THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

State of South Carolina, ex rel Alan Wilson, Attorney General. . . . . Petitioner,

v.

City of Columbia. . . . . Respondent.

PETITION FOR ORIGINAL JURISDICTION AND EXPEDITED CONSIDERATION

The State of South Carolina ex rel Attorney General Alan Wilson (State) respectfully requests that the South Carolina Supreme Court authorize the bringing of the attached suit within its original jurisdiction pursuant to Rule 245, SCACR, S.C. Code Ann §14-3-310 and S.C. Const. art. V §5. A proposed complaint is attached along with other exhibits. The Petition and proposed complaint assert that the City of Columbia has ordinances imposing mask requirements on schools that are prohibited by a proviso adopted by the General Assembly in the annual Appropriations Act and otherwise exceed the authority of the City. The State respectfully requests that this Court take jurisdiction of this case, direct a response to the proposed complaint, and give this matter expedited consideration.

I

INTRODUCTION AND SUMMARY

We understand and respect the concerns that citizens and governments have about the spread of Covid 19 and its variants. This case is not about what policies are best for dealing with the virus. We bring this Petition not to choose sides in debates over health precautions. Instead, we ask this Court to resolve a dispute over the controlling effect of a legislative proviso regarding mask requirements so that all jurisdictions will be informed about what law governs. Act No. 94, Part 1B, §1.108, 2021 S.C. Acts. In bringing this action, we agree with the words of the Court in the recent *Creswick* opinion, that appropriation provisos must be construed "as . . . written." *Creswick* v. *University of South Carolina and Wilson*, Op. No. 28053 (Adv. Sh. No. 28 at 32, 38 n. 4 (August 17, 2021)). Like this Court's holding, our bringing this action "is not an approval or disapproval of a mandate, nor is it an approval or disapproval of an attempt by the General Assembly to prohibit a mandate." *Creswick,* n. 4. The rule of law must prevail.

This Court has observed that "[w]ithout a legislature and the exercise of the power to appropriate funds . . . anarchy and chaos would pervade society. There would not be a republican form of government." *Segars v. Parrott*, 54 S.C. 1, 31 S.E. 677, 699 (1898). Thus, the legislative power is sacrosanct and must be preserved. The fundamental question in this case is whether political subdivisions, such as the City of Columbia, as well as various school districts, must abide by the will of the General Assembly – the supreme legislative power in this State – when it places conditions upon

its appropriations that mask mandates may not be imposed in schools as required by Proviso 1.108.

Under the Constitution and laws of this State, "the General Assembly is the sole entity, with the power to appropriate funds including federal funds." By example, as to this sweeping appropriations power, when the Legislature mandated in 2009, as part of its appropriations authority, that the Governor must apply for federal funds, and he failed to comply, this Court ordered that he must do so by issuing a mandamus against him. *Edwards v. State*, 383 S.C. 82, 91, 678 S.E.2d 412, 417 (2009). Therefore, as this Court has emphasized, [t]he power of the Legislature over matters of appropriations is plenary. . . ." *Cox v. Bates*, 237 S.C. 198, 214, 116 S.E.2d 828, 834 (1960).

So too here. In this case, it is not the Governor who refuses to abide by a legislative mandate in the Appropriations Act, but various political subdivisions of the State, such as the City of Columbia. When the General Assembly attaches conditions to its appropriations to school districts, forbidding mask mandates, neither the city, nor a county, nor the school districts themselves, no more than the Governor, may commandeer the power of the General Assembly by disregarding the appropriations proviso in question. A legislative directive, such as Proviso 1.108, which is "reasonably and inherently" related to spending revenue appropriated by the General Assembly, must be followed and cannot be circumvented. Thus, this Court's relief is required here.

This Petition presents simple legal questions about the failure of the City of Columbia to adhere to a clear legislative directive about mask usage. Contrary to the

terms of the Appropriations Act proviso set forth below prohibiting schools and school districts from imposing mask mandates and otherwise exceeding its municipal powers, the City of Columbia has passed ordinances imposing mask requirements on public schools in the City. Exhibits, pp. 1 & 3. These ordinances have already been followed by a similarly invalid Richland County ordinance (Exhibits, p. 5 (description from website)) and even a school district, Richland One, has violated the mask proviso by requiring that students and staff wear masks (Exhibits, p. 7). Similar requirements are likely to follow from other jurisdictions absent a ruling from this Court.

Although local governments certainly have an interest in community safety, their ordinances must conform to State law in doing so. These ordinances and directives do not. While cities, such as Columbia, have strong Home Rule powers – and we respect those powers – this case is not about Home Rule. The Legislature is the ultimate lawmaker. Its laws must be followed.

Proviso 1.108 of the provisos for the South Carolina Department of Education directs as follows:

> (SDE: Mask Mandate Prohibition) No school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.

Despite the clear language of this Proviso, the City proceeded to adopt contrary ordinances. City of Columbia Ordinance 2021-069 (attached Exhibits, p. 1), ratifies the Mayor's Declaration of Emergency by Ordinance 2021-068 (Exhibits, p. 3) and provides in part, as follows.

> facial coverings shall be required by all faculty, staff, children over the age of two (2), and visitors, in all buildings at public and private schools or daycares whose purpose is to educate and/or care for children between the ages of two (2) and fourteen (14) to slow the spread of the novel Coronavirus and the disease COVID- 19 within the City limits.

The General Assembly took note of the City's violation of the proviso. On August 6, 2021, the Honorable Harvey Peeler, Jr., President of the Senate, and the Honorable Jay Lucas, Speaker of the House, wrote the Attorney General on August 6, 2021, stating, in part, as follows:

> We believe Proviso 1.108 is clear and unambiguous. It prohibits face-covering mandates in public schools no matter where in the state they are located. Further, there is nothing about this proviso that indicates local government has authority to amend, augment or even ignore the policy set forth by the State. We also believe that any directive properly enacted by the General Assembly serves as the general law of the State of South Carolina.
>
> The actions taken by Columbia City Council at the request and direction of Mayor Benjamin are in clear and deliberate violation of the plain meaning of the proviso.
>
> We would respectfully request that your office review the action of the City of Columbia and if you believe it necessary, take appropriate action on behalf of the State of South Carolina and the statewide policy adopted by Proviso 1.108.

Exhibits, p. 8.

11. The Attorney General wrote the Honorable Stephen K. Benjamin, Mayor of Columbia, and City Council members on August 11 stating, in part, as follows:

> It is the opinion of my office that these ordinances [2021-068 and 2021-069] arc in conflict with state law and should either be rescinded or amended. Otherwise, the city will be subject to appropriate legal actions to enjoin their enforcement. Encouragement of facemask wearing by city officials and even requirements for facemasks in city buildings and other facilities would not be in violation or the proviso. Also, parents, students, and school employees may

choose to wear facemasks anywhere at any time.

> My office has previously opined that budget provisos have the full force and effect of state law throughout the fiscal year for which a budget is adopted. . .
>
> While the proviso [1.108] does not mention municipalities. it is clear from both a plain reading of its language and from the intent expressed by legislative leaders that the General Assembly does not believe that school students or employees should be subject to facemasks mandates. While we appreciate the efforts of city leaders around the state to protect their populace from the spread of the COVID-19 virus and variants of it, these efforts must conform to state law.

Exhibits p. 9.

The City responded to the Attorney General on August 11, 2021 stating, in part, as follows:

> In the matter at hand, the issue is whether a Proviso that acts as a "Mask Mandate Prohibition" for schools and school districts, is germane to fiscal issues, raising and spending taxes, which is the sole purpose of the appropriations act? The clear answer, using the sound logic of our Supreme Court is that it is not. A mask mandate prohibition is clearly not a matter that is germane to fiscal issues which is the only issue allowed to be taken up in the general appropriations act and therefore it is unconstitutional and unenforceable.

Exhibits, p. 11.

Although we recognize that the City is acting out of genuine concern about the spread of the Covid-19 virus and its variants, it cannot do so contrary to the law of this State. The Proviso is quite clear that masks are not to be mandated by government for the schools of this State. As this Court has advised, "where an ordinance permits that which a statute prohibits, the ordinance is void." *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818, 831 (1965). Here, the City's Ordinances are precluded by the Proviso and respectfully, must be declared invalid for this reason and the others discussed below.

Therefore, we respectfully request that this Court grant original jurisdiction so that controlling State law may be upheld and that other governmental bodies will be informed that the Proviso is controlling.

II

AUTHORITY OF THE COURT TO ASSUME ORIGINAL JURISDICTION

Under Rule 245, SCACR, the Court may assume original jurisdiction "if the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised...." *See also* S.C. Const. art. V, §§ 5 and 20 and §14-3-310 (1976); *Key v. Currie*, 305 S.C. 115, 406 S.E. 2d 356, 357 (1991). Certainly, the public interest is involved here when, as discussed above, the City of Columbia has adopted an ordinance squarely contrary to State law.

This Court has exercised its authority in the original jurisdiction in several recent cases involving challenges to local ordinances or actions. *Adams v. McMaster*, 432 S.C. 225, 231, 851 S.E.2d 703, 706 (2020) (declaratory judgment action challenging the constitutionality of Governor's allocation of federal emergency education funding); *Mitchell v. City of Greenville*, 411 S.C. 632, 633, 770 S.E.2d 391, 391 (2015) (challenge to municipal election ordinance); *State v. Cty. of Florence*, 406 S.C. 169, 171, 749 S.E.2d 516, 517 (2013) (challenge to proposed county tax referendum.); *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 694 S.E.2d 213 (2010) (challenge to helmet ordinance); *O'Brien v. S.C. ORBIT*, 380 S.C. 38, 46, 668 S.E.2d 396, 400 (2008) (challenge to City decision to

invest in equity securities). This Court has also granted original jurisdiction to challenges to State legislation. *See, eg, Doe v. State*, 421 S.C. 490, 808 S.E.2d 807 (2017) (challenge to definitions of "household member" in the Domestic Violence Reform Act and the Protection from Domestic Abuse Act); *S.C. Pub. Interest Found. v. Lucas*, 416 S.C. 269, 270, 786 S.E.2d 124, 125 (2016) (challenge to Appropriations Act proviso); *Bodman v. State*, 403 S.C. 60, 742 S.E.2d 363 (2013) (challenge to exemptions and caps placed on the state's sales tax).

This case falls squarely within the Court's authority to take original jurisdiction when the public interest is involved. Local ordinances are challenged because they are in conflict with State legislation. Adherence to the rule of law is clearly and profoundly in the public interest. This Court should grant this Petition for these reasons and the others discussed below.

III

REASONS FOR TAKING ORIGINAL JURISDICTION IN THIS CASE

As discussed below, this case involves a simple, but significant question of the City's authority to adopt an ordinance that is directly contrary to a legislative proviso and will have an immediate impact on thousands of school children and personnel. This case may be concluded by rulings on legal issues without the necessity of this Court's making factual findings. Considering the fact that the Supreme Court is likely to decide ultimately the merits of this case, the exigencies of time, judicial economy and fairness warrant the

Court's taking original jurisdiction of this case rather than allowing the case to proceed first in the Circuit Court. Moreover, an Opinion of this Court will be informative to all governmental bodies that have adopted or are considering adopting mask requirements for the schools.

IV

GROUNDS FOR JUDGMENT FOR THE STATE

A

The Ordinances Violate Proviso 1.108

As set forth above, the Proviso prohibits school districts from using any funds "appropriated or authorized by the Appropriations Act to require that its students and/or employees wear a facemask at any of its education facilities [and] [t]his prohibition extends to the announcement or enforcement of any such policy." In its Opinion this week in *Creswick* this Court stated that "Proviso 1.108 clearly evinces the General Assembly's intent to prohibit the use of state funds to require any mask mandate in public K-12 schools." *Id.* at 36. This statement by the Court is strong evidence of the proviso's meaning and the General Assembly's intent underlying it.

Although the City ordinances state that the City will provide the masks, the enforcement responsibilities will fall on the districts and their State funded personnel which will necessarily involve use of appropriated funds. School personnel will have to monitor and enforce mask compliance including dealing with students and staff who are

resistant to wearing masks. Therefore, the ordinances essentially direct the school districts to violate State law by making them use State funded resources to enforce a City mask requirement contrary to Proviso 1.108. In short, the City's funding the masks cannot circumvent the Legislature's clear intent. Proviso 1.108 and the Ordinances are therefore in conflict, and Proviso 1.108 preempts them and prevails. Well-settled authority supports this conclusion. As this Court has written,

> The government of a municipality is created by the laws of the State of South Carolina, and the creature cannot be greater than its creator, and the laws of a municipality to be good must not be inconsistent with the laws of the State."

McAbee v. S. Ry. Co., 166 S.C. 166, 164 S.E. 444, 444 (1932)

> Local governments derive their police powers from the state. S.C.Const. art. VIII, §§ 7, 9. The state has granted local governments broad powers to enact ordinances "respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities." S.C. Code Ann. § 5-7-30 (1976). This is in recognition that more stringent regulation often is needed in cities than in the state as a whole. *Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943). However, the grant of power is given to local governments with the proviso that the local law not conflict with state law. *City of Charleston v. Jenkins*, 243 S.C. 205, 133 S.E.2d 242 (1963). A city ordinance conflicts with state law when its conditions, *157 express or implied, are inconsistent or irreconcilable with the state law. *Town of Hilton Head v. Fine Liquors, Ltd*., 302 S.C. 550, 553-54, 397 S.E.2d 662, 664 (1990) (quoting *McAbee v. Southern Rwy. Co*., 166 S.C. 166, 169-70, 164 S.E. 444, 445 (1932)). Where there is a conflict between a state statute and a city ordinance, the ordinance is void. *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965).

City of N. Charleston v. Harper, 306 S.C. 153, 156–57, 410 S.E.2d 569, 571 (1991)

> Conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible. *See Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 530, 476 S.E.2d 477, 480 (1996) ("To determine whether the ordinance has been preempted by Federal or State law, we must determine whether there is a conflict between the ordinance and the statutes and whether the

> ordinance creates any obstacle to the fulfillment of Federal or State objectives."); *192 Coin–Operated Video Game Machines*, 338 S.C. at 186, 525 S.E.2d at 877 (describing federal law conflict preemption); 56 Am.Jur.2d Municipal Corporations 392 ("[i]mplied conflict preemption occurs when an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute"); 5 McQuillin Municipal Corporations § 15.18.

S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 400–01, 629 S.E.2d 624, 630 (2006).

The conflict here is express and the Proviso preempts the ordinances because "compliance with both is impossible." *Ports Authority, supra.* The Ordinances cannot "make legal that which the State statute declared unlawful." *State v. Solomon*, 245 S.C. 550, 574–75, 141 S.E.2d 818, 831 (1965). Even if the conflict were not deemed to be express, the ordinances frustrate the purposes of the Proviso, and are therefore, preempted. 5 *McQuillin Mun. Corp*. § 15:19 (3d ed.)("even when a local ordinance does not expressly conflict with a State statute, it will be preempted when it frustrates the statute's purpose.").

Moreover, in our view, the City through its Ordinances, seeks to "encroach upon the Legislature's power to appropriate funds. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002). The City cannot commandeer the General Assembly's appropriations power. As this Court underscored in *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 313-14, 295 S.E.2d 633, 637 (1982), "[t]he General Assembly has, beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent." (emphasis added). Here, it has specified those conditions by prohibiting mask mandates in the schools. That is a policy decision which the legislative branch must make, and the executive branch, via the Attorney

General, must enforce. Thus, while the City may "make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking [by the City or a school district] is an intrusion upon the legislative power." *Hampton v. Haley*, 403 S.C. 395, 403-04, 743 S.E.2d 258, 262 (2013). Such intrusion is clear in this case.

B

The City Lacks Authority to Side-Step the Ordinance Under S.C. Const. art. XVII, §17

As noted above, the City contends that it does not have to comply with the Proviso alleging that it violates the "one subject" clause of the Appropriations Act. S.C. Const. art. III, §17. The Proviso does not violate the Constitution, but the City is not a judicial body to determine whether State legislation is constitutional. It must comply with the Proviso unless a Court declares it invalid. *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014)("'all statutes are presumed constitutional and, if possible, will be construed to render them valid.'). '[A] legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt.'").

Proviso 1.108 does not violate art. III, §17 as "it reasonably and inherently relates to the raising and spending of tax monies." *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 35, 484 S.E.2d 104, 107 (1997). It is among the Department of Education's budget provisos and is expressly tied to funding ("no school district . . . may use any funds

appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask.) Fact finding is unnecessary for this Court to take judicial notice that expenditure of public funds will necessarily be involved in a school district's enforcement of the City Ordinances. *See, Caldwell v. McMillan*, 224 S.C. 150, 77 S.E.2d 798 (1953) (statute allowing highway department to lease space in its administrative offices for a restaurant sufficient under Article III, § 17 since it "increases the efficiency of the State's business" by making meals available to state employees), quoted in *Keyserling v. Beasley*, 322 S.C. 83, 86–89, 470 S.E.2d 100, 102–03 (1996). *Keyserling* held that provisions creating a new "Low–Level Radioactive Waste Compact Negotiating Committee" and repealing the Southeastern Compact were germane to the Appropriations Act because they would impact revenue. Similarly, enforcement of a mask mandate in schools within the City of Columbia will necessarily impact the expenditure of State funds even if the City provides the masks. Although the Court is to apply a liberal construction "so as to uphold the Act if practicable" and "[d]oubtful or close cases are to be resolved in favor of upholding an Act's validity" (*Keyserling*), such construction is not necessary as to Proviso 1.108. The terms of the Proviso are quite clear, as this Court recognized in *Creswick*, and overwhelmingly demonstrate the legislature's intent that schools funded with State appropriations must not impose or implement mask mandates. Proviso 1.108 is germane to the Appropriations Act. This Court has, time after time, upheld the General Assembly's power to appropriate funds and attach strings to those appropriations. However, in this case the City of Columbia has taken scissors to those strings and cut

them to pieces.

C

The City Ordinances Otherwise Exceed Municipal Powers

Apart from Proviso 1.108, the above ordinances exceed the authority of the City of Columbia under State law and conflict with the authority of school districts as well as the General Assembly. *See, eg*., S.C. Code Ann. §59-19-90 (general powers and duties of school trustees); *Moye v. Caughman*, 265 S.C. 140, 143, 217 S.E.2d 36, 37 (1975)("public education is not the duty of the counties, but of the General Assembly."); The recitations in the whereas clauses in the City's ordinances give it no authority to impose mask requirements on the schools within its boundaries. *See also*, *Sandlands C & D, LLC v. Cty. of Horry*, 394 S.C. 451, 461, 716 S.E.2d 280, 285 (2011).[1]

REQUEST FOR EXPEDITED CONSIDERATION

Because of the need for clarity as to conflicting mask provisions as schools are reopening, we respectfully request that this Court expedite consideration of this case. Discovery should not be necessary, and the case may be decided based upon filings by the parties and any briefing requested by the Court.

CONCLUSION

Again, we bring this action, not to assume policy positions, or to take sides in

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1"We note that the mere mention of police power rhetoric as part of the preamble to an ordinance does not guarantee that a local governmental action is a valid exercise of such powers. *See, e.g., Henderson v. City of Greenwood*, 172 S.C. 16, 24, 172 S.E. 689, 691 (S.C.1934) ("The mere statement in the preamble of an ordinance that is passed under the police power does not give a municipality carte blanche to pass an unreasonable ordinance or one opposed to the Constitution or laws of the state.") (citations omitted)." *Id.*

debates over health measures. We instead ask that this Court resolve which law controls in this State, the legislative proviso or local ordinances to the contrary. As this Court has noted, in *Condon v. Hodges, supra*, it is the Attorney General's role to bring to the Court's attention violations of the Constitution and the rule of law. 349 S.C. at 241, 562 S.E.2d at 628. Accordingly, the State of South Carolina respectfully requests that this Court order the following relief:

1. Grant this Petition and expedite consideration of this case.

2. Grant the relief requested in the Complaint which is to declare the referenced Ordinances void.

Respectfully submitted,

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