IN THE MISSOURI SUPREME COURT

SUPREME COURT No. SC94379

COURT OF APPEALS EASTERN DISTRICT No. ED100701

ST. CHARLES COUNTY 13th JUDICIAL CIRCUIT No. 1311-MU00010

CITY OF ST. PETERS, APPELLANT

v.

BONNIE A. ROEDER, RESPONDENT

Appeal from the Circuit Court of the County of St. Charles
21st Judicial Circuit, Division 1
The Honorable Ted House

RESPONDENT'S SUBSTITUTE BRIEF

Respectfully submitted,

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Standard of Review

Respondent Bonnie Roeder agrees with Appellant the City of St. Peters that for all points the Standard of Review is *de novo*.

The question of "[w]hether an ordinance conflicts with state law is purely a question of law; a determination which we review *de novo*". *State ex rel. Sunshine Enterprises of Missouri, Inc. v. Board of Adjustment of City of St. Ann*, 64 S.W.3d 310, 313–314 (Mo. banc 2002), relying on *State ex rel. Teefey v. Board of Zoning Adjustment*, 24 S.W.3d 681, 684 (Mo. banc 2000).

Further, review for all points is *de novo*, because all statutory construction issues are matters of law—not fact. *State v. Plastec*, 980 S.W.2d 152, 154 (Mo. App. 1998).

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INTRODUCTION

This is an appeal by the City of St. Peters of a red light camera ticket prosecution. After a September 5, 2013 jury verdict against Respondent Bonnie Roeder, the court invalidated the ordinance and dismissed the charge pursuant to *Unverferth v. City of*

Florissant, 419 S.W.3d 76 (Mo. App. E.D. Sept. 10, 2013), which had been decided five days after trial.[1]

The Ordinance at issue is City Ord. 4536, and particularly City Code Section § 335.095 (R.O. 2007 §335.095; Ord. No. 4412 §1, 1-12-2006; Ord. No. 4536 §1, 6-16-2006) (The Legal File and the City's Appendix include two versions of the ordinance.

[1] This is an unusual appeal first because the Appellant City is the prosecutor, and second because Appellant City has elected not to order a transcript of the trial or the hearings on pre-trial Motions. While Rule 30.04(c) states that the Appellant in a criminal case "shall order" a transcript, the City has indicated to Respondent's counsel that it relies on Rule 30.04(a) stating that "The record on appeal shall contain all of the record, proceedings and evidence necessary to the determination of all questions to be presented" and since the City has concluded that the transcript is not "necessary to the determination of all questions to be presented" it did not order a transcript.

Respondent is willing to proceed with the appeal without a transcript because Respondent agrees that a transcript is not needed. In fact, Respondent has not included a Statement of Facts in this Brief because Respondent believes that no facts are in dispute and Appellant's Statement of Facts fairly describes the details. Respondent does propose, however, that if this Court believes a transcript is necessary, the Court should simply require under Rule 30.04(h) that Appellant order and file a transcript of the trial and motion hearings and that the Court should then proceed to adjudicate the matter.

All references are to the version at L.F. 40, which appears to include a very small number of tiny technical corrections, and appears to be the final version "as passed".)

Roeder generally agrees with the City's recitation of the procedural history:

1. The City started the prosecution by sending Roeder a Notice of Violation, L.F. 52.
2. Roeder certified the case to circuit court for jury trial, L.F. 8.
3. Roeder filed her First Motion to Dismiss Based on Defect in the Prosecution, (the "First Motion to Dismiss"), L.F. 24.
4. The Court denied the Motion, L.F. 74.
5. The parties conducted discovery including depositions.
6. Roeder filed a Second Motion to Dismiss Based on Defect in the Prosecution (the "Second Motion to Dismiss), raising the equal protection issue, L.F. 75.
7. The Court denied the Motion, L.F. 178.
8. The Jury found Roeder guilty of violating the red light with the offense detected by a camera, L.F. 169.
9. The Jury assessed a fine, L.F. 171, 174.
10. The Court of Appeals issued the *Unverferth* decision.
11. Roeder filed a "Renewed Motion for Acquittal", L.F. 182, which brought to the court's attention the same issues as she had raised in her First Motion to Dismiss, and which had been viewed in her favor by the *Unverferth* opinion.

12. The Trial Court, based on *Unverferth*, reversed its prior denial of Roeder's First Motion to Dismiss, declared the Ordinance invalid and dismissed the charge, L.F. 289.

13. The City appealed.

14. The Court of Appeals affirmed.

15. This Court accepted transfer.

For purposes of this response Roeder does not contest the evidence that she entered the intersection after the light turned red (albeit, as is common in these cases, by a fraction of a second). The response thus addresses not the facts or the sufficiency of the evidence, but instead the appeal only addresses the validity of the St. Peters Ordinance both on its face and as applied to Roeder.

As this Court is of course aware, as Roeder writes this Brief the Court also has pending before it two other camera traffic cases, *Moline Acres v. Brennan,* SC94085 and *Tupper, et al. v. City of St. Louis, et al.,* SC94212.

Brennan is a speeding camera ticket prosecution matter in which the Ordinance provides for strict owner liability – that is, the City does not care about the identity of the driver - the Ordinance explicitly states that no points are to be assessed, and there is a hotly contested notice issue.

Tupper is an action by two recipients of multiple red light camera tickets to enjoin the City of St. Louis's entire red light camera ticket program. That case features an explicit rebuttable presumption, silence in the Ordinance as to points, and no notice issue (at least as the parties presented the case to the court).

In both *Brennan* and *Tupper* the car is identified by the license plate but the City has no specific information about the identity of the driver.

In this matter there are photos from both the front and rear of the vehicle, so there is a photograph of the driver through the windshield. Although Roeder put the City to its burden of proof on the identity question, the Jury did indeed find that Roeder was the driver. Nevertheless Roeder continues to contest the issuance of the charge because, she asserts, the officer's methodology of determining the driver's identity on an initial basis was unlawfully suggestive.

Just as in *Brennan*, the Ordinance here states on its face that no points shall be assessed. Further, as the Ordinance is applied, no points are assessed. Another issue here is the Notice of Violation's compliance with Rule 37.33(b)(2)(B) because the Notice of Violation did not explicitly state that the recipient of the notice had the option of "either paying the fine or pleading not guilty and appearing at trial". That issue leads to (1) what Roeder will refer to here as an "implied" rebuttable presumption, (2) equal protection as applied, and (3) the suggestiveness of the identification process at the charging stage.

Roeder's argument will track the following outline. Roeder will answer one by one the Points raised in Appellant's Substitute Brief. Roeder will then tackle the identity of the driver and the form of the Notice of Violation issues—which as the court will see will leak into the rebuttable presumption issue—and Roeder will conclude with the equal protection and suggestive identification issues.

POINT ONE: INTERACTION OF CHAPTER 43 AND CHAPTER 302

In Point One the City asserts that because RSMo. 43.512 authorizes creation of a Charge Code Manual by the Department of Public Safety, and because the resulting Charge Code Manual contains a charge code for red light camera tickets which does not assess points, this Court can ignore the RSMo. 302.302.1(1) requirement that the Director of Revenue access points for moving violations. (Whether points are required to be assessed in camera cases is the subject of the City's Point Two. For purposes of this Point One it appears the City has assumed RSMo. 302.302 does require the assessment of points for a situation in which the car is moving, as occurs when a driver enters an intersection when the light is red.)

The City's Charge Code argument has at least two flaws.

The first flaw relates to the specificity of two statute sections, RSMo. 43.512 and RSMo. 302.302.1(1). While all agree that under *Smith v. Mo. Local Government Employees' Retirement System*, 235 S.W.2d 578, 581 (Mo. App. 2007) and other cases a more specific statute shall trump a more general statute, the parties disagree strongly on which of these two statutes is "more specific".

At p. 14 of its Brief the City specifically asserts that Chapter 43 is more specific than Chapter 302 and so Chapter 302 must "yield" to Chapter 43. (At this point in its argument the City uses chapter numbers instead of individual statute sections). The City rationalizes that because the charge code created pursuant to the authority of Chapter 43 contains a charge code for red light camera tickets, and Chapter 302 does not even mention red light camera tickets, that Chapter 43 is the more specific statute of the two.

Roeder responds that the relevant section of Chapter 302 relates specifically to moving violations but the relevant section of Chapter 43 relates to reporting of all crime through a system of charge codes, and so it is actually Chapter 302 which is more specific than Chapter 43 on the subject of moving violations. Also it is in Chapter 302 where the legislature prescribes points as a penalty for the offense itself.

The City thus has it backwards and it is Chapter 302 which trumps Chapter 43. The existence of a charge code created by the Director of Revenue with the participation of OSCA and/or others pursuant to Chapter 43 does not render the points requirement of Chapter 302 toothless.

The second flaw is a failure to read the statutes in the context of our three branch system of government with each branch having a specific "magistracy" and with no branch having authority to invade the magistracy of another. Article II of the Missouri Constitution reads:

> The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Article III, § 1 reads:

> The legislative power shall be vested in a senate and house of representatives to be styled "The General Assembly of the State of Missouri."

In *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 230 (Mo. 1997) this court said:

> A careful reading of article shows that the constitution assigns the General Assembly the single power and sole responsibility to make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility.

The Department of Public Safety is created pursuant to Article IV **§** 48. Article IV is titled "Executive Department". The Director of the Department of Public Safety is appointed by the Governor and the Department's duties are administrative. It is thus part of the Executive Branch and has no power at all to make laws or define crimes, because to do so would invade the magistracy of the Legislative Branch. (Roeder does not contest the Executive Branch's rulemaking authority per se; she only asserts the Department of Public Safety cannot make up a Rule out of whole cloth which directly contradicts a statute).

Let us now examine the individual statutes in more detail.

RSMo. 43.512 authorizes the Department of Public Safety to create a charge code manual:

> The central repository, with the approval of the Supreme Court, shall publish and make available to criminal justice officials, a standard manual

> of codes for all offenses in Missouri. The manual of codes shall be known as the "Missouri Charge Code Manual", and shall be used by all criminal justice agencies for reporting information required by sections 43.500 to 43.530.

RSMo. 43.500(7), a definitions statute, provides specifics:

> "Missouri charge code", a unique number assigned by the office of state courts administrator to an offense for tracking and grouping offenses. Beginning January 1, 2005, the complete charge code shall consist of digits assigned by the office of state courts administrator, the two-digit national crime information center modifiers and a single digit designating attempt, accessory, or conspiracy.

Roeder suggests that read together these sections require the charge code manual to be part of a system of reporting conduct which the legislature has already made criminal by formal legislation, (or which the legislature might make criminal in the future), but does not authorize creation of new crimes or offenses.

Particularly, the phrase "for tracking and grouping offenses" in 43.500(7) does not refer to new offenses which the Department of Public Safety might happen to think up. In our three branch system of government, "offenses" can only refer to offenses created by the legislature.

The City would have the Department of Public Safety leapfrog the legislature's sole power to create crimes. But giving such power to the Department of Public Safety would violate the constitution's separation of powers provisions as stated above.

The City's argument also misreads the strict limits of the Department of Public Safety's rulemaking authorization under RSMo. 43.509. That statute only gives the Department of Public Safety authority to create rules related to criminal recordkeeping.

The City's Point One therefore fails.

POINT TWO: POINTS

The City argues in its Point Two that the Ordinance is not in irreconcilable conflict with the RSMo. 302.302 requirement that the Director of Revenue assess points for "moving violations".

At p. 16 of its Substitute Brief the City makes its core argument for this Point stating that "the ultimate determination of whether points, which can lead to a revocation, should be assessed for violation of a City Ordinance is left to the DOR". (Roeder raised the Points issue at para. 44 of her First Motion to Dismiss, L.F. 33, and so raised it at the earliest possible time, *MB Town Center, LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595 (Mo.App. E.D. 2012)).

Here the core of the parties' disagreement is that while Roeder agrees that the Director of Revenue is to create and put into effect a charge code system, Roeder asserts that the Director of Revenue does not have such unfettered discretion that the Director can create charge codes which explicitly conflict with Missouri statutes.

In short, RSMo. 302.302 requires that the Director assess points for moving violations. A car running a red light is by definition moving (barring the scenario of the car dropped into the intersection by a helicopter), and so points must be assessed. Nothing the Director does can conflict with that.

Section G of the ordinance states that no points shall be assessed:

> A person commits an offense under this section when such person fails to comply with the City Traffic Code and the violation is detected through the automated red light enforcement system as herein provided. A conviction for a violation of the City Traffic Code through the automated red light enforcement system shall be deemed an infraction and, upon a conviction thereof, shall be punishable by a fine no greater than two hundred dollars ($200.00). **In no case shall points be assessed against any person, pursuant to section 302.302 RSMo., for a conviction of the City Traffic Code detected through the automated red light camera system**. (emphasis added)

(The following analysis tracks the briefing on this subject in Brennan and Tupper).

In *Brunner v. City of Arnold*, 427 S.W.3d 201, 229 (Mo. App. E.D. December 17, 2013) the court followed well established precedent to lay out the logic:

The law goes so far as to say that a municipal ordinance is altogether void if it conflicts with the general laws of the state, *McCollum v. Dir. of Rev.*, 906 S.W.2d 368, 369 (Mo. banc 1995). No ordinance is valid which contains provisions contrary to or in conflict with the state's traffic regulations, and the test for determining if a conflict exists is whether the ordinance permits what the statute prohibits or prohibits what the statute permits, *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986) (quoting *Page Western, Inc. v. Cmty. Fire Protection Dist.*, 636 S.W.2d 65, 67 (Mo. banc 1982)). An ordinance may supplement a state law, but when the expressed

or implied provisions of each are inconsistent and in irreconcilable conflict, then the statute annuls the ordinance, *Miller v. City of Manchester*, 834 S.W.2d 904, 907 (Mo.App.E.D.1992) (citing *Page Western, Inc.*, 636 S.W.2d at 67).

The *Brunner* court went on to cited established case law to explain that a municipal court has no jurisdiction to adjudicate a prosecution under a void law. (And Roeder asks the court's indulgence for quoting such long sections from *Brunner*, but undersigned counsel believe the Court of Appeals has said it as succinctly as it can be said):

> The effect of the ordinance being in violation of the state statute is that the ordinance is void and unenforceable ab initio, *Levinson v. City of Kansas City*, 43 S.W.3d 312, 320 (Mo.App. W.D.2001) (quoting *Armco Steel v. City of Kansas City*, 883 S.W.2d 3, 7 (Mo. banc 1994)). Thus, a void ordinance is equivalent to none at all, thereby rendering all court proceedings transpiring under said ordinance void as well, *City of St. Louis v. Handlan*, 145 S.W. 421, 423–24 (1912) ("a void ordinance is equivalent to none at all; and that where a court proceeding cannot go on without an ordinance ... a valid one is essential to the court's jurisdiction "). Therefore, a municipal court—having jurisdiction only to try violations of municipal ordinances and not state law—has no subject matter jurisdiction, ab initio, pursuant to a void and unenforceable ordinance that conflicts with state law, *Williams v. Williams*, 932 S.W.2d 904, 905 (Mo.App. E.D.1996) ("A judgment is void from its inception if the court that rendered judgment did

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

Brunner then explained that the points problem rendered the ordinance in that case void:

> Generally, ordinances are presumed to be "valid and lawful" and are construed in such a manner as to uphold its validity unless the ordinance is *expressly inconsistent* or in irreconcilable conflict with the general law of the state. *McCollum v. Dir. of Revenue***,** 906 S.W.2d 368, 369 (Mo. banc 1995) (emphasis added). However, ordinances imposing penalties are "strictly construed" against the municipality and will not be extended by implication. *City of Kansas City v. Heather*, 273 S.W.3d 592, 595 (Mo.App. W.D. 2009). There being a "fine (penalty)" imposed for violation of the Ordinance, we will strictly construe the Ordinance against the municipality. *See, e.g., City of St. Louis v. Brune Mgmt. Co.*, 391 S.W.2d 943, 946 (Mo.App.1965) (because violation of housing ordinance

was a misdemeanor and subjected violator to a fine, the ordinance was penal in nature and, therefore, strictly construed).

Like all creatures of this state, City's power to enact ordinances is derived from the state and must be exercised under that authority so given by the state. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 205 (Mo. banc 2008) ("A non-charter city, such as Arnold, derives its power from the legislature's enactment of laws."). It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and none others: those powers expressly granted, those powers necessarily and fairly implied in or incidental to powers expressly granted, and those powers essential to the declared objects and purposes—"not simply convenient, but indispensable"—of the municipal corporation. *City of Richmond Heights v. Shackelford*, 446 S.W.2d 179, 180 (Mo.App.1969) (citations omitted). Courts will adhere to a "strict rule of construction" when determining the powers of a municipality and any reasonable doubt as to whether a power has been so delegated to a municipality will be resolved in favor of non-delegation. *Burks v. City of Licking*, 980 S.W.2d 109, 111 (Mo.App. S.D.1998).

…

RSMo. 302.225 requires that courts report any moving violation offenses to the Department of Revenue within seven days of any plea or finding of guilty. *See* RSMo. 302.225.1. RSMo. 302.010(13) plainly defines a

"moving violation" as the character of traffic violation where at the time of violation the motor vehicle involved is in motion. Section 302.302.1(1) requires the Department of Revenue to assess two points against the driver's license of any person convicted of a moving violation. *Edwards v. City of Ellisville*, 426 S.W.3d 644, (Mo. App. E.D. November 5, 2013). Thus, the plain language of Missouri state law requires any municipal ordinance violation occurring while the vehicle is in motion be assessed two points by the director of revenue. *Unverferth v. City of Florissant*, 419 S.W.3d 76 (Mo App. 2013).

…

As in *Unverferth*, *Edwards*, and *Damon*, the conduct regulated by the Ordinance is, quite simply and unambiguously, running a red light, as common sense and collective experience suggest that a person cannot fail to stop at a red light without being in motion. *Unverferth v. City of Florissant*, 419 S.W.3d 76 (Mo App. 2013); *Edwards v. City of Ellisville*, 426 S.W.3d 644, 664 (Mo. App. E.D. November 5, 2013); *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. App. W.D. November 26, 2013); *see also City of Springfield v. Belt*, 307 S.W.3d 649, 652 (Mo. banc 2010) ("a violation of a red light ordinance, which typically is considered a moving violation"). In so doing, Arnold permits what the state law prohibits—the classification of running a red light as a non-moving violation free from the assessment of points. *Unverferth v. City of Florissant*, 419 S.W.3d 76 (Mo

> App. 2013); *Edwards v. City of Ellisville*, 426 S.W.3d 644, 664 (Mo. App. E.D. November 5, 2013) (determining that an ordinance conflicts with statutes related to assessment of points where red-light ordinance failed to require the municipal court to report a violation of the Ordinance as a moving violation to the director of revenue for the assessment of points"); *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. App. W.D. November 26, 2013). When is running a red light not the same as running a red light? Arnold believes it is when the violation is captured by a red light camera. Arnold is incorrect.
>
> Therefore, as a matter of law, the Ordinance unequivocally conflicts with the state statute and is therefore void and unenforceable.
>
> (Some internal quotations omitted.)

As these quotes indicate, a red light camera ticket ordinance in which no points are assessed is void. Since pursuant to specific language in the City's Ordinance in this case no points are to be assessed, this ordinance is void and City's Point Two fails.

POINT THREE: DIRECTORY V. MANDATORY

In Point Three the City argues that because there is no penalty to the Department of Revenue if it fails to follow the RSMo. 302.302.1(1) directive that it "shall" assess points for moving violations, RSMo. 302.302 is "directory" and not "mandatory", and so this Court should find the RSMo. 302.302 points requirement to be a nullity and so reverse the trial court and find Respondent guilty of violating the red light.

Respondent cites two cases, *State v. Conz*, 756 S.W.2d 543 (Mo. App. 1988), and *Kersting v. Department of Revenue*, 792 S.W.2d 651 (Mo. App. 1990). In *Conz* the Defendant was convicted of being a persistent DWI offender under RSMo. 577.023.1(2). On appeal he asserted that the prosecution had to obtain records of prior convictions from Department of Revenue records and if it obtained them from any other source the prosecution was unlawful. The court did include an analysis of when the word "shall" is mandatory or merely directory, but the court then short circuited the discussion with the following statement, 756 S.W.2d at 546:

> To whatever extent any directive of RSMo. 557.023.13 could have possibly been violated by the state in this case, we are unable to see how appellant was in any way prejudiced, as there was sufficient evidence produced at trial to establish appellant's persistent offender status.

Roeder believes this paragraph proves that the *Conz* discussion of mandatory v. directive is only dicta.

It is also likely irrelevant since Roeder is a defendant faced with the seizure of her property (and already a deprivation of liberty), and a Defendant has standing to challenge any defect in the prosecution against her as it directly and adversely affects her, *State ex rel. City of St. Louis v. Litz*, 653 S.W.2d 703, 706 (Mo. App. E.D. 1983).

In *Kersting* the Court of Appeals gave the "shall" argument more teeth. Petitioner was convicted of vehicular manslaughter and the court took more than ten days to get the records to the Department of Revenue. RSMo. 302.225.2 states that the court shall send a record of a conviction to Department of Revenue within 10 days. The Court of Appeals

disallowed Defendant from using the timing miscue by the court as a defense to a ten year denial. The Court of Appeals stated, 792 S.W.2d at 653, that "the legislative intent of this statute is to speed revocation of driving privileges, not to provide procedural protection for the driver." Respondent suggests that the *Kersting* court is directing the focus of the inquiry to legislative intent. Since the court found in *Kersting* that the legislative intent was to keep people convicted of vehicular manslaughter off the roads for ten years, this court should interpret "shall" in this case in a manner consistent with the legislative intent to have points assessed for convictions for moving violations. The lack of a penalty provision for not assessing points should not be seen as a procedural protection for the municipality. The City's argument therefore fails.

Roeder also directs this court to the logic of the Court of Appeals in *Edwards v. City of Ellisville*, 426 S.W.3d 644, 664 (Mo. App. E.D. November 5, 2013) holding that the term "shall" is used in laws, regulations, or directives to express what is mandatory, citing *Allen v. Pub. Water Supply Dist. No. 5 of Jefferson Cnty.*, 7 S.W.3d 537, 540 (Mo.App.E.D.1999).

The "mandatory v. directory" distinction does not save the Ordinance from being void on its face and as applied here to Roeder.

POINT FOUR: SEVERANCE OF THE NO POINTS CLAUSE

In Point Four the City asserts that under the Ordinance's severability clause the trial court should have severed the defective no points section of the Ordinance and enforced the rest. Such a severance would make it so that Roeder would receive points for running the light.

This argument fails under the Rule of Lenity, due process analysis, the statutory provision which governs severability of legislative enactments, the Sixth Amendment right to be informed of the cause and nature of the charge, and the cases cited by the City.

(Roeder also notes that even if the court finds the City's argument on this Point persuasive, the Ordinance still fails for the other reasons stated in this Brief).

Let us start with the Rule of Lenity. Respondent suggests that the provision of the ordinance eliminating points is favorable to her, because points are harmful to one's driving record and insurance rates, and therefore to eliminate the no points clause would make the ordinance more severe than it would be with that provision. Let us consider that. The City wants this court to rewrite a criminal Ordinance so that after the rewrite the Ordinance is more severe to the Defendant than it was originally. The court described the Rule of Lenity in *State v. Dougherty*, 358 Mo. 734, 741, 216 S.W.2d 467, 471 (1949):

> Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and proof. No one is to be made subject to such statutes by implication.

Roeder suggests that a "liberal" reading of the Ordinance would not allow it to be read more severely against her than the Ordinance read as originally written. The Rule of Lenity therefore prohibits the severance. (See below for argument that violation of a red light camera ordinance is criminal. Roeder also points to the exhaustive briefing on that subject in the Tupper matter, omitted here under the judicial mercy doctrine).

Let us now turn to due process under the Fifth Amendment to the United States constitution, and Article I § 10 of the Missouri Constitution.

The critical sentence in section 3 of the Ordinance states that regardless of what portion of the statute a court might sever the court should enforce the rest: "It being the intent of the Board of Alderman that it would have enacted this Ordinance without the invalid or unenforceable provisions."

The quoted sentence has either no limits or has impermissibly vague limits in the context of a criminal (or quasi-criminal) ordinance violation enforcement. Whether either without limits or with impermissibly vague limits, the City is asking the judicial branch to unlawfully tread on the power of the legislative branch and so violate Roeder's right to due process. For example, if any part of the ordinance can be severed, a particular severance might render the ordinance void for vagueness. Similarly, the severance of the word "not" in some particular sentence would make the meaning of the sentence the exact opposite of what had been passed the first time. The breadth of the rationalizing phrase leaves Roeder concluding that the Board of Alderman has failed to write a statute which is specific enough to be enforced. That is a due process violation and so the Ordinance fails.

Let us now turn to the section of the Missouri statutes governing severability. RSMo. 1.140 reads:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the

> legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Roeder first draws the court's attention to the requirement that the duty to sever only applies to sections which are unconstitutional. The sentence which the City wants severed relates to the RSMo. 302.302 *statutory* requirement to assess points. The free from points assessment sentence thus has nothing to do with the constitution at all, and so the duty to sever is not even authorized by the statute. (In the eyes of the Court of Appeals, this was the winning argument on this point).

Additionally, the rest of the ordinance is invalid if the court finds that the severed provisions of the statute are "essentially and inseparably connected with" the rest of the statute, such that the court can conclude that the legislative body "would have enacted the valid provisions without the void one". In *Weinschenk v. State*, 203 S.W.3d 201, 219 (Mo. 2006) the court described this analysis this way:

> In other words, "[t]he test of the right to uphold a law, some portions of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left.

Roeder suggests that the required analysis cannot be done when the Board of Alderman asserts that if any part is invalid the rest is to be valid, because the Board has failed to sufficiently clarify what it intended to enact.

Roeder now turns to her Sixth Amendment right to be informed of the nature and cause of the accusation. How can a person knowingly conform his or her conduct to an ordinance's requirements and then in the event of a court action against him or her be informed of the nature and cause of the accusation if he or she must anticipate that only some parts of the Ordinance will be valid after random cutting and the remaining detritus may be more adverse than the whole?

Let us finally turn to the City's cases, *St. Louis County v. Glore*, 715 S.W.2d 565 (Mo. App. 1986) and *City of Booneville v. Rowles*, 869 S.W.2d 889 (Mo. App. 1994).

Glore was an anti-obscenity criminal prosecution in which the statute contained a presumption that someone who promoted obscene material in his business did it for a monetary consideration. The trial court dismissed the entire charge because the presumption violated the Fourteenth Amendment by eliminating the duty of the Prosecutor to prove scienter. The Court of Appeals reversed holding that the trial court was correct that the presumption unconstitutionally eliminated the requirement of proving scienter, but the Court of Appeals held that the correct solution was to make the prosecution prove that element and so the Court remanded for trial. Thus, the severing of the offending presumption made the situation *better* for the Defendant because the prosecutor had to prove more to get a conviction. Here severing the no points provision would make it worse for the Defendant.

Rowles was a bar fight case in which gentlemen combatants in Mr. Rowles' drinking establishment "took it outside". Once the gentlemen reached the bracing freshness of the evening air, the first gentlemen proceeded to slay the second gentleman.

Taking an aggressive position, the City of Booneville suspended Mr. Rowles' liquor license for ten days over this minor contretemps, and he challenged the suspension. At the Court of Appeals the City defended the suspension on two theories – first, on the undisputed facts that a fight had occurred in the bar and the owners had failed to call the police immediately as the local Liquor Ordinance required in all cases of violence, and second, that the bar owner had operated the premises so as to "offend the decency and repose of others within 300 feet". It appeared to the Court of Appeals that the "offend the decency and repose" language was likely unconstitutionally vague and so the Court severed that clause, but the court's actual holding was to uphold the suspension because it was wholly valid under the first rationale of a direct violation of the mandatory duty to immediately report the violence. One may conclude while that statute had a severability clause which the court upheld, the severance had no effect on the outcome of the case. Therefore the case does not have a holding which supports Appellant's argument for severability in this matter.

Point Four fails because even if the severability argument succeeds, the Ordinance fails for other reasons already briefed, and because if the court were to sever the points clause the Ordinance would be more severe to Respondent than as it is written, and so would violate the Rule of Lenity and Roeder's due process rights under the Missouri and United States Constitutions.

———

Roeder will now review other issues which this court may find relevant to this case.

IDENTITY OF THE DRIVER

In her First Motion to Dismiss at para. 17, L.F. 26 Roeder acknowledged that she finds the St. Peters Ordinance on the issue of identity of the driver somewhat confusing.

As near as she can tell the Ordinance's process for identifying and charging a particular Defendant works in the following unfortunately complex manner:

Section D of the Ordinance, L.F. 42, is labeled "probable cause". That section reads:

> D. *Probable Cause.* An officer employed by the St. Peters Police Department shall examine the recorded image to determine if a violation of the City Traffic Code has occurred. If the recorded image shows a violation, contains a date and time of the alleged violation, shows the letter and numbers on the vehicle's license plate, as well as the state in which the license was issued, and the traffic control signal while it is emitting a steady red signal, the officer may use any lawful means to identify the vehicle's owner.

Roeder interprets the language of this section to mean that the officer is to use the photo of the license plate, which is presumably what the phrase "or any lawful means" is getting at, to first go into the state's car registration records and to thereby determine the identity of the owner.

Section E of the Ordinance (up through the list of what the Notice of Violation is to contain) then reads:

E. Upon the filing of an information in the Municipal Court, the St. Peters Police Department shall cause a summons to be Issued**,** with a court date, pursuant to Missouri Supreme Court Rules 37.42 through 37.44. Not later than sixty (60) days after the date the violation is alleged to have occurred, the summons shall be served on the owner by mailing it, together with:

1. A copy of the violation notice; and
2. A copy Instructions and information regarding the viewing of the recorded image(s) of the alleged violation, which forms the basis of the information; and
3. A copy of the supplemental violation notice as described in Subparagraph 1a of this section, to the owner's last known address by first class mail. If, however, the vehicle is registered in more than one person's name, the summons shall be issued to the registrant whom the issuing Police Officer determines, under all the facts and circumstances, was the person most likely depicted in the recorded image.

Roeder interprets section E as follows: The Ordinance first unequivocally instructs the City officials to send a notice of the violation to the owner. But the "basis of the information" phrase in the Ordinance seems to temper that directive by instructing the officer to look at the image created at the time of the alleged infraction and to compare it

to the owner's driver's license picture in the state records to see if the two look alike. (See below regarding the equal protection concerns raised by this procedure).

Subsection E.3 turns to the situation in which there is more than one owner and it directs the officer to review the information in hand and issue the summons to the person "most likely" to be the driver. It appears to Roeder that quite a few potential scenarios are left out of this phase of the proceedings. What if the owner is a company? Or a trust? Or a government entity? There appears to be no instruction to the city official for such situation in which the DoR records will not have a direct link to the driver.

Roeder now turns to section G where the conduct of running the light is declared illegal. That section reads, as stated above:

> A person commits an offense under this section when such person fails to comply with the City Traffic Code and the violation is detected through the automated red light enforcement system as herein provided. A conviction for a violation of the City Traffic Code through the automated red light enforcement system shall be deemed an infraction and, upon a conviction thereof, shall be punishable by a fine no greater than two hundred dollars ($200.00). In no case shall points be assessed against any person, pursuant to section 302.302 RSMo., for a conviction of the City Traffic Code detected through the automated red light camera system.

As the court can see, the beginning of the section refers to the perpetrator of the crime under this section as a "person [who] fails to comply with the City Traffic Code". In Respondent's view that makes the actual driver of the car the person who is guilty of the

offense. That might resolve the concern that the Ordinance targets the owner instead of the driver, a practice rejected in *Edwards v. City of Ellisville*, 426 S.W.3d 644, 664 (Mo. App. E.D. November 5, 2013) and briefed heavily in the Brennan case, but based on the record of the Ordinance's enforcement it turns out that to stop there would be premature.

Roeder will now address the "implied" rebuttable presumption, which this analysis has just raised.

NOTICE OF VIOLATION – AN "IMPLIED" REBUTTABLE PRESUMPTION

The city normally initiates the proceeding by sending the owner a Notice of Violation. The Notice of Violation comes in four pages, L.F.52-55 (out of order in the Legal File):

> Page One has address information for the Defendant and the City, L.F. 54,
>
> Page Two has "options", L.F. 55
>
> Page Three has the specifics of the violation at issue, L.F. 52, and
>
> Page Four gives instructions, L.F. 53.

Let us place ourselves in the position of Roeder in receipt of these documents, collectively referred to herein as the "Notice of Violation". Since she is presumed to know the law, she begins her examination with knowledge that Rule 37.33(a)(5) requires that a violation notice shall "state the facts that support a finding of probable cause to believe the ordinance violation was committed and that the accused committed it," (emphasis added).

Let us presume she first examines the "Instruction Page", Page Four, L.F. 53, for starting with the instructions seems reasonable in such a situation. That Page states, in relevant part, starting at the top:

INSTRUCTION PAGE

1. Reason You Received This Notice of Violation and Summons

   A vehicle registered in your name was photographed running a red light or the registered owner of the vehicle depicted on this notice has submitted an Affidavit naming you as the driver of the vehicle at the time of the violation…

The next paragraph states:

2. You must select one of the following options. Complete the coupon on the Options Page for the option you select and return the coupon in the enclosed envelope.

   A. Payment Method. **As the registered owner or identified driver of the vehicle…we have no choice but to hold you responsible for paying this fine**… Of course, if you were not the driver at the time of the violation you may appear in court to identify another driver.

   (emphasis added).

   [bullet points identifying payment methods].

   B. Affidavit: Vehicle Sold or Stolen. It is sufficient evidence of the St. Peters City Code Section 335.095 that the person

registered as the owner of the vehicle was operating the vehicle at the time of the violation. However, liability of the owner may be removed if the Affidavit of non-responsibility (Option B of the mail in coupon on page 2) is completed and returned.

C. Right to a hearing.

You may appear in court on your scheduled court date and to have the matter reviewed by the Municipal Judge.

…

If you do not pay the fine prior to, or appear in court on, your scheduled court date, a warrant may be issued for your arrest which could result in additional fines and costs for failure to appear.

Preliminarily, as stated at paras. 17&c and 34&c of Roeder's First Motion to Dismiss, L.F. 26 and 30, respectively, the standards for identifying the owner seem to fail to fulfill the Missouri Constitution, Article I § 10 requirement of due process, (as made applicable in municipal prosecutions in Rule 37.33(a)(5)), that the Officer issuing the summons have probable cause to believe that the accused committed [the offense]. Particularly, Roeder submits that the phrase in 2.A. that "We have no choice but to hold you responsible for paying this fine" is insufficient to meet due process under Article 1 **§** 10 and the due process clauses of the United States Constitution in the Fifth and Fourteenth Amendments.

Roeder now digs further into this Instruction Page and notices the caveat in para. 2 that she "must select one of the following options". She sees that there is a limited universe of options offered but one is the affidavit of non-responsibility offered in 2.B. Roeder then turns to Page 2, L.F. 55 in order to examine this option and there she finds the promised "Option B of the mail in coupon on page 2". The options there are:

Check One: ___ I sold the vehicle prior to the violation date to the person named below

___ The vehicle or license plate(s) were stolen at the time of the violation.

These options do not meet the notice and procedural requirements of Rule 37.33(b)(2). The options make Roeder feel like a customer of Hobson's livery stable, a customer presented with only two horses from which to choose, each an old and decrepit nag.[2] She likely feels frustrated by the lack of other, better options. For example, again presuming she knows the law, what if she wants legitimate options that are required by the constitution and by the Rules, *e.g.*, options such as: "I wish to exercise my Fifth Amendment right to remain silent", or "I have no burden of proof here so I should have

[2] Scholars probing the etymology of the expression "a Hobson's choice" are in two camps. Some assert that Hobson offered the customers of his livery stable either one lousy nag or no nag at all, and others say Hobson offered the customer a choice between just two lousy nags. For the purposes of this argument Respondent goes with the latter approach, also called a "dilemma".

no duty to implicate someone else in order to get out of this"? None of those options are available to Roeder in this limited universe.

Further, one may note that even if Roeder feels an affirmative obligation to defend herself by ratting out another person as the true driver, the rat out option is not available on "Option B of the mail in coupon on page 2", which in any event does not comply substantially with Rule 37.33(b) and/or the model Uniform Citation in Form 37.A.[3]

Let us now assume that Roeder concludes that due to the paucity of choices within "Option B of the mail in coupon on page 2", 2.B is not for her and so she will go back to Page Four, the Instruction Page, to consider 2.C, "Right to a Hearing".

As noted in *Smith v. City of St. Louis*, 409 S.W.3d 404, 415-17 (Mo. Ct. App. 2013), and reinforced in other red light camera cases, *e.g.*, *Unverferth v. City of Florissant*, 419 S.W.3d 76 (Mo App. 2013), and as briefed heavily in this court in *Brennan*, (as well as by *Amicus Curiae*, the Missouri ACLU), the requirements for the language of a "Right to a Hearing" notice in a Notice of Violation are strict. The *Smith*

[3] Roeder foresees unreasonable defects with the un-notarized affidavit, a/k/a the rat out provision, as the basis for a driver identification. Since the statement is not made under penalty of perjury and is not sworn, some vehicle owners may be less than honorable and instead of ratting out the true driver – whose identity the owner might happen to know – might falsely rat out a random person, perhaps an estranged relative, or perhaps a spouse's lover - hoping that the rascal will soon be arrested, *see below* regarding the arrest of Roeder in this very matter.

court stated that Defendant City "is required to inform individuals who receive a Notice of Violation that they must respond to the violation notice by *either* paying the fine *or* pleading not guilty and appearing at trial." That language is missing from this Notice of Violation.

As Roeder is reading 2.C her attention might also be drawn to the option to appear in court for the matter "to be reviewed by the Municipal Judge". It is reasonable to ask what "to be reviewed" means procedurally? Is that a trial with customary American and Missouri rights to due process? Is it a perfunctory "review" in which the Defendant has no right to present a defense and in which the City's accusation will be presumed correct? Is it hearing in which the Defendant will be required to speak, perhaps under threat of some penalty if she declines? (We appear to have abandoned the thumb screws in this Country, but a scared Defendant might have concerns in that direction). Is it a review in which the Defendant will bear the burden of proof?

The language in this Notice of Violation answers none of these questions, and the Ordinance is silent.

Roeder believes that the failure of the Notice of Violation to formally state the option of "Pleading not guilty and appearing at trial" as required by Rule 37.33(b)(2)(B), and the case law as stated above, renders the Notice of Violation unlawful, and so the entire prosecution of this case is fatally wounded. (It is undisputed that the City operates

the red light camera ticket program through a Traffic Violations Bureau, and so Rule 37.33(b)(2)(B) applies pursuant to Rule 37.49**).**[4]

There is, however, even more to say about this Notice of Violation. As stated at para. 24&c and 36&c of the First Motion to Dismiss, L.F. 27 and 30, respectively, even though the Ordinance is silent about a rebuttable presumption, it turns out that the instructions on Pages Four and Two create that very thing.

As stated above, "Option B of the mail in coupon on page 2" gives the recipient of the summons the opportunity to rebut the charge only by either stating the car was sold or stolen, and/or that the plates were stolen. In reference to this option, however, the instruction further includes the grammatically challenged phrase: "It is sufficient evidence of the St. Peters City Code Section 335.095 that the person registered as the owner of the vehicle was operating the vehicle at the time of the violation." (The Ordinance says no such thing explicitly).

The rebuttable presumption is implied in the part of the form appearing just above the sentence quoted in the prior paragraph. The critical sentence is: "As the registered owner or identified driver of the vehicle…we have no choice but to hold you responsible for paying this fine… Of course, if you were not the driver at the time of the violation you may appear in court to identify another driver."

[4] In a letter to undersigned counsel dated September 30, 2013 Appellant's counsel confirmed that the City of St. Peters operates its red light camera tickets through a TVB.

The court in *Brunner v. City of Arnold*, 427 S.W.3d 201, 230-231 (Mo. App. E.D. December 17, 2013) rejected a rebuttable presumption in camera ticket cases because the prosecution was criminal. This issue is briefed in great detail in Tupper.

The *Brunner* court found that a rebuttable presumption is not permissible in a criminal case, and the threat of imprisonment made the case criminal.

Just as in Tupper it is therefore appropriate to inquire whether the facts here make this prosecution also criminal. (The following is an abbreviated argument when compared to the argument in Tupper).

As a preliminary point in this case, as stated above, Roeder actually was arrested, L.F. 15, 21, 22, and so she actually suffered the "infamous punishment of imprisonment", *Hudson v. United States***,** 522 U.S. 93, 104 (1997). That would seem to be a strong factor toward concluding the offense is criminal. (Roeder acknowledges that the arrest was purportedly for the bootstrapped charge of failing to appear in court and not for the red light camera ticket itself).

Other factors are as follows: The Ordinance states in Section G: "A conviction for a violation of the City Traffic Code through the automated red light enforcement system shall be deemed an infraction and, upon a conviction thereof, shall be punishable by a fine no greater than two hundred dollars". Then, just below the probable cause statement on Page Three, L.F. 52, the page whose left side has the appearance of a routine traffic ticket, the Notice of Violation states:

> NOTE: As the registered owner of the vehicle described in this Notice, you are responsible for paying this fine or appearing in court by 07/31/2012.

> Failure to respond to this Summons may result in a warrant being issued for your arrest which could result in additional fines and costs for failure to appear.

The exact same language about "a warrant being issued for your arrest" appears twice more on Page Four, the Instruction Page, L.F. 53.

It thus appears that St. Peters is committed to having the recipient of the Notice of Violation think that if the recipient doesn't pay or come to court the recipient will be arrested. The *Brunner* court found it dispositive that "Arnold has acted as if the Ordinance was criminal in nature, presumably to coerce violators into paying the fine." That is what St. Peters is doing here. Roeder suggests that the Court of Appeals had it right in *Brunner*, and this court should agree that the Ordinance is criminal, which means the rebuttable presumption is unlawful. As the *Brunner* court stated:

> Regardless of the capability of Arnold to legally arrest non-payers, the threat of imprisonment is sufficient to conclude that Arnold believed or intended the Ordinance to be criminal, in that Arnold imposes an affirmative disability or restraint on violators. While we agree that the intent of the Ordinance was not to punish violators via imprisonment, Arnold has acted as if the Ordinance was criminal in nature, presumably to coerce violators into paying the fine. Arnold may not use the Ordinance as a weapon and then ask to be shielded by the Ordinance. Moreover, because of the threat of imprisonment, the Ordinance imposes an additional penalty.

And so again the prosecution is fatally void.[5]

Roeder finds St. Peters Ordinance's complicated options, with its flow chart approach, to be, at best, somewhat opaque. At worst she finds the flow chart approach to be a shell game designed to confuse the recipient of the Notice of Violation so much that he or she will be coerced to pay the fine, instead of risking imprisonment without probable cause or due process.

Roeder concludes this section of the brief by noting, as she did in para. 59&c of her First Motion to Dismiss, L.F. 37, that the presumption of guilt in the phrase: "As the registered owner or identified driver of the vehicle…we have no choice but to hold you responsible for paying this fine" violates Roeder's right to be presumed innocent. *See e.g., City of Kansas City v. Mathis*, 409 S.W.2d 280, 283 (Mo. App. 1966) (holding the accused in an ordinance violation is "clothed with the presumption of innocence" and that "[c]onsequently the city had the burden of proving every element of the offense charged and defendant's guilt thereof beyond a reasonable doubt"); *City of Webster Groves v. Erickson*, 789 S.W.2d 824, 826 (Mo. Ct. App. 1990) ("in a prosecution for an ordinance violation, the rules of criminal procedure apply including the criminal standard of proof

[5] Respondent notes that in *Smith v. United States*, 133 S.Ct. 714, 184 L. Ed. 2d 570 (2013) the Supreme Court did not approve rebuttable presumptions in cases of this nature, but only stated that the Defendant in a criminal case has the burden of proof for his affirmative defenses. In that case the Defendant had to prove that he withdrew from a conspiracy before the statute of limitations deadline.

beyond a reasonable doubt"); *State v. Buford*, 309 S.W.3d 350, 361-62 (Mo. Ct. App. 2010) (holding that a defendant is "not required to put on evidence that he did not commit the charged crime" and he "has no such burden").

EQUAL PROTECTION

Roeder notes that she raised the equal protection issue in her Second Motion to Dismiss, L.F. 77, which was the first time she could have reasonably raised the issue, because at the time of her First Motion to Dismiss she had not taken depositions and so lacked knowledge of the equal protection deficiencies in the prosecution. Further, the City briefed the issue in its Response to that Second Motion to Dismiss, L.F. 137. Therefore the issue was raised at the earliest possible moment that good pleading and orderly procedure would admit under the circumstances of the given case, *MB Town Center, LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595 (Mo.App. E.D. 2012).

Roeder will now proceed to the merits of her equal protection argument.

It is undisputed that if the officer determines that the car is owned by a trust, a company or a corporation, the officer simply throws it out. See depositions of the officer, L.F. 82, submitted to the court in connection with Defendant's Second Motion to Dismiss Failure to Appear Charge, L.F. 75.

Roeder asserts that the disparate treatment of cars owned by trusts, companies and corporations violates the equal protection clause of the Fourteenth Amendment. There is no rational basis for having the ownership form of the vehicle in question be determinative of whether the officer sends or does not send a ticket to the driver. Cars do not run red lights, drivers do. "Differentiation between those who are otherwise similarly

situated must be adequately justified", *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Further, while Roeder acknowledges the duty to negate every conceivable basis which might support the differentiation, *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973), in this case there are no such conceivable bases which might support the differentiation.

The Ordinance, as applied, therefore violates the equal protection clause of the Fourteenth Amendment.

While on this subject it is worthwhile to speculate about how government vehicles are treated. Surely the police officer examining the records has no way to identify the driver of a government vehicle, and so surely the driver of a government vehicle gets no ticket. That leaves St. Peters in the somewhat distasteful position of allowing government officials to skate away from these prosecutions while regular working stiffs like Roeder face the long arm of the law.

The Ordinance as applied violates Roeder's right to equal protection, and so again the prosecution fails.

SUGGESTIVE IDENTIFICATION PROCESS

As Roeder briefed to the trial court in her Second Motion to Dismiss, L.F. 75-79, she suggests there are serious due process defects in the comparison between the red light camera image and the owner's driver license photo. Roeder suggests this comparison process fails due process because it is an impermissibly suggestive out-of-court identification that creates a very substantial likelihood of irreparable misidentification, *United States v. Johnson*, 56 F.3d 947, 952 (8th Cir. 1995); *Mason v. Brathwaite*, 432

U.S. 98, 116 (1977); and *see generally discussion in United States v. Roberts*, 928 F.Supp. 910, 925-28 (W.D. Mo. 1996). The officer who investigated Roeder's situation admitted in his deposition that he looked only at her own particular driver license photograph and not the photo of any other likely driver (including, for example, her sister and daughter, each of whom testified at trial and each of whom in counsel's opinion looks similar to Roeder[6]). The officer testified that his *entire investigation* into this case lasted 60 to 120 seconds. L.F. 76, 89-90, 95-96. Further, the red light camera photograph and the driver's license photograph were not contemporaneous, but rather admittedly were taken several years apart, as admitted in deposition by one of the police officers who investigated the case, L.F. 80.

In *State v. Body*, 366 S.W.3d 625, 629-30 (Mo. Ct. App. 2012) the court said

> Identification testimony is admissible unless the pretrial identification procedure was unnecessarily suggestive *and* the suggestive procedure made the identification unreliable. We will not examine whether the identification was sufficiently reliable unless the defendant has first borne the burden of demonstrating that the police procedures were impermissibly suggestive. Police procedure is unduly suggestive if the witness's identification of the defendant results from the procedure or actions of the police, rather than from the witness's recollections of his or her firsthand observations. Identification evidence should not be excluded as unduly suggestive unless the procedure was so suggestive that it gave rise to a

[6] Roeder acknowledges that there is no finding in the record that the three look alike.

"very substantial likelihood of irreparable misidentification. (Internal quotations and citations omitted).

In *Roberts*, 928 F.Supp. at 927, citing *inter alia Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) the court identified five due process factors to determine the constitutionality of an identification: (1) the witness's opportunity to view the suspect, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the defendant, (4) the witness's level of certainty when identifying the suspect at the confrontation, and (5) the length of time elapsed between the crime and the confrontation.

Respondent believes this identification fails these tests as follows: (1) because the officer never viewed the suspect in person, (3) because there was no prior description, and (5) because of the uncertainty of the time when the driver's license photo was taken.

As applied here, the process would work as follows: the officer would note that a female holds title. The officer would look at the title holder's driver license and sees an image taken at another date and time of woman who looks somewhat similar to the woman in the camera photo. No further investigation would be conducted into the driver's identity, but the Notice of Violation would go right out.

Roeder suggests this process is an impermissibly suggestive identification procedure.

Indeed the process reminds Roeder of the three famous police line-ups sketches aired by Saturday Night Live on Dec. 13, 1975. The line-up in the first sketch consisted of the late black comedian Richard Pryor in handcuffs and jail garb together with a goose, a refrigerator, and a white nun in her habit. The second line up Pryor, again in handcuffs

and jail garb, together with a uniformed Boy Scout, a Doctor in white lab coat, and a businessman in a three-piece suit with pocket watch. The last was the topper. It featured Pryor this time with three uniformed police officers, each pointing at him as if to say "he's the one!"

Unfairly suggestive ID procedures are funny when no one's life, liberty or property is at stake.

The identification process fails these tests, the identification was therefore unconstitutional, and once more the prosecution fails.

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FINAL THOUGHTS

"The exercise of the police power cannot be made a cloak under which to overthrow or disregard constitutional rights," *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. Ct. App. 2013), citing *City of Kansas City v. Jordan*, 174 S.W.3d 25, 40 (Mo.App. W.D.2005) citing *Craig v. City of Macon*, 543 S.W.2d 772, 774 (Mo. banc 1976)). This brief has identified countless constitutional, statutory, and Rule-breaking infirmities.

Additionally, the St. Peters red light camera ticket Ordinance appears to be cleverly designed to accomplish the following:

1. Having recipients of Notices of Violation be scared by the difficulty of following complicated instructions and by having them face a Hobson's choice,

2. Acting as if the Ordinance was criminal in nature, presumably to coerce violators into paying the fine,

3. Having the form of the Notice of Violation go further than the Ordinance itself in creating a rebuttable presumption, again presumably to coerce violators into paying the fine, and

4. Violating the equal protection clause and in the course thereof protecting government officials caught by cameras from responsibility for their conduct.

At a time when numerous authorities are examining and reporting on the excessive reliance of small St. Louis-area suburbs on municipal court fines and warrants, and there is palpable anger on the streets toward insufficient due process of law within those municipal courts, Roeder asks this court to countenance none of the above in favor of the City.

CONCLUSION

Respondent prays this Court to affirm the Circuit Court's Order and Judgment of October 30, 2013.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATION AND VIRUS PROTECTION NOTICE

Undersigned counsel certifies that this Brief complies with the limitations contained in Rule 84.06(b) because the word limit for a Respondent's Brief is 27,900 words and this Brief's word count is 10,672.

Pursuant to undersigned counsel's customary practices and virus protection software, all emails and attachments have been checked for viruses and on information and belief are virus free.

/s/ W. Bevis Schock .
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CERTIFICATE OF SERVICE

Undersigned counsel for Appellants hereby certifies that on October 20, 2014 pursuant to Rule 103 he is delivering an email copy of this brief to opposing counsel named below via the electronic filing system:

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