permits "[u]pon application in writing and for good cause shown." Here, the City of Norton sought to dispense with this permitting process by enacting an ordinance that purports to grant a "blanket exemption" from the state limits on certain named streets in the city. The Court should reject the City's approach, and affirm the appeals court's holding in favor of the state law.

This clash of state and local law arose in the context of a private tort suit involving an oversize vehicle, and the Attorney General does not take sides on the ultimate resolution of that dispute. Here, Plaintiff-Appellee John Marich was injured in an automobile accident involving driver Defendant-Appellant John Goss, who was hauling a 124-inch-wide bulldozer for his employer, Defendant-Appellant Bennett Construction, on Clark Mill Road in the city of Norton. Goss and Bennett Construction did not have a written permit to haul the over-width bulldozer on Clark Mill Road, so Marich maintains they were negligent per se, and the appeals court agreed.

The conflict arises, though, because Goss and Bennett Construction (together, "Bennett Construction" or "Bennett") showed the oversize vehicle was authorized by the City of Norton,

so in their view, they cannot be negligent per se—they complied with the law, as they saw it. No one can dispute that Norton Ordinance 440.01(c)(1), on its face, indeed allows operation of over-width vehicles on Clark Mill Road without a written permit. The Norton city official who issues special hauling permits testified that the ordinance functioned as a blanket exception to the width requirements of R.C. 5577.05. In fact, Norton would decline to give a special permit to anyone who asked, as the city would point such applicants to the ordinance. The appeals court, however, rejected Bennett’s attempt to ward off a finding of negligence per se by relying on the city ordinance. The appeals court held that R.C. 5577.05 preempted the local ordinance and that the statutory oversized-load permitting process did not allow a municipality to eliminate the need for a permit altogether. Thus, the city ordinance was void, and Bennett was held to be negligent per se for violating the state law.

This case differs from most home-rule cases in at least two ways, both of which weigh in the State’s favor. First, many home-rule cases arise when a city enacts an ordinance *stricter* than the corresponding state statute. Here, however, the Norton city ordinance tries to authorize something that state law forbids. Second, the state law here expressly allows cities to grant exemptions, and the parties disagree about the effect of that distinction. Bennett says that the city ordinance must be valid because the state allows cities to grant exemptions; all this city ordinance does is make the exemptions automatic. But in our view, the opposite is true, and the special permit system in the state law shows why Norton’s blanket exemption cannot be allowed. The case-by-case system, although it empowers cities in one sense, also restricts them by requiring that *every* oversize load is carefully reviewed to protect public safety. The case-by-case system also ensures that cities consider putting conditions on a special permit, such as blinking lights, etc. Indeed, 4513.34 directs cities to “limit or prescribe conditions of operation for the

vehicle” to protect the traveling public. No municipality can enact an ordinance to absolve itself of this duty.

Consequently, the Attorney General urges the Court to affirm the appeals court’s holding that the state laws trump the city ordinance. However, as noted above, we take no view on the appeals court’s holding regarding negligence per se, so this brief is filed in support of neither party. We agree in principle with the appeals court’s statement that the case should be remanded to the trial court for further resolution, but whether that remand should be accompanied by a reversal of the appeals court’s finding of negligence per se, as Bennett seeks in its second proposition of law, is a private dispute between the parties. We ask only that the state law be vindicated, regardless of its effect on the private dispute.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Marc Dann acts as Ohio’s chief law officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring rigorous and consistent enforcement of Ohio laws, including those governing the use of Ohio’s roadways. As the state’s lawyer, the Attorney General also has a responsibility to enforce the will of the General Assembly in passing legislation and of the Governor in signing that legislation into law.

STATEMENT OF THE CASE AND FACTS

John Marich was injured in an accident on Clark Mill Road involving a 124-inch-wide bulldozer, which was the load on a vehicle being hauled by John Goss on behalf of Bennett Construction. App. Op. ¶¶ 2, 14. R.C. 5577.05 prohibits hauling a load wider than 102 inches on a public road. *Id.* at ¶ 11. Marich sought partial summary judgment holding Bennett Construction and Goss negligent per se for operating an over-width vehicle without a special hauling permit. *Id.* at ¶¶ 2-3. After several rounds of motion practice and a hearing, the trial court denied the motion, the matter proceeded to trial, and the jury found no negligence occurred. *Id.* at ¶¶ 3-5.

The Ninth District reversed, holding that Goss and Bennett Construction had operated an oversized vehicle on a public road without a permit and therefore were negligent per se. *Id.* at ¶ 7. The appeals court reached this conclusion even though Norton Ordinance 440.01(c)(1) purported to exempt Clark Mill Road from the general ban on over-width vehicles, and even though the city's permit official testified that he would not issue a special hauling permit for Clark Mill Road because the ordinance was a "blanket exemption" from the load-width requirement. *Id.* at ¶¶ 15-16. Applying the home-rule analysis of *City of Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, the appeals court held that R.C. 5577.05 preempted the conflicting local ordinance, reversed the trial court, and remanded the case for further proceedings. *Id.* at ¶¶ 17-32. This Court accepted jurisdiction. See *1/24/2007 Case Announcements*, 2007-Ohio-152.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

R.C. 5577.05 sets statewide size limits for vehicles on Ohio's roads, and R.C. 4513.34 allows a city to issue permits for oversize loads on a case-by-case basis. These state laws preempt a city ordinance that purports to replace the case-by-case permit process by giving a "blanket exemption" allowing oversize loads on some city streets.

Two statutes operate together to regulate the width of vehicle loads on all Ohio highways, streets, and roads. R.C. 5577.05(A) limits the width of most loads to 102 inches. Recognizing that wider loads must sometimes be moved, however, the General Assembly enacted R.C. 4513.34, which establishes a procedure that state and local authorities may use to issue written permits for movement of oversized loads. It says that "local authorities with respect to highways under their jurisdiction may, *upon application in writing and for good cause shown, issue a special permit in writing* authorizing the applicant to operate or move a vehicle . . . of a size . . . of vehicle or load exceeding the maximum specified" in R.C. 5577.05.

By specifying a written application and permit and a showing of good cause, the General Assembly required each oversized load to be evaluated on a case-by-case basis. One reason for that requirement, as the statute indicates, is to allow the local authority to "limit or prescribe conditions of operation for the vehicle." R.C. 4513.34. Accordingly, the permitting authority can restrict the time of day, speed, and weather conditions in which the oversized load can be moved. OAC 5501:2-1-09(A)-(C). After evaluating the specific vehicle and load, the permitting authority may find it in the public interest to require additional safety measures such as flags and flag persons, flashing beacons, and escort vehicles. OAC 5501:2-1-09(G), (H), (J).

But these case-by-case safeguards are entirely lost under the City of Norton's approach, as Ordinance 440.01(c)(1) functions as a "blanket exemption" from the state limits. Thus, the law on its face conflicts with R.C. 4513.34 and R.C. 5577.05, as Norton does not require written

applications. The evidence in this case confirmed that Norton takes a blanket approach, as the city will not even consider applications for special permits to haul oversize loads on Clark Mill Road and the other streets named in the Ordinance. Instead, the city points applicants to the blanket exemption. This conflicts with the State law in practical effect, and not just in theory, because by giving everyone a blanket exemption, Norton never takes the time to consider the other limits suggested in the statute, such as limiting hours, adding flashing light, and so on.

This common-sense conclusion comports with case law, as a review of all the factors outlined in the Court's home-rule cases shows why the state law trumps the city law here.

A. A general statute takes precedence over a conflicting exercise of municipal police power.

The test used to decide whether a state statute takes precedence over a municipal ordinance examines whether (1) the ordinance is in conflict with the statute; (2) the ordinance is an exercise of the police power, rather than the power of local self-government, and (3) the statute is a general law. *City of Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, ¶¶ 9-10. This test must be applied carefully, as even an ordinance that appears to implicate local self-government might involve a matter of "statewide concern" that takes it outside the scope of municipal home-rule powers. *American Fin. Svcs. Assoc. v. City of Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043, ¶¶ 26-30; *City of Reading v. Public Util. Comm'n of Ohio*, 109 Ohio St. 3d 193, 2006-Ohio-2181, ¶¶ 29-34.

Bennett disputes the appeals court's application of all three parts of the test. But as shown below, the appeals court correctly concluded that the state's load limit and permitting statutes preempt Norton Ordinance 440.01(c)(1). Thus, the appeals court's holding on that issue should be affirmed.

B. Limits on the size of vehicles and loads are police power regulations of statewide concern.

1. Traffic regulation is a quintessential exercise of police power.

In several recent decisions, the Court has explained that ordinances regulating vehicles and traffic are enacted under municipal police power and must not conflict with general state laws.

This series of decisions began in 1993, when the Court reviewed the scope of R.C. 4511.07, which is part of the Uniform Traffic Act, 1941 Am. Sub. S.B. No. 29, 119 Ohio Laws 766. See *Geauga Cty. Bd. of Comm'rs v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 1993-Ohio-55. That statute says that the Act's provisions "do not prevent local authorities from carrying out" certain specified traffic regulations "with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power."¹ In *Munn Road*, a conflict arose because Geauga County thought the statute affirmatively granted it the power to regulate truck traffic on county roads. But the Court disagreed, holding that the statute's "do not prevent" provision meant it was directed at the existing constitutional powers of municipalities. Rather than preempting the entire field of traffic laws, R.C. 4511.07 signaled the General Assembly's intent to allow complementary municipal regulation. As the Court put it, "a municipality has the authority, as part of its home rule powers, to enact a police regulation which does not conflict with the general laws of the state." *Munn Road*, 67 Ohio St. 3d 579 at 584, 1993-Ohio-55.

A year later, the Court examined the language in R.C. 4511.07 making ordinances that regulate the use of streets ineffective "until signs giving notice of the local traffic regulations are posted." *State v. Parker*, 68 Ohio St. 3d 283, 1994-Ohio-93. In that case, Victor Parker, a trucker

¹ For purposes of Chapter 4511 and 4513, R.C. 4511.01(AA) defines "local authorities" as "every county, municipal, and other local board or body having authority to adopt *police regulations* under the constitution and laws of this state."

cited for hauling an overweight load on a Toledo street without a city permit, challenged the citation because the city had not posted a sign advising drivers of the city's weight limit. The Court began its analysis by noting that "[p]romptly after the establishment of home rule in Ohio, municipal control over municipal streets was clearly enunciated." *Parker*, 68 Ohio St. 3d at 284, 1994-Ohio-93, citing *Billings v. Cleveland Ry. Co.* (1915), 92 Ohio St. 478. If the power to regulate traffic were an untouchable power of local self-government, as Bennett argues here, then the *Parker* Court would have stopped its analysis there, because the statute limited when a local traffic ordinance is effective. Instead, the Court described the limits of municipal power to regulate traffic, stating: "[u]nder the general concept of preemption, a local regulation is valid if it is consistent with the related state statute." *Id.*, citing *Weir v. Rimmelin* (1984), 15 Ohio St. 3d 55, 57.²

The *Parker* Court followed the path started in *Munn Road*, and it construed the permissive language of R.C. 4511.07 to mean "a municipality may regulate in a particular area whenever the regulation is not in conflict with general laws." *Id.* at 285. The Court then explained how the statute and ordinance would work together, stating:

Thus, while a municipality has the power to regulate traffic within its jurisdiction, if local traffic regulations are at variance with provisions of state law, they do not become effective "until signs giving notice of the local traffic regulations are posted. . . ." R.C. 4511.07. This is a notice requirement and its purpose is clear. While the municipality may legislate in this area, it must post signs to give warning of a variant local regulation to drivers to that they may not unwittingly violate the law.

Id. Since the city's permissible weight limit paralleled the state's allowable weight limit, the Court concluded that no sign was required.

² In *Weir*, the Court had explained, "[u]nder the general concept of preemption, a local ordinance is valid if it is consistent with the related state statute. The query is whether the local regulation complements the statute." 15 Ohio St. 3d 55, 57.

The Court also rejected Parker's contention that the city had to post a sign warning drivers of the need to obtain a city permit to haul overweight loads. The Court rejected that argument because the city's permitting procedure was not some variant requirement. Instead, the Court explained that the permitting procedure was a normal part of the overall scheme:

statutes and ordinances commonly confer discretionary power upon state and local authorities to waive regulations of this type and to issue special haul permits for the operation of noncomplying vehicles for a limited time or special purpose. The permit serves as an exception to the operation of the laws, and it furnishes a defense to one charged with operating a vehicle of excessive weight which otherwise would be unlawful.

Id. at 285-86, quoting Fisher & Reeder, *Vehicle Traffic Law* (1974 Rev. Ed.) 275. Accordingly, the Court found "no conflict with state law," so it concluded, "Toledo had authority to require a city permit in this case." *Id.* at 286.

Finally, in 1999, the Court cited *Munn Road* for the proposition that "a municipality may regulate in an area such as traffic whenever its regulation is not in conflict with the general laws of the state." *Village of Linndale v. State*, 85 Ohio St. 3d 52, 54, 1999-Ohio-434. The statute at issue in *Linndale*, R.C. 4549.17, restricted when local police in some communities could issue speeding and overweight citations on interstate highways. As in *Parker*, the Court did not treat *Linndale's* ability to give speeding tickets as part of an unlimited power of local self-government. Instead, it employed conventional principles of home-rule analysis. But the Court did not find the statute to be a general law that would prevail over local traffic laws; instead, it was "an attempt to limit the powers of municipal corporations to adopt or to enforce police regulations" and therefore an unconstitutional violation of the Home Rule Amendment. *Id.* at 53. Thus, the problem there was the state's attempt to prevent the city from enforcing rules; the city there did not purport to grant citizens the ability to do something that the state law forbade.

Bennett relies heavily on the Court's 1919 *Froehlich v. City of Cleveland* decision, in which a divided court upheld a municipal weight limit lower than the state-allowed maximum, but Bennett's reliance is misplaced. See *Froehlich*, 99 Ohio St. 376. The three justices in the *Froehlich* plurality suggested that, if decisions on where to locate streets and how to build them are matters of local self-government, regulation of the traffic using them must be as well. *Id.* at 384-85. But the other three justices believed the regulation was a plain exercise of police power. *Id.* at 394-96 (Wanamaker and Robinson, JJ., concurring); 402-04 (Jones, J., dissenting).

A decade later, only one justice maintained that regulating traffic speed was an exercise of the power of local self-government. *Schneiderman v. Sesanstein* (1929), 121 Ohio St. 80, 92 (Allen, J., dissenting). Two of the justices in the *Froehlich* plurality combined with the *Froehlich* dissenter and another justice to hold that an ordinance regulating traffic speed, being "a police regulation," was invalid because it set a lower speed limit than a state statute did. *Id.* at 82, 87.

The *Froehlich* and *Schneiderman* Courts would not, of course, have given the classification of a municipal act as "police power" or "power of local self-government" the significance it gained decades later after *State ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191. And while the apparent dichotomy between the *Froehlich* and *Schneiderman* decisions continued to trouble courts into the 1960s, it was the presence or absence of conflicting state statutes, not the type of municipal power exercised, that the Court found to be significant. *Union Sand & Supply Corp. v. Village of Fairport* (1961), 172 Ohio St. 387, 389-91.

Since then, an entire body of law on implied conflicts between ordinances and statutes has developed. In some cases, a state statute sets a requirement that cannot be varied. In other cases, however, when "the state had adopted minimum requirements and invited additional municipal regulation, the state did not occupy the field and thereby preempt municipal regulation," leading

the Court to conclude “that the stricter ordinance standards did not conflict with the state statute.” *American Fin. Svcs. Assoc. v. City of Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043, ¶ 45.

The Court’s *Parker* decision fits squarely within that body of law. As *Parker* noted, “R.C. Title 45 was enacted to provide uniformity in traffic laws throughout the state of Ohio,” but R.C. 4511.07 invites additional municipal regulation of some aspects of traffic law. 68 Ohio St. 3d 283, 284-85. Because the state has not fully occupied the field of traffic regulation, under “the general concept of preemption, a local ordinance is valid if it is consistent with the related state statute.” *Id.* at 284.

As *Parker* and the rest of this Court’s modern jurisprudence indicate, traffic ordinances are not some privileged form of municipal action exempt from state regulation. Rather, they are a simple product of municipal police power, subject to normal principles of home-rule analysis.

2. Requiring case-by-case decisions on oversize load permits is a matter of statewide concern.

Although *Parker* and R.C. 4511.07 indicate that cities can regulate the size and weight of vehicles using their streets, they cannot abandon such regulations entirely or abdicate their duty to review individual permit applications regarding oversize loads.

The permitting procedure specified by R.C. 4513.34 is part of a statewide and comprehensive legislative enactment. The General Assembly established the procedure in 1941 as part of the Uniform Traffic Act.³ 1941 Am. Sub. S.B. No. 29, 119 Ohio Laws 766. The same Act also created R.C. 4511.06, which made R.C. 4513.34 part of a group of traffic statutes that the General Assembly specified “shall be applicable and uniform throughout this state and in all

³ “It is fundamental that with reference to the Uniform Traffic Act municipalities cannot pass ordinances in conflict therewith.” *Shapiro v. Butts* (1951), 155 Ohio St. 407, 416.

political subdivisions and municipal corporations of this state.” Accordingly, R.C. 4513.34 is a matter of general and statewide concern, and therefore a constitutionally-permissible limit on municipal power. Compare *City of Reading v. Public Util. Comm’n of Ohio*, 109 Ohio St. 3d 193, 2006-Ohio-2181, ¶ 29-34.⁴

Like the regulation of rail crossings in *Reading*, uniformity of vehicle widths is not just a statewide concern but a matter of national importance. On interstate highways, states “may not prescribe or enforce a regulation of commerce that enforces a vehicle width limitation of more or less than 102 inches,” 49 U.S.C. § 31113(a), but a state “may grant special use permits to motor vehicles . . . that exceed 102 inches in width.” 23 CFR § 658.15. Norton Ordinance § 440.01(c)(1), however, allows the operation of vehicles wider than 102 inches on Interstate 76 without a permit. See Ordinance, Supp. at 80.

As this conflict with federal law illustrates, the ordinance’s seemingly mundane topic is not just a local matter. It transcends the boundaries of the city and forms the subject of a federally-sanctioned statewide regulatory scheme. Accordingly, the matter is not a power of *local* self-government reserved to municipalities. *Reading*, 109 Ohio St. 3d 193, 2006-Ohio-2181, ¶ 34-36.

C. The municipal “blanket permit” ordinance conflicts with the state statutes that establish maximum load widths and require a case-by-case permitting process for over-width loads.

This Court’s *Parker* decision suggests that a city could enact a load-width limit narrower than the state-allowed maximum, so long as it posts signs giving notice of the stricter regulation. 68 Ohio St. 3d 283, 285-86. That result makes sense, because not all city streets are designed to

⁴ Vacating a city street is an exercise of the power of local self-government. *Sparrow v. City of Columbus* (10th Dist. 1974), 40 Ohio App. 2d 453, 466-71. *Reading* dealt with the closure of a railroad grade crossing, not the city street on either side of the crossing, so the Court found no infringement on the city’s powers of local self-government. 109 Ohio St. 3d, 2006-Ohio-2181, ¶ 26-28. But even if closing the crossing did infringe, the Court noted, “we have never held that the powers of local self-government under *Section 3* are unlimited.” *Id.*, ¶ 32.

handle vehicles as large or heavy as those traveling the state highway system. But as *Parker* cautioned, a municipal traffic ordinance must be “consistent with the related state statute.” *Id.* at 284. Here, the City of Norton entirely did away with width limits on some city streets. Its ordinance is inconsistent with the related state statutes in three ways.

First, R.C. 5577.05 says its width limits apply to all the “public highways, streets, bridges, and culverts within the state.” The General Assembly, through R.C. 4511.07, invited additional municipal regulation of the use of city streets, but it did not authorize a municipal act that would effectively abrogate the statute. To imply, as Bennett does, that R.C. 4511.07 opens the door to any and all municipal legislation reverses the basic principle that state “minimum requirements” will permit “stricter ordinance standards.” *American Fin. Svcs. Assoc.*, 112 Ohio St. 3d 170, 2006-Ohio-6043, ¶ 45.

Second, an ordinance conflicts with a general law if it permits or licenses what the statute forbids. *Village of Struthers v. Sokol* (1923), 108 Ohio St. 263, syllabus 2. R.C. 4513.34 and 5577.05 prohibit operating a vehicle with a load wider than one hundred two inches on any street or highway in the state without a written permit. Norton Ordinance 440.01(c)(1) either makes this width limit inapplicable to Clark Mill Road or makes a written permit unnecessary. Either way, it conflicts with one of the statutes.

Third, although R.C. 4513.34 allows the permitting of over-width loads, it specifies a process that requires a written application, a showing of good cause, and a written permit. That process is mandatory: R.C. 4511.06 applies the permit statute to all political subdivisions and says that “[n]o local authority shall enact or enforce any rule in conflict” with it. And this process has a point: The statute anticipates the permitting authority may “limit or prescribe conditions of operation for the vehicle.” Those conditions, as typified by ODOT regulations, can include

restrictions on time of day, speed, and weather, and additional safety measures such as flags and flag persons, flashing beacons, and escort vehicles. OAC 5501:2-1-09(A)-(C), (G), (H), (J).

Norton's "blanket permit" ordinance negates the permitting process mandated by R.C. 4513.34. By enacting it, the city abdicated its responsibilities to require a showing of good cause and evaluate the load's safety. Under the ordinance, a trucker might haul a load of any width (even if it could be broken down into smaller components), on a rainy night, without any flags or beacons or escort vehicles to warn other drivers. The General Assembly could not have intended such a result when it allowed municipalities to issue permits for oversized loads.⁵

D. The load width and permitting statutes are general laws.

The Court has adopted a four-part test to determine whether a state statute is a "general law" for purposes of home-rule analysis. To be a general law, a statute must (1) be part of a statewide and comprehensive legislative enactment; (2) apply to all parts of the state alike and operate uniformly throughout the state; (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit a municipal corporation's power to enact such regulations; and (4) prescribe a rule of conduct upon such citizens generally. *City of Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, syllabus. As the appeals court concluded, the load width and permitting statutes pass each part of this test.

First, the permitting statute, incorporating by reference the maximum load sizes and weights that trigger the need for a permit, was enacted as part of the Uniform Traffic Act. 1941 Am. Sub. S.B. No. 29, 119 Ohio Laws 766. By its terms, the Act was both statewide and

⁵ In 1930 Op. Atty. Gen. 2056, the Attorney General construed the scope of local permitting authority under General Code § 7248-2, which allowed written permits for oversized loads "in special cases." He reasoned that "special cases" must refer to "some peculiar or extraordinary event or occurrence" because, if permits were routinely issued, then it would "grant to certain officers the power to substitute their judgment for that of the legislature in determining which vehicles should be operated generally upon the highways to promote safety and economy."

comprehensive. And as the appeals court noted, R.C. 5577.05 bans oversized vehicles on all public roads in Ohio. App. Op. ¶ 22.

Second, the permitting requirements of R.C. 4513.34 are part of R.C. Title 45, which “was enacted to provide uniformity in traffic laws throughout the state of Ohio.” *State v. Parker*, 68 Ohio St.3d 283, 284, 1994-Ohio-93. The permit process of R.C. 4513.34 applies equally to the director of transportation and local authorities with regard to highways under their respective jurisdictions, and imposes uniform requirements on all permit holders with regard to the display and use of the permit. And the load limits of R.C. 5577.05 expressly apply to the entire state.

Third, as shown above, statutes affecting vehicles and traffic are police power enactments. See also *Sproles v. Binford* (1932), 286 U.S. 374, 388-90 (regulating dimensions of vehicles operating on the public roads is an exercise of the state’s police power); *City of Cincinnati v. Cook* (1923), 107 Ohio St. 223, 225 (examining whether parking ordinance was a “valid exercise of the police power of the municipality to control its streets and regulate traffic thereon”). And while the statutes limit the power of municipal corporations to enact inconsistent ordinances, that is not their *only* purpose: they also regulate vehicle loads and establish a process for permitting oversized loads.

Fourth, the statutes prescribe rules of conduct that apply to citizens in general. Under R.C. 5577.05, unless certain statutory exceptions apply, no citizen is allowed to operate a vehicle that is wider than one hundred and two inches, including load, on any highway, street, bridge, or culvert in the state. And under R.C. 4513.34, any citizen who wants to move a larger load must apply in writing for a special hauling permit, show good cause for its issuance, carry the permit in the vehicle to which it refers, allow the permit to be inspected, and comply with its terms.

In sum, R.C. 4513.34 and R.C. 5577.05 are general laws, and Norton Ordinance 440.01(c)(1) is a piece of municipal police-power legislation that plainly conflicts with them. Accordingly, the appeals court correctly ruled that the statutes preempt the ordinance.

E. The Court may remand the case to the trial court to determine whether Bennett may be held negligent per se for violating a state law in light of its good-faith compliance with the city ordinance

As noted above, the Attorney General is in this case as *amicus* to preserve the consistent application of state law; we do not wish to see a local law undercut the state scheme. Our state interest does not cause us to address the second issue in the case, regarding Bennett's possible negligence per se. While we do not urge any result on that score, we recognize that our position on the primary issue might be inadvertently perceived as leaving Bennett with no shield, as we do ask for the Norton Ordinance to be declared invalid. To ensure that we are not perceived as encouraging (or discouraging) a finding of negligence, we offer a few comments, but again, do not urge the Court to affirm or reverse the appeals court's holding that Bennett was negligent per se.

As the appeals court noted, a perceived inequity arises when an actor whose conduct was consistent with a municipal ordinance is found negligent per se for violating a state statute. App. Op. ¶ 30. The appeals court said that such equitable concerns did not, however, prevent a negligence finding. But the court also remanded to the trial court to address ultimate liability, as negligence does not equal liability.

The Court may reach this issue itself, or it may find it prudent to remand to the trial court to revisit the negligence and liability issues in light of a holding (as we urge above) that the Norton Ordinance is invalid. Even though an ordinance purporting to allow conduct forbidden by a statute is invalid, the actor's conduct may be excusable if it was reasonable.

When a statute establishes a definite and positive standard of care, failure to comply with that standard is negligence per se. *Becker v. Shaul* (1992), 62 Ohio St. 3d 480, 483. In this case, R.C. 5577.05 prohibited the operation of Bennett's vehicle, which had a load twenty-two inches wider than the statutory maximum, without a written permit. App. Op. ¶ 13-14. Since the statute's standard of care is definite and positive, it might seem that Bennett was negligent per se, as the appeals court held. App. Op. ¶ 29.

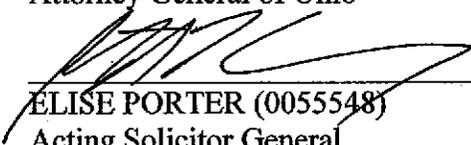
But the Court's recent opinion in *Robinson v. Bates* explains that "a negligence-per-se violation will not preclude defenses and excuses, unless the statute clearly contemplates such a result." 112 Ohio St. 3d 17, 2006-Ohio-6362, ¶ 23. As the Court explained, "Most statutes are construed to require that the actor take reasonable diligence and care to comply, and if after such diligence and care the actor is unable to comply, the violation will ordinarily be excused." *Id.*, citing Restatement of the Law 2d, Torts (1965) 38, Section 288A, Comment g. The statement of facts in Bennett's merit brief indicates it may have acted with reasonable diligence and care. Thus, in its proceedings on remand, the trial court should determine whether appellants have shown, or preserved a right to show, that their violation of R.C. 5577.05 was excusable.

CONCLUSION

The appeals court's holding on the first issue, i.e., that the Ohio statutes at issue here preempt the Norton Ordinance, so that the Ordinance is invalid, should be affirmed.

Respectfully submitted,

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I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Marc Dann in Support of Neither Party was served by U.S. mail this 20th day of April, 2007, upon the following counsel:

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