IN THE SUPREME COURT OF OHIO

KELLY MENDENHALL, et al,	:	**Case No. 2006-2265**
	:	
vs.	:	
	:	
THE CITY OF AKRON, et al,	:	

CERTIFIED QUESTION OF STATE LAW

AMICUS CURIAE BRIEF OF THE CITY OF COLUMBUS
IN SUPPORT OF RESPONDENT, CITY OF AKRON

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AMICUS CURIAE BRIEF OF THE CITY OF COLUMBUS IN SUPPORT OF RESPONDENT, CITY OF AKRON

ARGUMENT

The City of Columbus respectfully submits this *amicus curiae* brief in support of Respondent, City of Akron, on the certified question of "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."

The City of Columbus, as *amicus curiae*, respectfully urges this Honorable Court to find that municipalities are guaranteed the right of self-regulation under the Ohio Constitution, and are permitted to penalize traffic violations as civil infractions provided the punishment does not finally dispose of a criminal prosecution. The relevant portions of the Revised Code permit the use of civil sanctions in order to enhance the safety of municipal roadways. Further, even if civil infractions were not authorized, they would not be in conflict with the general laws of Ohio because they would not prevent the imposition of criminal sanctions. Thus, in resolving the certified question, this Honorable Court should find that a municipality may enact civil penalties for offenses that are criminal offenses so long as the civil penalties do not foreclose prosecution of those offenses.

Petitioner and *amici curiae* for Petitioner have raised numerous due process arguments.[1] The question certified by this Court: "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" does not

[1] Brief of Petitioner Mendenhall, *et. al*, 10; *Amicus Curiae* Brief of Moadus *et. al*, in Support of Petitioner, 15; *Amicus Curiae* Brief of McNamara, *et. al*, in Support of Petitioner, 12.

encompass consideration of a due process challenge. Because this issue is beyond the scope of the certified question, the City of Columbus, as *amicus curiae*, has not addressed this issue.

A. The Revised Code recognizes the authority of the municipalities to regulate traffic within their jurisdiction by any reasonable exercise of police power, and thus civil infraction systems are within the statutory grant of authority.

The Revised Code contains a grant of authority to local authorities that encompasses the civil infraction systems at question in the instant case. Because the Revised Code grants local authorities the right to use reasonable police powers to regulate traffic within their jurisdictions, the civil infraction systems do not violate the Home Rule provision of the Ohio Constitution. "Municipalities shall have 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 general laws." Ohio Const., Art. XVIII, § 3. "It is . . . well established that 'in order for such a conflict to arise, the state statute must positively permit what the ordinance prohibits, or vice versa, regardless of the extent of state regulation concerning the same object.'" *Cincinnati v. Baskin*, 112 Ohio St.3d 279, 2006-Ohio-6422, ¶19, 859 N.E.2d 514, quoting *Cincinnati v. Hoffman* (1972), 31 Ohio St.2d 163, 169, 285 N.E.2d 714. In the instant case, RC § 4511.07(A)(2) positively permits the regulation of traffic by reasonable police power, and therefore the civil infraction systems are not in conflict with the general laws.

1. Revised Code § 4511.07(A)(2) grants municipalities the right to exercise reasonable police power in regulating traffic, and therefore the reasonable use of civil infraction systems is authorized by statute.

A conflict with the general laws cannot logically exist where the general laws authorize a municipality to regulate in a field. In a broad grant of power to local authorities, the General Assembly passed RC § 4511.07, which provides, in relevant part:

> (A) Sections 4511.01 to 4511.78 . . . of the Revised Code do not prevent local authorities from carrying out the following activities with respect to streets and

> highways under their jurisdiction and within the reasonable exercise of police power:
>
> . . .
>
> (2) Regulating the traffic by means of police officers or traffic control devices;

RC § 4511.07(A)(2). Thus, under RC § 4511.07, the State has granted authority to municipalities to reasonably exercise their police power to regulate traffic. In the instant cases, the local authorities enforce their regulation of lawfully placed traffic control devices—speed limit signs and red light signals—by both using both their police forces and camera enforcement systems. Local police officers institute criminal charges, while the camera enforcement systems initiate purely civil actions. The cameras themselves do not regulate traffic and are not traffic control devices. A "traffic control device" is "any flaggers, signs, signals, markings, and devices placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic . . .." RC § 4511.01(QQ). A camera, however, does not fit within this definition because it does not regulate, warn, or guide traffic. Rather, a camera is an enforcement device. It is no more a traffic control device than a laser speed measuring device in a police cruiser, an alcohol-breath testing machine in a police station, or an officer looking at his watch to determine that a person had violated an after-hours civil parking ordinance.

Thus, the question is whether a civil infraction system using camera enforcement is within the grant of authority contained within RC § 4511.07(A)(2). This Court should find that it is. Revised Code § 4511.07 specifically allows local authorities to regulate traffic within a "reasonable exercise of police power." RC § 4511.07(A)(2). The use of a civil infraction system tied to camera enforcement is a reasonable use of police power because it enhances the safety of the streets and highways within a local authority's jurisdiction. The mere existence of a civil infraction does not "decriminalize" the still-existing traffic offenses, nor does it displace or subvert them. Rather, it gives municipalities an additional and reasonable tool in protecting the

citizenry from errant and dangerous motorists. Had the General Assembly not wished to grant municipalities broad authority in regulating traffic, it would not have used expansive language that allowed municipalities to carry out activities so long as they were within the reasonable exercise of police power. However, the General Assembly did choose to use expansive language, authorizing municipalities to use the "reasonable exercise of police power" in regulating traffic.

When considering whether the civil infraction systems can be harmonized with the terms of the general laws, this Court should find that RC § 4511.07(A)(2) already authorizes their usage so long as they are instituted in a reasonable exercise of police power. Civil infraction systems offer municipalities a way to enhance the safety of all motorists. By creating a system of remedial civil sanctions, municipalities are able to discourage dangerous driving without being required to place officers are every intersection or on every busy roadway. And because these infractions do not implicate the Double Jeopardy provision of the Ohio Constitution (see Section B-2, below), the State's interest in criminal punishments is still preserved. Such a scheme is a reasonable exercise of police power, and therefore is authorized by RC § 4511.07(A)(2).

This Honorable Court should give affect to the language used by the General Assembly. It should find that the civil infraction systems are within the grant of authority that municipalities may regulate traffic within the reasonable exercise of their police powers. Because the civil infraction system is a reasonable exercise of police power, it fits squarely within the terms of RC § 4511.07(A)(2), and therefore cannot be in conflict with the general laws.

2. Revised Code § 4511.06 was designed to give municipalities flexibility in parking enforcement, it was not designed to circumspectly prohibit civil infraction systems.

Petitioner and *amici curiae* have largely ignored the grant of authority in RC § 4511.07(A)(2), and have instead focused on RC § 4511.06 as a tacit prohibition on civil infraction systems. However, RC § 4511.06 does not proscribe the civil infraction systems involved in the instant case. Revised Code § 4511.06 provides that most of the sections of Chapter 4511, including RC § 4511.07, "shall be applicable and uniform throughout this state . . .. No local authority shall enact or enforce any rule in conflict with such sections, except that this section does not prevent local authorities from exercising the rights granted them by Chapter 4521 [dealing with civil parking violations] . . .." RC § 4511.06. The reference to Chapter 4521 in RC § 4511.06 indicates that it was designed to afford local authorities greater flexibility in regulating local parking issues, and not to require the existence of an "enabling statute" as argued by Petitioner.

a. The Constitution does not require the existence of an enabling statute before a municipal authority may regulate by ordinance.

Petitioner's argument that an "enabling statute" is required for the adoption of civil infraction systems is contrary to this Court's interpretation of the Constitution. "The power of any Ohio municipality to enact local police regulations is derived directly from Section 3 of Article XVIII of the Ohio Constitution *and is no longer dependent upon any legislative grant thereof*, as it was prior to the adoption in 1912 of that section of the Constitution." *West Jefferson v. Robinson* (1965), 1 Ohio St.2d 113, 205 N.E.2d 382, at paragraph one of the syllabus (emphasis added). This Court has found that the existence of an enabling statute is irrelevant to the determination of whether a conflict exists. Indeed, if, as Petitioner asserts, an "enabling statute" must be present before a municipality may regulate in an area, the vast majority of this Court's jurisprudence on the issue must be reconsidered. However, this is not necessary.

Petitioner's "enabling statute" argument notwithstanding, the language of the Constitution controls and it places no prior restraints on a municipality's exercise of power.

The Constitution does not require the existence of an enabling statute, therefore this Court must resolve whether the structure of RC § 4511.06 clearly indicates an intent by the General Assembly to proscribe civil infraction systems. Because the structure of RC § 4511.06 does not support this conclusion, this Court should find Petitioner's arguments not well-taken.

b. A reasonable reading of RC § 4511.06 suggests that it was limited specifically to the subject matter of civil parking ordinances adopted by local authorities.

The precise wording of RC § 4511.06 indicates that the intent of the General Assembly was to give local authorities the ability to adopt civil parking infractions even if those infractions would have been in conflict with the criminal parking infraction found in RC §§ 4511.66 to 4511.69. Revised Code § 4511.06 states, "No local authority shall enact or enforce any rule in conflict with such sections [including §§ 4511.66 to 4511.69], except that this section does not prevent local authorities from exercising the rights granted them by Chapter 4521 . . .." RC § 4511.06. Revised Code § 4521.01 states:

> (A) "Parking infraction" means *a violation of any ordinance* . . . enacted by a local authority that regulates the standing or parking of vehicles *and that is authorized pursuant to section . . . 4511.07* of the Revised Code, or a violation of any ordinance, resolution, or regulation enacted by a local authority as authorized by this chapter, if the local authority in either of these cases also has enacted an ordinance, resolution, or regulation of the type described in division (A) of section 4521.02 of the Revised Code [authorizing civil parking violations] in relation to the particular regulatory ordinance, resolution, or regulation.

RC § 4521.02 (emphasis added). Thus, under RC § 4521.02, a parking infraction is any ordinance adopted under RC § 4511.07 or Chapter 4521. Accordingly, a civil parking infraction would be any ordinance promulgated within the "reasonable exercise of police power" dealing with the regulation of stopping, standing, or parking vehicles. RC § 511.07(A)(1). Nothing in

Chapter 4521 limits municipal parking ordinances to the same subject matter or scope of the criminal parking offenses specified under RC §§ 4511.66 to 4511.69.

Thus, a reasonable interpretation of RC § 4511.06 is that it granted authority for municipalities to create civil parking violations that could otherwise conflict with the criminal parking offenses. This would allow local authorities to adopt more strict parking offenses, or parking offenses dealing with situations not encompassed in RC §§ 4511.66 to 4511.69, as long as the local regulations were a reasonable exercise of police power. This grant of authority is sensible given the subject matter. Parking, unlike most other traffic offenses, is an area that would be highly subject to local circumstances. Parking prohibitions that would be sensible in the densely populated urban areas would not necessarily be sensible in rural areas. Thus, RC § 4511.06 allows local authorities to adopt stricter parking regulations—so long as those violations are reasonable civil infractions that meet the requirements of Chapter 4521—without worry that they will be found to be in conflict-by-implication with the criminal parking violations codified in RC §§ 4511.66 to 4511.69. With this authority, a municipality, acting within the "reasonable exercise of police power" could prohibit parking that the Revised Code tacitly permits. For example, a municipality could create a civil infraction for parking bicycles on sidewalks where such parking led to pedestrian congestion, despite the fact that such parking is authorized by RC § 4511.68(A)(1).

Further, this interpretation is consistent with the overall structure of statutory scheme. Had RC § 4511.06 not contained a reference to Chapter 4521, then it could be argued that any parking ordinance would have to conform to the criminal parking violations in RC §§ 4511.66 to 4511.69. This would be inconsistent with the expansive grant of authority contained in RC §§ 4521.01(A), which defines parking infractions as any ordinance that is a reasonable exercise of

police power and civil in nature. Thus, by including the reference to Chapter 4521, the General Assembly excluded parking infractions from the uniformity requirement of RC § 4511.06. This is consistent with the language of RC § 4511.06 and gives logical effect to all portions of the relevant statutes.

For these reasons, this Honorable Court should find that the reference of Chapter 4521 in RC § 4511.06 was designed to address matters relating to parking infraction, and also find that it does not implicate the broad grant of authority under RC § 4511.07(A)(2) for municipalities to regulate traffic within their jurisdictions.

c. Reading RC § 4511.06 as a positive proscription of all civil infraction systems is not consistent with the language or the structure of the statute, and would require presuming the General Assembly was intentionally vague and circumspect.

Petitioner appears to be arguing that the reference to Chapter 4521 implies that local authorities cannot promulgate civil sanctions in any area other than parking violations. This is essentially an argument of conflict-by-implication. See, generally, *American Financial Services Association v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, ¶¶41-45, 858 N.E.2d 776. However, a court must determine whether a statute contains a "limiting provision or declaration to the contrary" in order to determine whether a conflict-by-implication test is appropriate. *Baskin*, 2006-Ohio-6422, ¶24. As shown above, Revised Code § 4511.07(A)(2) contains a specific declaration that allows municipalities to reasonably exercise police power in the regulation of traffic (see Section A-1, above), and Petitioner has conceded that RC § 4511.06 is limited by the operation of RC § 4511.07(A)(2). Petitioner's Brief, 9. Thus, under *Baskin*, a conflict-by-implication cannot exist because the Generally Assembly has expressly exempted 4511.07(A)(2) regulations from the uniformity requirement of RC § 4511.06.

Further, to read RC § 4511.06 as Petitioner has endorsed it would require greatly stretching the terms of the statute and creating surplusage. In order to accept Petitioner's argument, the Court would have to find that the reference to Chapter 4521 was specifically meant to say, in essence, "Any other civil penalty is hereby considered a conflict." If the General Assembly had intended such a result, it seems absurd that they would have attempted to codify it in such a circumspect manner. Indeed, it stretches credibility to argue that the reference to Chapter 4521 was meant to indirectly declare any other civil remedy a conflict. The General Assembly could have more clearly and directly stated that "local authorities shall not create non-criminal infractions except that this section does not prevent local authorities from exercising the rights granted to them by Chapter 4521." However the General Assembly did not do so. In order for this Honorable Court to endorse Petitioner's interpretation of the statute, it must read those words into the statute. "In matters of construction, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Cleveland Electric Illuminating, Co. v. Cleveland* (1988) 37 Ohio St.3d 50, 524 N.E.2d 441, at paragraph three of syllabus.

"Statutory language 'must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.'" *D.A.B.E. v. Toledo Lucas Board of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶21, 773 N.E.2d 536, quoting *State ex rel. Myers v. Board of Education* (1917), 95 Ohio St. 367, 372-737, 116 N.E. 516. However, Petitioner's reading would create unnecessary surplusage. If, as Petitioner argues, the reference to Chapter 4521 was designed to carve out the sole area of civil regulation, it is a fundamentally unnecessary reference. If Section

4511.06 generally bars the existence of civil infraction systems, it would do so without reference to Chapter 4521. The General Assembly could have achieved the same goal by not referencing Chapter 4521 and preserving Section 4511.06's current conflict language. Had they done so, the only difference would be that Section 4511.06 would not prevent civil parking infractions from conflicting with the criminal parking infractions found in RC §§ 4511.66 to 4511.69 (see Section A-2-b, above).

"It is presumed that in enacting a statute the General Assembly intended a just and reasonable result and a result feasible of execution." *D.A.B.E.*, 2002-Ohio-4172, ¶21. If the General Assembly intended to give local authorities greater control over parking violations—an issue affected drastically by local circumstances—by exempting civil parking infractions from the uniformity requirement, RC § 4511.06 can be read in whole, with a logical result, and with all parts having meaning. However, if the General Assembly intended to carve out one area where civil regulation was appropriate, it did so in a way that circumspect and ambiguous, and in doing so it created surplusage within the statute. Under *D.A.B.E.*, the preferred reading of a statute is the one derived from its actual text. Petitioner's reading would not be preferred because it requires this Court to add words that are not used and to find superfluous words that are used.

Accordingly, when considering the entire statutory scheme, this Court should give effect to the language adopted by the General Assembly that local authorities retain the right to regulate traffic within the reasonable exercise of police power. The Court should also reaffirm that there is no requirement of an "enabling statute" as asserted by Petitioner, and that since there is no evidence that the General Assembly intended Chapter 4521 to be an exclusive limitation on all forms of regulation, that there is no basis for finding that the grant of authority in RC §

4511.07(A)(2) does not encompass civil infraction systems. Thus, this Honorable Court should find that the civil infraction systems fall within the scope of the reasonable authority the General Assembly afforded municipalities for the regulation of traffic within their jurisdiction.

B. A civil penalty for a traffic signal violation does not violate the Home Rule provision as long as it does not prevent the criminal prosecution of that offense.

Civil infractions do not conflict with the general laws of traffic offenses. As this Court has previously stated: "A state statute takes precedence over a local ordinance 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." *Canton v. State,* 95 Ohio St.3d 149, 2002-Ohio-2005, ¶9, 766 N.E.2d 963. Unless each of these factors is met, the municipal ordinance in question is constitutional under the Home Rule provision of the Ohio Constitution. Ohio Const., Art. XVIII, § 3. Additionally, "It is firmly established that legislative enactments, whether of a municipality or state, have a strong presumption of constitutionality. Further, it is noted that, 'when it is possible * * * to harmonize the general law and municipal ordinances, the same should be done.'" *Northern Ohio Patrolmen's Benevolent Ass'n v. Parma* (1980), 61 Ohio St.2d 375, 377, 402 N.E.2d 519 (internal citations omitted).

Although "conflict" is not a defined term in the Constitution, this Honorable Court has stated that the "first step in determining the meaning of a constitutional provision is to look at the language of the provision itself." *State ex rel. King v. Summit County Council*, 99 Ohio St.3d 172, 2003-Ohio-3050, ¶35, 789 N.E.2d 1108, quoting *State ex rel. Maurer v. Sheward,* 71 Ohio St.3d 513, 520, 1994-Ohio-496, 644 N.E.2d 369. In *King*, the Court found that "[t]he usual, normal, or customary meaning of 'conflict' is 'clash, competition, or mutual interference of *opposing or incompatible* forces or qualities.'" *King*, ¶36 (emphasis added), quoting Webster's

Third New International Dictionary (1986) 476. This is consistent with the Court's jurisprudence that:

> It has long been established that "[i]n 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.". . . . In other words, "[n]o real conflict can exist unless the ordinance declares something to be a right which the state law declares to be wrong, or vice versa."

Baskin, 2006-Ohio-6422, ¶19 (internal citations omitted, alterations sic), quoting *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519, at paragraph two of the syllabus. "It is also well established that 'in order for such a conflict to arise, the state statute must positively permit what the ordinance prohibits, or vice versa, regardless of the extent of state regulation concerning the same object.'" *Baskin*, at ¶20, quoting *Hoffman*, 31 Ohio St.2d at 169. Because no such conflict exists, this Court should find that the civil infraction systems do not violate the Home Rule provision.

1. **In order for a municipal ordinance to violate the Home Rule provision, an irreconcilable conflict must exist with a general law.**

The civil infraction systems used by local governments do not permit that which the general laws proscribes, or vice versa; nor do they finally dispose of the general laws, and therefore do not "conflict" with the general laws. Along with the *Baskin* language, this Court has also noted that a conflict can arise where the operation of a municipal ordinance forecloses the execution of a state statute. In *Cleveland v. Betts*, the Court found a conflict between a municipal misdemeanor that criminalized the same conduct as a state felony because the "[c]onviction of a misdemeanor entails relatively minor consequences, whereas the commission of a felony carries with it penalties of a severe and lasting character." *Cleveland v. Betts* (1958), 168 Ohio St. 386, 389, 154 N.E.2d 917. The *Betts* Court further stated: "If by ordinance a municipality can make the felony of carrying concealed weapons a misdemeanor, what is there

to prevent it from treating armed robbery, arson, rape, burglary, grand larceny or even murder in the same way, and *finally dispose* of such offenses in the Municipal Court." *Id.*, 389-390 (emphasis added). The key words in the *Betts* decision are "finally dispose". This is because a conviction to a misdemeanor offense would foreclose the more severe and lasting penalties of a felony conviction. See, *State v. Golston*, 71 Ohio St.3d 224, 227, 1999-Ohio-109, 643 N.E.2d 109 (detailing various disabilities imposed upon on all persons convicted of a felony) and Ohio Const. Art. I, § 10 (preventing multiple criminal punishments for the same act). Where imposition of a misdemeanor punishment frustrates the intent of the General Assembly for more strict punishment, the misdemeanor punishment must yield. However, a punishment can only frustrate the intent of the General Assembly if the punishment prevents the intent of the General Assembly from being effectuated. If, however, the punishment intended by the General Assembly can still be imposed, an alternate punishment does not frustrate the intent of the General Assembly.

Thus, both the *Baskin* and *Betts* definition of conflict are consistent with the common understanding of the word. The statutory scheme in *Betts* would constitute a clash, competition, or mutual interference of incompatible forces; the imposition of misdemeanor penalties being incompatible with the Revised Code because it prevented the imposition of felony penalties. Similarly, this Honorable Court found that a municipal ordinance barring the concealed carry of a firearm with a ten round magazine did not conflict with the Revised Code provision banning the concealed carry of a firearm with a thirty-one round magazine because there was no incompatibility between the municipal ordinance and the Revised Code. *Baskin*, 2006-Ohio-6422 at ¶23, 24. *Baskin* and *Betts* recognize and endorsed the understanding that the word

"conflict" presumes not merely that two things are different, but rather that they are incompatible or irreconcilable. Put another way, the Home Rule Provision

> was intended to clothe municipalities with power to prescribe rules of conduct in all matters relating to local police, sanitary, and other similar regulations, where no rules had been prescribed by the General Assembly; and, as to the matter where the General Assembly had theretofore or might thereafter prescribe rules, the municipal ordinances and regulations would be effective only so far as consistent with general law. That is to say, if the entire ordinance were wholly repugnant to a general law, it would be wholly invalid; if repugnant in certain of its provisions, the repugnant part would be invalid.

Youngstown v. Evans (1929), 121 Ohio St. 342, 347, 348, 168 N.E. 864.

Civil infractions do not permit that which the general laws proscribes, nor do they proscribe that which the general laws permit, and they are not incompatible under *Baskin*. And because civil infractions do not finally dispose of criminal offenses, they are not incompatible under *Betts*. Because they are not objectionable under the standards set forth by *Baskin* and *Betts*, they are not "inconsistent" or "repugnant" to the purpose of the general traffic laws. Thus, this Honorable Court should find that the civil infractions systems are not in conflict with the general laws. To read "conflict" as meaning anything other than creating an incompatible or irreconcilable result is contradictory to this Court's precedent in *Baskin* and *Betts*, is inconsistent with the common understanding of the word "conflict," and violates this Court's mandate that "when it is possible to harmonize the general law and municipal ordinances, the same should be done.'" *Northern Ohio Patrolmen's Benevolent Ass'n,* at 377 (internal alterations omitted). For these reasons, this Honorable Court should find that in order for an civil infraction to conflict with a misdemeanor punishment, it must make the imposition of that punishment impossible.

2. Civil sanctions that do not implicate the Double Jeopardy provision do not irreconcilably conflict with analogous criminal provisions.

Sanctions for civil infractions do not directly or indirectly conflict with the general laws. They do not "finally dispose" of criminal actions, nor do they prevent the punishment of criminal offenses. Indeed, most of Petitioner's arguments are predicated upon a single logical fallacy: that the civil infractions somehow abrogate the criminal offenses. However, the adoption of civil sanctions does not "decriminalize" red light violations. For example, the City of Columbus has not "changed,"[2] "converted,"[3] or "done away with"[4] its criminal provisions relating to traffic control devices. See Columbus City Code § 2113.01(a). Nor can it be said that the mere existence of a civil infraction makes the criminal violation non-prosecutable. In order for a civil penalty to foreclose a criminal prosecution, a court would have to find that the civil penalty implicated the prohibition against being placed twice in jeopardy. Ohio Const. Art. I, § 10.

Even if this Court found no positive grant of authority for a civil infraction system (see Section A, above), the civil infraction system would not conflict with the general laws unless it created criminal jeopardy by imposing a penalty that was so disproportionate as to be primarily punitive. Where a municipal civil infraction finally disposed of a state misdemeanor by creating criminal jeopardy, the logic of the *Betts* decision would apply with full force. However, the question of whether a particular municipal ordinance implicates the Double Jeopardy provision is not one that can be answered in the instant case. It is a question that would necessarily require an ordinance-by-ordinance analysis and significant factual findings that are not present in the record. *Dep't of Revenue v. Kurth Branch* (1994), 511 U.S. 767, 777 (In order to overcome the presumption of the legislative label of the sanction, the challenging party must demonstrate that

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[2] "There is no enabling statute allowing Ohio cities to change speeding and red light violations from criminal to civil offenses." Brief of Mendenhall, 9 (emphasis omitted).

[3] "Here the Ordinances convert a criminal matter to a civil matter." *Amicus curiae* Brief of Moadus, 9 (emphasis omitted).

[4] "If the municipalities were interested in the safety of their citizens and those who are employed within their borders, the criminal penalties for speeding and/or red lights would have been increased, not done away with." *Amicus curiae* Brief of McNamara, 4.

the sanction cannot fairly be characterized as remedial, but rather serves only as a deterrent or punishment). The remedial or punitive nature of a statute is necessarily based on facts relating to the cost of an administrative scheme, and because the facts for the various scheme used in Ohio are not in the instant record, this Court cannot answer the question of whether any individual scheme creates criminal jeopardy. However, for the purposes of answering the certified question, it is sufficient to presume that civil penalties do not implicate the double jeopardy provision, per se.

The very fact that a person could lawfully be held to account for both the remedial civil sanction and the criminal punishment proves that the two laws do not conflict. That is, if a photographic enforcement system identified an offender at the same time as a peace officer, the offender could be held accountable for both the civil infraction and the criminal offense. So long as the civil infraction system was remedial in nature, the person could be required to pay the administrative fee and be prosecuted on the criminal offense. Because the two laws can coexist, they cannot be said to "conflict," as that word has been defined by this Court. Thus, despite Petitioner's protestations to the contrary, the limitation imposed by the Double Jeopardy provision as it interacts with the Home Rule provision effectively prevents municipalities from having "*carte blanche* to create an entirely new system of traffic enforcement . . .." *Amicus Curiae* Brief of McNamara, 5. This is because a civil penalty that is so punitive as to implicate Double Jeopardy concerns would create a Home Rule conflict. By contrast, a remedial sanction that did not implicate the Double Jeopardy provision would not create an irreconcilable conflict with a misdemeanor punishment.

For example, if a municipality created a civil infraction system that imposed a punishment that was so punitive as to serve only as a deterrent or a punishment, then the "civil"

infraction system would impose a criminal punishment under the double jeopardy provision of the Ohio and United States Constitution. *Kurth Branch*, 511 U.S. at 777. Thus, later prosecution of a criminal offense would be impossible. Because municipalities do not have the authority to circumvent the general laws by finally disposing of a criminal offense in a manner that conflicts with the purpose of the law, a civil infraction that implicated criminal jeopardy would violate the Home Rule Provision and RC § 4511.07(A)(2). It is this interplay that preserves the appropriate prerogative of the State to create uniform laws while also allowing municipalities the latitude afforded to it under Home Rule. Thus, if a court were to find that a municipality had created a sanction that was punitive in nature rather than remedial, the court would properly find that the civil infraction scheme was unconstitutional. By contrast, if a court were to find that a sanction was remedial in nature, there would be no irreconcilable conflict with the general laws. Because the civil infractions system can be harmonized with the general laws, this Honorable Court should find there is no conflict. *NOPBA*, at 377. For these reasons, this Court should find that 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 Revised Code.

Finally, Petitioner's reliance upon *State v. Rosa* (1998), 128 Ohio App.3d 556, 716 N.E.2d 219, is misplaced. The Seventh District's decision was not well-grounded in Ohio's Constitution, and it would not be applicable to the instant statutory scheme in light of the grant of authority to municipalities in RC § 4511.07(A)(2). The *Rosa* Court's analysis of the Home Rule question is limited to the following:

> In enacting C.O. 727.02 (a), the City of Youngstown changed the classification of the offense of committing deceptive acts or practices in connection with consumer transactions from a civil violation to a criminal violation. Comparatively, if changing a misdemeanor offense to a felony, or vice versa, is in conflict with

> general state law, changing the classification of an act from a civil to a criminal violation would also be in conflict. Therefore, the City of Youngstown has created an ordinance that is in conflict with a general law of the state, and as a result, C.O. 727.02 (a) is unconstitutional.

Rosa, at 561. Initially, it is worth nothing that there is nothing in *Betts* that mandates the *Rosa* conclusion that a conflict between a misdemeanor and a felony mandates a finding of conflict between a civil sanction and a criminal penalty. Nor did the *Rosa* Court attempt to justify this conclusion. Rather, without any analysis on the issue, the *Rosa* Court appears to have simply declared the two situations to be identical. However, the two situations are not identical, and therefore do not lead to identical results under *Betts*. The *Rosa* Court ignored the *Betts* Court's concern that the misdemeanor/felony scheme would "finally dispose" of the felony offense by treating it merely as a misdemeanor. This is a key aspect of determining the existence of a true conflict—that is, one that creates an incompatible or irreconcilable result—and the *Rosa* Court's failure to address the issue was a fundamental flaw in its reasoning. Because there is no intrinsic conflict between a civil infraction system and the general laws, the *Rosa* decision should be rejected, and this Court should instead find that an actual irreconcilable result must occur before a conflict exists.

Requiring lower courts to analyze cases for the existence of an actual conflict will, of course, require more attention than merely finding a "conflict" by some incongruency between a municipal ordinance and a statute. However, the Ohio Constitution requires this type of analysis. For lower courts to find an incompatible or irreconcilable "conflict" merely because an ordinance takes a different form than the Revised Code—but does not preclude the operation of the Revised Code—would be to ignore the constitutional duty to afford the municipal ordinances a strong presumption of constitutionality and to harmonize—whenever possible—a municipal ordinance and a statute. *NOPBA*, 61 Ohio St.2d at 377. Thus, this Honorable Court should give

affect to the legal definition contained within *Baskin* and *Betts*, as well as the commonly understood definition of "conflict," and find that the expansive authority of the Home Rule provision precludes the perfunctory conclusion of the *Rosa* Court.

However, even if the *Rosa* decision had been correctly decided, it would not apply because of the positive grant of authority in RC § 4511.07(A)(2) for municipalities to regulate traffic. Where the State authorizes municipalities to regulate, the distinction between civil and criminal sanctions is irrelevant. *Akron v. Ross* (July 11, 2001), Ninth Dist. No. 20388, 2001 Ohio App. LEXIS 3083, *11-12. In the instant case, the Revised Code did not limit municipalities to purely civil or purely criminal regulations, and thus the broad grant of authority from Art. XVIII, § 3 of the Ohio Constitution should be seen as giving municipalities their choice of how to regulate in these areas.

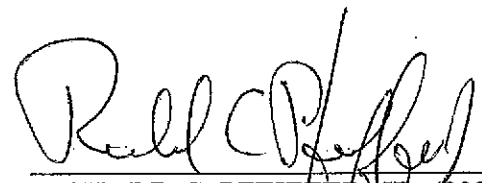
CONCLUSION

The Ohio Constitution guarantees autonomy to municipalities, provided the exercise of that autonomy does not create an irreconcilable conflict with the general laws of the State. The State of Ohio has adopted uniform traffic offenses, but at the same time has granted municipalities authority to adopt their own regulations for controlling local traffic under RC § 4511.07(A). The civil infraction systems adopted by the municipalities do not conflict with the general laws because they do not permit that which the general laws proscribes, or vice versa; nor do they finally dispose of the subject matter of the general laws. Additionally, they exist by virtue of an express grant of authority by the General Assembly for municipalities to adopt reasonable means to regulate local traffic. For all these reasons, this Honorable Court should find that 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 Revised Code.

Respectfully submitted,

CITY OF COLUMBUS
DEPARTMENT OF LAW



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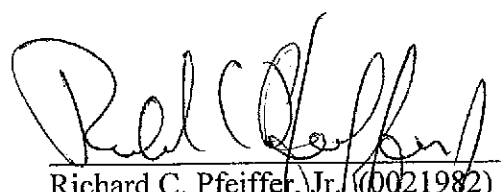
CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Brief of Plaintiff-Appellee was mailed by regular U.S. Mail to Jacquenette S. Corgan, Attorney for Defendant-Appellant, Law Office of Warner Mendenhall, 190 North Union Street, Suite 201, Akron, Ohio 44304 this 18th day of April, 2007.



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