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
Twenty-Second Judicial Circuit
Honorable Steven R. Ohmer, Circuit Judge
Cause No. 1322-CC10008

AMENDED BRIEF OF APPELLANT CITY OF ST. LOUIS

WINSTON E. CALVERT,
CITY COUNSELOR

Michael A. Garvin, #39817
Erin K. McGowan, #64020
1200 Market Street, Room 314
St. Louis, MO 63103
(314) 622-3361
(314) 622-4956 (fax)
garvinm@stlouis-mo.gov
mcgowane@stlouis-mo.gov

Attorney for Appellant/Cross-Respondent

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JURISDICTIONAL STATEMENT

This appeal lies from a judgment entered by the Circuit Court of the City of St. Louis. *See* Mo. Rev. Stat. § 512.020. This appeal does not involve the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or an imposed punishment of death. Therefore, pursuant to Article V, § 3 of the Missouri Constitution, the Eastern District of the Missouri Court of Appeals originally had jurisdiction over this appeal. This Court granted Appellant's Application for Direct Transfer to the Missouri Supreme Court pursuant to Article V, § 10 of the Missouri Constitution and Missouri Rule of Civil Procedure 83.01.

STATEMENT OF FACTS

Respondents Sarah Tupper and Sandra Thurmond filed suit on November 25, 2013, asserting various claims attacking the validity of the red light camera enforcement program initiated by the City of St. Louis ("City"). *L.F. 14.* After a bench trial, the trial court rendered its Order and Judgment on February 11, 2014, declaring the City's red light camera enforcement program ordinance invalid and enjoining the City from enforcing the ordinance. *App., A-15, 18; L.F. 455-472.* The trial court also stayed its judgment pending appeal, subject to the condition that fines paid for violations that occurred after February 11, 2014 be escrowed while the stay is in effect. *L.F. 437, 538.* The City appealed and applied to this Court for direct transfer, which application was granted on June 24, 2014.

Red Light Camera Ordinance

The City enacted its red light camera legislation, Ordinance 66868, in 2005. *App., A-19, 20; L.F. 245-246.* As implemented, police officers review video recordings of suspected red light violations and determine whether probable cause exists to issue a notice of violation. The Ordinance creates a rebuttable presumption that the registered owner of the vehicle was the operator at the time of the violation. *Id.*

Ordinance 66868 is silent on the topic of points and does not reference, mention or otherwise address whether points should be assessed against the driver's licenses of those convicted of red light camera enforcement system violations. *L.F. 223-224; App. A-19, 20.* The Ordinance does not attempt to classify red light camera violations as

moving or nonmoving violations. *Id.* No penalty is stated in Ordinance 66868 for a red light camera violation.[1] *Id.; L.F. 226.*

Cases arising from the red light enforcement program of the City are brought in the municipal division of the Circuit Court for the City of St. Louis[2] ("Municipal Court"). *L.F. 226.* The presiding judge of the Twenty-Second Judicial Circuit has general administrative authority over the Municipal Court judges and personnel. *Supreme Court Rule 37.04.*[3] Pursuant to a 2007 administrative order approved by the

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[1] The City has a general penalty ordinance for various traffic violations. *L.F. 402.*

[2] Commonly called a "municipal court," the municipal division, though operated by the City of St. Louis, is a division of the Circuit Court. Mo. Const. Art. V, § 23; *see also* Missouri Rule 37.04 (giving the presiding judge authority over all divisions of the circuit court hearing municipal ordinance violations); and *see* Local Rule 69 (governing the operation of the City's Municipal Division of the circuit court) and Local Rule 100.1.2(12) (providing that the circuit court's presiding judge is responsible for, among other things, establishing "standardized administrative procedures in the various Divisions of the Circuit Court").

[3] The Missouri Constitution provides that each state circuit court may have municipal judges who shall hear and determine violations of municipal ordinances. *Mo.Const. Art V, §23.* This Court promulgated rules of procedure that control the manner and details of how municipal ordinance violations are processed and determined. *Missouri Rules 37.01-.75.* Pursuant to authority granted by Rule 37.05, the Twenty-Second Judicial

judges of the City's Municipal Court, the maximum penalty for violations of the City's red light enforcement program is a $100 fine. *L.F. 226, 306.*

Defendant City has not fined any violator of the red light photo enforcement program more than $100.00 since the inception of the program, nor has anyone ever been arrested for any such violations. *L.F. 226-227.* The City has never issued a warrant for the arrest of any violator of the red light photo enforcement program who failed to appear for an assigned court date. *L.F. 226.*

When the red light camera program began, police identified dangerous intersections with a high number of accidents. *Tr. 96.* Cameras were installed at those intersections. *Id.* The number of red light violations at those intersections dropped by 63 percent from 2007 to 2013. *Tr. 118-119.* The number of red light camera violators has decreased each year at intersections where red light cameras are present. *Tr. 95.* In St. Louis, 84 percent of the people who pay a red light camera ticket do not get another one. *Tr. 118.* Studies by the Kansas City police, the Missouri Highway Commission and the Missouri Department of Transportation all confirm that there has been a reduction over time in collisions at intersections with red light cameras. *Tr. 96-97.* From 2010 through 2012, total traffic fatalities in the City of St. Louis dropped 19 percent. *L.F. 381.*

Circuit adopted local rules governing the municipal courts and the disposition of ordinance violations. *See* Twenty-Second Judicial Circuit's Local Rules 1, 4.7 and 69.

Respondents' Red light Camera Cases

At the time they filed suit, two red light camera matters were pending in Municipal Court against Respondent Thurmond and one against Tupper. *L.F. 227-230.* In each case, respondents admitted that red light violations actually occurred, and that they were the owners of record of the respective vehicles. *L.F. 227-230.* Tupper testified that her domestic partner was driving her vehicle at the time of the violation and that she was a passenger. *Tr. 60, 126-127.* Thurmond testified that she believes her daughter was driving for one of the violations and she does not know who was driving her car for the second. *Tr. 129.*

Neither Thurmond nor Tupper paid the fines. *L.F. 227-230.* Thurmond's violations occurred on March 12, 2012 and May 19, 2012. *L.F. 264, 266.* Her respective court dates for the violations were May 29, 2012 and August 8, 2012 (*L.F. 310, 312*), but she did not appear in Municipal Court for either of her scheduled court dates, nor did she otherwise attempt to contest the violations in Municipal Court. *L.F. 229-230.* Tupper's violation occurred on September 6, 2013. *L.F. 252.* According to the summons, Tupper's court date was scheduled for January 22, 2014. *L.F. 308.* Respondents Tupper and Thurmond, however, filed their lawsuit on November 25, 2013 (*L.F. 1, 14),* prior to the Municipal Court date for Tupper's red light camera violation.

The Municipal Court proceedings against Respondents Tupper and Thurmond were dismissed on November 27, 2013. *L.F. 230.* After those proceedings were

terminated by dismissal, no red light camera matters were pending in Municipal Court against Tupper or Thurmond. *Id.*

Assessment of Points

The Missouri Department of Revenue is responsible for keeping driving records, including records of points assessed against the driver's licenses of violators. *L.F. 233, 235.* After a conviction is entered in Municipal Court in a case involving a violation of the City's red light camera ordinance, the Clerk of the Municipal Court enters a record of that conviction into the data system operated by Regional Justice Information Services ("REJIS") in a format that enables REJIS to determine that the conviction is one for a violation of a red light camera ordinance.[4] *L.F. 222.* To the record of conviction, REJIS assigns the State of Missouri's charge code for violations of red light camera ordinances as designated by the Office of State Courts Administrator ("OSCA") and the Missouri Highway Patrol. *L.F. 223, 236.* OSCA has only one charge code for red light camera violations, which states "Public safety violation – red light camera (no points)." *App., A-24; L.F. 224, 236, 298, 305.* REJIS transmits the record of conviction of red light camera convictions to the Missouri Department of Revenue using that OSCA-designated charge code. *L.F. 223.* The Missouri Director of Revenue

[4] REJIS is a quasi-governmental entity created by St. Louis County and the City of St. Louis. It provides information technology services for reporting criminal justice information. *L.F. 222.*

does not upload the reports of red light camera violations submitted by REJIS on behalf of the City. *L.F. 236.*

Violation Notices

Ordinance 66868 requires that red light camera violation notices be sent, but does not require any specific content in the notices. *App., A-19, 20; L.F. 245-246.* Therefore, the content is determined administratively. A previous court decision in *Smith v. City of St. Louis* held, in part, that a City red light camera violation notice issued in 2007 failed to comply with Missouri Rule 37.33. *Smith v. City of St. Louis*, 409 S.W.3d 404, 417 (Mo.App.E.D. 2013). Specifically, *Smith* held that the City's 2007 Notice of Violation was defective because it (i) failed to advise recipients that they had the option of paying the fine or pleading not guilty and having a trial; and (ii) lacked a probable cause statement. *Id.* at 418, 427. The 2007 violation notice considered in *Smith* is included in the trial record. *L.F. 231, 317-320.* The content of the violation notices utilized by the City for red light camera infractions has changed multiple times since the program's inception, including amendments made on March 1, 2012. *L.F. 231.* Respondents Tupper and Thurmond received violations notices that were issued using the revised form of notice. *L.F. 247-248, 252-253, 264-267.* Their violation notices each provided a set of options for payment of the fine, procedures for disputing the notice without appearing in court, or pleading not guilty and requesting a trial. *Id.* Unlike the *Smith* violation notices (*L.F. 317-320*), each notice issued to respondents included the following information:

FAILURE TO RESPOND to this notice will result in the service of a Summons and a required court appearance. At this court appearance you may enter a not guilty plea and request a trial.

L.F. 248, 253, 265, 267.

Both respondents acknowledged via stipulation that they understood, based on the information provided in their respective violation notices, that they were afforded the option of paying the fine specified in the Notice of Violation or pleading not guilty and appearing at trial. *L.F. 231-233.* Probable cause statements were included in each Notice of Violation sent to respondents. *L.F. 247, 252, 264, 267.*

Additional revisions were subsequently made to the City's violation notices and summons. *L.F. 231, 362-365.* The version of violation notice utilized by the City at the time of trial retained the statement quoted above, added text repeating the option to appear in court and plead not guilty, and added the following, among other things:

You must respond to this Information/Violation Notice by 1) Paying the specified fine; or 2) Pleading not guilty and appearing at trial (see reverse side for additional details); or 3) Submitting a properly completed Affidavit of Non-Responsibility (see reverse side for additional details).

L.F. 362-363. For purposes of their injunction request, respondents conceded at trial that the current form of the City's violation notices conforms to Missouri court rules. *Tr. 7.*

The affidavit option is an alternative to a court appearance. The affidavit may be completed in one of two ways: a recipient may (i) indicate that the recipient was not

the driver and identify the actual driver; or (ii) state any other reason the recipient believes that he or she was not responsible. *L.F. 248, 253, 265, 267.* This provision allows the city counselor's office to terminate prosecutions before a court appearance is necessary. *Id.*

Procedures for Issuance of Red light Camera Violation Notices

The City contracted with American Traffic Systems, Inc. ("ATS") to install cameras at various traffic intersections in the City. *L.F. 224.* ATS personnel forward video of all possible red light violations to the Metropolitan St. Louis Police Department. *L.F. 225.* ATS employees do not make judgments or determinations of whether a violation occurred. *Id.* City police officers review video recordings of suspected red light violations and determine whether probable cause exists to issue a notice of violation. *Id.* About 25 percent of the potential violations examined by police officers are rejected with no charge issued. *Tr. 101, 113.* When a violation is detected by a police officer as part of the red light photo enforcement program, a Notice of Violation is issued to the registered owner(s) of the vehicle. *L.F. 225.*

Red light camera ticket program payments are received and processed by the City's Traffic Violations Bureau. *Id.* If there is no payment after the initial Notice of Violation is sent, a Summons and Supplemental Notice of Violation is sent to the registered owner(s) of the vehicle. *Id.* Violation notice recipients may raise any number of defenses in Municipal Court, including constitutional defenses. *L.F. 226.*

Lawsuit and Trial

Respondents filed suit against multiple defendants in circuit court on November 25, 2013, contesting the legality of City Ordinance 66868 and the red light camera program on various grounds. *L.F. 14.* They asserted:

(1) that Ordinance 66868 is void because points are not assessed by the State of Missouri for red light camera violations (*L.F. 26*);

(2) that the City's continued operation of its red light camera program based on the allegedly invalid Ordinance violated respondents' due process rights (*L.F. 27*) in that:

(a) the City lacked probable cause to send violation notices to respondents based on the rebuttable presumption that the vehicle owner was the driver, thus allegedly violating respondents' due process rights (*L.F. 18*);

(b) the violation notices sent to respondents did not conform to Rule 37.33(b), thus violating respondents' procedural due process rights (*L.F. 19-20*); and

(c) the rebuttable presumption created in Ordinance 66868 is unreasonable. *L.F. 33.*

At trial, the parties stipulated to 103 uncontested facts (including a separate stipulation executed by respondents and the Director of Revenue) and to the admission of 28 stipulated exhibits. *L.F. 221, 235, 238.* The stipulated facts and exhibits provided all of the substantive evidence related to the issue of points and to whether the content of the violation notices was sufficient. Respondents' counsel also made an oral

stipulation on the record that the current version of the City's violation notices satisfies the requirements of Missouri Court Rules, including Rule 37.33. *Tr. 7.*

Evidence related to the reasonableness and validity of the Ordinance's rebuttable presumption that the vehicle owner is the driver was a combination of stipulations and evidence presented at trial. Police witnesses for both respondents and defendants testified that the large majority of drivers stopped for routine traffic violations were also the owners of the vehicles they were driving. These witnesses for both sides essentially agreed with one another.

Respondents presented testimony from Officer Sherri Bruns of the Metropolitan St. Louis Police Department that, based on her eight years of experience as an officer who made traffic stops, 70 or 80 percent of the drivers stopped for routine traffic violations were also the sole owners of the vehicles they were driving at the time of the violation. *Tr. 86, 88.* In cases where a vehicle was titled in more than one name, the chance that a driver in a routine traffic stop would also be an owner increased to about 90 percent, according to Officer Bruns. *Tr. 87.* St. Louis Police Chief Sam Dotson, a City witness, obtained similar results from a survey he commissioned by Traffic Safety Division officers. *Tr. 99.* Using a sample of about 60 traffic stops over a one-week period, 80 percent of the drivers in routine traffic stops were both the owner and the operator of the subject vehicle. *Id.* Those findings were consistent with Chief Dotson's personal observation in more than 20 years as a police officer. *Tr. 92, 99-100.* Finally, Damon Cross, a former St. Louis police officer of 22 years, testified that about 80 percent of the drivers in the 2,000 to 3,000 traffic stops he made were also the vehicle

owners. *Tr. 108-109*. The cumulative effect of the officers' testimony was that 70 to 80 percent of the drivers stopped for routine traffic violations were also the sole owners of the vehicles they were driving, and 80 to 90 percent were one of the owners of a multi-owner vehicle. Those percentages were not contested on cross-examination or with other evidence.

The trial court entered its Order and Judgment on February 11, 2014, finding for plaintiffs-respondents and against the City, declaring the City's red light camera enforcement program ordinance invalid and enjoining the City from enforcing the ordinance. *App., A-1.* The trial court found in favor of all other defendants and denied the relief sought against them. *L.F. 536.*[5] Respondents' motion for an award of attorney's fees was also denied. *Id.*

[5] The other defendants were the Director of the Missouri Department of Revenue, St. Louis Mayor Francis Slay, St. Louis Police Chief Dotson and American Traffic Solutions, Inc. and Linebarger Goggan Blair & Sampson, LLP.

POINTS RELIED ON

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DECLARING ORDINANCE 66868 VOID AND ENJOINING ITS ENFORCEMENT, AND THE JUDGMENT SHOULD BE REVERSED, BECAUSE THE TRIAL COURT MISAPPLIED THE UNCONTESTED FACTS TO THE LAW IN FINDING THAT THE REBUTTABLE PRESUMPTION PROVISIONS OF ORDINANCE 66868 ARE UNLAWFUL, IN THAT (A) THE UNCONTESTED EVIDENCE AT TRIAL CONCLUSIVELY DEMONSTRATED THE REASONABLENESS OF THE REBUTTABLE PRESUMPTION IN ORDINANCE 66868; AND (B) RED LIGHT CAMERA MATTERS IN MUNICIPAL COURT ARE CIVIL PROCEEDINGS, WITH QUASI-CRIMINAL ASPECTS, IN WHICH REBUTTABLE PRESUMPTIONS ARE A PROPER MEANS OF SHIFTING THE BURDEN OF EVIDENCE.

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

City of Webster Groves v. Erickson, 789 S.W.2d 824 (Mo.App.E.D.1990)

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

Unverferth v. City of Florissant, 419 S.W.3d 76 (Mo.App.E.D. 2013)

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT ORDINANCE 66868 CONFLICTS WITH STATE LAW REGARDING THE ASSESSMENT OF POINTS FOR MOVING VIOLATIONS, AND THE TRIAL COURT'S JUDGMENT SHOULD THEREFORE BE REVERSED, BECAUSE THE ORDINANCE DOES NOT MENTION, REQUIRE OR PROHIBIT THE ASSESSMENT OF POINTS, THE MUNICIPAL DIVISION OF THE CIRCUIT COURT REPORTS ORDINANCE VIOLATIONS TO THE DIRECTOR OF REVENUE USING THE CHARGE CODE PRESCRIBED BY THE OFFICE OF STATE COURTS ADMINISTRATOR (OSCA) WHICH CATEGORIZES RED LIGHT CAMERA VIOLATIONS AS "NO POINT" VIOLATIONS, AND THE DECISION WHETHER TO ASSESS POINTS FOR RED LIGHT CAMERA VIOLATIONS IS MADE BY THE DIRECTOR OF REVENUE PURSUANT TO R.S. MO. 302.225.

McCollum v. Dir. of Revenue, 906 S.W.2d 368 (Mo. banc 1995)

Mo. Rev. Stat. § 302.225

Mo. Rev. Stat. § 302.302

City of St. Louis Ordinance 66868

III. THE TRIAL COURT ERRED IN DECLARING ORDINANCE 66868 VOID AND ENJOINING ENFORCEMENT OF THE ORDINANCE BECAUSE RESPONDENTS HAD AN ADEQUATE REMEDY AT LAW WHICH PRECLUDES EQUITABLE RELIEF, IN THAT THE CITY'S MUNICIPAL COURT, A DIVISION OF THE CIRCUIT COURT, PROVIDES A FORUM IN WHICH THE RESPONDENTS SHOULD HAVE CONTESTED THEIR RED LIGHT CAMERA VIOLATIONS, INCLUDING RAISING ANY CHALLENGE TO THE VALIDITY OF THE ORDINANCE UNDER WHICH RESPONDENTS WERE CHARGED, THUS REQUIRING REVERSAL OF THE TRIAL COURT'S JUDGMENT.

Smith v. City of St. Louis, 409 S.W.3d 404 (Mo.App.E.D. 2013)

Unverferth v. City of Florissant, 419 S.W.3d 76 (Mo.App.E.D. 2013)

State ex rel. Janus v. Ferriss, 344 S.W.2d 656 (Mo.App. 1961).

IV. THE TRIAL COURT ERRED IN DECLARING ORDINANCE 66868 VOID *AB INITIO* (ON ITS FACE) BASED UPON *SMITH V. CITY OF ST. LOUIS*, 409 S.W.3D 404 (MO.APP. E.D. 2013) AND IN APPLYING *BRUNNER V. CITY OF ARNOLD*, 427 S.W.3D 201 (MO.APP. E.D. 2013), WHICH HOLDS THAT ORDINANCE VIOLATIONS ARE CRIMINAL AND NOT CIVIL PROCEEDINGS, BECAUSE BOTH PROPOSITIONS ARE ERRONEOUS IN THAT (A) *SMITH* HELD ORDINANCE 66868 VOID AS APPLIED TO JUST ONE PLAINTIFF AND (B) *BRUNNER'S* HOLDING THAT ORDINANCE VIOLATIONS ARE CRIMINAL MATTERS IS CONTRARY TO BINDING MISSOURI PRECEDENT, REQUIRING REVERSAL OF THE TRIAL COURT'S JUDGMENT

Smith v. City of St. Louis, 409 S.W.3d 404 (Mo.App.E.D. 2013)

Unverferth v. City of Florissant, 419 S.W.3d 76 (Mo.App.E.D. 2013)

Sprague v. City of St. Joseph, 549 S.W.2d 873 (Mo. banc 1977)

V. THE TRIAL COURT ERRED IN DECLARING ORDINANCE 66868 VOID AND ENJOINING ITS ENFORCEMENT DUE TO IMPROPER NOTICE IN THAT THE COURT IGNORED THE CITY'S NOTICE REVISIONS THAT CORRECTED THE DEFICIENCIES CITED IN *SMITH V. CITY OF ST. LOUIS*, AND THE TRIAL COURT IMPROPERLY GRANTED PROSPECTIVE, INJUNCTIVE RELIEF DESPITE RESPONDENTS' ADMISSION THAT THE CITY'S CURRENT VIOLATION NOTICES COMPLY WITH RULE 37.33, THUS REQUIRING REVERSAL OF THE TRIAL COURT'S JUDGMENT.

Missouri Supreme Court Rule 37.33

Smith v. City of St. Louis, 409 S.W.3d 404 (Mo.App.E.D. 2013)

Goerlitz v. City of Maryland Heights, 333 S.W.3d 450 (Mo. banc 2011).

ARGUMENT

A recent series of Missouri red light camera cases have considered two basic approaches to using cameras to detect red light signal violators. The first approach treats red light camera violations in a manner similar to parking tickets – the vehicle owner is considered responsible and the identity of the driver is immaterial.[6] The second approach allows, along with all other defenses available by law, vehicle owners to contest whether the owner was the driver at the time of the violation. With the second approach, the owner of a vehicle that runs a red light is presumed to also be the driver at the time of a violation. The presumption is rebuttable, which affords a vehicle owner the opportunity to contest the violation on any basis, including the circumstance where the owner was not actually driving the vehicle at the time of the violation.[7] The second approach allows more avenues for violation notice recipients to contest the violations. Regardless of the approach, the goal of a red light camera program is to

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[6] This approach is addressed in *Edwards v. City of Ellisville*, 426 S.W.3d 644 (Mo.App.E.D. 2013); *Ballard v. City of Creve Coeur*, 419 S.W.3d 109 (Mo.App.E.D. 2013); *City of Creve Coeur v. Nottebrok,* 356 S.W.2d 252 (Mo.App.E.D. 2011).

[7] Addressing the second approach are *Brunner v. City of Arnold*, 427 S.W.3d 201 (Mo.App.E.D. 2013); *Unverferth v. City of Florissant*, 419 S.W.3d 76 (Mo.App.E.D. 2013); *Damon v. Kansas City*, 419 S.W.3d 162 (Mo.App.W.D. 2013); *Smith v. City of St. Louis*, 409 S.W.3d 404 (Mo.App.E.D. 2013); *Kilper v. City of Arnold*, 2009 WL 2208404 (E.D.Mo. 2009).

deter red light running both through a public awareness program that includes warning signs at each intersection and through a fine, if necessary.

Appellant City of St. Louis adopted the second approach in 2005 with Ordinance 66868, which is the subject of this appeal. The same Ordinance was also considered in *Smith v. City of St. Louis*, 409 S.W.3d 404 (Mo.App.E.D. 2013). During and since the *Smith* litigation the City has strived to adapt to the developing case law. Less than two weeks after the *Smith* trial court issued its judgment, the City modified the content of its violation notices on March 1, 2012. *L.F. 349, 231.*[8] After this Court denied the *Smith* plaintiffs' application for transfer, the City modified its violation notices again in an attempt to comport with *Unverferth v. City of Florissant*, 419 S.W.3d 76 (Mo.App.E.D. 2013)(suggesting that a court date should be included on the initial notice and information even though it is not required by Rule 37.33). *L.F. 362-364.*

The City also took steps beyond what was required in the appellate decisions. Among the holdings in *Smith* was that a plaintiff who never appeared in the City's Municipal Court to contest her red light camera violation possessed "an adequate remedy at law in her municipal court hearing, which is the forum in which she must raise all of her claims. . . . [and therefore] is not entitled to judgment as a matter of law in the equitable claim before us." *Smith,* 409 S.W.3d at 414-415. But because *Smith*

[8] The 2007 Notice of Violation considered in *Smith* is part of the trial record. *L.F. 231, 317-320.* It can be compared with the post-March 1, 2012 revised notices that were sent to respondents. *L.F. 247-248, 252-253, 264-267.*

also found faults with the content of the City's Notice of Violation, the City's Municipal Court prosecutor decided to dismiss all red light camera cases that were initiated with the faulty violation notices, which were those sent prior to March 1, 2012. *L.F. 384-385.* The cutoff date for the dismissals coincides with the date of the revisions to the violation notices (March 1, 2012). *Smith* did not require those dismissals, but the City's Municipal Court prosecutor made the decision to dismiss in the exercise of his discretion.

Standard of Review

The trial court's judgment should generally be affirmed unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the court erroneously declares or applies the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). The application of this standard of review varies depending on the burden of proof applicable at trial and the error claimed on appeal to challenge the judgment. *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012). The reviewing court must consider the burden of proof governing the trial court's determination. *Id.*

In this case, the burden of proof is on Tupper and Thurmond, the plaintiffs-respondents to overcome the presumption that Ordinance 66868 is constitutional. *Pearson,* 367 S.W.3d at 43, citing *Mo. Prosecuting Attorneys v. Barton County,* 311 S.W.3d 737, 740 (Mo. banc 2010) Claims contesting the validity of ordinances are subject to the same standards as applied to statutes. *Neske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo. 2007).

Because this cause is a challenge to the validity of an ordinance enacted pursuant to the City's police power, the ordinance is presumed constitutional "unless it clearly and undoubtedly contravenes the constitution. Thus, respondents' burden at trial was to prove that the City's Ordinance "clearly and undoubtedly contravene[d] the constitution" and "plainly and palpably affronts fundamental law embodied in the constitution." *Pearson,* 367 S.W.3d at 43*; Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo. banc 1992). All doubts are "resolved in favor of the constitutionality of the statute." *Pearson,* 367 S.W.3d at 43. Accordingly, review by this Court is properly conducted in the context of determining whether respondents met their burden of proving the City's Ordinance unconstitutional "by negating every conceivable basis that might support it." *Eastern Mo. Laborers' Dist. Council v. City of St. Louis,* 5 S.W.3d 600, 604 (Mo.App. 1999).

This Court reviews questions of law *de novo*, without deference to the trial court. *Pearson,* 367 S.W.3d at 43-44; *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 338 (Mo. 2007). Where facts are contested, the reviewing court will defer to the trial court's assessment of the evidence. *Pearson*, 367 S.W.3d at 44. But where the evidence was not contested, no deference is due the trial court's judgment. *Id.; Bremen Bank and Trust Co. of St. Louis v. Muskopf,* 817 S.W.2d 602, 604 (Mo.App.E.D. 1991).

Stipulated facts are uncontested by definition. The trial court record here was established with 103 stipulations of fact and 28 stipulated exhibits, supplemented with the testimony of five witnesses and five trial exhibits. Where the trial court based its decision on its interpretation and application of the ordinance on the stipulated facts, the

decision is reviewed *de novo* by this Court, without deference to the trial court. *State ex rel. Valentine v. Orr,* 366 S.W.3d 534, 538 (Mo. 2012); *Lumetta v. Sheriff of St. Charles County*, 413 S.W.3d 718, 720 (Mo.App.E.D. 2013). The interpretation of an ordinance based on stipulated facts is a pure question of law, and the trial court's decision should therefore be given no deference. *Valentine,* 366 S.W.3d at 538.

Most, if not all, of the material evidence presented via witness testimony and trial exhibits also was uncontested. On review, no deference should be given to the trial court's findings based on uncontested evidence. *Pearson*, 367 S.W.3d at 44. A factual issue is contested if it is disputed in any manner. *Id.* at 44, *citing White v. Director of Revenue*, 321 S.W.3d 298, 307-308 (Mo. 2010). A party may contest evidence in a variety of ways, such as providing contrary evidence, cross-examining a witness, challenging the credibility of a witness, pointing out inconsistencies in evidence, or arguing the meaning of the evidence. *Id.* None of the material evidence introduced at trial was contested or challenged, meaning that no deference should be accorded to the trial court's findings based on that evidence. *Id.* The City will address this in the Argument section of its brief where appropriate.

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DECLARING ORDINANCE 66868 VOID AND ENJOINING ITS ENFORCEMENT, AND THE JUDGMENT SHOULD BE REVERSED, BECAUSE THE TRIAL COURT MISAPPLIED THE UNCONTESTED FACTS TO THE LAW IN FINDING THAT THE REBUTTABLE PRESUMPTION PROVISIONS OF ORDINANCE 66868 ARE UNLAWFUL, IN THAT (A) THE UNCONTESTED EVIDENCE AT TRIAL CONCLUSIVELY DEMONSTRATED THE REASONABLENESS OF THE REBUTTABLE PRESUMPTION IN ORDINANCE 66868; AND (B) RED LIGHT CAMERA MATTERS IN MUNICIPAL COURT ARE CIVIL PROCEEDINGS, WITH QUASI-CRIMINAL ASPECTS, IN WHICH REBUTTABLE PRESUMPTIONS ARE A PROPER MEANS OF SHIFTING THE BURDEN OF EVIDENCE.[9]

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[9] Missouri case law uses the phrases "burden of evidence" and "burden of producing evidence." These phrases have the same meaning and are used interchangeably. In the context of this case, as is explained in this section, the phrases mean that the prosecution's evidence raises a rebuttable presumption that shifts the burden to the defendant to produce evidence to rebut that presumption, but that the burden of proof remains on the prosecution even after the defendant produces such evidence. *See Nelson v. Hammett*, 189 S.W.2d 238, 243 (Mo. 1945) (citation omitted)(duty of producing evidence, sometimes called the 'burden of evidence,' passes from party to

The trial court found in favor of respondents on their claim that the rebuttable presumption provisions of Ordinance 66868 violate due process protections afforded by the federal and state constitutions, thus rendering the Ordinance invalid. *L.F. 469-470.* In so ruling, the trial court noted that appellate decisions "strongly trended" against the validity of red light camera ordinances (*L.F. 468-469*), but the trial court did not attempt to apply the facts established at trial to the legal principles or standards that were referenced in those appellate decisions. Rather, the trial court appears to have implicitly adopted the reasoning of the decisions in *Brunner v. City of Arnold*, 427 S.W.3d 201 (Mo.App.E.D. 2013) and *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo.App.W.D. 2013). *L.F. 469-470.*

Because the trial court did not specify the basis for its decision, the City will assume for purposes of this brief that the trial court found in favor of respondents on the grounds alleged in respondents' petition. First, respondents alleged that it is unreasonable to presume that the owner of a vehicle that runs a red light is also the driver. *L.F. 33.* Second, respondents claim that the Ordinance's rebuttable presumption

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party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue and never shifts during the course of the trial) (accord *Moses v. Carnahan*, 186 S.W.3d 889, 905 (Mo. Ct. App. 2006) (citing *Downs v. Horton*, 230 S.W. 103, 108 (Mo. 1921)).

provisions violate their constitutional due process rights because the presumption allegedly shifts the burden of proof to respondents to prove their innocence in a "criminal" proceeding. *L.F. 31-32.*

Respondents make their due process argument under both Article I, Section 10 of the Missouri Constitution and the U.S. Constitution, Amend. XIV, sec. 1. *L.F. 31.* This Court has historically treated the state and federal due process clauses as equivalent, parallel provisions. *Jamison v. Dept. of Social Services*, 218 S.W.2d 399, 405 (Mo. banc 2007). The principle that the federal and state due process provisions are equivalent clauses has been referenced in many different scenarios, including a due process challenge to red light camera ordinance. *Unverferth,* 419 S.W.3d at 103. *See also, Brehm v. Bacon Township*, 426 S.W.3d 1, 5 (Mo. banc 2014)(dispute over ownership of a gravel road); *Wells Fargo v. Smith,* 392 S.W.3d 446, 458 (Mo.banc 2013)(due process challenge to the legislature's decision to separate actions concerning possession of real property from actions concerning ownership or the validity of title); *Stone v. Missouri Dept. of Health and Senior Services*, 350 S.W.3d 14, 27 (Mo. banc 2011); *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 82 (Mo. banc 2008)(principle applied regarding whether a prison inmate has a protected property interest in his inmate account).

A. The Uncontested Evidence Conclusively Demonstrated the Reasonableness of the Rebuttable Presumption in Ordinance 66868.

Respondents allege that Ordinance 66868's rebuttable presumption is unreasonable because vehicle owners sometimes allow others to drive their vehicles.

L.F. 33. Rebuttable presumption provisions are appropriate in an ordinance if there is "some rational connection between the fact proved and the ultimate fact presumed (or inferred), and the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *State ex rel. State Dept. of Public Health and Welfare v. Ruble*, 461 S.W.2d 909, 912-13 (Mo.App. 1970). "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." *Eastern Mo. Laborers',* 5 S.W.3d at 604. Because this cause is a challenge to the validity of an ordinance enacted pursuant to the City's police power, respondents had the burden at trial of proving that the rebuttable presumption in Ordinance 66868 "clearly and undoubtedly contravene[d] the constitution" and "plainly and palpably affronts fundamental law embodied in the constitution." *Pearson,* 367 S.W.3d at 43.

Respondents and defendants each presented trial testimony on the issue of the reasonableness of the Ordinance's presumption that the owner of a vehicle that runs a red light is also the driver. A police officer-witness for respondents (Sherri Bruns) testified that, based on her eight years of experience making traffic stops in the City of St. Louis, 70 to 80 percent of the drivers stopped for routine traffic violations were also the sole owners of the vehicles they were driving at the time of the violations. *Tr. 86, 88.* In cases where a vehicle was titled in more than one name, the chance that a driver in a routine traffic stop would also be the vehicle's owner increased to about 90 percent, according to Officer Bruns. *Tr. 87.* That testimony was not contested, discredited or

challenged. The St. Louis police chief (Dotson) and a former City police officer (Cross) each testified that about 80 percent of the drivers in routine traffic stops are also owners of the vehicle. *Tr. 99-100.* Chief Dotson's testimony was based on a survey that he commissioned as well as his personal experience. *Tr. 92, 99-100.* Respondents did not cross examine Chief Dotson or otherwise contest any aspect of his testimony. *Tr. 101.* Similarly, respondents did not test or dispute this aspect of Cross' testimony. *Tr. 119-122.*[10]

Thus, the uncontested evidence at trial established that: (i) 70 to 80 percent of the drivers stopped for routine traffic violations were also the sole owner of the vehicles they were driving at the time of the violation. *Tr. 86, 88* (Officer Bruns' testimony); and (ii) at least 80 percent of the drivers in routine traffic stops are also an owner of the vehicle they were driving. *Tr. 99-100, 108-109.* Therefore, this Court's review of the reasonableness of the Ordinance's presumption is *de novo*, applying the uncontested facts to the law. *Pearson*, 367 S.W.3d at 44.

The trial record conclusively demonstrates that respondents failed to meet their burden of proving that the Ordinance's rebuttable presumption is "unreasonable" because vehicle owners sometimes allow others to drive their vehicles. As the court noted in its red light camera decision in *Idris v. City of Chicago*, 552 F.3d 564 (7th Cir.

[10] Respondents cross-examined witness Damon Cross on other topics, but not on the subject of the likelihood that the driver of a vehicle would also be the owner. *Tr. 119-122.*

2009), while a car owner might not always be the driver, the presumption makes sense from general experience:

> Plaintiffs observe that owners won't always have control: A parent who lives in California may lend a car to a child attending college in Chicago, or a divorce decree may require one spouse to supply a car for the other. True enough, but review under the rational-basis doctrine tolerates an imprecise match of statutory goals and means. Broad ("overinclusive") categories are valid even if greater precision, and more exceptions or subcategories, might be better, for the task of deciding how much complexity (at what administrative expense) is justified is legislative rather than judicial. *See Vance v. Bradley,* 440 U.S. 93, 108-09, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979).

552 F.3d at 567.

The evidence at trial confirmed that the intuition of general experience referenced in *Idris* is accurate. The testimony of three police officers, including respondents' officer-witness, demonstrated that a significant majority of the drivers in routine traffic stops also owned the vehicles they were driving – between 70 percent and 90 percent, depending upon how the questions were posed. Even the low end of that range is sufficient to establish a rational connection between the fact proved and the ultimate fact presumed. The uncontested evidence at trial established that the presumption in Ordinance 66868 is reasonable and rational. This is especially true in light of the fact that all doubts are "resolved in favor of the constitutionality of the statute." *Pearson,* 367 S.W.3d at 43.

B. Red Light Camera Matters in Municipal Court are Civil Proceedings, With Quasi-Criminal Aspects, in Which Rebuttable Presumptions are a Proper Means of Shifting the Burden of Producing Evidence.

Respondents claim that the rebuttable presumption provisions of Ordinance 66868 infringe on their constitutional due process rights because the presumption allegedly shifts the burden of proof to the accused to prove the accused's innocence in a criminal proceeding. This, according to respondents, violates their rights to due process under federal and state constitutions.

Respondents' contention that a rebuttable presumption shifts the burden of proof to the defendant is incorrect. "Even with the allowance of a rebuttable presumption, the prosecution is still required to prove its prima facie case against the accused." *Unverferth,* 419 S.W.3d at 104. Only after the establishment of a prima facie case does the burden of evidence shift to the accused to produce evidence, if desired, to rebut the prosecution's case. *Id.* "The Missouri Supreme Court has held that providing such a rule of evidence lies within the legitimate power of the municipality and violates neither the federal nor Missouri constitutions." *Id.,* citing *City of St. Louis v. Cook*, 221 S.W.2d 468, 469-70 (Mo. 1949). Though the burden of evidence may shift to the defendant, the burden of proof remains on the prosecution. *Id.*

While *Cook* addressed the use of a rebuttable presumption in the context of parking tickets, *Cook* did not limit the application of its rationale to parking tickets or any other particular type of offense or municipal violation. *Cook*, 221 S.W.2d at 469-70. Nonetheless, for different reasons *Unverferth (dissenting opinion), Damon and*

Brunner all questioned or attempted to limit *Cook's* precedential effect. But unlike this case, *Unverferth, Damon and Brunner* all were appeals of trial court dismissal orders, meaning that the court of appeals divisions based their conclusions upon the bare pleadings without the benefit of a factual record. Those court of appeals decisions had no basis to judge or evaluate the reasonableness of the rebuttable presumption in the respective ordinances other than by "general experience" (i.e., the general experience of judges); *Idris*, 552 F.3d at 567. Instead of the hypothetical analysis utilized in *Unverferth, Damon and Brunner*, this Court has benefit of a fact-based trial record. The above-described evidence at trial conclusively demonstrated the rational link that justifies the presumption that the owner of a vehicle that ran a red light was also the driver when the violation occurred.

The *Brunner* court sidestepped *Cook* by concluding that, based on factors unique to the City of Arnold, violations of Arnold's red light camera ordinance should be considered criminal matters rather than civil proceedings or civil proceedings with quasi-criminal aspects. *Brunner*, 427 S.W.3d at 232-233. The *Brunner* holding – that the ordinance violation proceeding is criminal because the rules of criminal procedure apply – was contrary to the established principle that prosecutions of municipal ordinances are civil proceedings with quasi-criminal aspects. *See City of Webster Groves v. Erickson,* 789 S.W.2d 824, 826 (Mo.App.E.D.1990). Moreover, the same court previously considered a challenge to City Ordinance 66868, finding that "prosecutions by municipalities for the violation of a municipal ordinance are civil proceedings with quasi-criminal aspects." *Smith v. City of St. Louis*, 409 S.W.3d at

417, citing *State ex rel. Kansas City v. Meyers,* 513 S.W.2d 414, 416 (Mo. banc 1974). *Smith* dealt directly with the same Ordinance that is at issue here and was consistent with established precedent in that respect. *See also*, *Unverferth,* 419 S.W.3d 104 (in considering presumptions in a red light camera ordinance, court noted the "validity of such a presumption has been long established in Missouri").

The principle that municipal ordinance violations are civil matters "has been universally adhered to by [Missouri] courts from time immemorial." *Kansas City v. Plumb*, 419 S.W.2d 457, 460 (Mo.App. 1967); *see also, Frech v. City of Columbia*, 693 S.W.2d 813, 814 (Mo. banc 1985); *City of Dexter v. McClain*; 345 S.W.3d 883, 885 (Mo.App. 2011). Any conclusion otherwise would disregard this principle and conflicts with most decisions which have applied the rule in the context of a red light camera ordinance. *See Smith v. City of St. Louis*, 409 S.W.3d at 417; *City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252, 257-58 (Mo.App. 2011) (finding Creve Coeur's red light camera ordinance to be civil), overruled on other grounds by *Edwards,* 426 S.W.3d at 665. To hold otherwise would essentially eviscerate the long-held principle that municipal ordinance violations are civil matters.

In rejecting the City of Arnold's rebuttable presumption provision, *Brunner* distinguished the content of the Arnold ordinance and the fact that arrest was threatened in Arnold's violation notices even if it was never carried out. 427 S.W.3d at 233. The allegations considered in *Brunner* are materially different than the facts established at trial here. First, the Arnold violation notices threatened arrest for those who failed to appear in court for their red light camera matters, stating: "failure to appear in court at

the time specified on this citation or otherwise respond to this Notice of Violation as directed may result in a warrant being issued for your arrest." *Id.* The *Brunner* court concluded that this threat of arrest in the violation notice was sufficient to "tip the scale" in favor of classifying the Arnold red light camera proceedings as criminal in nature. *Id.*[11] Unlike Arnold's violation notices, neither the City's current form of

[11] Two of the three factors in the *Brunner* analysis dealt with the content of the violation notices rather that the content of the ordinance itself. 427 S.W.3d at 233 (referencing the threat of arrest in the violation notice and a statement in the violation notice that payment of the fine would be an "admission of guilt or liability"). Unless the Arnold ordinance required specific content within the violation notices, the notice content could simply be amended to remove the language that *Brunner* found offensive. It is unclear why *Brunner* chose to declare the Arnold ordinance invalid and void based on the content of the violation notices. *Brunner* also ignored a previous decision in *Kilper v. City of Arnold*, 2009 WL 2208404 (E.D.Mo. 2009), where the court examined the same red light camera ordinance of the City of Arnold and concluded its provisions were civil, rather than criminal, in nature. Additionally, if the broad holdings in *Brunner* and *Damon* are correct in that a finding of an ordinance to be criminal in nature thus renders the use of a rebuttable presumption unconstitutional, several existing state statutes may be in similar constitutional jeopardy. For example: § 304.050.7 R.S.Mo., which proscribes the illegal passing of a school bus when children are entering or departing the school bus is a misdemeanor offense that permits the use

violation notices nor the form sent to respondents contain any mention the possibility of arrest. *L.F. 247-248, 252-253, 264-265; 362-365 (current).* Therefore, the "threat" that tipped the scales in *Brunner* does not exist here.[12]

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of a rebuttable presumption that the registered owner of a vehicle is the driver at the time the offense is committed. Similarly, § 577.080 R.S.Mo., which prohibits abandoning a motor vehicle likewise regards the fact of ownership as "prima facie" evidence" that the registered owner is the individual who abandoned the vehicle. See § 577.080.2 R.S.Mo. Notably, like the Ordinance at issue in this appeal, § 577.080.2 authorizes a registered owner to "transfer liability" to another individual by submitting an affidavit that identifies the person who was in custody or control of the vehicle. *Id.* Section 238.365 R.S.Mo. presumes the owner of a vehicle to have been the operator in the event of the infraction of failure to pay a toll, which, like violations of the City's Ordinance, is punished by a fine.

[12] The Missouri Supreme Court Form 37L, the form of summons used in municipal ordinance violation cases, states: "If you fail to appear a warrant may be issued for your arrest." This Court, in promulgating this form in 1985 (as amended in 2007 and 2008), showed no intention to negate the long line of cases, including cases decided after 1985, that hold that municipal ordinance violations are civil proceedings with quasi-criminal aspects. Nowhere does the Rule 37 or Form 37L show a purpose to convert ordinance violations to criminal proceedings.

The City's administration of its red light camera program over a span of many years confirms that the "threat" factors that were decisive in *Brunner* do not exist here. The stipulated record established that no one has been arrested for a City red light camera violation since Ordinance 66868 was adopted in 2005. *L.F. 226-227.* The City has never issued an arrest warrant for anyone who failed to appear for a red light camera court appearance. *L.F. 226.* By a 2007 administrative order of the City's municipal judges, the maximum penalty for a red light camera program violation is a $100 fine. *L.F. 226, 306.*

Brunner also referenced a statement in Arnold's violation notices that payment of the red light camera fine would constitute an "admission of guilt or liability" as an indication that Arnold's ordinance created a criminal proceeding. 427 S.W.3d at 233. The City's notices contain a similar phrase. *L.F. 362.* *Brunner* suggested that the reference to "guilt" in Arnold's violation notices weighed in favor of finding that the red light camera matters should be considered criminal proceedings as opposed to civil or quasi-criminal. 427 S.W.3d at 233. This logic is flawed in that Supreme Court rules tailored especially for ordinance violations and municipal courts make multiple references to guilty pleas and pleading not guilty. All municipal ordinance violations are governed by Supreme Court Rules that reference the term "guilty." Rule 37.33 requires that violation notices inform recipient that they have the option of paying their fines or pleading not guilty and having a trial. Rule 37.49(e) expressly states that payment of a specified fine "constitutes a guilty plea and waiver of trial." The inclusion of information in red light camera violation notices regarding guilty pleas

simply reflects the terms of the Supreme Court rules applicable to all municipal ordinance violations and informs the recipient of the consequences of paying the fine.

If *Brunner's* logic were correct and the mention of a guilty plea in a violation notice or information converts a municipal ordinance violation from a civil or quasi-criminal proceeding to a criminal proceeding, then all ordinance violations would be considered criminal proceedings and the civil and quasi-criminal standards would be extinguished. It would obviate and negate years of precedent which has established that prosecutions of municipal ordinances are civil proceedings with quasi-criminal aspects. *State ex rel. Kansas City v. Meyers,* 513 S.W.2d 414, 416 (Mo. banc 1974). They are "quasi-criminal in nature because the rules of criminal procedure apply." *Webster Groves*, 789 S.W.2d at 826. But they are not criminal proceedings.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT ORDINANCE 66868 CONFLICTS WITH STATE LAW REGARDING THE ASSESSMENT OF POINTS FOR MOVING VIOLATIONS, AND THE TRIAL COURT'S JUDGMENT SHOULD THEREFORE BE REVERSED, BECAUSE THE ORDINANCE DOES NOT MENTION, REQUIRE OR PROHIBIT THE ASSESSMENT OF POINTS, THE MUNICIPAL DIVISION OF THE CIRCUIT COURT REPORTS ORDINANCE VIOLATIONS TO THE DIRECTOR OF REVENUE USING THE CHARGE CODE PRESCRIBED BY THE OFFICE OF STATE COURTS ADMINISTRATOR (OSCA) WHICH CATEGORIZES RED LIGHT CAMERA VIOLATIONS AS "NO POINT" VIOLATIONS, AND THE DECISION WHETHER TO ASSESS POINTS FOR RED LIGHT CAMERA VIOLATIONS IS MADE BY THE DIRECTOR OF REVENUE PURSUANT TO R.S. MO. 302.225.

The decision whether to assess points is a decision made by the state, not by the City, and the City's ordinance is appropriately silent on this issue. *App., A-19, 20.* Respondents alleged that Ordinance 66868 is invalid because points are not assessed against the driver's licenses of those found guilty of red light camera violations. *L.F. 23-26.* For that reason, respondents asserted that Ordinance 66868 conflicts with state law and is therefore void. *Id.* All facts were stipulated pertaining to the issue of whether Ordinance 66868 is invalid due to a conflict with state law.[13]

[13] The trial court's judgment contained no explicit findings or conclusions on this issue. As in Point I, because the trial court did not specify the basis for its decision, the City will assume for purposes of this brief that the trial court found in favor of respondents

Section 302.302 of the Revised Missouri Statutes states that the "director of revenue shall put into effect a point system for the suspension and revocation of licenses." The statute includes a table indicating the points to be assessed for various types of violations and includes a catch-all category for moving violations that are not specifically listed. *Id.* Red light violations and red light camera violations are not specifically listed. *Id.* Section 302.225 requires, in pertinent part, that courts must "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 . . . any moving traffic violation under the laws of this state or county or municipal ordinances . . . The record of all convictions involving the assessment of points . . . shall be forwarded by the department of revenue within fifteen days of receipt to the Missouri state highway patrol."

As stipulated by the parties, the City's Municipal Court reports red light camera convictions to the director of revenue, using the State's only charge code for red light camera violations. After the convictions are reported to the director of revenue, the role of the City and its Municipal Court is complete. Ordinance 66868 is silent on the issue of points and the City makes no attempt to dictate whether points should be assessed to the driver's licenses of red light camera program violators.[14] The State of Missouri

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on the grounds alleged in respondents' petition.

[14] The violation notices sent to respondents included the following statement: "The State of Missouri does not assess points for red light camera infractions." *L.F. 247,*

determined that it would not assess points for red light camera convictions, as evidenced by its charge code indicating "Public safety violation – red light camera (no points)" (*App., A-24*), and the fact that the Missouri Director of Revenue does not upload the reports of red light camera violations submitted by the City when those reports are made using the State's charge code for red light camera conviction. *L.F. 236.*

Ordinances are presumed to be "valid and lawful" and are construed in such a manner as to uphold their 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). Because Ordinance 66868 contains no terms or provisions whatsoever regarding whether points should be assessed for red light camera violations, the Ordinance is not "expressly inconsistent" or in "irreconcilable conflict" with state laws regarding the assessment of points. The Ordinance therefore must be presumed valid and lawful. *Id.* Ordinance 66868 is silent on the issue of points and therefore is not "expressly inconsistent" with § 302.225

252, 264. That statement accurately reflects the State's policy as reflected in the State's single charge code for its red light camera convictions charge code. *App., A-24; L.F. 224, 236, 298, 305.*

R.S.Mo. As the parties stipulated, the responsibility to assess points for any traffic violation rests with the State of Missouri.[15]

The points issue arose in previous decisions, but the municipal ordinances in all of those cases expressly stated that no points would be assessed for red light camera violations. *See Brunner,* 427 S.W.3d at 207 (Arnold city code expressly stated that "no points will be assigned to the violator[']s driver[']s license when guilty of an automated red light enforcement violation"); *Damon,* 419 S.W.3d at 186 (city ordinance stated "that no points will be assessed against the defendant's license"); *Edwards,* 426 S.W.3d at 664 (city ordinance stated "that an infraction of the Ordinance constitutes a non-moving violation"); *Unverferth, 419* S.W.3d at 96-97 ("Unverferth pleaded in the petition that the Ordinance conflicts with the aforementioned statutes because . . . Florissant has classified violations of the Ordinance as non-moving infractions for

[15] As respondents allege in their petition, § 302.302 R.S.Mo. requires that points be assessed for "moving" violations. However, the common understanding of the term "moving violation" is not always consistent with the State of Missouri's definition and application of the term. For example, drivers who commit speeding violations must necessarily be moving when the violations occur. But points are not assessed to drivers for "moving violations" when they are convicted for speeding less than five miles per hour over the posted limit. § 304.009 R.S.Mo.

which no points may be assessed");[16] The Creve Coeur cases, *Nottebrok and Ballard,* each addressed a Creve Coeur ordinance that expressly disallowed the assessment or reporting of points. *Ballard,* 419 S.W.3d at 125 (dissenting opinion).

Respondents appear to contend that City Ordinance 66868 is void because, in practice, points are not assessed for red light camera violations. *L.F. 24*. Their petition does not explain the legal basis for their contention that the State's decision not to assess points for red light camera violations would have the effect of rendering the City's Ordinance void.

Ordinance 66868 is silent on the points issue and does not purport to classify red light camera violations as moving or nonmoving. Therefore, on its face, Ordinance 66868 does not conflict with state law. Only one charge code was established by the State of Missouri to report red light camera convictions. The City uses that charge code to report red light camera convictions to the Department of Revenue. The fact that the State does not then assess points is beyond the City's control and has no bearing on the validity of the City's Ordinance.

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[16] The record in *Unverferth* did not include the Florissant ordinance. *Unverferth,* 419 S.W.3d at 101. Because the case was decided on a motion to dismiss and court could not take judicial notice of a municipal ordinance (*id.*), the court was confined to assuming that all of the petition's allegations were true, including the allegation that "Florissant has classified violations of the Ordinance as non-moving infractions for which no points may be assessed." *Id.* at 96-97.

III. THE TRIAL COURT ERRED IN DECLARING ORDINANCE 66868 VOID AND ENJOINING ENFORCEMENT OF THE ORDINANCE BECAUSE RESPONDENTS HAD AN ADEQUATE REMEDY AT LAW WHICH PRECLUDES EQUITABLE RELIEF, IN THAT THE CITY'S MUNICIPAL COURT, A DIVISION OF THE CIRCUIT COURT, PROVIDES A FORUM IN WHICH THE RESPONDENTS SHOULD HAVE CONTESTED THEIR RED LIGHT CAMERA VIOLATIONS, INCLUDING RAISING ANY CHALLENGE TO THE VALIDITY OF THE ORDINANCE UNDER WHICH RESPONDENTS WERE CHARGED, THUS REQUIRING REVERSAL OF THE TRIAL COURT'S JUDGMENT.

Respondents Tupper and Thurmond each decided to file this suit for injunctive and declaratory relief rather than contest their red light camera violations in Municipal Court. Plaintiffs are not entitled to seek and receive equitable relief unless the facts pleaded in the petition show they lack an adequate remedy at law. *State ex rel. Janus v. Ferriss,* 344 S.W.2d 656, 659 (Mo.App. 1961). Equitable relief is warranted only where the legal remedies available to a plaintiff are inadequate or incomplete. *Smith at 413-414, citing Home Shopping Club. Inc. v. Roberts Broad. Co.,* 989 S.W.2d 174, 180 (Mo.App. 1998).

Like Tupper and Thurmond, the *Smith* plaintiff (Faith Morgan) opted to sue for equitable relief rather than contest her red light camera violation in Municipal Court. *Smith* held that the City's Municipal Court provided the *Smith* plaintiff an adequate remedy at law to challenge the City's ordinance. *Smith*, 409 S.W.3d at 414-415.

Accordingly, *Smith* held that all equitable claims asserted by *Smith* plaintiff Morgan must be dismissed because she failed to appear in the City's Municipal Court to contest her red light camera violations. *Id.*

The fact that the *Smith* plaintiff's equitable claims sought to invalidate the ordinance did not alter the fact that she possessed an adequate remedy at law in Municipal Court:

> [T]he mere invalidity of a municipal ordinance is not alone sufficient ground for enjoining its enforcement. Ordinarily the one asserting such a claim would have an adequate remedy at law by establishing the invalidity of the ordinance as a defense to the proceeding brought against him for its violation. To warrant the intervention of a court of equity, there must be a showing of something in addition to the claim of invalidity which serves to bring the case within one or more of the recognized grounds of equitable jurisdiction. It must appear, for instance, that the enforcement of the ordinance would deprive the complaining party of his property rights without adequate redress by legal remedy, or that injunctive relief is required to prevent a multiplicity of actions or proceedings for violation of the ordinance.

Smith, 409 S.W.3d at 414, quoting *Bhd. of Stationary Engineers v. City of St. Louis,* 212 S.W.2d 454, 458 (Mo.App. 1948).

Smith concluded that plaintiff Morgan had an adequate remedy at law in her municipal court hearing to contest the validity of Ordinance 66868, holding: "Morgan has an adequate remedy at law in her municipal court hearing, which is the forum in

which she must raise all of her claims. Because Morgan has an adequate legal remedy, she is not entitled to judgment as a matter of law in the equitable claim before us." *Smith*, 409 S.W.3d at 414-415.

Tupper and Thurmond are contesting the same Ordinance and are in the same posture as the plaintiff described above in *Smith*. All received red light camera violation notices pursuant to Ordinance 66868. They did not appear in Municipal Court and instead filed lawsuits seeking injunctive and declaratory relief. The trial court in this case therefore erred by ignoring the constitutionally established jurisdiction of the municipal division and proceeding to reach the merits of the plaintiffs' claims for injunctive and declaratory relief. *Smith* correctly stated the law on this point, and the trial erred in failing to adhere to the *Smith* precedent regarding Ordinance 66868.

Municipal divisions and circuit courts always retain the jurisdiction to determine ordinance violations and any accompanying defenses. After trial in the municipal division, a defendant can choose to have a trial *de novo* in the circuit court. Mo. Rev. Stat. § 479.200. The losing party may then appeal. As provided for in the Constitution, the municipal division proceeding and subsequent trial *de novo* in the circuit court offer an adequate forum with subject matter jurisdiction. The Missouri Constitution provides that the circuit court has subject matter jurisdiction over *all* matters civil or criminal, which necessarily includes proceedings on ordinance violations. *See* Mo. Const. art. V, §14; *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253-54 (Mo. banc 2009). Where, as here, the circuit court has a municipal division, the latter's plenary jurisdiction remains the same. *Unnerstall v. Berkemeyer*, 298 S.W.3d at 517-18. The

circuit court is a unified court, and "[e]ach division of the circuit court possesses all the jurisdiction vested in the circuit court by the Constitution." *K.H. v. State*, 403 S.W.3d 720, 723 (Mo. 2013). Statutory limits on when and how a divisional court should act, such as Mo. Rev. Stat. §479.010, cannot change the constitutionally-prescribed jurisdiction. *See id.*; *In re Estate of Ridgeway*, 369 S.W.3d 103, 106-07 & n.1 (Mo. 2012); *Unnerstall*, 298 S.W.3d at 517-18.

This determination is consistent with the well-established procedure under which a defendant may raise *any* defense to the ordinance violation – including challenges to the ordinance's validity – during the municipal division and the trial *de novo* in circuit court. *See, e.g.*, Mo.S.Ct.R. 37.51; *Smith*, 409 S.W.3d at 414; *J.H. Fichman Co. v. Kansas City*, 800 S.W.2d 24, 27 (Mo. App. 1990); *Brhd. of Stationary Eng'rs v. Louis*, 212 S.W.2d 454, 458 (Mo. 1948); *Kansas City v. Carlson*, 292 S.W.3d 368, 370 (Mo. 2009)(challenging validity in proceeding on ordinance violation); *Columbia v. Henderson*, 399 S.W.3d 493, 494 (Mo. 2013)(same); *Jackson v. Oliver*, 680 S.W.2d 406 (Mo. 1984)(same).

The municipal division proceeding and trial *de novo* in the circuit court offered respondents reasonable opportunities to challenge the constitutionality of the ordinance before a court of law. But, they chose not to do so. Therefore, their constitutional claims are waived. *See, e.g.*, *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 225 (Mo. banc 1998); *Overland v. Kearney*, 589 S.W.2d 627 (Mo. App. 1979).

It is well-settled that a court cannot decide constitutional questions unless they have been properly raised by a party. *See, e.g. Callier v. Dir. of Revenue*, 780 S.W.2d

639, 641 (Mo. banc 1989); *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 231 (Mo. App. 1997). In fact, the Court of Appeals has specifically denounced the suggestion that a court is required to search out and determine constitutional issues on its own initiative to satisfy itself it enjoyed subject matter jurisdiction.

> Even though the constitutionality of a statute or ordinance is included within the permissible scope of judicial inquiry . . . , it is beyond the scope of logic and does violence to the existing and binding rules with reference to pleading and presentation of constitutional points, to hold that in such judicial review a court is required to (or would be within its historical function if it did) search, *sua sponte*, for constitutional infirmities not put forward by the parties.

Perez v. Webb, 533 S.W.2d 650, 655-56 (Mo. App. 1976).

It is similarly well-settled that a claim for declaratory judgment or injunctive relief is improper if an adequate remedy is--or was--available at law. *See Lane v. Lensmeyer*, 158 S.W.3d 218, 223-24 (Mo. 2005); *State ex rel. Freeway Media, LLC v. City of Kansas City*, 14 S.W.3d 169, 173 (Mo. App. 2000); *Home Shopping Club, Inc. v. Roberts Broad. Co.*, 989 S.W.2d 174, 180 (Mo. App. 1998). Just as the *Smith* plaintiff's (Morgan's) equitable claims were barred, the claims of Respondents Tupper and Thurmond should have been dismissed by the trial court. *Smith* correctly stated the law on this point. Given that the municipal division had subject matter jurisdiction over plaintiffs' challenges to the ordinance, the trial court further erred in failing to adhere to the *Smith* precedent regarding Ordinance 66868.

The trial court attempted to avoid all contrary precedent by finding that the City's continued enforcement of Ordinance 66868 subjected respondents to a multiplicity of future citations and proceedings in Municipal Court, making their remedy at law inadequate. *App., A-16, 17.* Similar contentions were recently rejected in several red light camera cases. *See* e.g., *Unverferth,* 419 S.W.3d at 92–93; *Ballard,* 419 S.W.3d 118. At the time of trial neither Tupper nor Thurmond had any red light camera matters pending in Municipal Court. *L.F. 230.* Tupper and Thurmond each stipulated that they had no plan or intent to run red lights in the future. *L.F. 233.* As described in *Edwards*, *Ballard* and *Unverferth*, respondents' contention that they could be subjected to a multiplicity of future red light camera actions "conflates a multiplicity of actions against one plaintiff with a multiplicity of actions against a large number of plaintiffs." *Edwards*, 426 S.W.3d at 657-658; *Unverferth,* 419 S.W.3d at 92–93; *Ballard,* 419 S.W.3d at 118. Respondents did not seek to represent a class. They are subject to multiple prosecutions only if they continue to be charged with red light camera violations, and they stipulated that they have no plan or intent to run red lights in the future. *L.F. 233.*

Courts will not assume that a party in the future will violate the law; therefore, this controversy cannot be kept alive because the party argues it is capable of repetition. The trial court erred in holding otherwise.

IV. THE TRIAL COURT ERRED IN DECLARING ORDINANCE 66868 VOID *AB INITIO* (ON ITS FACE) BASED UPON *SMITH V. CITY OF ST. LOUIS*, 409 S.W.3D 404 (MO.APP. E.D. 2013) AND IN APPLYING *BRUNNER V. CITY OF ARNOLD*, 427 S.W.3D 201 (MO.APP. E.D. 2013), WHICH HOLDS THAT ORDINANCE VIOLATIONS ARE CRIMINAL AND NOT CIVIL PROCEEDINGS, BECAUSE BOTH PROPOSITIONS ARE ERRONEOUS IN THAT (A) *SMITH* HELD ORDINANCE 66868 VOID AS APPLIED TO JUST ONE PLAINTIFF AND (B) *BRUNNER'S* HOLDING THAT ORDINANCE VIOLATIONS ARE CRIMINAL MATTERS IS CONTRARY TO BINDING MISSOURI PRECEDENT, REQUIRING REVERSAL OF THE TRIAL COURT'S JUDGMENT

The trial court erroneously held that the City's Ordinance was void *ab initio* as a result of *Smith v. City of St. Louis,* 409 S.W.3d 404, despite *Smith's* clear holding that the invalidity of the ordinance was "as applied." The trial court then compounded the error by treating *Brunner v. City of Arnold*, 427 S.W.3d 201 (Mo.App.E.D. 2013) – which held that ordinance violations are criminal and not civil – as overruling other recent red light camera decisions by the court of appeals. This void *ab initio* aspect of the trial court's decision has left the law of municipal ordinance violations in a state of confusion.

Smith resolved the claims of two plaintiffs – one (Morgan) who did not pay her fine and another who paid the fine (Smith). As with both of the plaintiffs-respondents here, Plaintiff Morgan in *Smith* filed suit seeking injunctive and declaratory relief even

though she had not appeared in Municipal Court to contest her red light cameras citations. *Smith* dismissed that plaintiff's claims, holding that the City's municipal court proceedings provided her an adequate remedy at law to make her various legal arguments, including her defective notice contention.

The Court of Appeals for the Eastern District subsequently applied the *Smith* reasoning to bar claims for similar reasons in three other red light camera cases decided in 2013. *Edwards*, 426 S.W.3d at 655 (Some plaintiffs "had a reasonable opportunity to raise the alleged unconstitutionality of the Ordinance prior to their filing of this action. By choosing not to raise their constitutional concerns at the earliest opportunity, they have waived whatever constitutional claims they may have had"; also holding that estoppel barred the claims); *Ballard*, 419 S.W.3d at 117-118 ("Because [some of the plaintiffs] have an adequate remedy at law in their municipal court proceeding, we affirm the trial court's judgment dismissing their claims"); *Unverferth,* 419 S.W.3d at 108 ("Because the Cusumanos have an adequate remedy at law in their municipal court proceeding, we affirm the trial court's judgment with regard to its dismissal of all of the Cusumanos' claims").

Respondents were in the same position as the plaintiffs referenced above in *Smith, Edwards, Ballard and Unverferth* – all received red light camera violation notices, did not pay their fines and did not appear in municipal court to contest the violations. In each case, their claims for injunctive and declaratory relief were dismissed because they possessed an adequate remedy at law, thus precluding equitable relief.

The trial court apparently concluded that *Brunner* implicitly overruled all of the 2013 cases referenced above. The trial court employed a flawed, two-step analysis in finding for respondents: (1) it misconstrued *Smith* as holding Ordinance 66868 void on its face (that is, *ab initio)* as opposed to "as applied"; and (2) based upon its erroneous application of *Smith*, the trial court relied upon *Brunner* to hold that respondents were not required to appear in municipal court to challenge a facially void ordinance.

That the trial court erred in applying *Smith* is apparent from the fact that *Smith* required the *Smith* plaintiff (Morgan) to appear in Municipal Court to assert her defenses. If *Smith* had found Ordinance 66868 void on its face it would not have also required each accused to appear in Municipal Court to contest the violations. Even more telling is the fact that *Smith* expressly states on multiple occasions, as to the second *Smith* plaintiff, that a notice defect caused Ordinance 66868 to be void "as applied" to that particular plaintiff, not on the face of the Ordinance:

(1) "City's Notice of Violation is deficient under Rule 37.33, and we are not persuaded that the Final Notice cures this deficiency. Accordingly, the Ordinance is ***invalid as applied.***" *Smith*, 409 S.W.3d at 418 (emphasis added).

(2) "Despite our holding that the Ordinance is ***invalid as applied***, Smith is not entitled to obtain restitution from City under Missouri law because she voluntarily paid the fine." *Id.* (emphasis added).

(3) "As noted above, we have already determined that the Notice of Violation must inform the ticket recipient of his or her option to plead not guilty and

appear at trial. City's failure to do so rendered the enforcement of its Ordinance ***invalid as applied***." *Id.* at 427 (emphasis added).

(4) "Therefore, we affirm the trial court's grant of summary judgment to Respondents on Count I on the grounds that City's ***enforcement of the Ordinance*** violates the Missouri Supreme Court rules and is invalid." *Id.* at 418 (emphasis added).

The trial court refused to recognize the difference between a holding that an ordinance is void *as applied* versus a holding that an ordinance is void *ab initio*. Instead, the trial court reasoned that a void ordinance must necessarily be void in all respects, at all times. *App., A-15, 16.*

That conclusion was incorrect as a matter of law. A statute or ordinance may be unconstitutional "as applied" to one party but not unconstitutional as to another party. For instance, in *Sprague v. City of St. Joseph*, 549 S.W.2d 873 (Mo. banc 1977), this Court held a state statute "unconstitutional and void as applied to constitutional charter cities," meaning that the statute was not void as to non-charter cities. *Id.* at 879. This type of "as applied" analysis is particularly appropriate where, as in *Smith*, the deficiency related to inadequate notice. Due process claims addressing the adequacy of a particular notice are, by definition, fact-specific inquiries that do not lend themselves to broad edicts. *See, e.g., Garcia v. Meza*, 235 F.3d 287, 291 (7th Cir. 2000); *Cronin v. Federal Aviation Administration*, 73 F.3d 1126, 1128 (D.C. 1996)("given the fact-specific nature of procedural due process inquiries, we think it unadvisable to consider

the issue at this time in the context of a broad facial challenge . . . We will leave the resolution of such challenges to case-by-case dispositions").

Smith specifically held that a 2007 red light camera violation notice sent to one plaintiff (Smith) was deficient, "render[ing] the enforcement of [Ordinance 66868] invalid as applied." 409 S.W.3d at 427. If any doubt existed in this respect, it was eliminated when the Court of Appeals subsequently described its holding in *Smith* as follows: "[b]ecause the City of St. Louis did not include such language on its Notice of Violation, we found the Ordinance, *as applied to the appellant in that matter*, to be void." *Unverferth*, 419 S.W.3d at 101 (emphasis added). *Unverferth's* clear statement that the Court of Appeals intended *Smith* to be an "as applied" holding was ignored by the trial court.

Compounding this error is the trial court's reliance upon *Brunner*. The Court of Appeals in *Brunner* rejected the municipal division proceeding as providing an adequate forum, and in so ruling, directly contradicted its earlier and opposite determinations in *Smith*, 409 S.W.3d at 414-15; *Unverferth*, 419 S.W.3d at 93 and *Edwards*, 426 S.W.3d 644 at 657-58. The *Brunner* court held that the violators' claims were not barred even though those plaintiffs chose to forego challenging the ordinance in the municipal division proceeding. 427 S.W.3d at 215-16. In doing so, the *Brunner* court determined that the municipal division proceeding did not constitute an adequate forum for challenges to the ordinance's validity and constitutionality.

The determination in *Brunner* that the plaintiffs lacked an adequate remedy in the municipal division was premised on its new and unprecedented holding that the

municipal division lacked subject matter jurisdiction over any proceedings under the Arnold ordinance if the ordinance was void. *Id.* 427 S.W.3d at 214-15. The court reached that conclusion in misplaced reliance on a passage from *City of St. Louis v. Handlan*, 145 S.W. 421, 423-24 (Mo. 1912) "a void ordinance is equivalent to none at all." *Id.* at 214. But *Handlan* actually and more specifically held "***where*** a court proceeding cannot go on without an ordinance, ***as here***, a valid one is essential to the court's jurisdiction." *Handlan*, 145 S.W. at 424 (emphasis supplied).

But, here the ordinance is *not* essential to the jurisdiction of the municipal division, which derives instead from the Missouri Constitution. Nearly 65 years after this Court decided *Handlan*, the Missouri Constitution was amended in 1976 to reorganize the Courts of Missouri, and among the sections added was Art. V, § 23: "[a] municipal judge shall hear and determine violations of municipal ordinances...." Another was Art. V, § 27(2)(d), which provides "[t]he jurisdiction of municipal courts shall be transferred to the circuit court . . . and, such courts shall become divisions of the circuit court." In addition, Mo. Rev. Stat. §479.010 (1978) requires that all violations of municipal ordinances be heard and determined in the municipal division.

A municipal court's subject matter jurisdiction to determine ordinance violations does not therefore rise and fall with the validity of the ordinance. This Court has explained that subject matter jurisdiction refers solely to "the court's authority to render a judgment in a particular category of case" and is defined by the Missouri Constitution. *See J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253-54 (Mo. banc 2009). In

J.C.W., this Court rejected the temptation to expand the concept of jurisdiction to include other types of limitations on a court's ability to provide relief:

> Elevating statutory restrictions to matters of 'jurisdictional competence' erodes the constitutional boundary established by article V of the Missouri Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter jurisdiction of the clarity that the constitution provides.

Id. at 254. Questions over a court's authority arising out of statutory or judicial restrictions are not therefore jurisdictional and are in fact "incorrect." *Id.* at 254-55; *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 517-18 (Mo. banc 2009).

Brunner ignored that the Missouri Constitution confers jurisdiction to municipal courts. *Brunner* also contradicts decisions of this Court regarding both jurisdiction and judicial review of constitutional questions. The analysis of subject matter jurisdiction in *Brunner* contradicts established principles of judicial review and is wholly unworkable in practice. Under the *Brunner* Court's analysis, the municipal division's jurisdiction rests upon the validity of the ordinance. Therefore, the municipal division must, *sua sponte*, determine the constitutionality and validity of *every* ordinance and must then dismiss any violation for lack of subject matter jurisdiction if it determines the ordinance is invalid. Such an action by the municipal division would be beyond established judicial reach. The result of that flawed analysis is directly contrary to the boundaries of judicial review and to the presumption of validity accorded to municipal ordinances—the one against which ordinances must be reviewed. *See, e.g., City of*

Kansas City v. Carlson, 292 S.W.3d 368, 370 (Mo. App. 2009). By relying on *Brunner* and concluding that plaintiffs had no adequate remedy at law in the Municipal Court, the trial court created corresponding error in this case.

V. THE TRIAL COURT ERRED IN DECLARING ORDINANCE 66868 VOID AND ENJOINING ITS ENFORCEMENT DUE TO IMPROPER NOTICE IN THAT THE COURT IGNORED THE CITY'S NOTICE REVISIONS THAT CORRECTED THE DEFICIENCIES CITED IN *SMITH V. CITY OF ST. LOUIS*, AND THE TRIAL COURT IMPROPERLY GRANTED PROSPECTIVE, INJUNCTIVE RELIEF DESPITE RESPONDENTS' ADMISSION THAT THE CITY'S CURRENT VIOLATION NOTICES COMPLY WITH RULE 37.33, THUS REQUIRING REVERSAL OF THE TRIAL COURT'S JUDGMENT.

Respondents Tupper and Thurmond stipulated that their violation notices informed them of their options of paying the fine specified in the Notice of Violation or pleading not guilty and appearing at trial. *L.F. 231-233.* They understood their options based on the content of the notices. *Id.* It is therefore uncontested that the revised version of the violation notices received by respondents was sufficient to provide actual

notice of those options to respondents, which was the concern stated in *Smith.* 409 S.W.3d at 418, 427.[17]

Although the parties stipulated that the City revised the content of its red light camera violation notices on March 1, 2012 (prior to the issuance of respondents' violation notices), the trial court nonetheless found that that the revised version sent to respondents "merely provides a 'due date' for the fine, and states that 'FAILURE TO RESPOND to this notice will result in in the service of a Summons and a required court appearance.'" *L.F. 463.* The trial court ignored the very next sentence in the passage it quoted, which was added as part of the City's revisions and states: "At this court appearance you may enter a not guilty plea and request a trial." *L.F. 248, 253, 265, 267.* This is the admonition that the *Smith* notices lacked. *See Smith*, 409 S.W.3d at 427 ("[W]e have already determined that the Notice of Violation must inform the ticket recipient of his or her option to plead not guilty and appear at trial. City's failure to do so rendered the enforcement of its Ordinance invalid as applied"). The trial court disregarded the new notice language, which directly addresses the flaw identified in *Smith.* The revision was established by stipulations and was therefore uncontested.

Perhaps even more significant is the acknowledgement by respondents, also stipulated, that they understood based on the content of the notices that they had the options of paying the fine specified in the Notice of Violation or pleading not guilty and

[17] Probable cause statements were included in each Notice of Violation sent to respondents. *L.F. 247, 252, 264, 267.*

appearing at trial. *L.F. 231-233.* The uncontested facts therefore establish that respondents received actual and adequate notice of those options.

Respondents apparently argue that their due process rights are violated if the notices do not include the exact verbiage contained in Rule 37.33.[18] "The Due Process

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[18] Missouri Supreme Court Rule 37.33 (App., A-22) states:

(a) A violation notice shall be in writing and shall:

(1) State the name and address of the court;

(2) State the name of the prosecuting county or municipality;

(3) State the name of the accused or, if not known, designate the accused by any name or description by which the accused can be identified with reasonable certainty;

(4) State the date the date and place of the ordinance violation as definitely as can be done;

(5) State the facts that support a finding of probable cause to believe the ordinance violation was committed and that the accused committed it;

(6) State that the facts contained therein are true;

(7) Be signed and on a form bearing notice that false statements made therein are punishable by law;

(8) Cite the chapter and section of the ordinance alleged to have been violated and the chapter and section that fixes the penalty or punishment; and

Clause requires notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Crum v. Vincent,* 493 F.3d 988, 993 (8th Cir. 2007). *See also, Reasoner by Reasoner v. Meyer,* 766 S.W.2d 161, 167 (Mo.App. 1989) (Nugent, J. concurring) ("A failure to follow procedural rules does not by itself, however, violate constitutional due process").

Respondents do not contend that they were deprived of a hearing in Municipal Court. The record clearly demonstrates that respondents received a Summons notifying them of their court dates for each violation and they decided not to appear. *L.F. 308-313; Tr. 80.* As noted above, respondents also stipulated that they understood, based on their violation notices, that they had the option of paying their fines or pleading not guilty and requesting a trial. The essential purpose of notifying respondents of their options and court dates was clearly served by the Notice of Violation and the Summons they received. Respondents do not appear to argue otherwise. *See also*, Missouri Rule 37.35 (regarding contents for an Information); *City of Grandview v. Winters*, 768 S.W. 2d 162, 165 (Mo.App. 1989) (municipal informations not tested by the same degree of strictness and particularity as is one charging a criminal offense). The violation notices substantially complied with the requirements Rule 37.33.

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(9) State other legal penalties prescribed by law may be imposed for failure to appear and dispose of the violation.

The trial court correctly noted that the violation notices sent to respondents did not include a court date. *L.F. 468.* Rule 37.33 does not require that a court date be included in a notice of violation. The notices provided to respondents advised them of various options, including the options of paying the fine specified in the Notice of Violation or pleading not guilty and appearing at a trial. *L.F. 231-233.* Respondents subsequently received a Summons that informed them when and where to appear for their Municipal Court proceedings. *L.F. 308-313.* The Summons complied with the separate requirements of Rule 37.42 for ordinance violations, including the requirement that a summons specify time and place for the recipient to appear in court. Mo.Sup.Ct.R. 37.42(e).

This approach is envisioned by the rules governing municipal ordinance violations. Rule 37.33 establishes the requirements for the violation notices, but does not require a court date. Rule 37.42 provides for issuance of a summons and court date. Construed together, the rules contemplate a process whereby an accused is issued a notice of violation or information (pursuant to Rule 37.35), with a separate summons issued later. Rule 37.33 expressly provides that the Notice of Violation must indicate that payment is an option to a court appearance (Rule 37.33(b)(2)), so it is logical to summon recipients to court only after they opt against paying the fine.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 598, 94 S.Ct. 2963, 2995 (1972). Respondents readily admit that they made a conscious, informed choice against appearing for their red light camera court date.

They clearly were not deprived of the opportunity to be heard at a meaningful time and in a meaningful manner.

Finally, the respondents acknowledged that the City's current form of violation notice complies with Rule 37.33. *Tr. 7.* For that reason no prospective relief was needed or appropriate to address any alleged deficiency in the City's violation notices. Injunction is a prospective remedy that looks forward to address conduct or actions in the future. *Goerlitz v. City of Maryland Heights*, 333 S.W.3d 450, 453, 455 (Mo. banc 2011). The trial court erred in granting prospective injunctive relief based on the contents of the City's violation notices when it was undisputed that the City's current notices comply with Missouri Supreme Court Rules.

CONCLUSION

For all of the foregoing reasons, the trial court's Order and Judgment dated February 11, 2014 should be reversed.

WINSTON E. CALVERT
City Counselor

/s/ Michael A. Garvin
Michael A. Garvin #39817
Erin K. McGowan, #64020
1200 Market Street, Room 314
St. Louis, MO 63103
(314) 622-3361; (314) 622-4956 (fax)
garvinm@stlouis-mo.gov
mcgowane stlouis-mo.gov

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2014 the foregoing and Appellants' Appendix were filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all attorneys of record.

/s/ Michael A. Garvin

CERTIFICATION

The undersigned attorney for Appellant, Michael A. Garvin, Missouri Bar Number 39817, 1200 Market Street, Room 314, St. Louis, Missouri 63103, (314) 622-3361, hereby certifies that Appellant's brief (i) complies with the limitations of Rule 84.06(b); and (ii) complies with the requirements of Rule 55.03; and (iii) that the number of words in this brief equals 12,729.

/s/ Michael A. Garvin