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IN THE SUPREME COURT OF OHIO

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CASE NO. 2006-2265

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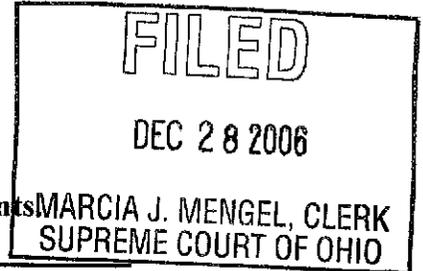
Kelly Mendenhall, et al.,

Plaintiffs-Petitioners,

v.

The City of Akron, et al.,

Defendants-Respondents



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Preliminary Memorandum on Certified Question of Law From the  
United States District Court for the Northern District of Ohio

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**MEMORANDUM OF DEFENDANTS-RESPONDENTS  
THE CITY OF AKRON AND NESTOR TRAFFIC SYSTEMS, INC.  
IN SUPPORT OF THE COURT'S JURISDICTION TO ANSWER  
THE CERTIFIED QUESTION OF LAW**

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## **PRELIMINARY STATEMENT**

The City of Akron (“City”) and Nestor Traffic Systems, Inc. (“Nestor”) urge this Court to accept jurisdiction and resolve the issue of a municipality’s Home Rule Authority to impose civil liability on owners of cars speeding in school zones as detected by an automated traffic system. Specifically, the Court is requested to answer the essence of the question posed by Senior United States District Judge Dowd:<sup>1</sup>

Whether a municipality has the power under home rule to enact civil penalties for the offense of violating a traffic signal light or for the offense of speeding, both of which are criminal offenses under the Ohio Revised Code.

## **STATEMENT OF FACTS**<sup>2</sup>

### **A. The Akron Ordinance**

In September of 2005, the City of Akron enacted Chapter 79 “Automated Mobile Speed Enforcement System,” including Section 79.01 entitled “Civil Penalties for Automated Mobile Speed Enforcement System Violations” (the “Akron Ordinance”). (Attached as Exhibit A.) In furtherance of the Akron Ordinance, the City entered into contracts with Nestor Traffic Systems, Inc. (“Nestor”) for the provision of services designed to detect mobile speed violations in school zones within the City limits.

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<sup>1</sup> The parties agree that the following question more precisely addresses the issue to be answered by this Court:

Whether a municipality has the power under its Home Rule Authority to assess only civil penalties against the *owner* of a vehicle whose car was photographed and identified as being driven in excess of the speed limit in a school zone when state law affords certain procedural protections and assesses criminal penalties and driver’s license points against the *driver* of a vehicle charged, by a police officer in a properly marked vehicle, with speeding in a school zone.

<sup>2</sup> As part of its Order of Certification, the United States District Court provided this Court with the parties’ Agreed Stipulations of Fact and accordingly, only a brief summary of the background is provided herein.

Under this safety initiative, the City assesses civil fines against vehicle owners – not criminal penalties against drivers – for vehicles photographed and identified by the automated traffic system as exceeding the posted speed limits in school zones:

Notwithstanding any other provision of this Traffic Code, the City of Akron hereby adopts a civil enforcement system for automated mobile speed enforcement system violations as outlined in this Section. Said system imposes monetary liability on the owner of a vehicle for failure of an operator thereof to strictly comply with the posted speed limit in school zones or streets or highways within the City of Akron that include crosswalks used by children going to or leaving school during recess and opening and closing hours.

Akron Muni. Code, § 79.01(A)(1).

The Ordinance further states that “[a]ny violation of this section shall be deemed a noncriminal violation for which a civil penalty ... shall be assessed.” *Id.* at § 79.01 (D)(2). A violation of this ordinance is not considered a moving violation and no “points” are assessed to anyone’s driving record. *Id.* at § 79.01 (D)(3). There is no possibility of imprisonment. Civil liability rests with the owner of the vehicle, not the driver. *Id.* at § 79.01 (C)(1). Moreover, individuals faced with a civil penalty under this ordinance have the right to institute an administrative appeal. *See Id.* at § 79.01 (D), (F). Finally, if the civil penalty is not paid, the City must institute civil proceedings to collect the debt. *Id.* at § 79.01 (E).

The criminal enforcement of the state traffic laws *against the driver* are in full force and effect in the City of Akron. *See* Akron Muni. Code, § 73.20.

#### **B. The Underlying Lawsuits**

Kelly Mendenhall (“Mendenhall”), as the owner of the subject vehicle, received a civil violation in November 2005 because a car she owned was determined to be traveling 39 miles per hour in a 25 mile per hour speed zone. Mendenhall exercised her right to an administrative hearing and, based on the fact that the 25 mile per hour speed limit sign was vandalized or

missing at the time she was allegedly speeding, her citation was dismissed and no civil penalty was assessed.

On three different dates in late October and November 2005, Janice A. Sipe, Joanne L. Lattur, and Wayne H. Burger (collectively the “Sipe Plaintiffs”) were issued citations under the Akron Ordinance for cars titled in their names traveling at excessive speeds in school zones. None of the Sipe Plaintiffs exercised their right to an administrative hearing, and none paid the required civil penalty.

The Mendenhall and Sipe plaintiffs instituted lawsuits against the City and Nestor asserting various causes of action. For purposes of the certified question, Mendenhall directly attacks the City’s Home Rule Authority asserting that the Akron Ordinance conflicts with the general laws of the State of Ohio. Specifically, Mendenhall claims that the Akron Ordinance “violates R.C. § 4511.07, which does not authorize local authorities to enact their own laws regarding the speed on vehicles on streets.” (Mendenhall Complaint at ¶ 5(b).)

The Sipe Plaintiffs do not cite an allegedly conflicting statute but instead focus on the Ohio Rules of Evidence, the Ohio Rules of Criminal Procedure and the Ohio Traffic Rules.<sup>3</sup> The Sipe Plaintiffs contend that traffic violations are strictly criminal in nature and the City is without authority to enact civil penalties against anyone for such violations.

All parties initially briefed the Home Rule Authority issue and on May 17, 2006, the Northern District of Ohio concluded that the Akron Ordinance is “a proper exercise of the powers bestowed on the City of Akron by Article XVIII, Section 3 of the Ohio Constitution.” Litigation on the remaining causes of action ensued, principally on federal constitutional issues. On November 30, 2006, the District Court vacated its May 17 decision, citing conflict with an

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<sup>3</sup> Mendenhall’s claims also appear to implicate these rules. (See Mendenhall Complaint at ¶ 5(c).)

unpublished Court of Common Pleas decision in *Moadus v. The City of Girard*, Case No. 05-CV-1927, (Trumbull County Court of Common Pleas). Thereafter, the District Court certified to this Court the question of a municipality's Home Rule Authority as it pertains to implementation and enforcement of a civil traffic enforcement system.

### **LAW AND ARGUMENT**

Municipalities across Ohio have enacted various forms of legislation authorizing the implementation of automated traffic enforcement systems, and numerous challenges to those ordinances are in various stages of litigation. Some of the cases involve use of cameras at red lights, some use the cameras to detect cars speeding, others use the cameras for both purposes, and Akron only uses the cameras to deter speeding in school zones. Regardless of the specific case, the fundamental issue in each, as well as the present certified question, involves a municipality's Home Rule Authority under the Ohio Constitution to authorize an automated speed enforcement system imposing civil liability upon an owner of a car. Although this Court has issued recent opinions on Home Rule Authority, *see American Financial Servs. Ass'n v. City of Cleveland* (November 20, 2006), \_\_ Ohio St.3d \_\_, 2006-Ohio-6043 and *City of Cincinnati v. Baskin* (December 8, 2006), \_\_ Ohio St.3d \_\_, 2006-Ohio-6422, neither of those decisions address the facts or circumstances presented herein, and in particular did not address the civil/criminal penalties distinctions raised herein. *See* Order of Certification ("No controlling precedent of the Ohio Supreme Court answers this question"). Accordingly, this is a question of significance in Ohio that should be answered by this Court.

**A. This Court Should Answer the Certified Question Because There is No Controlling Precedent that Determines Whether A Municipality Is Permitted Under Its Home Rule Authority To Enact Legislation Implementing An Automated Traffic Enforcement System Which Imposes Civil Liability On The Owner Of A Vehicle That Is Photographed Exceeding The Posted Speed Limits.**

A municipality derives its powers of local self-governance directly from the Ohio Constitution. *Geauga Cty. Bd. of Comms. v. Munn Rd. Sand & Gravel* (1993), 67 Ohio St.3d 579; *City of Canton v. State of Ohio* (2002), 95 Ohio St.3d 149, 151. Specifically, the “Home Rule Amendment” to the Ohio Constitution provides that a municipality has the “authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws” of the state. OHIO CONST. ART. VIII, Sec. 3.

Under well-established Home Rule analysis, a state statute takes precedence over a local municipal ordinance **only** when:

- (1) the ordinance is in conflict with the statute;
- (2) the ordinance is an exercise of the police power, rather than of local self-government; and
- (3) the statute is a general law.

*City of Canton*, 95 Ohio St. 3d at 151.

The test to determine whether a local ordinance is in conflict with a general law is whether the ordinance permits or licenses that which the statute forbids and prohibits, or vice versa. *Fondessy Enterprises, Inc. v. City of Oregon* (1986), 23 Ohio St.3d 213, 219-20, paragraph 2 of the syllabus; *City of Middleburg Heights v. Ohio Bd. of Bldg. Standards* (1992), 65 Ohio St.3d 510, 512-13. This Court has very recently reaffirmed this Home Rule analysis. *See American Financial*, 2006-Ohio-6043, at ¶ 46 (“any local ordinances that seek to prohibit conduct that the state has authorized are in conflict with the statutes”); *Baskin*, 2006-Ohio-6422,

at ¶¶ 19-20 (“It has long been established that in determining whether an ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which the statute forbids or prohibits, and vice versa.”).

Under this test, the Defendants-Respondents submit that there is no conflict because the Akron Ordinance does not permit anything that a state statute prohibits, *i.e.*, it does not permit speeders, nor does the Akron Ordinance prohibit anything permitted by the state statute. Indeed, there is clear authority for the proposition that merely having a different or heavier penalty does not give rise to a “conflict” for purposes of home rule analysis.<sup>4</sup>

Nevertheless, the Defendants-Respondents agree that there is no decision from this Court that has spoken specifically to a municipality’s Home Rule Authority to impose civil liability against the *owner* of a vehicle whose car was photographed and identified as being driven in excess of the speed limit in a school zone, when state law assesses criminal penalties against the *driver* of a vehicle charged with speeding in a school zone. Indeed, just several days ago, in rejecting a writ of prohibition, this Court noted that it was “unclear” whether the City of Cleveland’s automated traffic enforcement system conflicted with R.C. 4521.05. *See State ex rel. Scott v. Cleveland* (December 20, 2006), \_\_\_ Ohio St.3d \_\_\_, 2006-Ohio-6573, at ¶ 20.

Accordingly, this Court should accept jurisdiction of the certified question to determine whether the City of Akron, and other municipalities regulating traffic using automated systems are acting within the scope of their Home Rule Authority.

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<sup>4</sup> *See Columbus v. Molt* (1973), 36 Ohio St. 2d 94 (reversing *State v. Waite* (1971), 27 Ohio App.2d 187); *Toledo v. Best* (1961), 172 Ohio St. 371; *Columbus v. Bar* (1952), 160 Ohio St. 209; *Youngstown v. Evans* (1929), 127 Ohio St. 342; *Struthers v. Sokol* (1923), 108 Ohio St. 263.

**B. Whether a Municipality has the Authority to Implement a Civil Traffic Enforcement System is of Great Public Importance.**

In addition to the fact that no controlling precedent answers the certified question, the issue is also one of great public interest. *See* S. Ct. R. III (discretionary jurisdiction exists over cases of “public or great general interest”). At least nine cities in Ohio have implemented automated traffic enforcement systems,<sup>5</sup> and Defendants-Respondents are aware of at least six cases seeking to invalidate them. The Home Rule issue in these pending cases – and no doubt in many future cases – is similar, if not the same, as the Home Rule issue certified to this Court. Indeed, several judges have stayed proceedings until there is a decision on the certified question by this Court.

For example, in *McNamara v. City of Cleveland, et al.*, Case No. 06-582364 (Cuyahoga County Court of Common Pleas),<sup>6</sup> Judge Timothy McMonagle stated that:

THE COURT FINDS THAT THE REMAINING ISSUE IN THIS CASE IS IDENTICAL TO THE QUESTION OF LAW CERTIFIED TO THE OHIO SUPREME COURT ON DECEMBER 8, 2006, CASE NO. 06-2265. THEREFORE, THIS CASE IS HEREBY PLACED ON THE INACTIVE DOCKET. THE CASE MAY BE REACTIVATED ONLY UPON MOTION OF A PARTY AFTER THE OHIO SUPREME COURT ISSUES A RULING IN CASE NO. 06-2265.<sup>7</sup>

Similarly in *Riber v. The City of Dayton*, Case No. 2005 CV 4461 (Montgomery County Court of Common Pleas), the court stayed all proceedings and noted that a decision by this Court on the certified question will “likely dispose of this matter as well.” (*See* Exhibit B.) The court

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<sup>5</sup> *See* [http://www.iihs.org/research/topics/sc\\_cities.html](http://www.iihs.org/research/topics/sc_cities.html) and [http://www.iihs.org/research/topics/rle\\_cities.html](http://www.iihs.org/research/topics/rle_cities.html).

<sup>6</sup> Consolidated with *Rogaskie v. City of Cleveland*, Case No. 597186 (Cuyahoga County Court of Common Pleas).

<sup>7</sup> *See* [http://cpdocket.cp.cuyahogacounty.us/p\\_CV\\_Docket.aspx](http://cpdocket.cp.cuyahogacounty.us/p_CV_Docket.aspx).

in *Moadus v. The City of Girard*, Case No. 05-CV-1927, (Trumbull County Court of Common Pleas) has done likewise.<sup>8</sup>

Another Home Rule challenge to automated traffic enforcement systems is *Ann Lewicki v. City of Toledo, et al.*, No. G-4801-CI-200604524 (Lucas County, filed July 13, 2006). According to counsel, the *Lewicki* case is set for hearing on a motion to dismiss that does not implicate the Home Rule issues therein.

The bottom line is that the Home Rule issue certified to this Court could not be timelier. Municipalities, their citizens, and the courts of this State deserve a ruling from this Court on an issue that has a daily impact on many persons. A clear, authoritative decision by this Court will serve the public interest because if municipalities are permitted to implement automated traffic enforcement systems, they should be able to do so without constant and costly litigation. Tax payer dollars should be put to better use. The current state of limbo is unsatisfactory and benefits no one.

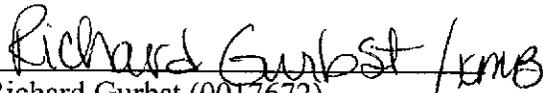
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<sup>8</sup> A motion to stay proceedings was filed in *Moadus*, but not yet officially ruled upon. Per counsel, the judge stated on the record that no further rulings would be made pending this Court's decision on the certified question.

**CONCLUSION**

For the foregoing reasons, this Court should answer the certified question from the Northern District of Ohio.

Respectfully submitted,

  
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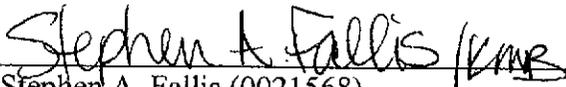
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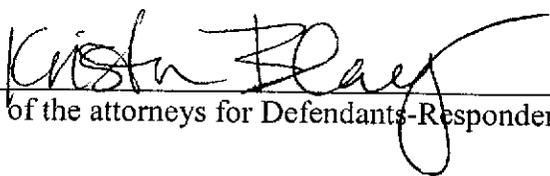
Attorneys for Defendant-Respondent The City of  
Akron

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Preliminary Memorandum on Certified Question of Law From the United States District Court for the Northern District of Ohio was served by regular U.S. mail, postage prepaid, upon the following this 28<sup>th</sup> day of December, 2006.

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# EXHIBIT A

## TITLE 7 TRAFFIC CODE

## CHAPTER 79 AUTOMATED MOBILE SPEED ENFORCEMENT SYSTEM

## 79.01 Civil penalties for automated mobile speed enforcement system violations.

**79.01 Civil penalties for automated mobile speed enforcement system violations.**

## A. General.

1. Notwithstanding any other provision of this traffic code, the City of Akron hereby adopts a civil enforcement system for automated mobile speed enforcement system violations as outlined in this section. Said system imposes monetary liability on the owner of a vehicle for failure of an operator thereof to strictly comply with the posted speed limit in school zones or streets or highways within the City of Akron that include crosswalks used by children going to or leaving a school during recess and opening and closing hours.

2. The Akron Police Department shall be responsible for administering the automated mobile speed enforcement system. Specifically, the Akron Police Department shall be empowered to install and operate the automated mobile speed enforcement system within the City of Akron using trained technicians who may be police officers, Police Department employees, or other trained technicians who are not employees of the Akron Police Department.

3. Any citation for an automated mobile speed system violation pursuant to this section, known as a "notice of liability" shall:

- a. Be processed by officials or agents of the City of Akron; and
- b. Be forwarded by first-class mail or personal service to the vehicle's registered owner's address as given on the state's motor vehicle registration; and
- c. Clearly state the manner in which the violation may be appealed.

## B. Definitions.

1. Automated mobile speed enforcement system is a system with one or more sensors working in conjunction with a speed measuring device to produce recorded images of motor vehicles traveling at a prohibited rate of speed.

2. "Hearing Officer" is the independent third party appointed by the Mayor.

3. "Vehicle owner" is the person or entity identified by the Ohio Bureau of Motor Vehicles, or registered with any other state vehicle registration office, as the registered owner of a vehicle or a lessee of a motor vehicle under a lease of six months or more.

## C. Offense.

1. The owner of a vehicle shall be liable for a penalty imposed pursuant to this section if such vehicle is operated at a speed in excess of those set forth in Section 73.20.

2. It is prima facie evidence that the person registered as the owner of the vehicle with the Ohio Bureau of Motor Vehicles (or with any other state vehicle registration office) was operating the vehicle at the time of the offense set out in subsection (C)(1).

3. Notwithstanding subsection (C)(2) above, the owner of the vehicle shall not be responsible for the violation if, within twenty-one days from the date listed on the "notice of liability," as set forth in subsection (D)(2) below, he furnishes the Hearing Officer:

- a. An affidavit by the vehicle owner, stating the name and address of the person or entity who leased the vehicle in a lease of six months or more at the time of the violation; or
- b. A law enforcement incident report/general offense report from any state or local law enforcement agency/record bureau stating that the vehicle involved was reported as stolen before the time of the violation.

4. Nothing in this section shall be construed to limit the liability of an owner of a vehicle for any violation of subsection (C)(1) or (C)(2) herein.

## D. Civil Penalties.

1. Unless the operator of the motor vehicle received a citation from a police officer at the time of the violation, the owner of the motor vehicle is subject to a civil penalty if the motor vehicle is recorded by an automated mobile speed enforcement system while being operated in violation of this ordinance.

2. Any violation of this section shall be deemed a noncriminal violation for which a civil penalty of one hundred fifty dollars shall be assessed to the owner for speed in excess of twenty miles per hour and less than thirty-five miles per hour in a school zone during restricted hours and a civil penalty of two hundred fifty dollars shall be assessed for speeds of thirty-five miles per hour or greater in a school zone during restricted hours. A civil penalty of one hundred fifty dollars shall be assessed for speeds in excess of the posted limits, but less than fifteen miles per hour over the posted limit, on streets and highways not in school zones that include crosswalks used by children going to or leaving school. A civil penalty of two hundred fifty dollars shall be assessed for

speeds that exceed the posted speed limit by fifteen miles per hour or greater on streets and highways not in school zones that include crosswalks used by children going to or leaving school.

3. A violation for which a civil penalty is imposed under this ordinance is not a moving violation for the purpose of assessing points under Ohio Revised Code Section 4507.021 for moving traffic offenses and may not be recorded on the driving record of the owner of the vehicle and shall not be reported to the Bureau of Motor Vehicles.

E. Collection of Civil Penalty. If the civil penalty is not paid, the civil penalty imposed under the provisions of this ordinance shall be collectible, together with any interest and penalties thereon, by civil suit pursuant to procedures established by the City of Akron for the collection of debts.

F. Administrative Appeal. A notice of appeal shall be filed within twenty-one days from the date listed on the "notice of liability" with the Hearing Officer appointed by the Mayor of the City of Akron. The failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the citation and will be considered an admission of a violation of this section. Administrative appeals shall be heard through an administrative process established by the City of Akron. A decision in favor of the City of Akron may be enforced by means of a civil action or any other means provided by the Ohio Revised Code. (Ord. 461-2005)

[<< previous](#) | [next >>](#)

# EXHIBIT B



FILED  
COURT OF COMMON PLEAS  
06 DEC 20 PM 2:34

SCANNED

FILED IN THE COURTS  
IN THE COURT OF COMMON PLEAS, MONTGOMERY COUNTY, OHIO  
CIVIL DIVISION

<b>DALE W. RIBER,</b>	:
	:
<b>Plaintiff/Appellant,</b>	:
	:
	: <b>Case No. 2005 CV 4461</b>
<b>v.</b>	:
	:
<b>THE CITY OF DAYTON, et al,</b>	: <b>Judge Michael L. Tucker</b>
	:
	:
<b>Defendants/Appellees.</b>	:

**ENTRY GRANTING STAY OF PROCEEDINGS PENDING APPEAL**

Upon application of Defendant, The City of Dayton, and for good cause shown, the Court finds that Defendants are entitled to a stay as a matter of right and it is hereby ORDERED that all proceedings consistent with this Court's decision of December 15, 2006 are hereby stayed pending appeal pursuant to Civil Rule 62(B).

IT IS SO ORDERED.

  
\_\_\_\_\_  
Judge Michael L. Tucker

Copies of the above were sent to all parties listed below by ordinary mail this date of filing:

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