IN THE
SUPREME COURT OF OHIO

NIKKI NOVAK Relator, v. THE HON. KENNETH R. SPANAGEL Respondent.	Case No. 2019-1093 **ORIGINAL ACTION FOR A WRIT OF PROHIBITION**

RESPONSE TO RESPONDENT'S MOTION TO DISMISS PETITIONER'S COMPLAINT FOR WRIT OF PROHIBITION

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BRIEF IN RESPONSE TO MOTION TO DISMISS

"[W]here there is a patent and unambiguous lack of subject matter jurisdiction in the court exercising judicial authority, it is not necessary to establish that the relator has no adequate remedy at law in order for a writ to issue." *Ohio Edison Co. v. Parrott*, 71 Ohio St.3d 705, 654 N.E.2d 106 (1995), citing *State ex rel. Enyart v. O'Neill (1995)*, 71 Ohio St.3d 655, 656, 646 N.E.2d 1110, 1112.; *State ex rel. Tilford v. Crush* (1988), 39 Ohio St.3d 174, 176, 529 N.E.2d 1245, 1247.

It is Relator's position that Respondent patently and unambiguously lacks subject matter jurisdiction on the basis that Ohio's Home Rule Amendment, Section 3, Article XVIII, Ohio Constitution bars Parma's codified Ordinance 618.05. Because Parma Ordinance 618.05 conflicts with general law, Respondent never obtained subject matter jurisdiction.

In the above captioned case, Relator Nikki Novak was criminally charged with violating Parma Ordinance 618.05(A), which is the City of Parma's 'Dog at Large' law. On July 3, 2019 Relator plead 'No Contest with an Assertion of Innocence' to a violation of Parma Ordinance 618.05. On July 11, 2019 Relator filed, with the Trial Court, a Motion to Dismiss asserting Parma's Ordinance is unconstitutional. Respondent denied this Motion on July 29, 2019 stating in relevant part, "[t]hat motion was [ ] filed well beyond the time frames for filings of such motions. Additionally, Defendant's argument as to O.R.C. 955.22 fails. The Ordinance on which Defendant was charged is not the same as 955.22."[1] Relator was sentenced in August 7, 2019 under the second degree misdemeanor provisions.

A violation of City of Parma Ordinance 618.05 (dog at large), is a misdemeanor of the second degree,

[1] Ex. B.

618.05 RUNNING AT LARGE PROHIBITED, EXEMPTIONS.

(a) No owner/guardian of any animal, including, but not limited to, dogs and cats, shall permit such an animal to run at large within the City at any time. Any animal shall be deemed running at large when such an animal is not inside a resident structure, secure fence or pen; on a leash and held by a person capable of controlling such animal; or tethered in such a manner as to prevent its getting on the public right-of-way or another's property. This provision shall not apply to dogs being obedience trained by a certified trainer.

* * *

(d) Whoever violates any of the provisions of this section is guilty of a misdemeanor of the second degree. A separate offense shall be deemed committed each day during or on which a violation occurs or continues.

Ohio Revised Code 955.22(C) "dog at large" statute provides in relevant part,

> 955.22 Confining, restraining, debarking dogs; dangerous dog registration certificate.
>
> (C) Except when a dog is lawfully engaged in hunting and accompanied by the owner, keeper, harborer, or handler of the dog, no owner, keeper, or harborer of any dog shall fail at any time to do either of the following:
> (1) Keep the dog physically confined or restrained upon the premises of the owner, keeper, or harborer by a leash, tether, adequate fence, supervision, or secure enclosure to prevent escape;
> (2) Keep the dog under the reasonable control of some person.

955.22(C). Under the penalty provisions of Chapter 955, the penalty for a violation of the dog at large statute is a fine of "not less than twenty-five dollars or more than one hundred dollars on a first offense, * * *." R.C. 955.99(E)(1); see also *Gates Mills v. Welsh*, 146 Ohio App.3d 368, 371, 766 N.E.2d 204 (8th Dist. 2001) ("R.C. 955.99(E)(1) says that a violation of R.C. 955.22(C) is punishable by a fine of not less than twenty-five dollars or more than one hundred dollars on a first offense. Although the statute does not specify a degree for the offense, a one hundred dollar

limitation on a fine makes a first offense under R.C. 955.22(C) a minor misdemeanor. See R.C. 2929.21(D).").

Ohio's Home Rule Amendment is found in Section 3, Article XVIII of the Ohio Constitution, and provides,

> 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.

See also *City of Columbus v. Spingola*, 144 Ohio App.3d 76, 80 (10th Dist. Franklin 2001). "The authority conferred by Section 3, Article XVIII of the state Constitution upon municipalities to adopt and enforce police regulations is limited only by general laws in conflict therewith upon the same subject-matter.'" *Spingola*, 144 Ohio App. at 80, quoting *Akron v. Scalera* (1939), 135 Ohio St. 65, paragraph one of the syllabus; and citing *Columbus v. Barr* (1953), 160 Ohio St. 209, 215.

Ohio courts must apply 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 Ordinances when (1) the Ordinances is in conflict with the statute, (2) the Ordinances 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. Ohio Revised Code Chapter 955 is a general law. See *Russ v. City of Reynoldsburg*, 81 N.E.3d 493, 2017-Ohio-1471, ¶ 27 (5th Dist. Licking. 2017) ("we find that Revised Code Chapter 955 is a general law * * *."). Thus the third part of the three-part test has been satisfied.

Parma Ordinance 618.05 is an exercise of police power. See *Russ*, 2017-Ohio-1471, at ¶ 19, quoting *State v. Anderson*, 57 Ohio St.3d 168, 170, 566 N.E.2d 1224, " ("'[a]mong the

regulations which have been upheld as legitimate exercises of police power are those regulations addressing the ownership and control of dogs.'"). Thus the second part of the three-part test has been satisfied.

Having established that Ohio Revised Code Chapter 955 is a general law, and that the Ordinance is an exercise of police power, the remaining determination is whether the Parma Ordinance 618.05 is in conflict with Ohio Revised Code Chapter 955. To determine whether the Ordinance conflicts with the Statute, the Supreme Court of Ohio has set forth three theories "to prove either the presences or absence of a conflict." See *Mendenhall v. Akron* (2008), 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 28. Those three approaches are, 1) contrary directives; 2) conflict by implication; and, 3) conflict regarding decriminalization. See *Mendenhall*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, at ¶ 28–37.

To determine whether Ordinance 618.5 is in conflict with Ohio Revised Code Chapter 955, under the contrary directives approach, the test is "whether [an] ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Mendenhall v. City of Akron* (2008), 117 Ohio St.3d 33, 2008-Ohio-270, ¶ 29, quoting *Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, ¶ 40, 858 N.E.2d 776. (internal citations and quotation marks omitted).

Courts must "first examine the actual conduct that both the state statute and the municipal ordinance target * * *." *Id.* at ¶ 30. Ordinance 618.05 and R.C. 955.22(C) both target the act of a dog not being under the control of its handler when off the property of the owner. The only material difference between the state statute and the ordinance regarding prohibited conduct relates to the penalties imposed for violating the offense. Parma Ordinance 618.05 is a second degree misdemeanor, whereas R.C. 955.22(C) is a minor misdemeanor.

The City of Parma does not have the power of local self-government over laws related to dogs at large. Chapter 955 sets forth strictures of how an Ordinance can be written, and explicitly and unambiguously requires a municipality to adopt ordinances for controlling dogs that "are not otherwise in conflict with any other provision of the Revised Code. The statute provides a follows,

> 955.221 Local ordinances or resolutions pertaining to dog control.
>
> (A) For the purposes of this section, ordinances or resolutions to control dogs include, but are not limited to, ordinances or resolutions concerned with the ownership, keeping, or harboring of dogs, the restraint of dogs, dogs as public nuisances, and dogs as a threat to public health, safety, and welfare, except that such ordinances or resolutions as permitted in division (B) of this section shall not prohibit the use of any dog which is lawfully engaged in hunting or training for the purpose of hunting while accompanied by a licensed hunter. However, such dogs at all other times and in all other respects shall be subject to the ordinance or resolution permitted by this section, unless actually in the field and engaged in hunting or in legitimate training for such purpose.
>
> (B)
> * * *
> (3) A municipal corporation may adopt and enforce ordinances to control dogs within the municipal corporation that are not otherwise in conflict with any other provision of the Revised Code.
> (C) No person shall violate any resolution or ordinance adopted under this section.

R.C. 955.221. Therefore, according to R.C. 955.221, as long as the Ordinance does not conflict with any section of the Ohio Revised Code, it is a valid dog control ordinance.

Ordinance 618.05 directly conflicts with Chapter 955. Again, under the penalty provisions of Chapter 955, the penalty for a violation of the dog at large statute is a fine of "not less than twenty-five dollars or more than one hundred dollars on a first offense, * * *." R.C. 955.99(E)(1). Because a municipality is explicitly barred from adopting and enforcing ordinances which conflict with the Ohio Revised Code, Ordinance 618.05 is unconstitutional,

and the City of Parma acted outside its home rule authority granted by the Constitution of Ohio. When a municipal ordinance only imposes a greater penalty, the varying of punishment between the state statute and the ordinance does not create a conflict. *Mendenhall*, 117 Ohio St. 3d at 41 (internal citation and quotation marks omitted).

However, where "there is a significant discrepancy between the punishments imposed for that behavior" the municipal ordinance will conflict with the state law where *Id.* When a "municipal ordinance does more than simply impose a greater penalty – by changing the character of an offense, for example – the ordinance and statute are in conflict." Id. at 41-42, citing *Cleveland v. Betts* (1958), 168 Ohio St. 386, 389, 7 O.O.2d 151, 154 N.E.2d 917. In *City of Toledo v. State*, 6th Dist. Lucas No. L-18-1168, 2019-Ohio-1681, the court found that the challenged Ordinance did not conflict because "both call for imposition of a civil violation, and there is no significant or notable discrepancy between the punishments the ordinance and statutes impose." *Id.* at ¶ 109. In *City of Toledo v. Best*, the sentence imposed under the municipal ordinance was "imprisonment for three days, assessment of the costs of $81, and suspension of driving rights." *City of Toledo v. Best* (1961), 172 Ohio St. 371, 375, 176 N.E.2d 520. "Had the defendants been charged under the state statute * * * he could have received the identical sentence imposed by the Municipal Court under the municipal ordinance." *Id.* The *Best* court found that because of the same identical sentence under both the municipal ordinance and statute, there was no conflict. *Id.* In *Columbus v. Kemper*, the court determined there was no conflict between the municipal ordinance, which had a minimum penalty for DUI of thirty days incarceration, and the state statute which had a state minimum of three days' incarceration under R.C. 4511.99. See *Columbus v. Kemper* (1992), 82 Ohio App.3d 49, 610 N.E.2d 1194 (19th Dist. Franklin 1992).

Parma Ordinance 618.05 has changed the character of the offense of having a dog at large. There are significant and notable discrepancies between Parma's Ordinance and the Statute in terms of sentencing, unlike the insignificant differences set forth in the cases above. Parma Ordinance 618.05 is a second-degree misdemeanor offense. Under Parma Ordinance 698.02, the penalties for a second degree misdemeanor are a) definite jail term of not more than 90 days; b) community control sanctions; c) community residential sanctions; and d) financial sanctions, including restitution and fines of "not more than seven hundred fifty dollars." *See* Parma Ordinance 698.02. Ohio Revised Code 955.22(C) is a minor misdemeanor offense, which does not permit imposition of jail time or restitution. "Minor misdemeanors are unique in that they can never result in the imposition of a jail sentence." *State v. Jackson*, 9th Dist. Summit No. 28625, 2018-Ohio-19, ¶11**,** citing R.C. 2901.02(G).

Additionally, in Ohio, a court is not authorized to order restitution for a minor misdemeanor penalty.

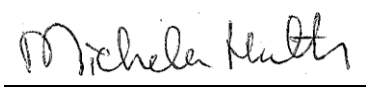
> (A) In addition to imposing court costs pursuant to section 2947.23of the Revised Code, the court imposing a sentence upon an offender for a misdemeanor, including a minor misdemeanor, may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section. If the court in its discretion imposes one or more financial sanctions, the financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:
>
> (1) Unless the misdemeanor offense is a minor misdemeanor or could be disposed of by the traffic violations bureau serving the court under Traffic Rule 13, restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss."

R.C. 2929.28(A)(1); see also *State v. Danni Yao*, 2nd Dist. Champaign No. 2013-CA-29, 2014-Ohio-852, **¶ 7** ("[A] trial court lacks authority to order restitution as a sanction for a minor misdemeanor."); see also *Id*., citing *Columbus v. *4 Cardwell*, 176 Ohio App.3d 673, 2008-

Ohio-1725, 893 N.E.2d 526, ¶9 (10th Dist.2008) ("recognizing that a trial court cannot order restitution for a minor misdemeanor assured-clear-distance violation); *State v. Miller,* 2d Dist. Greene No. 09-CA-74, 2012-Ohio-211, ¶ 15 ("opining that "since Miller was charged with a minor misdemeanor, the court could not have ordered her to pay restitution"); *Beavercreek v. Ride,* 2d Dist. Greene No. 06CA0082, 2007-Ohio- 6898, ¶ 46 ("noting that restitution could not be imposed for the appellant's minor misdemeanor conviction").

Relator's ability to obtain expungement is detrimentally affected by a conviction under Parma Ordinance 618.05. Under R.C. 2953.32, "a trial court can grant expungement when an applicant meets all of the statutory requirements," See *State v. M.E.*, 8th Dist. Cuyahoga No. 106298, 2018-Ohio-4715, ¶7, citing *State v. Hamilton,* 75 Ohio St.3d 636, 640, 665 N.E.2d 669 (1996). **"**An 'eligible offender' includes those convicted of 'not more than one felony conviction, not more than two misdemeanor convictions, or not more than one felony and one misdemeanor conviction.'" *Id*. at ¶8, quoting R.C. 2953.31(A). "A minor misdemeanor and certain other traffic-or vehicle-related offenses are not counted for purposes of determining an applicant's eligibility." *Id,*. citing R.C. 2953.31(A). Because Ordinance 618.05 is a second-degree misdemeanor offense, the ability for Relator to seek expungement as an eligible offender would be detrimentally affected if she were to be convicted and sentenced under the municipal ordinance.

Multiple conflicts exist under the three-part test, which is used to evaluate claims that a municipality has exceeded its powers under the Home Rule Amendment. Respondent therefore lacks subject matter jurisdiction over this case, and Respondent's Motion to Dismiss should be denied.



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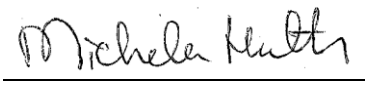
PROOF OF SERVICE

On August 30, 2019, a copy of the above Response was emailed to Timothy Dobeck at tdobeck@parmalaw.org and Richard Summers at rsummers@parmalaw.org.



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