

IN THE SUPREME COURT OF OHIO

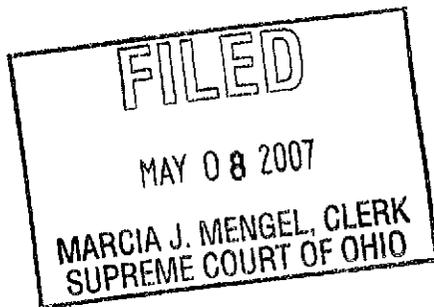
KELLY MENDENHALL, et al.,	*	Case No. 06-2265
	*	
Plaintiffs-Petitioners	*	On Question Certified by the
	*	United States District Court
-vs	*	for the Northern District of Ohio
	*	
THE CITY OF AKRON, et al.,	*	
	*	
Defendants-Respondents.	*	

Reply Brief of *Amici Curiae*
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on behalf of themselves and all similarly situated,
and in support of the Petitioners

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TABLE OF CONTENTS

Table of Authorities	ii
Reply	1
Certificate of Service	9

TABLE OF AUTHORITIES

Cases

Am. Financial Servs. Assn. v. Cleveland (2006), 112 Ohio St. 3d 170	1, 8
City of Cincinnati v. Roettinger (1922), 105 Ohio St. 145	1
Cleveland Elec. Illum. Co v. Painesville (1968), 15 Ohio St 2d 125	1
Fondessy Enterprises, Inc. V. City of Oregon (1986), 23 Ohio St. 3d 213	4
Reading v. Pub. Util. Comm. (2006), 109 Ohio St. 3d 193	1
Schneiderman v. Sesanstein (1929), 121 Ohio St. 80	3, 8
State ex rel. Evans v. Moore (1982), 69 Ohio St. 2d 88	1
Struthers v. Sokol (1923), 108 Ohio St. 263	4

Constitutional Provisions

Section 3, Article XVIII, Ohio Constitution	1
---	---

Statutes

Chapter 4511	1
R.C. 4511.106	2
R.C. 4511.21	2
R.C. 4511.13	2
R.C. 4521.02	2
R.C. 4521.04	2

REPLY

Most of what matters in this case is undisputed.

First, all agree – as they must – that the Ohio Constitution expresses the crucial principle that general laws adopted by the General Assembly take precedence over, and preclude, municipal ordinances that conflict with the general laws.¹ This Court’s embrace and enforcement of this principle is long-standing, unwavering, and forceful:²

It is a fundamental principle of Ohio law that, pursuant to the “statewide concern” doctrine, a municipality may not, in the regulation of local matters, infringe on matters of general and statewide concern.³

Likewise, neither defendants, nor the amici who have rallied to their cause, dispute that the Ohio traffic statutes are general laws. Nor could they. The Ohio Revised Code contains a detailed, clear, and comprehensive set of laws governing traffic offenses. The laws are applicable uniformly throughout the State. This conclusion is inescapable, first, from the structure of Chapter 4511, taken as a whole. That structure manifests the legislature’s intent that its statutory scheme apply

¹ Section 3, Article XVIII, Ohio Constitution.

² See, e.g., *City of Cincinnati v Roettinger* (1922), 105 Ohio St. 145; *Am Financial Servs. Assn. v Cleveland* (2006), 112 Ohio St. 3d 170.

³ *Reading v Pub. Util. Comm.* (2006), 109 Ohio St. 3d 193, 199, quoting *State ex rel. Evans v Moore* (1982), 69 Ohio St. 2d 88, 89-90; accord *Cleveland Elec. Illum. Co v Painesville* (1968), 15 Ohio St 2d 125, 129.

generally. And, to buttress this conclusion one need only look at the specific language of the statutes that are particularly implicated in this action: R.C. 4511.13 and 4511.21.⁴ On their faces, these statutes reflect the considered and sensible judgment of the General Assembly that the laws governing speed limits and signal lights in Ohio should be consistent and uniform – that is to say, general.

Nor is there any dispute that the state statutes reflect not only the General Assembly's intention to exercise its power through general traffic laws, but its simultaneous intention to leave to local governments the regulation of the “standing or parking” of vehicles, the placement of tourist-oriented directional signs and trailblazer markers, and such matters.⁵

Of course, the state traffic statutes do considerably more than this. They establish crucial elements of the substantive and procedural norms that apply to traffic offenses. The defendants and their amici cannot really dispute this, since it is inarguable. Thus, for instance, the statute on speed limits defines a speed violation as operating a motor vehicle “at a speed greater or less than is reasonable or proper” under the circumstances.⁶ The statute prohibits the operation of a vehicle at such a

⁴ Strictly speaking, this case involves only the constitutionality of Akron's speeding ordinance. But the certified question asks also about “the offense of violating a traffic signal light.”

⁵ R.C. 4521.02(A), 4521.04(A)(1), 4511.106

⁶ R.C. 4511.21(A).

proscribed speed. The statute on signal lights is structured similarly; the prohibition is clearly expressed, and it is aimed at the vehicle's operator.

And, finally, there is no real dispute that the Akron ordinance differs fundamentally from the state statutes. The differences are substantive and procedural. The ordinance's definition of speeding bears no relationship whatever to the state definition; rather than taking the long-settled circumstantial approach of the statute, the ordinance erects an absolute rule. Of course, this Court made clear nearly eighty years ago that such an approach in a municipal ordinance is constitutionally invalid.⁷ Defendants may disagree with the Court's 1929 ruling, but they cannot seriously contend that, as a factual matter, the ordinance's approach to speeding differs substantively from that of the statute.

Rather, the defendants seek refuge from the settled principle that the Ohio Constitution prohibit local enactments that conflict with state laws of general application through a gymnastic argument about the meaning of "conflict." Defendant argues that, despite the manifest differences, there is in truth no real "conflict." For this argument, defendant relies heavily, if not exclusively, on the denomination of the ordinance as "civil," in putative contrast to the state statute's "criminal" nature.

⁷ *Schneiderman v Sesarstein* (1929), 121 Ohio St. 80, paragraphs one and two of the syllabus.

The effort is unavailing. The conflicts are manifest.

First, as noted, the Akron ordinance assesses a civil fine for vehicles traveling in excess of the posted speed limit. The state statute does not do so; rather, it prohibits operation “at a speed greater or less than is reasonable or proper.”

Under the simple test that this Court has repeatedly enunciated, a conflict undoubtedly exists: “whether the ordinance permits or licenses that which the statute prohibits and prohibits, and vice versa.”⁸ The Akron ordinance fails each side of the test:

- The ordinance prohibits that which the statute licenses – driving in excess of a posted speed limit, even if doing so is reasonable and proper under the prevailing circumstances. Thus, for instance, if exceeding the posted speed limit was necessary to pass a congested stretch of road in order to move to the side to allow an emergency vehicle to pass, the operator of the vehicle would not be liable under the statute, but would be liable under the Akron ordinance.
- Conversely, the ordinance licenses that which the statute prohibits – driving at a speed below the posted, even if doing so is unreasonable and improper. Thus, for instance, if going 30 in a 35-posted zone is

⁸ *Fondessy Enterprises, Inc. v City of Oregon* (1986), 23 Ohio St. 3d 213, quoting *Struthers v Sokol* (1923), 108 Ohio St. 263, paragraph two of the syllabus.

perilous because of the condition of the road or the presence in the roadway of pedestrians fleeing a burning building, the Akron ordinance licenses such operation, even though the statute clearly prohibits it.

Second, the Akron ordinance creates a presumption – rebuttable, but a prima facie presumption nonetheless – that the owner of a vehicle photographed driving in excess of a posted speed limit is guilty of the speeding infraction. In contrast, the statute creates no such presumption. Indeed, the statute in no way implicates the owner of the vehicle. Rather, the statute applies, simply and directly (and sensibly), to the individual who was actually driving the vehicle. In effect, the ordinance prohibits owning a vehicle that is photographed while being operated, regardless of by whom, in excess of a posted speed limit. In other words, the ordinance conflicts with the statute.

It is no resolution of this conflict to say that the owner can wriggle out of liability by identifying under oath the person who was driving at the time of the offense, or by presenting a law-enforcement report stating that the vehicle was reported as stolen before the time of the violation.⁹ The prima facie presumption exists, and it implicates the owner under circumstances in which the statute does not. Further, in effect, the ordinance prohibits owning a vehicle that is photographed

⁹ Akron Ordinance, 79.01(C)(3)

speeding, even if the owner was not operating the vehicle, if (a) the owner does not know who was driving the vehicle, or (b) was not able for whatever reason, including the shortness of time, to file a stolen-vehicle report before the offense. Thus, in the sort of tragi-comic Kafkaesque scene that often makes the most telling points about a law's absurd application, imagine:

A vehicle is stolen. The thief drives twice the speed limit (or runs a red light), as thieves are wont to do, and does so through an Akron neighborhood scrutinized by the Orwellianly-named "automated mobile speed enforcement system." This system churns out a ticket, timed 90 seconds after the theft. The owner, having taken more than ninety seconds to recover from the shock of the theft (and perhaps from the accompanying bludgeoning) was unable to make it to the phone within the 90 seconds. Too bad.

The scene shows the silliness of the ordinance. But it shows, as well, that the ordinance conflicts, in manifold ways, with the statute, because, both legally and practically, the ordinance prohibits things that the statute does not prohibit.

In addition to their creative and unavailing slalom regarding "conflict," defendants and their amici try in various ways to divert the Court's attention from this unavoidable conclusion. They conjure the horrors of speeding and the epidemic of red-light running, citing various websites for all manner of unauthenticated and unverified "statistics." Of course, none of these so-called facts are cognizable in this

matter, which raises a simple and straightforward legal question. Which is just as well for defendants, since the news on the Internet hardly supports their protestations of concern for public safety. For instance, in Lubbock, Texas, the city council voted to delay installation of red light cameras after a local television station exposed the city's short-timing of yellow lights at eight of the twelve intersections where the devices were to be installed.¹⁰ CBS News exposed the same trick in Bethesda, Maryland, where a yellow light at a camera-monitored intersection was shortened to 2.7 seconds. That one traffic camera "earned" the county \$1 million in fines in a mere 14 months.¹¹ The available science makes clear that shortening the yellow-light period is a prescription for traffic disaster. But it would sure enhance revenues for the defendants and their kind.

In any event, the policy issues that defendants and their amici urge the Court to consider are irrelevant. As this Court stated succinctly just six months ago, in rejecting a municipality's argument that its ordinances that conflicted with state law

¹⁰ <http://www.thenewspaper.com/news/16/1621.asp>

¹¹ <http://www.cbsnews.com/stories/2003/06/12/eveningnews/main558431.shtml>

should be spared because they were wise, "It is not the province of the court to formulate or declare a policy."¹²

It is, rather, the province of the Court to apply long-settled legal principles to the only facts that matter: the text of the state statutes and of the Akron ordinance. The conflict between those texts is unavoidable.

CONCLUSION

The Akron ordinance conflicts with state statutes. In the case before this Court, the Court should answer the certified question No.



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¹² *Am. Financial Servs. Assn., supra*, 112 Ohio St. 3d at 178, quoting *Schneiderman, supra*, 121 Ohio St. at 87.

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing Reply was served by ordinary U.S. Mail, postage prepaid, on the following counsel of record this 7th day of May, 2007:

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A handwritten signature in black ink, appearing to read "Mark Byers". The signature is written in a cursive style with a horizontal line underneath the name.