

# Order

Michigan Supreme Court  
Lansing, Michigan

September 27, 2024

Elizabeth T. Clement,  
Chief Justice

166885

Brian K. Zahra  
David F. Viviano  
Richard H. Bernstein  
Megan K. Cavanagh  
Elizabeth M. Welch  
Kyra H. Bolden,  
Justices

PEOPLE OF THE CITY OF STERLING  
HEIGHTS,

Plaintiff-Appellant,

v

SC: 166885  
COA: 364264  
Macomb CC: 2022-000387-AV

ROBERT BAHNKE,  
Defendant-Appellee.

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On order of the Court, the application for leave to appeal the February 15, 2024 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

CLEMENT, C.J. (*concurring*).

I generally agree with the Court of Appeals' analysis and thus concur in this Court's denial of leave to appeal in this case. However, I write to draw the Legislature's attention to what I believe is likely an unintended result of MCL 28.457. Specifically, I question whether MCL 28.457(1) was truly meant to prohibit local ordinances such as the one at issue here, which requires vendors of fireworks to provide purchasers with informational flyers.

MCL 28.457 provides, in relevant part:

(1) Except as provided in this act, *a local unit of government shall not enact or enforce an ordinance, code, or regulation pertaining to or in any manner regulating the sale, display, storage, transportation, or distribution of fireworks regulated under this act.* [Emphasis added.]

The ordinance at issue here, Sterling Heights Code, § 20-115(I), requires vendors selling fireworks in the city to provide flyers to those who purchase fireworks. These flyers must

contain a notice of city and state laws, as well as information as required by the city manager, the police chief, or the fire chief.<sup>1</sup>

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<sup>1</sup> The ordinance provides:

Every fireworks vendor advertising consumer fireworks for sale within the city shall provide notice, as set forth in this subsection, to every purchaser of consumer fireworks by including an 8½” x 11” flyer with every purchase and by displaying a sign affixed to each side of any display area or temporary facility or consumer fireworks retail stand, as both are defined by the Michigan Administrative Code, where fireworks are sold at retail. To be in compliance with this subsection, the font on a flyer shall be no smaller than 14 point boldface type, and the lettering on a sign shall be visible and discernible from every point of sale and, for temporary facilities, from a distance of at least 20 feet outside the footprint or boundaries of the facility. Each day that a vendor remains out of compliance with the requirements of this subsection shall be chargeable as a separate offense. At a minimum, each flyer and/or sign shall contain any information required by the City Manager, the Police Chief, or the Fire Chief, as well as all of the following information:

**NOTICE OF CITY AND STATE LAWS**

1. STATE LAW PERMITS, UNDER MCL 28.457, THE IGNITION, DISCHARGE, AND USE OF CONSUMER FIREWORKS (IN GENERAL, THE TYPE THAT LEAVE THE GROUND) AT THE FOLLOWING TIMES, AND SUCH ACTIVITIES ARE PROHIBITED IN STERLING HEIGHTS ON ANY DAYS AND TIMES OTHER THAN THE FOLLOWING TIMES: BETWEEN 11:00 A.M. AND 11:45 P.M. ON THE SATURDAY AND SUNDAY IMMEDIATELY BEFORE MEMORIAL DAY AND LABOR DAY, JUNE 29TH TO JULY 4TH, AND JULY 5TH IF THAT DATE IS A FRIDAY OR SATURDAY, AND BETWEEN 11:00 A.M. ON DECEMBER 31ST UNTIL 1:00 A.M. ON JANUARY 1ST (A TOTAL OF 12 OR 13 CALENDAR DAYS PER YEAR).

2. FIREWORKS THAT MAKE NOISE THAT CAN BE HEARD FROM ANY PUBLIC PLACE MAY NOT BE USED AFTER 11:00 P.M.

3. FOR FIREWORKS THAT LEAVE THE GROUND, ONLY THE PERSON IGNITING THE FIREWORKS MAY BE WITHIN 25 FEET, AND MINORS MAY NOT BE WITHIN 50 FEET.

4. FIREWORKS THAT LEAVE THE GROUND MAY NOT BE DISCHARGED ON GOVERNMENT PROPERTY, INCLUDING

In this case, defendant, Robert Bahnke, was ticketed for violating the city code because he had not handed out the required flyers when he sold fireworks. The district court and the circuit court affirmed the \$150 fine that the magistrate had ordered. But the Court of Appeals reversed in a published opinion, holding that Sterling Heights Code, § 20-115(I) was preempted by MCL 28.457. *People v Bahnke*, \_\_\_ Mich App \_\_\_ (February 15, 2024) (Docket No. 364264).

As stated, I believe the Court of Appeals opinion generally reached the correct result. Conflict preemption occurs “when a local regulation directly conflicts with state law[.]” *DeRuiter v Byron Twp*, 505 Mich 130, 140 (2020). A local regulation directly conflicts with a state law when “ ‘the ordinance permits what the statute prohibits or the

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PARKING AREAS, STREETS, AND SIDEWALKS, OR ON PROPERTY OWNED BY ANOTHER UNLESS YOU HAVE EXPRESS PERMISSION FROM THE GOVERNMENT OR THE PROPERTY OWNER TO DISCHARGE FIREWORKS.

5. FIREWORKS THAT LEAVE THE GROUND MAY NOT BE USED BY A PERSON WHO IS UNDER THE INFLUENCE OF ALCOHOLIC LIQUOR AND/OR ANY CONTROLLED SUBSTANCE (INCLUDING PRESCRIPTIONS).

6. DISTURBING THE PEACE, NOISE AND NUISANCE VIOLATIONS, AND LITTERING ARE MISDEMEANORS. YOU ARE RESPONSIBLE FOR CLEANING UP ANY FIREWORKS DEBRIS THAT ENDS UP ON PROPERTY THAT IS NOT YOUR OWN.

7. POLICE AND FIRE OFFICIALS MAY CITE YOU FOR MISDEMEANOR OR CIVIL INFRACTION VIOLATIONS OF STATE LAWS AND CITY ORDINANCES, WITH FINES RANGING FROM \$150 TO \$1,000 FOR EACH CIVIL INFRACTION VIOLATION. OFFICIALS MAY ALSO CONFISCATE ILLEGAL FIREWORKS AND FIREWORKS BEING USED UNLAWFULLY. YOU WILL BE RESPONSIBLE FOR THE COST OF DISPOSING OF THOSE FIREWORKS.

The reverse side of every flyer shall depict a standard calendar for the applicable year, with each day on which consumer fireworks may be used highlighted for easy reference. The title on the calendar side of the flyer shall read: “Consumer fireworks may only be used on 12 or 13 calendar days each year, subject to the rules on the reverse side. Permitted days are highlighted on the calendar below.”

ordinance prohibits what the statute permits.’ ” *Id.*, quoting *People v Llewellyn*, 401 Mich 314, 322 n 4 (1977). Here, MCL 28.457(1) prohibits local units of government from enacting or enforcing ordinances “pertaining to or in any manner regulating the sale . . . of fireworks . . .” By requiring fireworks vendors to provide flyers to purchasers, the city ordinance does “pertain[] to” or “regulat[e]” the sale of fireworks.<sup>2</sup>

But I question whether invalidating city ordinances such as the one at issue here is truly what the Legislature intended when it passed MCL 28.457. While I understand that the Legislature may have reasonably sought to prohibit local units of government from passing more substantive regulations of the sale of fireworks, it is difficult for me to imagine that the Legislature intended to prohibit cities from ensuring that fireworks purchasers are adequately advised of applicable laws. The city ordinance here is a relatively small burden on fireworks vendors and provides useful information to purchasers regarding relevant laws. For these reasons, I question whether the text of MCL 28.457 is achieving the result the Legislature intended, and I encourage the Legislature to review the statutory language.

WELCH, J. (*concurring in part and dissenting in part*).

Defendant is the manager of a store in the city of Sterling Heights that sells fireworks. Defendant was issued a citation for refusing to comply with Sterling Heights Code, § 20-115(I), an ordinance that requires businesses selling fireworks to display a flyer with information about state and local firework regulations at certain locations within the facility and to provide a copy of the same flyer to every purchaser of consumer fireworks. The record indicates that defendant was cited and fined for the failure to provide a copy of the flyer to customers at the point of sale. It does not appear that the citation and fine were premised on the failure to display a flyer within the store.

I agree with the Court of Appeals’ holding that the requirement of providing a flyer to customers with every purchase is preempted by MCL 28.457(1). That provision states that “[e]xcept as provided in this act, a local unit of government *shall not enact or enforce an ordinance, code, or regulation pertaining to or in any manner regulating the sale, display, storage, transportation, or distribution of fireworks regulated under this act.*” (Emphasis added.) Requiring a firework business to provide a flyer with every purchase is an ordinance *pertaining to or in any manner regulating* the sale or distribution of fireworks regulated under the Michigan Fireworks Safety Act, MCL 28.451 *et seq.* The applicability of this part of the ordinance is related to the sale of fireworks, is triggered by the sale of regulated fireworks, and applies only in conjunction with a purchase of

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<sup>2</sup> I believe that Justice WELCH raises valid concerns though regarding whether the Court of Appeals overstepped by concluding that the entirety of the city ordinance, even the requirement that flyers be displayed in a store, is preempted by MCL 28.457(1).

fireworks by a customer. And although MCL 28.457(2) permits a local government to regulate “the ignition, discharge, and use of consumer fireworks,” it does not allow limitations on fireworks at the point of sale. Therefore, the ordinance’s requirement to provide a flyer with every purchase is in conflict with MCL 28.457(1), and thus it is preempted by state law and rendered unenforceable. See *DeRuiter v Byron Twp*, 505 Mich 130, 140 (2020). I agree with this Court’s decision to deny leave to appeal to the extent that the prosecution, on behalf of the people of the city of Sterling Heights, challenges this part of the Court of Appeals’ judgment.<sup>3</sup>

The Court of Appeals’ opinion, however, holds that the entirety of Sterling Heights Code, § 20-115(I) is preempted by MCL 28.457(1). In addition to requiring the distribution of informational flyers with each sale, the ordinance also required that the flyers be displayed in the store. In my view, the Court of Appeals overstepped by reaching this separate issue in its published decision because defendant is not being prosecuted for violating the display requirement of the ordinance. Therefore, this aspect of the Court of Appeals’ holding is nonbinding dicta. See *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3 (2006) (“ ‘Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication’ ”), quoting *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 719 n 101 (1991) (LEVIN, J., dissenting) (some quotation marks and citations omitted).

I also question whether defendant has standing to argue that the display requirement is preempted by state law *in this action* because, in the absence of enforcement of the requirement, defendant does not have an actual injury caused by that part of the ordinance. See *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010) (“A litigant may have standing [in the absence of a direct legal cause of action] if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.”). Defendant, who is a store manager but not the store owner, has not filed a lawsuit seeking to challenge the validity of the ordinance as a general matter. Rather, he is seeking vacatur of the citation and fine issued against

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<sup>3</sup> I agree with Chief Justice CLEMENT that it is debatable whether the Legislature intended MCL 28.457 to prohibit municipalities from enacting ordinances that require the sellers of fireworks to notify their customers of applicable laws and regulations.

him for failing to provide a flyer to customers with each purchase as required by the local ordinance.

Finally, the question of whether the display requirement of the ordinance directly conflicts with MCL 28.457(1) is a closer question than that raised by the requirement that a flyer be provided to customers with every purchase. The applicability of the display requirement of the ordinance is triggered through the operation of a facility that sells fireworks, but it is not contingent on a specific sale. Nor does the ordinance change how fireworks are displayed; it simply requires that additional information about firework regulations also be displayed. This separate question warrants independent legal analysis of whether the requirement to display a flyer within a facility selling fireworks is an “ordinance . . . pertaining to or in any manner regulating the sale [or] display . . . of fireworks regulated under this act.” MCL 28.457(1) (emphasis added). The Court of Appeals did not independently analyze the ordinance’s display requirement. For all these reasons, I would vacate the Court of Appeals’ judgment to the extent it holds that the display requirement of Sterling Heights Code, § 20-115(I) is preempted by MCL 28.457(1), and I would deny leave to appeal in all other respects. I respectfully dissent from the Court’s decision to simply deny the application for leave to appeal without addressing the Court of Appeals’ questionable holding as to the flyer display requirement of Sterling Heights Code, § 20-115(I).



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 27, 2024

Clerk