No. 127040

IN THE
SUPREME COURT OF ILLINOIS

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 50, *Plaintiff-Appellee,* v. CITY OF PEORIA, a Municipal Corporation, *Defendant-Appellant.*	On Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-19-0758 There Heard on Appeal from the Circuit Court of Peoria County, Illinois, No. 18-MR-00439 The Honorable Mark E. Gilles, Judge Presiding

DEFENDANT-APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

ARGUMENT

This appeal boils down to the answer of one question: whether the judicial definition of "catastrophic injury" contained in *Krohe v. City of Bloomington*, 204 Ill. 2d 392 (2003)—a decision that did not discuss home rule—eviscerated the City's constitutional home rule powers to define that term through legislation. The Union, on the one hand, advocates in favor of such unexpressed preemption. The City, meanwhile, maintains that the Illinois Constitution's promise of home rule authority bars implicit judicial preemption.

1. The Union's Argument that *Krohe* Preempts the City's Home Rule Power to Enact the Ordinance Violates the Constitution's Grant of Broad Home Rule Powers which Only the General Assembly May Preempt through Legislative Action and Also Profoundly Misconstrues *Krohe*

The constitution states that *only* "the General Assembly by law" may "specifically limit the concurrent exercise [of home rule power] or specifically declare the State's exercise to be exclusive." Ill. Const. 1970, art. VII, § 6(i). But neither *Krohe* itself nor the legislature's failure to respond to *Krohe* amount to the *General Assembly* "specifically limit[ing]" home rule "by law." *Id.* Therefore, *Krohe* cannot constitutionally be applied to limit the City's right to legislatively define "catastrophic injury" for Illinois Public Safety Employees Benefits Act ("PSEBA") purposes.

This is a case of first impression. The Union tries to distract from that reality by emphasizing how loyally *Krohe* has been followed. But the City does not challenge *Krohe.* Nor does the City question *Krohe*'s definition of catastrophic

injury where—as in *Krohe*, but unlike here—no legislative body acting within the scope of its constitutional authority has defined that term. None of the decisions the Union cites involve a home rule unit legislating to define catastrophic injury. The City did just that by enacting a legitimate and valid Ordinance. As a result, *Krohe*'s judicial definition of catastrophic injury is inapplicable here.

The City also admits that in *Village of Vernon Hills v. Heelan*, 2015 IL 118170, this Court most recently confirmed that a catastrophic injury under PSEBA exists when a firefighter has been awarded a duty-related disability pension. But in *Heelan*, as in *Krohe*, no home rule legislation offered an alternate definition. While the municipality in *Krohe* had home rule powers, it did not exercise them by promulgating a definition of "catastrophic injury" via a legislative act. Neither *Heelan* nor *Krohe* contain the words "home rule."

The Union also cites *Heelan*'s application of the "legislative inaction" canon of statutory construction. Under this canon, when a court interprets a statute and the legislature fails to react, courts may "presume that the legislature has acquiesced in the court's exposition of legislative intent" such that the judicial construction is deemed to be "a part of the statute." *Heelan*, 2015 IL 118170, ¶¶ 19, 27; A6. Critically, the General Assembly's silence can only be interpreted as accepting this Court's definition in the absence of a local ordinance enacted under home rule power.

While this canon may present a useful tool for construing legislative texts, it is purely an interpretive device. *See e.g.,* William Eskridge, Jr., *Interpreting*

Legislative Inaction, 87 Mich. L. Rev. 67 (1988). Canons cannot override the constitution. But that is how the appellate court applied the canon. See A6.

2. The Definitions Represent a Valid Exercise of Home Rule Power Because They Pertain to the City's Government and Affairs and Do Not Produce Benefits that Are Inconsistent with the Requirements of PSEBA

This Court adopted a two-prong test to determine whether home rule authority has been constitutionally exercised. This test inquires, *first*, whether a home rule enactment pertains to the home rule unit's government and affairs, and, if so, *second*, whether the General Assembly has specifically prohibited home rule authority in that field. *Palm v. Lake Shore Drive Condominium Ass'n*, 2013 IL 110505, ¶ 36.[1]

The Ordinance's definitions concern the City's government and affairs and, while PSEBA prohibits home rule enactments that produce benefits that are inconsistent with PSEBA's text, it does not prohibit home rule enactments which

[1] The Union advocates for the application of a three-part test. Union Br. at 24-25. But *City of Chicago v. Stubhub, Inc.*, 2011 IL 111127 truncated that inquiry. *Id.* at ¶ 22 n.2; *Jaros v. Village of Downers Grove*, 2017 IL App (2d) 170758, ¶ 36 (explaining that what previously was a three-part test has been shortened into two parts, which holds that "if a subject pertains to local government and affairs, and the legislature has not expressly preempted home rule, the exercise of municipal power is valid"); see also *Omega Medical Imaging, LLC v. County of Cook*, No. 19-cv-4323, 2020 U.S. Dist. LEXIS 24190, at *5 (N.D. Ill. Feb. 12, 2020) ("In determining the constitutionality of exercise home rule, prior to 2011, Illinois courts used a three-part test. In *Chicago v. StubHub, Inc.*, however, the test took on its present, simplified form, namely, if a subject pertains to local government and affairs, and the legislature has not expressly preempted home rule, municipalities may exercise their power"); *Accel Entertainment Gaming v. Village of Elmwood Park*, 2015 IL App (1st) 143822, ¶ 32 (citing two-factor test).

supplement it, as the definitions do. Therefore, the definitions represent a valid exercise of home rule authority.

A. The Definitions—and PSEBA Benefits in General—Pertain to the City's Government and Affairs

Whether a given problem is of statewide rather than local dimension is not resolved via a specific formula but through an analysis that may consider a plethora of factors such as "(1) the nature and extent of the problem, (2) the units of government which have the most vital interest in its solution, and (3) the role traditionally played by local and statewide authorities in dealing with it." *City of Chicago v. Stubhub, Inc.*, 2011 IL 111127, ¶ 24. Applying those flexible factors here shows that the regulation of access to PSEBA benefits for City firefighters pertains to the City's local government or affairs because it involves the City's "power to regulate for the protection of the public health, safety, morals and welfare" of its residents. Ill. Const. 1970, art. VII, § 6(a).

First, with regard to the nature and extent of the problem, the City's concern is not PSEBA benefits in general but what triggers these benefits for members of its own fire department. The Ordinance applies exclusively to firefighters who work for the City; it does not attempt to regulate PSEBA benefits elsewhere.

Second, on the issue of which unit of government has the most vital interest in solving the problem, the City agrees that the State has an interest in ensuring that firefighters retain health benefits if they are catastrophically injured while serving their communities under the circumstances listed in Section 10 of PSEBA. 820

ILCS 320/10 & 5. Crucially, PSEBA leaves it to the City to administer and fund PSEBA benefits, and so the City has a concurrent interest in regulating PSEBA benefits. Moreover, PSEBA benefits are employment benefits intertwined with inherently local employment relationships, given that the City, on its own, makes hiring and retention decisions subject to local collective bargaining agreements if they exist. The availability of such benefits, as with any other employment term, may convince someone to join, or remain with, the fire department. The level of incentives is best left to local officials, who have fiduciary responsibilities.

The Union would distinguish this Court's decisions upholding home rule authority because "specific facts about the population, geography, and other characteristics of each home rule unit [ ] made a local solution appropriate." Union Br. at 35. The same is true here. Population, geography, access to amenities, infrastructure quality and other local circumstances dictate that not all municipalities have fire departments, not all fire departments are equally attractive for applicants or existing employees, and departments function differently from one another to maintain adequate workforces. For example, if a city by virtue of things such as quality schools and reasonable housing costs can attract capable firefighters, there may be no need for the city to create further incentives via broad benefits that are easily triggered. Conversely, if a city suffers from a shallow talent pool, public safety may be well served by making access to benefits broad and easy to attain.

Third, both local and statewide authorities have been actively involved in determining PSEBA benefits since the statute took effect in 1997. Pub. Act 90-535

(eff. Nov. 14, 1997). Although the State has been regulating PSEBA benefits through legislation for decades, local governments also have been directly involved by virtue of hiring the employees, administering and funding benefits and ensuring that catastrophically injured firefighters do not suffer. Indeed, cases such as *Krohe*, *Nowak v. City of Country Club Hills*, 2011 IL 111838 (2011), *Gaffney v. Board of Trustees*, 2012 IL 110012 and *Heelan*, illustrate the longstanding role of local governments in administering and preserving PSEBA benefits. Union Br. at 10-13, 33-34.

B. PSEBA's Home Rule Limitation Does Not Expressly Preempt the Definitions nor Substantive Home Rule Regulation concerning PSEBA Benefits As Long As Benefits Provided by the City Comply with the Statutory Minimum Identified in PSEBA's Text

This Court has "clearly accepted the basic principle that an ordinance may supersede or limit a conflicting statute." *Palm*, 2013 IL 110505, ¶ 44. PSEBA's home rule limitation abrogates that tenet to the extent of limiting the City's concurrent exercise of home rule power by prohibiting the City from "provid[ing] benefits . . . in a manner inconsistent with the requirements of this Act." 820 ILCS 320/20; see *Palm*, 2013 IL 110505, ¶ 41. PSEBA's home rule preemption must be construed as precisely as possible so that the City's power is, as the constitution demands, "construed liberally." Ill. Const. 1970, art. VII, § 6(m); see *id.* § 6(i).

Thus, just because home rule units must offer benefits consistent with PSEBA's explicit statutory mandate does not mean that they are precluded from enacting laws that affect PSEBA benefits. This is especially true because PSEBA

creates only a statutory floor that necessitates significant involvement by local governments that must, for example, administer the law and provide funding. See *Englum v. City of Charleston*, 2017 IL App (4th) 160747, ¶ 72 (noting the need for "local procedures to address [PSEBA's] statutory gap.")

The Union argues that PSEBA and the Ordinance's definitions conflict. Union Br. at 40. However, PSEBA as enacted dovetails neatly with the Ordinance because the definition section in the local legislation defines terms needed to interpret and administer the state statute. PSEBA and the Ordinance can, and so must, be construed *in pari materia*. See *Schillerstrom Homes v. City of Naperville*, 198 Ill. 2d 281, 293 (2001).

The conflict which the Union identifies arises only after *Krohe*'s definition of "catastrophic injury" is superimposed on PSEBA. No conflict exists among PSEBA as enacted by the General Assembly and the Ordinance as enacted by the city council. Compare Peoria Municipal Code § 2-350(b) (A 10), with 820 ILCS 320/10 (A 14-15). "Judicial gloss," as the Union calls it, produces the conflict. Union Br. at 45. But if that conflict is resolved by permitting *Krohe*'s definition of "catastrophic injury" to trump the City's legislative alternative achieved by local ordinance, then home rule powers would be judicially preempted, a practice the constitution does not contemplate and this Court has rejected. Ill. Const. 1970, art. VII, § 6; *Palm*, 2013 IL 110505, ¶ 34 ("We have consistently recognized that the home rule provisions of the Illinois Constitution are intended to eliminate or at least reduce to a bare minimum the circumstances under which local home rule powers are

preempted by judicial interpretation of unexpressed legislative intention.") Notably, the Union fails to identify a single case where judicial gloss on a statute preempted a parallel home rule enactment which, like the Ordinance, complemented plain statutory text.

The Union submits that PSEBA's home rule limitation prohibits any substantive legislation by home rule units concerning PSEBA. Union Br. at 36, 38, 40. Tellingly, PSEBA Section 20 is not drafted so broadly. 820 ILCS 320/20. If the General Assembly wished to preempt all substantive home rule legislation governing PSEBA benefits, it could easily have said so. Moreover, the General Assembly *had to* say so, specifically, to effectuate preemption, because Article VII, Section 6(i)—which PSEBA Section 20 expressly invokes—envisions concurrent state and home rule legislation unless "the General Assembly by law . . . specifically limit[s] the concurrent exercise or specifically declare the State's exercise to be exclusive." Ill. Const. 1970, art. VII, § 6(i).

PSEBA Section 20 does not specifically curtail the City from passing laws that impact PSEBA benefits or declare that such a task is solely within the General Assembly's domain. Again, it merely bars the provision of benefits "in a manner inconsistent with the requirements of this Act." 820 ILCS 320/20. The definitions in the City's Ordinance are consistent with the requirements of PSEBA as enacted by the General Assembly because they merely supplement PSEBA by defining terms which the statute leaves undefined. As such, the Ordinance facilitates the City's

provisions of PSEBA benefits and builds on the health coverage benefits guaranteed by the statutory framework.

3. The Cases the Union Relies on Are Distinguishable

The Union cites *Gaffney* in an attempt to show that home rule powers are limited. Union Br. at 36-37. But *Gaffney* did not involve a home rule government. Rather, the firefighters in *Gaffney* worked for fire protection districts and the powers of such local government units are limited by specific grants of authority bestowed by the General Assembly. *Id.* ¶¶ 39-45. This concept is known as Dillon's Rule. *E.g., Blanchard v. Berrios*, 2016 IL 120315, ¶ 47 n.2. Home rule flipped the presumptions of Dillon's Rule so that the power of home rule units—in contrast to non-home rule units of local government—emanate from the constitution itself and can be *limited* only when the General Assembly specifically says so via statute. *Id.* ("[T]he abrogation of 'Dillon's rule' was the whole point of the new home rule provision"); see also *People ex rel. Bernardi v. Highland Park*, 121 Ill. 2d 1, 11 (1988)("Home rule abrogates the restrictions of Dillon's Rule" by shifting the balance of power—not increasing government power overall).

Likewise, the Union's reliance on *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537 (1975) and *People ex rel. Lignoul v. City of Chicago*, 67 Ill. 2d 480 (1977) is misplaced because the Illinois Constitution expressly reserves for the State topics at issue in those cases. In *Ampersand*, this Court reasoned that the constitution contemplates "[o]nly one unified court system operating statewide" and so a county ordinance that required payment of a library fee to litigate in Cook County Circuit

Court did not pertain to the county's government and affairs. *Ampersand*, 61 Ill. 2d at 542-43. Similarly, *Lignoul* held that a home rule unit could not regulate branch banking, because the constitution "makes manifest that only the General Assembly may make branch banking possible." *Lignoul*, 67 Ill. 2d at 485.

Here, in contrast to *Ampersand* and *Lignoul*, the constitution does not identify PSEBA as a state, as opposed to local, matter. The constitution is silent on PSEBA or, more generally, on public employees' health coverage. It simply decrees that a home rule unit's government and affairs "includes the protection of the public health, safety, morals and welfare." Ill. Const. 1970, art. VII, § 6(a).

The Union also invokes *Stubhub*, which determined whether the City of Chicago could require internet auctioneers such as Stubhub and eBay to collect and remit to the city amusement taxes on tickets for athletic and entertainment events. The Court concluded that Chicago lacked home rule authority to place this obligation on internet auctioneers because the State had (1) a "vital interest" in regulating the then-emerging market of online ticket resales, and (2) "a traditionally exclusive role," or at least a "more traditional role" than Chicago, in collecting taxes from internet auctioneers. *Stubhub*, 2011 IL 111127, ¶¶ 25, 28-29, 35-36. *Stubhub* is distinguishable from the instant case because the then-novel business model employed by online auctioneers was uniquely suited to statewide regulation and the State had been the only government to regulate that new industry until Chicago decided to give itself a role by collecting taxes. *Id.* ¶¶ 28-36. Here, the administration and funding of PSEBA requires, and has traditionally and

predominantly depended on, local governments. As explained *supra*, the employment of firefighters rests entirely with local governments. That is, the City, unlike Chicago in *Stubhub*, "has a traditional role in solving the problem" of employing a fire department and any firefighters and ensuring that catastrophically injured firefighters retain health benefits. *Id.* ¶ 35.

Bernardi is likewise distinguishable. The issue in *Bernardi* was whether home rule units must comply with the Illinois Prevailing Wage Act. The City of Highland Park had ignored the Prevailing Wage Act in soliciting bids for a public works project, claiming that home rule powers allowed suspension of the statute. *Bernardi*, 121 Ill. 2d at 4-5. The Illinois Department of Labor, the state agency that enforces the Prevailing Wage Act, sued Highland Park for refusing to follow state law. *Id.* at 4. This Court held that Highland Park's departure from the statute is not a matter of local concern, explaining that departure from prevailing wage requirements exceeded home rule authority because it directly impacts matters and persons outside of Highland Park's territorial limits. *Id.* at 12-16. Specifically, *Bernardi* reasoned this:

> Allowing a single municipality in Lake County to avoid its obligations under the prevailing wage law will have a direct impact upon wages paid workers on public works projects at least throughout the county. The prevailing wage is determined solely by reference to wages paid on public works [and] so the reduced wages for public works in Highland Park could profoundly depress the prevailing wage in Lake County and thereby reduce earnings of workers outside the home rule unit.

Id. at 13.

Unlike for wages, no prevailing-benefit law exists in Illinois. The Department of Labor tracks wages across localities, but no governmental entity does the same for health benefits nor does the State have a designated enforcer to ensure that health benefits for all firefighters in the state do not fall below certain levels, as is the case with prevailing wages. As stated *supra*, the Ordinance applies only within the City's functional limits. Nothing in this record suggests that the City's definitions will jeopardize PSEBA as enacted or other state laws designed to compensate injured public servants extraterritorially.

The Union and its *amici* make much of the State's olio of laws offering various benefits to injured public employees. But this Court's jurisprudence is clear: "The fact that the [S]tate has occupied some field of governmental endeavor . . . is not in itself sufficient to invalidate the local ordinances." *Palm*, 2013 IL 110505, ¶ 42. To limit home rule power, the General Assembly must legislate with precision. *Id.* ¶ 43. Even "[c]omprehensive legislation that conflicts with an ordinance is insufficient to limit or restrict home rule authority." *Id.* Here, the State's amalgamation of laws protecting injured public servants does not even conflict with the Ordinance and so cannot upend its definitions.

4. The Patchwork which the Union and Its *Amici* Lament Already Exists

The Union and its *amici* complain that upholding the Ordinance's definitions could result in a patchwork of PSEBA requirements statewide. But home rule hinges on the premise that local problems are best solved through local solutions, a practice that may well produce a quilt of rules tailored to local

preferences and needs. *Schillerstrom*, 198 Ill. 2d at 286. So the "geographic checkerboard," which *amici* lament, is inherent in the design of the constitution's home rule provisions. Compare Amici Curiae Br. of Associated Firefighters of Illinois and Illinois AFL-CIO at p. 27, with Ill. Const. 1970, art. VII, § 6.

Besides, the patchwork already exists. Firefighters across Illinois are employed in all sorts of ways. They work for rural fire protection districts, sometimes as unpaid volunteers, for home rule units as paid employees and also for non-home rule units of government that include townships, airport authorities, colleges and universities. *See e.g.,* 70 ILCS 705/1 & 6; 60 ILCS 1/85-13(a)(1)(A); 65 ILCS 5/11-6-3. Illinois law leaves it to local governments to decide whether to have a fire department at all, 65 ILCS 5/11-6-1, and that is reflected in communities, such as Northfield, where public works employees double as firefighters. In the Village of Glencoe, the Public Safety Department employs officers who are all cross-trained as police officers, firefighters and first responders to medical emergencies, an efficiency that the village touts "allows [it] to provide a high level of emergency services to the community at a reduced cost when compared to municipalities utilizing traditional, separate police, fire and emergency medical components."[2] Furthermore,

[2] The City encourages this Court to take judicial notice of Northfield's and Glencoe's public websites which best describe those municipalities' respective decisions on the employment of their firefighting personnel. See https://www.northfieldil.org/149/Departments & https://www.villageofglencoe.org/government/departments/public_safety/index.php (last visited August 25, 2021); *Kopnick v. JL Woode Management Co.*, LLC, 2017 IL App (1st) 152054, ¶ 26 ("Information on the municipality's public website is subject to judicial notice.")

firefighters who serve communities with populations of less than 5,000 are enrolled in the Illinois Municipal Retirement Fund. See 40 ILCS 5/4-141.

The State has little say on this plethora of choices regarding whether, and how, firefighters are employed. Such decisions are made on the local level. In short, the terms of firefighters' employment, including access to PSEBA benefits, primarily pertain to local, as opposed to state, government and affairs.

5. Conclusion

The Illinois Constitution decrees that the "[p]owers and functions of home rule units shall be construed liberally." Ill. Const. 1970, art. VII, § 6(m). That overarching command when coupled with the City's extensive role in providing PSEBA benefits, the lack of statutory language specifically prohibiting home rule regulation of PSEBA eligibility and the constitution's drafters' aversion to judicial preemption decidedly tip the scale in the City's favor in this case of first impression. Therefore, this Court should, reverse the Third District Appellate Court's decision and declare that the Ordinance and its definitions constitute a valid exercise of the City's home rule powers.

Respectfully submitted,

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SUPREME COURT RULE 341(C) CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 14 pages.

/s/ *Esther J. Seitz*

CERTIFICATE OF SERVICE

I, Esther J. Seitz, attorney for Defendant-Appellant, hereby certify that I caused to be electronically filed and served the foregoing Reply Brief of Defendant-Appellant with the Clerk of the Supreme Court of Illinois, and that I caused one copy to be served on the attorneys listed below via email, on August 25, 2021:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Esther J. Seitz
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