IN THE MISSOURI SUPREME COURT

SUPREME COURT NO.: SC94085

EASTERN DISTRICT NO.: ED99787

21st CIRCUIT NO: 12SL-MU01295

CITY OF MOLINE ACRES, MISSOURI, APPELLANT

v.

CHARLES W. BRENNAN, RESPONDENT

Appeal from the Circuit Court of the County of St. Louis
21st Circuit, Division 32
Associate Circuit Judge The Honorable Mary B. Schroeder

SUBSTITUTE BRIEF OF RESPONDENT CHARLES W. BRENNAN

Respectfully Submitted,

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STATEMENT OF FACTS

The City of Moline Acres' speed camera system caught a car going 56 in a 45 on State Highway 367, a portion of which is within the City limits, L.F. 19. The City sent the car's owner, Charles Brennan, a Notice of Violation, L.F. 19. He transferred the case to Circuit Court and filed a Motion to Dismiss Based on Defect in the Prosecution, L.F.6. The court granted the Motion. After opinion, this court accepted transfer.

The charged offense is that the owner permitted the car to have been operated at greater than 10 miles over the posted limit, and the speeding was caught by a camera, Ord., § B, L.F. 22.

The City has no clue about who was driving, Appellant's Substitute Brief, 1.

The fine for a violation is $124, stipulated, L.F. 32. The Ordinance says no one can be jailed, L.F. 24, but the City says the Defendant can be charged with Failure to Appear if he fails to show up in court, Appellant's Substitute Brief, p. 6, and L.F. 25.

The Ordinance is silent as to whether points are to be assessed, L.F. 21. The Notice of Violation, L.F. 19, however, states: "No points will be assessed against your driver's license", upper right corner under "Public Safety Violation".

During the hearing on Defendant's Motion to Dismiss the Judge stated, Tr. 27, "but there [are] no points connected with this charge", and the City did not disagree.

Slightly later in the hearing, in a colloquy with counsel, Tr. 29-30, the City attempted to distinguish the ordinance from parallel state statutes by noting the disparate treatment between tickets originating with live officers - which carry points, and tickets originating with cameras - which carry no points.

RESPONDENT'S ARGUMENT

STANDARD OF REVIEW

Brennan agrees with the City that the Statement of Review is *de novo*, because all issues are of law –not of fact. ***State v. Plastec,*** 980 S.W.2d 152, 154 (Mo. App. 1998).

RESPONSE TO POINT 1: POINTS

Context

This is the second camera case to come before this court, the first being ***City of Springfield v. Belt,*** 307 S.W. 3d 649 (Mo. banc 2010). In the Court of Appeals most of the traffic camera cases have involved red lights. This camera case, however, is about speeding. Also, in most of the Court of Appeals camera cases the City has been prosecuting the car's operator. In this case, however, the city is prosecuting the car's owner.

Further, while this court owes no deference to the Missouri Courts of Appeals, the many opinions of the Court of Appeals in recent times surely are worthy of consideration in analyzing the legal issues involved. Thus, while Brennan will try to base his analysis on the authority of statutes and the opinions of this court, Brennan will also liberally quote from the recent Court of Appeals cameras cases and the other Court of Appeals decisions cited therein.

As an additional note of context, Brennan notes that the City writes at page 12:

> Inexplicably, the Eastern District in ***Brunner***, [another camera case], began its opinion by commenting "[t]his is yet another challenge to the validity

> and constitutionality of a municipal ordinance governing what are commonly referred to as 'red light camera enforcement systems' and we take another hike through a legal and unfortunately, political minefield."

Brennan does not find the Court of Appeals reference to an "unfortunately, political minefield" to be "inexplicable". To the contrary, this Court may take judicial notice that over the last several years many politically powerful Missourians have been pumping and pushing to keep camera tickets legal, whether for a sweet and innocent desire to save people from property damage and/or personal injuries, or mere revenue generation.[1] On the other side, from the public's perspective, based on Brennan himself and his counsels' endless conversations with citizens about these tickets, this Court may take judicial notice that the public absolutely despises these tickets, because the public believes that George Orwell was correct in his book *1984*, and it is just a bad idea for the government to be taking pictures of cars and using the photos to prosecute car owners for what are mostly technical violations of the driving laws – perhaps as a mere money grab. Such conduct is ill suited to a people laying its government's "Foundation on such Principles, and organizing its powers in such Form, as to them shall seem most likely to effect their

[1] *See* Editorial, St. Louis Post Dispatch (Feb. 12, 2014), *available online at* http://www.stltoday.com/news/opinion/editorial-traffic-camera-conundrum-is-now-officially-ridiculous/article_2ba76d35-6a92-5132-b7c3-58e5fa9830a4.html ("The only proven beneficiaries [of camera tickets] are city treasuries, a company in Arizona and the political operatives they hire to lobby government officials").

Safety and Happiness". Nevertheless, this court must, of course, resolve this case pursuant to law, and not pursuant to political or ideological forces.

What the Statutes Say

Brennan suggests that the relevant parts of the relevant statutory sections are as follows, in numerical order.

RSMo. 301.010, contains definitions, and subsection 12 defines moving violations:

> "Moving violation", that character of traffic violation where at the time of violation the motor vehicle involved is in motion, except that the term does not include the driving of a motor vehicle without a valid motor vehicle registration license, or violations of sections 304.170 to 304.240, RSMo, inclusive, relating to sizes and weights of vehicles;

RSMo. 302.302.1, creates the point system:

> The director of revenue shall put into effect a point system for the suspension and revocation of licenses. Points shall be assessed only after a conviction or forfeiture of collateral. The initial point value is as follows:
>
> (1) Any moving violation of a state law or county or municipal or federal traffic ordinance or regulation not listed in this section, other than a violation of vehicle equipment provisions or a court-ordered supervision as provided in section 302.303 2 points.

RSMo. 302.225.1, requires reporting of points by a municipality to the Director of Revenue:

Every court having jurisdiction over offenses committed under sections **302.010 to 302.780**, or any other law of this state, or county or municipal ordinance, regulating the operation of vehicles on highways or any other offense in which the commission of such offense involves the use of a motor vehicle, including felony convictions, shall, within seven days thereafter, forward to the department of revenue, in a manner approved by the director of the department of public safety a record of any plea or finding of guilty of any person in the court for a violation of sections **302.010 to 302.780** or for any moving traffic violation under the laws of this state or county or municipal ordinances. The record related to offenses involving alcohol, controlled substances, or drugs shall be entered in the Missouri uniform law enforcement system records. The director of revenue shall enter the conviction information into the appropriate computer systems and transmit the conviction information as required in **49 CFR Part 384**, or as amended by the Secretary of the United States Department of Transportation. The record of all convictions involving the assessment of points as provided in section **302.302** and convictions involving a commercial motor vehicle as defined in section **302.700** furnished by a court to the department of revenue shall be forwarded by the department of revenue within fifteen days of receipt to the Missouri state highway patrol. The record related to offenses involving alcohol, controlled substances, or drugs, or in which the Missouri state highway patrol was the arresting

agency shall be entered into the Missouri uniform law enforcement system records.

RSMo. 304.009, makes speeding by five miles per hour or less an infraction and prohibits the assessment of points

1. Notwithstanding the provisions of section **304.010**, a speeding violation of section **304.010** which is over the posted speed limit by five miles per hour or less is an infraction.
2. No points shall be assessed pursuant to section **302.302** for any speeding violation which is over the posted speed limit by five miles per hour or less.

RSMo. 304.010, allows municipalities to regulate the speed limits within their corporate limits, and makes operation of a vehicle in violation of such speed limits a C misdemeanor.

4. Notwithstanding the provisions of section 304.120 or any other provision of law to the contrary, cities, towns and villages may regulate the speed of vehicles on state roads and highways within such cities', towns' or villages' corporate limits by ordinance.
11. Any person violating the provisions of this section is guilty of a class C misdemeanor, unless such person was exceeding the posted speed limit by twenty miles per hour or more then it is a class B misdemeanor.

RSMo. 304.120.3, requires municipal ordinances to be consistent with chapter 304:

> No ordinance shall be valid which contains provisions contrary to or in conflict with this chapter…

RSMo. 304.151.1, requires drivers, except those in serious accidents, not to obstruct traffic:

> Except in the case of an accident resulting in the injury or death of any person, the driver of a vehicle which for any reason obstructs the regular flow of traffic on the roadway of any state highway shall make every reasonable effort to move the vehicle or have it moved so as not to block the regular flow of traffic.

RSMo. 304.271.1, requires drivers to obey traffic signals:

> The driver of any vehicle shall obey the instructions of any official traffic-control device applicable thereto placed in accordance with the provisions of the law.

RSMo. 304.281.1(3), requires drivers to stop at red lights:

> (a) Vehicular traffic facing a steady red signal alone shall stop before entering the crosswalk on the near side of the intersection at a clearly marked stop line but, if none, then before entering the intersection and shall remain standing until an indication to proceed is shown except as provided in paragraph (b);

(b) The driver of a vehicle which is stopped as close as practicable at the entrance to the crosswalk on the near side of the intersection or, if none, then at the entrance to the intersection in obedience to a red signal, may cautiously enter the intersection to make a right turn but shall yield the right-of-way to pedestrians and other traffic proceeding as directed by the signal at the intersection, except that the state highways and transportation commission with reference to an intersection involving a state highway, and local authorities with reference to an intersection involving other highways under their jurisdiction, may prohibit any such right turn against a red signal at any intersection where safety conditions so require, said prohibition shall be effective when a sign is erected at such intersection giving notice thereof.

The Straightforward Points Analysis

The "points issue" is actually quite simple, as explained by the trial court in its two page opinion, L.F. 32. The above statutes require the assessment of points for moving violations, that is, when a local jurisdiction obtains a conviction for a moving violation the Department of Revenue must assess points. "The point system is not discretionary", ***Penn v. Director of Revenue,*** 937 S.W.2d 407, 408 (Mo. App. 1997).

Moline Acres' Ordinance for camera tickets does not assess points. (See statement of facts indicating that counsel for the City took the position that the City does not assess points. The City cannot walk that back now, see citations below). **Rule**

71.010 requires that municipal ordinances conform to state law. ***State v. Ostdiek***, 351 S.W.3d 758, 766 (Mo App. 2011) stated that the state speeding Ordinance, **RSMo. 304.010** "does not proclaim that a municipal ordinance regulating speed limits within a city, town or village renders state law devoid of application." The prosecution of Brennan under the Ordinance therefore fails, and this court should affirm the dismissal by the trial court.

Brennan notes that when the trial court released its opinion in this case the Court of Appeals in ***City of Creve Coeur v. Nottebrok***, 356 S.W.3d 252 (Mo App. E.D. 2011), since overruled by that court, see citations in this paragraph below, had recently concluded that the Creve Coeur red light camera ticket Ordinance would survive because it penalized being "present" in the intersection when the light was red instead of moving into the intersection when the light was red, and so the Creve Coeur Ordinance did not penalize a "moving violation". That was why the trial court here noted that in this case the charge was speeding, not violation of a red light, and wrote: "It would seem impossible and a violation of the laws of physics to have speed without motion". The Eastern District later elected to right themselves of the "present in the intersection" theory with the new statement: "Common sense and collective experience suggest that a person cannot fail to stop at a red light without being in motion", ***Unverferth .v City of Florissant***, 419 S.W.3d 76, 98 (Mo App. 2013), and ***Edwards v. City of Ellisville***, 426 S.W.3d 644, 664 (Mo. Ct. App. 2013). Those cases overruled ***Nottebrok***.

The Court of Appeals laid out the statutory logic surrounding the points issue in ***Brunner v. City of Arnold***, 427 S.W.3d 201, 229 (Mo. Ct. App. 2013):

> **RSMo. 302.225** requires that courts report any moving violation offenses to the Department of Revenue within seven days of any plea or finding of guilty. *See* Section **302.225.1**. Section **302.010(13)** plainly defines a "moving violation" as the character of traffic violation where at the time of violation the motor vehicle involved is in motion. Section **302.302.1(1)** requires the Department of Revenue to assess two points against the driver's license of any person convicted of a moving violation. ***Edwards v. City of Ellisville***, 426 S.W.3d 644, 664 (Mo. Ct. App. 2013). Thus, the plain language of Missouri state law requires any municipal ordinance violation occurring while the vehicle is in motion be assessed two points by the director of revenue. ***Unverferth .v City of Florissant***, 419 S.W.3d 76 (Mo App. 2013).

In the Court of Appeals opinion from this matter, ***City of Moline Acres v. Brennan,*** ED99787, 2014 WL 295050 (Mo. Ct. App. Jan. 28, 2014), the court used opinions from this court to describe the test for the analysis of a municipal ordinance:

> In Missouri a municipal ordinance is void if it conflicts with the general laws of the state. ***McCollum v. Dir. of Rev.,*** 906 S.W.2d 368, 369 (Mo. banc 1995). Further, no ordinance shall be valid which contains provisions contrary to or in conflict with the state's traffic regulations. **Section 304.120.3, RSMo. 2000**. The test for determining if a conflict exists is whether the ordinance permits what the statute prohibits or prohibits what the statute permits. ***Cape Motor Lodge, Inc. v. City of Cape Girardeau,***

706 S.W.2d 208, 211 (Mo. banc 1986) (quoting ***Page Western, Inc. v. Cmty. Fire Protection Dist.,*** 636 S.W.2d 65, 67 (Mo. banc 1982)). The ordinance may supplement a state law, but when the expressed or implied provisions of each are inconsistent and in irreconcilable conflict, then the statute annuls the ordinance. ***Miller v. City of Manchester,*** 834 S.W.2d 904, 907 (Mo.App.E.D.199 2) (citing ***Page Western, Inc.,*** 636 S.W.2d at 67). (Internal quotation marks omitted).

In ***Brunner*** the court also explained that a municipal court has no jurisdiction even to adjudicate a prosecution under a void law:

> The effect of the ordinance being in violation of the state statute is that the ordinance is 'void and unenforceable ab initio. ***Levinson v. City of Kansas City,*** 43 S.W.3d 312, 320 (Mo.App. W.D.2001) (quoting ***Armco Steel v. City of Kansas City,*** 883 S.W.2d 3, 7 (Mo. banc 1994)). Thus, a void ordinance is equivalent to none at all, thereby rendering all court proceedings transpiring under said ordinance void as well. ***City of St. Louis v. Handlan,*** 145 S.W. 421, 423–24 (1912) ("a void ordinance is equivalent to none at all; and that where a court proceeding cannot go on without an ordinance ... a valid one is essential to the court's jurisdiction ") (emphasis added) (the Supreme Court of Missouri could not reach other points on appeal because the ordinance was invalid). Therefore, a municipal court—having jurisdiction only to try violations of municipal ordinances and not state law—has no subject matter jurisdiction, ab initio,

> pursuant to a void and unenforceable ordinance that conflicts with state law. ***Williams v. Williams,*** 932 S.W.2d 904, 905 (Mo.App. E.D.1996) ("A judgment is void from its inception if the court that rendered judgment did not have jurisdiction."); **RSMo. 479.020.1** (municipal courts have jurisdiction only to try violation of municipal ordinances and do not have jurisdiction to try violations of state law)… Inasmuch as the Ordinance is deemed void and unenforceable based upon the Ordinance's conflict with state law, the Arnold Municipal Court had no subject matter jurisdiction from inception, and all the judicial proceedings based on the Ordinance are consequently void. ***Travis v. Contico Intern., Inc.,*** 928 S.W.2d 367, 370 (Mo.App. E.D.1996) (a void judgment is a legal nullity). (Some citations and internal quotation marks omitted).

The ***Brunner*** court then went further and explained that the failure to assess points rendered an ordinance which did not assess points void. If this court will allow Respondent the indulgence of a very long quote from that case, with the suggestion that the logic is impeccable, albeit this matter is a speeding camera no points case and not a red light camera no points case, this prosecution should be once and for all stomped out beyond all recognition:

> Generally, ordinances are presumed to be "valid and lawful" and are construed in such a manner as to uphold its validity unless the ordinance is *expressly inconsistent* or in irreconcilable conflict with the general law of the state. ***McCollum v. Dir. of Revenue,*** 906 S.W.2d 368, 369 (Mo. banc

1995) (emphasis added). However, ordinances imposing penalties are "strictly construed" against the municipality and will not be extended by implication. ***City of Kansas City v. Heather,*** 273 S.W.3d 592, 595 (Mo.App. W.D.2009). There being a "fine (penalty)" imposed for violation of the Ordinance, we will strictly construe the Ordinance against the municipality. *See, e.g.,* ***City of St. Louis v. Brune Mgmt. Co.,*** 391 S.W.2d 943, 946 (Mo.App.1965) (because violation of housing ordinance was a misdemeanor and subjected violator to a fine, the ordinance was penal in nature and, therefore, strictly construed).

Like all creatures of this state, City's power to enact ordinances is derived from the state and must be exercised under that authority so given by the state. ***City of Arnold v. Tourkakis,*** 249 S.W.3d 202, 205 (Mo. banc 2008) ("A non-charter city, such as Arnold, derives its power from the legislature's enactment of laws."). It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and none others: those powers expressly granted, those powers necessarily and fairly implied in or incidental to powers expressly granted, and those powers essential to the declared objects and purposes—"not simply convenient, but indispensable"—of the municipal corporation. ***City of Richmond Heights v. Shackelford,*** 446 S.W.2d 179, 180 (Mo.App.1969) (citations omitted). Courts will adhere to a "strict rule of construction" when determining the powers of a municipality and any

reasonable doubt as to whether a power has been so delegated to a municipality will be resolved in favor of non-delegation. ***Burks v. City of Licking,*** 980 S.W.2d 109, 111 (Mo.App. S.D.1998).

…

As in ***Unverferth***, ***Edwards***, and ***Damon***, the conduct regulated by the Ordinance is, quite simply and unambiguously, running a red light, as common sense and collective experience suggest that a person cannot fail to stop at a red light without being in motion. ***Unverferth .v City of Florissant,*** *419 S.W.3d 76 (Mo App. 2013)****; Edwards v. City of Ellisville***, 426 S.W.3d 644, 664 (Mo. Ct. App. 2013)**; *Damon v. Kansas City,*** 419 S.W.3d 162 (Mo App. WD 2103)**; *see also City of Springfield v. Belt,*** 307 S.W.3d 649, 652 (Mo. banc 2010) ("a violation of a red light ordinance, which typically is considered a moving violation"). In so doing, Arnold permits what the state law prohibits—the classification of running a red light as a non-moving violation free from the assessment of points. ***Unverferth .v City of Florissant***, 419 S.W.3d 76 (Mo App. 2013); ***Edwards v. City of Ellisville***, 426 S.W.3d 644, 664 (Mo. Ct. App. 2013) (determining that an ordinance conflicts with statutes related to assessment of points where red-light ordinance failed to require the municipal court to report a violation of the Ordinance as a moving violation to the director of revenue for the assessment of points"); ***Damon v. Kansas City,*** 419 S.W.3d 162 (Mo App. WD 2103). When is running a red light not the same as running

a red light? Arnold believes it is when the violation is captured by a red light camera. Arnold is incorrect.

Therefore, as a matter of law, the Ordinance unequivocally conflicts with the state statute and is therefore void and unenforceable.

(Some internal quotations omitted.)

Brennan submits that a ticket for speeding is surely a moving violation in the same way that way that running a red light is a moving violation, and so the analysis is the same for both situations. The Ordinance purports to make speeding an offense for which no points are assessed. The Ordinance is void and so the trial court should be affirmed.

Countering the City's Counter Arguments

Brennan will now turn to the City's various attempts to circle around the above logic.

1. Blaming the Owner Not the Driver

The City focuses its attack on its theory that because the Ordinance makes the offense not the driver having sped, but instead *the owner* having allowed the car to have sped (presumably while being driven either by the owner him or herself), with this speeding having been caught by a camera, the Ordinance is actually just a routine, supplemental extra safety rule, and so is permissible under many Missouri cases including but not limited to ***Bezayiff v. City of St. Louis***, 963 S.W.2d (Mo. App. E.D. 1997). The City cites cases from the Prohibition era in which owners could be prosecuted for allowing their cars to be used for the transport of demon liquor.

In its opinion in this case the Court of Appeals rejected that argument by citing in general terms to that court's prior reasoning in ***Edwards v. City of Ellisville***, 426 S.W.3d 644, 664 (Mo. Ct. App. 2013), a red light camera ticket matter and not a speed ticket matter, but with parallel facts. In ***Edwards*** the Court of Appeals faced what was for all purpose and effect materially the same statute which Moline Acres promotes here: penalizing the owner for having let the car be too fast, all without worrying about penalizing the actual operator for having violated the limit.

The strength of City's argument depends on whether the relevant statutes *require* that the target of the assessment of points be the operator, and so an attempt to pin the blame on the owner instead of the operator fails. Brennan believes this is settled by the relevant parts of **RSMo. 304.010**, **A-13**, quoted above and for ease of reference requoted here:

> 4. Notwithstanding the provisions of section 304.120 or any other provision of law to the contrary, cities, towns and villages may regulate the speed of vehicles on state roads and highways within such cities', towns' or villages' corporate limits by ordinance.
>
> 11. Any person violating the provisions of this section is guilty of a class C misdemeanor, unless such person was exceeding the posted speed limit by twenty miles per hour or more then it is a class B misdemeanor.

Just as the ***Edwards*** court found that the **red light** statute, **RSMo. 304.281**, required penalizing the operator, Brennan suggests that the above **speeding** statute,

RSMo. 304.010 requires penalizing the operator. Particularly, Subsection 4 allows Cities to regulate speeds on state roads within their City limits, as Hwy 367 is in this case. Subsection 11 then states that "any person violating [the regulation of speed] is guilty of a C misdemeanor." Brennan suggests that the logical meaning of "any person" is the person at the wheel of the car. That is the person who sped and who is therefore the one to be penalized. The City's attempt to penalize someone other than the operator thus directly conflicts with the Ordinance. While it is well established that the City has the right to enact public safety Ordinances which do not conflict with state law, the City's argument here that it may regulate owners instead of operators, and that this Ordinance is just an additional rule of the road falling into the safe harbor of a public safety rule, must fail. See City's case cited at 38, ***Page Western v. Community Fire***, 636 S.W.2d 65 (Mo. Banc 1982), rejecting ordinances in "irreconcilable" conflict with state statutes".

The City's approach to giving camera tickets - ready, fire, aim - conflicts with **RSMo. 304.010.**

2. The Hertz Case: Parking v. Moving

Let us now turn to the ***City of Kansas City v. Hertz Corp.***, 499 S.W.2d 449, 453 (Mo. 1973). In ***Hertz*** this court allowed holding the owner liable for parking tickets. At 453, however the court limited its holding to, well, parking tickets: "In the field of **automobile parking** violation this court believes that the Massachusetts and New York holdings are sound and meet the needs of today without violating the constitutional due process rights of the people," (emphasis added).

This Court faces the question whether parking actually different from speeding. The answer lies in the reasons the ***Hertz*** offered for distinguishing parking tickets from moving violations, (which happened to be cited in the City's Brief at 16):

1. The maximum penalty is a relatively small fine and no potential incarceration.
2. There is no public stigma attached to receiving a parking ticket and it has no effect upon one's driver's license or insurance cost.

Brennan admits that the judicial branch is generally better off leaving the line drawing to the legislative branch:

> Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—"inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." ***F.C.C. v. Beach Commc'ns, Inc.***, 508 U.S. 307, 315-16 (1993).

But it is true that this court must sometimes engage in drawing a line. Brennan suggests this is such a time. The line to be drawn is between parking tickets and moving violations. As the City emphasizes and as all acknowledge, running red lights and speeding are dangerous to the public at large. There is a stigma attached to behavior which is dangerous to the public at large. There is little or no stigma attached to getting a parking ticket. Brennan notes on this subject that the City takes contradictory positions.

The City demurely asserts that Hertz applies because no one may be incarcerated but it also brazenly beats its chest and asserts that if a person just ignores the camera ticket the city will charge the Defendant with Failure to Appear, Appellant's Brief, p.6, and see Ordinance in § G at L.F. 25 where the Ordinance specifically states that if a Defendant fails to respond to the ticket he or she will receive a Notice of Hearing and that if he or she fails still to respond the City will issue a charge for Failure to Appear. It is a short if unstated step to know that the City will soon issue a warrant if the Defendant fails to come to court to answer the charge of Failure to Appear. Further at various places in the Brief the City states that the technical nature of many, many of these tickets on the red light side, that is, failing to fully stop before making a right on red when no one is coming, and failing to beat the yellow by a tenth or two of a second, are extremely dangerous, but in this section the City states that a speeding ticket carries no stigma and, essentially, is "no big deal." It seems to Brennan that as to this distinctions the City must pick one position or the other. (Brennan states that regardless of whether a violation is merely technical or is more serious such as careening into the intersection several seconds after the light has turned red or speeding more than, say, 15 miles over the limit, running a light and speeding always carry more stigma than a parking ticket).

And, of course, as the night follows the day if the City prevails here it will soon become more brazen and begin issuing warrants for Defendants who fail to either pay or show up in court. (This Court may take judicial notice that Cities issuing these tickets have generally been re-assuring the public that no one will ever get arrested for a camera ticket). One may note the City's clever bootstrapping of a Failure to Appear charge onto

a red light camera ticket charge. (In fact, that charge is right in the Ordinance). But the City simultaneously asserts that no one will ever be arrested for a red light camera ticket. Car owners may soon routinely face warrants for the conduct of others, get arrested, and so lose their jobs for failing to show up for work.

The penultimate difference in the ***Hertz*** factors between parking and speeding, the size of the fine, also point to a difference in kind and not merely a difference in degree. The fine is $124, not the $10 at stake for a parking ticket currently in effect, for example, in the City of St. Louis.

The final difference is as discussed above. Points have an effect on one's driver's license and insurance rates. Parking tickets occur when the car is parked, and not moving, and so no points need be assessed. This case involves speeding, which requires points, which affects the driver's right to drive and the driver's insurance rates.

At the last a speeding ticket is fundamentally different than a parking ticket because of the threat of incarceration, the stigma of a moving violation, the size of the fine, and the effect on one's driver's license and insurance rates as a result of points. (Brennan assumes the court agrees with him that points must be assessed for a lawful speeding ticket).

Brennan suggests that therefore this court may feel comfortable drawing a line between parking tickets and speeding tickets.

3. Police Power

Beginning at 23 the City discusses the police power. Throughout this litigation and consistent with the City's citations, Brennan has conceded that the police power is

broad and lawful, a public safety regulation is assumed valid, and an otherwise valid Ordinance must be approved under the rational basis test unless the challenger negates every conceivable basis for the Ordinance, ***Bezayiff v. City of St. Louis***, 963 S.W.2d (Mo. App. E.D. 1997). The City walks into a buzz saw, however, as discussed above, when its public safety ordinances conflict with state statutes. In such circumstances, the court does not reach reasonableness or rational basis.

4. Other States

While Brennan acknowledges that the holdings in other states may provide insight, at the last Missouri's cities and towns must comply with Missouri law. As outlined above this Ordinance flunks the "conflict with Missouri statutes" test.

The City has cited to the opinions of Courts of other states. To the extent that this Court does look to the experience of other states, within our Eighth Circuit the Minnesota Supreme Court in 2007 invalidated camera ticket enforcement schemes on similar grounds to those argued here by Brennan, ***Minnesota v. Kuhlman,*** 729 N.W.2d 577 (MN 2007).

5. City of St. John v. Brockus

In ***City of St. John v. Brockus***, ED99644, 2014 WL 2109108, the Eastern District addressed whether a city may make a seat belt violation a "primary" offense, that is, an offense for which an officer may pull over a driver without the driver having committed any other infraction. The court allowed the municipality to make failure to wear a seat belt a primary offense even though the state seat belt statute, **RSMo. 307.178**, makes failing to wear a seat belt not a primary offense. The court's conclusion has no

application here, however, because the state's seat belt statute specifically limits its applicability to state law offenses, and so there was no conflict when a municipal ordinance went further. Here the Ordinance does specifically conflict with a Missouri statute. ***Brockus*** therefore does not help the City.

6. Equal Protection

The **Fourteenth Amendment** of the United States Constitution guarantees equal protection of the laws. While this issue was admittedly not raised below by Brennan, and is likely thus waived in this court in this case, ***St. Louis Cnty. v. Prestige Travel, Inc.***, 344 S.W.3d 708, 712 (Mo. banc 2011), it is interesting to consider what would happen if the speed camera were to catch a car owned by government.

If the State of Missouri were to own the car then "Moline Acres v. the State of Missouri" would be prohibited by the **Eleventh Amendment**. One may also have a real world doubt that the City would penalize any other government entity whose driver sped on Hwy 367. There would be something rotten in the State of Missouri if government workers skated free while private citizens had to pay – all for the same conduct.

"Differentiation between those who are otherwise similarly situated must be adequately justified", ***City of Cleburne v. Cleburne Living Ctr.,*** 473 U.S. 432, 439 (1985). Further, while Respondent acknowledges the duty to negate every conceivable basis which might support the differentiation, ***Lehnhausen v. Lake Shore Auto Parts Co.,*** 410 U.S. 356, 364 (1973), in this case there is no such "conceivable basis" to support the differentiation between treatment of speeding cars owned by government, and

speeding cars owned by individuals. (Brennan, of course, does not waive his argument that the City must target operators not owners).

Failure to prosecute vehicles owned by government creates an equal protection issue which the City cannot surmount.

7. Private Company with Economic Stake in the Game

Many lawyers on the public's side have worked many long and hard hours on these cases, but undersigned counsel must give a tip o' the hat to the Western District Court of Appeals in ***Damon v. City of Kansas City***, 419 S.W.3d 162 (Mo. Ct. App. 2013), where the court found an issue which to counsels' knowledge had not been briefed below in any of the multitudinous cases working through the system.

The ***Damon*** court stated at 181-82:

> The United States Supreme Court in ***Tumey v. Ohio***, 273 U.S. 510, 523 (1927) recognized that to subject a defendant to criminal sanctions involving his liberty or property before a tribunal that has a direct, personal, and substantial pecuniary interest in convicting him is a denial of due process of law. Notably, ATS [American Traffic Solutions, the most well-known camera ticket company], is not a party to the underlying offenses pending in the municipal court. Further, our Supreme Court has recognized that to allow private prosecutors, employed by private citizens, to participate in the prosecution of a defendant "is inherently and fundamentally unfair." ***State v. Harrington***, 534 S.W.2d 44, 48 (Mo. banc 1976).

While just like equal protection this issue was admittedly not raised by Brennan below, it nevertheless gives one pause. On information and belief the City uses a private, for-profit company to operate its cameras, and faraway persons view the videos and pick out the ones for whom there was a violation, handle the money, and then in exchange get a cut of the cash.

Brennan expects this issue to be briefed in detail in ***City of St. Louis v. Tupper,*** SC94212, which this Court recently accepted transfer, and for which there is a record related to this issue. In the meantime, it seems that a private company has a stake in the outcome of the case, and that is unlawful under ***Tumey***.

8. Severability

Brennan will quote the final words of his Statement of Facts above:

> The Ordinance is silent as to whether points are to be assessed, L.F. 21. The Notice of Violation, L.F. 19, however, states: "No points will be assessed against your driver's license", upper right corner under "Public Safety Violation".
>
> During the hearing on Defendant's Motion to Dismiss the Judge stated, Tr. 27, "but there [are] no points connected with this charge", and the City did not disagree.
>
> Slightly later in the hearing, in a colloquy with counsel, Tr. 29-30, the City attempted to distinguish the ordinance from parallel state statutes by noting the disparate treatment between tickets originating with live

officers - which carry points, and tickets originating with cameras - which carry no points.

Despite stating on the face of the Notice of Violation and in the trial court that no points are assessed, the City now attempts another end-around by arguing at 50 that this Court should sever an unnamed portion of the Ordinance so that points will be assessed. This reminds undersigned counsel of a high school chum who was reluctant to read Charles Dickens intrepid if somewhat lengthy novel, *Great Expectations*, and asserted (in jest) that he would not read it "because **there is nothing to *expect***."

The City's Ordinance is silent on points. Therefore this court can not sever a section of the Ordinance "because **there is nothing to *sever***."

It would seem to have been well established in Missouri law for over a century that a party cannot take a position in this court contrary to the position it took below:

> The plaintiff tried his case on the theory that he occupied the position of a *bona fide* purchaser and he is estopped now to deny his theory below, ***Harris v. Hays***, 53 Mo. 96 (1873), ***State ex rel. Robertson v. Hope,*** 88 Mo. 430, 431 (1885).

Also, it would seem to violate both Brennan's **Missouri Constitution Article I § 10** right to due process and the Rule of Lenity if this court were to get into the business of supplementing ordinances by adding penalties to make them valid after a Defendant had been charged under an original version without such a penalty. The Rule of Lenity states:

> Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof.

No one is to be made subject to such statutes by implication," ***State v. Dougherty,*** 216 S.W.2d 467, 471 (1949).

9. Is It Really All About Safety?

The City claims it is all about safety. The Court of Appeals has remanded earlier camera cases for which this did not accept transfer to allow discovery on the very question whether these tickets actually do have a safety benefit or whether they are just a money grab. See ***Unverferth,*** 419 S.W.3d 76; ***Damon,*** 419 S.W.3d 162; ***Brunner,*** 427 S.W.3d 201; *see also* ***Edwards,*** 426 S.W.3d 644 (mooting remand by finding ordinance void at state law).

But one may note that this Court has found that the drivers' license point assessment law is "for the purpose of increasing public safety on highways," ***Rudd v. David***, 444 S.W.2d 457, 460 (Mo. 1969). If the City is so worried about safety, why are points not assessed? The ***Brunner*** court described not assessing points as "paradoxical to safety. Why would a municipality enact an ordinance permitting a driver to run 100 red lights and, yet, remain on the road, left to endanger other drivers?" ***Brunner v. City of Arnold***, 427 S.W.3d 201, 226 (Mo. Ct. App. 2013).

RESPONSE TO POINT 2: DUE PROCESS

In his Motion to Dismiss Brennan raised three issues related to his due process rights, first the form of the Notice of Violation, with particular attention to the lack of a hearing date, L.F. 7, second, the lack of evidence of who was driving, L.F. 7, and third, the shifting of the Burden of Proof, L.F. 16.

The trial court reached none of these issues for it found the points issue dispositive, L.F. 32-33, but since this is a *de novo* review and because the City has briefed these issues, Brennan will respond to the City's arguments.

1. Option of "Pleading Not Guilty and Appearing at Trial" Absent from Notice of Violation

The Notice of Violation, both sides, is at p. 19-20 of the Legal File. Upon examination of the Notice of Violation one notices that the Notice has several references about how to pay the fine, but nowhere formally gives the Defendant the option of "Pleading not guilty and appearing at trial". Brennan draws this Court's attention to **Rule 37.33(b)(2)(B)**, which requires the City to give the Defendant that option in the Notice of Violation. That Rule states the Notice of Violation must include language stating that:

> (2) That a person must respond to the violation notice by:
>
> (A) Paying the specified fine and court costs; or
>
> (B) Pleading not guilty and appearing at trial.

(On a technical note, **Rule 37.33(b)(2)(B)** applies pursuant to **Rule 37.49** if the City operates a Traffic Violations Bureau. Although the existence of a Traffic Violations Bureau is not formally established in the record, this court may conclude the City does have one. The Notice of Violation seems to indicate that the City maintains exactly such an office, and, perhaps of greater significance, the City website says that the City has a "Municipal Court and Violations Bureau … established in compliance with the rules and regulations of the Missouri Supreme Court and is a Division of the 21st Judicial Circuit Court of St. Louis County."

See: http://www.molineacres.org/Courts.asxp (Jul. 30, 2014)).

As an apparent replacement for the required language of **Rule 37.33(b)(2)(B)** (and perhaps in order to dissuade those pesky Defendants from asserting their rights), the back of the Notice of Violation contains the following language:

> COURT PROCEEDINGS: If you do not wish to resolve this matter outside of the municipal court system, and you do not remit payment as herein requested, a summons will be issued for you to appear in the Municipal Court. Please be advised that once this matter has been filed in the Municipal Court, court costs will be assessed in addition to the fine set forth herein.

Obviously the quoted language does not include the magic language "pleading not guilty and appearing at trial." In ***Unverferth v. City of Florissant***, 419 S.W.3d 76, 88 (Mo App. 2013) the court described the level of congruence required between the words in the Rule and the language on the notice as "substantial compliance". Brennan states that the requirement should be absolute, but even if this Court adopts the "substantial compliance" standard the City's language still flunks. Nowhere does the Notice give the Defendant the stark contrast of choices outlined in the Rule: that is, to either pay or contest the matter at trial. Of particular note, there is no indication at all of a specific court date. The lack of a court date is fatal.

As the court noted in ***Unverferth***, there is a reason for the required stark contrast between paying and holding out for trial: "the lack of a court date could erroneously lead the recipient to believe that he or she has no other option but to pay the fine." 419 S.W.3d

at 102; *see also* ***Smith v. City of St. Louis,*** 409 S.W.3d 404, 418 (Mo. App. E.D. 2013). A Defendant who pays gives up his rights, and so a city issuing a Notice of Violation must make the options clear to the Defendant.

In its Briefing on this subject the City states that since Brennan did appear he has waived this issue. That position, however, may have required Brennan to be arrested to contest the issue, so it seems doubtful that is correct.[2] It also presumes that the municipal court has subject matter jurisdiction to enforce a facially void ordinance, and that

[2] There is conflicting Missouri law on the issue of waiver of constitutional questions, as the ***Brunner*** court noted at fn. 15: "Conflicting cases emanate from our Missouri courts regarding whether constitutional questions must first be raised in municipal court. In one line of cases, which have never been overtly overruled, "failure to raise constitutional questions in municipal court is not considered a waiver of the same." ***State ex rel. Kansas City v. Meyers,*** 513 S.W.2d 414, 418 (Mo. banc 1974); *see also* ***Kansas City v. Hammer,*** 347 S.W.2d 865, 868 (Mo. 1961) (the invalidity of an ordinance "on constitutional grounds goes to the subject matter of the prosecution and may be raised at any stage of the proceedings, even by a collateral attack after conviction."). In the other line of cases are those which require constitutional questions be raised at first opportunity as recognized, ***MB Town Center, LP v. Clayton Forsyth Foods, Inc.,*** 364 S.W.3d 595 (Mo. App. E.D. 2012); ***State ex rel York v. Daugherty,*** 969 S.W.2d 223, 224-25(Mo. banc 1998).

therefore Brennan's waiver properly occurred. ***State ex rel York v. Daugherty,*** 969 S.W.2d 223, 225(Mo. banc 1998).

Further, the City bears the burden of showing waiver or mootness. ***Friends of the Earth v. Laidlaw Environmental Sv'cs, Inc.****, 528* U.S. 167, 189, 193 (2000). If this court elects to hear this issue it presumably will be under the mootness exception doctrine, capable of repetition yet evading review, ***Kinsky v. Steiger***, 109 S.W.3d 194, 196 (Mo App. 2003). It is also significant that speeding camera enforcement issues are (1) of general public interest, (2) will recur, and (3) will evade review in many future live controversies where Defendants appear. ***In re Dunn,*** 181 S.W.3d 601, 604 (Mo.App. E.D. 2006).

Also, in ***State Highway Commission of Missouri v. Volpe***, 479 F.2d 1099 (8th Cir.1973), the Eighth Circuit stated the general principle that voluntary cessation of certain conduct does not render a case moot if there is a "reasonable expectation," the wrong will be repeated, and where the actions of government may impact on the "same objecting litigants." Brennan, as a St. Louis County resident, has a reasonable expectation that—perhaps through no intent of his own—he may receive as a car owner another speeding camera ticket from the City.

The U.S. Supreme Court more recently affirmed this standard as to recurrence in ***Associated General Contractors v. City of Jacksonville,*** 508 U.S. 656, 661–62 (1993):

> The standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: a case might become moot if subsequent events made it absolutely clear that the

allegedly wrongful behavior could not reasonably be expected to recur. (Citations omitted).

Here, the City cannot show that it is "absolutely" clear" that the City's "allegedly wrongful behavior could not reasonably be expected to recur."

That reasoning as to recurrence and voluntary cessation has been adopted and followed by our Missouri courts. ***Bratton v. Mitchell,*** 979 S.W.2s 232, 236 (Mo.App. W.D. 1998); *see also* ***Kandlbinder v. Reagen,*** 713 F.Supp. 337, 339 (W.D.Mo. 1989) (court retained power to determine legality of government's practice even after issue mooted).

Finally, there are important public policy issues at play as traffic cameras metastasize across Missouri. *See* ***Brunner,*** at 27: "public policy would be ill served if these cases are 'not litigated on the merits'."

2. City Does Not Know the Identity of the Driver

The City has no clue about who was driving Brennan's car at the time the car sped, see stipulated fact on the first page of the judgment, L.F. 32. The City, of course, claims that it can punish the owner for letting his car be driven when it was caught by a camera system. Brennan will not restate his Point 1 arguments on this issue, and incorporates those arguments by reference.

3. The "I Didn't Do It" Affidavit – Improper Shifting the Burden of Proof

The Ordinance at § D.4, L.F. 24, states that the Notice of Violation shall direct the Defendant to respond "either by paying the fine specified in this Section at the

appropriate time and place in the City or by providing a sworn statement of applicability of one of the justifications for exceeding the speed limit set forth in this section."

The justifications are in § B, L.F. 22, and include such items as that the Owner was following the lawful direction of a police officer, the vehicle was an emergency vehicle, the vehicle was stolen and so operated by a non-permissive user, the license tags were stolen, that the owner had sold the car, and "any other issues or evidence that the Court deems pertinent". (As to the last Brennan suggests is impermissibly vague and arbitrary to place a burden on a Defendant to determine what the Court might "deem[] pertinent".)

Brennan notes again that this is not a "rebuttable presumption" case in the more common form, where the owner is presumed to be the driver and the driver may get out of it by naming someone else as the true driver. Instead, the affidavit is an option under which the Defendant may present evidence of theft of the vehicle, law enforcement evasion, or something else. Brennan asserts, however, that even so the affidavit option impermissibly shifts a burden to the Defendant.

Whether the Ordinance is civil and thus Defendant is afforded quasi-criminal process, or the Ordinance is criminal and thus Defendant is afforded criminal process (a question discussed below), either way the City cannot shift *any burden* to Defendant to prove an element of the offense, as that violates the Defendant's presumption of innocence on each element of the offense, and invades the province of the factfinder as to each element, ***Sandstrom v. Montana,*** 442 U.S. 510, 523-24 (1979). Here, the City must prove beyond a reasonable doubt each element of the offense, including that the owner in

fact owned the car, *see* ***State v. Jackson,*** SC93108 (Mo. banc, Jun. 24, 2014) and ***State v. Lewis,*** 188 S.W.3d 483 (Mo. App., 2006) regarding the duty on the prosecution to prove each element.

To the extent that the Ordinance requires the Defendant to prove that he did not own the car (*e.g.*, Defendant had previously sold it), the affidavit is not an affirmative defense to which the City can shift the burden to Defendant. (Defendant concedes that the argument that the car had been stolen may perhaps be an affirmative defense. *See, e.g.*, ***State v. Holmes,*** 399 S.W.3d 809 (Mo. 2013)). But, any burden on Defendant to prove or disprove the element of his ownership outside the stolen car context is impermissible burden shifting. [3]

This Court may very well find that the Ordinance is civil in nature, that is legal for the City to hold a car owner strictly liable for the driver's speeding, and that the notice provided is adequate. That would make much of this Brief a failure, notwithstanding Brennan's passionate rhetoric about liberty and the unprecedentedly invasive behavior of the City's for-profit contractor's cameras. But in the history of Missouri traffic enforcement, until for-profit camera companies contracted with cities, neither the

[3] The Court is not faced here with a rebuttal presumption that the owner is the driver, but will soon be in ***Tupper,*** SC94212. Such a presumption is impermissible burden-shifting. "A mandatory presumption instructs the factfinder that it must infer the presumed fact if the State proves certain predicate facts," ***In re J.N.C.B.,*** 403 S.W.3d 120, 127 (Mo. App. W.D. 2013).

legislature nor the courts have ever penalized car owners with a strict liability civil penalty for moving traffic violations. Defendant suggests that civil laws (including civil forfeiture laws) penalizing owners for the use of their cars in bootlegging, drug running, or other serious crimes are different in kind from municipal traffic enforcement for moving violations.

But Brennan goes further and asks this Court to follow the Courts of Appeals and hold that any speeding camera ordinance is criminal in nature, because the conduct it punishes, speeding, is criminal at state law, ***City of Creve Coeur v. Nottebrok,*** 356 S.W.3d 252, 257-58 (Mo. App. E.D. 2011) (overruled on related grounds); *see also* ***Kennedy v. Mendoza-Martinez,*** 372 U.S. 144 (1963); ***Brunner v. City of Arnold***, 427 S.W.3d 201, 230&c (Mo. App. E.D. 2013); ***Damon v. Kansas City,*** 419 S.W.3d 162, 189&c (Mo App. W.D. 2103). (Brennan notes that the ***Brunner's*** court's analysis is particularly extensive and persuasive). Here the City is penalizing speeding which is a misdemeanor at state law. **RSMo. 304.010.11**. A penalty for speeding is not civil in purpose and effect; rather it is punitive and thus criminal. Further, Defendant faces a potential deprivation of liberty given the City's enforcement scheme. *See* ***Hudson v. U.S.,*** 522 U.S. 93, 104 (1997) (an affirmative disability or restraint is one approaching the "infamous punishment of imprisonment"); ***Id.*** at 99 ("'statutory scheme was so punitive either in purpose or effect,' as to 'transform what was clearly intended as a civil

remedy into a criminal penalty'"); ***Kansas City v. Bott,*** 509 S.W.2d 42, 45 (Mo., 1974)[4] ("The significant fact in the context of this case is that the possible effect and consequence of the action is a deprivation of liberty.")

But the distinction between civil and criminal is less significant than the City suggests, because either way the Defendant is afforded criminal process. In criminal prosecutions, the Defendant is afforded criminal process. In municipal prosecutions of civil ordinances, the Defendant is afforded quasi-criminal process. ***City of Webster Groves v. Erickson,*** 789 S.W.2d 824, 826 (Mo. App. E.D. 1990); ***City of Stanberry v. O'Neal,*** 150 S.W. 1104, 1105 (Mo. App. 1912). Both criminal and quasi-criminal defendants enjoy the heightened protections required by the **Fifth, Sixth, and Eighth Amendments** and their corollary Missouri constitutional provisions. The City cannot chip away Defendant's procedural rights even if this Court finds the enforcement of the Ordinance to be civil.[5]

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[4] ***Bott,*** relying on ***North Carolina v. Pearce,*** 395 U.S. 711 (1969), also raises a Fifth Amendment double jeopardy issue should Defendant or another driver have been acquitted of a speeding ticket for the same conduct at the same time and place. There is no statement in the Ordinance that if a driver gets a speeding ticket for the same incident of speeding that the owner cannot also be charged separately.

[5] *See also* ***City of Ash Grove v. Christian,*** 949 S.W.2d 259 (Mo. App. S.D., 1997) ("The law in Missouri considers violations of municipal ordinances to be civil matters, but requires courts to apply the criminal standard of proof beyond a reasonable doubt because

Brennan believes that if one reads the ***Brunner*** case closely, starting at , 230&c, that court seems to be questioning the wisdom of the existence of the hair splitting category, "quasi-criminal". As Brennan states above, however, regardless of what the court calls it, in this case he is entitled to criminal procedure.

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of the quasi-criminal aspects involved." citing ***University City v. MAJ Inv. Corp.,*** 884 S.W.2d 306, 307 (Mo.App.1994).

CONCLUSION

Respondent prays the court to dismiss the charge and so affirm the Trial Court.

RULE 84.06(c) CERTIFICATION

This Brief complies with the limitations contained in Rule 84.06(b) because the Brief's word count is less than 27,900, that is, the word count is 8787.

The Brief has been scanned and is virus free.

/s/ W. Bevis Schock .
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CERTIFICATE OF SERVICE

Undersigned counsel for Intervenors hereby certifies that on July 30, 2014 he delivered copies of this brief by the electronic filing system to:

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