

**IN THE SUPREME COURT OF OHIO**

CITY OF DAYTON,	:	Supreme Court Case No. _____
	:	
Plaintiff-Appellant,	:	On Appeal from the Montgomery
	:	County Court of Appeals,
v.	:	Second Appellate District
	:	(Case No. 26643)
STATE OF OHIO,	:	
	:	
Defendant-Appellee.	:	

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT CITY OF DAYTON**

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**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION  
AND IS OF PUBLIC AND GREAT GENERAL INTEREST**

The Second District Court of Appeals has issued an extraordinary decision – that the Ohio General Assembly may legislate the Home Rule Amendment out of existence by simply burying unconstitutional statutes within larger bills. The specific question before the Court is whether three provisions of Amended Substitute Senate Bill 342 (“SB 342”), whose sole purpose is to restrict municipal authority to enact automatic traffic enforcement programs, constitute general laws and prescribe rules of conduct on citizens generally, as they must under the Home Rule Amendment of the Ohio Constitution. Although three trial courts found that the contested provisions of SB 342 were unconstitutional as a matter of law, the Second District held that these provisions were general laws because the bill in which they were contained included provisions that are not constitutionally invalid. Thus, the Second District allowed the State to circumvent this Court’s decisions in *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255 and *Walker v. City of Toledo*, Slip Op. No. 2014-Ohio-5461, ¶¶ 3, 29 (Dec. 18, 2014), that Ohio municipalities have the authority under the Ohio Constitution to impose civil liability on traffic violations through automated traffic enforcement systems.

This is a case that involves both a substantial constitutional question and an issue of great public importance.

Approximately twenty Ohio cities have, or have had, ordinances providing for automated traffic photo-enforcement programs. Besides Dayton, these cities include Akron, Ashtabula, Campbell, Chillicothe, Cleveland, Columbus, East Cleveland, Garfield Heights, Hamilton, Heath, Middletown, Newburgh Heights, Parma, Parma Heights, Richmond Heights, Rutland, Springfield, Steubenville, Toledo, Trotwood, and West Carrollton, and Youngstown. These cities have passed automated traffic enforcement program ordinances to promote traffic safety;

amounts collected from violators of these traffic ordinances are typically dedicated to public safety. Moreover, it is undisputed that traffic photo enforcement programs save lives, reduce accidents, and make roadways safer. In Dayton alone, there was a 45 percent decrease in red light related accidents, and a 30 percent decrease in overall accidents where photo enforcement cameras were installed. Furthermore, every Ohio municipality has an interest in Home Rule Authority.

The Court of Appeals' opinion raises a substantial constitutional question: is a legislatively-enacted de facto ban on cities' use of photo enforcement programs to police traffic within their own borders a violation of the Home Rule Amendment? The constitutional impact of the Court's decision on this question does not end with photo-enforcement programs, however. If left to stand, the Court of Appeals' decision *would change home-rule jurisprudence in an astonishing way by providing that if the General Assembly wants to court-proof a piece of legislation that violates Home Rule, it need only bury it in a larger piece of legislation.* Not only does this ignore this Court's precedent requiring a reviewing court to analyze the merits of challenged provisions individually to ensure that they respect Home Rule Authority, but it would render the protections provided in the Home Rule Amendment meaningless.

## **STATEMENT OF THE CASE AND FACTS**

### **The Contested Provisions**

The day after this Court issued its opinion in *Walker*, upholding municipal authority to enact automated traffic enforcement programs, Governor Kasich signed SB 342 into law. SB 342 amended or enacted over a dozen sections of the Ohio Revised Code<sup>1</sup> for the purpose of

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<sup>1</sup> SB 342 amends R.C. §§ 1901.20, 1907.02, 4511.094, and 4511.204; amends for the purpose of adding a new section number as indicated in parenthesis, § 4511.093 (4511.043); enacts §§ 3937.411, 4511.095-4511.099 and §§ 4511.0910-4511.0914; enacts new sections 4511.092 and 4511.093; and repeals § 4511.092.

restricting cities' authority to enact automated traffic monitoring programs. SB 342 contained three provisions that common pleas courts in Montgomery, Summit, and Lucas Counties held violated Home Rule Authority under the Ohio Constitution (the "Contested Provisions"):

*The Officer Present Requirement:* New R.C. 4511.093(B)(1) provided that a local authority "may utilize a traffic law photo-monitoring device ... **only if** a law enforcement officer is present at the location of the device at all times during the operation of the device[.]" (Emphasis added.) The Officer Present Requirement interferes with local authority to decide how best to deploy law enforcement resources, without serving any obvious purpose. Indeed, the Officer Present Requirement does not require that the officer be in a marked patrol car, looking at the street, looking at automobiles, looking at the traffic signal, or even paying attention to anything in particular. The officer just has to be present in body at the location of a device. Moreover, in order to serve its purpose of maximizing expense to municipalities, the statute requires that the officer be a full-time officer in the jurisdiction. So even though Ohio law allows a part-time police officer to make felony arrests, he or she is deemed unfit by SB 342 to sit and be present at the location of a traffic camera.

The sole function of the Officer Present Requirement is to make it prohibitively expensive for cities to utilize automated photo enforcement programs. Indeed, the sponsor of SB 342 bluntly disclosed that his purpose in sponsoring the legislation was to "force most cities to make hard choices about law enforcement priorities, and would likely reduce the number of operating cameras."<sup>2</sup> The Ohio Legislative Service Commission (LSC) determined that putting officers at each device around Ohio would cost cities \$73 million per year.<sup>3</sup>

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<sup>2</sup> Senator William Seitz, Sponsor Testimony, House Policy and Legislative Oversight Committee, December 2, 2014.

<sup>3</sup> See <http://www.lsc.ohio.gov/fiscal/fiscalnotes/130ga/sb0342sp.pdf>.

*The Three-Year Study Requirement:* New R.C. 4511.095(A) required that cities must “conduct a safety study of intersections or locations under consideration for placement of fixed traffic law photo-monitoring devices.” Under this provision, safety studies “*shall* include an accounting of incidents that have occurred in the designated area *over the previous three-year period* and shall be made available to the public upon request.” (Emphasis added.) In addition, this provision requires cities to conduct “a public information campaign to inform motor vehicle operators about the use of traffic law photo-monitoring devices at system locations prior to establishing any of those locations.”

The Three Year Study Requirement restricts not only municipalities’ authority to deploy law enforcement resources as they see fit, but it also restricts municipal legislative decision making. Under the Three Year Study Requirement, Ohio cities can no longer pass emergency legislation or use their powers to address immediate community needs. This is a real issue, as Akron, for example, enacted its automated photo traffic enforcement program pursuant to an emergency ordinance, after the tragic death of a child in a school crosswalk. *See* Akron Emergency Ordinance 461-2005 (Sept. 19, 2005).

The Three Year Study Requirement is, moreover, purposeless. The statute does not require the study to be referenced in a city’s decision as to whether to place a traffic camera at a new location, and a city is allowed to install a new traffic camera regardless of the outcome of the study.

*The Speeding Leeway Provision:* New R.C. 4511.0912 provided that municipalities “shall not issue a ticket for a violation” of local speed limits unless “the vehicle involved in the violation is traveling at a speed that exceeds the posted speed limit by not less than” six miles per hour in a school or park zone, or ten miles per hour elsewhere. The Speeding Leeway Provision

impedes municipalities' ability to enforce speed limits within their borders – and particularly in school and park zones, where accidents are particularly likely and the consequences of accidents are particularly tragic. The Legislature has offered no justification for this restriction on cities' ability to protect their citizens' safety.

#### Dayton's Program and Constitutional Challenges by Ohio Cities

Dayton operates 36 speed and/or red light violation cameras at locations throughout the city. Dayton does not have the police resources or money to station police officers at each of its automated traffic cameras, and requiring a Dayton police officer to be present at each camera will force Dayton to discontinue its program. Dayton issues a civil notice of violation to the registered owner of a vehicle that is caught running a red light or speeding. Dayton's traffic cameras provide both video and photographs of offending vehicles. A Dayton police officer reviews the videos and photos to confirm infractions before issuing notices of violation.

Dayton sued the State of Ohio on March 18, 2015, seeking a preliminary and permanent injunction to enjoin the State from enforcing SB 342 on the grounds that it violated the Home Rule Amendment of the Ohio Constitution. The Montgomery County Court of Common Pleas issued an expedited briefing schedule, and both Dayton and the State promptly filed summary judgment motions and reply briefs. On April 2, 2015, the trial court issued an order granting Dayton's motion for summary judgment, and denying the summary judgment motion filed by the State. The trial court found that the Contested Provisions were not general laws because they served only to limit municipal authority and did not prescribe a rule of conduct upon citizens generally. (Trial Court Decision at 3). The trial court also held that the Contested Provisions placed "an onerous burden on local municipalities seeking to administratively enforce their own traffic control procedures . . . [u]nder the guise of a general police power." (Trial Court Decision

at pg. 10-11). The trial court's order permanently enjoined the State from enforcing the Contested Provisions.

Shortly after the Montgomery County Court of Common Pleas issued its summary judgment order enjoining the enforcement of the Contested Provisions, two other Ohio Common Pleas courts, in Summit County and Lucas County, followed suit. Those courts also held that the Contested Provisions of SB 342 violated municipal Home Rule Authority. *See City of Akron, v. State of Ohio*, Summit C.P. No. CV-2015-02-0955 (Apr. 10, 2015); *City of Toledo v. State of Ohio*, Lucas C.P. No. CI-12-1828 (Apr. 27, 2015). In each decision, the common pleas courts found that the Contested Provisions were unconstitutional limits on municipal powers that served no rational public safety purpose, and were merely a transparent attempt to make automated photo enforcement prohibitively costly for Ohio cities. (Trial Court Decision at 10-11; Lucas County Decision at 10-12; Summit County Decision at 9-10).

Ignoring these three well-reasoned decisions, the Second District Court of Appeals reversed the Montgomery County Common Pleas Court's order, and held that because the Contested Provisions were accompanied by other, non-objectionable provisions, they were constitutional. The Court of Appeals never analyzed the constitutionality of the Contested Provisions individually.

## ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: Provisions in a state statute that are arbitrary and serve no purpose except to limit municipal police power are not general laws, and violate the Home Rule Amendment of the Ohio Constitution.

Proposition of Law No. 2: Including provisions that violate the Home Rule Amendment into larger legislative enactments does not convert the offending provisions into general laws. While under home-rule analysis courts are required to analyze the legislation as a whole, they are also required to specifically analyze the challenged provisions to determine if they unconstitutionally limit cities' home-rule authority.

The Home-Rule Amendment, found in Article XVIII, Section 3 of the Ohio Constitution, provides:

Municipalities shall have authority to exercise all power of 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.

This provision of the Ohio Constitution provides municipalities with “the exclusive power to govern themselves, as well as the power to enact local health and safety measures not in conflict with the general law . . . .” *Am. Fin. Servs. Assn. v. City of Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 26. Just a few years after home rule was adopted, the Supreme Court stated that “the object of the home rule amendment was to permit municipalities to use [their] intimate knowledge and determine for themselves in the exercise of all powers of self-government how . . . local affairs should be conducted.” *Froelich v. City of Cleveland*, 99 Ohio St. 376, 385, 124 N.E. 212 (1919).

This Court has adopted a three-part test to determine whether a state statute takes precedence over a municipal ordinance. A state statute takes precedence over a local ordinance **only** when: (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the state statute is a general law. *See City of Canton v. State of Ohio*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, citing

*Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmstead*, 65 Ohio St.3d 242, 244-45, 603 N.E.2d 1147 (1992).

It is this third element—whether SB 342 is a general law—that is at issue in this case. To constitute a general law for purposes of home rule analysis, the Ohio Supreme Court set forth four requirements in *Canton*. Under the *Canton* test, to survive a Home Rule Amendment challenge, a statute must: (1) be part of a statewide and comprehensive legislative enactment; (2) apply to all parts of the state alike and operate uniformly throughout the state; (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations; and (4) prescribe a rule of conduct upon citizens generally. 95 Ohio St.3d 149, at ¶ 21. As the Montgomery, Summit, and Lucas County Courts of Common Pleas all held, SB 342 flunks the third and fourth prongs of the *Canton* test.

**1. THE CONTESTED PROVISIONS ARE UNCONSTITUTIONAL BECAUSE THEIR PURPOSE IS TO LIMIT MUNICIPAL POWER.**

This Court’s precedent is clear that “legislation that purports only to grant or limit the legislative power of a municipal corporation to set forth police, sanitary, or similar regulations” is unconstitutional in violation of the Home Rule Amendment and the third prong of the *Canton* test. See *Linndale v. State*, 85 Ohio St.3d 52, 706 N.E.2d 1227 (1999); *West Jefferson v. Robinson*, 1 Ohio St.2d 113, 205 N.E.2d 382 (1965). Joining unconstitutional provisions that restrict municipal powers with other provisions that are unobjectionable and constitutional does not convert the unconstitutional provisions into constitutional ones. See *Canton, supra*. Indeed, this Court has rejected this strategy several times in the past.

In *Canton*, for example, the State argued that a law prohibiting a municipality from banning manufactured homes within its jurisdiction was part of Chapter 3781 of the Ohio

Revised Code, which contained “a statewide and comprehensive zoning plan.” 95 Ohio St. 3d at ¶ 23. This Court, however, disagreed, holding that Chapter 3781 “relates to building standards but varies widely in its content from adopting rules for licenses from group homes..., fire systems in tall buildings..., deadbolt locks on swing exit doors in apartment buildings..., to rules for restroom facilities... and thermal efficiency standards.” *Id.* Consequently, although the State claimed that the new legislation was part of a greater, comprehensive scheme, the Court held that the additional, supposedly related provisions did not constitute a statewide or comprehensive “zoning plan” of which the contested state law was a part.

Likewise, in *Linndale*, the State enacted a law that prohibited local law enforcement from issuing speeding citations on freeways if the locality had less than 880 yards of interstate freeway within its jurisdiction, among other restrictions. To support the constitutionality of the law, the State argued there, as here, that its restriction was simply “part of a comprehensive statewide regulatory scheme covering the interstate highway system.” This Court again disagreed: “The statute before us is not a part of a system of uniform statewide regulation on the subject of traffic law enforcement. It is a statute that says, in effect, certain cities may not enforce local regulations[.]” 85 Ohio St.3d at 54. In other words, simply enacting unconstitutional provisions alongside provisions that are not unconstitutional does not transform the unconstitutional sections into a constitutional part of a statewide scheme. Laws whose purpose is to prohibit municipal action do not pass muster under the third prong of the *Canton* test.

Here, the Contested Provisions of SB 342 serve only to limit municipal power and are not general laws. The State’s claim that the Contested Provisions form part of a greater, comprehensive statutory scheme is even weaker than the claims this Court rejected in *Canton*

and Linndale. Even the dissenters in Linndale would have agreed that SB 342 is unconstitutional. In disagreeing with the majority, the dissenters gave examples of situations they believed *would* be blatantly unconstitutional conduct by the state. Here’s the list: “trying to tell Linndale how many traffic lights it should have, how to enforce its jaywalking laws, or how many police officers to hire.” *Id.* at 56 (Pfeifer, J., dissenting). But this is precisely what the State is attempting to do by way of SB 342—tell cities how to enforce their traffic laws and that they must hire more police officers to do so.

The trial courts in Montgomery, Lucas, and Summit counties all found that the Contested Provisions of SB 342 serve no statewide purpose, and have absolutely no relationship to the public health, safety, morals, or general welfare. The Lucas County Common Pleas Court noted, after considering the legislation, in *pari materia*, that the “statutory provisions read together” serve only to limit municipal power. In addition, the court noted that because SB 342 was enacted pursuant to the State’s police powers, SB 342 was required to “bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.” The court noted that the provisions could not be deemed general laws because they bore no relation to the public health, safety, morals or general welfare, but were instead simply intended to cause onerous expense to the municipalities, resulting in a de facto ban. (Lucas County Decision at pgs. 11-12.)

Likewise, the Summit County Common Pleas Court held that the Contested Provisions only served to limit municipal power without serving an overriding statewide interest and would directly contravene the constitution. Therefore, the provisions are not general laws.

Even a cursory glance at the Contested Provisions of SB 342 renders these conclusions inescapable. While SB 342 requires an officer to be “present” when a traffic monitoring camera

is in operation, it does not require the officer to be looking at the intersection, at the vehicle in question, or anything in particular while there. The Contested Provisions do not even require the officer to be awake! The reason the statute does not require the officer to do anything is that there is nothing for the officer to do at the location of an automated photo enforcement camera. The “automated” system was specifically designed to operate without a police officer.

Shockingly, the Second District did not analyze the Contested Provisions. The Second District did not reject—or even address—the findings of the trial court and every other court that reviewed the provisions that they served no purpose other than to limit municipal authority. The Second District did not look at the actual effect of the Contested Provisions. Instead, the Second District merely determined that because the Contested Provisions were included as part of a larger legislative enactment, they must be general laws.

But the State cannot make an end run around the Home Rule Amendment by dropping clearly unconstitutional provisions within the framework of a larger legislative enactment. These are provisions that serve no purpose but to limit municipal power to establish and maintain traffic photo enforcement. Not only are the actual effect and purpose of these provisions transparent and inescapable, but the leaders of the legislature have publicly admitted this! The Court of Appeals’ decision essentially guides the legislature on how to insulate them from home rule scrutiny: bury unconstitutional provisions in larger enactments. Allowing such an analysis would provide no restriction on the legislature, and render the Home Rule Amendment meaningless.

**2. THE CONTESTED PROVISIONS ARE UNCONSTITUTIONAL BECAUSE THEY DO NOT PRESCRIBE A RULE OF CONDUCT UPON ALL CITIZENS GENERALLY.**

The Contested Provisions of SB 342 also violate the Home Rule Amendment because they do not prescribe a rule of conduct upon Ohio’s citizens generally, but instead impermissibly

constitute “a limitation upon lawmaking by municipal legislative bodies,” in violation of the fourth prong of the *Canton* test. 95 Ohio St.3d at ¶ 34. The Contested Provisions apply only to municipalities, limiting their authority to enact and implement automated traffic enforcement programs. They do not even purport to legislate Ohio’s citizens generally. Just as with the third prong of the *Canton* test, including these unconstitutional provisions in a larger legislative enactment does not render them constitutional. This Court has repeatedly required reviewing courts to specifically analyze the challenged provisions to determine if they prescribe conduct upon citizens generally.

In *Linndale*, this Court struck down a strikingly similar state statute that prohibited municipalities from enforcing their own speed laws on freeways except under certain conditions, *even though the State argued that the new law was part of a larger legislative package of traffic regulations, most of which were directed at citizens generally.*

Likewise, in *Canton*, this Court struck down a single subsection of a statute that prohibited municipalities from placing zoning restrictions on manufactured housing, *even though the State argued that the new law was part of a larger legislative enactment that also placed restrictions on citizens in general.*

SB 342 is exactly the same as the provisions at issue in *Linndale* and *Canton*. Its provisions are directed *solely* at municipalities, not at citizens generally. The preamble of SB 342 plainly states that the purpose of the Act is “*to establish conditions for the use by local authorities* of traffic law photo-monitoring devices to detect certain traffic law violations.” (Emphasis added.)

Rather than a general law that merely included cities, SB 342 is a list of do’s and don’ts that *cities* have to follow. The conditions placed on cities permeate the entirety of SB 342. *See,*

e.g., R.C. 4511.093(B)(1) (“The use of a traffic law photo-monitoring device is *subject to* the following *conditions* . . .”); 4511.093(B)(3) (“If a traffic law photo-monitoring device . . . the *local authority* may only issue a ticket in accordance with . . .”); 4511.094(A) (“No *local authority* shall use a traffic law photo-monitoring device . . . until it has done both of the following . . .”); 4511.094(B) (“A ticket . . . is invalid under the following circumstances . . .”); 4511.095(A) (“Prior to deploying any traffic law photo-monitoring device, a *local authority* shall do all of the following”); 4511.095(B)(1) (“A *local authority* that deploys its first photo-monitoring device after the effective date of this section shall do so only after complying with . . .”); 4511.096(A) (“A law enforcement officer employed by *a local authority* utilizing a traffic law photo-monitoring device shall examine . . .”); 4511.097(A) (“If *a local authority* issues a ticket for such a violation, the ticket shall comply with the requirements of this section and the fine shall not exceed the amount . . .”); 4511.098(B) (“*A local authority* or its designee shall process such a ticket for a civil violation and shall send the ticket by ordinary mail . . .”); 4511.099(A)(1) (“A hearing officer appointed by the *local authority* shall hear the case”); 4511.099(A)(4) (“The hearing officer shall determine whether a preponderance of the evidence establishes that the violation . . .”); 4511.099(B)(4): “The hearing officer shall render a decision on the day a hearing takes place”); 4511.099(D)(2) (“*A local authority* shall ensure that a ticket issued . . . confirms with . . .”); 4511.0912: “*A local authority* shall not issue a ticket for a violation . . .” (emphasis added).

The Contested Provisions do not prescribe a rule of conduct upon all citizens generally, but rather purport to tell municipal legislative bodies what they can and cannot do. *Canton*, 95 Ohio St.3d at ¶ 36 (“we hold that R.C. 3781.184(C) does not prescribe a rule of conduct upon citizens generally, because just as in *Youngstown* and *Linndale*, the statute applies to municipal

legislative bodies, not to citizens generally”). Simply inserting the Contested Provisions within a larger legislative enactment cannot shield them from the Home Rule Amendment.

### **CONCLUSION**

For the reasons set forth above, this case involves a substantial constitutional question and is a matter of public and great general importance.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The undersigned certifies that on September 18, 2015, a copy of the foregoing *Memorandum in Support of Jurisdiction of Appellant City of Dayton* was served via U.S. mail, postage pre-paid to the following:

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