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

REPLY BRIEF AND RESPONSE TO CROSS-APPEAL OF APPELLANT/CROSS-RESPONDENT CITY OF ST. LOUIS

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STATEMENT OF FACTS

The Statement of Facts in Cross-Appellants' Amended Brief submitted on behalf of Tupper and Thurmond (hereinafter referenced as "Respondents' Brief") is argumentative, neither fair nor concise, often fails to cite specific or accurate page references in the record, and includes inaccurate statements. Appellant City of St. Louis ("City") filed a separate motion to strike respondents' brief for noncompliance with Missouri Supreme Court Rule 84.04(c). Those arguments will not be repeated in this brief, but they are incorporated herein.

A comprehensive statement of facts pertinent to the City's points on appeal is provided in the City's initial brief. Because Respondent's brief – which contains argument on their cross-appeal for attorney's fees – omits facts needed for the cross-appeal. Additional facts pertinent to respondents' cross-appeal are provided as part of the City's response to the cross-appeal.

CITY OF ST. LOUIS' REPLY TO THE RESPONSE BRIEF OF TUPPER AND THURMOND ON THE CITY'S APPEAL

ARGUMENT

I. Respondents fail to present argument or evidence sufficient to abrogate established precedent that municipal ordinance violations are civil in nature, nor do respondents overcome the presumption that City Ordinance 66868 is constitutional; the trial court erred as a matter of law in declaring the ordinance void and enjoining its enforcement.

Respondents' attack on the rebuttable presumption provisions of the City's red light camera ordinance (Ordinance 66868) depends entirely upon their contention that the Ordinance should be construed as a criminal matter rather than a civil matter. In making that argument, respondents acknowledge that they "face a steep hill" in their effort to overturn "a century of established precedent holding that municipal prosecutions for ordinance violations are quasi-criminal." *Respondents' Brief, p. 39.* But overcoming precedent is just part of their burden.

Longstanding precedent establishes that municipal ordinance violations are civil or matters, which are sometimes characterized as "civil" or "quasi-criminal" matters. *Frech v. City of Columbia,* 693 S.W.2d 813, 814 (Mo. banc 1985); *City of Webster Groves v. Erickson*, 789 S.W.2d 824, 826 (Mo.App.E.D. 1990). The case law history includes the fact that City Ordinance 66868 has already been construed and applied as a civil ordinance. *Smith v. City of St. Louis*, 409 S.W.3d 404, 417 (Mo.App.E.D. 2013). The addition of the label "quasi-criminal" does not

alter the civil character of ordinance violations. The "quasi-criminal" label appears to have been added to reflect the use of concepts from the criminal law such as "pleas," "convictions," "acquittals," and so forth, but this Court never has held that the use of such words would convert a civil ordinance proceeding into a criminal case with all of its attendant consequences.

In addition, procedural rules adopted by this Court distinguish municipal ordinance violations from criminal matters. Those rules are designed, in part, to promote a cost-efficient means to process ordinance violations. *See* Supreme Court Rule 37.03 (Rule 37 shall be construed to secure "just, speedy and inexpensive determination of ordinance violations"). *See also* Supreme Court Rules 37.54 (discovery only permitted at judge's discretion); 37.49(e) (permitting deviation from guilty plea procedures when accused opts to pay the specified fine and court costs to the City's Traffic Violation Bureau, which payment "constitutes a guilty plea and waiver of trial"). The common law principle that an ordinance violation is civil in nature is also codified in the Revised Code of the City of St. Louis ("City Code"), which states that all City ordinance violation cases brought in Municipal Court are civil cases:

> The City Courts shall have jurisdiction of all suits for the recovery of any fine, forfeiture or penalty imposed for the violation or breach of any ordinance, ***which suits and proceedings therein shall be in the nature of a civil action***. *City Code, § 3.08.040 (Joint Supplemental Filing of Exhibits, p. 5)(emphasis added).*

This Court's rules, the City Code and common law are therefore consistent in that municipal ordinance violations are treated as civil matters.

Respondents must also overcome the presumption that Ordinance 66868 is constitutional. Their burden at trial was to prove that the City's Ordinance "clearly and undoubtedly" contravenes the constitution and "plainly and palpably affronts fundamental law embodied in the constitution." *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012); *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 [ordinance]." *Pearson,* 367 S.W.3d at 43.

Thus, the "steep hill" confronting respondents is more than overruling years of precedent. They effectively ask the Court to rewrite its procedural rules and invalidate the City Code even while all doubts are resolved if favor of the constitutionality of the Ordinance. Respondents offer multiple arguments in this effort. Among other things, they contend that the factors enunciated in *Brunner,* 427 S.W.3d 201, 232 (Mo.App.E.D. 2013), determine whether the City's Ordinance is civil or criminal.[1] They also argue that (a) the use of terms such as

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[1] The factors listed in *Brunner* for determining whether an automated traffic ordinance is civil in nature are:

(1) the ordinance includes express language indicating a municipality's 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

"prosecution" and "guilt" in the City's ordinance indicate criminal rather than civil proceedings (*Respondents' Brief, pp. 37-39*); and (b) the fact that 70 to 80 percent of the drivers in routine traffic stops in the City of St. Louis are the sole owners of their vehicles is insufficient to establish a reasonable basis to presume that the owner of a vehicle was the driver at the time of the red light violation. *Id. at 44.*

A. *Brunner* Factors

Respondents assert that the *Brunner* factors – which have never been adopted by this Court – govern this case. But their argument at trial and to this Court is

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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.

427 S.W.3d at 232.

inconsistent with that position. Respondents objected at trial to evidence pertaining to the *Brunner* factors related to the public safety benefits of Ordinance 66868 (*Brunner* factors 4 and 6). They offered no evidence on these points. Their brief to this Court states that respondents "hotly dispute" the relevance of evidence pertaining to the public safety benefits of the City's red light camera ordinance. *Respondents' Brief, p. 34.* Therefore, while respondents urge the Court to apply the Brunner factors, they also argue that some of the factors are irrelevant.

The analysis used in *Brunner* and relied upon by respondents weighs seven factors. The balance of those factors weighs in favor of this Court a finding that confirms Ordinance 66868 is civil in nature.[2]

(1) Whether the ordinance specifies that it is civil or criminal.

Ordinance 66868 does not specify that is it is a civil measure. But City Code sections applicable to all Municipal Court proceedings provide that all ordinance violation proceedings are civil actions. *City Code, § 3.08.040 (Joint Supplemental Filing of Exhibits, p. 5).* All red light cameras matters are brought in the City's Municipal Court. *L.F. 226.* Although Ordinance 66868 does not

[2] As mentioned in the City's initial brief, *Brunner* was decided on the basis of a motion to dismiss where the allegations in the plaintiffs' petition were assumed true and were considered in a light most favorable to plaintiffs. A trial record exists here, meaning the *Brunner* factors should be applied on the facts proven at trial and not on the facts presumed as true as in other red light camera cases.

specify that is it is a civil measure, such a provision was not necessary because the City Code already provides that all ordinance violation matters in Municipal Court are civil matters. The rules of construction applicable to state statutes also apply to municipal laws. *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City,* 24 S.W.3d 681, 684 (Mo. banc 2000). It is presumed that lawmakers have knowledge of existing laws when they enact new legislation. *Turner v. School District of Clayton*, 318 S.W.3d 660, 667-668 (Mo. 2010). Therefore, it must be assumed that the City lawmakers who approved Ordinance 66868 knew that the City Code already provided that all ordinance violation proceedings are civil actions. To include the same provision in Ordinance 66868 would have been redundant and unnecessary.

Therefore, the first *Brunner* factor weighs in favor of construing Ordinance 66868 as civil in nature because the City Code specifies that all ordinance violation proceedings are civil in nature. This is especially true given the fact that all doubts must be resolved in favor of finding the Ordinance constitutional. *Pearson,* 367 S.W.3d at 43.

(2) The City's red light camera ordinance does not impose an affirmative disability or restraint on the individual, but merely imposes a fine without assessing points against an individual's driver's license.

This factor actually poses two questions: (i) whether the Ordinance imposed an affirmative disability or restraint on respondents; and (ii) whether the

Ordinance imposes a fine without assessing points against an individual's driver's license. *Brunner*, 427 S.W.3d at 232

Pertinent to the first question, the parties stipulated that no one has ever been arrested for a City red light camera violation and no warrant has never been issued for the arrest of anyone accused of a red light camera violation since the adoption of Ordinance 66868, including those who did not appear for scheduled court dates. *L.F. 226-227.* The maximum fine is $100 and no offender has been fined more than $100 since the adoption of Ordinance 66868. *Id.* Thus, the undisputed facts confirm that no affirmative disability or restraint has been imposed upon respondents or anyone else as a result of Ordinance 66868.

The second question relates to points. Ordinance 66868 is silent on the issue of whether points should be assessed for a violation, so it does not, by its terms, purport to assess points against any driver's license. Ordinance 66868 does not contain a penalty provision, but the maximum penalty established by the Municipal Court, acting under the direction of the Circuit Court, is $100. *L.F. 226-227.*

Therefore, this factor also weighs in favor of the civil nature of Ordinance 66868 because the City does not arrest red light camera program violators and the Ordinance contains no terms or provisions that would dictate whether or not the State of Missouri assesses points for red light camera violations.

(3) The civil, non-point penalty for violating Ordinance 66868 is assessed without regard to the individual's knowledge or state of mind at the time of the violation.

As described in the context of a challenge to another red light camera ordinance, "[t]he existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes." *Kilper v. City of Arnold*, 2009 WL 2208404, *16 (E.D.Mo. 2009), *quoting Kansas v. Hendrick*, 521 U.S. 346, 362 (1997). The absence of a scienter requirement indicates that the penalty is not intended to be retributive. *Id.*

Ordinance 66868 contains no scienter requirement, nor is one apparent given the nature of the violation. Prosecutors are not required to demonstrate knowledge or intent to run the red light. Because the Ordinance's sanction does not require a finding of scienter, this third factor further supports a determination that the Ordinance and its penalty are not criminal in nature. *Kilper,* 2009 WL 2208404, *16.[3]

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[3] Respondents address this point with commentary that their violations were not flagrant and "simply involve running through the light a scant portion of a second after the light changed." *Respondents' Brief, p. 33.* That assertion is irrelevant to the scienter issue, has no basis in the record and is contradicted by Tupper's trial testimony. Tupper acknowledged when reviewing the video of her violation at trial that her car passed between two stopped vehicles that had already stopped at

Respondents acknowledge that "state of mind is irrelevant" In this context. *Respondents' Brief, p. 33.* There is no serious dispute that this factor weighs in favor of the conclusion that Ordinance 66868 is civil in nature.

(4) The undisputed evidence demonstrates that fines assessed under the City's red light camera ordinance may serve civil as well as punitive goals.

Although respondents rely upon the *Brunner* standards in their brief, they objected on relevance grounds to the City's evidence pertaining to the fourth *Brunner* standard – whether the presence of the deterrent purpose of fines imposed for Ordinance violations may serve civil as well as punitive goals.

Though it is respondents who advocate use of the factors described in *Brunner*, they "hotly dispute" whether the fourth *Brunner* factor is properly before the Court. *Respondents' Brief, p. 34.* They also offer the self-defeating statement

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the red light when it ran the same red light. *Tr. 66.* She further acknowledged that it's "not very likely" that the driver of her car could have seen cross traffic coming from either direction when it ran the red light due to the two stopped cars on either side. *Tr. 67.* After initially refusing to answer, Tupper finally testified that she was a passenger in her car when it ran the red light Tupper and that she was frightened and scared when the violation occurred. *Tr. 126-127.*

that "whether the deterrent purpose serves the goal of public safety is unknown." *Id. At 34-35*. It was respondents' burden at trial was to prove that the City's Ordinance clearly and undoubtedly contravenes the constitution (*Pearson,* 367 S.W.3d at 43) and to negate 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.E.D. 1999). Their brief to this Court acknowledges their failure, in that they did not produce any evidence on this point and they represent that the deterrent effect is "unknown." *Respondents' Brief, p. 35.*

While respondents acknowledge that they failed to fulfill their burden on this factor, they instead offer the conclusory statement that they "believe" the City's red light camera program is a "money grab." *Respondents' Brief, p. 34.* This unsupported argument was contradicted by the uncontested evidence at trial. The City's evidence established that the cameras were installed at intersections identified as dangerous by police (*Tr. 96; App, A-19),* that after the cameras were installed the number of red light violations at those intersections dropped by 63 percent from 2007 to 2013 (*Tr. 118-119),* and that red light camera violations decreased each year at intersections with red light cameras (*Tr. 95).* Eighty-four percent of the people who pay a red light camera ticket do not receive another one. *Tr. 118.* The uncontested evidence included the fact that studies by Kansas City police, the Missouri Highways and Transportation 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.* Respondents did

not dispute or contest any of this evidence. In addition to the City's public safety and deterrence evidence described above, Police Chief Dotson also testified that he would not have devoted the resources of the six to eight officers that review red light camera violations if he did not believe the program had a legitimate public safety impact, particularly if the program was just designed to be a revenue generator. *Tr. 98.*

The deterrent aspect of fines may serve civil as well as criminal goals and. without more, this factor weighs in favor of a finding that the Ordinance and its penalty are civil in nature. *See Kilper,* 2009 WL 2208404, *16, *quoting Hudson v. U.S.,* 522 U.S. 92, 105 (1997).

While bare allegations such as those offered in Respondents' Brief were sufficient to defeat motions to dismiss in *Brunner* and *Damon v. Kansas City*, 419 S.W.3d 162 (Mo.App.W.D. 2013), in this case respondents bore the burden to produce evidence at trial that would prove the City's Ordinance unconstitutional "by negating every conceivable basis that might support it." *Eastern Mo. Laborers' Dist. Council,* 5 S.W.3d at 604. They did not attempt to do so.

(5) The behavior to which the sanction applies is not already a "crime."

Assuming for the sake of argument that the violation of a red light signal is criminal, the fact that conduct for which Ordinance 66868's penalty is imposed "may also be criminal ... is insufficient to render the money penalties... criminally punitive... ." *Kilper,* 2009 WL 2208404, *16, *quoting Hudson, 522* U.S. at 105. Supporting this conclusion is the fact that ordinance violations in Missouri are

governed by separate rules and procedures contained in Supreme Court Rules 37 and 38. Criminal prosecutions are governed by Supreme Court Rules 19 and 36. The fact that separate sets of rules apply to municipal and criminal cases serves to distinguish the two types of offenses.[4] The rules reflect the common law principle that ordinance violations are civil in nature.

(6) The City's Ordinance is rationally related to the broader, legitimate non-punitive purpose of promoting public safety.

As noted above with respect to the fourth *Brunner* factor, respondents presented no evidence at trial regarding the public safety effects of the City's red light camera ordinance. The uncontroverted evidence demonstrates that Ordinance 66868 is rationally related to the purpose of promoting public safety.

The premise is obvious, but the uncontested testimony at trial confirmed that "[i]t is a public safety hazard to run a red light." *Tr. 95.* Ordinance 66868 expressly required that red light cameras be installed at "intersections identified by the police department as dangerous due to numerous traffic control ordinance violations." *App., A-19 (section 3).* The number of red light violations at intersections with red light cameras dropped by 63 percent from 2007 to 2013. *Tr.*

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[4] This is also consistent with § 479.170.1 R.S.Mo., which requires municipal court judges to immediately cease any proceeding if it appears that the accused "ought to be put upon trial for an offense against the criminal laws of the state." Those cases must be transferred to an associate circuit judge. *Id.*

118-119. The reduction realized in the City of St. Louis was mirrored and confirmed in studies by the Kansas City police, the Missouri Highway Commission and the Missouri Department of Transportation. *Tr. 96-97.* The unrebutted evidence thus confirmed that the provisions of the City's red light camera ordinance are rationally related to the purpose of promoting public safety in that all of the evidence indicates a dramatic reduction in red light violations at intersections with cameras.[5]

(7) The $100 fine for City red light camera violations is not excessive in relation to the public safety purpose.

The City Charter generally enables the City to enforce any ordinance by, among other things, adopting fines for ordinance violations. *Charter of the City of St. Louis, Art. I, Sec. 34.* City ordinance violations are punishable by fines up to $500, including citations for traditional red light violations. *L.F. 435.* Missouri

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[5] Respondents attempt to plug this hole in their argument by making improper references to "reports" referenced in appeal briefs in other cases. *Respondents' Brief, pp. 34-35, fn. 4, 5.* Those allusions to "reports" merely refer to unproven allegations made by other plaintiffs in other red light camera cases. In each instance, the cases mentioned by respondents were appeals of dismissal orders, in which the appellate courts assumed all allegations were accurate as plead by the plaintiffs. If such reports exist, respondents made no effort to include them as evidence in support of their claims.

counties and cities are generally allowed to enact fines up to $1,000. *See e.g., §§ 66.080, 82.300, R.S.Mo.* In that light, $100 can hardly be considered excessive. The maximum penalty for a City red light camera violation is $100. *L.F. 226-227.* Thus, the City's $100 fine is at the low end of authorized fine amounts and cannot reasonably be considered excessive.

Respondents offer no meaningful argument on this point. *Respondents' Brief, p. 36.* This factor weighs in favor of the City's Ordinance.

B. The use of terms such as "prosecution" and "guilt" in the City's ordinance and violation notices do not change the civil nature of Ordinance 66868.

Municipal ordinance violations are governed by Supreme Court Rules 37 and 38. Those rules contain multiple references to prosecution, arrest and guilty pleas. Respondents argue that the use of those terms in Ordinance 66868 and the City's red light violation notices weighs in favor of construing Ordinance 66868 violation proceedings as criminal matters. *Respondents' Brief, pp. 37-38.* The terminology in the City's violation notices simply mirrors the terminology provided in Supreme Court Rules 37 and 38, which govern municipal court proceedings. What respondents appear to request is that the Court eliminate the

distinction between municipal ordinance proceedings and criminal matters, treating all as criminal. *Respondents' Brief, p. 43.*[6]

[6] Respondents also reference a letter sent to her by mistake by a court clerk after she was acquitted on her first red light matter. *Respondents' Brief, p. 38.* The letter purports to "reset" Tupper's case after her acquittal and mentions the possibility of arrest. *L.F. 291.* The Municipal Court clerk's office was obviously in error in sending the letter to Tupper, in that there is no reason to "reset" any case after an acquittal. As explained to Tupper in stipulated Exhibit 13, the error was an isolated, one-time occurrence. *L.F. 292-293.* Tupper was provided a full explanation of the error and the clerk confirmed that no warrants have ever been issued for an alleged red light camera offender, including those failed to appear on their court dates. *Id.* Ordinance 66868 was enacted in 2005. *App., A-21.* A one-time error by a court clerk during a nine-year period does not change the fact that the City has not and does not arrest red light camera offenders. Nor does evidence of a single clerical error suffice to overcome the presumption that Ordinance 66868 is constitutional.

C. The uncontested evidence that 70 to 80 percent of the drivers in routine traffic stops in the City of St. Louis are also the sole owners of their vehicles is sufficient to establish a reasonable basis to presume, subject to rebuttal, that the owner of a vehicle was the driver at the time of a red light violation.

Respondents argue that the 70 to 80 percent correlation between vehicle ownership and the identity of the driver in routine traffic violations does not provide a reasonable basis to support the rebuttable presumption in Ordinance 66868. The reasonable basis standard differs depending upon whether Ordinance 66868 is considered civil or criminal in nature. Civil ordinances "need not provide the heightened procedural protections required by the Fifth, Sixth, and Eighth Amendments of the U.S. Constitution." *Mills v. City of Springfield,* 2010 WL 3526208, at *12 (W.D.Mo. 2010).

As noted above, this Court's procedural rules, the City Code and longstanding common law all support the conclusion that ordinances in general, and City Ordinance 66868 in particular, are civil in nature. For violations of municipal parking ordinances, this Court previously upheld the City's use of a presumption that vehicle owners are responsible when their vehicles are cited for parking violations. *City of St. Louis v. Cook*, 221 S.W.2d 468, 469-70 (Mo. 1949). The presumption is valid if it has "some relation to or natural connection with the fact to be inferred" and is not "purely arbitrary or wholly unreasonable, unnatural, or extraordinary." *Id.* at 470. *Cook* did not limit the application of its rationale to parking tickets or any other particular type of offense or municipal violation. *Id.*

at 469-70. The uncontested 70 to 80 percent correlation established at trial certainly satisfies those standards.

In considering appeals of dismissal orders, the *Brunner* and *Damon* courts dealt with plaintiffs' petitions alleging that the presumptions in the respective ordinances lacked a reasonable relation to the fact to be inferred and were arbitrary. The allegations *Brunner* and *Damon* were taken as true on their face and applied in a light most favorable to the plaintiffs. Here, respondents could not simply rely on their pleadings and bore the burden of producing evidence sufficient to overcome the presumption that Ordinance 66868 is constitutional, with all doubts resolved in favor of the constitutionality of the ordinance. *Pearson,* 367 S.W.3d at 43. With a 70 to 80 percent correlation, the evidence at trial established that a reasonable relationship exists between the presumption to the fact inferred and that the presumption clearly is not arbitrary.

The uncontested trial evidence here is consistent with *Cook*, in that *Cook* found that a rational connection existed to affirm the presumption that the owner of a vehicle is responsible for parking violations. If a rational connection exists between ownership of a vehicle and a parking violation, there is no reason to believe the analysis is different for the relationship between vehicle ownership and a routine traffic violation. That common sense conclusion was confirmed by evidence presented at trial.

Brunner and *Damon* avoided the *Cook* standards by declaring the ordinances in those respective cases to be "criminal" in nature and holding that presumptions are

unconstitutional in criminal matters. *Brunner*, 427 S.W.3d at 231-232; *Damon,* 419 S.W.3d at 191. As described above, Ordinance 66868 is civil in nature, which makes the logic in *Brunner* and *Damon* inapplicable. In addition, Ordinance 66868 was already found to be civil in nature. *Smith*, 409 S.W.3d at 417 (based on a summary judgment record rather than a motion to dismiss). But even in criminal cases, presumptions may be proper where there is a rational connection between the basic facts that the prosecution proved and the ultimate fact presumed, and that the latter is "more likely than not to flow from" the former. *Ulster County Court v. Allen*, 442 U.S. 140, 142 (1979).[7]

Under either standard, 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.

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[7] Respondents attempt to distinguish *Cook* by saying that "in the real world no one gets arrested for parking tickets." *Respondents' Brief, p. 48*. In the "real world," no one has ever been arrested for a City red light camera violation either. *L.F. 266-227*. This effort to distinguish *Cook* fails.

II. Ordinance 66868 is silent on the topic of assessing points and respondents' argument that the City should disregard the charge code prescribed by the Office of State Courts Administrator (OSCA) would circumvent the authority of the Director of Revenue to decide whether points should be assessed for red light camera violations.

Respondents attempt a peculiar argument regarding points. In effect, respondents argue that the City should use administrative means to circumvent the State of Missouri's determination that it will not assess points for red light camera violations. Respondents assert that the City should ignore the only State charge code specifically designated for reporting red light camera convictions to the Missouri Department of Revenue. Instead, according to respondents, the City has a duty to report those convictions using a different charge code applicable to standard red light violations, which would result in an assessment of points against the offender's driver's license. This argument defies the law and common sense.

The decision whether to assess points against an operator's license is a decision made by the State of Missouri. *§§ 302.225, 302.302, R.S.Mo.* The State of Missouri determined that it would not assess points for red light camera convictions, as evidenced by (i) the State's charge code – promulgated by the Office of State Courts Administrator – indicating "Public safety violation – red light camera (no points)" (*App., A-24*) and (ii) the fact that the director of the Department of Revenue does not upload the reports of red light camera violations

that are submitted by the City using the State's charge code for red light camera convictions. *L.F. 236.*

Respondents do not offer a legal basis or rationale for their argument that the City may simply choose to disregard charge codes designated by the State of Missouri for reporting purposes to the Department of Revenue. State law clearly envisions that the Director of Revenue will establish a schedule of points assessed for various offenses and that courts throughout the state will use that schedule to report convictions. *§ 302.302 R.S.Mo.* Municipal 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." *§ 302.225 R.S.Mo.*

Respondents acknowledge that 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 who incur 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.* These facts distinguish the City's Ordinance from the ordinances considered in other cases, where the municipal legislation allegedly included express provisions concerning points. *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 (ordinance specified that camera violation was a no-point violation); *Edwards v. City of Ellisville*, 426 S.W.3d 644, 664 (Mo.App.E.D. 2013)(city ordinance stated "that an infraction of the Ordinance constitutes a non-moving violation"); *Ballard v. City of Creve Coeur*, 419 S.W.3d 109, 125 (Mo.App.E.D. 2013)(same); *Unverferth v. City of Florissant*, 419 S.W.3d 76, 96-97 (Mo.App.E.D. 2013)(although ordinance was not in the record, case was decided on a motion to dismiss and plaintiff pleaded "that the Ordinance conflicts with the aforementioned statutes because . . . Florissant has classified violations of the Ordinance as non-moving infractions for which no points may be assessed").[8]

It is clear that Ordinance 66868, on its face, does not conflict with state law. Respondents' suggestion that the City should manipulate the State-created reporting scheme in order to circumvent the State's decision not to assess points for red light camera violations *would* conflict with state law. In respondents' scenario, the City would effectively be making point assessment determinations by assigning charge codes other than those established by the State.

Finally, even if this Court accepts respondents' argument and finds that the City report red light camera violations using a charge code other than the code designated by the State, that determination would not invalidate Ordinance 66868.

[8] All of these cases were decided on motions to dismiss, without a fact-based record.

The Ordinance does not include provisions regarding the logistics of reporting violations to DOR. The City would simply change its reporting practices administratively to implement the Court's holding.

III. The fact that each respondent received two red light camera citations does not change the holding in *Smith* that respondents had an adequate remedy at law to dispute their red light camera citations in the City's municipal court, which precludes equitable relief.

The City asserts that Respondents Tupper and Thurmond are barred from obtaining equitable relief because they possessed an adequate remedy at law to contest their red light camera citations in Municipal Court. *Smith,* 409 S.W.3d at 418. Respondents acknowledge the adequate remedy at law bar, but claim it is inapplicable to them because (1) they each received two citations, which brings them under a "multiplicity of suits" exception to the rule; and (2) based on *Brunner*, Ordinance 66868 was void and the Municipal Court, a division of the Circuit Court, possessed no "jurisdiction" over respondents' red light camera matters. The City addressed both of these arguments in its opening brief.

In their "multiplicity of suits" argument, respondents attempt to distinguish themselves from the plaintiff in *Smith* whose equity claims challenging the same City Ordinance 66868 were dismissed because she possessed an adequate remedy at law in Municipal Court. *Smith,* 409 S.W.3d at 418. The distinguishing factor, according to respondents, is that they received two red light camera citations and

the *Smith* plaintiff received only one citation. *Respondents' Brief, p. 56.* Respondents maintain that they lack an adequate remedy at law in the City's Municipal Court division of the Circuit Court because of the burden and expense they would endure due to the extra citation.

Similar contentions were recently rejected in other red light camera cases. *See Edwards*, 426 S.W.3d at 657-658; *Unverferth,* 419 S.W.3d at 92–93; *Ballard,* 419 S.W.3d at 118. Respondents 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.

Finally, the Municipal Court option worked for Respondent Tupper on the occasion she actually appeared in court to contest her citation – she was acquitted. The Municipal Court proceeding certainly afforded an adequate remedy in her case.[9]

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[9] Respondents also argue that "it seems" the City should be estopped from asserting its argument that Tupper possessed an adequate remedy at law in Municipal Court for her second violation because the City opted to dismiss its appeal of Tupper's acquittal on her first red light camera matter. *Respondents'*

IV. The trial court misconstrued *Smith v. City of St. Louis* in declaring Ordinance 66868 void *ab initio;* and respondents' request that the Court repeal or disregard supreme court rules 37 and 38 is not properly before the Court.

The City maintains that the trial court committed multiple errors in applying the decisions in *Smith* and *Brunner,* the combination of which lead to the trial court's erroneous decision to enjoin the City's enforcement of Ordinance 66868. First, the trial court misconstrued *Smith* as holding Ordinance 66868 void *ab initio* as opposed to "as applied." Second, 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.

Respondents do not directly respond to this point. They concede the multiple references to a "void as applied" decision in *Smith*, but note that the "as applied" term does not always accompany the term "void" in the opinion. *Respondents' Brief, p. 57.* Respondents do not offer any argument or analysis as

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Brief, p. 56. No legal authority is offered for this argument and none is apparent. There is no legal basis for the theory that the City's decision not to appeal an acquittal of one alleged ordinance violation somehow disqualifies the Municipal Court when a second ordinance violation occurs. Rather, the fact that Tupper was acquitted would indicate that the Municipal Court remedy is a fair and adequate remedy.

to how their notation would change the legal analysis asserted in the City's argument. Nor do they suggest that the Court of Appeals for the Eastern District was wrong when it subsequently described its decision in *Smith* as an "as applied" holding. *Unverferth*, 419 S.W.3d at 101.

Instead of addressing the arguments raised in City's Point IV, respondents ask the Court to revamp the law pertaining to municipal ordinance violations, to require that all procedural rules and constitutional protections applicable to criminal proceedings also apply to ordinance violation proceedings. *Respondents' Brief, p. 57.*

V. Respondents concede that they 'dropped' their argument that the City's red light camera violation notices violate Rule 37.33, and the trial court improperly granted prospective, injunctive relief despite respondents' admission that the City's current violation notices comply with Rule 37.33.

The City argues in its Point V that the trial court erred in finding the violation notices sent to respondents were deficient and noncompliant with Supreme Court Rule 37.33. In response, respondents maintain that they "essentially dropped the issue" in the trial court and that the form of the violation notice is not properly before this Court. *Respondents' Brief, p. 59.* They are not defending the trial court's determination on this point because "[f]actually this was not the case with which to challenge the form of the Notice." *Id.* at 58.

Even in conceding this point in their brief, respondents misrepresent that "there is no copy of the [violation notice] form the City was using at the time of trial in the record." *Respondents' Brief, p. 59.* In fact, respondents stipulated that "a true and accurate sample of the Notice of Violation/Information currently utilized by the City is attached hereto as Exhibit 24." *L.F. 231, 362-363.* The current form of the City's summons was also part of the stipulated trial record. *L.F. 231, 364-365.*[10]

Whether or not respondents intended to drop the issue at trial, their petition alleged that their violation notices were deficient due to noncompliance with Rule 37.33 and the trial court proceeded with findings to that effect. *L.F. 32-33; App., A-13, 14.*[11] Moreover, the trial court ignored the stipulated facts and exhibits when it found that the violation notices sent to respondents did not advise them of

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[10] Respondents are also incorrect in stating that there was no briefing on the notice issue in the trial court. *Respondents' Brief, p. 58.* Defendants briefed the issue. *L.F. 440, 450-452.*

[11] At trial it appeared that respondents' counsel wished to preserve their notice claims. He advised the trial court as follows:

> The respondents do not concede that the form of notice was correct, the notice of violations were correct, in the documents they received from the City at the beginning of the process. We do concede that the current form has been corrected and is lawful under Rule 33 [actually Rule 37.33]. *Tr. 7.*

their options to pay their fines or appear in court and plead not guilty. *L.F. 463.* The violation notices, which were revised before they were sent to respondents, stated: "At this court appearance you may enter a not guilty plea and request a trial." *L.F. 248, 253, 265, 267.* This is the content that the *Smith* notices lacked. *See Smith*, 409 S.W.3d at 427. The trial court erred in disregarding the new language which corrected the deficiency found in *Smith.*

Respondents concede that they did not intend to pursue that issue at trial, but notwithstanding any miscommunications in the trial court, no prospective relief was needed or appropriate to address any alleged deficiency in the City's violation notices because the City's current form of violation notice complies with Rule 37.33. Injunction is intended to be a prospective remedy that looks forward to address future conduct or actions. *Goerlitz v. City of Maryland Heights*, 333 S.W.3d 450, 453, 455 (Mo. banc 2011). The trial court therefore 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.

VI. Respondents' "private, for-profit law enforcement" point was not raised below and was therefore waived; it also fails to state a due process violation.

Respondents' Point VI does not respond to a point raised by the City, but rather raises a new argument that was not raised in the trial court. Respondents assert that the role American Traffic Solutions ("ATS") plays in supporting the City's red light camera enforcement program somehow violates their due process rights. They argue that the payment arrangement under which the City pays ATS a portion of the fine payments the City collects gives ATS a financial interest that "might make [ATS] just a little too interested in finding violations in close cases." *Respondents' Brief, p. 62.* Respondents provide no further detail on how, exactly, their due process rights are violated, let alone which party, the City or ATS, is the purported violator. Other than citing a single paragraph from the stipulated facts that outlines the contractual payment arrangement between the City and ATS, Respondents fail to even attempt to support their position with any facts. The undisputed fact is that in each case, a City police officer, not an ATS employee, determines whether a violation notice should be issued after reviewing the video.[12] *L.F. 224-225.*

[12] Respondents make the false statement, without reference to the record, that ATS collects "a substantial number of payments" through an ATS website. *Respondents' Brief, p. 6.* In fact, the City collects all red light camera fines

Despite the myriad recently-decided red light camera cases across the country, respondents cite no decision that disapproves the provision of services by an automated traffic systems company like ATS in support of a City's red light camera enforcement program. The only reports of decisions Respondents do cite pertain to fundamentally different circumstances.

A. Respondents waived any due process claim.

This Court need not attempt to discern respondents' due process argument, however, because respondents waived it. "Constitutional violations are waived if not raised at the earliest possible opportunity." *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). "The critical question in determining whether waiver occurs is whether the party affected had a reasonable opportunity to raise the unconstitutional act or statute by timely asserting the claim before a court of law." *Id.* at 225. This rule is designed to "prevent surprise to the opposing party, and to permit the trial court an opportunity to fairly identify and

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through its Traffic Violations Bureau. *L.F. 225, 247.* The City's violation notices to respondents and others provide options for payment in person at the Municipal Court, by mail sent to the City, or on the City's Municipal Court website (STLCityCourt.org). *L.F. 247-248, 362-363.* No option is provided to make payment to an ATS website. Nothing in the record supports the contention that City red light camera fines may be paid to an ATS website. Respondents' statement to the contrary is false.

rule on the issue." *Land Clearance for Redevelopment Authority of Kansas City, Missouri v. Kansas University Endowment Ass'n*, 805 S.W.2d 173, 175 (Mo. banc 1991).

Under this principle, this Court prohibits a plaintiff from first raising a constitutional claim in a post-trial filing. *Id.* at 175-76 (holding that plaintiff waived constitutional claim where it first asserted the claim on a post-trial motion); *Hollis v. Blevins*, 926 S.W.2d 683, 684 (Mo. banc 1996) (holding plaintiff waived due process and equal protection claims by first raising them in motion for new trial). As this Court recently affirmed in *Mayes v. Saint Luke's Hosp. of Kansas City*, "An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." 430 S.W.3d 260, 268-69 (Mo. banc 2014) (*quoting Hollis*, 926 S.W.2d at 684) (additional citations omitted).

Respondents first asserted this due process claim after trial in their post-trial brief. *Supp. L.F. 637*. They neither raised it in their pre-trial pleadings nor at trial. Consequently, respondents failed to raise it at the "earliest possible opportunity" and, thereby, waived it. *Land Clearance*, 805 S.W.2d at 175-76. Therefore, in keeping with its decision in *Land Clearance*, *Blevins*, and *Mayes*, this Court would not reach the merits of this argument. *See also Siemer v. Schuermann Bldg. & Realty Co.*, 381 S.W.2d 821, 829 (Mo. 1964) (refusing to consider the plaintiffs' argument that the trial judge's financial interest in the

outcome of their case violated their due process rights where the plaintiffs raised the issue for the first time on appeal).[13]

B. Respondents' due process rights were not violated.

Even if respondents had adequately raised this claim, no due process violation occurred. The due process clauses of the United States and Missouri constitutions prohibit the taking of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, sec. 1; MO. CONST. art. I, sec. 10. Respondents do not specify the provision on which they base their claim, but this Court recognizes that the two provisions parallel each other and has treated them as equivalent. *See, e.g., Jamison v. State Dept. of Social Services Div. of Family Services*, 218 S.W.3d

[13] Underscoring the injustice that would follow if the Court decides to consider this issue notwithstanding the fact that it is waived is that to do so at this juncture would be tantamount to imposing on the City as Appellant, the burden of persuading this Court that no due process violation occurred. Respondents never established such a violation below in the first instance, and as a result, this issue was not decided by the Circuit Court. To require the City to establish to a negative on appeal that no due process violation occurred would be improper. Indeed, to proceed in that manner would be analogous to imposing on a defendant at the trial stage the burden of disproving the elements of claims against him, which is contrary to the fundamental principle that the plaintiff has the burden of proving each element of his claims.

399, 405 n.7 (Mo. banc 2007). Due process applies to the acts of states, not to the acts of private persons or entities. *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982); *Grinnell Mut. Reinsurance Co. v. Walters*, 194 S.W.3d 830, 832 (Mo. banc 2006). "State action requires both action taken pursuant to state law and significant state involvement. Specifically, state action requires both: (1) an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible and (2) that the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Grinnell*, 194 S.W.3d at 832.

Not only did respondents fail to timely raise a constitutional issue, they failed to present evidence sufficient to support the finding of a constitutional violation. At no point in their brief do respondents establish – or even allege – that ATS is a state actor. Respondents' argument thus falls short of even meeting the threshold elemental requirements for a claim that due process rights have been violated. Further, while the wrong that they allege is that a private entity worked within the City's red light program to "find[] violations" and "convict[]" violators (*Respondents' Brief, p. 62*), that allegation is belied by the stipulated facts, which establish that ATS employees had no role in evaluating a vehicle owner's liability for violating a red light or in determining whether to issue violation notices. *L.F. 224-225*. That ATS employees do not determine liability renders them unable to

commit the acts that upon which respondents' due process claims would have to rest.

In any event, no due process violation occurred. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). "This does not mean that the same type of process is required in every instance; rather, 'due process is flexible and calls for such procedural protections as the particular situation demands.'" *Jamison*, 218 S.W.3d at 405 (*quoting Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). The United States Supreme Court in *Matthews* enunciated three factors that courts must balance to determine whether the process the state provided is constitutional:

> [1] First, the private interest that will be affected by the official action; [2] second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335; *Belton v. Bd. of Police Comm'rs*, 708 S.W.2d 131, 135, 137 (Mo. banc 1986).

Application of the *Matthews* factors shows that the City's red light camera program, including its use of ATS, comports with due process. The private

interest at stake is low: violators were assessed fines of $100.00 and, as of the date of the stipulated facts, the Director of Revenue had not assessed points against the operator's license of any individual who had been found to have committed a red light camera violation that occurred in the City. *L.F. 224, 226, 367.*

The risk of an erroneous deprivation of this interest is also low because the automated cameras record the infractions on video, and because ATS sends to the City's Police Department for review and evaluation only the videos where the infractions or possible infractions appear to be clear from the video. *L.F. 224-225.*[14] A City police officer then reviews the footage and decides whether to issue a violation notice. *L.F. 225.* And, contrary to Respondents' suggestion that ATS is in a position to "find" violations (*Respondents' Brief, p. 62*), ATS has no discretion to issue violation notices (*L.F. 224-225*). The City's interest, on the other hand, is substantial, as the red light camera program increases the safety of its roadways and reduces the time, money, and resources the City would have to spend enforcing red light violations with street officers. *Tr. 95, 98. 102, 117 – 119, 372.*

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[14] Tupper and Thurmond cannot complain about the ATS review of videos to screen out instances where no violation appears. As taxpayers, surely they have no interest in having police officers waste their time reviewing video footage where no violations appear.

On balance, these factors show that the City's red light camera program afforded Respondents due process. This conclusion is supported by cases from across the country. *See, e.g., Devita v. District of Columbia*, 74 A.3d 714, 722-24 (D.C. Cir. 2013); *Bevis v. City of New Orleans*, 686 F.3d 277, 280-81 (5th Cir. 2012); *Shavitz v. City of High Point*, 270 F. Supp. 2d 702, 717-21 (M.D.N.C. 2003); *Krieger v. City of Rochester*, 978 N.Y.S.2d 588, 600-01 (N.Y. Sup. Ct. 2013). Each of these cases involved red light camera systems similar to that here, where a private company like ATS contracted with a city to install and operate the camera systems that a City used to enforce against red light violations. None of these cases found a due process violation, which indicates that the private red light camera provider's involvement did not violate due process, either.

Especially revealing here is the fact that ATS employees do not determine whether a violation notice is issued. *L.F. 224-225*. Because ATS employees did not determine whether respondents' committed an ordinance infraction, their "financial stake" in the collection of respondents' payment of the violation notice had no impact on the process by which it was determined by an officer of the City's Police Department that a violation occurred or the ensuing judicial process. Consequently, the pecuniary interest of a red light camera program provider does not taint the tribunal with violating due process. Numerous courts have so held. *See*, e.g., *Agomo v. Fenty*, 916 A.2d 181, 195-97 (D.C. Cir. 2007); *Shavitz*, at 720-21; *accord Doolin Sec. Sav. Bank, F.S.B. v. FDIC*, 53 F.3d 1395, 1405–07 (4th Cir.1995) (concluding that the mere fact that an administrative or adjudicative

body derives a financial benefit from fines or penalties that it imposes is not, in general, a violation of due process). As *Agomo* explains, because a third-party provider "does not make determinations of liability, any financial compensation received by [them] thus has no effect on the adjudicatory process." 916 A.2d at 196.

The cases respondents cite on this point are inapposite. Although *Damon* implicates a due process concern, it does not hold that a due process violation occurred. Rather, it merely concludes that the plaintiff's petition survived a motion to dismiss or failure to state a claim for declaratory relief. 419 S.W.3d at 182. *Damon*'s discussion of *Tumey* and due process is, therefore, dictum.

Tumey v. Ohio, 273 U.S. 510 (1927), and *State v. Harrington*, 534 S.W.2d 44, 48 (Mo. banc 1976), likewise do not control. In *Tumey*, the Supreme Court reversed a defendant's conviction for illegal possession of liquor on due process grounds where Ohio state law authorized the mayor to serve as the judge on Prohibition violations and awarded the mayor payment for his services only on convictions returned. 273 U.S. at 531-32. In other words, the mayor was paid only if he convicted. The tribunal's direct pecuniary interest in convicting the defendant clearly deprived the defendant of his due process rights.

In *Harrington*, the Missouri Supreme Court reversed a defendant's murder conviction in part because the victim's father hired a private prosecutor to assist with the prosecution. 534 S.W.2d at 48. Quoting an opinion from the Wisconsin Supreme Court, *Harrington* explained: "The prosecuting officer represents the

public interests, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice." *Id.* at 49 (additional citations omitted). In contrast, the employment of a private prosecutor "invites error from an excess of zeal." *Id.* at 48 (*quoting State v. Camlen*, 515 S.W.2d 574, 576 (Mo. banc 1974)).

The inherent procedural unfairness in *Tumey* and *Harrington* is not present here. In *Tumey*, the mayor functioned as a judge and controlled the outcome of the prosecution. In *Harrington* the private prosecutor was in a position to influence the case against the defendant, from the charges filed to the evidence introduced (or not introduced). Unlike the judge and the private prosecutor in those cases, ATS performs the ministerial function of forwarding to the City video of all possible red light violations that meet a minimum optical standard. As discussed above, if the video appears to be sufficient to find a violation, ATS has no discretion to withhold sending it. The procedural bias at issue in *Tumey* and *Harrington* therefore does not exist here. This is confirmed by the District of Columbia Court of Appeals' decision in *Agomo*, where the court specifically refused to apply *Tumey* because the connection between the private red light camera provider and the defendant's conviction was "too attenuated." 916 A.2d at 196; *see also Jadeja v. Redflex Traffic Sys., Inc.*, 764 F. Supp. 2d 1192, 1196 (N.D. Cal. 2011) (rejecting party's reliance on *Tumey* for its allegation that ATS' pecuniary interest in his red light camera citation invaded a "legally protected interest" for purposes of standing).

For these reasons, any financial interest ATS has in the fines the City ultimately collects as part of its automated red light enforcement system does not violate Respondent's due process rights.

CITY OF ST. LOUIS' ARGUMENT IN RESPONSE TO CROSS-APPEAL

The City acted properly in administering its red light camera program in accordance with the appellate court decision pertaining to the City's Ordinance (*Smith v. St. Louis*) and the trial court therefore did not abuse its discretion in denying counsel's request for attorney's fees under the "special exception" provisions of § 527.100 R.S.Mo.

The trial court rejected respondents' contention that "special" or "very unusual" circumstances exist to justify an award of attorney's fees under § 527.100 R.S.Mo. and denied respondents' application for an award of attorney's fees. Respondents' one-point cross-appeal seeks reversal of that order. This Court reviews the decision of the trial court on this issue for abuse of discretion, as correctly stated in Respondents' Brief.[15]

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[15] The City and other defendants disputed the contention that special circumstances existed and also objected to counsels' fees and billing practices. *L.F. 519, 526, 532.* Counsel acknowledged that their respective $600 and $400 hourly billing rates were "quite high." *L.F. 498.* Counsel originally sought

The gist of respondents' claim that the City acted frivolously, without substantial legal grounds, recklessly or punitively is that the City continued its red light camera program after post-*Smith* appellate decisions were issued affecting other cities.

A. Facts Pertinent to the Cross-Appeal

The context for providing additional facts in this Reply Brief is that respondents misstate and omit facts pertaining to their cross-appeal from the trial court's denial of their application for reimbursement of attorney's fees. Respondents sought an award of attorney's fees pursuant to § 527.100 R.S.Mo., which permits such an award under "special" or "very unusual" circumstances. They maintain that the City intentionally and wrongfully continued an unlawful red light camera program despite various court decisions affecting other Missouri cities.

The factual sequence relevant to determine whether the City intentionally and wrongfully continued a red light camera program is as follows:

(i) This action was filed on November 25, 2013. *L.F. 13-14.* At that time, this Court had already denied the plaintiffs' transfer application in *Smith,* 409 S.W.3d 404. *Smith* construed and applied City Ordinance 66868, the

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compensation for time spent on their efforts to obtain media coverage. *L.F. 503-504.* Defendants' objected to these items, noting that counsel also attempt to delay hearings in trial court until media arrived. *L.F. 530, 533.*

same red light camera ordinance that is at issue in this appeal.

(ii) When Tupper and Thurmond filed this action, applications for transfer to this Court were pending in *Unverferth,* 419 S.W.3d 76; *Edwards,* 426 S.W.3d 644; and *Ballard,* 419 S.W.3d 109. Of those three cases, only *Unverferth* involved an ordinance containing a rebuttable presumption similar to City Ordinance 66868. None were "final" in that transfer applications were still pending.

(iii) The decision of the Court of Appeals for the Western District in *Damon,* 419 S.W.3d 162 was issued on November 26, 2013, the day after the instant action was filed in circuit court. The decision in *Brunner,* 427 S.W.3d 201 was not rendered until the month after this cause was initiated (December 17, 2013).

B. Smith v. City of St. Louis

Among other things, *Smith* held that a City red light camera violation notice utilized in 2007 failed to comply with Missouri Rule 37.33 because it failed to advise recipients that they had the option of paying the fine or pleading not guilty and having a trial. *Smith,* 409 S.W.3d at 417. The 2007 violation notice considered in *Smith* is included in the trial record. *L.F. 231, 317-320.*

C. Measures taken by the City after *Smith.*

In their effort to meet their burden to establish that the City's conduct was frivolous, without substantial legal grounds, reckless or punitive, respondents assert that the City engaged in intentional misconduct when it enforced its red

light camera Ordinance after appellate decisions that did not involve the City but addressed red light camera programs. In fact, the City made multiple efforts to adjust to new case law.

At the time respondents filed suit, *Smith v. City of St. Louis*, 409 S.W.3d 404, had already considered the validity of City Ordinance 66868. The only flaw found in *Smith* with the City's red light camera program was that the content of the City's 2007 violation notices was deficient because the notices failed to advise recipients that they had the option of paying the fine or pleading not guilty and having a trial. *Smith,* 409 S.W.3d at 417. The 2007 violation notice considered in *Smith* is included in the trial record here. *L.F. 231, 317-320.*

On March 1, 2012, about two weeks after the trial court's decision in *Smith*, the City modified the content of its violation notices to include the options of paying the fine or appearing in court to enter a not guilty plea and request a trial. *L.F. 248, 253, 265, 267.* Respondents received the post-*Smith* version of the City's violation notice.[16] Respondents stipulated that their violation notices adequately informed them 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.* This corrected the defect referenced in *Smith*.

[16] This is demonstrated by comparing the 2007 Smith notice (*L.F. 231, 317-320)* with the notices received by respondents. *L.F. 248, 253, 265, 267.*

The City also dismissed all pending red light camera matters that were issued using the *Smith* form of the violation notice. *L.F. 384-386.* Those cases were dismissed even though *Smith* held that individuals who received the notices were required to appear in Municipal Court to assert their defenses and were not entitled to equitable relief. *Smith*, 409 S.W.3d at 414-415, 418. The dismissals were ordered at the prosecutor's discretion, not because they were required by *Smith.*

The City also revised its violation notices a second time to include, among other things, a court date in the initial violation notice as suggested in *Unverferth,* 419 S.W.3d at 102. The court date is included in the current form of the City's violation notices. *L.F. 231; 362-363.* Contrary to respondents' assertion, the current form of the City's violation notices was included by stipulation in the trial court record. *Id.* Although Supreme Court Rule 37.33 does not require a court date in the initial notice, it is now included in the current version of the City's violation notices in response to *Unverferth.*

Finally, the City began reporting red light camera convictions to DOR. In 2012, the trial court in *Smith* determined that "it was the State, and not the City, that decided that red light photo enforcement violations would not be reported to the State." *L.F. 343.* The *Smith* trial court found that DOR instructed the City not to report such violations. *Id.* The fact that the violations were not reported to DOR was not dictated by the terms of Ordinance 66868 and was an administrative task that did not impact the validity of the Ordinance, according to the *Smith* trial

judge. *L.F. 344.*[17] Nonetheless, the City started reporting red light camera convictions to DOR using the State-assigned code for red light camera offenses, as stipulated by the parties.

D. *Other Court Decisions*

Respondents attempt to create the false impression that the City was ignoring multiple appellate decisions. The City's red light camera ordinance differed materially from those considered other municipalities because the City's ordinance is silent on the issue of points and, in each of the other cases relied upon by respondents, those ordinances attempted to regulate "points" on drivers' licenses. *See Brunner,* 427 S.W.3d at 228-229(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 (ordinance stated "that no points will be assessed against the defendant's license");

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[17] The *Smith* trial court stated:

> [T]he Director of Revenue has determined that points will not be assessed for municipal red light photo enforcement violations, and that such violations are not reportable as convictions to the Department of Revenue. . . . The assessment of points in § 302.302 is a duty placed upon the Director of Revenue, and the Court agrees that the City cannot be liable for the Director's failure.

L.F. 343-344.

Edwards, 426 S.W.3d at 664-665(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 which no points may be assessed"). The Creve Coeur cases, *Nottebrok v. City of Creve Coeur*, 356 S.W.3d 252, 256 (Mo.App.E.D. 2012) and *Ballard,* each addressed a Creve Coeur ordinance that "expressly disallowed the assessment or reporting of points." *Ballard*, 419 S.W.3d at 116, 119-120.

Another material difference is that *Smith* construed Ordinance 66868 as civil in nature, while *Brunner* and *Damon* applied different facts to different ordinances with different provisions. Because City Ordinance 66868 had already been construed as a civil measure, the fact that different ordinances in other cities were found to be "criminal" would not be reason for the City to terminate its already-adjudicated red light camera program.

In any event, *Brunner* and *Damon* had not been decided at the time respondents filed the instant suit. Therefore, respondents obviously did not base the claims in their petition on those decisions. *Edwards* and *Ballard* addressed a different type of red light camera ordinance, which treats red light camera violations like parking tickets and the identity of the driver is immaterial. Neither addressed ordinances with rebuttable presumption provisions similar to the City's Ordinance. The only other decision potentially applicable to the City Ordinance

at the time respondents filed suit was *Unverferth*. But *Unverferth* was not a final decision at the time respondents filed this suit, in that a transfer application was pending with this Court. In addition, the Florissant ordinance at issue in *Unverferth* was not part of the appeal record in that case and the record did not include a complete copy of Florissant's violation notice. 419 S.W.3d at 101. The *Unverferth* court remanded the cause to the trial court for further proceedings. *Id.* at 108. Thus, *Unverferth* was still a case in progress when respondents field the instant suit.

What the City did take from the *Unverferth* opinion, however, was the suggestion to include the court date in the offender's first violation notice even though inclusion of a court date is not required by Rule 37.33. *Id.* at 102. The City's current violation notices now include a court date. *See L.F. 362-363*.

E. The City's conduct was proper and trial court did not abuse its discretion in finding that "special" or "very unusual" circumstances did not exist to justify an award of attorney's fees to respondents' counsel.

The "special" or "very unusual" circumstances claim is respondents' only avenue to recover attorney's fees because no contractual or statutory entitlement exists, and, under the American Rule, each party pays his or her own attorney's fees.. *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151, 155-56 (Mo.App.E.D. 2000). The "special circumstances" exception is narrow and is applied to very limited factual circumstances where a party's conduct is "frivolous, without substantial

legal grounds, reckless or punitive." *St. Louis Title, LLC v. Talent Plus Consultants, LLC*, 414 S.W.3d 24, 26 (Mo.App.E.D. 2013). This matter boiled down to dispute with conflicting legal interpretations. "As in all litigation, the parties simply advocated inconsistent legal and factual positions. Advocating inconsistent positions is not a special circumstance; it is the very nature of litigation." *Smith v. City of St. Louis*, 395 S.W.3d 20, 26 (Mo. 2013).

The record demonstrates that the City quickly corrected the notice deficiencies identified in *Smith*. At trial, plaintiffs' counsel acknowledged that the current form of the City's violation notices satisfies the requirements of Missouri court rules and *Smith*. *Tr. 7.* The City took additional, voluntary steps in an attempt to comply with various, sometimes contradictory, court rulings. These facts directly contradict respondents' assertion that the City's conduct was "frivolous, without substantial legal grounds, reckless or punitive." *St. Louis Title*, 414 S.W.3d at 26. Rather, the City acted in good faith to apply its program in accordance with *Smith* and other cases when they subsequently were decided. The "special circumstances" exception for "very unusual circumstances" does not apply. See *Troske v. Martigney Creek Sewer Co.*, 706 S.W.2d 282, 286 (Mo.App.E.D. 1986), citing *Calvin v. Sinn*, 652 S.W.2d 277, 279 (Mo.App.E.D. 1983); *Osterberger v. Hites Construction Co.*, 599 S.W.2d 221, 230 (Mo.App.E.D. 1980).

"Taxpayers should not be required to foot the bill for counsel's self-promotion. Also, virtually all of the facts in this case were stipulated and the role

of counsel for each side was mostly limited to making legal arguments. No extraordinary effort or skill was required of legal counsel.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 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 11,474.

/s/ Michael A. Garvin