

**IN THE SUPREME COURT OF OHIO**

CITY OF DAYTON,	:	Supreme Court Case No. 2015-1549
	:	
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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**REPLY BRIEF OF AMICUS CURIAE, CITY OF TOLEDO  
IN SUPPORT OF APPELLANT**

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## I. Introduction

The General Assembly banned automated traffic-law-enforcement systems when it passed Amended Substitute Senate Bill 342 (“SB 342”). This Court is familiar with the term “automated traffic-law enforcement system” because it has twice held that municipalities have home-rule authority to use them. *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255; *Walker v. City of Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474.

The adjective “automated” is derived from “automation,” which can be defined as “the technique, method, or system of operating or controlling a process by highly automatic means, as by electronic devices, reducing human intervention to a minimum.”<sup>1</sup> The State of Ohio’s Merit Brief uses the words “traffic camera” 62 times and the word “automated” only twice. The two times the State used the word “automated” both occurred on page nine of its brief. The penurious use of the word “automated” is intentional and necessary to the State’s strategy in defending SB 342.

The State argues that SB 342 is a comprehensive and statewide “uniform framework for traffic cameras.” (State’s Brief at pg. 10). While all three of the Contested Provisions are unconstitutional, the heart of the legislation and the dispute in this case is the “officer present” requirement. The new law states that a local authority “shall use a traffic law photo-monitoring device to detect and enforce traffic law violations *only if a law enforcement officer is present at the location of the device....*” R.C. § 4511.093(B)(1). By requiring an officer to be present, the state, by definition, has banned the use of “automated” traffic-law enforcement systems.

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<sup>1</sup> See <http://www.dictionary.com/browse/automation>

Requiring the officer to be present means that the traffic camera is no longer “automated.” This requirement defeats the very purpose of automated traffic cameras (i.e. precious police manpower is not utilized). In a very recent decision, the Sixth District noted this fact when it wrote that “the conditions established by the legislature actually render illusory most municipalities’ right to use photo-detection devices for enforcing traffic laws.” *Toledo v. State*, 6<sup>th</sup> Dist. Lucas No. L-15-1121, 2016-Ohio-4906.<sup>2</sup>

The State wants to avoid any reference to the fact that the statute purporting to *allow* municipalities to use “traffic cameras” actually *bans* the use of “automated traffic cameras.” The State claims that the statute is permissive regulation even though SB 342 specifically retains any existing local bans on traffic cameras. *See* R.C. § 4511.0914. Rejecting the farce that SB 342 is permissive (when it is actually restrictive) leads to the inexorable conclusion that the true purpose and effect of SB 342 is to prevent municipalities from utilizing automated traffic cameras.

To avoid invoking the fact that SB 342 bans automated traffic cameras, the State, reframes the issue through an ingenious use of language. The very first sentence on page nine states “In 2002, Dayton placed ‘automated traffic control photographic systems’ (‘traffic cameras’) at various intersections to enforce civilly rather than criminally the ban on running red lights.” Later on the same page, the State quotes this Court’s ruling in *Mendenhall* that a municipality does not exceed its home rule authority by creating “an automated system for enforcement of traffic laws that imposes civil upon violators....” The word “automated” is never used again. The State’s brief sweeps the word away and simply continually refers to the devices

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<sup>2</sup> In this opinion, the Sixth District held that SB 342 was unconstitutional and certified the conflict with the Second District Court of Appeals’ decisions in *Dayton v. State*, 2015-Ohio-3160, 36 N.E.3d 235 (2d Dist.) and *Springfield v. State*, 2<sup>nd</sup> Dist. Clark No. 2015-CA-77, 2016-Ohio-725.

as “traffic cameras.” The State’s brief seeks to camouflage the blatant constitutional problem created by SB 342 through careful wording in the same manner the General Assembly attempted to camouflage a “ban” as a “regulation.” When SB 342 is analyzed as an actual ban on automated traffic cameras, it becomes impossible to defend constitutionally.

Indeed, the legislative history supports the fact that SB 342 is intended to ban automated traffic cameras. Senator William Seitz, the primary sponsor of SB 342, explained on the date of the final Senate vote that a previous incarnation of this legislation, HB 69, which banned the use of traffic cameras altogether, would likely have run afoul of the Home Rule Amendment. Senator Seitz explained to his colleagues on the Senate floor that because of the Ohio Constitution “we cannot ban things in cities, rather we have the power to *regulate* things in cities pursuant to a general law of uniform operation throughout the state” (emphasis in the original speech).<sup>3</sup> Senator Seitz then proceeded to lambaste automatic traffic cameras, calling them “noxious” and repeatedly insinuating that they were “all about the money.” *Id.* The primary sponsor of SB 342 was not interested in creating a “uniform framework for traffic cameras” but rather eliminating them through regulation.

This Court should reject this chicanery. The General Assembly’s attempt to create a ban on cities through “permissive” regulation is not a general law pursuant to the *Canton* test.

## **II. SB 342 Violates the Home Rule Amendment**

There are many parts of SB 342 that violate the Home Rule Amendment beyond the three Contested Provisions at issue in this case. These constitutional violations not only invoke municipal police powers, but also the power of local self-government. While this case is limited

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<sup>3</sup> Speech of Sen. William Seitz, Ohio Senate, November 19, 2014 available at <http://ohiosenate.gov/session/session-video-library>.

to the question of police powers, this Court has also accepted jurisdiction in *Springfield v. State*, Case No. 2016-0461 which should address the local self-government issues. Regarding the specific violations at issue in this case, the Contested Provisions are not general laws for purposes of a home-rule analysis because they purport to limit legislative municipal power and because they do not prescribe rules of conduct upon citizens generally.

**A. SB 342 Purports to Limit Municipal Power**

The third factor of the *Canton* test states that in order for a statute to be a general law, and therefore constitutional under the Home Rule Amendment, it must “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....” *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963. SB 342 fails this factor. The statute does not affirmatively set forth State police power. The statute only limits municipal police power.

There is no argument that the Contested Provisions limit municipal power. The preamble of SB 342 states that the act establishes “conditions for the use by local authorities of traffic law photo-monitoring devices....” The Contested Provisions very specifically limit when a municipality may use a traffic camera. The “officer present” requirement literally bans the use of “automated” traffic cameras. Furthermore, the legislative history proves that the supporters of this legislation knew exactly what they were doing: the fundamental purpose of SB 342 was to restrict and/or eliminate municipal use of traffic cameras. Even the State concedes that the “Contested Provisions address a *local authority’s* use of traffic cameras” (emphasis in original) (State’s Brief at p. 30).

Since there is no debate over the fact that SB 342 limits municipal power, the State’s only avenue to defend the constitutionality of the statute is to rewrite the *Canton* test. As will be addressed below, this Court should affirm *Canton* and reject the State’s attempt to rewrite it.

**B. The Contested Provisions Do Not Prescribe a Rule of Conduct Upon Citizens Generally**

The fourth factor of the *Canton* test states that in order for a statute to be a general law, and therefore constitutional under the Home Rule Amendment, it must “prescribe a rule of conduct upon citizens generally.” *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963. Once again, there can be no debate that the Contested Provisions do not prescribe a rule of conduct upon citizens generally, but rather prescribe rules of conduct upon municipalities. But once again, to avoid the blatant fact that the Contested Provisions fail the fourth factor of the *Canton* test, the State asks this Court to rewrite the *Canton* test.

**C. The State’s Attempt to Rewrite the *Canton* Test Should be Rejected**

In an intriguing display of legal necromancy, the State begins its attempt to rewrite the third and fourth general-law factors in the *Canton* test by citing cases that analyze old state statutes, which predate the Home Rule Amendment of 1912. The State argues that really the third and fourth factors of the *Canton* test have a common core and there are never circumstances where a statute passes one but fails the other. The State further argues that in cases where the State has made a State police-power choice, the statute gets an automatic pass under the third and fourth factors of the *Canton* test. On the other hand, if the State cannot tie the statute to a State police-power choice, the statute fails the third and fourth factors of the *Canton* test. The State argues that a statute passes the third and fourth factors of the *Canton* test when the statute has a “plausible connection” to other State laws exercising State police power.

First of all, regardless of whether or not the third and fourth factors in the *Canton* test have a common core, SB 342 fails both of them. The fact that this Court has yet to rule on a case where a statute passes one factor but fails the other has no bearing on the constitutionality of SB 342, nor does this fact merge the third and fourth factors of the test into a single obstacle that can easily be circumvented.

Second of all, the *Canton* test does not contain any reference to a “plausible connection” analysis. Since *Canton* was decided in 2002, this Court has quoted the third and fourth factors of the test *verbatim* at least nine times. See *Cleveland v. State*, 138 Ohio St. 3d 232, 2014-Ohio-86 at ¶ 9; *In re Complaint of Reynoldsburg*, 134 Ohio St. 3d 29, 2012-Ohio-5270 at ¶ 38; *Cleveland v. State*, 128 Ohio St. 3d. 135, 2010-Ohio-6318 at ¶ 13; *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597 at ¶ 49; *Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605 at ¶ 38; *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270 at ¶ 20; *Marich v. Bob Bennet Constr. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92 at ¶ 16; *Cincinnati v. Baskin*, 112 Ohio St.3d 279, 2006-Ohio-6422 at ¶ 13; *Am. Fin. Servs. Ass’n v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043 at ¶ 32. In none of these cases does this Court undertake the analysis urged by the State to determine if there is a “plausible connection” to other state laws. In an attempt to avoid having to meet the third and fourth *Canton* factors, the State attempts to reverse-engineer a new test from the *Canton* decisions that would support the constitutionality of SB 342. Unless this Court decides to overrule *Canton*, the State’s “plausible connection” test must be rejected as having nothing to do with the clear precedent to determine if a statute is a general law.

Finally, even if this Court accepts the State’s premise that a “plausible connection” to the State’s police power grants an automatic pass under the *Canton* factors, the State has failed to actually identify the affirmative exercise of State police power SB 342 invokes. The record is

devoid of any evidence that there are any state-run traffic cameras or that SB 342 promotes any state usage of traffic cameras. SB 342 does not establish traffic cameras on state roads or on the turnpike. Furthermore, SB 342 states specifically that any ban of the use of traffic cameras by local authorities is not disrupted by the statute. R.C. § 4511.0914. SB 342 does not change any existing traffic rules. Rather than setting forth new state police-power regulations, the Contested Provisions regulate municipalities merely to regulate municipalities. Unless one considers limiting municipal police itself an act of State police power, the State fails its own reverse-engineered test of invoking State police power to pass the general law test.

Contrasting SB 342 with statutes that affirmatively utilized the State's police power illustrates this concept. For example, in *Am. Fin. Servs. Ass'n v. City of Cleveland*, the State had affirmatively enacted its police power to regulate lending. 112 Ohio St.3d 170, 2006-Ohio-6043. *In re Complaint of Reynoldsburg*, the State again affirmatively used its police power via statutes authorizing public utility tariffs to prevail over a conflicting local ordinance. 134 Ohio St. 3d 29, 2012-Ohio-5270. There is no affirmative use of the State's police powers regarding the usage of traffic cameras in SB 342. The statute's stated purpose is to limit the application of traffic cameras by municipalities, which is why it fails the third and fourth factors of the *Canton* test.

The State attempts to bootstrap the usage of State police power from *existing traffic* laws to connect SB 342 into a comprehensive police power framework. But there is an obvious difference between traffic laws and the enforcement of those traffic laws. Furthermore, "the provisions of a multi-statute legislative act aimed primarily at limiting municipalities' power to legislate cannot be insulated simply by placing it into a larger statutory scheme." *Toledo v. State*, 6<sup>th</sup> Dist. Lucas No. L-15-1121, 2016-Ohio-4906. There was no comprehensive statute regulating traffic cameras before SB 342 and the State cannot honestly claim that SB 342

provides a comprehensive regulatory framework when all it does is limit municipal power. If the State can pass any law limiting municipal police powers so long as it relates in some way to an existing regulatory framework, the Home Rule Amendment becomes meaningless as everything the state does becomes a general law that trumps the municipal legislative power.

### **III. Conclusion**

SB 342 was designed to ban municipalities from using automated traffic cameras. The statute does not affirmatively assert State police power, but it does purport to limit municipal police power. The statute does not prescribe a rule of conduct on citizens generally. The statute cannot pass the *Canton* test as it was written, applied and repeatedly affirmed by this Court. Because SB 342 is not a general law, this Court should find the Contested Provisions unconstitutional and reverse the opinion of the Second District Court of Appeals.

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