

In the State of Michigan
Michigan Supreme Court

Appeal from the Court of Appeals
Hoekstra, Wilder, and Zahra

CITY OF DETROIT, A MUNICIPAL CORPORATION,)	Supreme Court No. 132329
Plaintiff-Appellee,)	Court of Appeals No. 257415
)	Circuit Court No. 01-106546
v.)	
)	
AMBASSADOR BRIDGE COMPANY)	
A/K/A, DETROIT INTERNATIONAL)	
BRIDGE COMPANY, <i>ET AL.</i> ,)	
Defendants-Appellants.)	

**REPLY BRIEF FOR APPELLANT
AMBASSADOR BRIDGE COMPANY**

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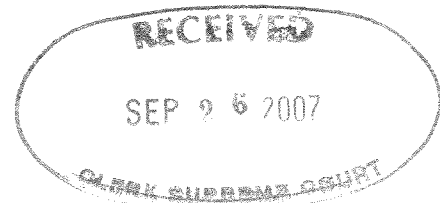


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PRELIMINARY STATEMENT

The City of Detroit and its amici ignore crucial findings of the Circuit Court, among them that severe traffic congestion on the bridge was costing “businesses money” (App 479a) and that the federal government, through GSA, “has asserted its control over the property within the complex.” (App 476a).

These and like findings establish that the City’s attempt to veto the relocation project constitutes an unreasonable interference with foreign commerce subject to federal control and preemption. While the City’s brief attempts to relitigate the facts through selectively chosen snippets of testimony from the four-week trial, the City ignores that the Circuit Court found the City’s evidence unpersuasive and ruled against it. (App 482a). The City has not come close to showing that the Circuit Court’s findings were clearly erroneous, the standard it must meet in this Court. Nor has the City demonstrated any good reason for this Court to disturb the Circuit Court’s finding that the City’s arguments on the role of the federal agencies “present a far too narrow view of bridge operations and ignore not only the practical realities of the required inter-relationship between DIBC and federal agencies at work on the bridge complex but also the substantial control exercised by the federal government within the compound.” (App 483a).

The Circuit Court’s findings of fact also underscore that interests at stake are of broader statewide and national significance than the parochial concerns which spawned the City’s intransigence relative to the Bridge improvements. As the Circuit Court found, “There are numerous federal purposes or objectives achieved by operation of the bridge” and “[t]he Federal Government exercises a substantial degree of control and involvement with DIBC” in facilitating the flow of international traffic across the Bridge. (App 477a-478a). The Ambassador Bridge is the busiest commercial crossing in North America and a crucial link for U.S. industry and more specifically for Michigan’s auto industry. (App 58a). More than a quarter of all trade between

the US and Canada flows over the bridge – an estimated \$1 billion daily. (App 58a, 87a).

General Motors alone depends on 600 trucks per day arriving from Canada across the Bridge to support its “just in time” deliveries to assembly operations in Michigan. (App 88a, 91a, 381a); *see Parks, The U.S. Canada Smart Border Action Plan*, 10 L. & Bus. Rev. Am. 395, 399 (2004).

Contrast the critical role of the Bridge to Michigan businesses with the City’s unproven allegations of increased traffic, noise and pollution, allegations which the Circuit Court found were “not supported by competent, material and substantial evidence on the record[.]” (App 503a). Were such concerns allowed to trump the Bridge-related improvements that DIBC planned, and that federal agencies reviewed and approved, the adverse economic implications of the City’s actions to the state and nation would have been enormous.

ARGUMENT

The unique nature of the Ambassador Bridge, along with the nation’s dependence on it, is a theme that runs through the Circuit Court’s decision. The Circuit Court ultimately concluded that DIBC was “a federal instrumentality to the extent that it is involved in managing and facilitating the timely and efficient flow of vehicular traffic in and out of the bridge complex.” (App 471a, 473a). The Circuit Court was correct.

Presumption Against Preemption. A cornerstone of the City’s brief is its contention that state law is presumed not to be preempted “unless that was the clear and manifest purpose of Congress.” City Br 14-15, 18, 22. The City is mistaken for at least two reasons.

First, the City’s argument falls victim to the same legal error committed by the Court of Appeals – conflict preemption is a function of *implied* congressional intent which turns on the identification of an actual conflict with federal law or federal objectives, rather than from an express congressional intent to displace state law. *See* DIBC Br 23-24. That being so, no

presumption against preemption exists because the preemption flows directly from the Supremacy Clause, rather than analysis of congressional intent. *See Irving v Mazda Motor Corp*, 136 F3d 764, 769 (CA 11, 1998) (“[W]hen considering implied preemption, no presumption exists against preemption.”). “The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.” *Free v Bland*, 369 US 663, 666; 82 S Ct 1089, 1092 (1962).

Moreover, the presumption “is not triggered when the State regulates in an area where there has been a history of significant federal presence.” *United States v Locke*, 529 US 89, 108; 120 S Ct 113; 146 L Ed 2d 69 (2000). Here, the history of “significant federal presence” reaches back to the Ambassador Bridge Authorization Act, 41 Stat 1439 (1921) (granting authority to build, operate and maintain bridge); *see also* 33 USC §§ 491, 535 (requiring federal approval to change bridge or its approaches). “The Federal government is interested in [the bridge] by virtue of its constitutional authority over navigation, interstate and foreign commerce and post roads.” *Detroit Int’l Bridge Co v Am Seed Co*, 249 Mich 289, 298; 228 NW 791, 794 (1930).

Transportation is an area of historical federal interest, but foreign commerce is even more imbued with federal control. *See* U.S. Const. art. I, § 8; *Japan Line, Ltd v County of Los Angeles*, 441 US 434, 448; 99 S Ct 1813, 1821 (1979). The unique federal interests weigh *in favor* of preemption. *See Boyle v United Tech. Co.*, 487 US 500, 505; 108 S Ct 2510, 2514 (1988) (“The fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can.”). “Any concurrent state power that may exist is restricted to the narrowest of limits.” *Hines v Davidowitz*, 312 US 52, 68; 61 S Ct 399, 404 (1941).

Federal Goals and Regulatory Scheme. The Circuit Court found, and the Court of Appeals agreed, that “the bridge was constructed for the purpose of facilitating interstate and international commerce.” (App 471a, 494a). The City does not contest this finding. The Bridge serves national interests and not just the parochial interests of local communities in its vicinity.

The City argues that “DIBC cannot point to one federal regulation or statute that regulates the construction projects.” City Br 15; Amici Br 16, 20.¹ But the City ignores that Customs pointedly told DIBC in one letter: “Customs cannot authorize the relocation of these toll booths until we have had the opportunity to thoroughly review your detailed proposal and related site plans.” (App 39a). Customs further explained: “In addition, Customs will need other affected Federal agencies to review your toll booth relocation proposal for potential impact on their operations at the Ambassador Bridge.” *Id.* On July 11, 2000, the GSA wrote to DIBC in which it made clear that “[t]he Government asserts that it has an interest in this property because of its obligation to safeguard U.S. Customs Operations . . .” (App 45a). The Circuit Court found that GSA, through letters to DIBC, asserted control over *these* projects. (App 476a).

The City’s brief suggests that these directives are not compulsory because they are embodied in informal letters. *See* City Br 6. However, federal agencies often use informal means – including letters, advisory opinions, industry guides and other methods – to secure adherence to their policies. *See United States v. Mead Corp.*, 533 US 218, 236; 121 S Ct 2164, 2176; 150 L Ed 2d 292, 310 (2001). Cognizant of this, courts have repeatedly found conflict preemption based on actions other than rulemaking, such as informal letters. *See Geier v American Honda Motor Co*, 529 US 861, 884-85, 120 S Ct 1913; 146 L Ed 2d 914 (2000)

¹ The City cites to a 1927 municipal ordinance that contemplates the exercise of local safety and health regulation with regard to the Ambassador Bridge. *See* Br 21; *see also* App 490a. This argument leads nowhere. An ordinance cannot trump the application of federal law.

("[T]he Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists."); *Dowhal v Smithkline Beecham Consumer Healthcare*, 12 Cal Rptr 3d 262; 88 P3d 1, 9-10 (Cal 2004) (finding preemptive intent in an FDA letter establishing its policy regarding FDA approved nicotine warnings); *Bank of Am v City of San Francisco*, 309 F3d 551, 563-64 (CA 9 2002) (conflict preemption based on reading of national bank powers set forth in "amicus brief" and "two interpretative letters").

Moreover, the trial court found that "in practice on a day-to-day basis there is a strong and substantial level of Federal control and involvement with the DIBC within the Bridge Complex." (App 474a). This federal control is required for border security reasons. (App 474a-475a). The City concedes that the federal government follows local ordinances within the Bridge Complex as a matter of comity, but is not legally bound by them. *See* City Br 20-21; *see also* App 227b. DIBC tried to comply with the zoning laws, but the City refused to issue a permit. *See US v City of Berkeley*, 735 F Supp 937, 940 (ED Mo 1990) (city may not halt construction of airport facility by demanding compliance with its building code). A statute cited by the City, 40 USC § 619, merely calls for the GSA to take into consideration the zoning laws of state or local authorities in constructing or altering a federal building. It provides no support for the notion that a non-proprietor municipality can use its police powers to halt a federally-approved relocation project involving the flow of foreign commerce within the Bridge Complex.

The City's confusion continues when it asserts that this case "does not involve the construction of the Ambassador Bridge or even a portion of it." City Br 24. The Bridge is defined, by statute, to include the bridge structure and all of its approaches. *See* DIBC Br 2-3; *see also Detroit Int'l Bridge*, 249 Mich at 299; 228 NW at 795. The City also asserts that the "project took place on property outside the existing bridge plaza." City Br 2. However, the

Circuit Court explicitly found that the project was within the Bridge Complex. (App 454a-455a). Its order encompasses only property within the Bridge Complex. (App 10a, 454a-455a, 485a).

The City's brief repeatedly refers to DIBC's private for-profit status. *E.g.*, City Br 1-3, 5, 16, 23, 35. The character of DIBC's ownership is not determinative of federal preemption. *See* DIBC Br 38. By analogy, the Supreme Court has preempted local safety laws as applied to all airports without regard to their public and private character. *See City of Burbank v Lockheed Air Terminal*, 411 US 624; 93 S Ct 1854 (1973) (cited at Amici Br 15-16). Given the Bridge's federal purpose in facilitating interstate commerce, the same outcome is warranted here.

Interference/Obstacle. The City repeatedly suggests that an irreconcilable conflict between federal law and local law must exist for preemption to apply. *E.g.*, City Br 22 (“Compliance with the building code and the managing traffic matters ... is not a physical impossibility.”); *see id.* at 15, 19, 24, 25. This overstates the law.

Conflict preemption arises when local law, although not literally irreconcilable with federal law, nevertheless frustrates or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Geier*, 529 US at 886; S Ct at 1921 (state regulation of transportation *safety* standards in conflict with federal objective); *Hines v Davidowitz*, 312 US at 67 n.20; 61 S Ct at 404 n.20. The City's actions would have precisely this consequence. The City's zoning ordinance was used to delay DIBC from timely responding to the critical traffic congestion on the Bridge; but for DIBC's federally-approved actions (upheld by the Circuit Court) it would have prevented DIBC from making any response.

The Circuit Court found that the City “interfere[d] with” and “create[d] a legally unacceptable conflict with the DIBC's performance ... in the furtherance of international/interstate commerce over the Ambassador Bridge.” (App 484a). The trial court

made extensive findings of fact on this issue, including that the traffic congestion was a major problem and that “DIBC proposed construction will have a positive impact on traffic flow and reduce delays for traffic at the bridge.” (App 481 a).

The briefs of the City and its amici essentially ignore the adverse findings and proceed as if they can reargue the facts to this Court. Such an approach is, of course, doomed in an appellate tribunal. This Court does not sit as a fact finder in the first instance, but rather reviews the trial court’s factual findings for clear error. *See* DIBC Br 13-14. “This is especially true where the testimony at trial is in sharp conflict and the judge had the advantage of seeing and hearing the witnesses.” *Sturgis Sav & Loan Ass’n v. Italian Village, Inc*, 81 Mich App 577, 581; 265 NW2d 755, 757 (Mich App 1978). The City’s brief does not even attack the evidence relied upon by the Circuit Court; it simply cites other evidence in the record that could support a different finding. This is not plainly sufficient to meet their burden.

The City and its amici rely heavily on the testimony of Donald Melcher, a GSA architect, and Kevin Weeks, a U.S. Customs employee. City Br 5, 23; Amici Br 25. The trial court, however, considered their testimony and found it insufficiently persuasive: “while there was some testimony from Mr. Weeks and Mr. Melcher that the City’s refusal to allow DIBC’s three projects to go forward would not effect the work of federal agencies on the bridge plaza, the City presented insufficient evidence to rebut the showing by DIBC that these projects are designed to facilitate the efficient movement of traffic on the bridge and its approaches.” (App 482a).

The trial court’s finding was not clearly erroneous. Mr. Melcher admitted that DIBC had primary responsibility for facilitating the traffic flow. (App 482a). He added that GSA was concerned that DIBC’s project would not completely resolve the congestion on the bridge. (App 105b). Upon questioning from the trial judge, Melcher admitted that DIBC’s proposal on paper

showed improvements would be made, but Melcher was not “convinced that it would flow without problems.” (Tr 73-75). As the trial court explained, “[w]hile the impact may not be as great as other measures, the Court is satisfied that these projects will contribute in a positive way to reduce traffic delays at the bridge.” (App 481a-82a). The court emphasized that DIBC was responsible for the flow of traffic, not GSA or Customs. (App 482a).

The City also makes much of past litigation between the federal government and DIBC. City Br 42-43. But a proposed 1991 settlement agreement shows that the Bridge is a federal-private partnership. The federal government (through GSA) and DIBC agreed to expand the Bridge facility, only allowing the City to “comment” on their plan. (App 36b-37b). Several provisions highlighted federal control: the Attorney General would have to approve; DIBC would need a GSA license to operate traffic equipment; and Congress would have to approve the return of DIBC’s land were the Bridge no longer to be a border crossing. (App 64b, 51b, 56b).

Further, DIBC has not abandoned field preemption, as the City claims. City Br 18. DIBC concurs with the Circuit Court’s finding that Congress has “occup[ied] the field of regulation with respect to the Ambassador Bridge, its approaches and accessory works.” (App 485a). The predicates for field preemption are illustrated by the same facts and circumstances that give rise to conflict preemption in this case.

Local Police Powers. The City emphasizes the relative importance of its own building zoning laws. However, federal objectives cannot be “thwarted by local fiat.” *Don’t Tear It Down v Pennsylvania Ave. Dev. Corp.*, 642 F2d 527, 534 (DC CA, 1980). “[A]ny state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.” *Free*, 369 US at 666 (emphasis added); see also *Gade v Nat’l Solid*

Wastes Mgmt Ass'n, 505 US 88, 108; 112 S Ct 2374, 2388 (1992) (noting that a state law that conflicts with federal law must yield even if it is a public health and safety law).

The Circuit Court found “strong indications” that the City was “motivated by forces and/or considerations other than the public health, safety and wealth.” (App 485a). The concerns about adverse community impact were never substantiated. The City relies heavily upon the arguments attorney Steve Tobocman, but an advocate’s arguments are not evidence. City Br 9, Residents’ testimony formed the basis for the BZA’s decisions denying DIBC’s variance request. The Circuit Court later reversed because they were “not supported by competent, material and substantial evidence on the record[.]” (App 503a).

Federal Instrumentality. The analysis above also establishes that DIBC is a federal instrumentality “to the extent that it is involved in managing and facilitating the timely and efficient flow of vehicle traffic in and out of the bridge complex.” (App 483a-84a). As the Circuit Court explained, DIBC is responsible for “a uniquely federal activity” and subject to government control, making it a federal instrumentality. App 478a. DIBC, not the government, controls traffic over the Bridge and facilitates commerce. (App 378a; 386-87a; 408-09a). DIBC is also subject to extensive federal control and oversight. DIBC can be an instrumentality for some but not all purposes. *See Name.Space, Inc v Network Solutions, Inc*, 202 F3d 573, 581-82 (CA 2, 2000) (conduct-based immunity); *Paslowski v Standard Mortgage Corp*, 129 F Supp 2d 793, 802 n.12 (WD Pa 2000) (“an entity simultaneously can be a federal instrumentality for some purposes but not a federal agency or entity for others”).

The City attacks the Circuit Court’s conclusion in two ways. First, it argues as if DIBC were claiming blanket federal instrumentality status, leading it to dwell on the myriad tests for determining whether an entity is a federal instrumentality. *Mt Olivet Cemetery v Salt Lake City*,

164 F3d 480, 486 (CA 10, 1998); *Lewis v United States*, 680 F2d 1239, 1242 (CA 9, 1982). This Court does not need to untangle this case law. The City's attempt to stop the reconfiguration of the toll plaza using its zoning laws impermissibly interferes with DIBC's execution of a "unique federal activity," namely securing the flow of interstate commerce. Under any federal instrumentality test, DIBC is exempt from City zoning control.

Second, the City cites cases in which private entities were held not to be federal instrumentalities. Most involve the Federal Tort Claims Act, which requires a narrow test that is not applicable here.² *Kuntz v Lamar Corp.*, 385 F3d 1177, 1185 (CA 9, 2004). The other cases support DIBC's argument that it can be a federal instrumentality in one context but not another. *Lewis*, 680 F2d at 1242; *Mendrala v Crown Mortgage*, 955 F2d 1132, 1139 (CA 7, 1992).

If the City had legitimate zoning concerns here, it could have shared these with GSA, which is obligated to "consider" them. (App 277b). However, DIBC cannot serve the federal government, Michigan business, or the traveling public if it gets caught in a Catch-22 of inconsistent mandates: Customs legitimately narrows traffic improvement options for security reasons, and the City uses its zoning laws to eliminate the rest. The result would be gridlock of one of the busiest international border crossings in the world. Confirming that DIBC is a federal instrumentality with respect to the matters at issue here would avoid this outcome.

CONCLUSION AND REQUEST FOR RELIEF

The Court should vacate the Court of Appeal's judgment and affirm the decision of the Circuit Court.

² In addition to *Lewis*, *Kuntz*, and *Mendrala*, *supra*, the City cites the following FTCA cases: *Logue v United States*, 412 US 521; 93 S Ct. 2215 (1973); *Pearl v United States*, 230 F 2d 243 (CA 10, 1956); *United States v Orleans*, 425 US 807; 96 S Ct 1971 (1976).

DATED this 25th day of September, 2007.

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