

IN THE SUPREME COURT OF OHIO

State ex rel. Anthony C. Christoff, *et al.*,

CASE NO.

11-0235

Relators,

Original Action

v.

Earle B. Turner, Clerk of Courts,  
Cleveland Municipal Court and  
Violations Clerk, Cleveland Parking  
Violations Bureau, *et al.*,

Respondents.

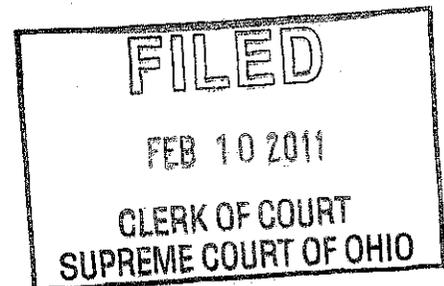
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S. Ct. Prac. R. 10.4(B)  
MEMORANDUM IN SUPPORT OF  
PEREMPTORY AND ALTERNATIVE WRITS OF PROHIBITION,  
AND PEREMPTORY AND ALTERNATIVE WRITS MANDAMUS

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## PRELIMINARY STATEMENT

**Under Section 1, Article IV of the Ohio Constitution, the General Assembly, and only the General Assembly, may vest judicial power in a court and determine its jurisdiction.**

This Court has without exception repeatedly recognized and vindicated the absolute supremacy of the General Assembly's exclusive power under Section 1, Article IV of the Ohio Constitution to establish courts and determine their jurisdiction, over a municipality's home-rule powers under Section 3, Article XVIII of the Ohio Constitution. *Cupps v. Toledo* (1959), 170 Ohio St. 144, 163 N.E.2d 384, paragraph one of the syllabus; *In re Fortune* (1941), 138 Ohio St. 385, 388, 35 N.E.2d 442; *State ex rel. Ramey v. Davis* (1929), 119 Ohio St. 596, 165 N.E.2d 298, syllabus; and *State ex rel. Cherrington v. Hutsinpillar* (1925), 112 Ohio St. 468, 474, 147 N.E. 647. The General Assembly has vested municipal courts with jurisdiction over the "violation of any ordinance," with but one explicitly limited exception that is irrelevant to this matter. R.C. 1901.20(A)(1) (emphasis added).

Because Respondent Clerk and Respondent Hearing Examiners have, and are continuing to, exercise judicial power over ordinance violations—jurisdiction over which the General Assembly has vested in municipal courts—their exercise of judicial power is unlawful, necessitating this Court's immediate issuance of extraordinary writs, all as detailed below.

While this case addresses both Respondent Cleveland's lack of authority to divest the Cleveland Municipal Court of its constitutionally reposed jurisdiction over the "violation of any ordinance," and Respondent Cleveland's concomitant unconstitutional effort to expand the authority of its parking violations bureau, it implicates neither Respondent Cleveland's home-rule powers nor this Court's prior decisions in *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, and *State ex rel. Scott v. City of Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923.

## **BACKGROUND**

### **I. Respondents**

- A. Under Section 413.031 of its Codified Ordinances, Respondent Cleveland has unlawfully taken judicial power over certain municipal ordinance violations away from the Cleveland Municipal Court and given it to Respondent Clerk and Respondent Hearing Examiners.**

Section 433.03 of Cleveland's Codified Ordinances addresses maximum speed limits.<sup>1</sup> Section 413.03 of Cleveland's Codified Ordinances addresses traffic control signals (i.e., red lights). Section 413.031 of Cleveland's Codified Ordinances provides for the civil enforcement of certain violations of Sections 433.03 and 413.03.

Of particular pertinence to this action, under Section 413.031, instead of being adjudicated by the Cleveland Municipal Court, violations of Sections 433.03 and 413.03 are adjudicated by Respondent Earle B. Turner, as Clerk of Courts for the Cleveland Municipal Court and the Violations Clerk for the Cleveland Parking Violations Bureau ("Respondent Clerk") and by Respondents Brian Mahon and Verlin Peterson, as hearing examiners for the Cleveland Parking Violations Bureau ("Respondent Hearing Examiners"), both appointed by Respondent Clerk pursuant to Section 459.03(b) of Cleveland's Codified Ordinances.

- B. Respondent Clerk periodically distributes the monies that he and Respondent Hearing Examiners exact through their unlawful exercise of judicial power under Section 413.031 to Respondent Cleveland, Respondent Director of Finance, or Respondent Treasurer.**

Respondent Sharon A. Dumas is the Director of Finance for the City of Cleveland ("Respondent Director of Finance"). Respondent James Hartley is the Treasurer for the City of Cleveland ("Respondent Treasurer"). Respondent Clerk, who as the Clerk of Courts for the Cleveland Municipal Court, is obligated to periodically remit the monies that he and the

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<sup>1</sup>All of the Sections of Respondent Cleveland's Charter and all of Respondent Cleveland's Codified Ordinances referred to in this Memorandum are attached as Exhibit A to the Complaint.

Respondent Hearing Examiners exact through their unlawful exercise of judicial power over certain municipal ordinance violations—civil speeding and red light violations—to Respondent Cleveland, Respondent Treasurer, or Respondent Director of Finance. *See* R.C. 1901.31(F) (obligating clerks of municipal courts to “pay all fines received for violation of municipal ordinances into the treasury of the municipal corporation the ordinance of which was violated”); R.C. 4521.05(A) (obligating clerks of parking violations bureaus to disburse the “fine and penalties collected . . . for a parking infraction . . . to the local authority whose ordinance . . . was violated”); and Section 459.03(c) (“The fine, penalties, fees, and costs established for a parking infraction shall be collected, retained and disbursed by the Violations Clerk if the parking infraction out of which the fine, penalties, fees, and costs arose occurred within the jurisdiction of the Parking Violations Bureau.”).

Respondent Cleveland, Respondent Director of Finance, and Respondent Treasurer are named in this action because they hold, and/or have the power to disburse, monies exacted by Respondent Clerk and Respondent Hearing Examiners through the exercise of judicial power over certain municipal ordinance violations. (*See* Charter, Sections 94, 99, and 100.) In addition to being named in this action because he exercises judicial power over certain municipal ordinance violations under Section 413.031, Respondent Clerk is named to the extent that he holds monies that he and Respondent Hearing Examiners exact through their exercise of judicial power, prior to his periodic distribution to Respondent Cleveland, Respondent Director of Finance, or Respondent Treasurer as required by R.C. 1901.31(F), R.C. 4521.05(A), and Section 459.03(c).

## II. Relators

- A. **Relator Christoff seeks a writ of prohibition because he has been, and is about to be, subject to the unlawful exercise of judicial power under Section 413.031 by Respondent Clerk and Respondent Hearing Examiners.**

The Complaint contains two counts. In Count One, Relator Anthony C. Christoff (“Relator Christoff”), who has received a Notice of Liability under Section 413.031 for alleged violations of Sections 433.03 and 413.03, seeks a writ of prohibition preventing Respondent Clerk and Respondents Hearing Examiners from continuing to unlawfully exercising judicial power over his alleged ordinance violations, and to correct the results of prior actions taken without jurisdiction.

- B. **Relator Goldstein and the class of Relators that he represents seek a writ of mandamus because Respondent Clerk and Respondent Hearing Examiners have exacted monies from them through the unlawful exercise of judicial power under Section 413.031.**

In Count Two, Relator William M. Goldstein (“Relator Goldstein”), on behalf of himself and a class of all similarly situated Relators who have had monies exacted from them by Respondent Clerk and Respondent Hearing Examiners through the unlawful exercise of judicial power under Section 413.031, seeks a writ of mandamus compelling Respondent Cleveland, Respondent Clerk, Respondent Director of Finance, and Respondent Treasurer to restore these monies to the appropriate Relators in the appropriate amounts as determined by the records that Respondent Clerk is required to maintain under R.C. 1901.31(G), R.C. 4521.07(E), and R.C. 4521.08(C), less reasonable attorneys’ fees and costs.

## LAW AND ARGUMENT

**I. Because of Respondent Clerk and Respondent Hearing Examiners' patent and unambiguous lack of jurisdiction, Relator Christoff is entitled to a writ of prohibition preventing them from continuing to unlawfully exercise judicial power over his alleged ordinance violations, and to correct the results of prior actions taken without jurisdiction.**

The prerequisites for issuing a writ of prohibition are (1) that the respondent is about to exercise judicial or quasi-judicial authority, (2) the authority is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *Department of Admin. Services v. SERB* (1990), 54 Ohio St.3d 48, 53, 562 N.E.2d 125. Relator Christoff satisfies all three requirements and is entitled to a writ of prohibition preventing Respondent Clerk and Respondent Hearing Examiners from exercising judicial power over him.

**A. Respondent Clerk and Respondent Hearing Examiners are exercising judicial or quasi-judicial authority by exercising judicial power under Section 413.031.**

By exercising judicial power under Section 413.031—specifically judicial power over Relator Christoff's alleged violation of Sections 433.03 and 413.03—Respondent Clerk and Respondent Hearing Examiners are about to exercise judicial or quasi-judicial authority.<sup>2</sup>

That which constitutes judicial power when exercised by the municipal court over “the violation of any ordinance,” remains judicial power when exercised by Respondents Clerk and Respondent Hearing Examiners. *State ex rel. Coyne v. Todia* (1989), 45 Ohio St.3d 232, 236, 543 N.E.2d 1271 (“By seeking exclusive jurisdiction at the expense of relators-mayor's courts, respondents are about to exercise judicial power—that currently [sic] exercised by the mayors.”).

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<sup>2</sup>Respondent Cleveland has previously conceded that the adjudicatory process provided by Section 413.031 involves the exercise of quasi-judicial power. *State ex rel Scott v. City of Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶15.

Respondent Clerk and Respondent Hearing Examiners are determining issues of fact, legal principles, or both, and, as a result, are exercising judicial power over violations of municipal ordinances without authority. *Hocking Valley Ry. Co. v. Cluster Coal & Feed Co.* (1918), 97 Ohio St. 140, 142, 119 N.E.2d 207 (“If the statute [here, the ordinance] in question required the determination by the clerk of any issue of fact or legal principle involved, this would have been an unwarranted exercise of judicial power.”).

Moreover, under Section 413.031(k), Respondent Clerk may further enforce determinations made by himself and Respondent Hearing Examiners through “any other means provided by the Revised Code.” R.C. 4521.08(C) provides one such “other means.” Under R.C. 4521.08(C), when the Cleveland Parking Violations Bureau finds a violation, Respondent Clerk may file a judgment or default judgment of the Cleveland Parking Violations Bureau with the Cleveland Municipal Court, which, when filed has “the same force and effect as a money judgment in a civil action rendered in that court.” This itself constitutes the exercise of judicial power by Respondent Clerk and Respondent Hearing Examiners because “[t]he proceeding contemplated by the sections of the [Codified Ordinances] now under consideration does confer power to render a judgment ... that is binding ... upon all litigants until overruled ...,” *State v. Cox* (1913), 87 Ohio St. 313, 333-334, 101 N.E. 135, and “[j]udicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.”<sup>3</sup> *Id.*

Notably, this requirement is satisfied irrespective of whether Respondent Clerk and Respondent Hearing Examiners have already exercised judicial power, because, “[p]rohibition is

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<sup>3</sup> Of course, the use of a municipal court to enforce a determination made by Relator Clerk and Relator Hearing Examiners through the exercise of judicial power does not remedy their unlawful exercise of judicial power.

not limited to prevention of *future* unauthorized judicial or quasi-judicial actions.” *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 102 Ohio St.3d 301, 302-303, 2004-Ohio-2894, 809 N.E.2d 1146, 1148, ¶11 (emphasis original). Where, as here, respondents “patently and unambiguously lack[] jurisdiction over the cause, prohibition will lie both to prevent the future unauthorized exercise of jurisdiction and to correct the results of previous jurisdictionally unauthorized actions.” *State ex rel. Stern v. Mascio* (1998), 81 Ohio St.3d 297, 298-299, 691 N.E.2d 253, 255, quoting *State ex rel. Rogers v. McGee Brown* (1997), 80 Ohio St.3d 408, 410, 686 N.E.2d 1126; *See also, Rogers*, 80 Ohio St.3d at 1127-1128 (“... rejecting a similar contention that a writ of prohibition will not issue where the respondent judge already exercised the judicial act sought to be prevented ....”).

**B. The judicial or quasi-judicial authority being exercised by Respondent Clerk and Respondent Hearing Examiners is unlawful.**

Respondent Cleveland has usurped the General Assembly’s exclusive authority under Section 1, Article IV of the Ohio Constitution to vest judicial power in courts and determine their jurisdiction by taking judicial power over certain speeding and red light ordinance violations from the Cleveland Municipal Court and giving it to Respondent Clerk and Respondent Hearing Examiners. The exercise of judicial power under Section 413.031 by Respondent Clerk and Respondent Hearing Examiners, therefore, is unlawful.

**1. Only the General Assembly may vest judicial power in a court and determine its jurisdiction.**

Section 1, Article IV of the Ohio Constitution provides:

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, *and such other courts inferior to the supreme court as may from time to time be established by law.*

(Emphasis added.)

“Established by law” means established by the General Assembly; it does not mean established by the legislative body of a municipal corporation. *State ex rel. Ramey v. Davis* (1929), 119 Ohio St. 596, 599, 165 N.E.2d 298. The power to create a court carries with it the power to define its jurisdiction. *Id.*

Cleveland’s home-rule powers do not come into play because Section 1, Article IV of the Ohio Constitution supersedes municipal home-rule powers under Section 3, Article XVIII of the Ohio Constitution. *See State ex rel. Cherrington v. Hutsinpillar* (1925), 112 Ohio St. 468, 474, 147 N.E. 647 (“Section 1, Article IV of the Ohio Constitution supersedes the general power of local self-government, as granted in Section 3, Article XVIII.”)(emphasis added); *see also Cupps v. Toledo* (1959), 170 Ohio St. 144, paragraph one of the syllabus, 163 N.E.2d 384 (“The authority granted to municipalities by Section 3 of Article XVIII, Ohio Constitution, 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’ and, by Section 7 of Article XVIII, to ‘frame and adopt or amend a charter for its government and . . . exercise thereunder all powers of local self-government’ **does not include the power to regulate the jurisdiction of courts established by the Constitution or by the General Assembly thereunder.**”)(emphasis added); and *In re Fortune* (1941), 138 Ohio St. 385, 388, 35 N.E.2d 442 (“Municipalities have no power to establish courts or regulate the administration of justice.”).

And, as this Court held in *Ramey*:

The sovereignty of the state in respect to its courts extends over all the state, including municipalities, whether governed by charter or general laws.

***None of the various provisions of article XVIII of the Constitution of Ohio are effective to abridge the sovereignty of the state over municipalities in respect to its courts.***

*Id.*, 119 Ohio St. 596, at syllabus (emphasis added). In fact, this Court made the point quite clear in *Cherrington*, holding that:

The municipalities of this state have no power by charter or otherwise, to create courts and appoint judges thereof, such exercise of power being in violation of Section 1 and 10, Article IV, of the Constitution of Ohio.

*Id.*, at syllabus.

As a result, there can be absolutely no doubt that the Ohio Constitution gives the General Assembly, and only the General Assembly, the authority to vest, or for that matter to divest, judicial power in a court, even municipal courts, and determine its jurisdiction.

2. ***The General Assembly has vested judicial power over all speeding and red light ordinance violations in municipal courts.***

Exercising its authority under Section 1, Article IV of the Ohio Constitution, the General Assembly, in a comprehensive, fully-integrated statutory scheme, has vested judicial power over all violations of municipal ordinances in municipal courts, even the most minor civilly enforced ordinances, with one meticulously circumscribed exception limited to certain “parking infractions” that may be adjudicated by a parking violations bureau. Violations of speeding and red light ordinances—whether enforced criminally or civilly—do not fall into this limited exception, and municipal courts retain jurisdiction over violations of all speeding and red light ordinances.

a. ***The General Assembly has vested judicial power over all violations of municipal ordinances in municipal courts—with the sole exception of those violations of municipal ordinances that are required to be handled by a parking violations bureau pursuant to Chapter 4521.***

Under R.C. 1901.20(A)(1), the General Assembly has unequivocally vested judicial power over all violations of municipal ordinances in municipal courts with the sole exception of

those violations that are “required to be handled by a parking violations bureau pursuant to Chapter 4521.” More specifically, R.C. 1901.20(A)(1) provides, in pertinent part:

The municipal court has jurisdiction of *the violation of any ordinance of any municipal corporation* within its territory, *unless the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code*, and of the violation of any misdemeanor committed within the limits of its territory. The municipal court has jurisdiction of the violation of a vehicle parking or standing resolution or regulation if a local authority, as defined in division (D) of section 4521.01 of the Revised Code, has specified that it is not to be considered a criminal offense, if the violation is committed within the limits of the court's territory, and if the violation is not required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code. . . .

(Emphasis added.) The term “any” ordinance means “every” and “all” ordinances. *See, State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶33.

The General Assembly, therefore, has vested judicial power in municipal courts over the violation of *any* municipal ordinance “unless the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521.” At the same time, the General Assembly has been careful to emphasize that unless the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521, municipal courts have jurisdiction over the violations of even the most minor ordinances—even where the municipality has “specified that it is not to be considered a criminal offense.”

b. *Violations of speeding and red light ordinances cannot possibly be required to be handled by a parking violations bureau pursuant to Chapter 4521 of the Revised Code.*

Violations of speeding and red light ordinances cannot possibly fall into the category of violations required to be handled by a parking violations bureau pursuant to Chapter 4521

because Chapter 4521 of the Ohio Revised Code limits the jurisdiction of a parking violations bureau to “parking infractions.” R.C. 4521.05(A) provides:

If a parking violations bureau or a joint parking violations bureau is established pursuant to section 4521.04 of the Revised Code, notwithstanding any other provision of law to the contrary, the bureau or joint bureau has jurisdiction over each parking infraction that is a violation of an ordinance, resolution, or regulation of any local authority . . . .

(Emphasis added.) R.C. 4521.01(A) defines a “parking infraction” as:

*a violation of any ordinance, resolution, or regulation enacted by a local authority that regulates the standing or parking of vehicles* and that is authorized pursuant to section 505.17 or 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* in relation to the particular regulatory ordinance, resolution, or regulation.

(Emphasis added.) And, R.C. 4521.02(A), in turn, provides, in pertinent part:

A local authority that enacts any ordinance . . . that *regulates the standing or parking* of vehicles . . . that a violation of the regulatory ordinance . . . shall not be considered a criminal offense for any purpose, that a person who commits the violation shall not be arrested as a result of the commission of the violation, and that the violation shall be handled pursuant to this chapter . . . If such a specification is made, the local authority also by ordinance, resolution, or regulation shall adopt a fine for a violation of the regulatory ordinance, resolution, or regulation and prescribe an additional penalty or penalties for failure to answer any charges of the violation in a timely manner. In no case shall any fine adopted or additional penalty prescribed pursuant to this division exceed the fine established by the municipal or county court having territorial jurisdiction over the entire or a majority of the political subdivision of the local authority, in its schedule of fines established pursuant to Traffic Rule 13(C), for a substantively comparable violation. Except as provided in this division, in no case shall any fine adopted or additional penalty prescribed pursuant to this division exceed one hundred dollars, plus costs and other administrative charges, per violation.

(Emphasis added.) Finally, the General Assembly further meticulously circumscribed the jurisdiction of parking violations bureaus by providing under R.C. 4521.05(C) that:

***If a local authority does not enact an ordinance ... of the type described in division (A) of section 4521.02 of the Revised Code in relation to an ordinance ... enacted by the local authority that regulates the standing or parking of vehicles ... a violation of the particular regulatory ordinance ... is not a parking infraction for purposes of this chapter.***

(Emphasis added.)

Thus, only “parking infractions” can be violations required to be handled by a parking violations bureau under Chapter 4521. And, “parking infractions,” in turn, can only concern the “standing or parking of vehicles.” As a result, violations of speeding and red light ordinances cannot be violations required to be handled by a parking violations bureau under Chapter 4521, and a municipality simply cannot expand the jurisdiction of a parking violations bureau beyond the jurisdiction provided by the General Assembly for “parking infractions”—particularly at the expense of a municipal court’s jurisdiction over violations of municipal ordinances.

3. ***Mendenhall v. City of Akron and State ex rel. Scott v. City of Cleveland are distinguishable from this case because they do not address Section 1, Article IV of the Ohio Constitution by which the General Assembly vested judicial power in municipal courts.***

Importantly, neither *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, nor *State ex rel. Scott v. City of Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, addresses a municipality’s unlawful intrusion upon the General Assembly’s impermeable and exclusive authority under Section 1, Article IV of the Ohio Constitution, and none of the rulings in those two cases touch upon this issue.

None of the litigants in *Scott* and *Mendenhall* raised the issue of the General Assembly’s exclusive authority under Section 1, Article IV of the Ohio Constitution to vest judicial power in

courts and determine their jurisdiction. Unlike *Scott* and *Mendenhall*, this case does not implicate a municipality's home-rule powers under Section 3, Article XVIII of the Ohio Constitution. Instead, it turns entirely upon the application of the Section 1, Article IV of the Ohio Constitution which, as noted above, this Court has repeatedly held supersedes the home-rule powers of municipalities. See *Cupps*, 170 Ohio St. 144, at paragraph one of the syllabus; *In re Fortune*, 138 Ohio St. at 388; *Ramey*, 119 Ohio St. 596, at syllabus; and *Cherrington*, 112 Ohio St. at 474.

While the issue of jurisdiction was raised in *Scott*, in its opinion this Court dealt only with the jurisdiction of Cleveland and applied the traditional home-rule conflict test found in *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140, N.E. 519 in concluding that "it is unclear whether Section 413.031 conflicts with R.C. 4521.05." *Id.*, 2006-Ohio-6573, at ¶20. This Court did not address the creation of, and vesting of jurisdiction in, the Cleveland Municipal Court—by the General Assembly pursuant to Section 1, Article IV of the Ohio Constitution and Chapter 1901 of the Ohio Revised Code.

Finally, while Relators agree with the argument briefed by the appellant in *Scott* that a parking violations bureau, as a creature of statute, has only the jurisdiction expressly conferred upon it by the General Assembly, it is unnecessary for them to make—or to prevail on—that argument because a municipal court's jurisdiction over all violations of speeding and red light ordinances is immutable.

**C. Denying the requested writ of prohibition will result in injury for which no other adequate remedy exists in the ordinary course of law.**

The patent and unambiguous lack of jurisdiction by Respondent Clerk and Respondent Hearing Examiners to exercise judicial power makes the availability of either appeal or injunction irrelevant. *Department of Admin. Services v. SERB* (1990), 54 Ohio St.3d 48, 53, 562

N.E.2d 125. The Cleveland Parking Violations Bureau is not a tribunal with general subject-matter jurisdiction and, as a result, cannot determine its own jurisdiction. *State ex rel. Sliwinski v. Unruh*, 118 Ohio St.3d 76, 78, 2008-Ohio-1734, 886 N.E.2d 201, ¶8, citing *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶16. Because a parking violations bureau “is without jurisdiction whatsoever to act, the availability or adequacy of a remedy of appeal to prevent the resulting injustice is immaterial to the exercise of supervisory jurisdiction by a superior court to prevent usurpation of jurisdiction by the inferior court.” See *State ex rel. Adams v. Gusweiler* (1972), 30 Ohio St.2d 326, 329, 285 N.E.2d 22; see also *State ex rel. Northern Ohio Telephone Co., v. Winter* (1970), 23 Ohio St.2d 6, 260 N.E.2d 827; and *Hall v. American Brake Shoe Co.* (1968), 13 Ohio St.2d 11, 13, 233 N.E.2d 582. Finally, and importantly, while R.C. 1901.30(A) provides those found violating speeding and red light ordinances with the right to an appeal to a court of appeals, Section 413.031 improperly deprives Relators of this right by providing for only an administrative appeal under Chapter 2506 of the Ohio Revised Code. See *Scott*, 2006-Ohio-6537, ¶24.

**II. Relator Goldstein and the class of Relators that he represents are entitled to a writ of mandamus requiring the restoration of all monies improperly exacted from them by Respondents through the unlawful exercise of judicial power under Section 413.031.**

“In order to be entitled to the writ of mandamus, relators must establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of respondents to provide it, and the lack of an adequate remedy in the ordinary course of the law.” *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 357, 2004-Ohio-4960, 815 N.E.2d 1107, ¶16, citing *State ex rel. Moore v. Malone*, 96 Ohio St.3d 417, 2002-Ohio-4821, 775 N.E.2d 812, ¶20. Relator Goldstein and the class of Relators that he represents are similarly situated and satisfy all three requirements for a writ of mandamus compelling Respondent Cleveland, Respondent Clerk,

Respondent Treasurer, and Respondent Director of Finance to restore all monies unlawfully exacted from Relator Goldstein and the class of Relators that he represents through the unlawful exercise of judicial power under Section 413.031.

- A. Relator Goldstein and the class of Relators that he represents are similarly situated because they all assert the same challenge to Respondents' improper exaction of monies through the unlawful exercise of judicial power under Section 413.031.**

Relator Goldstein and the class of Relators that he represents are similarly situated—indeed identically situated—because they all assert the same challenge to Respondents' improper exaction of monies through the unlawful exercise of judicial power under Section 413.031. All the claims of Relator Goldstein and the class of Relators that he represents for restoration of all monies taken without jurisdiction in violation of Section 1, Article IV of the Ohio Constitution are identical except for the amount paid by each respective Relator. As detailed below, however, these amounts are matters of statutorily required records kept by Respondent Clerk.

- B. Relator Goldstein and the class of Relators that he represents have established a clear legal right to the requested relief—restoration of all monies unlawfully exacted from them—and a corresponding clear legal duty on the part of Respondents to provide the requested relief.**

Absolutely no question exists concerning the unlawfulness of Respondent Clerk and Respondent Hearing Examiners exercising judicial power under Section 413.031. There should also be no question that Relator Goldstein and the class of Relators that he represents have established a clear legal right to the return of the monies unlawfully exacted from them, and, correspondingly, that Respondent Cleveland, Respondent Clerk, Respondent Director of Finance, and Respondent Treasurer have a clear legal duty to restore all monies that were improperly exacted from Relator Goldstein and the class of Relators that he represents.

When a court finds an ordinance unconstitutional in a mandamus action, it may direct public bodies or officials to follow a constitutional course in completing their duties. *State ex*

*rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 133, 568 N.E.2d 1206; *State, ex rel. Park Invest. Co. v. Board of Tax Appeals* (1971), 26 Ohio St.2d 161, 270 N.E.2d 342. “In other words, if a court determines that a challenged ordinance is unconstitutional, it may order a municipality to satisfy its clear legal duty, i.e., to rectify any action taken pursuant to the unconstitutional ordinance.” *Parker v. City of Upper Arlington*, 10th Dist. No. 05AP-695, 2006-Ohio-1649, ¶20. **This is true even in the absence of a controlling statute.** *State ex rel. Zone Cab Corp. v. Industrial Com.* (1937), 132 Ohio St. 437, 443-444, 8 N.E.2d 438. The same power to compel rectification holds true in a prohibition action, because “prohibition will lie both to prevent the future unauthorized exercise of jurisdiction **and to correct the results of prior actions taken without jurisdiction.**” *Hughes v. Calabrese*, 95 Ohio St.3d 334, 2002-Ohio-2217, 767 N.E.2d 725, ¶15 (emphasis added).

Here, it is appropriate for this Court to compel Respondent Cleveland, Respondent Clerk, Respondent Director of Finance, and Respondent Treasurer by writ, to restore all monies that were improperly exacted from Relator Goldstein and the class of Relators that he represents by the unlawful exercise of judicial power by Respondent Clerk and Respondent Hearing Examiners. The unlawfulness of Respondent Clerk and Respondent Hearing Examiners’ exercise of judicial power changes the status of all monies collected by them because, in reality, these monies never belonged in the hands of Respondent Cleveland, Respondent Clerk, Respondent Director of Finance, and Respondent Treasurer in the first place. *Zone Cab*, 132 Ohio St. at 443-444 (“The rationale of this concept is that the [unlawful] payments never did in reality belong in the [the clerk’s hands] ... [and are]... no longer properly a part of the fund and should be restored to the rightful owner.”). The monies, therefore, are not part of the funds properly held by them and, **even in the absence of a controlling statute**, must be restored by writ

of mandamus to the rightful owners—Relator Goldstein and the class of Relators that he represents. *Id.*

Importantly, Respondents can immediately discern how much money to restore, and to whom they should restore it, minus reasonable attorneys' fees and costs, because “[a]ll moneys paid into a municipal court *shall be noted on the record of the case in which they are paid . . .*,” R.C. 1901.31(G) (emphasis added), and because R.C. 4521.07(E) requires that “the payment of any fine, and any other relevant information shall be entered in the records of the . . . [parking violations] bureau,” over which Respondent Clerk is the violations clerk, per Section 459.03(b), and further because “the clerk shall enter the fact of payment of the money and its disbursement in the records of the bureau.” R.C. 4521.08(C). Any requirement to determine a definite amount of monies to be restored, therefore, has been eminently satisfied.

In short, as determined by this Court in *Zone Cab*, 132 Ohio St. at 443-444, even in the absence of a controlling statute, Respondents should be required to restore the monies that never belonged in their hands in the first place.

**C. Relator Goldstein and the class of Relators that he represents lack an adequate remedy in the ordinary course of law.**

Relator Goldstein and the class of Relators that he represents lack an adequate remedy in the ordinary course of law for the same reasons that Relator Christoff lacks an adequate remedy in the ordinary course of law detailed above.

**III. The writs issued by this Court should be peremptory writs of prohibition and mandamus.**

This original action satisfies the requirements for the issuance of peremptory writs. “[I]f the pertinent facts are uncontroverted and it appears beyond doubt that [relator] is entitled to the requested extraordinary relief in prohibition, a peremptory writ will be granted.” *State ex rel.*

*Duke Energy Ohio, Inc. v. Hamilton Cty. Court of Common Pleas*, 126 Ohio St.3d 41, 2010-Ohio-2450, 930 N.E.2d 299, ¶15, citing *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶14. The same test applies for the issuance of a peremptory writ of mandamus. *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 119, 2009-Ohio-4805, 914 N.E.2d 397, ¶3, citing *Sapp*, 2008-Ohio-2637, at ¶14.

There are no questions of fact here. Section 1, Article IV of the Ohio Constitution does not present a question of fact. The General Assembly's vesting judicial power and jurisdiction over certain violations of speeding and red light ordinances in the Cleveland Municipal Court does not present a question of fact. Section 413.031—which unlawfully usurps the General Assembly's exclusive authority under Section 1, Article IV of the Ohio Constitution by taking jurisdiction over certain violations of speeding and red light ordinances away from the Cleveland Municipal Court and giving it to Respondent Clerk and Respondent Hearing Examiners—does not present questions of fact. That Respondent Clerk and Respondent Hearing Examiners have, and are about to, exercise judicial or quasi-judicial power by exercising judicial power over Relator Christoff's alleged violation of Sections 433.03 and 413.03 does not present a question of fact. That denying the requested writ of prohibition will result in an injury for which no adequate remedy exists in the ordinary course of law does not present a question of fact. And, finally, that Relator Goldstein and the class he represents have had monies improperly exacted from them by Respondent Clerk and Respondent Hearing Examiners' unlawful exercise of judicial power does not present a question of fact. Simply put, no disputed facts—pertinent or otherwise—exist.

Alternatively, however, should this Court determine that peremptory writs are inappropriate, it should instead issue alternative writs of prohibition and mandamus because, at a

minimum, Relators' claims unquestionably may have merit. *See Duke Energy Ohio*, 2010-Ohio-2450, at ¶14, citing *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶8 (finding that "after so construing the complaint, it appears that its prohibition [and mandamus] claim[s] may have merit, we will grant an alternative writ and issue a schedule for the presentation of evidence and briefs.").

**IV. This Court should award reasonably attorneys' fees and costs to Relators from the amounts restored by Respondents under the common fund doctrine.**

Irrespective of whether a class is certified, Relators are entitled to an award of reasonable attorneys' fees and costs from the amounts restored by Respondents under the common fund doctrine. "The common fund doctrine is the exception to the general American rule that, absent statutory authority or a finding of bad faith, a prevailing party may not recover attorney fees as part of the cost of litigation." *Hoepfner v. Jess Howard Elec. Co.* (10th Dist.), 150 Ohio App.3d 216, 228-229, 2002-Ohio-6167, 780 N.E.2d 290, ¶¶53-54. Thus, where a fund has been created or preserved for the benefit of a class at the expense of one class member or a few class members, all members of the class may be required to share proportionately in the counsel fees incurred thereby. *See, e.g., Smith v. Kroeger* (1941), 138 Ohio St. 508, 37 N.E.2d 45, and *State ex rel. Montrie Nursing Home v. Creasy* (1983), 5 Ohio St.3d 124, 449 N.E.2d 763. This is exactly what has happened here. Accordingly, Relators are entitled to an award of reasonable attorneys' fees and costs from the amounts restored to Relators by Respondents.

**CONCLUSION**

Based on the foregoing, Relators are entitled to the requested peremptory writs of prohibition and mandamus for Relators are entitled to an award of reasonable attorneys' fees and costs from the amounts restored to Relators by Respondents. Absent this Court's issuance of the requested writs, Respondent Clerk and Respondent Hearing Examiners will continue to exercise

judicial power over ordinance violations, jurisdiction over which the General Assembly has vested in municipal courts, and Respondent Cleveland, Respondent Clerk, Respondent Finance Director, and Respondent Treasurer will continue to hold monies that they should never have had in the first place because they were exacted through the unlawful exercise of judicial power.

-- The Writ of Prohibition

The writ of prohibition should both *correct the results of prior actions taken without jurisdiction*, and preclude Respondent Clerk and Respondent Hearing Examiners from further exercising judicial power over “the violation of any ordinance” unless such “*violation is required to be handled by a parking violations bureau pursuant to Chapter 4521.02,*” namely parking infractions, or, more precisely, Respondent Clerk and Respondent Hearing Examiners should be precluded from exercising judicial power over “the violation of any ordinance” unless such “*violation is required to be handled by a parking violations bureau*” pursuant to R.C. 4521.02(A), namely, when:

- a. Respondent Cleveland enacts or has enacted an ordinance:
- b. “that *regulates the standing or parking* of vehicles;”
- c. “that a violation of the regulatory ordinance .. *shall not be considered a criminal offense for any purpose;*”
- d. “that a person who commits the violation *shall not be arrested* as a result of the commission of the violation;”
- e. “that the violation shall be handled pursuant to this chapter;” and
- f. for which a *fine* is adopted which *shall not “exceed one hundred dollars*, plus costs and other administrative charges, per violation.”

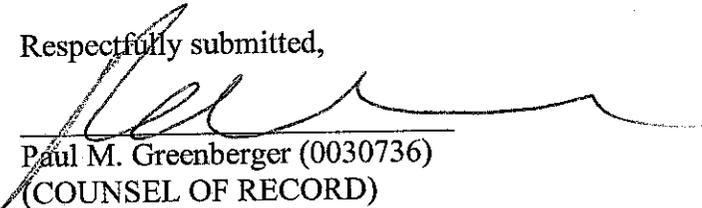
-- The Writ of Mandamus

The writ of mandamus should compel Respondent Clerk, Respondent Director of Finance, Respondent Treasurer, and Respondent Cleveland to restore to each Relator the specific amount paid by each Relator to Respondent Clerk, as appears on the records of said Respondent Clerk, for other than statutorily defined "*parking infractions*," to wit: all money collected by said Respondents under the auspices of the Cleveland Parking Violations Bureau pursuant to Section 413.031, for violations of Cleveland's speeding and red light ordinances, or collected in satisfaction of any judgment for said violations, irrespective of whether such money remains in the possession, custody, and control of Respondent Clerk, Respondent Director of Finance, Respondent Treasurer, and/or Respondent Cleveland, less attorneys fees and costs.

-- Award of Reasonable Attorney Fees and Costs

The Court should award Relators reasonable attorneys' fees and costs in an amount to be determined under the parameters of Rule 1.5 of the Ohio Rules of Professional Conduct from the amounts restored to Relators by Respondents.

Respectfully submitted,



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