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BEFORE THE MISSOURI SUPREME COURT

No. SC94085

CITY OF MOLINE ACRES, MISSOURI

Plaintiff /Appellant

vs.

CHARLES BRENNAN

Defendant/Respondent.

On Appeal from the Circuit Court of St. Louis County
Honorable Mary B. Schroeder, Associate Circuit Judge
Cause No. 12SL-MU01295

SUBSTITUTE REPLY BRIEF OF APPELLANT CITY OF MOLINE ACRES

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Introduction

The instant appeal reviews the validity of Appellant City of Moline Acres' ("City") public safety ordinance ("Ordinance"), which was enacted pursuant to its police powers, and is enforced using camera technology devices commonly referred to as speed cameras. The Ordinance places responsibility upon the owner of the vehicle, not the operator, for instances where the speed camera captures video evidence of a vehicle travelling in excess of the posted speed limit. Other ordinances govern driver behavior. The question before this Court is whether the Ordinance is valid and not in conflict with state law. The plethora of political rhetoric, unfounded requests for judicial notice and Orwellian references by Respondent in his brief are entirely irrelevant to the instant appeal.

Respondent has not rebutted the validity, utility and legality of the Ordinance, which was enacted for the benefit of the public. The City seeks to address important public safety concerns by requiring vehicle owners to ensure that they and those whom they permit to use their vehicle act responsibly.[1]

[1] See generally the brief of *Amici Curiae*, the Missouri Municipal League.

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Argument

I. The Trial Court's dismissal of the prosecution against Respondent was in error, because the Ordinance which imposes owner-based liability is a lawful use of the City's police powers and does not conflict with: (A) state statutes prohibiting speeding; (B) Chapter 302 RSMo's point-reporting requirements.

Respondent questions the validity of holding vehicle owners liable for offenses committed using their vehicles, asserting that this Court should limit its holding in City of Kansas City v. Hertz, 499 S.W.2d 449 (Mo. 1973) to parking tickets.

Section 304.120.2 RSMo provides that "Municipalities, by ordinance, may. . . [m]ake additional rules of the road or traffic regulations to meet their needs and traffic conditions." Further, Section 546.902 RSMo, which applies to cities in Saint Louis County (including Moline Acres), authorizes the City to "enact and make all such ordinances and rules, not inconsistent with the laws of the state, as may be expedient for maintaining the peace and good government and welfare of the city . . ." Similarly, Section 79.110 RSMo, which allows fourth class cities (like Moline Acres) to "enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect . . ." Finally, Section 304.010 RSMo itself provides in subsection four that "[n]otwithstanding the provisions of section 304.120 or any other provision of law to the contrary, cities, towns and villages may regulate the

speed of vehicle on state roads and highways within such cities', towns' or villages' corporate limits by ordinance."

Moreover, Section 304.120.4 RSMo, which was enacted in response to the Hertz decision, only prohibits cities from imposing liability on the "owner-lessor of a motor vehicle when the vehicle is being permissively used by a lessee and is illegally parked **or operated** if the registered owner-lessor of such vehicle furnishes the name, address and operator's license number of the person renting or leasing the vehicle at the time the violation occurred . . ." (emphasis added).[2]

The express prohibition against cities holding an owner-lessor liable for the "illegal operation" of their vehicle in limited circumstances, demonstrates the authority of cities to hold owners of vehicles responsible for illegal operation in other circumstances.

If the legislature did not intend to authorize cities to impose liability upon owners of vehicles for operation as well as parking, then it would not have used the word "operation" in Section 304.120.4 RSMo. "This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." Bateman v. Rinehart, 391 S.W.3d 441, 446 (Mo. banc 2013)

Therefore, even though the Hertz decision addressed a parking ordinance, its reasoning is applicable to the instant case. The Hertz Court held that:

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[2] The City's Ordinance complies with this exception. *See* §395.010(B) [Legal File ("L.F.") at 23].

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> The purpose of ordinances regulating parking is to permit the public streets to be used to their best advantage by the public. The maximum penalty is a relatively small fine and no potential incarceration. 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. If the ticket is paid promptly, no court appearance is required. The movement of automobile traffic is a major problem in the cities of this state. Cars illegally parked contribute substantially to that problem and the enforcement of parking regulations is difficult and expensive. Most cars are driven by the owner, some member of the owner's family, or his employee or lessee and with the owner's consent. **An ordinance imposing liability for the parking violation fine on the owner as well as the driver may very well result in fewer violations and thereby assist in the reduction of traffic problems**.

Id. at 453. (Emphasis added).

Both the ordinance in Hertz and the City's Ordinance serve the same goal of alleviating issues concerning the "traffic problems." *Id.* at 453. The Hertz Court clearly recognized the utility of holding either drivers **or** owners responsible for traffic violations. As with parking tickets, keeping watch over all roadways in the City at all times of day "would be impracticable, if not impossible." *Id.* at 452. Thus, the reasoning in Hertz is equally applicable to the instant case.

The City's Ordinance fines owners of vehicles for safety violations that occur when their vehicles are operated in excess of the posted speed limits. It applies the

rebuttable presumption that the vehicle owner consented to the use of his/her vehicle by the operator, **not** on a presumption that the owner was the operator.[3] When, as here, fines are low and incarceration is prohibited, Hertz authorizes owner liability based on a presumption of consent to operate a vehicle: "[m]ost cars are driven by the owner, some member of the owner's family, or his employee or lessee and with the owner's consent." *Id*. at 453.

Accordingly, the Ordinance is valid pursuant to Sections 304.120, 546.902 and 79.110 RSMo and the Hertz decision, and as discussed below does not conflict with Sections 304.009 and 304.010 RSMo.

Respondent avers that this case is distinguishable from Hertz, because of the supposedly greater stigma that attaches to the charge under the Ordinance, rather than with a parking ticket. Setting aside the irony of having one who has purposefully brought public recognition and media coverage of this charge upon himself complaining of stigma, Respondent's arguments are entirely without merit. There is no self-evident public stigma associated with the charged violation. Hertz expressly rejected the notion

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[3] In Damon v. Kansas City, 419 S.W.3d 162 (Mo. App. W.D. 2013) and Brunner v. City of Arnold, 427 S.W.3d 201 (Mo. App. E.D. 2013) the ordinances utilized a rebuttable presumption that the vehicle owner was the operator at the time of the violation and, therefore, are distinguishable from the instant case. Further, those ordinances expressly addressed driving, and not ownership-based liability. Such an ordinance is currently before this Court in City of St. Louis, *et al.* v. Tupper, *et al.*, SC94212.

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that such offenses carry with them a public stigma. *Id.* at 453. Further, even if Respondent had passably shown some form of stigma attached to the charged violation, "stigma alone is insufficient to invoke due process protections." Jamison v. State Department of Social Services, Division of Family Services, 218 S.W.3d 399, 406 (Mo. banc 2007). "For state action resulting in stigmatization to rise to the level of a constitutionally protected interest, a person must also show that the state action affects some other tangible liberty or property interest." *Id.* Respondent falls short of this standard.

Respondent also seeks to distinguish Hertz on the basis that the $124 fine is greater than the $10 fine that Respondent suggests (without support) applies to parking tickets in St. Louis City. As discussed in the City's initial substitute brief, Courts have routinely considered fines less than $300 to be minor. See e.g. State v. Marshall, 821 S.W.2d 550, 552 (Mo. App. E.D. 1991); Idris v. City of Chicago, Il, 552 F.3d 564, 566 (7th Cir. 2009); City of Springfield v. Belt, 307 S.W.3d 649, 650 (Mo. banc 2010); Kilper v. City of Arnold, Missouri, 2009 WL 2208404, 13-17 (E.D. Mo. 2009).[4] It should also be noted that municipalities may impose a fine of between $50 and $300 for parking in a handicapped spot without the required permit. See Section 301.143 RSMo.

Finally, Respondent asserts that the Ordinance is distinguishable from the Hertz analysis due to the assessment of points. As discussed *infra*, in Points I.B and I.C

[4] A copy of the Court's Order is provided in the City's Appendix to its initial brief, at A24.

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respectively: (1) points are not required to be assessed; and (2) even if this Court should find that the Director of Revenue is required to assess points, the assessment of points is not punitive in nature and, therefore, does not exclude the Ordinance from the holding in Hertz.

A. The Ordinance does not conflict with state statutes prohibiting speeding, and is a lawful use of the City's police powers.

The Trial Court in this case ruled that the City's Ordinance conflicted with Sections 304.009 and 304.010 RSMo. Section 304.010 RSMo establishes a **state** speeding violation, stating: "[e]xcept as otherwise provided in this section, the uniform maximum speed limits are and **no vehicle shall be operated in excess of the speed limits** established pursuant to this section . . ." (emphasis added).

The City's Ordinance fines owners of vehicles when the photo enforcement system shows their vehicles were operated at a rate of speed in excess of the posted speed limit.[5] Contrary to the Trial Court's ruling, Section 304.010 RSMo's language that "[n]o vehicle shall be operated in excess of the speed limits established pursuant to this

[5] Again, the City's Ordinance presumes that an owner has consented to the use of their vehicle and holds them responsible for safety violations detected by photo enforcement, because "[e]very motor vehicle owner has a duty to ensure that their motor vehicle at all times complies with the prescribed speed limits." [L.F. at 22]. As such, the Ordinance excuses owners whose vehicles were stolen or utilized without their "effective consent." *Id*.

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section," does not preclude the City from holding owners responsible for safety violations in addition to holding operators responsible for speeding. There is no conflict between the statute and the City's Ordinance, and the Legislature has expressly **not** preempted the field with respect to traffic enforcement.

"Where its language will permit an ordinance should be construed so as to uphold its validity as against a construction which would invalidate it." Kansas City v. LaRose, 524 S.W.2d 112, 117 (Mo. banc 1975).

Municipalities are authorized to pass ordinances that supplement a state law, but may not pass ordinances that create an irreconcilable conflict. Page Western, Inc. v. Community Fire District of St. Louis County, 636 S.W2d 65, 67 (Mo. banc 1982). "The test for determining if a conflict exists is whether the ordinance permits what the statute prohibits or prohibits what the statute permits," *Id.* (Internal quotations omitted). "Local regulations may exceed state requirements, so long as they do not prohibit what state law permits." Babb v. Missouri Public Service Commission, 414 S.W.3d 64, 74 (Mo. App. W.D. 2013) (quoting Borron v. Farrenkopf, 5 S.W.3d 618, 623 (Mo. App. W.D. 1999). The Ordinance does not prohibit enforcement of the state speeding laws, but instead supplements them. Nothing in the Ordinance allows a vehicle operator to exceed the posted speed limits in the City or punishes a vehicle operator for complying with those same speed limits.

Respondent cites at length to the Eastern District's opinion in Brunner v. City of Arnold, 427 S.W.3d 201 (Mo. App. E.D. 2013), wherein the Court improperly stated the standard for reviewing whether municipal ordinances conflict with state law. The

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Brunner Court initially acknowledges that ordinances are presumed to be valid and should only be stricken if they are "expressly inconsistent or in irreconcilable conflict" with state law. *Id.* at 221. However, the Brunner Court then states that ordinances imposing penalties "are 'strictly construed' against the municipality and will not be extended by implication." *Id.* For this proposition the Brunner Court cited to Kansas City v. Heather, 273 S.W.3d 592, 595 (Mo. App. W.D. 2009). Essentially the Eastern District bootstrapped the concept that the **scope of conduct** prohibited under an ordinance is to be strictly construed against the municipality (i.e. what actions violate the provisions of an ordinance) to the underlying statute/ordinance conflict analysis. The most evident problem with this approach is that the City is authorized to impose penalties for **all** ordinance violations pursuant to Section 546.902 RSMo (which pertains to municipalities in St. Louis County) and Section 79.470 RSMo (which pertains to Fourth Class cities). Accordingly, **all** ordinances would be subjected to stricter analysis, which is inconsistent with the multitude of cases that require deference to the validity of municipal ordinances.

As discussed at length in the City's initial substitute brief, this Court should reaffirm traditional conflict analysis. The state statutes make it an offense for **a person to operate** a vehicle in excess of the posted speed limits. However, the statutes do not exempt a vehicle owner from separate responsibility for the manner in which their vehicle is operated as authorized by Hertz and Section 304.120 RSMo.

Unlike the state speeding statutes and corresponding City speeding ordinance, the Ordinance in question establishes a mechanism for placing responsibility upon the

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owners of motor vehicles **for the unsafe manner** in which their vehicles are operated. The two offenses are different, and the fact that both involve vehicles travelling at excessive speeds does not place them in conflict. An ordinance holding the owner of a vehicle liable for unsafe operation by another does not conflict with a statute holding a vehicle driver responsible for the manner in which he/she operates the vehicle.

B. The Ordinance does not conflict with state laws requiring the assessment of points for moving violations.

The Ordinance is silent as to the assessment of points; it neither requires nor prohibits that they be assessed. [L.F. at 21]. Further, as Respondent's case was dismissed prior to any plea or finding of guilt, the question of whether points would be assessed was never reached. The Eastern District in Edwards v. City of Ellisville, 426 S.W.3d 644, 665 (Mo. App. E.D. 2013), erroneously stated that: "[b]ecause the Ordinance allows a driver to commit a moving violation without being assessed points on his or her license, the Ordinance conflicts with Missouri law." Crucially, nothing in the City's Ordinance allows a vehicle **operator** to violate speeding laws and avoid the assessment of points.

Section 302.302.2 RSMo provides that the Director of Revenue shall "assess an **operator** points for conviction." (Emphasis added). Under the Ordinance, the City does not charge an operator with speeding, but instead charges a vehicle **owner** for the fact that his or her vehicle was operated in an unsafe manner. As the Eastern District correctly noted in City of Creve Coeur v. Nottebrok, 356 S.W3d 252, 262, "[t]he City intended to impose liability on a vehicle owner for a violation, not the 'operator.'"

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Accordingly, simply because the violation involves a speeding vehicle, it does not make it a "moving" violation committed by a vehicle "operator."

The Ordinance does not seek to punish the operator of a vehicle and, therefore, the assessment of points against the owner does not appear to be required pursuant to Section 302.302.2 RSMo. However, the Director of Revenue is in charge of the points-assessment system and the Ordinance does not address the issue. The City merely reports "moving traffic violation[s]" to the Director of Revenue pursuant to Section 302.225.1 RSMo, not owner violations. Further, Section 43.505 RSMo designates the Department of Public Safety as the "central repository for the collection, maintenance, analysis and reporting of crime incident activity generated by law enforcement agencies in this state." Pursuant to Section 43.512 RSMo, "[t]he central repository, with the approval of the supreme court, shall publish and make available to criminal officials, a standard manual of codes for all offenses in Missouri." In this case, the charges were dismissed against Respondent prior to trial, and so no record has been developed as to whether a guilty verdict or plea would have been reported to the Department of Revenue, or whether there is an applicable charge code for speed camera violations based upon ownership liability. Based upon the fact that the Ordinance establishes an ownership, not operator, offense it would appear to be a non-moving violation and, therefore, not subject to the reporting requirement. If, however, this Court disagrees and finds that the offense is a reportable moving traffic violation, the City can report such violations and there is nothing in the Ordinance that would be inconsistent or in conflict with the statutory reporting requirements.

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If the City's notice form and employee practices regarding points[6] [L.F. 19] are flawed, that does not impact the validity of the Ordinance.[7] *See e.g.* Huttig v. City of Richmond Heights, 372 S.W.2d 833, 838 (Mo. 1963), wherein the Missouri Supreme Court recognized that a zoning ordinance may be generally valid, but invalid as applied to a particular property. Even if the City's employees had failed to properly enforce the ordinance previously, it does not prevent the City from subsequently enforcing it correctly. See e.g. Kansas City v. Wilhoit, 237 S.W.2d 919, 924 (Mo. App. W.D. 1951) ("[T]he failure of municipal authorities to enforce a zoning ordinance against some violators does not preclude its enforcement against others. Nor does the fact that city officials fail to enforce the zoning ordinance against a violator estop the city from subsequently enforcing it against him." – internal citations omitted).

Similarly, as discussed *infra*, if this Court finds that the Ordinance has been invalidly prosecuted with respect to Respondent, because the contents of the notice

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[6] As noted in the City's initial substitute brief, Respondent would appear to lack standing to raise this issue, as he is essentially claiming that he should be facing the possibility of stricter sanctions for allegedly violating the Ordinance.

[7] Similarly, the statement by Counsel for City during arguments before the Trial Court that points were not assessed in connection with a violation of the Ordinance does not affect the validity of the Ordinance, rather it pertains to the manner in which the Ordinance is being enforced by the City's employees.

conflicts with Section 302.302.2 RSMo, that should not affect the validity of the Ordinance, but simply require a different notice in the future.

Finally, contrary to Respondent's suggestion, the City is not asking the Court to rewrite the Ordinance, rather it asks that if the Court identifies language it believes precludes the assessment of points in a manner that violates state law, that the Court sever such language from the rest of the Ordinance. The City does not believe such language is found in the Ordinance, nor does Respondent. See Respondent's substitute brief at p. 31.

C. The Ordinance is civil not criminal in nature.

Respondent urges this Court to ignore the substantial and well established precedent that the Courts in Missouri consider that "[p]rosecutions for violation of a city ordinance are in this state regarded as a civil action with quasi criminal aspects." City of Independence v. Peterson, 550 S.W.2d 860, 862 (Mo. App. W.D. 1977); City of Webster Groves v. Erickson, 789 S.W.2d 824, 826 (Mo. App. E.D. 1990) ("Municipal ordinance violations are said to be quasi-criminal in nature" - Internal quotations omitted); and Jordan v. City of Kansas City, 972 S.W.2d 319, 324 (Mo. App. W.D. 1998) ("A violation of a municipal ordinance is a civil proceeding, not a criminal one." – citing Frech v. City of Columbia, 693 S.W.2d 813, 814 (Mo. banc 1985)).

The Court in Nottebrok, *supra*, set forth a seven prong analysis[8] for determining whether a municipal ordinance is civil in nature, which originated from the Eastern District's paraphrasing of the seven factors considered by the Court in Kilper, *supra*:

(1) "[w]hether the sanction involves an affirmative disability of restraint";

[8] This analysis is set forth in its entirety in the City's initial substitute brief.

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(2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it" and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Kilper at 15, quoting Hudson v. United States, 522 U.S. 93, 99-100 (1997) and Kennedy v. Mendoz-Martinez, 372 U.S. 144, 168-69 (1963). The second and fifth factors are the most relevant to the instant discussion, and in fact the fifth factor is that upon which the Trial Court based its decision.

Assuming *arguendo* this Court determines that points should be assessed for a violation of the Ordinance, the question becomes whether the assessment of points would weigh against finding the Ordinance to be civil in nature. However points have always been assessed for certain municipal ordinance violations, and yet they have been consistently recognized as civil offenses. Jordan, *supra* at 324. Moreover, the assessment of points is not done for the purposes of punishment, rather, as the Eastern District noted in City of St. Peters v. Roeder, ED100701, 2014 WL 2468832 (Mo. App. E.D. - Decided June 3, 2014), the purpose of the point system "is the protection of the public from dangerous drivers." *Id.* at 3. Even the suspension of a license due to the accumulation of points is not criminally punitive, in that it is akin to a debarment. In

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Hudson, the U.S. Supreme Court found that the occupational debarment of bank officers did not rise to the level of being criminally punitive:

> Turning to the second stage of the Ward[9] test, we find that there is little evidence, much less the clearest proof that we require, suggesting that either OCC money penalties or debarment sanctions are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary. First, neither money penalties nor debarment has historically been viewed as punishment. We have long recognized that revocation of a privilege voluntarily granted, such as a debarment, is characteristically free of the punitive criminal element. . . . Second, the sanctions imposed do not involve an affirmative disability or restraint, as that term is normally understood. While petitioners have been prohibited from further participating in the banking industry, this is certainly nothing approaching the infamous punishment of imprisonment.

Hudson at 104 (internal citations and quotations omitted).

Clearly, with or without the assessment of points, public safety ordinances are not criminally punitive. Furthermore, the U.S. Supreme Court in Ward stated:

> This Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction.

[9] In United States v. Ward, 448 U.S. 242 (1980), the Court also analyzed the Kennedy factors.

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> Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. **In regard to this latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.**"

Ward at 248-249 (internal citations omitted – emphasis added).

The Ordinance expresses that it is civil in nature by reference to a "civil fine," and thus enjoys the high level of deference noted by the U.S. Supreme Court in Ward. [L.F. at 24]. The Ordinance expressly forbids the imposition of imprisonment for a violation of the Ordinance. [L.F. at 24]. Respondent avers that the possibility that one might be imprisoned for the separate charge of Failure to Appear, means that one might be imprisoned for a violation of the Ordinance. However, the two charges are separate. Those summoned to Court are not allowed to simply ignore the charges against them, even if they dispute them or believe them to be invalid. Further, a witness subpoenaed to testify in a civil matter, may be subject to being held in jail without bail for contempt for failing to appear in court as requested, despite not being charged with any underlying wrongdoing. Section 491.200 RSMo. Despite Respondent's suggestions to the contrary, those subject to the rule of law in this Country should not be free to ignore the issuance of

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a summons or order to appear in court with impunity.

Furthermore, even if this Court considers the possibility of imprisonment for the charge of Failure to Appear as connected with the underlying public safety violation, as noted previously municipal ordinance violations are civil in nature. Jordan, *supra* at 324. Yet municipalities have the authority to sentence violators of municipal ordinances to a term of imprisonment not to exceed ninety days, except where by ordinance they have chosen to remove the possible sanction of imprisonment, or where state statute otherwise precludes imprisonment. See Section 546.902 RSMo; and Section 79.470 RSMo. The U.S. Supreme Court in Baldwin v. New York, 399 US 66, 69 (1970) recognized that no constitutional right to a jury trial pursuant to the Sixth Amendment to the U.S. Constitution attaches to any charge that does not carry a potential sentence in excess of six months. The Baldwin Court held "we have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." This Court in Cole v. Nigro, 471 S.W.2d 933 (Mo. banc 1971) recognized the Baldwin holding.

The fifth factor is resolved in favor of finding the Ordinance to be civil in nature. In Kilper, the U.S. District Court for the Eastern District of Missouri interpreting the City of Arnold's rebuttable presumption ordinance, stated:

> The fifth factor the Court may consider is "whether the behavior to which [the penalty] applies is already a crime." *Hudson*, 522 U.S. at 99 (internal quotation marks omitted) (quoting *Kennedy*, 372 U.S. at 168). Assuming that the violation of a red light is criminal, the fact that conduct for which

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> the Ordinance's penalty is imposed "may also be criminal . . . is insufficient to render the money penalties . . . criminally punitive." *Id.* at 105; *Students for Sensible Drug Policy Found.*,[10] 523 F.3d at 901 (quoting *Hudson*, 522 U.S. at 105). . . Without more, this factor weighs in favor of a finding that the Ordinance and its penalty are civil in nature.

In considering this fifth factor, the U.S. Supreme Court in U.S. v Ursey, 518 U.S. 267 (1996) in a case involving a forfeiture proceeding of equipment allegedly used in connection with the production of marijuana, recognized that although both the forfeiture statute and the statute that authorizes the criminal prosecution of a defendant are both tied to "criminal activity," "this fact is insufficient to render the statutes punitive." *Id.* at 292. "By itself, the fact that a forfeiture statute has some connection to a criminal violation is far from the 'clearest proof' necessary to show that a proceeding is criminal." *Id.*

Accordingly, the Ordinance is civil under the Nottebrok/Kilper/Hudson/Kennedy factors. The civil nature of the Ordinance confirms that the Ordinance supplements the State's criminal traffic prosecutions under Section 304.010 RSMo. Furthermore, Section 304.010.11 RSMo expressly provides that "[a]ny 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." (Emphasis added). In City of St. John v. Brockus, ED99644, 2014 WL 2109108 (Mo.

[10]Students for Sensible Drug Policy Foundation v. Spellings, 523 F.3d 896 (8th Cir 2008).

App. E.D. - Decided May 20, 2014),[11] the Eastern District recognized the language of "this subsection" as limiting the prohibition on primary seat belt enforcement to a prosecution under the state statute, thus not precluding the use of primary enforcement of municipal seat belt ordinances. This is consistent with State v. Ostdiek, 351 S.W.3d 758 (Mo. App. W.D. 2011), which holds that a state law charge can be issued notwithstanding the existence of a parallel municipal ordinance. Accordingly, only a violation charged under Section 304.010.11 RSMo is a misdemeanor, not a violation of the corresponding municipal speeding ordinance, or a violation of the Ordinance in question in this case. Again, the Ordinance does not conflict with the state statutes.

D. Courts should defer to the legislative decisions of municipalities.

Despite not having raised the issue in a timely manner, Respondent also questions whether the Ordinance is truly about public safety, or whether it was merely enacted for revenue generating purposes. While of course violations of the Ordinance generates fine revenues, as do all traffic violations, such revenue does not negate the clear and obvious public safety impacts of the ordinances. Further, the revenues generated are expended for the benefit of the public to provide necessary police and public safety services. The General Assembly has guarded against any potential for excessive revenue generation from traffic fines through the "Macks Creek Law", codified in Section 302.341.2 RSMo, as discussed in the City's initial substitute brief.

[11] A copy of the opinion is included in the Appendix to the City's initial substitute brief at A55.

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Respondent also questions the utility of the Ordinance with respect to the promotion of public safety if points are not assessed for violations. The Ordinance is, however, reasonably related to the promotion of traffic safety and, therefore, a valid exercise of the City's legislative powers. See e.g. Wells & Highway 21 Corp. v. Yates, 897 S.W.2d 56, 60-61 (Mo. App. E.D. 1995). Respondent is essentially asking that this Court second guess the City on public safety legislation, which as discussed in the City's initial substitute brief, violates the constitutional mandate of separation of powers. *See* Mo. Const. Art 2, Section 1. There are two broad categories of acts that violate the constitutional mandate of separation of powers.

This Court has previously recognized that "[t]he indispensability of local self-government arises from problems implicit in the safety, order, health, morals, prosperity, and the general welfare of thickly populated areas." State ex rel Audrain County v. City of Mexico, 197 S.W.2d 301, 303 (Mo. 1946). Cities must be allowed to address their particular local concerns, as long as they do so within the scope of their delegated authority, without being subjected to the type of judicial legislation undertaken by the Court in Brunner.

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II. The Trial Court's dismissal of the prosecution against Respondent was in error, because the Ordinance did not violate Respondent's due process rights, in that (A) Respondent waived any claims as to the alleged deficiencies with the City's notices; and (B) the Ordinance does not impermissibly shift the burden of proof to Respondent.

A. Respondent waived any claims as to the alleged deficiencies with the City's notices.

"Under both the federal and state constitutions, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Jamison, *supra* at 405 (internal quotations omitted). Respondent has certainly had a meaningful opportunity to be heard in this case. After receiving a Notice of Violation, Respondent's Counsel entered his appearance and had the case certified for a jury trial. [L.F. at 4 & 6]. In certifying the matter for a jury trial, Respondent waived any question as to whether he had been deprived of adequate notice under the State and Federal Constitutions. Neither Respondent, nor the ACLU in its *Amicus Curiae* brief can deny that Respondent has received an opportunity to be heard. Instead they attack the notices in general, as they may pertain to other defendants. However, this case involves the prosecution of a single defendant.

If this Court nevertheless concludes that the notice Respondent received was insufficient, it should still reverse the Trial Court's ruling concerning the validity of the underlying Ordinance. If this Court further finds that the Ordinance's provisions addressing the notices to be issued with respect to violations are improper, those

provisions are expressly severable from the rest of the Ordinance.[12] Where one provision of an ordinance is found to be invalid, a court should not strike down the remainder of the ordinance as void "unless it may be judicially found that the City Council would not have passed the entire enactment if it had known of such invalidity." Pearson v. City of Washington, 439 S.W.2d 756, 762 (Mo. 1969).

The City acknowledges that the notices issued in this case may need revision in order to comply with the mandates issued in the various recent relevant opinions from the Courts of Appeal, subject to this Court's ruling in pending cases.

B. The Ordinance does not impermissibly shift the burden of proof to Respondent.

Respondent erroneously argues that the opportunity the Ordinance provides to demonstrate the applicability of a justification defense to the charged infraction renders the Ordinance invalid. The Ordinance provides an opportunity for vehicle owners to submit affidavits to inform the prosecutor as to why the violations should be excused. These include justifications such as the vehicle was stolen or that ownership had been transferred prior to the date of the violation. [L.F. at 22-23]. Some of these justifications relate to the City's authorized presumption in the Ordinance that the vehicle was being operated with the owner's permission at the time the offense occurred.

"Where a statute or ordinance defines and creates an[] offense and contains a proviso exempting a class therein from its operation, it is not necessary for the

[12] [L.F. at 25].

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prosecution to negative the proviso." City of Brentwood v. Nalley, 208 S.W.2d 838, 840 (Mo. App. E.D. 1948). "The applicability of the exemption contained in the proviso is an affirmative defense, and the burden of proving facts which will invoke the exception contained in the proviso is upon the party accused." *Id.*

The City, in allowing defendants to submit an affidavit stating a justification defense, has created a mechanism consistent with Hertz to allow for an expedient resolution for those cases where the vehicle's otherwise improper speed was justified, or where the owner is excused from liability due to the vehicle having been stolen or the applicability of another excuse set forth in the Ordinance. The City does not seek to prosecute an owner of a vehicle who has had the misfortune of having their vehicle stolen, and accordingly has sought to provide an expeditious mechanism for those who find themselves in that unfortunate situation.

Contrary to Respondent's suggestions, the fact that the City also provides an expedited mechanism for those who have sold their vehicles to have the tickets dismissed prior to appearing in Court, does not mean the City has shifted the burden of proving ownership of the vehicle. The City acknowledges it has the burden of proving ownership. The City proves ownership through the records of the Department of Revenue. [L.F. at 23]. It is certainly possible that a vehicle may have been sold, but that the Department of Revenue's records were not updated in time to avoid the mailing of a notice to a previous owner. If a defendant would rather appear in Court and have the City attempt to prove ownership they may do so; however, the City was simply trying to allow for those who have sold the vehicle prior to a violation to avoid the time and

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inconvenience of a Court appearance.

The Court in City of Knoxville v. Brown, 284 S.W.3d 330 (Tn. App. 2008), rejected a "burden of proof" argument similar to the one made by Mr. Brennan in his motion to dismiss, and is quoted at length in the City's initial substitute brief.

C. The Ordinance does not violate the Equal Protection Clauses of the U.S. and Missouri Constitutions.

Respondent acknowledges that he has not raised Equal Protection concerns in this matter, and thus the issue has been waived. "It is firmly established that a constitutional question must be presented at the earliest possible moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived." Meadowbrook Country Club v. Davis, 384 S.W.2d 611, 612 (Mo. 1964). "To preserve a constitutional question for review in this Court, it must be raised at the earliest possible opportunity; the relevant sections of the Constitution must be specified; the point must be preserved in the motion for new trial, if any; and, it must be adequately covered in the briefs." St. Louis County. v. Prestige Travel, Inc., 344 S.W.3d 708, 712-13 (Mo. banc 2011). However, even if this argument was before the Court it is without merit.

"The first step in considering an equal protection claim is to determine whether the challenged classification operates against a suspect class or impinges upon a fundamental right." State v. Pike, 162 S.W.3d 464, 470 (Mo. banc 2005). Clearly in this case no suspect class or fundamental right has been identified. "If the statute does not discriminate against a suspect class and does not implicate a fundamental right, then the

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rational basis test of review will be applied." *Id.* "The oft-stated rational basis test requires only that the challenged law bear some rational relationship to a legitimate state interest. To prevail under the rational basis test, [a challenger] must show that the classification has no reasonable basis and is purely arbitrary." *Id.* at 471. The Ordinance's relationship to the legitimate interest of promoting public safety is clear and has been recognized by this Court in Hertz. Further, the imposition of a fine without points or the threat of imprisonment is predicated upon the differences between the Ordinance and the state statutes prohibiting speeding by vehicle operators, and the corresponding City ordinance prohibiting speeding. The Ordinance holds vehicle owners responsible for the violation, whereas the state statutes and corresponding speeding ordinance hold the operator responsible for the violation. The City in charging Respondent with a violation has no knowledge as to whether he was driving his vehicle at the time, and thus the disparate treatment of violators between the Ordinance and the state speeding statutes or corresponding ordinances is permissible.

Respondent also complains of the hypothetical situation of a vehicle owned by the State violating the Ordinance, whereby pursuant to the Eleventh Amendment to the US Constitution the City would not be able to prosecute the State. This hypothetical is equally true of any municipal ordinance violation, for instance the City would not be able to prosecute the State for any zoning or building code violations that it commits. The constitutional protections afforded to the State has no bearing on, or relevance to, the instant matter.

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Further, Respondent's reasoning ignores the differences often present between municipal and state prosecutions, which are discussed in detail in the City's initial substitute brief, but include the fact that pursuant to Section 302.302 RSMo, speeding violations carry fewer points when charged under a municipal ordinance than under a state statute.

D. Respondent's arguments pertaining to the "Private Company with Economic Stake in the Game" are without merit.

Again, Respondent acknowledges that this issue has not been raised or briefed prior to his substitute brief. Furthermore, Respondent's argument entirely ignores the process utilized by the City in enforcing the Ordinance. The Ordinance provides that "upon review of Recorded Image(s) showing an infraction under this Section, **a police officer of the City Police Department** shall complete a Notice in a form approved by the Chief of Police . . ." (emphasis added). [L.F. at 23]. Further, violations are handled by the City's Prosecuting Attorney. [L.F. at 24]. Accordingly, the case is not instigated and prosecuted by a private company who selects the violators in exchange for "a cut of the cash" as Respondent suggests, but rather by representatives of the City performing their official duties.

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Conclusion

The City's Ordinance involves an infraction by a vehicle owner and does not conflict with state statutes pertaining to speeding by vehicle operators, and further is authorized under Section 304.120 RSMo and Hertz. Even if this Court should find that the initial notice received by Respondent was somehow deficient and that he had not waived any such deficiencies, or that points should be assessed for a violation, the validity of the Ordinance itself should still be confirmed.

Based upon the foregoing, the City respectfully requests that this Court reverse the Trial Court's dismissal of this matter, confirm the validity of the Ordinance and allow the underlying prosecution of Respondent to proceed.

Respectfully submitted,

CURTIS, HEINZ, GARRETT &
O'KEEFE, P.C.

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Certificate of Compliance

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Appellant's Substitute Reply Brief includes the information required by Rule 55.03.
2. The Appellant's Substitute Reply Brief complies with the limitations contained in Rule 84.06.
3. The Appellant's Substitute Reply Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service, contains 7,539 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Appellant's Brief was prepared.

/s/ *Kenneth J. Heinz*

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Certificate of Service

I hereby certify that on August 8, 2014 the foregoing Brief was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system to all attorneys of record.

/s/ Kenneth J. Heinz

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