COLORADO COURT OF APPEALS, STATE OF COLORADO
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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
Judge Paul A. Markson, Jr.
Case No. 98-CV-108

FILED IN THE COURT of APPEALS STATE OF COLORADO

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Plaintiffs - Appellants: THE CITY OF COMMERCE CITY, COLORADO, a Colorado Municipal Corporation; and TIMOTHY J. GAGEN, as City Manager of the City of Commerce City; and THE CITY OF WESTMINISTER, COLORADO, a Colorado Municipal Corporation; and WILLIAM M. CHRISTOPHER, as City Manager of the City of Westminster; THE CITY OF FORT COLLINS, COLORADO, a Colorado Municipal Corporation; and JOHN F. FISCHBACH, as City Manager of the City of Fort Collins; and THE CITY OF COLORADO SPRINGS, COLORADO a Colorado Municipal Corporation,

Defendants - Appellees: STATE OF COLORADO, a State of the United States of America; and BILL OWENS, as Governor of the State of Colorado.

Case Number: 01-CA-144

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AMICUS BRIEF OF COLORADO MUNICIPAL LEAGUE AND CITY OF BOULDER IN SUPPORT OF PLAINTIFFS

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Amici adopt the statement of the issues presented for review made by Plaintiffs (hereafter "Plaintiff Cities" or "Cities") in their Opening Brief. Generically, the issues are 1) whether certain state statutes regulating and limiting the way Plaintiff Cites, all of which are home rule cities with charters adopted pursuant to Article XX, Colorado Constitution, enforce their speed limit and traffic signal ordinances through use of photography combined with radar and other traffic sensing technology are matters of mixed state and local concern such that the statutes take precedence over the ordinances and charters of those home rule cities, and 2) whether the General Assembly could buttress this ukase by threatening to withhold access by noncompliant cities to the State motor vehicle licensing information essential to the cities' use of those photo-enforcement methods.

STATEMENT OF THE CASE

The Colorado Municipal League and the City of Boulder respectfully and conditionally submit this amicus brief along with their Rule 29, CAR. motion for leave to submit the brief, and urge this Court to reverse the rulings of the District Court which have been appealed by the Plaintiff Cities. The interests of these amici in the proper resolution of this matter are explained in the motion for leave to file this amicus brief.

This lawsuit involves several Colorado home rule municipalities as Plaintiffs seeking declaratory and injunctive relief and relief in the nature of mandamus and prohibition against the State of Colorado and its Governor, and arises out of the enactment and amendment of 42-4-110.5, C.R.S. and related statutes concerning automated vehicle identification systems (colloquially, photo-radar and photo-red-light, and for briefing purposes also "AVIS" or "photo-enforcement"). These

statutes purport to limit the use of these traffic law enforcement tools in various ways which conflict with ordinances and charters governing local and municipal matters, and thus must pursuant to Article XX, Section 6 of the Colorado Constitution be superseded by their charters and ordinances.

The statutes required that an AVIS summons be personally served on a defendant by a level I peace officer (primarily a police officer, state patrol officer, or deputy sheriff). The District Court held that this conflicted with the Supreme Court's regulatory authority under the Colorado Constitution, and the State Defendants have not appealed that ruling. That was the extent of the relief the Cities received.

Their challenges to the following provisions of 42-4-110.5, as supplemented by 42-3-112(14), C.R.S., failed because the District Court ruled that they involved matters where the state's interest predominated: a 90 day statute of limitations for serving AVIS summonses; a requirement that an AVIS detected speeding violation, if less than 10 miles per hour over the speed limit, could not be prosecuted unless a warning had been issued; a requirement that a sign warning of the use of AVIS nearby be posted in order for the ticket to be valid; various requirements and restrictions on mailings to violators; and various limits on the amount of the fines which could be imposed. These are a limit of $40 for speeding up to 25 miles per hour over the limit, although that can be doubled (as are all speeding fines under the State statutes) if in a school zone, and $75 for running a red light. It is the District Court's ruling that these limits may be imposed by the General Assembly on home rule municipalities despite conflicting ordinances, and that the General Assembly can direct that cities which use AVIS, but are not in compliance with all of these restrictions, are to be denied access to the State's motor vehicle registration records, which is being appealed.

This case was filed in 1998, decided (after the General Assembly amended the pertinent statutes) in December, 2000, and an appeal was timely filed by the Cities. These amici adopt the statement of the facts relevant to the issues presented for review found in Plaintiff Cities Opening Brief.

While some interesting facts are cited in the District Court's opinion, whether an ordinance involves an area of mixed concern or conflicts with a state statute is a conclusion of law. Quintana v. Edgewater Municipal Court, 179 Colo. 90, 498 P.2d 931 (Colo. 1972); see Dempsey v. City and County of Denver, 649 P.2d 726, 728 (Colo. App. 1982). As such, it is up to this Court to determine de novo whether or not the charter and ordinance provisions of the home rule cities supercede the statutes at issue within their respective city limits.

SUMMARY OF ARGUMENT

Under Colorado's Constitution, power is divided between the state, through the General Assembly, and home rule cities, through their charters and ordinances, into the following three relevant categories: 1) areas in which the municipalities may legislate, if at all, only by express delegation from the General Assembly. 2) areas in which both the state and the municipality may legislate, but in which the state interest predominates, so that a state enactment overrides any conflicting municipal enactment. 3) areas in which the interest of the home rule city predominates, and the local enactment supercedes any conflicting state statute. These categories are determined by comparing the inherent natures of the interests, their origins, and relevant constitutional provisions. Other than by creating conflicts, neither the state nor the cities can force the subject matter in dispute into one category or the other. Deciding whether or not to use photo-enforcement

to enforce local ordinances concerning speed limits and traffic signals, and deciding how to initiate enforcement actions based upon photo-enforcement is a matter of predominately local concern, where the interests of home rule cities greatly outweighs the interest, if any, which the state may have in frustrating the enforcement of local ordinances. Freeing home rule cities from meddling by the General Assembly in the minutia of local affairs was the principal reason the home rule provisions were added to Colorado's Constitution. Throughout Colorado's history vehicular traffic regulation has been held by the Supreme Court to be predominately local in extent and effect. Therefore, the Cities' ordinances and charter provisions permitting photo enforcement of their traffic ordinances supercede the conflicting state statutes, and this Court should so declare.

ARGUMENT

A. FRAMEWORK FOR ANALYSIS OF THE DIVISION OF POWER BETWEEN THE GENERAL ASSEMBLY AND HOME RULE CITIES

When examining Article XX of the Colorado Constitution, it is valuable to consider the history of that enactment. At the turn of the century, the General Assembly's exercise of control over local matters in the City of Denver proved particularly troublesome. Denver's Charter became the subject of "constant tinkering" by the General Assembly. J. Rush, The City-County Consolidated, 143 (1941) (hereinafter "Rush"). "Specific legislative approval was necessary for every power which [the City] wished to exercise." Hornbein, Denver's Struggle for Home Rule, 48 The Colorado Magazine, 337, 346 (1971).

In 1889 and 1891, the Colorado General Assembly adopted "special" legislation creating two Denver Boards which gave the Governor control over all of Denver's local public works and local

fire and police services. See Klemme, The Powers of Home Rule Cities in Colorado, 36 U. Colo. L. Rev. 321, 324 (1964). With the establishment of these two boards, "Denver came entirely within the shadow of the statehouse." Hornbein at 338.

For a decade or more a "bitter struggle" between the General Assembly and the City of Denver ensued. Johnson, Municipal Home-Rule in Colorado: Self Determination v. State Supremacy, 37 Dicta 240, 245 (1960). In the words of a contemporary observer: "The City of Denver had . . . been reduced to a position of political serfdom. So intolerable had conditions become that its people started a strong agitation for "Home Rule." Rush at 329-30.

By state-wide referendum on November 4, 1902, the people of Colorado voted to add a new Article XX to their Constitution to assure local autonomy for the City of Denver.

> The efforts of some of Denver's citizens to alleviate the city's problems led eventually to the home rule movement, culminating in the adoption in 1902 of Article XX. Thus, as seems generally true in other states, home rule was adopted in Colorado for the purpose of relieving municipalities from their dependence on legislative action for their form of organization and powers and from the resultant interference in municipal affairs such dependence made possible. Klemme at 324 (Footnotes omitted, emphasis added).

In 1912, another state-wide referendum broadened Article XX expanded substantially the home rule powers, and in so doing overruled a series of judicial determinations which took a very narrow view of what was a local or municipal matter and therefore within the control of a home rule city.

> "It is a part of the history of the state that the people were disappointed, not to say more, at the restrictions put upon the powers of cities by this court's interpretations of article 20, and that the home rule amendment [referring to the 1912 amendment] was the expression of that feeling. Denver v. Mountain States Telephone & Telegraph Co." Cited in Hoper v. City and County of Denver, 479 P.2d 967, 970 (Colo. 1971) (citation omitted, bracketed statement added).

The Colorado courts have at all times recognized that upon passage of the Home Rule amendment to the Colorado Constitution the General Assembly was dispossessed of some of its power to control the activities of charter cities, and that that power was now lodged in the cities themselves to use, subject to other constitutional prohibitions to be sure, as they themselves chose. Both the General Assembly and home rule cities derive their just powers from the same source: the sovereign people of the state. E.g., City of Thornton v. Farmers Reservoir & Irrigation Co., 194 Colo. 526, 575 P.2d 382, 388 (1978). The exercise of those powers by the cities is, of course, further limited by the power of the people of the individual cities to make and amend their charters and through the normal political process affecting their ordinances. But it is not a power, where it touches their local and municipal matters, which the General Assembly can reduce, because it comes directly from the Constitution of the state, and not indirectly through the state legislature.

Home rule in other states generally falls within two categories: legislative home rule and constitutional home rule. See generally 56 Am. Jur. 2d 110. In the former category the legislature makes broad delegations to those local governments which have adopted a home rule status to regulate within their local territory from its plenary power to manage all affairs within the state. There arguments mostly involve whether a particular power was delegable, and if so, whether it had been delegated by the legislature. Issues such as the present controversy cannot arise, since the legislature can at any time revoke what it gave.

Some states have what is often denominated as "constitutional home rule," but that is a bit misleading. Their constitutions expressly permit or require that the legislature fashion a home rule system. In such states there are naturally fewer arguments about whether a power is delegable, but

otherwise the same considerations arise: what did the legislature intend. Again, what the legislature gave it can revoke, and the contours of the home rule power continue to be dependent on the legislature.

Article XX of Colorado's constitution, with its grant of legislative power directly to the home rule cities, is unusual, if not unique. The home rule amendments wrought a very substantial change in the relationship between cities and the state legislature, because the constitution itself divided power between the legislature and the home rule cities. No longer were cities dependent on a delegation of power from the legislature: "The effect of the amendment was to grant to home rule municipalities 'every power theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs.' Four-County Metro. Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962) (emphasis in original)." City and County of Denver v. State of Colorado, 788 P.2d 764 (Colo. 1990). "The purpose of the twentieth article was to grant home rule to Denver and the other municipalities of the state, and it was intended to enlarge the powers beyond those usually granted by the Legislature . . .. It was intended to confer not only the powers specially mentioned, but to bestow upon the people of Denver every power possessed by the Legislature in the making of a charter for Denver." City and County of Denver v. Hallett, 34 Colo. 393, 83 P. 1066, 1068 (1905). It is in this setting that conflicts between enactments of the General Assembly and home rule cities must be considered.

As a result, the wisdom embodied in court decisions from other states drawing boundaries around the home rule power are unlikely to be of any assistance to Colorado judges in determining what falls within the intendment of Article XX, Section 6 as "local and municipal matters" where

the city through its charter and ordinances has supercessory power over the statutes passed by state legislature and signed by the governor.

A reading of the many cases construing Article XX, Section 6, might lead one to the conclusion that the law in this area follows a simple pattern: If a matter is of purely or exclusively statewide concern, any municipal ordinance is invalid. If a matter is of purely or exclusively local concern, the municipal ordinance supercedes any conflicting statute. And if the matter is of both local and also statewide concern (i.e., of "mixed concern"), then the statute supercedes any conflicting provisions of the municipal ordinance. E.g., Denver and Rio Grande Western Railroad Company v. City and County of Denver, 673 P.2d 354, 357 (Colo. 1983):

> "In matters of exclusive local and municipal concern, home rule charter provisions and ordinances supercede conflicting state statutes.[] In matters of exclusive state-wide concern, state statutes supercede home rule charter provisions and ordinances . . . If, however, the matter is of mixed local and state-wide concern, it must be determined whether there is a conflict between the charter provisions or ordinances and the state statute. If, for example, there is no conflict, the charter provisions or ordinances and the state statute may co-exist. . . . If, on the other hand, there is a conflict, the statute supercedes the home rule charter provisions. . . ." [Citations omitted].

But the result of a mechanical application of a rule phrased in this way can do violence to the purposes of Article XX, Section 6, which were to grant extensive powers of local self government to home rule cities free of attempts by the legislature to dictate its solutions for local problems. See Security Life and Accident Co. v. Temple, 492 P.2d 63 (Colo. 1972). See generally Klemme, The Powers of Home-Rule Cities in Colorado, supra. It does violence because few, if any, matters upon which the General Assembly may legitimately legislate do not have at least some aspect of statewide interest to them.

> "Although we have found it useful to employ the "local," "mixed," and "statewide" categories in resolving conflicts between local and state legislation, these legal categories should not be mistaken for mutually exclusive or factually perfect descriptions of the relevant interests of the state and local governments. Those affairs which are municipal, mixed or of statewide concern often imperceptibly merge. Fossett v. State, 34 Okla. Crim. 106, ___, 245 P. 668, 669 (1926). To state that a matter is of local concern is to draw a legal conclusion based on all the facts and circumstances presented by a case. In fact, there may exist a relatively minor state interest in the matter at issue but we characterize the matter as local to express our conclusion that, in the context of our constitutional scheme, the local regulation must prevail. Thus, even though the state may be able to suggest a plausible interest in regulating a matter to the exclusion of a home rule municipality, such an interest may be insufficient to characterize the matter as being even of "mixed" state and local concern." City and County of Denver v. State of Colorado, supra.

Cf. State of Kansas v. City of Kansas City, 612 P.2d 578 (Kan. 1980), ("As stated by one prominent author: `No ordinance deals with an exclusively local matter and no statute regulates a matter of exclusively state-wide concern. Instead, the interests of the municipality and the state are nearly always concurrent.' Clark, State Control of Local Government in Kansas: Special Legislation and Home Rule, 20 Kan. L. Rev. 631, 662 (1972).")

In actuality, the allocation of law-making functions between the general assembly and home rule municipalities under the Colorado Constitution is more complex. Leaving aside the always interesting and frequently confusing issues of delegation, because they are not involved in the present controversy, an examination of the Colorado Constitution and the cases construing the home rule provisions reveals the following categories:

(1) Areas in which no government may legislate. E.g., those impinging on freedom of speech, religion, and other areas protected under the United States and Colorado Constitutions. See Hartman v. City and County of Denver, 440 P.2d 778 (Colo. 1968).

(2) Areas in which only the General Assembly may legislate. E.g., areas reserved by the Colorado Constitution to the General Assembly such as declaring felonies, Quintana v. Edgewater Municipal Court, supra (Article V, §9); regulating the manufacture, sale, and distribution of intoxicating liquors, City of Colorado Springs v. People, 63 P.2d 1244 (Colo. 1936) (Article XXII); and the imposition of an income tax, City and County of Denver v. Sweet, 329 P.2d 441 (Colo. 1958) (Article X, §17). This category might be further subdivided into matters where local governments could legislate by express delegation of the General Assembly (e.g., §§ 12-47-310, 12-47-312(2)(b), and 12-47-313(1)(d)(III), C.R.S., concerning minor areas of liquor licensing where local enactments may be made), and matters wholly nondelegable, such as declaring felonies. These areas appear to be linked to a specific assignment of power to the General Assembly by the Colorado Constitution, and municipal legislation is simply ultra vires even in the absence of an expression of policy by the General Assembly. (These have properly been called "exclusively statewide.") Municipal ordinances in this area might be valid, but only if the legislature had specifically delegated its authority, and that authority was of a delegable power. Any municipal power in this area would be based solely on the legislative delegation, and not on Article XX.

(3) Areas in which both the General Assembly and home rule cities may legislate, but in which the statewide interest predominates and displaces any conflicting municipal efforts. E.g., Denver and Rio Grande Western Railroad v. City and County of Denver, supra, DuHamel v. People ex rel. City of Arvada, 601 P.2d 639 (Colo. App. 1979), Century Electric Service & Repair, Inc. v. Stone, 564 P.2d 953 (Colo. 1977). This has been called the "mixed" category. The term "mixed," and the explicit recognition of the analytical category to which it is applied, was not used by the

Colorado Supreme Court until Vela v. People, 484 P.2d 1204 (Colo. 1971), doubtless following the use of that term in Klemme, supra. Professor Klemme's thesis was that the court had, with some exceptions and deviations, been analyzing relevant home rule issues in this way all along. In Woolverton v. City and County of Denver, 361 P.2d 982, 988 (Colo. 1961) the Supreme Court used the term "intermediate subjects." Home Rule cities possess "supplemental" authority in this area derived from Article XX, Colorado Constitution, and need no delegation from the General Assembly. City of Aurora v. Martin, 507 P.2d 868 (Colo. 1973).

(4) Areas in which both the General Assembly and the home rule city may legislate, but in which the local or municipal aspect predominates and the homes rule ordinance supersedes any conflicting provisions of the state statute. The supercessory power comes from Article XX, Section 6, Colorado Constitution. E.g., City and County of Denver v. Henry, 38 P.2d 895 (Colo. 1934), Retallack v. Policy Court of City of Colorado Springs, 351 P.2d 884 (Colo. 1960), People v. Hizhniak, 579 P.2d 1131 (Colo. 1978), City and County of Denver v. State of Colorado, supra. See Klemme, supra, 36 U.Colo.L.Rev. at 338, FN 86. It is always worth noting that there is usually nothing inherently constitutionally wrong with the General Assembly legislating in this area: if a matter is a legitimate governmental concern (i.e., it does not fall within category (1) above), a statute is valid, but simply cannot be applied (that is, in the words of Article XX, Section 6, it is "superceded") within the territories of home rule cities which have adopted conflicting charter or ordinance provisions.

(5) Areas in which only the home rule city (or other local government) may legislate. E.g., Local or special laws vacating a town plat in violation of Article V, Section 25, Colorado

Constitution, or interfering with a home rule city's right pursuant to Article XXV to grant franchises relating to its streets. C.f. City of Montrose v. Public Utilities Commission, 732 P.2d 1181 (Colo. 1987). This is a small area, since the General Assembly has the obligation to provide general laws for the governance of statutory cities and towns, and Article XX, Section 6, of the Colorado Constitution wisely provided that home rule cities are also to benefit from such laws until they find the need otherwise to provide.

Such a framework is the appropriate analytical tool for separating out the complex issues in the division of power in the Colorado Constitution between the General Assembly and other institutions of the state (such as the Public Utilities Commission) on the one hand, and the home rule cities of Colorado on the other. For present purposes all five categories need not be examined. No one contends that the dispute here concerns a general subject matter area upon which no government may legislate, nor that it is an area reserved exclusively to the General Assembly in the absence of any delegation by that body. And these amici do not contend that the state statutes here at issue accomplish an end which only a local government could accomplish. It is unquestioned that the General Assembly can control how the State Patrol, county Sheriffs, counties, and statutory cities and towns enforce state traffic laws or local traffic ordinances or resolutions, and can tell them directly, through its statutes, if and how they are to employ AVIS. However, the AVIS statute has as one of its express purposes interference in how the home rule Cities want to employ to accomplish the purposes of their ordinances. As a result there is a conflict between the enactments of the two governments: The test for conflict is well settled: does the ordinance prohibit what the statute expressly permits, or vice versa. Ray v. City and County of Denver, 109 Colo. 74, 121 P.2d 396

(1942); Denver and Rio Grande Western Railroad Company v. City and County of Denver, supra. The parties and the District Court properly analyzed the issues on appeal on the basis of conflict.

Therefore, the issue is whether the subject matter area of the conflict is predominately of statewide or of local or municipal concern. If the former, the statute prevails. If the latter, the charter and ordinance provisions prevail.

B. PREDOMINANCE OF INTERESTS IS THE TEST TO DETERMINE WHICH OF THE CONFLICTING ENACTMENTS SUPERSEDES THE OTHER

If, as here, there is a conflict, then a Court must weigh the interests of the state and of the home rule municipalities, and the consequences to each of supersession by the other, and consider the factors pertinent to the actual subject matter before assigning it to the "mixed-state supercedes" or "local-municipality supercedes" category. The test for which enactment, state or home rule municipality, supercedes the other in areas where both have a legitimate interest is which interest predominates. This term captures the inevitable judicial weighing and balancing involved in these disputes between elected officials at different levels of government in applying the phrase "local and municipal matters." In City and County of Denver v. Henry, supra, our Supreme Court stated at 897: "Considering the question as a practical one, which seems after all to be the best test, there seems no escape from the conclusion that the regulation of traffic at street intersections in the City of Denver is primarily a matter of local concern, because proper regulation is almost wholly dependent upon local conditions." In City and County of Denver v. Pike, 342 P.2d 688 (Colo. 1959), where an issue was the power of the city versus the state to regulate the speed of traffic on a state highway within the City of Denver, our Supreme Court stated at 692: "We hold also that the predominant

interest was that of the State and that this warranted insertion in the contracts of the fifty mph limitation and the parking restrictions." Our Supreme Court also stated at 691: "If the matter is predominantly local and municipal it is under the Twentieth Article exclusively so, and the State of Colorado would, under this analysis, have no jurisdiction whatsoever in the premises, City of Canyon City v. Merris, 323 P.2d 614, 621, 137 (Colo. 169)."[1] In Davis v. City and County of Denver, 342 P.2d 674 (Colo. 1959), our Supreme Court stated at 676: "If the subject is local, the city has, under Article XX, exclusive authority. If it is predominantly of general interest, the state has the power to act and in this latter situation the city can exercise authority only with the consent of the state."[2] In City of Englewood v. Mountain States Tel. & Tel. Co., 431 P.2d 40, 43 (Colo. 1967) our Supreme Court found the need for a coordinated intra and inter state communications system to be "a matter of statewide concern heavily outweighing any possible municipal interest." In City of Craig v. Public Utilities Commission, 656 P.2d 1313 (Colo. 1983) at 1316 our Supreme Court stated that: "The state's interest in making railroad safety a matter of state-wide concern is two-fold: It insures a uniformity in railroad safety conditions, and it makes possible the regulation and supervision of those conditions by an agency possessing experience and expertise in such matters. While Craig also has a legitimate interest in the safety of its railroad crossings, the

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[1]The exclusivity language of Merris was, of course, overruled in Woolverton v. City and County of Denver, supra, and Vela v. People, supra. See generally the Klemme article, supra. While the exclusivity deviation complicates analysis of certain of the older Article XX cases, it does not seem to have been outcome determinative. Overruling the exclusivity concept, therefore, changed only part of the rhetoric of analysis used to reach the end, and left intact the test of predominance as well as the outcome of each of the cases in terms of distribution of power.

[2]The same caveat as to exclusivity applies here as well.

existence of a demonstrable local interest does not endow a home rule city with preemptive authority. . . . The concomitant state interest in regulation is predominant." This language from Craig was cited in Denver and Rio Grande Western Railroad Company v. City and County of Denver, supra.

In Century Electric Service & Repair, Inc. v. Stone, supra, the court did not actually refer to predominance, but stated at 954: "Since in this case the legislative prohibition of municipal licensing explicitly establishes such conflict, the only question with which this court must deal is whether the licensing of electrical contractors and electricians is of such state-wide concern that the home rule provisions do not apply."

While searching for "practical" grounds, our Supreme Court's ongoing allocation of powers to local home rule governments has dealt with the necessity of making ad hoc judgments delineating areas of predominant concern. The conclusion from these cases is that the Colorado courts have used the term "mixed" to indicate those areas of common or concurrent concern in which the state interest predominates, and have used the misleading terms "local," "exclusively local," "strictly local," and "purely local" to indicate those areas in which the local or municipal interest predominates. These terms are misleading because, as mentioned above, just as there is a local interest in many things the General Assembly does, so too there is a state interest in most of what local governments do. The issue is which interest predominates in this case.

In Retallack v. Police Court of City of Colorado Springs, supra, our Supreme Court upheld a Colorado Springs ordinance which declared exceeding 55 mph to be reckless driving. Retallack advanced the notion that, since a statute also prohibited reckless driving, the subject had been

preempted. Our Supreme Court noted that this view would "strip all of the home rule cities of the state of every last vestige of local rule and local control with the possible exception of a few regulatory and licensing ordinances." 351 P.2d at 885. Home rule cities would be similarly stripped of the control of local affairs intended by the people in passing Article XX of the Colorado Constitution to be reposed in them if any quantum of state interest, however small, in a subject were enough to make it of "mixed" concern, and our Supreme Court has made it clear that the mere presence of a state interest is not enough to decide the issue. City and County of Denver v. State of Colorado, supra. Obviously, for the state to legislate at all it must have some interest in the rule of conduct it enacts. The converse, of course, is equally true. These amici do not contend that a minute admixture of legitimate local concern invokes the supercessory power of home rule cities. Rather, they urge that predominance of interest is the test to determine whether the General Assembly or home rule city prevails in case of conflict.

C. FACTORS CONSIDERED IN DETERMINING THE PREDOMINANT INTEREST

The drafters of Article XX, Section 6, clearly envisioned that courts would be placed in the position of choosing between competing levels of government, state and local. In filling this difficult role,[3] the Colorado courts have adopted a flexible general approach, and have considered a variety of specific factors. The most consistent statement, however, has been that these divisions of power are approached on a case-by-case basis. In City and County of Denver v. Henry, supra, our Supreme Court said that a practical approach to these questions was the best test. In People v.

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[3]Bennion v. City and County of Denver, 504 P.2d 350 (Colo. 1972) ("What is local and municipal as opposed to what is of state-wide concern is frequently difficult to determine.")

Graham, 110 P.2d 256 (Colo. 1941), our Supreme Court said at 257: "What is local as distinguished from general and state-wide, depends somewhat upon time and circumstances.[] Technological and economic forces play their part in any such transition." (Citation omitted.) In People v. Hizhniak, supra, our Supreme Court stated at 1132 that "reality" requires the result reached. In Denver and Rio Grande Western Railroad v. City and County of Denver, supra, our Supreme Court stated at 358: "We have not formulated a litmus test for determining whether a matter is of local, statewide, or mixed concern; instead we have weighed various factors on a case-by-case basis." To like effect City and County of Denver v. State of Colorado, supra: "Instead [of a particular test to resolve every case], we have made these determinations on an ad hoc basis, taking into consideration the facts of each case."

While the factors are perhaps as numerous as the areas of conflict between state and home rule city governments, certain factors do recur throughout the decisions. The courts have considered the impact of allocating the power to one or the other[4] and the needs of the general public throughout the state.[5] A frequently cited factor is uniformity, both with respect to its beneficial effects and as to the adverse effects of its converse, balkanization.[6] Closely related to uniformity is a judicial

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[4]Century Electric Service & Repair, Inc. v. Stone, supra, People v. Mountain States Tel. and Tel. Co., 343 P.2d 397 (Colo. 1952).

[5]Century Electric Service & Repair, Inc. v. Stone, supra.

[6]City of Craig v. PUC, supra; Denver and Rio Grande Western Railroad v. City and County of Denver, supra; Bennion v. City and County of Denver, supra; DuHamel v. People ex rel. City of Arvada, supra; Hardamon v. Municipal Court in and for City of Boulder, 497 P.2d 1090 (Colo. 1972); cf. People v. Graham, supra. In City and County of Denver v. State of Colorado, supra, the court noted that uniformity in itself is no virtue, and that it is the harmful consequences, if any, of a lack of uniformity which are of interest in constitutional analysis.

consideration of the specific impact of municipal regulation outside of the limits of the municipality.[7]

Urban congestion and the problems peculiar to it are factors which weigh heavily in favor of municipal regulation.[8] Our Supreme Court has always seen the details of traffic regulation as an area in which a home rule ordinance will supercede a conflicting state statute. Both because of the difference between congested urban areas and open rural areas, and because the conditions requiring special regulation are as varied as the differences between the many cities of the state themselves, our Supreme Court seems to have been of the view that local governments are simply better placed to deal with the many and varying problems presented by traffic regulation.[9]

Extraterritorial impacts played a great part in the District Court's decision in this case. Their inapplicability here has been amply covered in the Cities' brief. It is enough to say that the many cases cited in this and the Cities' briefs in which it has been held that ordinary home rule traffic ordinances supercede conflicting state statutes refute the notion that the fact that some or many of

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[7]City and County of Denver v. State of Colorado, supra (the court found no need for uniformity); National Advertising Co. v. Department of Highways, 782 P.2d 632 (Colo. 1988) (Federal funding loss for whole state could result if city ordinance superseded state statute); Denver and Rio Grande Western Railroad v. City and County of Denver, supra (PUC regulated common carrier service to other communities could be affected by local enactments); DuHamel v. People ex rel. City of Arvada, supra; (effect of local ambulance licensing on intrastate travel on connecting links of statewide highway system), People v. Mountain States Tel. and Tel. Co., supra (multiple local franchising requirements on PUC regulated statewide telephone system); and Spears Free Clinic and Hospital v. State Board of Health, 222 P.2d 872 (Colo. 1950) (disease does not respect city boundaries).

[8]Woolverton v. City and County of Denver, supra; City and County of Denver v. Henry, supra; cf. Dominguez v. City and County of Denver, 363 P.2d 661 (Colo. 1961).

[9]E.g., City and County of Denver v. Henry, supra; Retallack v. Police Court of Colorado Springs, supra, (see particularly Justice Doyle's concurring opinion); People v. Hizhniak, supra.

the drivers who get tickets come from outside a city constitutes an extraterritorial effect of any significance at all. This has been the case only in the areas of licensing vehicles or drivers.

In a related area, the courts have sometimes considered the lack of any particular necessity or advantage in local regulation of an area already well regulated by the stat,[10] but that is not present here.

Our Supreme Court has, on occasion, referred to the desirability of using the expertise of a single statewide agency which has the opportunity to obtain that expertise[11] and in somewhat the same vein has pointed out the desirability of eliminating duplication of regulatory effort.[12] These factors are not present here, however. The special suitability of municipal courts for dealing with certain problems has been noted,.[13] and should play a role in determining this controversy.

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[10]In Davis v. City and County of Denver, supra, the court invalidated Denver's attempt to punish driving under suspension in its municipal court, and said at 677: "However, it is impossible to perceive any beneficial result from an ordinance which deals with the identical subject covered by a state statute." In fact, Denver's penalties for driving while one's license was suspended or revoked were substantially less, as to their maximums, than were those in the state statute. In Century Electric Service & Repair, Inc. v. Stone, supra, the court pointed out that even though the city was not to be allowed to license electricians, it could still achieve its stated goal of enforcing its electrical code by simply insuring that the state licensed electricians followed Denver's code when working in Denver.

[11]Denver and Rio Grande Western Railroad v. City and County of Denver, supra; City of Craig v. P.U.C., supra.

[12]Century Electric Service & Repair, Inc. v. Stone, supra; People v. Mountain States Tel. and Tel. Co., supra.

[13]City of Aurora v. Martin, supra (domestic assault and battery); Quintana v. Edgewater Municipal Court, supra (shoplifting).

The actions of home rule municipalities outside their city limits have, not surprisingly, been seen as subject to state regulation[14] to a greater degree than might otherwise be the case, but even outside its boundaries certain home rule powers are not subject to legislative control.[15] While this illustrates the sweep of the home rule power, it is also not an issue in the present litigation as the Cities are issuing or proposing to issue AVIS related summonses only for violations detected within their city limits.

Another factor which has been given weight in the cases is the legislative declaration that a matter is in fact of state-wide concern.[16] Logically, of course, such a factor cannot be determinative (and ought not to have any weight at all). If the General Assembly, merely by exercising its lungs in declaration, could make a matter one of exclusive statewide concern, or of "mixed" concern, the supersession clause of Article XX, Section 6, Colorado Constitution, would mean nothing, and the home rule amendment would be largely nullified. The court recognized this point in City and County of Denver v. State of Colorado, supra, when it said at footnote 6: "If the constitutional

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[14]E.g., City and County of Denver v. Eggert, 647 P.2d 647 (Colo. 1982) (Solid waste disposal site outside city subject to regulation by county commissioners under state solid waste act); City and County of Denver v. Board of County Commissioners, 782 P.2d 753 (Colo. 1989).

[15]E.g., City of Thornton v. Farmers Reservoir and Irrigation Company, supra (power to condemn water rights).

[16]Century Electric Service & Repair, Inc. v. Stone, supra (a legislative determination of statewide interest "is entitled to great weight"); DuHamel v. People ex rel. City of Arvada, supra; Hardamon v. Municipal Court in and for the City of Boulder, supra. Conversely, a home rule city can determine that a matter is of local concern. City and County of Denver v. Colorado River Water Conservation Dist., 696 P.2d 730 (Colo. 1985) ("The respective legislative bodies of a municipality and the state are the judges in the first instance of whether a matter is of local or statewide concern." Id. at 741). Because these declarations could cancel each other, one might be forgiven for wondering if this factor is anything more than a "makeweight."

provisions establishing the right of home rule municipalities to legislate as to their local affairs are to have any meaning, we must look beyond the mere declaration of a state interest and determine whether in fact the interest [the legislative declaration of statewide concern] is present." It is emphatically for the courts to say what the Constitution is. A legislative fox is not the proper guardian for the home rule henhouse. Cf. Bishop v. City of San Jose, 460 P.2d 137, 141 (Cal. 1969). A legislative determination reserving a subject to itself certainly creates a conflict, but logically that is all the effect it should have.

The availability of alternatives by which the home rule city may reach its asserted goal has been a factor in the court's determination that the ultimate power should reside with the state. In Century Electric the court pointed out that Denver did not need to license electricians (whose licensure the state claimed as its exclusive preserve) in order to advance its goal of enforcing compliance with Denver's building codes. Denver could enforce compliance with its codes directly, said the court, through the inspections it performed anyway. In City of Craig the court pointed out that, even though the PUC had the power to allow the railroad to close a grade crossing, Craig could condemn an easement for a street over the vacated crossing, and thus avoid the harm of having the city's traffic circulation disrupted. Here the Cities have no such convenient alternatives.

A factor adding great weight to the local interest is the express recitation of a power in Article XX itself,[17] although the Supreme Court has cautioned that enumeration in Article XX is not in all cases dispositive. City and County of Denver v. State of Colorado, supra. That factor is

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[17]City of Thornton v. Farmers Reservoir and Irrigation Company, supra at 389 (express grant of eminent domain powers under Article XX, Section 1); Security Life and Accident Co. v. Temple, supra (home rule power of taxation essential to the full exercise of the right of self-government).

present in this litigation because the power to create and define the powers and jurisdiction of police and municipal courts is enumerated in Article XX, Section 6, and is amply covered in the City's brief.

Ultimately, the legitimate local interests which support assigning power to a city council must be balanced against the interests which prompted the General Assembly to enact a conflicting statute to determine which interest predominates. Denver and Rio Grande Western Railroad Co. v. City and County of Denver, supra.

1 - The Cities' Interest In Using Photo-enforcement Tools To Enforce Their Speed Limits and the Protection of Their Intersections Which Have Traffic Signals Is Substantial

As the Cities point out in their Opening Brief, one of Plaintiffs ceased using AVIS when the statute was adopted, and two decided they could not institute it under those restrictions. Amicus City of Boulder, while it uses AVIS, has been significantly limited by certain of the statutory limitations. Few local issues raise such citizen concern as speeding on city streets, and few driver behaviors (short of intoxication) imperil life and property more than running red lights at the busy intersections where such traffic control signals are used. Boulder has been particularly interested in using AVIS to slow traffic on residential streets which are, by misfortune of geography and history, heavily traveled. Effective enforcement can obviate use of structural changes (dead ends, humps and bumps, or traffic circles) which can have unwanted deleterious effects on other municipal goals such as connectivity and emergency response.

It is not mere hyperbole to call this a matter of imperative local importance. Citizens don't complain to the General Assembly about speeding in their neighborhoods or drivers running red

lights in their cities. They complain to their city councils, and expect them to do something about it.

Boulder's experience with AVIS has been positive as to red-light-camera in term of reduced violation rates and accidents. The statistics on photo-radar are mixed, although Ft. Collins has reported positive results in the past. Both cost Boulder more money than the fines produce. However, both reach more violators than expenditure of equivalent amounts of public money on traditional police enforcement would. Home rule means leaving such decisions on how to spend municipal revenues to city councils. That is what Colorado's constitution requires.

2 - The State's Interest In Interfering With the Cities' Choices Is Not Substantial

Certain aspects of the regulation of motor vehicles have been held to be of predominately statewide concern, but an examination of these statutes reveals important distinctions. One class of decisions have been related to licensing of drivers or vehicles, which are matters which inherently require statewide uniformity and which can't really be said to vary from place to place in the reasons for their application: Davis v. City and County of Denver, supra (licensing drivers); Armstrong v. Johnson Storage & Moving Co., 268 P. 978 (Colo. 1928) (licensing vehicles). The other class concerned exceedingly serious traffic violations: e.g., People v. Graham, supra (duty to report accidents - hit and run); City of Canon City v. Merris, supra (drunk driving), which again have little to do with the local nature of the streets or traffic conditions or the enforcement of ordinary rules of the road which are intended to allow traffic to flow without accident if only the rules are followed.

Speeding per se and disobeying red signal lights per se, while behaviors which the plaintiff Cities and other cities are seeking to discourage even more effectively through automated vehicle

identification systems, are not on the same level on the distributive justice scale as hit and run accidents and drunk driving. The legislature has recognized this by providing significantly lower penalties and driver's license points for routine speeding tickets (maximum penalty $100 and 4 licensing points for speeds no more than 19 mph over the limit) and red light offenses (maximum penalty a fine of $100, 4 points), while enabling state court judges to mete out harsh punishments for the more serious offenses (DUI defendants face a year in jail and $1000 for first offense DUI, and convictions carry 12 penalty points, sufficient to suspend any driver's driving privilege. Hit and run where death or serious bodily injury is involved is a felony and upon conviction the driver's license is revoked).

Drivers who believe they have been "hometowned" or caught in some sort of improper speed trap may turn to the General Assembly, claiming local authorities have no interest in their complaints. To the extent that they are complaining that they can't speed or run red lights with less chance of being called to account, the General Assembly has no legitimate interest in assuaging these pleas. It, too, has made the driving conduct illegal. constitutional equal protection and due process protections are adequate to prevent abuses of power by local authorities. While perhaps the most cogent misgiving commonly voiced about AVIS is its impact on privacy - a sort of "big brother is watching you" concern, the General Assembly instead actually authorized AVIS as a traffic enforcement tool in the statutes at issue. And the restrictions it placed on the use of AVIS are in no way directed to ameliorating impacts on privacy.

What the General Assembly did assert was a belief that its unusual rules had to be applied uniformly. Other than promoting their damping effect on the use of AVIS enforcement tools, no

coherent argument can be made as to how this supposed uniformity advances any social goal other than putting uppity locals in their place. This, under Article XX of the Constitution, is not a legitimate state goal or interest. The requirements of the Colorado Rules of Municipal Court Procedure and the other protective commands of the Constitution for notice and an opportunity for a hearing are uniform protection enough.

If there were some indication that use of AVIS would overburden the State administratively, the state interest might be understandable. However, as the Cities' brief points out, the Department of Motor Vehicles administrator testified that the mere retrieval of motor vehicle registration information from the state's smoothly automated system was not a burden. The DMV historically has been concerned about integrating AVIS tickets into the State's points system for driver's licensing suspensions, and the burdens a requirement that the State enter what it thought might be massive additional numbers of citations into its system. The statute met that concern by declaring that AVIS tickets carry no penalty points and that they are not reportable to the DMV. That exercise of the State's power over licensing drivers is not challenged by the Cities in this litigation, so these important state interests are not present nor served by the challenged portions.

This peculiar legislative approach most clearly appeared in the requirement that a level 1 peace officer must serve any AVIS summons. The proposition that having a bored cop knock on your door to serve a summons about which he knew nothing advances any interest of the person being served (much less that service can be on any adult householder) is simply irrational. Predominate state interests should be made of much more important stuff.

3 - The Cities' Interest in Using Photo-enforcement Tools Should Be Held Predominant

The Supreme Court has many times held that regulation of traffic on local streets is a matter of predominately local and municipal concern, and conflicting statutes have been held to be superceded by home rule ordinances. Examples are City and County of Denver v. Henry, supra (intersection right of way); Pickett v. City of Boulder, 356 P.2d 489 (Colo. 1959)(flashing red light - dictum); Retallack v. Police Court of City of Colorado Springs, supra (reckless driving); Wiggins v. McAuliffe, 356 P.2d 487 (Colo. 1960) (speeding); People ex rel. City of Aurora v. Thompson, 437 P.2d 537 (Colo. 1968) (careless driving); and People v. Hizhniak, supra (absolute speed limit).

Even decisions concluding that the state interest predominated in certain areas involving motor vehicles also typically recognize that ordinary traffic regulation is a matter of local and municipal concern. E.g., Merris, supra, and City and County of Denver v. Pike, supra.

That is why People v. Hizhniak, supra, is so much on point here, and why a determination that the AVIS restrictions do not deal with predominately local and municipal matters would amount to a repudiation of Hizhniak. In that case the issue was not who got to set speed limits (as in Pike, supra), but the rule for determination of violation. The State's *prima facie* system allows the argument that the accused motorist's speed, while above a posted limit, was nonetheless a safe speed. The posted limit, in essence, is just a presumption of unsafe speed. The City of Sterling used an absolute speed limit in its traffic ordinance - if you exceeded it you were guilty. The Supreme Court ruled that Sterling's home rule ordinance superseded the statute. There is no functional difference between that ruling and the present statutory edicts that warnings must be given to persons speeding no more than 9 miles over the limit, or that fines are to be limited to $40, or that signs warning that photo-radar is in use must be posted near where it is being used, and so on. All are

aspects of enforcement of a matter which is of predominately local and municipal concern. These are, if you will, part of "all other powers necessary, requisite or proper for the government and administration of its local and municipal matters." Article XX, Section 6, fourth paragraph.

Only if regulation of traffic speed is not a local and municipal matter can these AVIS provisions be held not to be superceded by home rule ordinances under the reasoning of Hizhniak. To like effect is People v. Wade, 757 P.2d 1074 (Colo 1988). "A city's choice of a sentencing scheme different from the state's is well within the city's constitutional power as a home rule city." *Id.* at 1076. "Indeed, to find that a home rule city's penal ordinances must share the state's so-called "philosophy in sentencing" would diminish, to a large degree, the independence and self-determination vested in those cities by the constitution." *Id.* at 1077.

Here the District Court ruled that, despite this abundant precedent, the mere manner in which municipalities chose to detect these routine violations was of such significance that the opinions of the General Assembly overcame the views of the City Councils. It cited the aphorism that what is predominately local and what is predominately of statewide concern in allocating the final say between home rule ordinances and state statutes is something which varies according to time and place. While this undoubtedly is so in the abstract, where the Supreme Court has once determined that a matter is within the supercessory power of a home rule municipality, only the Colorado Supreme Court can determine that the times have so changed that the constitutional distribution of power between home rule cities and the state must change too.

If home rule jurisprudence is to be of any use on the orderly disposition of people's affairs, precedent os of the greatest value because it can sometimes be so hard to draw the line between

predominately local and predominately state interests. It is in this sense that tradition plays its role. In Colorado, the tradition is that traffic regulation is predominately local.

Further, only superficially has regulation of traffic changed since 1934 and the Henry decision. The dissent in that case argued strongly that 1934 was a far cry from the horse and buggy days, and that the easy movement of motor vehicles among jurisdictions meant the State's interest in uniform traffic laws was superior to any local interest in having anything conflicting. Any change since then has, however, been only in degree: there are more people in Colorado, more vehicles, and more roads and streets. Romans complained of crowded cities made noisy and dangerous by the traffic of ox carts over cobblestone streets, and we can be sure that our successor will have the same complaints we and the Romans had about how "modern" life is more difficult. If Denver could have a rule which said that the vehicle on the left must yield to the vehicle on the right at an uncontrolled intersection which superceded the State's rule (at that time - the State later changed to the rule Denver had, as did other states) which said that the first vehicle there had the right of way (the "race to the intersection" rule), how can the state interest in the size and type on advisory notices, or a requirement that they must be sent by certified mail, be of any significance? How can the state claim that the requirement of a warning for first time speeders caught on AVIS going over the speed limit but less than 10 miles per hour over be of great import? Denver surely could not have been required to post its right of way rule at its city limits. How does a state imposed statute of limitations comport with the division of power over local ordinance enforcement set up by Article XX?

The District Court accepted and placed great weight on the argument of the Attorney General on behalf of the State that these automated vehicle identification systems were "new technology, "

which somehow meant that the State's interest was higher than it otherwise would be, or that the matter was less local and municipal. Even aside from the lack of logic to this position (amply summarized in the Cities' brief), the "new technology" factual predicate simply isn't so: photography has been in practical use since about 1840, and its valuable role as evidence in court is well established (e.g., Mow v. People, 72 P. 1069, 1072 (Colo. 1903)). Radar came into practical use at the beginning of WWII, and in the immediate post-war era was promptly put to work measuring speed of vehicles for law enforcement purposes (e.g., State v. Dantonio, 18 N.J. 570, 115 A.2d 35, 49 ALR 2d 460 (1955) (taking judicial notice of radar speed measuring devices for traffic law enforcement). In fact, the Supreme Judicial Court of Massachusetts accepted evidence of speed from a device which used sequential photographs and a stop watch in 1910! Commonwealth v. Buxton, 205 Mass. 49, 91 N.E. 128 (1910). That there have been many improvements in these devices over a century and a half hardly makes them more novel, and certainly does nothing to undercut the longstanding determination by the Supreme Court that routine traffic regulation is a matter of predominately local concern.

If the Legislature wishes to tell the State Patrol and the county sheriffs and the police of statutory cities that they cannot use AVIS, or that they can use it only with odd restrictions intended to dilute its effectiveness, it is free to do so, as they are subordinate to the Legislature in almost all ways. But Article XX was intended to give home rule cities significant latitude in dealing with their local and municipal affairs despite the views of the Colorado General Assembly. It can hardly be surprising that what the Legislature sees as in people's best interests from time to time differs from

the views of a home rule city council harkening to a different constituency. In those instances the courts are inevitably the arbiter, so these amici respectfully request that the Cities'

CONCLUSION

This Court should:

1) declare that these parts of 42-4-110.5, C.R.S., are or may be superceded by any conflicting ordinance or charter of a home rule city because they cover matters predominately local or municipal: (2)(a)(II)(90 day statute of limitations); (4)(a) (warning letter required); (4)(b)(I) & (II) and (4.5)(limits on fines); (2)(a)(I)(B)(certified mail for informal notices); (2)(a)(I)(B)(photograph to appear on notices); (2)(a)(I)(B)(required warning, size of type); and (2)(d)(I)(warning sign required); and

2) prohibit the State Defendants from denying access under 42-3-112(14), C.R.S., to motor vehicle registration information even if a home rule city does not comply with some part of 42-4-110.5, C.R.S.

Respectfully submitted this 25th day of June, 2001.

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