IN THE SUPREME COURT OF MISSOURI

No. SC94212

SARAH TUPPER and SANDRA THURMOND

Plaintiffs/Respondents /Cross-Appellants

vs.

CITY OF ST. LOUIS, et al.,

Defendants/Appellants/Cross-Respondents.

Appeal from the Circuit Court of the City of St. Louis
Honorable Steven R. Ohmer, Circuit Judge
Cause No. 1322-CC10008

Brief of Amici Curiae Cities of Hazelwood, Ferguson and Creve Coeur

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Missouri Supreme Court Rules

Constitutional and Statutory Provisions

Other Resources

CONSENT OF ALL PARTIES

Pursuant to Rule 84.05(f) the *Amici Curiae* hereby notify this Court that they have obtained the consent of all parties to file this Brief.

JURISDICTIONAL STATEMENT

Amici Curiae adopt and incorporate the Jurisdictional Statement contained in Appellants/Cross-Respondents' Substitute Brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The *Amici Curiae* cities of Hazelwood, Ferguson and Creve Coeur ("*Amici*") are all cities located within St. Louis County, Missouri, which have operated public safety programs at intersections enforced through the use of camera technology. The cities have all currently suspended enforcement of their ordinances due to the uncertainty and confusion created by the multitude of opinions recently issued by the Missouri Courts of Appeal concerning the use of camera enforcement and current scrutiny by this Court.[1] The local elected legislative bodies of the *Amici* enacted their respective ordinances to protect the public health, safety and welfare. The *Amici* all adopted ordinances imposing owner liability based upon this Court's ruling in City of Kansas City v. Hertz Corp., 499 S.W.2d 449 (Mo. 1973), and pursuant to authority under Section 304.120. RSMo.

Initially, the Court of Appeals upheld such an ordinance in City of Creve Coeur v. Nottebrok, 356 S.W.3d 252 (Mo. App. E.D. 2011). However, just two years after

[1] The City of Moline Acres' owner liability based public safety ordinance is also currently before this Court in Moline Acres v. Charles Brennan, SC94085.

Nottebrok, the Eastern District in Edwards v. City of Ellisville, 426 S.W.3d 162 (Mo. App. E.D. 2013), overruled itself, ignored this Court's holding in Hertz, ignored Section 304.120 RSMo, and found that imposing liability on vehicle owners conflicted with the state statutes prohibiting drivers from running red lights. Thereafter, in an attempt to comply with the change in course by the Courts of Appeal, the *Amici* began preparing and considering amended ordinances utilizing the rebuttable presumption that the vehicle owner was the operator. The use of this rebuttable presumption was recognized as valid by this Court in City of St. Louis v. Cook, 221 S.W.2d 468, 469 (Mo. 1949), and was upheld in Kilper v. City of Arnold, Missouri, 2009 WL 2208404 (E. D. Mo. 2009), which in turn was cited favorably in Nottebrok. The rebuttable presumption that the vehicle owner was the driver was acknowledged, albeit with hesitation, as valid in Unverferth v. City of Florissant, 419 S.W.3d 76, 100 (Mo. App. E.D. 2013).[2] However, only a matter of months later in Damon v. City of 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 Western and Eastern District Courts of Appeal diverged from precedent, and found such a rebuttable

[2]"However, the *Cook* court's rationale in characterizing a rebuttable presumption as a permissible rule of evidence is not limited to a particular type of offense or municipal violation, and we have found no judicial authority so limiting the use of a rebuttable presumption in Missouri. Until the Missouri Supreme Court reconsiders its holding in *Cook*, *Cook* remains precedent. We are constrained to follow its holding and will not stray from its mandate." Unverferth, at 101.

presumption to be invalid.

Inexplicably, the Eastern District in Brunner, 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.**" Brunner at 206. (Emphasis added). Contrary to this statement, there should be nothing political about the judicial review of these various public safety enforcement ordinances; rather such review should be limited to the legality of such ordinances. The political/policy decisions regarding local traffic safety measures are not for the Courts to make, but are reserved to the duly elected municipal legislative bodies. This Court should rein in the lower Courts and restore the appropriate deference Missouri Courts have long accorded local legislative decisions. As this Court has previously recognized: "[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).

The recent appellate decisions are replete with errors, have created public confusion, and have rendered it virtually impossible for the *Amici* to continue to operate their public safety programs, notwithstanding their respective police powers and responsibilities to promote the health, safety and welfare of their citizenry.

STATEMENT OF FACTS

Amici adopt the Statement of Facts set forth in Appellants/Cross-Respondents' Substitute Brief.

POINTS RELIED UPON

I. **The Trial Court erred in declaring the City of St. Louis' red light camera ordinance invalid and enjoining its enforcement, because the City of St. Louis' red light camera ordinance is valid, in that it and other similar ordinances are properly enacted pursuant to municipal police powers and do not conflict with the state statutes pertaining to the running of red lights by vehicle operators.**

City of St. Louis v. Cook, 221 S.W.2d 468 (Mo. 1949)

State ex rel Audrain County v. City of Mexico, 197 S.W.2d 301 (Mo. 1946)

City of Creve Coeur v. Nottebrok, 356 S.W.3d 252 (Mo. App. E.D. 2011)

Section 304.120 RSMo

II. **The Trial Court erred in declaring the City of St. Louis' red light camera ordinance invalid and enjoining its enforcement, because the ordinance constitutes a permissible use of a rebuttable presumption and does not violate Article I, Section 10 of the Missouri Constitution, in that the ordinance is civil, not criminal, in nature.**

Kilper v. City of Arnold, Missouri, 2009 WL 2208404 (E. D. Mo. 2009)

City of Creve Coeur v. Nottebrok, 356 S.W.3d 252 (Mo. App. E.D. 2011)

Jordan v. City of Kansas City, 972 S.W.2d 319 (Mo. App. W.D. 1998)

Kennedy v. Mendoz-Martinez, 372 U.S. 144 (1963)

III. **The Trial Court erred in declaring the City of St. Louis' red light camera ordinance invalid and enjoining its enforcement, because even assuming *arguendo* that points should be assessed upon drivers' licenses and that the notices issued to Respondents were insufficient, the ordinance is still valid, in that the improper enforcement of an ordinance by city employees does not invalidate the underlying legislation.**

Kansas City v. Wilhoit, 237 S.W.2d 919 (Mo. App. W.D. 1951)

State v. Young, 362 S.W.3d 386 (Mo. banc 2012)

ARGUMENT

I. The Trial Court erred in declaring the City of St. Louis' red light camera ordinance invalid and enjoining its enforcement, because the City of St. Louis' red light camera ordinance is valid, in that it and other similar ordinances are properly enacted pursuant to municipal police powers and do not conflict with the state statutes pertaining to the running of red lights by vehicle operators.

A. Standard of Review

"An action seeking an injunction is an action in equity. The standard of review in a court-tried action in equity is that of a judge tried case: the trial court's judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or unless it erroneously applies the law." Systematic Business Services, Inc. v. Bratten, 162 S.W.3d 41, 46 (Mo. App. W.D. 2005).

Traffic ordinances are enacted pursuant to a city's police powers. Deutsch v. City of Ladue, 728 S.W.2d 239, 241 (Mo. App. E.D. 1987). "An ordinance enacted pursuant to the valid police power of a municipality is presumed valid, and the party contesting the ordinance bears the burden of proving its invalidity." Bezayiff v. City of St. Louis, 963 S.W.2d 225, 229 (Mo. App. E.D. 1997). "The burden is on the party contesting the ordinance to negate every conceivable basis which might support it." *Id.* "If reasonable minds might differ as to whether a particular ordinance has a substantial relationship to the protection of the general health, safety or welfare of the public, then the issue must be decided in favor of the ordinance." *Id.*

In declaring the City of St. Louis' ordinance to be invalid, the Trial Court erroneously declared the law and rendered injunctive relief without the requisite substantial evidence to support it.

B. The City of St. Louis' ordinance and other similar ordinances constitute the proper exercise of the municipal police power.

This Court in Cook, *supra*, recognized that "Municipalities have been expressly given the power to make rules of the road or traffic regulations to meet their needs. Public safety is involved. It is established that City's reasonable regulation of traffic, including the regulation of the parking of vehicles upon roads used for public travel, is a valid exercise of the police power." *Id.* at 469. (Internal citations omitted).

Further, Section 304.120.2 RSMo provides that "[m]unicipalities, by ordinance, may… [m]ake additional rules of the road or traffic regulations to meet their needs and traffic conditions." There is no need for state legislation that expressly allows for the use of camera enforcement technology as a method of policing, just as there is no need for legislation to authorize the use of cell phones, computers, electric cars or other technologies. See e.g. City of Jefferson City, Mo v. Cingular Wireless, LLC, 531 F.3d 595, 608 (8th Cir. 2008) ("Springfield is not required to update its Code for the purpose of recognizing the advent of each new form of technology"). Section 304.120 RSMo should be read consistently with the technology available at the present time to effectuate its purposes.[3] Even the Court in Brunner, *supra*, recognized "that the use of technology as a

[3] The use of cameras in traffic safety is not a new concept, and in fact they have been

means of police enforcement will inevitably continue to increase." *Id.* at 222.

Further, as noted above, this Court has recognized the "indispensable" nature of local control relative to the promotion of safety, order, health, morals, prosperity and general welfare. State ex rel. Audrain County, *supra* at 303.

C. The Courts should not substitute their judgment for that of the City's Board of Aldermen with respect to legislative matters.

The adoption of the ordinance at issue in this case and the ordinances adopted by the *Amici*, are local legislative actions. *See e.g.* Reynolds v. City of Independence, 693 S.W.2d 129, 132 (Mo. App. W.D. 1985) (Where an ordinance adopts a new policy or plan, as opposed to pursuing an existing plan already adopted, the act of adopting the ordinance is legislative). "Where an ordinance appears within the scope of delegated police power, the courts will not substitute their discretion for that of the legislative body which enacted the ordinance." State ex rel. Payton v. City of Riverside, 640 S.W.2d 137, 140 (Mo. App. W.D. 1982). "This is especially applicable to purely legislative acts of

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utilized in one form or other since 1909. Automated Traffic Enforcement Systems, 26 A.L.R. 6th 179, §2 (pub'd 2007). In 1909 the state of Massachusetts used a "photo-speed recorder" to capture photos of vehicles at timed intervals and the speed was calculated by measuring the reduction in the size of the vehicle as it moved away from the camera. *Id.* In the 1950s the state of New York began using photo technology to detect speeding vehicles. *Id.* Additionally, police radar was first developed and used in the late 1940s. *Id.*

municipal corporations." *Id.*

The recent camera traffic safety enforcement opinions, up to and including Edwards, acknowledge that ordinances, such as the one at issue in this case, are within the scope of the municipal police powers. However, the opinions in Brunner and City of St. Peters v. Roeder, ED100701, 2013 WL 2468832 (Mo. App. E.D. – Decided June 3, 2014)[4] have unjustifiably cast some doubt over this issue.

In Brunner, the Court determined that the question as to whether the ordinance was a valid exercise of the police power required remand to the Trial Court. "Moreover, Appellants contend that the Ordinance was unreasonable because there exist numerous other methods – as proven by studies – City had available to decrease red light violations, promote the general welfare of citizens, and increase safety. Such methods include the use of roundabouts and the timing of lights. All of these are facts in determining the reasonableness of the Ordinance." *Id.* at 225. Furthermore, in Roeder the Eastern District appeared to go further in stating "[b]ecause a system without a mandatory assessment of points would do little to protect the public . . ." *Id.* at 6.

However, the question of reasonableness, should only be reached if someone challenging an ordinance can rebut the presumption of reasonableness. See e.g. Wells & Highway 21 Corp. v. Yates, 897 S.W.2d 56, 60-61 (Mo. App. E.D. 1995) (A zoning ordinance (which was legislative in nature) is presumed to be reasonable, and the challenging property owner has the burden of rebutting presumption). Even if the presumption can be rebutted, an ordinance should still be upheld if its reasonableness is

[4] A copy of the Opinion is included in the *Amici's* Appendix at A1.

fairly debatable. *Id.* at 61. Cook, Nottebrok, and the recent opinions through Edwards, make it clear that the City's Ordinance is reasonably related to the promotion of the health, safety and welfare of the City's residents.

In some of the recent decisions from the Courts of Appeal, the Courts have also addressed arguments made by plaintiffs that the various public safety ordinances were unlawfully enacted simply for revenue generation purposes. While of course violations of the ordinances generate 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. This statute provides that no city can generate more than thirty percent of its annual general operating revenue through traffic fines. If a city exceeds this statutory cap, then they are required to remit excess sums to the Director of Revenue, who then must pay out such sums to the schools located in the municipality's county. Accordingly, the state legislature has established boundaries on revenue generation through traffic enforcement on the part of municipalities. A violation of the Macks Creek Law does not result in the invalidation of any particular traffic ordinance, rather it simply requires the remittance of excess revenues from fines for all forms of traffic violations.

Judicial determination of legislative matters, i.e. the weighing of different options to improve public safety or placing limits on total fine revenue, is an encroachment of the

judiciary on the legislative functions of the municipalities and the state, and 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. "One branch may interfere impermissibly with the other's performance of its constitutionally assigned [power] ... [citations omitted]. Alternatively, the doctrine [of separation of powers] may be violated when one branch assumes a [power] ... that more properly is entrusted to another. [citations omitted]." I.N.S. v. Chadha, 103 S.Ct. 2764, 2790-91, 77 L.Ed.2d 317 (1983) (Powell, J., concurring). See State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228, 231 (Mo. banc 1997). This Court should restore the proper balance of the legislative and judicial branches by deferring to local legislative traffic safety regulation choices. State ex rel. Audrain County, *supra,* at 303.

D. The *Amici's* ordinances, which place responsibility upon vehicle owners for intersection safety violations do not conflict with state statutes.

Traffic ordinances must be consistent, and not in conflict, with state law. See e.g. Sections 71.010 and 304.120.3 RSMo. "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 *Amici* have all enacted ordinances that hold the owner of a vehicle liable for violations of public safety at intersections. The ordinances do not prohibit the enforcement of state laws pertaining to red lights, nor do they permit operators to violate electric signals with impunity. The two systems complement each other, which as discussed below in Point II is consistent with the existence of the two different enforcement mechanisms of state and municipal prosecutions.

II. The Trial Court erred in declaring the City of St. Louis' red light camera ordinance invalid and enjoining its enforcement, because the ordinance constitutes a permissible use of a rebuttable presumption and does not violate Article I, Section 10 of the Missouri Constitution, in that the ordinance is civil, not criminal, in nature.

A. Standard of Review

The *Amici* incorporate the Standard of Review set forth in Section I.A of the brief.

B. The Ordinance is Civil, not Criminal, in Nature.

State statutes are enforced in the Circuit Courts, whereas municipal ordinances are enforced in the Municipal Courts. Pursuant to Section 479.020.1 RSMo, Municipal Judges only have "original jurisdiction to hear and determine all violations against the ordinances of the municipality." Further, Section 479.170.1 RSMo mandates that if "in the progress of any trial before a municipal judge, it shall appear to the judge that the accused ought to be put upon trial for an offense against the criminal laws of the state and not cognizable before him as municipal judge, he shall immediately stop all further proceedings before him as municipal judge and cause the complaint to be made before some associate circuit judge within the county." Further, ordinance violations are governed by separate procedures set forth in Rules 37 and 38, whereas criminal prosecutions are governed by Rules 19 through 36.

Accordingly, Municipal Courts preside over cases involving Municipal ordinance violations, and not cases that involve violations of state criminal laws. This distinction is evident in the context of the prosecution of traditional speeding violations. If an

individual is charged under the state statutes (Sections 304.009 and 304.010 RSMo), they would be charged with a misdemeanor, prosecuted in State Court, and subject to three points on their license pursuant to Section 302.302 RSMo. Conversely, if an individual is charged under a corresponding municipal ordinance, they would be charged with a municipal ordinance violation, prosecuted in Municipal Court and subject to only two points on their license pursuant to Section 302.302 RSMo. [LF at 26].

This Court in Strode v. Director of Revenue, 724 S.W.2d 245, 246-247 (Mo. banc 1987) when considering a defendant charged with driving with excessive blood alcohol content recognized:

> A person charged with violating a municipal ordinance faces far less serious sanctions than does a person charged with violating §§ 577.010 or 577.012. The state law violations are Class B and Class C misdemeanors respectively for first offenses; subsequent violations range from Class A misdemeanors (prior offenders) to Class D felonies (persistent offenders). § 577.023, RSMo 1986. Municipal ordinance violations are merely quasi-criminal in nature. *Tolen v. Missouri Dept. of Revenue,* 564 S.W.2d 601, 602 (Mo.App.1978). The fact that there are collateral consequences to convictions under § 577.010 and § 577.012 which do not attach to municipal convictions both explains and justifies the legislature's requirement that greater care be taken with warrantless arrests for violations of §§ 577.010 and 577.012 than with municipal violations.

Id. at 247-48.[5]

In recognition of the distinction between the state criminal laws and municipal ordinances, the Missouri General Assembly has enacted Chapter 300 RSMo setting forth a model traffic code which may, at the discretion of local elected officials, be adopted by municipalities. Alternatively, cities can adopt customized ordinances. However, cities do not enforce statutes in the Municipal Courts.

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*, held that:

> An automated traffic ordinance is considered to be a civil ordinance where (1) the ordinance includes express language indicating a municipality's

[5] The Eastern District in City of St. John v. Brockus, ED99644, 2014 WL 2109108 (Mo. App. E.D. - Decided May 20, 2014), also recognized this distinction between state and municipal prosecutions. A copy of the Opinion is included in the *Amici's* Appendix at A10.

> intention to consider a violation of the ordinance to be civil in nature; (2) the ordinance imposes a sanction that does not involve an affirmative disability or restraint on the individual but merely imposes a fine without assessing points against an individual's driver's license; (3) the civil, non-point penalty for violating the ordinance is assessed without regard to the individual's knowledge or state of mind at the time of the violation; (4) the presence of the deterrent purpose of the sanction may serve civil as well as punitive goals; (5) the behavior to which the sanction applies is not already a crime; (6) the ordinance is rationally connected to the broader, legitimate non-punitive purpose of promoting public safety; and (7) the sanction imposed by the ordinance does not appear excessive in relation to the ordinance's purpose of promoting public safety.

Id. at 257-258.

"These factors do not uniformly weigh in favor of finding an ordinance is criminal or civil in nature, but the balance of factors weigh in favor of finding a civil or criminal nature." Brunner at 232. In Brunner, the Eastern District applied the Nottebrok factors and found the red light ordinance to be criminal in nature, in part because: (1) there was no expression of intent by the legislative body for the violation to be civil in nature; and (2) the ordinance carried with it the threat of imprisonment.

The Nottebrok factors were the result of the Eastern District's paraphrasing of the seven factors considered by the Court in Kilper, *supra* (a copy of the Opinion is included in the *Amici*'s Appendix at A15):

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

Assuming *arguendo* this Court determines that points should be assessed under the St. Louis 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 Roeder, *supra*, 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 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[6] 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. Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the

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

> 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 *Amici's* ordinances all demonstrate an intent that they be civil in nature, and thus enjoy the high level of deference noted by the U.S. Supreme Court in Ward. Even if this Court should find that the absence of an express prohibition against imprisonment in the St. Louis ordinance (unlike the *Amici* cities' ordinances), leans in favor of viewing St. Louis' ordinance as being criminal, it still requires the clearest proof that the balance of the factors weigh in favor of finding the ordinance to be criminal.

Furthermore, 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. See e.g. Section 546.902 RSMo (municipalities in St. Louis County); and Section 79.470 RSMo (Fourth Class municipalities); and St. Louis City Ordinance 57831 [Legal File ("L.F."), at 435]. 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 St. Louis 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 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.*,[7] 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.

The ordinance considered in Kilper and the ordinance considered in this case both operate upon the rebuttable presumption that the owner was the operator of a vehicle that violated an electric signal and, therefore, the reasoning in Kilper is equally applicable to the instant case. In considering this fifth factor, the U.S. Supreme Court in U.S. v Ursey,

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

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.*

The ordinance in this case and the *Amici's* ordinances are civil under the Nottebrok/Kilper/Hudson/Kennedy factors.

C. The use of a rebuttable presumption is permissible in the instant case.

This Court in Cook, *supra* at 469 recognized that "[s]tatutes or ordinances providing a rule of evidence, in effect, that a shown fact may support an inference of the ultimate or main fact to be proved are well within the settled power of the legislative body; and such legislative provisions do not violate provisions of the federal or state constitutions."

Further, this Court in Hertz, *supra*, discussed the City of Kansas City's ordinance which provided:

> If any vehicle is found upon a street in violation of any provision of this chapter, the owner or person in whose name such vehicle is registered in the records of any city, county or state shall be held prima facie responsible for such violation, if the driver thereof is not present.

Hertz at 451.

This Court thereafter noted:

> The words 'prima facie', as used in this ordinance, do not mean the owner is presumed to be the driver. The phrase, as used here, means a rebuttable presumption exists that the car was not being operated by the driver without the consent of the owner and that the registration of the car is correct. Unless that presumption is rebutted, the ordinance imposes liability for the parking violation upon the owner.

Hertz at 452.

Hertz, therefore, is consistent with Cook, in that it authorizes use of a rebuttable presumption with respect to the owner's consent to the use of their vehicle by the operator.

Further, the Missouri legislature has created an offense whereby an individual can be charged with a felony based upon a rebuttable presumption that the owner of the vehicle was driving their vehicle. Section 304.050 RSMo, creates a multitude of traffic laws related to school busses. Subsection 1 requires a vehicle to stop upon encountering a school bus that has stopped to load and unload children.

Subsection 7 of Section 304.050, provides that:

> If any vehicle is witnessed by a peace officer or the driver of a school bus to have violated the provisions of this section and identity of the operator is not otherwise apparent, **it shall be a rebuttable presumption that the person in whose name such vehicle is registered committed the violation**.

(Emphasis added)

Pursuant to Section 304.070 RSMo, any "person who violates any of the provisions of Section 304.050 is guilty of a class A misdemeanor… [and] the court may suspend the driver's license of any person who violates the provision of subsection 1 of Section 304.050." Section 304.070 RSMo. Further, where a violation of Section 304.050.1 RSMo, results in an injury to a child the violator shall be guilty of a class D felony and where the violator causes the death of a child the violator shall be guilty of a class C felony. *Id.*

In Damon, the Western District cited to Sandstrom v. Montana, 442 U.S. 510, 523 (1979) for the notion that "a rebuttable mandatory presumption is unconstitutional when the presumed fact is an element of the crime charged because it violates the constitutional presumption of innocence as to every element of a crime and because it invades the factfinding function of the jury." Damon at 191. This is distinguishable from the instant case, because the violation in question here is not a "crime," it is an infraction under a municipal ordinance. Similarly, the Court in Brunner erroneously equated an ordinance violation as a crime. *Id.* at 230-231.

This Court should reaffirm the principles set forth in Hertz, as codified in Section 304.120 RSMo, and uphold ordinances holding vehicle owners civilly liable for intersection safety violations involving their vehicles.

III. The Trial Court erred in declaring the City of St. Louis' red light camera ordinance invalid and enjoining its enforcement, because even assuming *arguendo* that points should be assessed upon drivers' licenses and that the notices issued to Respondents were insufficient, the ordinance is still valid, in that the improper enforcement of an ordinance by city employees does not invalidate the underlying legislation.

A. Standard of Review

The *Amici* incorporate the Standard of Review set forth in Section I.A of the brief.

B. The ordinance does not state that points are not to be assessed.

The St. Louis ordinance itself does not state that points will not be assessed against the owner's driver's license. So even assuming *arguendo* that a violation of the City's ordinance should require the assessment of points, nothing in the ordinance contradicts such a requirement. Thus, violations of the City of St. Louis' ordinance would not be in conflict with Section 302.302 RSMo. In fact, violations of the City of St. Louis's ordinance are reported to the Department of Revenue. [L.F. at 222-223]. As with potential issues regarding the notices, discussed *infra*, any concern pertaining to the assessing and reporting of points would not relate to the ordinance as adopted by the elected officials, but to the implementation of the ordinance by City employees and the Director of Revenue.[8] Even if the City's employees had failed to properly enforce the

[8] Respondents/Cross-Appellants would appear to lack standing to raise this issue, as Respondents/Cross-Appellants are essentially claiming that they should be facing 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).

C. The ordinance itself expressly requires compliance with applicable Missouri Supreme Court Rules with respect to the issuance of summons.

The City of St. Louis' ordinance expressly provides, with respect to the issuance of a summons, that:

> A. Upon the filing of an information in the municipal court, the Court Clerk shall issue a summons, with a court date, pursuant to Missouri Supreme Court Rules 37.42 through 37.44.

[L.F. at 245].

Further, the St. Louis City ordinance does not set forth what information shall be included in the notice of violation, and merely provides a list of minimum requirements

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possibility of stricter sanctions for allegedly violating the City of St. Louis' ordinance. "Generally, only those adversely affected by a statute have standing to challenge the constitutionality of a statute." State v. Young, 362 S.W.3d 386, 396 (Mo. banc 2012).

for a supplemental notice of violation.[9] [L.F. at 245-246]. Accordingly, nothing in the ordinance provides for any conduct that would violate the Missouri Supreme Court Rules with respect to the issuance of citations, notices, summons or other required documents. Similar to the issue with respect to the issuance of points, if the notices issued in this case were deficient, that still does not invalidate the underlying ordinance.

[9] This includes: (1) a statement that the records of the automated system will be used in the Municipal Court proceeding as evidence; and (2) a statement that the owner may submit an affidavit stating that someone other than the owner was operating the vehicle. [L.F. at 246].

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request that this Court recognize the authority of municipalities to enact legislation to govern matters of health, safety and welfare within their borders. Further, this Court should uphold the imposition of owner liability for intersection safety violations involving their vehicles, based upon the presumption that the owner's vehicle was not being operated without their permission, as they do not conflict with the state statutes pertaining to the running of red lights, and are authorized pursuant to Hertz and Section 304.120 RSMo. The *Amici* further ask that this Court reaffirm its holding in Cook, and find that the use of a presumption that the owner was the operator of the vehicle at the time of the infraction is also valid. The *Amici* also respectfully request that this Court clarify that public safety ordinances such as the one at issue in this case are civil in nature, and that any errors with respect to enforcement do not invalidate the ordinances themselves.

Respectfully submitted,

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Certificate of Compliance

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

1. The Amici Curiae's Brief includes the information required by Rule 55.03.
2. The Amici Curiae's Brief complies with the limitations contained in Rule 84.06.
3. The Amici Curiae's Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service, contains 7,104 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Amici Curiae's Brief was prepared.

/s/ *Carl J. Lumley*

Certificate of Service

I hereby certify that on July 31, 2014 the foregoing Brief and Appendix thereto were 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/ Carl J. Lumley