
IN THE SUPREME COURT OF OHIO

Kelly Mendenhall, et al.,	:	Case No. 2006-2265
	:	
Plaintiffs-Petitioners,	:	
	:	Certified Question Of Law
v.	:	From The United States
	:	District Court, Northern
The City of Akron, et al.,	:	District of Ohio, Case Numbers
	:	05:06 CV 0139 and 5:06 CV 0154
Defendants-Respondents.	:	

**MERIT BRIEF OF RESPONDENTS
THE CITY OF AKRON AND
NESTOR TRAFFIC SYSTEMS, INC.**

Max Rothal, (0009431)
Director of Law, City of Akron
Stephen A. Fallis (0021568) - Counsel of Record
Michael J. Defibaugh (0072683)
Assistant Directors of Law
City of Akron
161 S. High Street, Suite 202
Akron, Ohio 44308
Telephone: (330) 375-2030
Facsimile: (330) 375-2041
fallist@ci.akron.oh.us
defibmi@ci.akron.oh.us

Counsel for Defendant-Respondent
The City of Akron

Richard Gurbst (0017672) - Counsel of Record
Heather L. Tonsing (0069606)
Donald W. Herbe (0076500)
SQUIRE, SANDERS & DEMPSEY LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
Telephone: (216) 479-8500
Facsimile: (216) 479-8780
rgurbst@ssd.com
htonsing@ssd.com
dherbe@ssd.com

Counsel for Defendant-Respondent
Nestor Traffic Systems Inc.

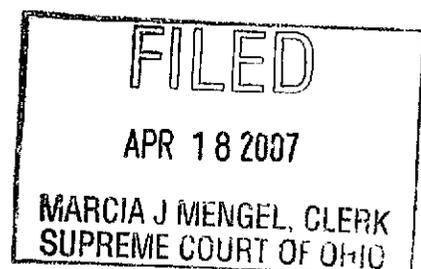


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STATEMENT OF FACTS¹

A. The Akron Ordinance

After a child was struck and killed in a school cross walk, the City of Akron enacted an ordinance authorizing the use of an automated mobile speed enforcement system in school zones. See Akron Municipal Code 79.01, “Civil Penalties for Automated Mobile Speed Enforcement System Violations” (the “Akron Ordinance”) (attached to the Mendenhall Brief at Appendix D); (Order of Certification at 5-6) (attached to the Mendenhall Brief at Appendix A). The purpose of the Akron Ordinance was to improve safety measures for children in Akron’s school zones and crosswalks. (Order of Certification at 5-6). Subsequently, Nestor Traffic Systems, Inc. (“Nestor”) contracted with the City to provide services designed to detect mobile speed violations in the designated areas. (*Id.* at 6).

The Akron Ordinance does not change the speed limits established by the State of Ohio nor affect in any way the criminal enforcement of the speed laws by the police department. (*Id.*) Instead, under this safety initiative, the City assesses civil fines against vehicle owners—not criminal penalties against drivers when cited by police—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 Municipal Code 79.01(A)(1).

¹ Included within the Order of Certification is the parties’ Agreed Stipulations of Fact and accordingly, only a brief summary of the background is provided in Respondents’ Brief.

As set forth in the Akron Ordinance, “[any] violation of this section shall be deemed a noncriminal violation for which a civil penalty... shall be assessed.” Akron Municipal Code 79.01(D)(2). The *prima facie* speed limits in the Akron Ordinance were not changed and are identical to the *prima facie* speed limits provided in the Ohio Revised Code. (Order of Certification at 6); Akron Municipal Code 79.01(C)(1). Owners cited under the Akron Ordinance have a right to an administrative appeal. *Id.* at 79.01(F). A violation of the Ordinance is not considered a moving violation and no “points” are assessed against the owner’s driving record. *Id.* at 79.01(D)(3). If the civil penalty is not paid, the City must initiate civil proceedings to collect the money. *Id.* at 79.01(E).

To be sure, the Akron Ordinance does not affect criminal enforcement of speed laws in Akron’s school zones. Indeed, the civil enforcement against an *owner* of a vehicle is subordinate to criminal enforcement against the *driver*:

Unless the operator of the motor vehicle receives 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.

Akron Municipal Code 79.01(D)(1) (emphasis added).

In sum, the Akron Ordinance does not prohibit the police from enforcing the criminal speed statute against the driver. Nor does the Akron Ordinance permit any speed that the State prohibits, or prohibit any speed that the State permits. All the Akron Ordinance does is give the City an additional tool to fight a local problem—speeding in neighborhood school zones.

B. The Underlying Lawsuits

Kelly Mendenhall (“Petitioner Mendenhall”), as the owner of the subject vehicle, received a civil violation in November 2005 because a car she owned was photographed traveling thirty-nine miles per hour in a twenty-five mile per hour speed zone. (Order of

Certification at 8). Petitioner Mendenhall exercised her due process right to an administrative hearing and, based on the fact that the twenty-five mile per hour speed limit sign was vandalized or missing at the time her vehicle was photographed allegedly speeding, she won the hearing, her citation was dismissed, and no civil penalty was assessed. (*Id.*).

On three different dates in late October and November 2005, Janice A. Sipe, Joanne L. Lattur, and Wayne H. Burger (collectively the “Sipe Petitioners”) were issued citations under the Akron Ordinance for cars titled in their names traveling at excessive speeds in school zones. (*Id.* at 14-15). Mr. Burger’s vehicle was photographed speeding on two separate occasions within twenty minutes in the same school zone. (*Id.* at 14). None of the Sipe Petitioners exercised their right to an administrative hearing, and none paid the required civil penalty. (*Id.* at 14-15).

All parties initially briefed the Home Rule issue in the United States District Court for the Northern District of Ohio, and on May 17, 2006, Judge Dowd 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.” (Order of Certification at 2-3). Briefing and discovery on the remaining causes of action ensued, principally regarding federal constitutional issues. On November 30, 2006, the District Court vacated its May 17 Memorandum Opinion, noting the 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 relates to enforcing traffic laws through the imposition of civil liability. The certified question is:

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.

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. (Order of Certification at 4). Some of the cases involve the use of cameras at red lights, others use the cameras to detect cars speeding, and still others use the cameras for both purposes. The City of Akron only uses the automated systems to reduce speeding in school zones. Regardless of the specific case or use, the fundamental issue in each instance, 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 vehicle.

I. Municipalities Derive Their Power Of Self-Governance From the Ohio Constitution, Not State Statute.

With the adoption of the Home Rule Amendment, a municipality, as distinct from a county, derives its powers of self-governance directly from the Ohio Constitution. *City of Canton v. State* (2002), 95 Ohio St.3d 149, 151, 2002 Ohio 2005, 766 N.E.2d 963. 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. Thus, "municipalities 'derive no authority from, and are subject to no limitations of, the General Assembly, except that such ordinances shall not be in conflict with general laws.'" *Geauga Cty. Bd. of Commrs. v. Munn Rd. Sand & Gravel* (1993), 67 Ohio St. 3d 579, 582, 1993 Ohio 55, 621 N.E.2d 696 (quoting *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519, paragraph one of the syllabus).

The Akron Ordinance is an exercise of the City's police power, authorizing the City to impose civil liability upon the owner of a vehicle that is photographed violating a traffic law, *i.e.*, speeding in a school zone. Because the Akron Ordinance does not conflict with any general laws, it is a valid exercise of municipal self-government and should be upheld as constitutional.

II. The Akron Ordinance Implementing the Automated Speed Enforcement System Does Not Conflict With the General Laws of Ohio.

Ohio's Home Rule Authority grants a municipality wide latitude in enacting its ordinances. Indeed, an ordinance is considered a valid exercise of municipal power unless each of the following three requirements is met:

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

Canton, 95 Ohio St. 3d at 151; *see City of Cincinnati v. Baskin* (2006), 112 Ohio St.3d 279, 281, 2006 Ohio 6422, 859 N.E.2d 514; *Am. Fin. Servs. Assn. v. Cleveland* (2006), 112 Ohio St. 3d 170, 175, 2006 Ohio 6043, 858 N.E.2d 776. Despite decades of complicated Home Rule jurisprudence, this Court recently reaffirmed that the conflict analysis, originally set forth in *Sokol*, is the test to determine if an ordinance is a valid exercise of Home Rule authority.² *Am.*

² Prior to the late 1980's, there was debate about whether a separate "preemption" or "statewide concern" test should also be applied in addition to the traditional three-part conflict analysis. *See City of Dayton v. State* (2004), 157 Ohio App. 3d 736, 744-53, 2004 Ohio 3141, 813 N.E.2d 707 (summarizing past Supreme Court Home Rule jurisprudence). Presumably, under the preemption/statewide-concern approach, municipalities could not legislate in areas of general or statewide concern, even if there was not a direct conflict between state and local law. *Id.*

Very recently, this Court stated that the "statewide-concern doctrine falls within the existing [three-part conflict] framework * * *" *Am. Fin. Servs. Assn.*, 112 Ohio St. 3d at 175. Thus, statements of preemption by the General Assembly do not "trump the constitutional authority of municipalities to enact legislation." *Id.* Instead, those statements indicate that the

Fin. Servs. Assn., 112 Ohio St. 3d at 175 (“we reaffirm that the conflict analysis as mandated by the Constitution should be used in resolving home-rule cases”).

Here, there is no dispute that the Akron Ordinance invokes the City’s exercise of its police powers. Consequently, the only issue is whether the Akron Ordinance (a) conflicts with (b) a general law of the state.

A. The Akron Ordinance Does Not Prohibit That Which The State Permits, Or Vice Versa.

This case boils down to the singular issue of whether the Akron Ordinance “permits or licenses that which the statute forbids or prohibits, and vice versa.” *Sokol*, 108 Ohio St. 263, paragraph two of the syllabus; see *Baskin*, 112 Ohio St. 3d at 283; *Am. Fin. Servs.*, 112 Ohio St. 3d at 177. This ninety year-old conflict test was first established in *Struthers v. Sokol*, and reaffirmed twice by this Court within the last year alone. *Baskin*, 112 Ohio St. 3d at 283; *Am. Fin. Servs.*, 112 Ohio St. 3d at 177. This test has always examined rules of conduct, not rules of enforcement. See *Am. Fin. Servs.*, 112 Ohio St. at 179 (“we conclude that any local ordinances that seek to prohibit **conduct** that the state has authorized are in conflict with the state statutes....”) (emphasis added). Indeed, the only type of law relevant to the conflict analysis is a

matter at issue is a matter of police power as opposed to local self-government under the conflict test. See *id.*

Even if the recent restatement of preemption/statewide-concern test were applied to this case, the Akron Ordinance would still be a valid exercise of the Home Rule power. See *Id.* at 180 (O’Connor, J. concurring) (setting forth the three part preemption test). First, the General Assembly has not passed express preemption language in the traffic code (R.C. 4511.06 merely prohibits local rules that conflict with R.C. Chapter 4511.) To the contrary, instead of expressly preempting a municipality’s regulation of traffic, the General Assembly encourages it. See R.C. 4511.07; *Munn*, 67 Ohio St. 3d at 584. Moreover, because the Akron Ordinance does not regulate anything outside the boundaries of the City’s school zones, the regulation has no extra-territorial impact. And, the City’s response to the tragedy of a hit and run death of one of its children is certainly a matter of local concern.

general law, which “prescribes a rule of **conduct** upon citizens generally,” *Baskin*, 112 Ohio St. 3d at 282 (citing *Canton*, 95 Ohio St. 3d at the syllabus) (emphasis added).

Petitioners’ fail to point to a single general law that allegedly conflicts with the Akron Ordinance and instead attempt to complicate the analysis by using several different tests for determining a conflict. However, the dispositive issue in this case is rather simple: Does the Akron Ordinance conflict with R.C. 4511.21, the state statute that regulates the conduct of speeding? By its very terms, the answer is no.

The Akron Ordinance does not alter in any way, the speed limits under the state statute. (See Akron Municipal Code 79.01(C)(1) (“The owner of a vehicle shall be liable * * * if such vehicle is operated at a speed in excess of those set forth in Section 73.20.”) Thus, the Akron Ordinance incorporates the actual Akron criminal speed law and its speed limits. And, significantly, the Akron criminal speed law set forth in Akron Municipal Code 73.20 (attached hereto at Appendix 1) is identical to the state speed limits in R.C. 4511.21. Accordingly, because the Akron Ordinance does not permit anything that a state statute prohibits, *i.e.*, it does not permit cars to exceed the speed limits set by the state, nor does the Akron Ordinance prohibit anything permitted by the state statute, *i.e.*, it does not lower the speed limits, there is no conflict. Simply put, as *the speeding laws under the Akron Ordinance are identical to those under state law, there can be no conflict.*

The Sipe Petitioners argue that under the Akron Ordinance, a vehicle owner is strictly liable when a vehicle is photographed operating in excess of the posted speed limits, regardless of the reasonableness of the speed, and that this creates a conflict with R.C. 4511.21. (Sipe Brief at 7). The Sipe Petitioners are simply incorrect as both the Akron Ordinance and R.C. 4511.21 require a rate of speed that is “reasonable or proper.” Indeed, R.C. 4511.21 provides that “[n]o

person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less than is reasonable or proper* * *” *Id.* Parroting this language, the Akron Ordinance provides that “[n]o person shall operate a motor vehicle at a speed greater or less than is reasonable or proper.” Akron Municipal Code 73.20. The Sipe Petitioners could have argued that they were driving at a reasonable rate of speed at an administrative appeal, but they chose not to exercise this right. (Order of Certification at 14-15).

Accordingly, the Akron Ordinance does not prohibit that which is permitted, or vice versa, and there is, thus, no impermissible conflict.

B. R.C. 4511.06, 4511.07, and 4511.99 Are Not General Laws And Have No Effect On The Validity Of The Akron Ordinance.

Petitioners’ invocation of R.C. 4511.06, 4511.07, and 4511.99 is misplaced because these statutory provisions are not general laws, and only general laws are relevant to the Home Rule analysis. *Canton*, 95 Ohio St. 3d at 151 (state laws only take precedence if they are general laws). This Court recently held that a state statute is a general law only if the law:

- (1) is part of a statewide and comprehensive legislative enactment;
- (2) applies to all parts of the state alike and operates uniformly throughout the state;
- (3) sets forth police, sanitary, or similar regulations, rather than purports only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations; and
- (4) prescribes a rule of conduct upon citizens generally.

Am. Fin. Servs., 112 Ohio St. 3d at 176 (citing *Canton*, 95 Ohio St. 3d at syllabus). State statutes that do not fit within these four parameters will not supersede a local ordinance, even if the local ordinance is in conflict with the statute. *See Canton*, 95 Ohio St. 3d at 151.

Sections 4511.06, 4511.07, and 4511.99 clearly do not meet the *Canton* test, and in fact, this Court has previously held that R.C. 4511.06 and 4511.99 are *not* general laws. *Columbus v. Molt* (1973), 36 Ohio St. 2d 94, 95, 304 N.E.2d 245; *see also Bailey v. City of Martins Ferry* (1976), 46 Ohio St.2d 95, 96-97, 346 N.E.2d 317 (“R.C. 4511.06 is not part of the ‘general laws’ as that term is used in Section 3 of Article XVIII, and, thus, does not provide a basis upon which a conflict may be asserted.”).

Moreover, and in accordance with the third prong above, this Court has long held that statutes purporting to grant or limit the legislative power of a municipal corporation are not general laws. For instance, in *Canton*, this Court held that R.C. 3781.184(C) and (D), which prohibited political subdivisions from restricting the location of certain manufactured homes, was not a general law. *Canton*, 95 Ohio St. 3d at 153-56. And, in *Village of Linndale v. State* (1999), 85 Ohio St. 3d 52, 55, 1999 Ohio 434, 706 N.E.2d 1227 this Court held that a statute that limited the legislative powers of a municipality to adopt and enforce certain police regulations was not a general law. *See also Am. Fin. Servs.*, 112 Ohio St. 3d at 175 (“A statement by the General Assembly of its intent to preempt a field of legislation...does not trump the constitutional authority of municipalities to enact legislation...provided that the local legislation is not in conflict with general laws.”); *West Jefferson v. Robinson* (1965), 1 Ohio St. 2d 113, 118, 205 N.E.2d 382 (statutes that “purport only to grant legislative power to and to limit legislative power of municipal corporations to adopt and enforce certain police regulations” are not general laws). Under this authority, it is clear that 4511.06 and 4511.07 are not general laws. R.C. 4511.06 states, in part, that “[n]o local authority shall enact or enforce any rule in conflict with” the state traffic laws. R.C. 4511.07 states that the state traffic laws “do not prevent” localities from carrying out certain activities in several enumerated areas. As such, these two statutes

“purport only to grant or limit legislative power of a municipal corporation” and, thus, fail the third prong of the general law test.

Moreover, R.C. 4511.06 and 4511.07 clearly do not “prescribe a rule of conduct upon citizens generally,” but instead apply to municipal legislative bodies, thus failing prong four of the general law test. *Id.* at 156; *Linndale*, 85 Ohio St. 3d at 55. Similarly, R.C. 4511.99, which prescribes the criminal penalties for violation of the state traffic laws, including speeding, does not prescribe a rule of conduct upon the citizenry.

As such, R.C. 4511.06, 4511.07, and 4511.99 are not relevant to the instant conflict analysis, because they are not general laws. The Akron Ordinance regulates speed in school zones, and the only relevant, general law is R.C. 4511.21, which also regulates speed limits. As set forth above, because the Akron Ordinance simply does not conflict with R.C. 4511.21, or any other provision of Chapter 4511, the Ordinance is a valid exercise of municipal Home Rule Authority and should be upheld.

C. Petitioners’ Purported Authority For Their Conflict Argument Is Misplaced.

Unable to point to a conduct-conflict under the traditional three-part test, the Petitioners invoke *Schneiderman v. Sesanstein*, *City of Cincinnati v. Hoffman*, and *Cleveland v. Betts* to support their claims. None of these cases, however, support the invalidation of the Akron Ordinance.

1. *Schneiderman* and *Hoffman* Do Not Stand For The Proposition For Which They Are Cited.

First, Petitioners argue that a conflict exists because the Akron Ordinance strips vehicle owners of due process. (Mendenhall Brief at 12-13, 17-18; Sipe Brief at 10-15). It is difficult to understand how the due process concern is relevant to the Home Rule-conflict analysis,

especially where, as here, the Sipe Petitioners fail to even make a connection between a due process argument and the conflict analysis. Moreover, this argument appears to be a pure due process question disguised in Home Rule garb. Obviously, due process issues have not been certified to this Court and remain before Judge Dowd in the federal district court.³

In any event, the purported authority for Petitioner Mendenhall's due process argument is *Schneiderman v. Sesanstein* (1929), 121 Ohio St. 80, 167 N.E. 158, which simply does not stand for the proposition as presented, *i.e.*, that the Akron Ordinances' failure to provide the due process required in the criminal context creates a Home Rule conflict. In *Schneiderman*, the issue in the appeal of the civil action was whether an ordinance that strictly prohibited traveling in excess of fifteen miles per hour conflicted with a statute that prohibited traveling at an unreasonable rate. *Schneiderman*, 121 Ohio St. at 87. The rules of conduct clearly conflicted: the strict fifteen mile per hour speed limit trumped the more flexible reasonableness standard required by the state statute. Unlike Petitioner Mendenhall's interpretation of the case, the conflict had nothing to do with the absence of a right to a trial by jury under the ordinance. The conflict arose because the ordinance prohibited that which the statute permitted—traveling at a reasonable rate of speed that may be in excess of fifteen miles per hour; something, as explained in detail above, the Akron Ordinance does not do. *Id.* at 90.

Nor does *Cincinnati v. Hoffman* (1972), 31 Ohio St. 2d 163, 285 N.E.2d 714 support Petitioners' due process/conflict arguments. (Mendenhall Brief at 18). In *Hoffman*, the defendant argued that an ordinance imposing strict liability for certain conduct conflicted with a statute that required that the same conduct be done with intent. *Id.* at 169-70. By changing the *mens rea*, the ordinance changed the elements of the crime and presented the classic conflict

³ None of the Sipe Plaintiffs availed themselves of an administrative hearing and

scenario. The Petitioners, however, point to no such discrepancy between the Akron Ordinance and the state traffic laws—indeed, because they cannot. As stated above, the Akron Ordinance contains the same rules of conduct as the state traffic statutes, including the same *mens rea*. Moreover, Petitioner Mendenhall grossly misstates *Hoffman*'s holding when she asserts that the ordinance at issue was invalidated. (Mendenhall Brief at 17-18). In fact, the Court held that, because the jury was properly instructed that the defendant must have been found to act with intent, the ordinance “escaped the conflict alleged.” *Hoffman*, 31 Ohio St. 2d at 173.

2. The Akron Ordinance Is Not Invalid Under The So-Called *Betts* test.

The Petitioners also invoke the so-called “*Betts* test.” (Mendenhall Brief at 13-14, 18-19; *see also* Sipe Brief at 7-8). In *Betts*, this Court held that an impermissible conflict exists when a municipality changes “an act which constitutes a felony under state law into a misdemeanor....” *City of Cleveland v. Betts* (1957), 168 Ohio St. 386, 389, 154 N.E.2d 917. The defendant in *Betts* was subject to either a misdemeanor under the ordinance or a felony under the statute, and this created an impermissible conflict. *Id.* In Akron, however, *drivers* of vehicles cited for speeding by a police officer face the same potential consequences—a misdemeanor—whether charged under the ordinance or the state statute. The City does not, as in *Betts*, criminally charge drivers any differently than the State does. The Akron Ordinance simply adds civil liability against the *owner* of a speeding vehicle. Accordingly, Petitioners’ reliance on *Betts* is misplaced.⁴

Mendenhall won her administrative hearing having the civil violation dismissed.

⁴ Although Petitioner Mendenhall cites *State v. Rosa* (1998), 128 Ohio App.3d 556, 716 N.E.2d 216 for the principle that a city may not make criminal that which the state does not so punish, her limited reading of *Rosa* omits any reference to the fact that there are multiple independent holdings in the Court of Appeals opinion dealing the death knell to the Youngstown ordinance. For instance, the Court of Appeals also found that the ordinance was void for

Moreover, *Betts* is further distinguishable from the instant matter as the ordinance in *Betts* created a jurisdictional quagmire for municipal courts—one that is not present with the Akron Ordinance. In concluding that the Cleveland ordinance directly conflicted with a general law of the state, this court cited Section 10, Article I of the Ohio Constitution that provides “[e]xcept in cases * * * involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury * * *.” *Betts*, 168 Ohio St. at 388. Accordingly, “a presentment or indictment by a grand jury is essential in the prosecution of an ‘infamous crime,’ and a prosecution in any other manner is unauthorized and a nullity for want of jurisdiction.” *Id.*

In Ohio, an offense is defined as infamous if it is punishable by imprisonment in the penitentiary or by death. *Id.* R.C. 1.06 provides “[o]ffenses which may be punished by death or imprisonment in the penitentiary are felonies * * *” and R.C. 1901.20 empowers municipal courts with only limited jurisdiction over felonies, *i.e.*, initial appearances, and preliminary hearings. Consequently, a municipal court lacks jurisdiction to convene grand juries and indict individuals for infamous crimes (felonies). Thus, the State retains exclusive jurisdiction to classify offenses as felonies and to set appropriate punishment for the commission of such offenses.

The Cleveland ordinance in *Betts* gave municipal courts authority to preside over an offense the state deemed a felony. This jurisdictional deficiency was certainly not lost on the

vagueness. *Id.* at 564. Nevertheless, since the City of Akron’s ordinance neither punishes civilly that which is criminal (behavior of the driver) nor punishes criminally that which was addressed civilly, *State v. Rosa* is not instructive. See *City of Akron v. Ross* (July 11, 2001), C.A. No. 20338, 2001 Ohio App. LEXIS 3083, at *10-13 (distinguishing *Rosa* and holding that no conflict exists when a city makes criminal that which the state makes civil).

Court. *See Betts*, 168 Ohio St. at 388-89. And, while there is no doubt that the State retains exclusive jurisdiction to classify offenses as felonies and to set appropriate punishment for the commission of those offenses, in the present case, the conduct at issue is classified as a misdemeanor under both state statute and the Akron Ordinance. Thus, the Akron Ordinance does not create the jurisdictional dilemma presented in *Betts*.

In conclusion, the City of Akron has not eliminated the criminal enforcement of speeding, changed the speed limits, or increased or decreased the penalties against a driver. Rather it has added enforcement using modern technology, assessing civil penalties against the *owner*, not the *driver*—a different party—and only when the police cannot be present and enforce the law through the criminal process. *See Akron v. Ross*, 2001 Ohio App. LEXIS 3083, at *10-13 (adding a layer of criminal penalties at local level not unconstitutional because civil liability under the statute arose in circumstances different from when criminal liability arose under the ordinance) (attached to Petitioner Mendenhall’s Brief at Appendix G).

III. The Akron Ordinance Provides An Additional and Necessary Tool For The City To Address the Local Concern of Speeding in School Zones.

Since the adoption of the Home Rule Amendment, this Court has consistently rejected challenges that seek to tie the hands of local governmental authorities in the exercise of their police powers when such exercise is not in conflict with a state statute. In fact, this Court has long protected local alternative approaches to dealing with a myriad of municipal problems where the ordinance complements, not conflicts, with state statutes.

In *City of Cleveland v. Raffa* (1968), 13 Ohio St.2d 112, 235 N.E.2d 138, this Court upheld Cleveland’s approach to dealing with the growing problem of “bottle clubs” in its neighborhoods. Seeking to attack nuisance issues relating to “after-hours clubs,” the City of Cleveland passed an ordinance regulating the storage of intoxicants in non-permit premises (state

statute regulated permit premises). *Id.* at 115. As this Court noted, “[b]oth the state and the municipality may exercise their police powers upon the same subject matter.” *Id.* This Court upheld the city’s exercise of its Home Rule Authority, finding that the ordinance and statute were “complementary rather than conflicting.”

Similarly, in *Bailey v. City of Martins Ferry*, this Court made it clear that a municipal ordinance prescribing a different type of enforcement did not create a conflict with the state statute. 46 Ohio St.2d 95. There, the state statute provided that “[no] vehicle shall be driven or moved on any highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom.” *Id.* at 96 (citing R.C. 4513.31). The city ordinance required vehicles traveling within its jurisdiction to secure their loads with a tarpaulin or other cover. *Martins Ferry*, 46 Ohio St.2d at 95. Several truck drivers filed suit claiming that the ordinance was in conflict with the statute because it required a “tarpaulin or other cover” on the loads while the state statute did not. *Id.* at 97.

This Court first determined that the primary purpose of the state statute was to keep the public roads clean and free of debris, implementing that objective by requiring each vehicle to be properly constructed or loaded to prevent spillage. *Id.* The municipal ordinance accomplished that same objective by requiring a “tarpaulin or other cover” on the loads. *Id.* Finding no conflict, this Court held that “[a]lthough the means may differ slightly, the ordinance does not prohibit that which the statute permits, or vice versa.” *Id.* 97-98 (emphasis added). So too here, although the means of enforcing traffic laws “may differ slightly” (sometimes using cameras to impose civil liability against owners while other times using police officers to impose criminal sanctions against drivers) there is no conflict. No state statute prohibits the use of cameras to

enforce traffic laws nor does any statute proscribe the imposition of civil liability on the owner of a speeding vehicle.

Likewise, in *Fondessy v. City of Oregon* (1986), 23 Ohio St.3d 213, 492 N.E.2d 797 this Court upheld the municipality's regulation of a hazardous waste facility located within its border, despite state regulation in the same area. There, a state statute specifically limited a political subdivision's right to regulate the "construction or operation of a hazardous waste facility" that was already licensed to operate by the state. *Id.* at 215 (citing R.C. 3734.05). The state statute further prohibited a political subdivision from adopting or enforcing a law that "in any way alters, impairs, or limits the authority granted" by the state license. *Fondessy*, 23 Ohio St.3d at 215.

The City of Oregon, a city with a hazardous waste facility and thus its own local concerns, passed an ordinance requiring hazardous waste facilities to submit monthly reports and permit fees to the City for the purpose of "protect[ing] the environmental safety, health and welfare of its citizens." *Id.* at 213. A landfill owner challenged the municipal regulation, claiming it conflicted with the state statute and was therefore invalid. *Id.*

In rejecting the landfill operator's claim, the Court found no conflict with the state statute in part because "there is nothing that this ordinance professes to do which requires [the landfill owner] to have taller fences, or more guards or more monitoring wells **or anything** other than that which is required in the state law." *Fondessy* 23 Ohio St. 3d at 217 (emphasis added). The Court concluded that nothing in the state legislation completely forecloses or precludes a municipality from providing additional regulation within its borders on the same subject matter regulated by a state statute.

Here, the Akron Ordinance requires nothing more than that required by the state traffic regulations. The Akron Ordinance does not alter, impair, or limit the state law making it a crime to speed. Indeed, speeding is still very much criminal in the City of Akron. *See* Akron Municipal Code 73.20. The Akron Ordinance merely permits the use of traffic cameras to impose civil liability against car owners in situations where the police are not present to ticket drivers. *See* Akron Municipal Code 79.01.

The City of Akron's imposition of civil liability to combat and deter speeding in school zones is purely local in nature. The ordinance does not transcend the City's boundaries, but addresses purely local conduct in the protection of school children on their way to and from school. Such an approach does not create a conflict with a state interest or statute.

CONCLUSION

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

Respectfully submitted,

Stephen A. Fallis by [Signature]

Max Rothal, (0009431)
Director of Law, City of Akron
Stephen A. Fallis (0021568) - Counsel of
Record
Michael J. Defibaugh (0072683)
Assistant Directors of Law
City of Akron
161 S. High Street, Suite 202
Akron, Ohio 44308
Telephone: (330) 375-2030
Facsimile: (330) 375-2041
fallist@ci.akron.oh.us
defibmi@ci.akron.oh.us

Counsel for Defendant-Respondent
The City of Akron

Richard Gurbst by [Signature]

Richard Gurbst (0017672) - Counsel of Record
Heather L. Tonsing (0069606)
Donald W. Herbe (0076500)
SQUIRE, SANDERS & DEMPSEY LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
Telephone: (216) 479-8500
Facsimile: (216) 479-8780
rgurbst@ssd.com
htonsing@ssd.com
dherbe@ssd.com

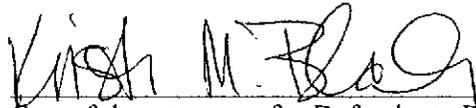
Counsel for Defendant-Respondent
Nestor Traffic Systems Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Respondents the City of Akron and Nestor Traffic Systems, Inc. was served by regular U.S. mail, postage prepaid, upon the following this 18th day of April, 2007.

Warner Mendenhall, Esq.
Jacquenette S. Corgan, Esq.
190 North Union Street, Ste. 201
Akron, Ohio 44304
Attorneys for Petitioner-Plaintiff Kelly Mendenhall

Antoni Dalayanis, Esq.
12 East Exchange Street, 5th Floor
Akron, Ohio 44308
Attorney for Petitioner-Plaintiffs Sipe, Lattur, and Burger



One of the attorneys for Defendants-Respondents

AKRON MUNICIPAL CODE

Article 3. Speed Regulations

73.20 Speed limits.

A. No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.

B. It is prima facie lawful, in the absence of a lower limit declared pursuant to this section by the Director of Transportation or the municipality, for the operator of a motor vehicle to operate the same at a speed not exceeding the following:

1. Fifteen miles per hour on all alleys;

2. a. Twenty miles per hour in school zones during school recess and while children are going to or leaving school during the opening or closing hours, and when a sign giving notice of the existence of the school is erected as provided in this section; except, that on controlled-access streets or highways and expressways, if the right-of-way line fence has been erected without pedestrian opening, this subsection shall not apply. The end of every school zone may be marked by a sign indicating the end of the zone. Nothing in this section or in the manual and specifications for a uniform system of traffic-control devices shall be construed to require school zones to be indicated by signs equipped with flashing or other lights, or giving other special notice of the hours in which the school zone speed limit is in effect.

b. For the purpose of this section, "school" means any school chartered under R.C. §3301.16 and any non-chartered school that during the preceding year filed with the department of education in compliance with Rule 3301-35-08 of the Ohio Administrative Code, a copy of the school's report for the parents of the school's pupils certifying that the school meets Ohio minimum standards for non-chartered, non-tax supported schools and presents evidence of this filing to the jurisdiction from which it is requesting the establishment of a school zone.

c. For the purpose of this section, "school zone" means that portion of a street or highway passing a school fronting upon the street or highway that is encompassed by projecting the school property lines to the fronting street or highway, and also includes that portion of a state highway. Upon request from local authorities for streets and highways under their jurisdiction and that portion of a state highway under the jurisdiction of the Director of Transportation, the Director may extend the traditional school zone boundaries. The distances in subsections (B)(2)(c)(i) through (iii) of this section shall not exceed three hundred feet per approach per direction and are bounded by whichever of the following distances or combinations thereof the Director approves as most appropriate:

i. The distance encompassed by projecting the school building lines normal to the fronting street or highway and extending a distance of three hundred feet on each approach direction;

ii. The distance encompassed by projecting the school property lines intersecting the fronting street or highway and extending a distance of three hundred feet on each approach direction;

iii. The distance encompassed by the special marking of the pavement for a principal school pupil crosswalk plus a distance of three hundred feet on each approach direction of the street or highway;

iv. A distance of six hundred feet using any combination or part thereof of the reference points described in subsections (B)(2)(c)(i) through (iii) of this section.

v. Nothing in this section shall be construed to invalidate the Director's initial action on August 9, 1976, establishing all school zones at the traditional school zone boundaries defined by projecting school property lines, except when those boundaries are extended as

provided in subsections (B)(2)(a) and (c) of this section.

d. As used in this subsection, "crosswalk" has the meaning given that term in subsection (LL) (2) of R.C. §4511.01.

3. Twenty-five miles per hour in all other portions of the municipal corporation, except on state routes outside business districts, through street or highways outside business districts, and alleys;

4. Thirty-five miles per hour on all state routes or through streets or highways within the municipal corporation outside business districts, except as provided in subsections (B)(5) and (6) of this section;

5. Fifty miles per hour on controlled-access street or highways and expressways within the municipality;

6. Fifty miles per hour on state routes within the municipality outside urban districts unless a lower prima facie speed is established as further provided in this section;

7. Fifty-five miles per hour at all times on freeways with paved shoulders inside the municipal corporation.

C. It is prima facie unlawful for any person to exceed any of the speed limitations in subsections (B)(1), (B)(2)(a), (B)(3), (4), (5), and (6) of this section or any declared pursuant to this section by the Director or the municipality, and it is unlawful for any person to exceed either of the speed limitations in subsection D of this section. No person shall be convicted of more than one violation of this section for the same conduct, although violations of more than one provision of this section may be charged in the alternative in a single affidavit.

D. No person shall operate a motor vehicle upon a street or highway as follows:

1. At a speed exceeding fifty-five miles per hour, except upon a freeway as provided in R.C. §4511.21(B)(10);

2. At a speed exceeding sixty-five miles per hour upon a freeway as provided in R.C. §4511.21(B)(10) except as otherwise provided in subsection (D)(3) of this section;

3. If a motor vehicle weighing in excess of 8,000 pounds empty weight or a noncommercial bus as prescribed in R.C. §4511.21(B)(10), at a speed exceeding fifty-five miles per hour upon a freeway as provided in that section.

E. In every charge of violation of this section the affidavit and warrant shall specify the time, place, and speed at which the defendant is alleged to have driven, and, in charges made in reliance upon subsection C of this section also the speed which subsection (B)(1), (2)(a), (3), (4), (5), or (6) of, or a limit declared pursuant to, this section declares is prima facie lawful at the time and place of such alleged violation, except that in affidavits where a person is alleged to have driven at a greater speed than will permit him to bring the vehicle to a stop within the assured clear distance ahead, the affidavit and warrant need not specify the speed at which the defendant is alleged to have driven.

F. When a speed in excess of both a prima facie limitation and a limitation in subsection (D)(1) or (2) of this section is alleged, the defendant shall be charged in a single affidavit, alleging a single act, with a violation indicated of both subsection (B)(1), (B)(2)(a), (B)(3), (4), (5), or (6), or of a limit declared pursuant to this section by the Director or local authorities, and of the limitation in subsection (D)(1) or (2) of this section. If the court finds a violation of subsection (B)(1), (B)(2)(a), (B)(3), (4), (5), or (6) of, or a limit declared pursuant to this section has occurred, it shall enter a judgment of conviction under such subsection and dismiss the charge under subsection (D)(1) or (2) of this section. If it finds no violation of subsection (B)(1), (B)(2)(a), (B)(3), (4), (5), or (6) of, or a limit declared pursuant to this section, it shall then consider whether the evidence supports a conviction under subsection (D)(1) or (2) of this section.

G. 1. Notwithstanding penalties as provided in §70.99 of this code, whoever violates subsection A of this section under circumstances detailed in subsection (B)(2)(a) of this section, shall be guilty of an unclassified misdemeanor. If the person involved in such an offense was operating a motor vehicle at less than thirty-five m.p.h., that person shall be subject to a minimum mandatory fine of ninety dollars and may be fined up to one hundred eighty dollars for the violation. If the person involved in such an offense was operating a motor vehicle at more than thirty-five m.p.h. that person shall be subject to a minimum mandatory fine of one hundred forty dollars and may be fined up to two hundred eighty

dollars for the violation.

2. All fines collected pursuant to subsection (G)(1) of this section shall benefit child safety programs, including the purchase and distribution of child safety helmets, educational programs, police payroll, and warning signage.

These child safety program funds shall be administered by the Deputy Mayor of Public Safety, with the spending of funds subject to Council approval.

H. Points shall be assessed for violation of a limitation under subsection D of this section only when the court finds the violation involved a speed of five miles per hour or more in excess of the posted speed limit.

I. Whenever the Traffic Engineer determines upon the basis of an engineering and traffic investigation that the speed permitted by subsection B of this section, on any part of a street or highway under its jurisdiction, is greater than is reasonable and safe under the conditions found to exist at the location, the Traffic Engineer may request the Director to determine and declare a reasonable and safe lower prima facie speed limit. The declared speed limit shall become effective only when appropriate signs giving notice thereof are erected at the location by the municipality. Upon withdrawal, the declared prima facie speed shall become ineffective and the signs relating thereto shall be immediately removed by the municipality.

J. Whenever the Traffic Engineer determines on the basis of an engineering and traffic investigation that the prima facie speed limit permitted in this chapter on any through street or highway, or upon streets or highways or portions thereof where there are no intersections or between widely spaced intersections, provided that such street or highway is not part of the state street or highway system is less than is reasonable or safe under the conditions found to exist at such location, the Traffic Engineer may designate and declare a higher, reasonable, and safe prima facie speed limit but he shall not modify or alter the basic rule set forth in subsection A of this section or in any event authorize by ordinance a speed in excess of fifty miles per hour. Alteration of prima facie limits on state routes by the Traffic Engineer shall not be effective until the alteration has been approved by the Director.

Penalty, see §70.99. (R.C. §4511.21) (Ord. 368-1998; Ord. 648-1986)