

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,	:	CASE NO. 12-1616
	:	
Appellee,	:	On Appeal from the Eighth
vs.	:	District Court of Appeals
	:	
STATE OF OHIO,	:	
	:	Court of Appeals
Appellant.	:	Case No. 97679
	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE CITY OF CLEVELAND

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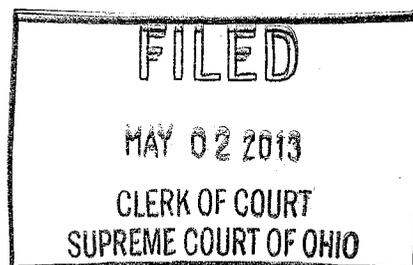


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I. INTRODUCTION

It is well understood that the City of Cleveland (“City”) and other Ohio municipalities have local self-governing authority expressly granted to them by the Ohio Constitution at Article XVIII, Section 3. Recognized as the Home Rule Amendment, this provision establishes that Cleveland and other cities have the right to adopt and enforce local police regulations when such local regulations are not in conflict with the general laws of Ohio.

At the time the City initiated its declaratory judgment complaint in 2009, the regulatory scheme codified in R.C. Chapter 4921, in authorizing regulation of motor transportation companies by the Public Utilities Commission of Ohio (“PUCO”), effectively recognized municipal home rule at former R.C. 4921.04(H)¹ (attached at Appendix) within the language of an established conflict analysis:

“...In case of ***conflict*** between any such ordinance, resolution, license, or permit, the order or rule of the commission shall prevail. Local subdivisions may make reasonable local police rules within their respective boundaries not inconsistent with those chapters and rules adopted under them.” (emphasis added).

The City’s local police authority emanates from the Ohio Constitution and its legislative authority to regulate in an area cannot be taken away by mere act of the General Assembly:

As discussed in *Fondessy Ents., Inc. v. Oregon*, 23 Ohio St.3d at 216, 23 OBR 372, 492 N.E.2d 797, the constitutional authority of municipalities to enact local

¹ This section was repealed with the passage of Am.Sub.H.B. 487 in 2012, with the same recognition now contained in R.C. 4905.81(G) as was adopted in 2012: “In case of ***conflict*** between any such ordinance, resolution, license, or permit, the order or rule of the commission shall prevail. Local subdivisions may adopt reasonable local police rules within their respective boundaries not inconsistent with those chapters and rules adopted under them.” (emphasis added)

police regulations emanates from the Constitution and “cannot be extinguished by a legislative provision.” In accordance with the approach followed in *Fondessy*, we reaffirm that the conflict analysis as mandated by the Constitution should be used in resolving home-rule cases.

American Fins. Servs. Assn. v. Cleveland, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 38, (emphasis added).

With deference to the Home Rule Amendment, and the existing “conflict” analysis recognized in the established PUCO scheme for motor carrier regulation, the City brought its declaratory judgment to challenge the narrow statutory preemption of local authority carved out with the General Assembly’s adoption of R.C. 4921.25². R.C. 4921.25 added tow truck operations to the broad mix of motor carriers regulated by the PUCO but also included narrow statutory language that sought to effectively preempt all local regulations throughout the state relating to persons, firms, co-partnerships, voluntary associations, joint-stock associations, or corporations engaged in the towing of motor vehicles through the following provision:

Such an entity is not subject to any ordinance, rule, or resolution of a municipal corporation, county, or township that provides for the licensing, registering, or regulation of entities that tow motor vehicles.

The trial court erred in concluding that such language “is directed to towing entities and not to any legislative body” and “does not grant or limit any municipality’s legislative power.” (See Journal Entry and Op. at p. 2, ¶ 4(c) and (d), attached to State’s Merit Brief as App’x Ex. C). Any reading of the statute and the displacement arguments presented by the State and amicus curiae Towing & Recovery Association of Ohio demonstrate this conclusion is both incorrect and illogical. The General Assembly’s

² Formerly R.C. 4921.30 at the time the City’s declaratory judgment action was filed. The provision was re-numbered with Am.Sub.H.B. 487.

language plainly seeks to eviscerate the City's inherent home rule rights under Article XVIII, Section 3 to enact local police tow truck regulatory ordinances "as are not in conflict with general laws."

To prevent any confusion, the City is not challenging the General Assembly's authority to provide the PUCO with authority to regulate for-hire tow trucks among other regulated motor carriers. Rather, the City challenges the constitutionality of the singular, narrow preemption of local authority included in R.C. 4921.25 at the time tow trucks were placed under the PUCO motor carrier authority. This tow truck preemption does not apply to any other class of motor carrier regulated by the PUCO in R.C. Chapter 4921 and the provision cannot be read as a part of the existing comprehensive PUCO motor carrier laws.

As the Eighth District Court of Appeals properly concluded, the preemption contained in R.C. 4921.25 is not a general law and the General Assembly's attempted preemption of local authority is an unconstitutional violation of the City's home rule authority established by Article XVIII, Section 3 of the Ohio Constitution.

STATEMENT OF THE CASE AND FACTS

Case

On March 19, 2009 the City filed a complaint seeking a declaratory judgment that the preemption language incorporated by the General Assembly in the former R.C. 4921.30 (hereafter referred to in its present statutory designation as R.C. 4921.25) violated the City's home rule rights established at Article XVIII, Section 3 of the Ohio Constitution. Specifically the City alleged, in part, with its Complaint:

20. The State's adoption of R.C. § 4921.30 and attempted preemption of the City's local regulation and enforcement of local tow truck ordinances is an

unconstitutional limitation and restriction on recognized home rule authority bestowed on the City by Article XVIII, Section 3 of the Ohio Constitution.

21. The State's adoption of R.C. § 4921.30 and attempted preemption impermissibly purports to limit and restrict the recognized home rule powers of municipalities bestowed by Article XVIII, Section 3 of the Ohio Constitution.

On November 19, 2011 the trial court issued a Journal Entry and Opinion in favor of the State, upholding the entirety of R.C. 4921.25 as a general law that does not infringe upon the City's home rule authority. (See State's Merit brief, Journal Entry and Opinion, attached to State's Appendix at Exhibit C.) The City timely appealed the trial court's opinion and placed a single assignment of error before the Eighth District:

The trial court erred in denying the City's motion for summary judgment and granting summary judgment in favor of the State of Ohio. The trial court's judgment is incorrect for the reason that the attempted preemption of local authority enacted in R.C. 4921.30 is not a general law and the General Assembly's attempted infringement upon the City's Home Rule Authority is contrary to Ohio law and violates Section 3, Article XVIII of the Ohio Constitution

(City of Cleveland's Merit Brief at pp. ii and 1). After due consideration of the appeal, the Eighth District Court reversed the trial court's opinion finding:

In accordance with the foregoing, [R.C. 4921.25] does not meet the test set forth in *Canton*, so we conclude that it is not a general law. Further, because [R.C. 4921.25] is not a general law, it unconstitutionally attempts to limit municipal home-rule authority.

We therefore conclude that the trial court erred in granting the state of Ohio's motion for summary judgment. We reverse that order and direct the trial court to enter summary judgment in favor of the City.

Cleveland v. State, 8th Dist. No. 97679, 2012 -Ohio- 3572, 974 N.E.2d 123, ¶¶ 42-43. The State's present appeal followed the ruling.

Facts

The Ohio Constitution was amended in 1912 to include several provisions that

expanded the local self-governing powers of Ohio's municipalities. A key aspect of this effort was to give cities the authority to enact police regulations when the local regulations did not conflict with general laws. Article XVIII, Section 3 ("the Home Rule Amendment"), continues to provide in pertinent part:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

As noted in the State's merit brief, the PUCO has overseen the regulation of motor carriers in Ohio since 1923. (State's Merit Brief at p. 2). In March 2003, "the Ohio General Assembly rescinded the exclusion for tow trucks previously set forth in R.C. 4921.02(A)(8), and thereafter included companies "[e]ngaged in the towing of disabled or wrecked motor vehicles" within the definition of a "[m]otor transportation company." *Cleveland* at ¶ 29. The court further recognized "[a]lso in March 2003, the Ohio General Assembly adopted [R.C. 4921.25]³, which provides:

Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, that is engaged in the towing of motor vehicles is subject to regulation by the public utilities commission as a for-hire motor carrier under this chapter. Such an entity is not subject to any ordinance, rule, or resolution of a municipal corporation, county, or township that provides for the licensing, registering, or regulation of entities that tow motor vehicles."

Id. at ¶ 30.

The State notes that the City had adopted a series of ordinances covering towing operations in 1981. (State's Merit Brief at p. 7). Such ordinances are primarily contained in Chapter 677A of the City's Codified Ordinances. (*Id.*, see Cleveland Codified Ordinances, Chapter 677A, attached to the State's Appendix at Exhibit H). In addressing

³ Bracketed references to [R.C. 4921.25] herein replace earlier references to the former R.C. 4921.30.

various examples of the City's towing ordinances the State makes no reference to Cleveland Codified Ordinance 677A.11 which addresses public safety as follows:

CCO 677A.11 Responding to the of an Accident

No person licensed under Section 677A.02, or any of his agents or employees, shall respond to the scene of an accident unless either summoned by a person having a direct interest in the vehicle or vehicles involved or dispatched thereto as provided in the rules and regulations promulgated by the Director of Public Safety pursuant to Chapter 135.

There is no comparable PUCO rule or regulation.

With its recent enactment of R.C. 4905.80 the General Assembly recognized "The policy of this state is to: (A) Regulate transportation by motor carriers so as to recognize and preserve the inherent advantages of, and foster safe conditions in, that transportation and among those carriers in the public interest." Additionally, language now included at R.C. 4905.81(G) as enacted in 2012 is similar to the former, repealed R.C. 4921.04(H) (noted above) in providing that the PUCO is to:

(G) Supervise and regulate motor carriers in all other matters affecting the relationship between those carriers and the public to the exclusion of all local authorities, except as provided in this section. The commission, in the exercise of the jurisdiction conferred upon it by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, may adopt rules affecting motor carriers, notwithstanding the provisions of any ordinance, resolution, license, or permit enacted, adopted, or granted by any township, municipal corporation, municipal corporation and county, or county. In case of conflict between any such ordinance, resolution, license, or permit, the order or rule of the commission shall prevail. Local subdivisions may adopt reasonable local police rules within their respective boundaries not inconsistent with those chapters and rules adopted under them.

The State argues that "[h]aving been brought into the motor-carrier regulatory regime, towing companies are therefore subject to comprehensive state regulation" and argues towing companies are regulated "[l]ike all for-hire motor carriers." (State's Merit Brief at pp. 5-6). While the City does not disagree that towing companies are regulated like all

for-hire motor carriers at the state level, the General Assembly seeks to exempt towing companies from non-conflicting reasonable local safety laws. The preemption language in R.C. 4921.25 attempts to remove towing companies from the established scheme of PUCO motor carrier regulations in R.C. 4905.81(G) that incorporates the local-state “conflict” standard and recognizes: “Local subdivisions may adopt reasonable local police rules within their respective boundaries not inconsistent with those chapters and rules adopted under them.” This standard comports with Article XVIII, Section 3 and continues the standard that was in place and had been established at former R.C. 4921.04(H) when the City brought its declaratory judgment action. Reasonable local laws such as CCO 677A.11 only serve to foster the public policy of safe transportation conditions.

LAW AND ARGUMENT

Appellant the State of Ohio’s Proposition of Law:

Because R.C. 4921.25 is part of a comprehensive, statewide legislative framework that regulates tow truck operations, it is a general law that displaces municipal tow truck ordinances.

Appellee the City of Cleveland’s Responsive Contention:

R.C. 4921.25 incorporates a singular preemption of local legislative authority with regard to the regulation of tow truck operators that is not otherwise found in the comprehensive, statewide framework for regulating motor carriers established in R.C. Chapter 4921. The State’s very characterization of R.C. 4921.25, that it “displaces municipal tow truck ordinances,” evidences a narrowly drawn statutory preemption that is outside the established framework for the PUCO’s regulation of motor transportation companies.

I. The General Assembly has no authority to expressly preempt municipal home rule authority established through Ohio's adoption of Article XVIII, Section 3 of the Ohio Constitution.

A. The City's Home Rule Authority is established at Article XVIII, Section 3.

The City's right to enact local safety regulations on behalf of its citizens is found in Article XVIII, Section 3 of the Ohio Constitution ("the Home Rule Amendment"), wherein the people of Ohio granted municipalities the power "* * * to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Home rule as vested in the City "was to put the conduct of municipal affairs in the hands of those who knew the needs of the community best, to-wit, the people of the city." *Northern Ohio Patrolmen's Benevolent Assn. v. Parma* 61 Ohio St.2d 375, 379, 402 N.E.2d 519, (1980), fn.1, citing *Goebel v. Cleveland Ry.* 17 Ohio N.P. (N.S.) 337, 343 (1915); *Billings v. Cleveland Ry.*, 92 Ohio St. 478, 111 N.E. 155 (1915); *Froelich v. Cleveland* 99 Ohio St. 376, 385, 124 N.E. 212 (1919), It was well understood that "[l]ocal authorities are presumed to be familiar with local conditions and to know the needs of the community." *Allion v. Toledo* 99 Ohio St. 416, 124 N.E. 237 (1919), syllabus.

B. The General Assembly has no authority to withdraw local police authority granted to local governments by Article XVIII, Section 3.

State and municipalities can exercise "the same police power." *Greenburg v. Cleveland*, 98 Ohio St. 282, 286, 120 N.E. 829, (1918). This Court has consistently recognized that the power of home rule, "expressly conferred upon municipalities," cannot be withdrawn by the General Assembly. *Fondessy Ents., Inc. v. Oregon*, 23 Ohio St.3d 213, 215, 492 N.E.2d 797 (1986), citing *Akron v. Scalera*, 135 Ohio St. 65, 66, 19

N.E.2d 279 (1939). See also *West Jefferson v. Robinson*, 1 Ohio St.2d 113, 205 N.E.2d 382, (1965), paragraph one of the syllabus.

Local police-power ordinances are intended to “protect the public health, safety, or morals, or the general welfare of the public.” *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605, 896 N.E.2d 967, at ¶ 30 quoting *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92, 880 N.E.2d 906, ¶ 11, citing *Downing v. Cook*, 69 Ohio St.2d 149, 150, 431 N.E.2d 995, (1982).

Mere declarations of intent to preempt a field of legislation by the General Assembly do not “trump” the constitutional Home Rule authority of municipalities:

A statement by the General Assembly of its intent to preempt a field of legislation is a statement of legislative intent and may be considered to determine whether a matter presents an issue of statewide concern, but does not trump the constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws. As discussed in *Fondessy Ents., Inc. v. Oregon*, 23 Ohio St.3d at 216, 23 OBR 372, 492 N.E.2d 797, the constitutional authority of municipalities to enact local police regulations emanates from the Constitution and “cannot be extinguished by a legislative provision.” In accordance with the approach followed in *Fondessy*, we reaffirm that the conflict analysis as mandated by the Constitution should be used in resolving home-rule cases.

American Fins. Servs. Assn. v. Cleveland, 112 Ohio St.3d 170, 2006-Ohio-6043,858 N.E.2d 776, ¶ 31; See also *Ohioans for Concealed Carry* at ¶ 29. As this Court earlier acknowledged in *Fondessy*: “If [state laws] were elevated to a level of ‘express preemption’ (its level as a result of the judgments of the courts below), no police power ordinance in the related field would survive long enough to face a conflict test against a state statute.” *Id.* at 216.

C. Federal regulation of tow trucks pursuant to 49 C.F.R. is no impediment or restriction on local legislation establishing tow truck safety regulations.

In addition to arguing that tow truck operators are now subject to the comprehensive PUCO motor carrier regulations the State refers to “a panoply of safety regulations” (State’s Merit Brief at p. 6) established by both the State and the U.S. Department of Transportation to which towing companies must comply, in arguing for the continued preemption of local authority contained in R.C. 4921.25. The amicus Towing & Recovery Association goes as far as to state that local ordinances serve “to circumvent preemption, thereby creating a climate of re-regulation and frustrating the policy objectives of Congress in passing § 14501 into law.”(Amicus Curiae Brief at p. 2).

In considering the effect of federal safety standards addressed at 49 U.S.C. 14501(c)(2)(A) on state and local authority to regulate tow trucks, however, the United States Supreme Court in *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002) specifically rejected the argument that local authorities were preempted by the federal provision from enacting local tow truck safety laws. As discussed below it is clear that federal law does preempt local authority to regulate towing safety in Ohio.

With its decision in *City of Columbus v. Ours Garage and Wrecker Service* the United States Supreme Court began its analysis framing the issue to be addressed as follows:

Federal preemption prescriptions relating to motor carriers, contained in 49 U.S.C. § 14501(c) (1994 ed., Supp. V), specifically save to States “safety regulatory authority ... with respect to motor vehicles,” § 14501(c)(2)(A). This case presents the question whether the state power preserved in § 14501(c)(2)(A) may be delegated to municipalities, permitting them to exercise safety regulatory authority over local tow-truck operations.

The Court rejected federal preemption over local authority with respect to safety regulations holding as follows:

We hold that § 14501(c) does not bar a State from delegating to municipalities and other local units the State's authority to establish safety regulations governing motor carriers of property, including tow trucks. A locality, as § 14501(c) recognizes, is a “political *subdivision*” of the State. Ordinarily, a political subdivision may exercise whatever portion of state power the State, under its own constitution and laws, chooses to delegate to the subdivision. Absent a clear statement to the contrary, Congress' reference to the “regulatory authority of a State” should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts.

Id. at 428-429. In analyzing the federal statute the Court concluded that 49 U.S.C. 14501(c)(2)(A) “does not provide the requisite clear and manifest indication that Congress sought to supplant local authority.” *Id.* at 434.

The amicus brief of the Towing & Recovery Association of Ohio generally misses the point in arguing that the City's ordinances serve to circumvent federal preemption.

Ours Garage made clear that local safety regulations were not the subject of preemption:

Congress' clear purpose in § 14501(c)(2)(A) is to ensure that its preemption of States' economic authority over motor carriers of property, § 14501(c)(1), “not restrict” the preexisting and traditional state police power over safety. That power typically includes the choice to delegate the State's “safety regulatory authority” to localities.

Id. at 439. In addressing the concept of “State” as used in the statute the Court in *Ours Garage* demonstrated a proper understanding of the constitutional basis establishing local municipal authority in Ohio, further commenting:

In Ohio, as in other States, the delegation of governing authority from State to local unit has long occupied the attention of the State's lawmakers. See D. Wilcox, *Municipal Government in Michigan and Ohio: A Study in the Relations of City and Commonwealth* 52-54, 63 (1896) (citing Ohio Const., Art. XIII (1851)). *The Ohio Constitution currently grants municipalities within the State general authority “to exercise all powers of local self-government and to adopt and enforce within their limits such*

local police, sanitary and other similar regulations, as are not in conflict with the general laws.” Art. XVIII, § 3.

Id. at p. 437 (emphasis added).

In short, with its decision in *Ours Garage* the Supreme Court recognized that local authority regulating in the area of tow truck safety regulations was not federally preempted, but was authorized through 49 U.S.C. 14501(C)(2)(a), with the state/local delegation of authority for safety in Ohio being governed in accordance with Article XVIII, Section 3 of the Ohio Constitution.

II. The Preemption Language in R.C. 4921.25 is not a general law.

A. The Eighth District Court of Appeals properly framed the analysis to be undertaken in testing the constitutionality of R.C. 4921.25.

The Eighth District Court of Appeals was not operating in a legal vacuum in determining that the preemption contained in R.C. 4921.25 was not a general law. The Eighth District recognized:

“In March 2003, following the *Ours Garage* decision, the Ohio General Assembly rescinded the exclusion for tow trucks set forth in R.C. 4921.02(A)(8), and therefore included companies ‘[e]ngaged in the towing of disabled or wrecked motor vehicles’ within the definition of a ‘[m]otor transportation company.’

Cleveland v. State, 2012 -Ohio- 3572 at ¶ 29. With such appreciation of the timing of the General Assembly’s action, the Eighth District correctly framed the legal analysis it undertook as follows:

As explained in *Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776:

[T]he constitutional provision as adopted gave municipalities the exclusive power to govern themselves, as well as additional power to enact local health and safety measures not in conflict with general laws, [but] “exclusive state power was retained in those areas where a municipality would in no way be affected or where state dominance seemed to be required.” (Emphasis sic.)

Id. at ¶ 27, quoting Vaubel, *Municipal Home Rule in Ohio*, at 1107–1108 (1978).

In *Canton*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 9, the Ohio Supreme Court set forth a three-part test for evaluating conflicts under the home-rule amendment. Pursuant to that test, a state statute takes precedence over a municipal ordinance and does not unconstitutionally infringe upon municipal home-rule authority when: (1) the ordinance is in conflict with the statute; (2) the ordinance is an exercise of the police power, rather than of local self-government; and (3) the statute is a general law. Where the statute fails to meet all of these conditions, it is not a general law, and, as such, it must yield to the municipal ordinance in question. *Id.* at 151, 2002-Ohio-2005, 766 N.E.2d 963.

In this matter, the City alleged in its complaint and in its motion for summary judgment that [R.C. 4921.25] is not a “general law,” and therefore, that is the focus of our analysis herein.

Id. at ¶¶ 18 – 20.

The basic positions presented by the State and the amicus Towing & Recovery Association argue that the very existence of any local police regulations governing tow truck safety operations, notwithstanding content, would conflict with the preemption language in R.C. 4921.25.⁴ The procedural context for analyzing the determinative issue raised on appeal is set out in *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008 -Ohio- 270, 881 N.E.2d 255 at ¶ 17:

We use a three-part test to evaluate claims that a municipality has exceeded its powers under the Home Rule Amendment. “A state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law.” *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶ 9. Although it may seem that the three issues should be taken in sequence as stated, we must examine the two

⁴ The State notes, however, that whether any of the City’s tow truck ordinances are actually in conflict with the State’s existing motor carrier laws is not subject to analysis within the context of its present appeal. (State’s Merit Brief at p. 10). The City agrees that a conflict analysis as anticipated by Article VXIII, Section 3 and R.C. 4905.81(G) is not reached as the attempted preemption in R.C. 4921.25 fails to qualify as a general law.

legislative enactments before determining whether a conflict exists. Thus, the *Canton* test should be reordered to question whether (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute.

The City agrees per the direction in *Mendenhall*, that where, as herein, “the dispute implicates the police power (for instance, health and safety issues), then the court proceeds to step two, asking whether the disputed state statute is a ‘general law’ under the *Canton* test.” (State’s Merit brief at p. 10). It is evident from the above framework outlined by the Eighth District that its analysis focused on the salient issue of whether R.C. 4921.25 constituted a general law. The Eighth District concluded that R.C. 4921.25 “is not a general law” and because the statute “is not a general law, it unconstitutionally attempts to limit municipal home-rule authority.” *Cleveland* at ¶ 42.

B. R.C. 4921.25 does not meet the four part general law test recognized in *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963.

A statute that does not meet the criteria of a “general law” is unconstitutional and void in circumstances where the State attempts to prohibit local authorities from exercising their police authority under Article XVIII, Section 3 of Ohio’s Constitution. *Freemont v. Keating*, 96 Ohio St. 468, 118 N.E. 114 (1917), syllabus. Statutes that do not constitute a general law, but that are intended to limit municipal legislative home rule powers “violate the Home-Rule Amendment, Section 3, Article XVIII, Ohio Constitution and, as such, must be struck down as unconstitutional.” See *Canton*, *supra* at ¶¶10-11 (emphasis added).

In *Canton* the Court formalized a four-part test that has been subsequently recognized and used by the Courts in determining whether a state statute would constitute a “general law” for purposes of any Article XVIII, Section 3 Home Rule analysis to be

undertaken. See e.g. *AFSA, supra*, 2006-Ohio-6043 at ¶ 32 (“In *Canton*... we announced a four-part test defining what constitutes a general law for purposes of home-rule analysis”).

Under *Canton* a statute will be recognized as a general law for purposes of home rule conflict analysis only when the statute: (1) is part of a statewide and comprehensive legislative enactment; (2) applies to all parts of the state alike and operates uniformly throughout the state; (3) sets forth police, sanitary, or similar regulations, rather than granting or limiting municipal legislative power; and (4) prescribes a rule conduct upon citizens generally. *Id.* at ¶ 2.

(1) RC 4921.25’s preemption language is not part of the comprehensive PUCO scheme established to regulate motor carriers.

The State cites to R.C. 4905.80 in arguing that “the General Assembly’s intent in passing R.C. 4921.25 was clear: to incorporate towing into the comprehensive and uniform regulation of motor carriers, thereby creating a uniform scheme for towing itself.” (State’s Merit Brief at p. 12). It is of note that in further citing to R.C. 4905.81 the State quotes from R.C. 4905.81(G), in part, and paraphrases the statute in part, arguing:

“the legislature included a final duty that is both a catch-all and that explicitly excludes local regulation” :“the public utilities commission shall...[s]upervise and regulate motor carriers in *all other matters* affecting the relationship between those carriers and the public to the exclusion of all local authorities,” **save for limited situations where local regulation is still permitted.** R.C. 4905.81(G) (emphasis added).”

(State’s Merit Brief at p. 13, the City’s emphasis of the State’s paraphrase is in bold to distinguish from State’s incorporated emphasis). R.C. 4905.81(G) actually reads as follows:

(G) Supervise and regulate motor carriers in all other matters affecting the relationship between those carriers and the public to the exclusion of all local

authorities, except as provided in this section. *The commission, in the exercise of the jurisdiction conferred upon it by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, may adopt rules affecting motor carriers, notwithstanding the provisions of any ordinance, resolution, license, or permit enacted, adopted, or granted by any township, municipal corporation, municipal corporation and county, or county. In case of conflict between any such ordinance, resolution, license, or permit, the order or rule of the commission shall prevail. Local subdivisions may adopt reasonable local police rules within their respective boundaries not inconsistent with those chapters and rules adopted under them.* (emphasis added).

In considering the State's argument several preliminary points are made. First, the PUCO's entire authority and power is conferred by statute. *New York Cent. R. Co. v. Public Utilities Commission*, 123 Ohio St. 370, 175 N.E. 596 (1931) (syllabus). This Court "has consistently recognized that the Public Utilities Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." *Pike Natural Gas Co. v. Public Utilities Commission of Ohio*, 68 Ohio St.2d 181, 183, 429 N.E.2d 444 (1981). It is evident that the State cannot delegate more authority to the PUCO (express preemption over local ordinances through R.C. 4921.25) than the State has under the Ohio Constitution, because the General Assembly has no power to declare a public policy that conflicts with the Constitution. *Stange v. City of Cleveland*, 94 Ohio St. 377, 380, 114 N.E. 261, (1916).

The General Assembly's attempted preemption in R.C. 4921.25 further disregards the consistent and long-standing judicial recognition that the PUCO regulatory scheme adopted pursuant to R.C. Chapter 4921 has long contemplated and allowed for reasonable local police regulations:

Under R.C. Chapter 4921, local subdivisions may make reasonable local police regulations relating to motor transportation companies so long as the local regulations are not inconsistent with the authority of the PUCO. R.C. 4921.04(H) and 4921.25. In interpreting the balance between local police regulations and the authority of the PUCO, the Ohio Supreme Court has stated

that local police regulations “should be reasonable in character and not designed to nullify and set aside the orders of the Public Utilities Commission by materially interfering with the efficiency of the utility as authorized by the Public Utilities Commission.” *Nelsonville v. Ramsey* (1925), 113 Ohio St. 217, 225, 148 N.E. 694, 696 (applying G.C. 614-86 [110 Ohio Laws 214], predecessor to R.C. 4921.04). See, also, *Lorain St. Rd. Co. v. Pub. Util. Comm.* (1925), 113 Ohio St. 68, 69, 148 N.E. 577, 577.

Coventry Twp. v. Ecker 101 Ohio App.3d 38, 43-44, 654 N.E.2d 1327, (9th Dist. 1995).

Other than the lone attempted preemption incorporated into the current R.C. 4921.25, the PUCO motor carrier statutes still contemplate the enactment of “reasonable local police rules” within a municipality’s boundaries.

While disclaiming the need for any conflict analysis in the current litigation, the State attempts to place just such analysis before the Court (see State’s Merit Brief at pages 14-16) in comparing a variety of various local municipal towing regulations to what it describes as its “statewide scheme.” (*Id.* at p. 15). The better analysis is that posited by the Eighth District in considering whether there was in fact a comprehensive scheme for tow trucks established outside the existing scheme otherwise identified in R.C. Chapter 4921 for motor carriers generally:

This overview of the events surrounding the enactment of R.C. 4921.30 indicates that tow trucks were simply included within the state’s regulation of for-hire motor carriers following the *Ours Garage* decision.

Moreover, we conclude that this matter is similar to the situation presented in *Canton*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963. In *Canton*, the city’s ordinance prohibited “manufactured homes” within the city limits as principal or accessory structures for residential use. Thereafter, the legislature enacted R.C. 3781.184 that pertained to manufactured homes. Subsections (A) and (B) addressed construction and safety standards, Subsection (C) of the statute prohibited political subdivisions from barring or restricting manufactured homes in single-family zones, Subsection (D) set forth an exception to subsection (C) and permitted private landowners to incorporate restrictive covenants in deeds to prohibit the inclusion of, among other things, manufactured homes.

In concluding that Subsections (C) and (D) are not part of a statewide and comprehensive zoning plan, the Supreme Court noted:

R.C. Chapter 3781 relates to building standards but varies widely in its content * * *.

Moreover, the state does not have a statewide zoning scheme, nor does the state have a comprehensive plan or scheme for the licensing, regulation, or registration of manufactured homes. Instead, R.C. 3781.184(A) and (B) simply refer to the current federal standards regulating the construction of manufactured homes. A United States district court has held that “[t]he [Federal Manufactured Home Construction and Safety Standards Act of 1974, Section 5403, Title 42, U.S.Code] preempts only construction and safety standards and does not apply to local zoning ordinances that purport to regulate the placement of certain types of dwellings in the community.” The court held that the codes at issue (Canton Ordinances 1123.57 and 1129.11) are zoning ordinances not aimed at construction and safety standards. “Because Congress intended to regulate safety and construction only, local laws aimed at purposes outside that area are not preempted by the Act. There is no indication that Congress intended to regulate any other aspect of the manufactured home industry.” *See Ohio Manufactured Hous. Assn. v. Canton* (Dec. 4, 1998), N.D. Ohio No. 5:97 CV 1190. Accordingly, we conclude that R.C. 3781.184(C) and (D) do not provide for uniform, statewide regulation of manufactured housing. *Canton* at ¶¶ 23–24.

Similarly, in this matter, although there has been considerable state and federal regulation of motor carriers, there has not been a comprehensive legislative enactment with respect to tow truck enterprises. To date, the legislature has not set forth a comprehensive plan or scheme for the licensing, regulation, or registration of tow truck enterprises. Instead, the existing scheme pertains to for-hire motor carriers and adopts federal safety regulations. This absence of a comprehensive scheme for tow truck operations stands in stark contrast with the detailed, comprehensive scheme through which the City sought, through its police powers, to regulate tow truck operations under CCO 677A. We therefore cannot infer an intent to preempt local legislation based upon broad regulatory enactment in this field. Accordingly, we conclude that [R.C. 4921.25] is not part of a statewide and comprehensive legislative enactment.

Cleveland v. State, 2012 -Ohio- 3572, at ¶¶ 31-34.

Contrary to the State’s arguments, the Eighth District understood and recognized that placing a preemption provision in R.C. 4921.25 did not result in the creation of a statewide and comprehensive legislative scheme for tow trucks, as the State did nothing more than fold tow truck operations into a general legislative scheme already in place for

motor carriers. Clearly, the existing state laws regulating all motor carriers are not tow truck specific, but for the attempted preemption. The existing PUCO scheme, as noted above, had not contemplated or attempted outright state preemption of reasonable local safety regulations in a manner directly contrary to Article XVIII, Section 3. Again, the City did not file its challenge to question the State's right to regulate tow trucks through the PUCO's motor carrier statutes and administrative regulations. As addressed above in the discussion concerning the *Ours Garage* decision, federal law does not preempt or favor preemption of the City or other local governments in the area of tow truck safety.

For example Cleveland Codified Ordinance 677A.11 regulates as follows:

No person licensed under Section 677A.02, or any of his agents or employees, shall respond to the scene of an accident unless either summoned by a person having a direct interest in the vehicle or vehicles involved or dispatched thereto as provided in the rules and regulations promulgated by the Director of Public Safety pursuant to Chapter 135.

The City's local law serves to regulate tow trucks responding to local accidents occurring within the City's limits, and is, without question, a safety regulation that protects the public in the potentially chaotic and developing circumstances of motor vehicle accidents and recovery operations. The language of the ordinance does not conflict with existing motor carrier laws, but its existence would be in conflict with that part of R.C. 4921.25 informing tow truck operators they can disregard all local regulations. Cleveland Codified ordinance 677A.11 clearly addresses a matter of tow truck related safety and the legislative intention of 49 U.S.C. 14501(c)(2)(A) recognized in *Ours Garage*.

In citing to this Court's decision in *AFSA, supra*, 2006-Ohio-6043 (State's Merit Brief at p. 16) as supporting the State's comprehensive tow truck law argument, the State disregards a rather obvious distinction between the particularized lending laws at issue in

AFSA and the general motor carrier laws in R.C. Chapter 4921 and Chapter 4901 of the Ohio Administrative Code, and their general application to all motor carriers, to now include tow truck operators. In upholding the limitations on local authority established in the State's predatory lending package of laws in its *AFSA* decision, the Ohio Supreme Court was construing otherwise limiting language on local authority contained in R.C. 1.63. The court construed the entirety of the laws governing lending established by the State in addition to the restrictive language of R.C. 1.63 in seeking to determine whether a statewide comprehensive enactment existed within which the statutory restriction fit:

Sub.H.B. No. 386 in effect incorporated parts of the Home Ownership and Equity Protection Act of 1994, i.e., the federal predatory-lending law, into the Revised Code in Ohio's predatory-lending laws, at R.C. 1349.25 through 1349.37. That legislation defined covered loans, R.C. 1349.25(D), and authorized the state to “solely * * * regulate the business of originating, granting, servicing, and collecting loans and other forms of credit in the state and the manner in which any such business is conducted, * * * in lieu of all other regulation of such activities by any municipal corporation or other political subdivision,” R.C. 1.63(A). (Emphasis added.) Therefore, with respect to the first part of our general-law analysis, Sub.H.B. No. 386 is clearly part of comprehensive statewide legislative regulation that relates to all consumer mortgage lending. The existence of this comprehensive statewide legislation and the language of Sub.H.B. No. 386 at R.C. 1.63 permitting the state to “solely * * * regulate the business of originating, granting, servicing, and collecting loans” indicate that this is an area “where state dominance seem[s] to be required.” Vaubel, *Municipal Home Rule in Ohio*, at 1107–1108.

Id. at ¶ 33.

Unlike the comprehensive predatory lending legislation at issue in *AFSA*, the General Assembly did not enact a new set of comprehensive statewide tow truck regulations with or following the enactment of R.C. 4921.25. Nor did the State modify the existing substantive PUCO regulations for motor carriers found in R.C. Chapter 4921 and R.C. 4905.81(G) – allowing reasonable non-conflicting local laws – in any manner

that would differentiate the regulation of tow trucks from other motor carriers, except for the expressed preemption language.

The lack of a newly enacted or preexisting comprehensive tow truck regulatory scheme also differentiates the State's analysis of R.C. 4921.25 within the context of this Court's earlier decisions in *Ohio Assn. of Private Detective Agencies v. North Olmsted*, 65 Ohio St.3d 242, 602 N.E.2d 1147 (1992), *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St.3d 44, 442 N.E.2d 1278 (1982), and more recently in *Cleveland v. State*, 128 Ohio St.3d 135, 2010 -Ohio- 6318, 942 N.E.2d 370.

The State mistakenly characterizes the issue presented in *Ohio Assn. of Private Detective Agencies v. N. Olmsted* in suggesting that this Court had "rejected a home-rule challenge to new language in R.C. 4749.09 that prohibited local licensing requirements and fees for private investigators." (State's Merit brief at p. 17). The challenge in *North Olmsted* arose because the "plaintiff-appellant, Ohio Association of Private Detective Agencies, Inc., [had] instituted ...[a]...declaratory judgment action in the Cuyahoga County Court of Common Pleas, seeking a judicial determination that [a]North Olmsted ordinance **was in conflict** with the state statute insofar as it attempted to exact a local fee for the registration of private security personnel and, thus, was unconstitutional." *Id.* at 243 (emphasis added). As noted above, the State has eschewed any need for this Court to similarly conduct a *Mendenhall* third step "conflict" analysis (State Merit Brief at p. 10) in the present litigation.

This Court considered R.C. 4749.09 within the scheme implemented by R.C. Chapter 4749 and concluded that the chapter "in its entirety does provide for uniform statewide regulation of security personnel" and within that context "[a]ccordingly, R.C.

4749.09 must be considered a general law of statewide application.” *Id.* at 245. As is clear from the syllabus in *North Olmsted*, a “conflict analysis” was undertaken after first finding the specific prohibition on local fees to be a general law. *North Olmsted* did not recognize any implementation of statutory preemption based solely on the language of the statute.

R.C. 4749.09 provides:

*Any class A, B, or C licensee, or registered employee of a class A, B, or C licensee, who operates in a municipal corporation that provides by ordinance for the licensing, registering, or regulation of private investigators, security guard providers, or their employees shall conform to those ordinances insofar as they **do not conflict** with this chapter. No license or registration fees shall be charged by the state or any of its subdivisions for conducting the business of private investigation, the business of security services, or both businesses other than as provided in this chapter. (emphasis added).*

The *North Olmsted* licensing issue did not involve the attempted general preemption of all local regulatory authority as is being attempted with R.C. 4921.25. This decision is further distinguished because of the narrowness of the issue actually considered in *North Olmsted*, and the decision must be viewed with due recognition of the conflict standard language (emphasized above) co-existing in the same statute, wherein it was recognized that any individual being regulated by the Chapter was to conform to local non-conflicting ordinances. In the current circumstances it must be considered in reviewing the precedent established in *North Olmsted* that current R.C. 4905.81(G), when read in the context of motor carrier regulation in R.C. Chapter 4921 provides in pertinent part:

“...In case of **conflict** between any such ordinance, resolution, license, or permit, the order or rule of the commission shall prevail. Local subdivisions may adopt reasonable local police rules within their respective boundaries not inconsistent with those chapters and rules adopted under them.” (emphasis added).

Clearly, this language would conform to the prior direction that PUCO authority “must be exercised consistently with the right of municipalities.” *Nelsonville v. Ramsey*, 113 Ohio St. 217, 225, 148 N.E. 694 (1925). Additionally, in exercising its authority the PUCO “should at all times give due consideration to local conditions, which are best known to municipal authorities.” *Id.*

Similarly, the State’s further reliance on *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St.3d 44 to support the purported preemption contained in R.C. 4921.25 is also misplaced. The Court considered with *Clermont* whether certain prohibitions on local regulation of hazardous waste facilities in R.C. 3734.05(D) constituted a general law. This statute read:

No political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility authorized by a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance, or regulation that in any way alters, impairs, or limits the authority granted in the permit issued by the board.

As in *North Olmsted*, the analysis undertaken in *Clermont* considered the limiting statutory language within the scope of the other sections of R.C. Chapter 3734 and not in isolated fashion:

The section of law questioned herein should not be read and interpreted in isolation from the other sections of R.C. Chapter 3734 dealing with the state's control of the disposal of hazardous wastes. All such sections read *in pari materia* do not merely prohibit political subdivisions of the state from regulation of these facilities. Conversely, the statutory scheme contained in this chapter is a comprehensive one enacted to insure that such facilities are designed, sited, and operated in the manner which best serves the statewide public interest.

Clermont at 48. As in *North Olmsted* this Court further conducted a conflict analysis in upholding the statute at issue in *Clermont*:

Further, we hold that such section of law being a general law enacted within a reasonable exercise of the police power of the state takes precedence over laws in conflict therewith enacted by municipalities pursuant to home rule power granted by Section 3, Article XVIII of the Ohio Constitution. Accordingly, the judgment of the court of appeals is hereby affirmed.

Id. at 50. (emphasis added). Clearly, *Clermont* does not stand for any proposition that preemption language placed in the Revised Code by the General Assembly can displace the City's authority under Article XVIII, Section 3 of the Ohio Constitution.

Subsequently, this Court reviewed the scope of its decision in *Clermont* with its decision in *Fondessy Ents., Inc. v. Oregon*, 23 Ohio St.3d 213, 215, 492 N.E.2d 797 (1986). With *Fondessy* this Court emphasized that it had not endorsed statutory preemption of municipal authority contrary to Article XVIII, Section 3.

If the provisions of R.C. 3734.05(D)(3) do preclude a home rule municipality, with police powers guaranteed it by the Ohio Constitution, from enacting any and all legislation related to the state statute, then that provision of state law must be ruled unconstitutional. However, this court already has held R.C. 3734.05(D)(3) to be constitutional. *Clermont, supra*, at paragraph one of the syllabus. Obviously, then, the instant provision cannot preclude the enactment of legislation such as the instant ordinance at the threshold. The conflict test must be applied.

Furthermore, as “[t]he power of any Ohio municipality to enact local police regulations is derived directly from Section 3 of Article XVIII of the Ohio Constitution and is no longer dependent upon any legislative grant thereof,” the same police power cannot be extinguished by a legislative provision. *West Jefferson v. Robinson* (1965), 1 Ohio St.2d 113, 205 N.E.2d 382 [30 O.O.2d 474], paragraph one of the syllabus, *Scalera, supra*, 135 Ohio St. at 66, 19 N.E.2d 279. If R.C. 3734.05(D)(3) were elevated to a level of “express preemption” (its level as a result of the judgments of the courts below), no police power ordinance in the instant field would survive long enough to face a conflict test against a state statute. Our review of the judgments of the courts below reveals to this court that both courts reasoned and ruled as they did on preemption grounds exclusively rather than applying the conflict test of *Struthers*, as most recently was accomplished by this court in *Weir v. Rimmelin* (1984), 15 Ohio St.3d 55, 472 N.E.2d 341.

Id. at 216. The *Fondessy* Court further held:

We hold that the language of R.C. 3734.05(D)(3) cannot be employed to nullify the police power granted the city of Oregon by the Home Rule Amendment. *R.C. 3734.05(D)(3) may be utilized only to limit the legislative power of municipalities by the precise terms it sets forth.* R.C. 3734.05(D)(3) provides a conflict standard by which to judge ensuing legislation in the instant arena of environmental regulation.

Id. at 217 (emphasis by court). The generalized attempt to limit the legislative power of municipalities in R.C. 4921.25 is not countenanced by *Clermont* or the review of that decision in *Fondessy*. The tow truck preemption is not narrowly drawn within the scope of the motor carrier regulatory chapter nor does it reflect precise terms in the preemption language stating with regard to towing companies: “Such an entity is not subject to *any ordinance, rule, or resolution of a municipal corporation, county, or township that provides for the licensing, registering, or regulation of entities that tow motor vehicles.*” (emphasis added). The attempted limit on local legislative authority the City and other municipalities to enact enforceable safety ordinances finds no support in the *North Olmsted, Clermont, and Fondessy* decisions.

This Court’s more recent decision in *Cleveland v. State*, 128 Ohio St.3d 135, 2010 -Ohio- 6318, 942 N.E.2d 370 does not support the preemption attempted by R.C. 4921.25. First, the firearms decision explicitly recognized the continuing existence of the “conflict” standard in lieu of preemption:

“Once a matter has become of such general interest that it is necessary to make it subject to statewide control as to require uniform statewide regulation, the municipality can no longer legislate in the field *so as to conflict with the state.*” *State ex rel. McElroy v. Akron* (1962), 173 Ohio St. 189, 194, 19 O.O.2d 3, 181 N.E.2d 26.

Id. at ¶ 12. (emphasis added).

The State argues that “[t]he comprehensiveness of a legislative scheme depends not on the novelty of the regulatory regime or the sequence in which legislation is

enacted. Rather, it turns on the framework *as a whole*.” (State Merit Brief at p. 18).

There simply is no “framework as a whole” that has been enacted for tow trucks that is separate and distinct from the existing motor carrier PUCO regulatory scheme. A scheme that has continuously recognized the constitutional conflict standard by providing and recognizing local adoption of reasonable and non-conflicting local police regulations. The State placed before the trial Court the affidavit of Alan Martin, Deputy Director of Transportation at the PUCO and has included his affidavit in the State’s Supplement. Mr. Martin evidences in his affidavit at paragraph 7 in listing tow truck company responsibilities under state law: “As with all MTC’s engaging in interstate commerce, for hire tow truck companies are required to...” Mr. Martin’s reference to “as with all MTC’s”⁵ in the context of the PUCO regulating “for hire tow trucks” rather evidences the City’s point; tow trucks are regulated the same as all other motor carriers and are not part of any separate and comprehensive PUCO scheme of regulations related to tow trucks only.

In the 2012 *Cleveland* firearms decision this Court concluded “that R.C. 9.68 is part of a comprehensive statewide legislative enactment.” *Id.* at ¶ 17. The Court then proceeded to identify the various state laws that demonstrated the comprehensiveness of the scheme governing a specific and particular subject - firearms. Contrary to the field of specific firearm regulations, the State’s regulation of tow trucks falls within a general scheme adopted for all motor carriers regulated by the PUCO.

⁵ By way of definition the current R.C. 4921.01(B) provides in pertinent part: “For-hire motor carrier” means a person engaged in the business of transporting persons or property by motor vehicle for compensation,...” Before the enactment of Am.Sub.H.B. 487 in 2012 former R.C. Chapter 4921 had used the term “motor transportation company” which was conveniently abbreviated as “MTC” in Mr. Martin’s affidavit and in the various briefs filed by the City that make up part of the record in this matter.

In deciding the firearms issues presented in *Cleveland* this Court particularly noted in the context of the previous intermediate appellate review, “Rather than considering [the statute] in pari materia with other statutes regulating firearms, the court of appeals considered the provision in isolation, leading to the erroneous conclusion that the statute is not part of a statewide comprehensive legislative enactment regulating firearms.” *Id.* at ¶ 23. That such isolated analysis is not present in this matter is reflected in the Eighth District’s thorough analysis of whether the tow truck preemption statute could be read within the scope of comprehensive tow truck regulations (See ¶¶ 23-34). The Eighth District first recognized the State’s comprehensiveness argument before conducting the court’s general law review:

In opposition, the state noted that the Ohio General Assembly has given the PUCO authority to supervise and regulate “motor transportation companies” since 1923, and this term has included tow trucks since 2003. Applying the analytic framework set forth in *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, the state argued that [R.C. 4921.25] does not simply limit the legislative power of cities, but is part of a comprehensive statewide scheme of regulations. The state further argued that [R.C. 4921.25] operates uniformly across the state and prevents “conflicting patchwork regulation by the cities.” It additionally argued that [R.C. 4921.25] is part of a safety regulatory scheme that adopts and enhances safety regulations of the U.S. Department of Transportation, and that it prescribes a rule of conduct upon citizens generally.⁶

Id. at ¶ 9.

The Eighth District properly concluded at ¶ 34 in light of the direction provided by this Court in *Canton*:

Similarly, in this matter, although there has been considerable state and federal regulation of motor carriers, there has not been a comprehensive legislative enactment with respect to tow truck enterprises. To date, the legislature has not

⁶ The ever present “patchwork” label should be seen for what it is, an argument against home rule that could be made in every case where two municipalities may, to someone’s inconvenience, have different laws. It is an argument that should have no resonance within the authority delegated to municipalities by the Home Rule Amendment.

set forth a comprehensive plan or scheme for the licensing, regulation, or registration of tow truck enterprises. Instead, the existing scheme pertains to for-hire motor carriers and adopts federal safety regulations.

The State's position in this matter concerning R.C. 4921.25 can only be read as supporting a legislative preemption that disregards the "conflict" standard found within the scheme established for motor carriers at R.C. 4905.81(G) and disregarding the constitutional prohibition on such state preemption found in Article XVIII, Section 3.

(2) **The second prong of the *Canton* general law analysis requires uniformity.**

The City had not separately addressed the *Canton* uniformity requirement below, but had placed before the Eighth District that "apart from arguably attempting to apply [R.C. 4921.25's] unconstitutional preemption uniformly throughout the state (2nd prong), the statute fails as to the three (1,2, and 4) remaining elements established for general laws in *Canton*. (City's Appellant's Merit brief at p. 14).

The Eighth District's analysis and finding concerning the *Canton* uniformity requirement herein was framed in the following introduction at ¶¶ 35-36:

General laws must "apply to all parts of the state alike." *Canton*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 13, quoting *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 82-83, 167 N.E. 158 (1929).

In this matter, however, the definition of motor transportation company set forth in R.C. 4921.02(A), does not include private motor carriers, as it incorporates an exclusion for companies meeting the definition set forth in R.C. 4923.02(A), i.e., companies "engaged in the business of private carriage of persons or property, or both, or of providing or furnishing such transportation service,for hire ***[.]"

Any consideration of the Eighth District's analysis must note that the definition of "motor transportation company" at former R.C. 4921.02(A) was repealed in 2012 and the exclusion identified by the Court in performing its uniformity analysis relating to a former definition at R.C. 4923.02(A) is no longer presented.

(3) The preemption contained in R.C. 4921.25 fails the third prong of the *Canton* general law analysis.

To meet the third requirement of the *Canton* general law analysis a statute must set forth police, sanitary, or similar regulations, rather than granting or limiting municipal legislative power.

The express language of R.C. 4921.25, beyond blending tow trucks into an already existing regulatory mix, establishes no new regulatory authority concerning the PUCO's existing authority to regulate motor carriers. The State's references to *North Olmsted*, *AFSA*, *Clermont*, and the 2010 *Cleveland* firearms decision (State's Merit Brief at p.20) do not provide any authority for revoking local authority contrary to Article XVIII, Section 3. The State's further reference to R.C. 4921.25 as "only a piece of the picture" (*Id.* at p. 21) seeks to frame with invisible paint. RC 4921.25 does nothing more than insert a singular, niche preemption for tow trucks that would improperly extinguish the City's constitutional local police powers to regulate such vehicles within the City, without any reference to a differing scheme of PUCO regulation for tow trucks beyond R.C. Chapter 4921 and its application to all motor carriers. In addition, as noted throughout herein by the City, the existing PUCO motor carrier scheme being relied upon by the State as support for summarily displacing all local authority recognizes and allows for reasonable, non-conflicting local ordinances at R.C. 4905.81(G).

The City's local authority to regulate flows directly from the Ohio Constitution and is not dependent on the General Assembly:

The power of any Ohio municipality to enact local police regulations is derived directly from Section 3 of Article XVIII of the Ohio Constitution and is no longer dependent upon any legislative grant thereof, as it was prior to the adoption in 1912 of that section of the Constitution.

West Jefferson v. Robinson (1965), 1 Ohio St.2d 113, paragraph one of the syllabus. The States reliance on ¶ 50 of *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008 -Ohio- 4605, 896 N.E.2d 967 in support of what it describes as the “municipal-displacement portion of R.C. 4921.25” (State merit brief at p. 21) is misplaced.

In *Clyde* the Court was looking at the State’s concealed carry law at R.C. 2923.126 in the context of whether it constituted a general law before conducting a home rule conflict analysis. The general law analysis was undertaken in light of a local Clyde ordinance that restricted the concealed carry of firearms in its public park contrary to what was authorized by the concealed carry statute. In describing R.C. 2923.126 this Court recognized a statute that:

“creates a right to carry concealed handguns if the carrier has obtained a state-issued permit. The statute also creates multiple, specific exceptions to this right, R.C. 2923.126(B), and it grants private property owners the right to preclude licensed firearm carriers from privately owned property through the use of posted signs, R.C. 2923.126(C).”

Id. at ¶ 42.

The *Clyde* decision in the conduct of its *Canton* analysis discusses the rather specific and comprehensive language in R.C. 2923.126 in describing that “[t]he statute therefore represents both an exercise of the state’s police power and an attempt to limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations.” *Id.* at ¶ 50.⁷ The limit on local authority addressed in *Clyde* arose from the

⁷ The Court further recognized that the General Assembly had provided by way of uncodified language that “[n]o municipal corporation may adopt or continue in existence any ordinance * * * that attempts to restrict the places where a person possessing a valid license to carry a concealed handgun may carry a handgun concealed.” *Id.* at ¶ 17.

effect of the comprehensive concealed carry language in the statute and not through the “municipal-displacement” language that is being advocated by the State in support of the preemption included in R.C. 4921.25. More appropriate to the preemption issue presented currently is the precursor explanation in *Clyde* contained at ¶ 29 before the Court began the Article XVIII, Section 3 general law analysis:

Before beginning our analysis, however, we note that the appellate court held that R.C. 9.68 and 2923.126 preempted the *Clyde* ordinance. *Ohioans for Concealed Carry Inc.*, 2007-Ohio-1733, 2007 WL 1098347, ¶ 12. But as we stated in *Am. Fin.*, “[a] statement by the General Assembly of its intent to preempt a field of legislation is a statement of legislative intent” that may be considered in a home-rule analysis but does not dispose of the issue. *Am. Fin. Servs. Assn.*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 31. Accordingly, although R.C. 9.68 and 2923.126 embody the General Assembly's intent to occupy the field of handgun possession in Ohio, that intent “does not trump the constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws.” *Id.* We therefore proceed to apply the test established in *Canton*.

The Eighth District conducted a proper general law analysis and the court understood that with R.C. 4921.25 the General Assembly was improperly seeking to limit local legislative authority under the third prong of the *Canton* general law test:

Proceeding to the third prong of the general law test outlined in *Canton*, we next consider whether...[R.C. 4921.25]...sets forth police, sanitary, or similar regulations; or, instead, simply purports only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations. Again, the legislature has not established police regulations for the operation of tow truck enterprises, and the ...[R.C. 4921.25]...preemption provision is not part of a larger regulatory scheme for tow truck operators. That is, in the years following the enactment of...[R.C. 4921.25], no other statutory provisions have been enacted to address such enterprises, and there is no clear indication that tow truck regulation is indeed a matter of such general interest that it is necessary to make it subject to statewide control. Like R.C. 4549.17, which was deemed unconstitutional in *Linndale v. State*, 85 Ohio St.3d 52, 706 N.E.2d 1227, ...[R.C. 4921.25]... is “simply a limit on the legislative powers of municipal corporations to adopt and enforce specified police regulations.” Therefore, we conclude that the preemption language simply curtails the City's police powers in this area and does not meet the third element of the *Canton* test.

Id. at ¶ 39.

(4) The preemption language in R.C. 4921.25 does not prescribe a rule of conduct upon citizens generally.

The fourth prong of the *Canton* test requires that a general law must prescribe a rule of conduct upon citizens generally. In conjunction with the analysis undertaken of the first three *Canton* requirements, it is without serious question that the Eighth District correctly found that the statute fails to prescribe a rule of conduct upon citizens generally:

In determining whether...[R.C. 4921.25]... prescribes a rule of conduct upon citizens generally, we conclude that it is not a part of a system of uniform statewide regulation on the subject of tow truck operation. It is a statute that simply provides that municipalities, counties, and townships may not license, register, or regulate entities that tow motor vehicles; it does not prescribe a rule of conduct upon citizens generally. Accordingly, the fourth element of the *Canton* test is not met.

Id. at ¶ 41. Statutory language that merely limits municipalities' legislative authority, fails to prescribe a rule of conduct upon citizens generally "because * * * the statute applies to municipal legislative bodies, not to citizens generally." *Canton, supra* at ¶ 36, citing *Linndale v. State of Ohio*, 85 Ohio St.3d 52, 706 N.E.2d 1227 (1999) and *Youngstown v. Evans*, 121 Ohio St. 342, 345, 168 N.E. 844 (1929).

It is evident that the preemption language employed by R.C. 4921.25 does not prescribe a rule of conduct upon citizens generally and the preemption must be separated from the General Assembly's placement of tow trucks in the mix of motor carriers regulated by the PUCO at R.C. Chapter 4921. The statutory preemption when otherwise read within the parameters of R.C. Chapter 4921 and R.C. 4905.81(G) is contrary and inconsistent with the authority delegated to the PUCO to regulate motor carriers. The preemption language is outside the existing motor carrier regulatory scheme and it

establishes no standard of conduct for citizens to follow. The preemption language fails to meet the required fourth prong of the *Canton* general law test.

III. Not being a general law the State's attempt to preempt local home rule authority through R.C. 4921.25 is unconstitutional.

A municipal corporation's authority to regulate comes from the Ohio Constitution. *Linndale*, 85 Ohio St.3d at 55, citing *State v. Parker*, 68 Ohio St.3d 283, 285, 626 N.E.2d 106 (1994). A municipality may regulate in an area whenever its regulation is not in conflict with the general laws of the state. *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006 -Ohio- 6573, 859 N.E.2d 923 at ¶ 19.

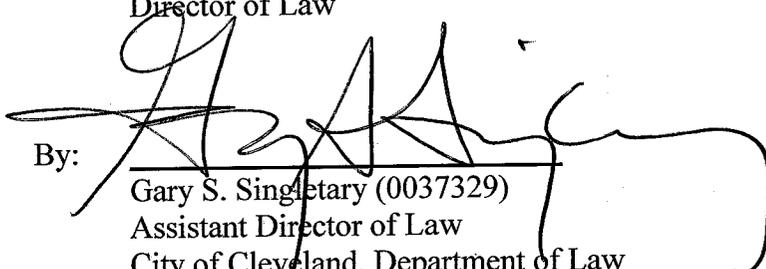
A statute that seeks to limit local authority but is not a general law “unconstitutionally impinges on the home-rule powers of the affected municipalities.” *Linndale*, at 55. In *Canton* the Court was wrestling with a statute (R.C. 3781.184) that by way of subsection (C) of the statute worked to forbid “political subdivisions from prohibiting or restricting the location of permanently sited manufactured homes in any zone or district in which a single-family home is permitted.” *Id.* at ¶ 2. Similar to the City herein, Canton had sought “a declaration that [the statute] was an unconstitutional infringement of municipal home-rule powers of the city of Canton under Section 3, Article XVIII...” *Id.* at ¶ 2. The *Canton* decision makes clear that a statute that seeks to limit local authority to regulate must first qualify as a general law or be struck down as an unconstitutional attempt to limit the legislative home rule powers of a municipality. *Id.* at ¶¶ 10-11. For the reasons addressed above, and incorporating the *Canton* “general law” test, the preemption language incorporated at R.C. 4921.25 does not qualify as a general law.

CONCLUSION

The attempted preemption language contained in R.C. 4921.25 does not qualify as a general law and is outside the recognized regulatory scheme for Ohio motor carriers established at R.C. Chapter 4921. The Eighth District Court of Appeals properly analyzed the provision under the four part general law test established in *Canton*. The court concluded that R.C. 4921.25 is not a general law and, therefore, held that the preemption language unconstitutionally attempts to limit the City's municipal home-rule authority. The City requests that this Court uphold the judgment of the Eighth Circuit

Respectfully submitted,

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CERTIFICATE OF SERVICE

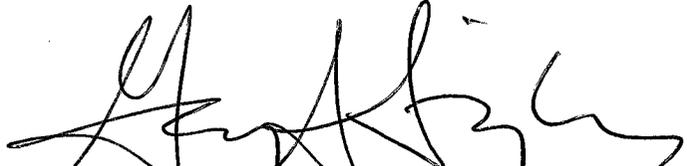
I hereby certify that a true and accurate copy of the "Merit Brief Plaintiff-Appellee City of Cleveland" was served by regular mail on this 2nd day of May, 2013 to:

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APPENDIX

FORMER R.C. 4921.04

§ 4921.04 Powers of public utilities commission.

The public utilities commission shall:

(A) Supervise and regulate each motor transportation company;

(B) Fix, alter, and regulate rates;

(C) Regulate the service and safety of operation of each motor transportation company;

(D) Prescribe safety rules and designate stops for service and safety on established routes;

(E) Prescribe safety rules applicable to the transportation and offering for transportation of hazardous materials in intrastate commerce within this state by motor transportation companies. The rules shall be consistent with, and equivalent in scope, coverage, and content to, the "Hazardous Materials Transportation Act," 88 Stat. 2156 (1975), 49 U.S.C. 1801, as amended, and regulations adopted under it. No person shall violate a rule adopted under this division or any order of the

commission issued to secure compliance with any such rule.

(F) Require the filing of annual and other reports and of other data by motor transportation companies;

(G) Provide uniform accounting systems;

(H) Supervise and regulate motor transportation companies in all other matters affecting the relationship between such companies and the public to the exclusion of all local authorities, except as provided in this section and section 4921.05 of the Revised Code.

The commission, in the exercise of the jurisdiction conferred upon it by this chapter and Chapters 4901., 4903., 4905., 4907., 4909., and 4923. of the Revised Code, may prescribe rules affecting motor transportation companies, notwithstanding the provisions of any ordinance, resolution, license, or permit enacted, adopted, or granted by any township, municipal corporation, municipal corporation and county, or county. In case of conflict between any such ordinance, resolution, license, or permit, the order or rule of the commission shall prevail.

Local subdivisions may make reasonable local police rules within their respective boundaries not inconsistent with those chapters and rules adopted under them.

HISTORY: GC § 614-86; 110 v 211; 111 v 20; Bureau of Code Revision, 10-1-53; 142 v H 428 (Eff 9-26-88); 144 v H 77. Eff 9-17-91.