

ORIGINAL

IN THE SUPREME COURT OF OHIO

BRADLEY WALKER,

Plaintiff-Appellee,

v.

CITY OF TOLEDO, *et al.*,

Defendant-Appellant.

: Case No. 13-1277
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: On appeal from the Court of Appeals
: for the Sixth District of Ohio
: App. Case No. L-12-1056
:
:

BRIEF IN SUPPORT OF APPELLEE BRADLEY WALKER OF AMICUS CURIAE 1851 CENTER FOR CONSTITUTIONAL LAW; STATE REPRESENTATIVES DALE MALLORY, JOHN ADAMS, RON MAAG, JOHN BECKER, MATT LYNCH, RICK PERALES, TERRY BOOSE, MARGARET CONDITT, TERRY BLAIR, RICHARD ADAMS, BOB HACKET, PETER STAUTBERG, CLIFF ROSENBERGER, MIKE DOVILLA, TIM DERICKSON, DAVE HALL, ALICIA REECE, LOUIS BLESSING III, BILL PATMON, PETER BECK, AND JOHN BARNES; AND STATE SENATORS KRIS JORDAN, SHANNON JONES, JOSEPH UECKER, TOM PATTON, JONATHAN ECKLUND, TIMOTHY SCHAFFER, AND WILLIAM SEITZ

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FILED
MAR 12 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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INTEREST OF AMICUS CURIAE

Formed to protect and advance Ohioans' constitutional liberties, individual rights, and prosperity through limiting state and local government to its constitutional confines, the **1851 Center for Constitutional Law** is dedicated to protecting Ohioans' control over their lives, their families, their property, and thus, ultimately, their destinies. In doing so, the 1851 Center has developed particular expertise in Ohio constitutional law, has authored numerous publications on this topic, and has achieved favorable results for Ohioans in numerous cases.

More pointedly here, the 1851 Center is committed to protecting the life, liberty, and property of Ohioans and their families from unreasonable deprivation without due process and judicial oversight. The City of Toledo's automated traffic camera ordinance attempts to exact property from Ohio drivers through administrative hearing officers, without access to an elected and accountable judge or a judge authorized by the state's duly-elected and accountable legislators. In doing so, the City maintains a system that thwarts and circumvents the structural limits contained in Sections 1 and 6 of Article IV of the Ohio Constitution, and Section 16, Article I of the Ohio Constitution.

Amicus Curiae **Ohio State Representatives and State Senators** represent and speak for, in aggregate, several million Ohioans. They maintain a distinct interest in performing the constitutional duties and functions of their offices - - the functions that they were elected by their constituents to perform, and duties that they are obligated to maintain.

Amongst these functions is the exclusive constitutional power to create "judicial power" through exercise of their authority under Section 1, Article IV of the Ohio Constitution. Because

the City of Toledo's traffic camera program is attempting to circumvent and thwart that power, these state representatives and senators have elected to intervene here.

INTRODUCTION

This case is about whether Ohio municipalities can create and exercise judicial power, and then use that power (or anything less than legitimate judicial power) to deprive Ohioans of their property. They cannot. And their conduct relating to automated traffic cameras is an assault upon the Ohio Constitution, the Ohio General Assembly, and the People of Ohio.

The People of Ohio, through their enactment of and amendments to the Ohio Constitution, created and specifically vested judicial power in the departments specified in Article IV of the Ohio Constitution. In addition, the People vested in the Ohio General Assembly the power to create additional judicial power. The People of Ohio have not delegated this power to municipalities. This arrangement evidences a *vertical* separation of powers, whereby the People of Ohio, to "secure the blessings of liberty," distribute government power amongst and between not just the legislative, executive, and judicial branches, but further, distribute it amongst and between state and local branches of government.

Meanwhile, the Ohio General Assembly has (1) abstained from vesting judicial power in automated traffic camera hearing officers; and (2) instead vested power over such infractions in Ohio municipal courts alone. Given this, the City of Toledo may not create and empower administrative hearing officers to adjudicate Ohioans rights and obligations: TMC 313.12 and 313.13 (hereinafter "TMC 313") violate Section 1, Article IV of the Ohio Constitution.

STATEMENT OF THE CASE AND FACTS

Amicus hereby incorporates the statement of the case and facts rendered by Counsel of Record, the trial court, and the Court of Appeals.

LAW AND ARGUMENT

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CITY OF TOLEDO'S AUTOMATED TRAFFIC CAMERA ENFORCEMENT PROCEEDINGS VIOLATE THE OHIO CONSTITUTION: THE CITY OF TOLEDO MAY NOT AUTHORIZE THE EXTRA-CONSTITUTIONAL EXERCISE OF JUDICIAL POWER TO DEPRIVE OHIOANS OF THEIR PROPERTY UNDER ITS AUTOMATED TRAFFIC CAMERA SCHEME

Toledo's attempted creation of judicial power to enforce its automated traffic camera system violates the spirit and letter of Section 1, Article IV of the Ohio Constitution, and accordingly, the Court of Appeals should be upheld. Section 4, Article I declares as follows: "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." In examining each constituent element of this Section, alongside all governing considerations of constitutional construction and interpretation, one overwhelming clear conclusion is as follows: unless expressly sanctioned by the Ohio General Assembly, Ohio cities may not circumvent elected Ohio judges by establishing *faux* courts to adjudge the rights and liabilities under a municipal ordinance.

Even further, the Toledo Municipal Code's automated traffic camera enforcement scheme thwarts the acts, pursuant to well-defined and exclusive constitutional authority, of the Ohio General Assembly, and thwarts the jurisdiction of the Toledo Municipal Court. Through R.C. 1920, the General Assembly has vested judicial power over municipal ordinances in Ohio's municipal courts alone, unless it has specifically stated otherwise. Here, the City of Toledo attempts to transfer that authority to itself and its own administrative hearing officers.

To be sure, this is an assault through the back door rather than a full frontal assault: rather than ripping jurisdiction over an existing ordinance away from the Municipal Court, the

City of Toledo has created an entirely *new* ordinance, and simply created a means of adjudicating the rights, liabilities and obligations under that ordinance. While this may render Toledo's conduct less offensive at first blush, the difference is one without meaningful distinction. If it were so, the City could rewrite old ordinances and create a flurry of new ones, each time creating hearing officer authority to enforce them, and each time circumventing and thwarting Ohioans' right to judicial oversight prior to deprivation of their property.

For these reasons, Toledo Municipal Code 313 is invalid, as is any fine issued pursuant thereto.

A. TMC 313.12 and 313.13 impermissibly authorize the exercise of "judicial power."

The first element of Section 4, Article I is its application to "judicial power." Toledo has unlawfully authorized governmental officials who are not elected judges to adjudicate rights and liabilities of citizens through the exercise judicial power.

Ohio Courts have specifically defined the term "judicial power": "judicial power is the power to decide and pronounce a judgment and carry it into effect in a controversy between two or more persons who by right bring that case before the court for its decision. Such decisions usually, but do not always, involve an exercise of discretion by the judicial officer who makes them."¹

"Those duties which do involve the exercise of judicial power are reserved to the judge and may not be delegated, by statute, order, or rule. Any determination of a fact or legal principle upon which the rights of one or more of the parties before the court is decided is an exercise of

¹ *State v. Wilson*, 102 Ohio App.3d 467, 657 N.E.2d 518 (1995).

the judicial power which may not be delegated to the clerk [of courts],"² for example. To that end, helpfully here, this Court has held that "A clerk of courts is a ministerial officer, one who performs a fixed and designated function that involves no exercise of discretion. The clerk makes and has custody of the court's records, has the power to certify the correctness of transcripts from those records, and files the court's papers, enters its judgments, and issues writs and process in the court's name * * * The clerk is not a judicial officer, and cannot perform judicial duties or act in exercise of the judicial power."³

Of note in *State v. Wilson*, the Court held that an act whereby the clerk determined whether one's license should be forfeited in response to a failure to pay certain court costs, *a civil, rather than criminal punishment*, yielded an exercise of "judicial power." There, the Court, accurately citing clear Ohio Supreme Court precedent, concluded that "that declaration of forfeiture is not a mere ministerial act. It is an exercise of the judicial power because it was based on a finding of fact: that Wilson had failed to pay his fine within the time allowed by the court. For that reason, and because the declaration was a judgment on a question of property, due process of law required its determination by a judge of the court, after Wilson had received notice and an opportunity to be heard. Therefore, the declaration by the clerk of courts was not merely voidable for error, but void, notwithstanding the prior administrative order of the court."⁴

This leaves the question here as "what is a TMC 313 hearing officer?" More like a clerk - - administrative and ministerial in character; or more like a judge? As will be seen below, a

² Id., citing *Hocking Valley Ry. Co. v. Cluster Coal & Feed Co.* (1918), 97 Ohio St. 140, 119 N.E. 207.

³ Id., citing *Mellinger v. Mellinger* (1906), 73 Ohio St. 221, 76 N.E. 615.

⁴ Id., at 472, 473, citing *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St.3d 46, 554 N.E.2d 97.

hearing officer cannot be a judge, because *the City of Toledo cannot create judges*. Yet, if this office is not "judicial in character," then the hearing officer, as is the case with a clerk of courts, "cannot perform judicial duties," such as exercising discretion to "determine facts or legal principles."⁵

However, *this is exactly what the City of Toledo authorizes hearing officers to do*. Drivers are mailed a "notice of liability" after a traffic camera suggests that they have engaged in the acts of (1) speeding; or (2) entering an intersection after that intersection's traffic light turns red. Unless appealed within 21 days, the citation becomes a final judgment and \$120 fined owed to the city. TMC 313.13(d)(4) describes the process for appealing such a citation:

A notice of appeal shall be filed with the Hearing Officer within twenty-one (21) days from the date listed on the 'Notice of Liability.' The failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the citation and will be considered an admission. Appeals shall be heard through an administrative process established by the City of Toledo Police Department. A decision in favor of the City of Toledo may be enforced by means of a civil action or any other means provided by the Ohio Revised Code.⁶

Thus, *any issue* related to one's citation must be adjudicated by the hearing officer. This includes loaded factual and evidentiary issues, such as whether the traffic cameras were "in good working condition" at the time of the citation (TMC 313.12(b)(2) and (3)).

While the City of Toledo Police Department apparently never established an administrative process, it is undisputed that the Hearing Officer adjudicates evidentiary issues bearing on whether the driver was speeding or running a red light. Drivers who dispute the

⁵ Id.

⁶ Appellee's Public Records Requests verify that such procedures were never established in writing.

hearing officer's determination, and do not pay up, face immobilization and/or seizure of their vehicle (TMC 313.12(d)(4)).⁷

Consequently, the TMC 313 hearing officers are masquerading as "judicial officers." And this alone renders TMC 313 plainly impermissible: "Both constitutional and statutory courts are clothed with the judicial power and may exercise that power to the extent of their jurisdiction. Exercise of that power in any manner which determines the individual rights of any person is reserved to the judge or judges of each of those courts, who holds office according to law and is commissioned to exercise the judicial power of his or her court."⁸

B. The TMC 313 hearing officers are "of the state," but not a "court . . . established by law," unless authorized by the General Assembly.

At first blush, the terms "of the state" and "established by law" could be viewed as including "law" created by a municipal ordinance, or exempting courts created by something other than "the state." Such readings, however, would be mistaken: the term "of the state" applies to all courts, including current Ohio municipal and mayors courts, and the term "established by law" applies only to acts of the Ohio General Assembly. In *State v. Hutsinpiller*, this Court deliberately (and logically) addressed each issue.⁹

There, the municipality contended that "[the] authority of municipalities to exercise 'all powers of local self-government' carries with it a sovereign power in itself, and that the creation

⁷ The seizure of private vehicles to benefit private Australians (Redflex, a private Australian corporation keeps half of the revenue collected by Toledo) reminds one of science fiction movies such as *Mad Max Beyond Thunderdome*. However, this is not a post-apocalyptic and lawless Australian outback of warring tribes - - this is Toledo, Ohio, which is governed by a Constitution. Compare Sections 1 and 4 of Article IV, Ohio Constitution with <http://www.imdb.com/title/tt0089530/>, last checked March 10, 2014.

⁸ *Wilson*, supra., at 471.

⁹ 112 Ohio St. 468 (1925).

of a court is one of the incidents thereto, especially if construed with reference to matters pertaining to purely local affairs."¹⁰ This Court responded by explaining, in pertinent part here, as follows: (1) "The sovereign power in this state abides with the people of the state, and not with the subdivisions thereof, and the highest expression of this power is found in the Constitution itself, being that body of rules, regulations, and political canons in accordance with which the powers of sovereignty are to be habitually exercised;" (2) "The right to exercise judicial authority as an incident to its sovereignty the state has, by section 1, article IV, vested in the courts therein named, and 'such other courts inferior to the courts of appeals as may from time to time be established by law.'"¹¹

Prior to the adoption of the amendments to the Constitution of 1912, to wit, in the Constitution of 1851, this section of the Constitution read, 'such other courts * * * as the General Assembly may, from time to time, establish,' and such was likewise the substance of the language of the Constitution of 1802. Given this change, the Court acknowledged the City's argument as follows: "It is argued that the amendments to the Constitution in 1912 took from the General Assembly the exclusive power to establish courts inferior to courts of appeals, and by implication granted to municipalities power to establish courts inferior to the courts of appeals, as they saw fit, as an incident to the power of local self-government granted to municipalities under section 3, art. XVIII."¹² The Court thoroughly rejected this argument, laying out the logical case as to why only the General Assembly could establish courts. Because

¹⁰ Id., at 472.

¹¹ Id.

¹² Id.

this reasoning is entirely on point and governs the outcome in this case, it must be quoted in its lengthy entirety:

This is a construction with which we cannot agree, for it allows, by implication only, the municipalities of the state the freedom to exercise this incident of sovereignty, to wit, creation of courts. A power so extraordinary and vital should not rest upon any less foundation than express grant or clear and necessary implication, and we find neither in the Constitution. The change in the phraseology from ‘as the General Assembly may, from time to time, establish,’ as provided in the Constitution of 1851, to the expression ‘be established by law,’ as appears in the amendments of the Constitution, of 1912, is to be construed as conveying no change of meaning, to wit, that courts shall be created by the exercise of the sovereign power by the lawmaking body, to wit, the General Assembly of the state. * * *

The duty of providing courts of justice is a governmental function of the state, and the authority to establish a court must emanate from the supreme power of the state, otherwise the court itself is an absolute nullity, and all its proceedings are utterly void. * * * The judicial power of the state is distinct from the executive and the legislative, and as one of the highest elements of sovereign power can only be created in strict conformity to the manner indicated by the rules laid down in the expression given to sovereignty by the people themselves, to wit, the Constitution.

This judicial power has been cared for by the organic law, and is beyond the control of municipalities, which, after all, are only agents of the state for local governmental purposes. Section 1, art. IV, is a special provision of the Constitution that has to do with the creation of courts, and as such supersedes the general power of local self-government, as granted in section 3, art. XVIII. After all, no power of local self-government in the municipality is interfered with by this denial of the power to create courts. All the executive, legislative, proprietary, and general governmental powers incident to municipal government may still be exercised, and legal rights, arising under state law and municipal ordinance, be measured by local judges sitting in courts created under constitutional sanction, applicable alike to *all* municipalities of the state. * * *. Local self-government does not extend so far as to override plain constitutional limitations. Even the Legislature cannot create a court by mere majority, but by section 15, art. IV, a two-thirds vote is required, thus indicating the care to be exercised in creating a court. We are, therefore, of opinion that no power exists in the municipalities of this state by their own fiat, by charter or otherwise, to create a court or courts, and thus seek to exercise the judicial power in contravention of section 1, art. IV, of the Constitution.¹³

¹³ Id., at 474, 475.

Thus, this Court has conducted plain language analysis and construction of the term "established by law," and determined that Section 1, Art. IV of the Ohio Constitution only empowers the Ohio General Assembly to create, through legislation, the authority to exercise "judicial power." Municipalities may not perform this function.

This conclusion is logically sound. It is true that the constitutional amendments of 1912 changed the language of the Section away from "as the General Assembly may, from time to time, establish," to the expression "as may from time to time be established by law." However, there was no debate on the measure during the 1912 convention, and there is absolutely no evidence that the ratifiers of the 1912 convention amended this language to (1) deliberately reject the exclusivity of the General Assembly's authority; or (2) bestow the authority to create "judicial power" upon municipalities.

In this sense, the change in language is akin to other amendments to Article IV, which have been found not to alter the meaning of its terms, despite changed language. As one prominent example, Section 4(B), Article IV, added to the Ohio Constitution in 1968, merely indicates that Ohio Courts of Common Pleas have jurisdiction over "all justiciable matters." Justices of this Court, in interpreting Section 4(B), Article IV, explain the non-event that was the enactment of the justiciability requirement: "[a]s I understand it, the underlying premise of the majority is that the 1968 amendment to Section 4, Article IV of the Ohio Constitution was the enactment of this court's justiciable case or controversy construction placed upon the original version of Section 2, Article IV. The majority opinion states that the use of the phrase 'proceedings of administrative officers' shows an intent by the framers of the amendment to maintain the impact of the decisions of the court. *I agree, and add that the insertion of the word 'justiciable' flavors the entire amendment and represents definite ratification of the*

interpretations previously issued by this court."¹⁴ Thus, minor changes to the language of Article IV do not typically amount to dramatically-changed meaning.

Moreover, it would be an odd result indeed if this Court were to find 100 years after that amendment, for the first time, that such an earth-shaking power had been conferred on municipalities. Finally, such a construction would pit Article IV against itself: as discussed below, Section 6 of Article IV, alongside constitutional due process guarantees, evidences a public policy in favor of elected judges deciding Ohioans' rights and obligations, rather than unaccountable appointed administrators.

Principles of separation of powers derived at the federal level hold true here, and enlighten our understanding of why the Ohio Constitution vests the creation of judicial power in the Ohio General Assembly, and not in municipalities at the same time. "[T]he Constitution divides authority . . . *for the protection of individuals*. [This division] *secures to citizens the liberties that derive from the diffusion of sovereign power.*"¹⁵ At the federal level, "[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers *to ensure the protection of 'our fundamental liberties.'*"¹⁶

Accordingly, Alexander Hamilton explained to the people of New York that the new federalist system would suppress completely "the attempts of the government to establish a tyranny": "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and *these will have the same disposition towards the general government. The people, by throwing themselves into either*

¹⁴ *Fortner v. Thomas* 22 Ohio St. 2d 13, 20, 257 N.E.2d 371, 375-76 (1970)(Duncan, J., concurring).

¹⁵ *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408 (1992).

¹⁶ *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147 (1985).

scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress."¹⁷

James Madison reverberated this principle, observing "In the compound republic of America, *** a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."¹⁸ This division of power "is more than an exercise in setting the boundary between different institutions of government for their own integrity . . . [it] secures the freedom of the individual."¹⁹

If this "double security to the rights of the people" is to be anything other than pyrrhic in Ohio, municipalities must be stopped from creating their own judicial power to enforce their own ordinances, all of the while diverting that power away from municipal court established and vested with jurisdiction by the Ohio General Assembly.

For each of these reasons, the "judicial power of the state" refers even to judicial power more local in character,²⁰ and "established by law" refers to the General Assembly alone. Given the plain meanings and constructions discussed thus far, this Court must conclude that the TMC 313 hearing officer (1) exercises "judicial power of the state;" and (2) exercises judicial power of the state that is *not* "established by law," unless the General Assembly has explicitly created such authority.

¹⁷ The Federalist No. 28, pp. 180-181 (C. Rossiter Ed. 1961). (Emphasis added).

¹⁸ Id., No. 51, p. 323.

¹⁹ *Bond*, 131 S. Ct. at 354.

²⁰ Courts have consistently determined that Ohio's municipal courts are "arms of the state" and "agents of the state." See *Davis v. Jackson County Mun. Court* (S.D. Ohio, 04-23-2013) 941 F.Supp.2d 870; *Sampson v. City of Xenia* (S.D. Ohio, 03-19-1999) 108 F.Supp.2d 821.

C. The General Assembly has not "established by law" the judicial power of the TMC 313 hearing officers; and *has* established municipal court to enforce municipal laws.

The General Assembly has never authorized the City of Toledo to vest "judicial power" in its traffic camera hearing officers. Two legislative acts and one omission verify this outcome.

First, R.C. 1901.01(A) states "there is hereby established a municipal court in each of the following municipal corporations: * * * Toledo * * *."

Second, the General Assembly has through R.C. 1920.01 defined the jurisdiction of the Toledo Municipal Court, stating "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. * * *."

Third, the omission: General Assembly has never conferred judicial power upon municipal hearing officers to determine the rights and liabilities of Ohioans ensnared in alleged automated traffic camera violations.

These two acts and this one omission make clear that General Assembly has never conferred judicial power upon municipal traffic camera hearing officers. First and foremost, the

General Assembly has never expressly conferred judicial power upon municipal traffic camera hearing officers. On this front, there is no dispute.

Secondly, the General Assembly has never impliedly conferred judicial power on traffic camera hearing officers. There is no serious dispute as to this either.

Third, "jurisdiction of the violation of any ordinance" is expressly invested in the Toledo Municipal Court ("the municipal court *has* jurisdiction of. . ."). Meanwhile, the General Assembly expressly exempted from the jurisdiction of the Toledo Municipal Court "any violation [that] is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521 of the Revised Code."

Thus, the only "judicial power of the state. . . established by law" over "any ordinance" of Toledo is delegated to the Toledo Municipal Court, unless that ordinance relates to a parking violation. TMC 313 is an "ordinance of" a municipality within the jurisdiction of the Toledo Municipal Court. Consequently, jurisdiction over it is expressly conferred on the Toledo Municipal Court.

As Justice Marshall famously expressed in *Gibbons v Ogden*, "the enumeration presupposes something not enumerated."²¹ What has been enumerated here is the jurisdiction of the Toledo Municipal Court over "any ordinance" unrelated to parking. Accordingly, jurisdiction elsewhere has not been enumerated. Likewise, an exemption for this general rule was enumerated for parking violations. No similar exemption is enumerated for automated traffic camera violations. Consequently, the General Assembly has never vested judicial power

²¹ *Gibbons v. Ogden*, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). Just as the federal constitution "withholds from Congress a plenary police power that would authorize enactment of every type of legislation" through enumerating specific governmental powers, R.C. 1920.01 withholds plenary local jurisdiction and judicial power by vesting that power in municipal courts only.

in TMC 313 hearing officers; and jurisdiction over Toledo traffic camera violations is vested in the Toledo Municipal Court alone. As such, proceedings before TMC 313 hearing officers are in derogation of Section 1, Article IV of the Ohio Constitution, and the consequences of such proceedings are invalid and void.

D. Traffic Camera proceedings before hearing officers transgress fundamental constitutional principles.

In addition to flagrantly violating Section 4, Article I of the Ohio Constitution, forcing Ohioans to defend themselves before hearing officers burdens and suppresses their right to defend themselves before an elected judge as well as their due process rights.

i. TMC 313 violates Ohioans' rights to defend themselves before an elected judge.

This Court has rightly identified a seminal principle of constitutional construction to be that "the Constitution must be read and construed in its entirety so as to give harmonize and give force and effect to all its provisions."²² The default position of the Ohio Constitution is that an elected and fully accountable judge should determine Ohioans' rights and liabilities (only the Ohio General Assembly may alter this, and only then by a super-majority vote). Section 4, Article I, alongside R.C. 1920.01 and any other statutes promulgated thereunder must be harmonized and construed to give full force and effect to the Ohio Constitution's expressed preference for adjudication of Ohioans' rights and liabilities *by elected judges*.

Section 6, Article IV mandates the election of judges of the Ohio Supreme Court, appellate districts, and the courts of common pleas. That Section also outlines basic qualifications related to residence, qualifications, and conflicts of interest.²³ Meanwhile, the

²² *Correll v City of Cincinnati*, 141 Ohio St. 535 (1943).

²³ See Section 6(A)(1)-(4), (B), (C), Article IV of the Ohio Constitution.

Ohio General Assembly, whose members are of course elected themselves and therefore accountable, has required that municipal judges be qualified and elected.²⁴

Importantly, neither the Ohio Constitution nor the Ohio General Assembly (nor even the Toledo Municipal Code itself) delineates the minimum qualifications for traffic camera hearing officers. However, elections are “powerful legitimacy-creating institutions” that “create an inextricable link” between the voters and those they elect.²⁵ Creating that link between judges and the state’s voters is important, if for no other reason than that “elected judges know for whom they work and who pays their salary.”²⁶ Whatever the policy rationale, Ohioans have made this choice, and Ohio municipalities may not overturn or undermine it.

Ohioans have expressly chosen (1) elected judges; and (2) strict controls over unelected judges through elected members of the Ohio General Assembly. Section 1, Article IV must be construed so that enterprising municipalities cannot circumvent these constitutionally-expressed preferences. As such, it must be construed in favor of a conclusion that Toledo’s unaccountable and unauthorized hearing officers may not exercise judicial power to impose liability on Ohio drivers.

Directly subsequent to the passage of the 1851 Constitution, this Court explained that “[a]ll the judicial power of the state is vested in the courts designated in the Ohio Constitution;

²⁴ R.C. 1901.06; R.C. 1901.07(A).

²⁵ *JUDICIAL ELECTIONS: THE CASE FOR ACCOUNTABILITY*, by Jack Park. Akron Journal of Constitutional Law and Policy, at 2:163 2011. Available at http://www.akronconlawjournal.com/articles/Park_ConLaw_2010-2011.pdf. Last checked March 10, 2014.

²⁶ *Id.*, citing Stephen Choi, *et al.*, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 290, 309, 315 (2010).

upon the creation of any additional court by the legislature, the judicial officer must be elected by the electors of the district for which such court is created and it is not within the competency of the legislature to clothe with judicial power any officer or person not elected as a judge."²⁷ This emphasis on the importance of an adjudication of rights and obligations by elected officials continues today.²⁸

ii. TMC violates Ohioans' Due Process right to judicial oversight before deprivation of their vehicles.

Section 1, Article IV of the Ohio Constitution must be read and construed so as to give force and effect to Ohioans' due process guarantees articulated in Section 16, Article I. However, in express defiance of this Court's clear precedent, TMC 313 mandates the immobilization of Ohioans' vehicles without judicial oversight. In *State v. Hochhausler*, this Court explained that "Due process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner where the state seeks to infringe a protected liberty or property interest."²⁹ More specifically, the Court held that the vehicle-seizure provision of then-R.C. 4511.195 was

²⁷ *Ex parte Logan Branch* (Ohio 1853) 1 Ohio St. 432. There, the Court found that Section 1, Article IV was violated by an Act providing that "the state auditor shall decide all questions in relation to any tax levied or proceeding under the same subject to an appeal to the supreme court."

²⁸ *State ex rel. Whitehead v. Sandusky Cty. Bd. of Commrs.*, 133 Ohio St.3d 561, 979 N.E.2d 1193 (2012) (holding "R.C. 1901.08 is unconstitutional because the General Assembly does not have power to appoint judges under the Ohio Constitution," and in addition, R.C. 1901.08 is unconstitutional because the judges of the county court were never elected to serve on the municipal"), citing *Ex Parte Logan Branch of State Bank of Ohio*, 1 Ohio St. 432, 434(1853) ("it is perfectly clear that, upon the creation of any additional court by the Legislature, the judicial officer must be elected, as such, by the electors of the district for which such court is created; and it is not within the competency of the Legislature to clothe with judicial power any officer or person, not elected as a judge").

²⁹ 76 Ohio St.3d 455, 668 N.E.2d 457 (1996), citing *Greene v. Lindsey* (1982), 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249; *Boddie v. Connecticut* (1971), 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113; *Williams v. Dollison* (1980), 62 Ohio St.2d 297, 299, 16 O.O.3d 350, 351, 405 N.E.2d 714, 716.

unconstitutional because no proper hearing or "opportunity to contest" was provided prior to a vehicle being seized and immobilized.³⁰ In so holding, the Court emphasized that "[c]learly, there is a substantial interest in the possession and use of a vehicle;" "[a]utomobiles occupy a central place in the lives of most Americans," "a delay, with no statutory mechanism to provide for immediate review, significantly increases the weight of the private interest of the vehicle owner;" and "even the temporary denial of possession and use of the vehicle inflicts too severe a hardship on the individual wrongfully deprived."³¹

Here, as in *Hochhausler*, "[t]he procedures set forth in the statute virtually ensure the erroneous deprivation of * * * property."³² TMC 313.12(d)(6) operates in a draconian fashion, providing for immobilization and seizure of drivers' vehicles without *any* judicial oversight, much less the oversight of an elected and accountable Ohio judge: "In lieu of assessing an additional penalty, pursuant to subsection (d)(5) above, the City of Toledo may (i) immobilize the vehicle by placing an immobilization device (e.g. a "boot") on the tires of the vehicle pending the owner's compliance with the Notice of Liability, or (ii) impound the vehicle, pursuant to TMC Section 303.08(a)(12). Furthermore, the owner of the vehicle shall be responsible for any outstanding fines, the fee for removal of the immobilization device, and any costs associated with the impoundment of the vehicle."

This deprivation, prior to and entirely without judicial oversight, violates the most basic precepts of due process, as chronicled by this Court in *Hochhausler*. Consequently, Toledo's

³⁰ Id.

³¹ Id.

³² Id, at 469.

shirking of judicial oversight over automated traffic camera liabilities violates not just Section 1, Article IV, but also attacks Ohioans' due process rights.

CONCLUSION

The purpose of this brief is to substantiate the logical underpinnings of Section 1, Article IV, and how they apply here. However, *amici* would be remiss not to observe that this Court has already decided this case against the City of Toledo. Twice.

In *State ex rel. Ramey v. Davis*, this Court held in its Syllabus that "[t]he 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," "the Legislature has the exclusive power to create courts inferior to the Courts of Appeals, and the power to create a court carries with it the power to define its jurisdiction and to provide for its maintenance."³³ There, the Court observed that this same City, Toledo, "sought the aid of the only body having the power to create for it such a court as it desired, and now has . . . a court that has . . . jurisdiction in cases arising out of the violation of the ordinances of the municipality."³⁴ This Court concluded that the City was obliged to maintain the Toledo Municipal Court; and such maintenance no doubt includes maintenance of its jurisdiction over "cases arising out of the violation of the ordinance of [Toledo]."

This Court reaffirmed these principles in *Cupps v. City of Toledo*, specifically holding in its Syllabus that "the jurisdiction of the Court [created by the General Assembly]. . . cannot be

³³ 119 Ohio St. 596, 165 N.E. 298 (1929).

³⁴ *Id.*

impaired or restricted by a provision of a municipal charter or ordinance."³⁵ There, as here, the City of Toledo attempted to create its own judicial power to address local matters (there, jurisdiction over an appeal from the decision of the office issuing such order suspend or discipline a police offer, "to the civil service commission." There, as here, the General Assembly had provided for jurisdiction to reside in a court it created. And this Court responded by explaining that, "Municipalities have no power to establish courts or regulate the administration of justice," "the city had no right to alter that jurisdiction by charter or ordinance," and "'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."³⁶ "To state it more aptly, the jurisdiction of the Court of Common Pleas to hear an appeal such as made here cannot be impaired or restricted by any municipal charter or ordinance provision."³⁷

Here, the City of Toledo has yet again assaulted the People of Ohio's express delegation and distribution of government powers, the jurisdiction of a constitutionally-created court, and the constitutionally authorized powers and acts of the Ohio General Assembly, albeit through the back door creation of a new ordinance, rather than a classic divestiture under an old one. And yet again, the City of Toledo has failed to present any compelling reason why this Court should sanction this extra-constitutional power-grab.

The Toledo Municipal Code's method of enforcing automated traffic camera citations strips Ohioans of their rights to judicial oversight and due process, while stripping the legislature

³⁵ 170 Ohio St. 144, 163 N.E.2d 384 (1959).

³⁶ *Id.*, at 387-388.

³⁷ *Id.*

of its exclusive constitutional powers. Consequently, the Appellate Court's decision must be affirmed, and Toledo's traffic camera proceedings must be enjoined and declared unlawful.

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