

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC12-644

RICHARD MASONE,

Petitioner,

-VS-

CITY OF AVENTURA,

Respondent.

\_\_\_\_\_ /

**INITIAL BRIEF OF PETITIONER ON THE MERITS**

On appeal from the Third District Court of Appeal of the State of Florida

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## **PREFACE**

This is an appeal from a Final Judgment of the Circuit Court in favor of the Petitioner, which was reversed in a 2-1 decision by the Third District Court of appeal, see City of Aventura v. Masone, 89 So.3d 233 (Fla. 3d DCA 2011), review granted, 2012 WL 5991346, Case No. SC12-644 (Nov. 6, 2012).

Plaintiff/Petitioner, Richard Masone, will be referred to as “Petitioner” or “Masone.” Defendant/Respondent, City of Aventura, will be referred to as “Respondent” or “the City.” A subsequent decision from the Fifth District certified conflict with the Third District, and that case from the Fifth District is also in the briefing stage before this Court, see City of Orlando v. Udowychenko, 98 So.3d 589 (Fla. 5th DCA 2012), review granted, 2012 WL 5991338, Case No. SC12-1471 (Nov. 6, 2012).

The Plaintiffs in each case before this Court are represented by the same appellate counsel, and the arguments in the Initial Brief in this appeal are very similar to the arguments in the Answer Brief filed in Udowychenko, supra. The following designations will be used:

(R) - Record-on-Appeal

(IB) – Initial Brief on the Merits

(IB 3DCA) - Initial Brief in the Third District Court of Appeal

(AB 3DCA) - Answer Brief in the Third District Court of Appeal

(A) - Appendix to Appellant's Initial Brief in the Third District Court of Appeal

(AA) - Appendix to Appellee's Answer Brief in the Third District Court of Appeal

## **STATEMENT OF THE CASE**

The instant case is one of two before this Court addressing very similar (though different in some important respects) municipal ordinances. Both Ordinances authorized the use of unmanned red-light cameras as the sole means to charge, enforce and adjudicate vehicle owners whose vehicle drivers [whoever they were] were alleged to have driven through steady red lights. The Ordinances also authorized adjudication outside of the judicial system, in an appellate proceeding, with City appointed hearing officers, using a vague burden of proof, and with the municipality and private vendors sharing revenue to the exclusion of the state.

In 2011, the Third District ruled, in a 2-1 decision, that the City of Aventura's Ordinance was lawful. See City of Aventura v. Masone, 89 So.3d 233 (Fla. 3d DCA 2011). The majority held that the Ordinance was not preempted by state law, and also was not in conflict with state law. Id. at 235-241. The dissenting judge believed the Ordinance was expressly and impliedly preempted, and in conflict with state law. Id. at 241-246 (Rothenberg, J., dissenting).

Masone (the Petitioner herein) filed a Jurisdictional Brief in May 2012.

Six weeks later, the Fifth District held that the City of Orlando's Ordinance was unlawful and unconstitutional. See City of Orlando v. Udowychenko, 98

So.3d 589 (Fla. 5th DCA 2012). The Fifth District certified conflict with Masone. See Udowychenko, 98 So.3d at 599. The City of Orlando sought review.

This Court accepted review of both cases. This Court should quash the Third District's 2-1 decision, and affirm the Fifth District's decision. These Ordinances unlawfully and unconstitutionally depart from state law and Florida's Constitution in at least eight different areas. The Ordinances are expressly and impliedly preempted, and in conflict with state law and the Constitution.

### **STATEMENT OF FACTS**

The sole issue of this appeal is whether the City's Ordinance was permitted under Florida's Constitution and Florida law. The City enacted its unmanned red-light traffic camera Ordinance in October 2007 (R1:3, 9-17, 30, 36-44). At that time, there was no state legislation approving this type of Ordinance. Moreover, at that time, two Attorney Generals had questioned the authority of local municipalities to enact such Ordinances, and to fine citizens for offenses, in the absence of legislative approval (AA27-33).

Under the Constitution and state law, only vehicle drivers may be cited for running through red-lights. See §§316.075(1)(c)1.a-b., (1)(c)2.a, Fla. Stat.<sup>1</sup> Nonetheless, the Ordinance enabled the City to use unmanned, automated cameras at traffic lights to photograph drivers for driving through red lights, and then issue

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<sup>1</sup> All statutes refer to 2008 unless otherwise noted.

citations for this conduct (R1-3, 9-10, 30, 36-37). Citations were issued to the registered owner of the vehicle, and mailed to the owner's address (R1:4, 12-13, 31, 39-40). The vehicle owner remained liable even if not driving (or present in the vehicle), subject to limited exceptions (R1:13-15, 40-42). To avoid strict liability, the vehicle owner was required to prove that the vehicle was "in the care, custody or control of another person without the consent of the" owner (R1:13-14, 39-40).<sup>2</sup>

Under state law, those driving through red-lights must be personally observed by law enforcement (§316.640(5)(a), Fla. Stat.). Under the City's ordinance, however, it is exclusively the unmanned camera that records and observes the alleged offense (R1:9-15). A City official later reviews the video, to determine whether the vehicle driver had committed a violation (R1:11-13). The City then mails a Notice of Infraction to the vehicle owner (R1:18-21).

A vehicle owner had 20 days to respond to the citation (R1:4, 13, 31; Aventura, Fla., Code pt. II, ch. 2, art. V, Sec. 2-341 ("Code Enforcement"), available \_\_\_\_\_ at

[http://library.municode.com/HTML/13153/level3/PTIICOOR\\_CH2AD\\_ARTVCO](http://library.municode.com/HTML/13153/level3/PTIICOOR_CH2AD_ARTVCO)

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<sup>2</sup> Other exceptions address short-term rental car owner liability, if the vehicle had been stolen at the time the infraction was issued, if an emergency vehicle responded to an emergency, if the vehicle operator was issued a citation for violating a state statute, or when there were vehicle collisions and a citation was issued for violating a state statute related to the accident (R1:13-15, 40-42).

EN.html (last visited Feb. 22, 2013)(hereafter referred to as Aventura, Fla., Code pt. II, ch. 2, art. V)). If there was no response, the vehicle owner was deemed to have admitted liability and waived the right to contest the citation (R1:4, 13, 19, 21, 31, 40, 46, 48). If contesting the citation, a challenge (an “Appeal”) was heard in City Hall before a special master appointed by the City Manager (R1:4, 12-13, 31, 40-41; Aventura, Fla., Code pt. II, ch. 2, art. V, Sec. 2.342; Aventura, Fla., Code pt. II, ch. 48, art. III, Sec. 33-34 (“Dangerous Intersection Safety”), available at [http://library.municode.com/HTML/13153/level3/PTIICOOR\\_CH48VEUSRI-WPAOTRE\\_ARTIIDAINSA.html](http://library.municode.com/HTML/13153/level3/PTIICOOR_CH48VEUSRI-WPAOTRE_ARTIIDAINSA.html) (last visited Feb. 22, 2013)(hereafter referred to as Aventura, Fla., Code pt. II, ch. 48, art. III)). The City Manager appoints “on the basis of experience or interest in code enforcement” (Aventura, Fla., Code pt. II, ch. 2, art. V, Sec. 2.-334). The City Manager decides compensation for the Special Master (Aventura, Fla., Code pt. II, ch. 2, art. V, Sec. 2.334). A vehicle owner was not entitled to challenge the citation in the first instance in County Court (R1:4, 19, 31; Aventura, Fla., Code pt. II, ch. 2, art. V, Sec. 2.-342; Aventura, Fla., Code pt. II, ch. 48, art. III, Sec. 48-26).<sup>3</sup>

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<sup>3</sup> The City of Orlando similarly utilizes an “appellate” process to challenge citations (Orlando, Fla., Code title II, ch. 5, art. III, Sec. 5.25 (“Red Light Infractions”), available at [http://library.municode.com/HTML/13349/level3/TITIICICO\\_CH5COEN\\_ARTIII\\_RELIIN.html](http://library.municode.com/HTML/13349/level3/TITIICICO_CH5COEN_ARTIII_RELIIN.html) (last visited Feb. 22, 2013)(hereafter referred to as Orlando, Fla., Code title II, ch. 5, art. III). An importance distinction lies with the appellate adjudicator. The City of Orlando hires “hearing officers”; their sole qualification

By contrast, under the Constitution and state law, when a driver is cited for running a red-light, a county court judge or specially trained hearing officer presides over the adjudicatory phase, where the State must prove fault. Article V, §1, Fla. Const.; §§318.13(4), 318.14(1), Fla. Stat.; §318.30-318.38, Fla. Stat.; Fla.R.Traf.Ct. 6.040(1), 6.450, 6.630. The driver must waive the right to a judicial hearing (§§318.32(3); 318.32). This is not an appeal.

Under state law, the state carries the burden of proving beyond a reasonable doubt that a driver ran through a red-light (§318.14(6), Fla. Stat.). The City's Ordinance is silent on who carries the burden of proof, and is silent on what that level of proof is (R1:9-15). See Udowychenko, 98 So.3d at 599 (noting that "presumably" the City of Orlando utilized a preponderance of the evidence standard); see also Masone, 89 So.3d at 245-46 (noting that the City of Aventura's Ordinance similarly lacks this burden of proof) (Rothenberg, J., dissenting).

While the Ordinance states due process must be followed, it makes no reference to state law as a guiding force (R1:13-14). Furthermore, a vehicle owner must come forward to avoid adjudication, for an appeal, and must meet one of the (limited) defenses provided in the Ordinance (R1:13-14, 19; Aventura, Fla., Code pt. II, ch. 2, art. V).

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is to be members of the Florida Bar (Orlando, Fla., Code title II, ch. 5, art. III, Sec. 5.20).

Under state law, a large portion of the revenue for each red-light offense goes to a variety of state agencies (§318.18(15), Fla. Stat.). By contrast, under the Ordinance the revenue is exclusively distributed between the City and the private vendor who installed the red-light cameras.

The Ordinance established a three-tiered fine system (R1:15-17, 42). First offenders are fined \$125, second offenders \$250, and third or subsequent offenders are fined \$500 (R1:9-17). There was no discretion to relax these fines. Additionally, a vehicle owner who challenged a citation was subject to “administrative [court] charges . . . in the event of a hearing and/or the necessity to institute collection procedures arises” (R1:14, 41). The citation explains that failing to respond could cause the “matter” to be submitted to a collections agency and reported to the credit bureaus (R1:19, 21, 46, 48).<sup>4</sup>

The City began issuing citations in 2008 (R1:7, 34). On January 9, 2009, and on January 12, 2009, Masone was issued two citations (R1:7, 18-21, 34, 45-48). Because citations are first reviewed by the City, and because of the mailing process, Masone could not have been aware of the first citation when he was cited

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<sup>4</sup> The City of Orlando’s Ordinance also has some important distinctions on this issue. Under the City of Orlando’s Ordinance, first and second offenses are \$125, and this doubles for third offenses and beyond (Orlando, Fla., Code title II, ch. 5, art. III, Sec. 5.26). An owner who fails to “appeal” or is unsuccessful on “appeal” before the hearing officer, and who fails to pay the fine, “shall be refused or denied the right to obtain and maintain any City permits or licenses, including, but not limited to, occupational licenses . . . and building permits” (Orlando, Fla., Code title II, ch. 5, art. III, Sec. 5.26).

three days later (A, Tab 4). Masone later attested he was unsure if he was driving his vehicle on the day of the second citation (AA5).

In February 2009, Masone brought an action for declaratory relief in circuit court, challenging the legality of the Ordinance (R1:3-21, 30-48, 49-50; AA9). The City answered the Complaint and raised Affirmative Defenses (R1:22-29, 51-58). After brief discovery, the City moved for Summary Judgment and Masone filed a Cross-Motion for Summary Judgment and in opposition to the City's Motion for Summary Judgment (R1:59-94).

The trial court granted Masone's Motion for Summary Judgment and denied the City's motion (A, Tab 2, Hearing Transcript of 2/22/10, p.4; R1:182-83).

### **SUMMARY OF ARGUMENT**

Before the Third District, the City -- assisted by amici who financially benefit from the use of red-light traffic cameras -- referred to the public benefit of these cameras. While Petitioner disagrees with the statistical data relied upon, whether the public benefits from cameras and whether car accidents are reduced is irrelevant. Public-safety goals, realized or otherwise, must yield to Florida's Constitution and the applicable statutes.

The sole issue of this appeal is whether the City's unmanned red-light camera Ordinance -- whereby the City used cameras as the sole means to record, charge and adjudicate vehicle owners -- was permitted under the Constitution and

state law. The Legislature enacted a “Uniform” Traffic Law which was intended to address the hodgepodge of local ordinances in the traffic arena. While the Legislature determined that local ordinances could not be in “conflict” with provisions under the Uniform Traffic Law [as derived from Florida’s Constitution], the Legislature went much further. No local authority could endeavor into an area “covered” by provisions under the Uniform Traffic Law, except with express authorization.

The City’s Ordinance has ignored this statutory language. There are at least eight different matters within the Ordinance covered by the Legislature, inter alia, the City’s imposition of strict liability for car owners, the City’s disregard for requiring officers to personally observe citizens, the City’s creation of a municipal “special master” appellate proceeding outside county court, the City’s disregard for a proof beyond a reasonable doubt standard, the City’s imposition of fines and collateral consequences beyond state law and to the elimination of judicial discretion, the City’s refusal to share any revenue proceeds with state agencies, and the City’s method of charging owners.

The Legislature has expressly preempted this field, and particularly as it comes to enforcement and such a broad departure from state law for the identical conduct. The Legislature may have allowed municipalities to utilize red-light cameras, but has not given this express authority for this fundamental departure. In

the eight matters addressed above, the notion of uniformity for the conduct, enforcement and punishment has been shattered by local municipalities.

There is also implied preemption. The state's intervention in this area of the law is pervasive as to the means and methods to charge, enforce and adjudicate red-light violations. There is nothing in the City's Ordinance that supplements Florida law; it sets this law and the Constitution aside in the name of code enforcement violations. Unlike a City's authority to utilize code enforcement to address the exterior color of one's house or the decibel level of music from inside one's house, the City enacted an Ordinance that so dramatically departs from state law, concerning the identical conduct. The very notion of uniformity throughout the state was shattered by the City's Ordinance. The very reason for Chapter 316's enactment in the first instance was to have this uniformity, not the inconsistency of local ordinances.

The Ordinance is also in direct conflict, as it cannot peacefully co-exist with state law. The identical conduct is being treated and enforced far differently and inconsistently. The Legislature has extensively covered this particular area of the law. To the extent the Legislature authorized municipalities to utilize red-light traffic cameras, there is no suggestion the Legislature gave the necessary express approval to dramatically depart from state law and Florida's Constitution.

The City believes that it had the authority to deviate from state law, because the state never explicitly prohibited the Ordinance. That reframing of legal and constitutional principles ignores the state's intervention and intent when enacting traffic statutes in the first instance, to bring uniformity and consistency to traffic issues. That argument also ignores the plain language of the applicable statutory provisions [§§316.002, 316.007, Fla. Stat.], whereby municipalities must be given express authorization to depart from state law in any area covered by state law.

This Court should quash the Third District's 2-1 decision, adopt the reasoning of the dissent, and affirm the Fifth District's decision in Udowychenko.

## **ARGUMENT**

### **POINT-ON-APPEAL**

THE CITY'S ORDINANCE IS UNCONSTITUTIONAL AND UNLAWFUL BECAUSE IT ADDRESSES AT LEAST EIGHT TRAFFIC MATTERS COVERED UNDER CHAPTERS 316 AND 318, AND WHERE THE ORDINANCE IS EXPRESSLY AND IMPLIEDLY PREEMPTED, AS WELL AS IN CONFLICT WITH STATE LAW AND THE FLORIDA CONSTITUTION.

### **Standard of Review**

This Court should review the trial court's summary judgment on de novo review, addressing the interpretation of state law and the Constitution. See City of Hollywood v. Mulligan, 934 So.2d 1238, 1241 (Fla. 2006).

## **Argument**

The Third District appears to have reasoned that the Legislature was required to state, “No Municipality may utilize a red-light traffic camera as the sole means to charge and adjudicate . . . no municipality may use a City-Appointed special master . . . no municipality may hold vehicle owners strictly liable . . . no municipality may relax the burden of proof below reasonable doubt” and so forth.

The Third District’s reasoning is misguided. Below, the Petitioner addresses the history of Chapter 316 (something ignored in the Majority Opinion, and extensively addressed in the Dissenting Opinion). The title of the chapter “may be known and cited as the ‘Florida Uniform Traffic Control Law’” (emphasis added).

In turn, §316.002, titled “Purpose,” states:

It is the legislative intent in the adoption of this chapter to make uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities. . . . Section 316.008 enumerates the area within which municipalities may control certain traffic movement or parking in their respective jurisdictions. This section shall be supplemental to the other laws or ordinances of this chapter and not in conflict therewith. It is unlawful for any local authority to pass or to attempt to enforce any ordinance in conflict with the provisions of this chapter.

Section 316.007, then states in full (all emphases added):

The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance on a matter

covered by this chapter unless expressly authorized. However, this section shall not prevent any local authority from enacting an ordinance when such enactment is necessary to vest jurisdiction of violation of this chapter in the local court.

The Third District overlooks the fact that the Legislature requires there to be “express authorization” on any matter “in conflict with,” and then more specifically and more broadly, any matter “covered” by the Chapter. The City needed express authority to eliminate the personal observation requirement, eliminate the county court judge requirement, and so forth, before proceeding. The Legislature did not have to expressly prohibit the City’s Ordinance; rather the Legislature had to give its express authority to municipalities to deviate from state law. The City also entirely misses the point of the state’s traffic statute, and the circumstances that led up to the statute’s enactment, namely uniformity.

**A. The Ordinance is Unlawful and Unconstitutional Because It Concerns and Deviates from Numerous Traffic Matters Covered by Chapter 316**

Art. VIII, §2(b), Fla. Const., states that municipalities can exercise any power for municipal purposes, except as otherwise provided by law. Florida law prohibited municipalities from passing local legislation on traffic issues covered by the Legislature, except with this express authority. The City cannot save its Ordinance in the face of the constitutional and legislative roadblocks. The proper

course of action would have been to await legislative intervention, just as most municipalities did across the state.<sup>5</sup>

Sections 316.002 and 316.007 are general laws, and traffic control through intersections is a “matter covered” in Chapter 316. To properly understand the operation of these laws, it is important to place it in its historical context. See Masone, 89 So.3d at 241-42; 244; 246 (emphasizing that this historical context helps explain why the City’s Ordinance is unlawful) (Rothenberg, J., dissenting).

In the early 1970’s Florida experienced a drastic change in how traffic infractions were adjudicated. Florida moved away from a multitude of municipal courts, with a hodgepodge of laws and cash-register jurisprudence, to a system vesting original jurisdiction in the county courts.

Before the current version of Article V of the Florida Constitution became effective on January 1, 1973, the Constitution “provided for separate municipal courts and county courts.” Miller v. City of Indian Harbour Beach, 453 So.2d 107, 111 (Fla. 5th DCA 1984). Chapter 186, Fla. Stat. (1969), set out a model traffic ordinance. Municipalities had the option of adopting the model ordinance.<sup>6</sup> Chapter 186 contemplated the existence of separate municipal courts. Miller, 453

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<sup>5</sup> The 2010 legislative intervention is addressed infra.

<sup>6</sup> Section 186.02, Fla. Stat. (1969) provided: “Any incorporated municipality by ordinance may adopt, by reference, any or all of the provisions of the Florida model traffic ordinance without setting forth such provisions in full.”

So.2d at 111: “While the municipal courts were in existence, they handled all traffic tickets written by municipal police departments and the county courts handled those traffic citations written by the county sheriff’s department.” Id.

Taking effect on January 1, 1973,<sup>7</sup> Article V, §20(d)(4), Fla. Const., provided for the abolition of all municipal courts by January 3, 1977. Article V, §1, Fla. Const., vested “the judicial power . . . in a supreme court, district court, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality” (emphasis added). Also, §1 now states that the “legislature may establish by general law a civil traffic hearing officer system for the purpose of hearing civil traffic infractions.” Id. (language added by a 1988 amendment). Art 5, §1, Fla. Const., Historical Notes. Article V, §20, Fla. Const., gave the county courts “jurisdiction now exercised by . . . municipal courts.” Id.

While the Article V revision was wending its way to the voters, the Legislature created Chapter 316 to address two abuses arising from the municipal court system of handling traffic infractions -- the “history of inconsistency of penalties imposed” by the municipal courts and the inconsistency of traffic laws in municipalities around the state. Miller, 453 So.2d at 112; see also Preamble to

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<sup>7</sup> The revised Article V was adopted in a special election on March 14, 1972.

Chapter 71-135, where the Legislature identified the problems with the municipal court system that Chapter 316 was designed to address.

Consistent with these concerns, the Legislature adopted two sections which expressly limit the power of a municipality to legislate traffic matters, §316.002 and §316.007, so as “to create a uniform, statewide traffic control system.” State v. Smith, 584 So.2d 145, 147 (Fla. 2d DCA 1991) (emphasis added). Further consistent with this intent, Chapter 316 is to be known as the “Florida Uniform Traffic Control Law,” §316.001, Fla. Stat. (emphasis added).

As quoted above, §316.002 states the legislative “purpose” and “intent” was for uniformity “to apply in all municipalities” (emphasis added). This Court has recognized this statutory purpose, i.e., “to make uniform traffic laws to apply throughout the state . . . and uniform traffic ordinances to apply in all municipalities.” See Maddox v. State, 923 So.2d 442, 446 (Fla. 2006). Section 316.002 expressly limits the power of municipalities to legislate traffic matters to those “conditions that require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities.”<sup>8</sup>

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<sup>8</sup> The City presented no evidence that it was “required” to pass this ordinance. Moreover, concerns about red-light running is not something unique to this municipality, i.e., not of concern “outside” of the City of Orlando. See Udowychenko, 98 So.3d at 599 (noting §316.008’s provisions appear to

Petitioner does not believe the City has or could ever have met these criteria for these Ordinances, which renders them unlawful. However, even assuming the City could have met these criteria (see n.8), §316.002 also makes it “unlawful for any local authority to pass or to attempt to enforce any ordinance in conflict with the provisions of this chapter.” Consistent with that provision, §316.007, like a constitutional provision over traffic matters, declares the principle of uniformity and the supremacy of Chapter 316. Yet, as ignored by the City, this latter provision quoted above, §316.007, imposes a far broader limitation on municipal authority, since there must be legislative express authorization on any matter covered anywhere in Chapter 316.

The City (as agreed with by the Third District majority) believes that under its “home rule” authority, the Legislature needed to take away the power of local municipalities to issue citations and enforce in so many departures from state law. Yet, the Legislature explicitly stated that express authorization was needed to do anything. There could not be a clearer statement of the constitutional and statutory limitations imposed upon municipalities.

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contemplate only unique situations where a statewide provision is lacking or inadequate).

Before the circuit court, the City rejected the notion there had to be any special conditions before enacting the Ordinance and, therefore, declined to introduce evidence (R1:99-100).

Home rule authority as a general principle is not before this Court. A municipality's desire to protect the well-being of its citizens is another general principle not before this Court. The issue is whether the City disregarded and violated the Constitution and Florida law, which the City has clearly done.

**1. The Ordinance Unlawfully Transforms Failing to Stop at a Traffic Signal into a Vicarious Liability Offense**

The municipalities before this Court have consistently stated that their Ordinances identically punish "drivers" just as Chapter 316 punishes drivers. In making these assertions, the municipalities demonstrate why these Ordinances are invalid. These Ordinances target vehicle owners. Nothing within Chapter 316 indicates that the Legislature has given its authority, let alone express authority, to the City to do so.

Chapter 316 punishes the failure to stop at a traffic signal device by exclusively holding the "driver of a vehicle" accountable. See §316.075(1)(c)1.a-b., Fla. Stat.; §316.075(1)(c)2.a.; Fla. Stat. By solely relying on a photograph to identify the purported perpetrator, the City's Ordinance makes the owner of the vehicle strictly liable for the civil penalty.

The municipalities have also consistently claimed that it is permitted to impose strict liability on vehicle owners, since the Legislature did not expressly prohibit this liability in §316.075 (R1:62-65). This argument is backwards and ignores §§316.002 and 316.007. The Legislature must have given its express

authority on any matter covered anywhere in Chapter 316. The Legislature must have expressly given its approval of strict liability. The state already “covers” the act of driving through a red-light and only charges vehicle drivers for this conduct.

The essence of the enactment of Chapter 316, and the express language of its text, would be eviscerated by the City’s position. The Masone majority and the City believe that because the City issues citations “outside” of Chapter 316, there are no statutory or constitutional restrictions. Calling an apple an orange does not make it one. There is nothing in the City’s Ordinance that supplements or complements state law. The Ordinance has brought inconsistency to identical driving conduct in an area that the state ensured would have consistency.

In the Third District, the City cited out-of-state decisions that have upheld local legislation utilizing red-light traffic cameras to issue tickets. None of these courts address a statutory scheme similar to Chapter 316 (§§316.002, and 316.007) i.e., where the Legislature prohibits local municipalities from entering any field on a matter “covered” by the Legislature, unless expressly authorized.

In fact, the closest statutory scheme to Florida, but still without the legislative command of §316.007, squarely addressed and invalidated a red-light camera ordinance because of vicarious liability. See State v. Kuhlman, 729 N.W.2d 577 (Minn. 2007). The City declined to discuss Kuhlman, even though the Fifth District discussed it. See Udowychenko, 98 So.3d at 594-95.

The Minnesota statute precluded a “local authority” from enacting or enforcing “any rule or regulation in conflict with the provisions of [the Minnesota Traffic Regulations] unless expressly authorized.” Id. at 580 (quoting §169.022, Minn. Stat. (2006) (emphasis added)).<sup>9</sup> A city ordinance declared a vehicle owner vicariously liable for traffic light violations. Id. at 582. The state Supreme Court unanimously held that the ordinance was invalid and observed that the ordinance’s imposition of strict liability upon vehicle owners did violence to the principle that traffic infractions should be uniform throughout the state (id. at 583):

[A] driver must be able to travel throughout the state without the risk of violating an ordinance with which he is not familiar. The same concerns apply to owners. But taking the state’s argument to its logical conclusion, a City could extend liability to owners for any number of traffic offenses as to which the [Traffic] Act places liability only on drivers. Allowing each municipality to impose different liabilities would render the Act’s uniformity requirement meaningless.

The rationale of the Minnesota Supreme Court is applicable to Florida, where Chapter 316 does not willy-nilly create vicarious liability for the owners of motor vehicles. The need for uniformity that prompted Chapter 316’s uniform traffic law demonstrates why the Ordinance’s imposition of vicarious liability is illegal, without express authorization. If local authorities had the option of making

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<sup>9</sup> This is similar to the last sentence of §316.002. Even Minnesota, like the other states that have addressed this issue, does not have the more limiting “covered” unless “expressly authorized” language of §316.007.

traffic signal violations a vicarious liability offense, a vehicle owner would sometimes be liable for traffic signal violations, and would sometimes not, depending on the car's location as it traveled through the state -- and through a municipality. Prior to the 2010 state legislation, there was no express authority for this matter covered by the Legislature.<sup>10</sup>

## **2. The Ordinance Unlawfully and Unconstitutionally Makes Traffic Control Signal Violations an Ordinance Violation**

At least two sections of Chapter 316 are directed at traffic control signal offenses. See §316.074, Fla. Stat. (obedience to traffic control devices); §316.075(1)(c), Fla. Stat. (steady red-light infraction). Failing to obey a traffic control signal device is, thus, a “matter covered” by Chapter 316 within the meaning of §316.007.

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<sup>10</sup> The City's Ordinance permits as a grounds for “appeal” that the vehicle was “was not in the vehicle owner's care, custody, or control” (R1:14). This provision cannot save the Ordinance. A vehicle will always technically be in the care, custody or control of that vehicle owner, when giving the vehicle for permissive use to a spouse, child, friend, etc. This is similar to the concept of dangerous instrumentality, except that is a judicially-created doctrine in tort law.

This is also a defense to an infraction, and a defense that must be met by a vehicle owner in an appellate proceeding. State law charges a vehicle driver and does not impose any burden on the driver to prove a defense. The City has not been given express authority for this method of charging or adjudicating guilt. The City has no express right to even charge a vehicle owner in the first instance. The Ordinance is void from its inception.

The City mistakenly seeks to save its Ordinance pursuant to §316.008(1)(w), Fla. Stat. Pursuant to §316.002, the Legislature “enumerates the areas within which municipalities may control certain traffic movement or parking in their respective jurisdictions,” areas identified in §316.008. These enumerated areas, of course, are always subject to the strict limitation on municipality authority in §§316.002 and 316.007: the Legislature must give its express authority on any matter covered within Chapter 316. The City ignores this central premise.

Under §316.008(1)(w), the Legislature has authorized municipalities to “regulat[e], restrict[], or monitor[] traffic by security devices or personnel on public streets and highways, whether by public or private parties. . . .” Even assuming that the unmanned cameras qualify as traffic devices or security devices, there still has been no express authority to utilize those cameras in the plethora of ways that the City has done.

The Fifth District ably recognized this point by noting that the Ordinance regulates conduct, adjudicates violations, and fines vehicle owners in a manner not expressly authorized by the Legislature. The enactment of §316.008 did not give express authorization for the multitude of ways in which this Ordinance departs from how all red-light infractions were previously cited and enforced. Vicarious liability was mentioned above as one such departure. As explained infra, there are a host of other improper departures without express authority.

The use of red-light cameras (if expressly authorized) comprises but a small portion of the Ordinance. Even §316.008(2), which gives a municipality “nonexclusive jurisdiction over the prosecution, trial, adjudication, and punishment” of traffic infractions, does so only for “violations of this chapter [316],” not for ordinance violations outside of Chapter 316. The City’s boldness (and defiance) in treating the identical driving conduct as merely a code enforcement violation was not expressly authorized in this fashion.

It is also significant that when the Legislature wanted to give express authority to enforce under §316.008(1), it did so. See (1)(t), where municipalities can “adopt[] and enforc[e]” regulations that are necessary to cover emergencies or special conditions. The Legislature did not give this authority as to red-light traffic cameras.

The City claims the Petitioner must prove that the Ordinance does not fall within the enumerated grounds of §316.008. The City, again, has this issue reversed. The City ignores §316.002 and §316.007. The Legislature has declared that it must give express authority to the City in any area covered under the Chapter. The City’s discussion of Home Rule principles falls flat when the Legislature has intervened into this arena. The City’s opinion on what this case would look like -- absent §316.002 and §316.0077 -- is legally meaningless.

The municipalities before this Court contend that the Legislature's grant of authority to "regulate" would be toothless if a city cannot enforce. The municipalities also claim that the Legislature has not limited "how" municipalities utilize red-light traffic cameras. The Masone majority reasoned that the Ordinance merely supplemented state law (89 So.3d at 236-37). Sections 316.002 and 316.007, however, limit how municipalities can utilize red-light traffic cameras.

Even if municipalities may be able to use the cameras, they can only charge vehicle drivers. As explained below, there must also be personal contemporaneous observation. Likewise on the other departures from state law identified infra, any use of red-light cameras could only supplement the already-existing statutory guarantees. The Legislature did not give its express authority to deviate in the multiple ways that the City's Ordinance operates, to the elimination of statutory and constitutional protections to the citizens traveling within the jurisdiction.

### **3. The Ordinance Violates the Requirement that Traffic Signal Infractions Be Contemporaneously Observed by Law Enforcement**

There is also no express legislative authority to use photographic or video evidence, and exclusively at that, to detect and prosecute. When the Legislature has authorized the use of photographic evidence for moving violations, it has done so explicitly. Section 316.007 required this for red-light traffic offenses.

For example, pursuant to §316.1001(2)(d), Fla. Stat.: "A written report of a toll enforcement officer to photographic evidence that a required toll was not paid

is admissible in any proceeding to enforce this section. . . .” That statute allows the photograph to be used as evidence of a violation: photographic evidence reflecting a driver has not paid a toll “raises a rebuttable presumption that the motor vehicle . . . shown in the photographic evidence was used in violation of this section.”

By contrast, the legislature has otherwise made clear that traffic infraction enforcement officers must “observe the commission of a traffic infraction . . . based upon personal observation [that] he or she has reasonable and probable grounds to believe that an offense has been committed which constitutes a noncriminal traffic infraction. . . ,” §316.640(5)(a), Fla. Stat. There has been no express approval by the Legislature to relax this for red-light violations.

The circuit court invalidated the City’s Ordinance, because the City solely relied on the red-light cameras (R1:182-83). The City was required to “expressly receive authority from the Florida Legislature allowing it to legislate the aforementioned subject” (R1:183).

The Masone majority concluded that §316.640(5)(a) is inapplicable to City code violations (89 So.3d at 237-38). But any attempt to avoid Chapter 316 (and Chapter 318) protections by labeling this as a code violation undermines the essence of the Constitutional enactment in the 1970’s. See supra pp. 12-14.

The Masone dissent went through a detailed examination of the historical perspective. The dissent also noted that §316.008(1)(w) “must be read in *pari*

*material* with other provisions of Chapters 316 and 318, namely §§316.002, 316.075, and 318.18. See 89 So.3d at 244 (emphasis in original) (Rothenberg, J., dissenting). Petitioner would be remiss without also mentioning §316.007.

With this guidance, “it is clear that the **enforcement** and **punishment** of red light violations are matters already covered by chapters 316 and 318. Id. (emphasis in original) (Rothenberg, J., dissenting). Eliminating a personal observation requirement in the name of a “code violation” is not supported by statutory text, and the underlying legislative intent of these Chapters.

Reviewing photographs after-the-fact cannot fairly be described as meeting this personal observation requirement. As shown by the toll booth statute, when the Legislature wanted the contemporaneous observation requirement to be relaxed -- and for electronic evidence to be used to cite citizens for driving on the road -- it gave express approval.

In this respect, an apt comparison can be made to when law enforcement officers use electronic speed measuring devices to detect vehicles exceeding the speed limit. See §316.1906 (2), Fla. Stat. That provision excludes evidence of the speed-measuring device, unless an officer “[h]as made an independent visual determination that the vehicle is operating in excess of the applicable speed limit.”

In other words, the officer must be present when a person drives in excess of the speed limit, and a device is an additional piece of evidence that is admissible in

court. The use of technology is an additional component, not a component chosen by a municipality as the sole means. The municipal decision to use unmanned cameras as the sole means for red-light infractions is unsustainable.

There are limited circumstances where an after-the-fact “observation” is statutorily permitted. Law enforcement officers may arrest drivers involved in a traffic crash based upon “personal investigation,” §316.645, Fla. Stat. Tellingly, this statute does not require “observation,” but solely an investigation. It would also be nonsensical to impose a personal observation requirement in that circumstance. Otherwise, an officer would have to be present at the exact moment of a traffic crash in order to be able to arrest someone for violating a law. Cf. §316.640(5)(a), (an officer can issue a parking infraction ticket when he or she “observes an illegally parked vehicle” and performs a “personal investigation”).

The Masone majority stated that a Traffic Control Review Officer “verifies the accuracy of the recording before issuing a notice of violation” (89 So.3d at 238). The Ordinance, however, is void from its inception in eliminating a contemporaneous, personal observation. Verification by any other means cannot cure the Ordinance.

#### **4. The Ordinance Violates the Requirement that Proof of a Traffic Signal Violation at a Contested Hearing be Beyond a Reasonable Doubt**

Section 318.14(6), states that failing to obey a traffic signal, as a “charged infraction . . . must be proved beyond a reasonable doubt.” The City’s Ordinance

is silent as to who carries the burden of proof, or what this standard of proof is. These departures from state law are also fatal to the Ordinance's survival.

There is not a hint of express legislative approval for the City to eliminate the burden of proof or reasonable doubt requirements for the identical driving conduct. Under §316.007, and §318.14, the Legislature has "covered" the standard of proof when a driver is accused of failing to obey a traffic signal. The Ordinance provides less protection than would be available if the person were charged with an infraction for the same conduct under Chapter 316. Municipalities were not given express authority to diminish rights that all citizens are guaranteed for the conduct.

Even assuming the Legislature gave authority to utilize red-light cameras for any enforcement, it gave no such [express] authority to relax the burden of proof. The relaxation is particularly disconcerting given the departure from state law as addressed in the next subsection: City-appointed special masters act as quasi-judicial appellate "courts" in the City's code enforcement system, outside the supervision of this Court.

**5. The Ordinance Unconstitutionally Evades the Requirement that Traffic Signal Infractions be Heard by Article V Judges or Hearing Officers, Rather than City-Appointed Officials in an Appellate Proceeding**

This is perhaps the most egregious manner in which municipalities enacted unlawful and unconstitutional Ordinances. The Legislature did not give its express

authority for the City to use untrained and unsupervised “special masters” rather than county court judges or trained traffic infraction hearing officers.

Article V, §1 of the Florida Constitution, the Florida Traffic Court Rules, and Chapters 316 and 318 all contemplate that hearings for traffic signal violations be conducted by county court judges or trained civil traffic infraction hearing officers authorized by §§318.30-318.38, Fla. Stat. See §§318.13(4), 318.14(1), Fla. Stat.; Fla.R.Traf.Ct. 6.040(1), 6.450, 6.630. Article V, §1, expressly references county courts and “a civil traffic hearing officer system for the purpose of hearing civil traffic infractions;” furthermore, “[n]o other courts may be established by the state, any political subdivision or any municipality.” Id.

The City instead relies on what is designated as “special masters.” Under the Ordinance, the City Council appoints these officers to preside over a hearing. The sole job requirement is that they are experienced or interested in code enforcement, as determined by the City Manager.

The Legislature did not give its express authority for these departures from state law. Rather than neutral judges and officials presiding over the hearings to determine fault, the City hires its own (appellate) adjudicators -- people who may not even be practicing attorneys. The appointment power creates an obvious incentive for the hearing officers to please their employers. County court judges and trained civil traffic infraction hearing officers (appointed by the judges) are

neutral arbiters. The county court judges are specially trained to preside over traffic offenses (§318.32(3)).

If citizens waive this right, they are still ensured neutral hearing officers will adjudicate. Id. These officers must be members in good standing of The Florida Bar, have completed a forty-hour training course approved by this Court, and are subject to the Bar Code of Professional Responsibility and, thus, the supervision of this Court. Id.; and see Masone, 89 So.3d at 244, 246 (discussing the City's "quasi-judicial adjudication on the merits") (Rothenberg, J., dissenting).

Failing to obey a traffic signal is a traffic infraction. The City has sought to make failing to obey a traffic signal an ordinance violation. The special master authorized by the Ordinance is a "court" within the meaning of the Article V, §1 prohibition. The Constitution cannot be read to authorize the very state of affairs that Article V, §1 was designed to eliminate, i.e., municipal courts for handling traffic violations.

No provision of §316.008 authorizes a City to designate a new forum for hearing Chapter 316 offenses. The general power to regulate traffic (even when there are unique local conditions passing through the threshold of §316.002, see n.8) is not a green light to effect a sea change in traffic enforcement in Florida.

The Masone majority believed that the municipality was not creating a new court (89 So.3d at 240). The majority concluded that the municipality was simply

resolving notices of code violations. Id. The majority overlooked that home rule powers have not been delegated by the Legislature. Express approval was required when the Legislature established a uniform court system, derived from Article V.

As for the use of City-appointed officials, the Masone majority reasoned that those who are cited can still utilize the court system in its appellate capacity (89 So.3d at 240). The comparison to those given code enforcement violations for painting the outside of their house a forbidden color is misplaced. Drivers under state law, for the identical conduct as the vehicle owners in these conflict cases, turn to the court system to adjudicate guilt, not to take an appeal. These Ordinances were void from their inception in depriving drivers of this protection.

Indeed, under the Ordinances, vehicle owners must come forward to defend themselves in an appellate proceeding. The owners are presumed guilty. The Ordinance ignores the Constitution, which promises a neutral judge, in a liability proceeding. The City creatively took the identical driving activity and turned into a code enforcement appellate proceeding, but this is impeded by the Constitution.

The lack of uniformity between the City of Orlando and City of Aventura's appellate proceedings is also revealing. The City of Orlando uses Florida Bar members as hearing officers, albeit it with no qualifications. The City of Aventura uses special masters who have even less professional requirements; that is, there are no requirements. The City Manager decides who is "experienced" and

“interested” in code enforcement. This is incompatible with uniformity. See Kuhlman, supra.

**6. The Ordinance’s Penalties Impermissibly Exceed Those Under State Law, and also Improperly Eliminate Judicial Discretion**

The Ordinance is also unlawful and unconstitutional because of its schedule of fines. Ordinances are prohibited from proscribing penalties more severe than prescribed by statute. See Thomas v. State, 614 So.2d 468, 473 (Fla. 1993).

Section 318.18(15), Fla. Stat., establishes that the penalty for failing to stop at a traffic signal, in violation of §316.074-.075, is \$125. This is a non-discretionary amount, and the Legislature has expressly forbidden municipalities from increasing the amount of any fine. See §318.121, Fla. Stat.

The City ignores these provisions with its three-tiered fine system, starting at \$125 and rising to \$500 for third or subsequent offenses. This is a mandatory fine, for which the Ordinance does not authorize any discretion. Because this is a penalty more severe than permitted under Chapters 316 and 318, the Ordinance is unlawful. The City has no authority to choose the monetary sanction in an area covered by the Legislature. Accepting the City’s logic, it could establish a first fine of \$500, or perhaps \$5,000 and this would be permissible. The Legislature surely did not intend for this disregard of state law and the Constitution.

Additionally, the City threatens those who challenge citations that they will be subject to administrative charges (in the “court” system which is most assuredly

not a court). Furthermore, the City advises that it may refer the matter to collections agencies, which will lead to a negative credit rating if the citation is not paid. Besides the fact there was no legislative express authority, this fine system (and accompanying consequences) is distinct from the City of Orlando.

The City of Orlando has a two-tiered fine system, rising to \$250. More distinctive than that, the City of Orlando's Ordinance provides that citizens who do not "appeal" or lose their "appeal" cannot obtain occupational licenses or building permits, until they pay the fine. The notion of uniformity intended under the Constitution and by the Legislature for identical driving conduct has been carelessly and improperly ignored by the municipalities. See also Kuhlman, supra.

Moreover, the Ordinance is also unlawful by eliminating discretion by the city-appointed special master. The City has deprived vehicle owners of the discretion afforded under state law, by which a county court judge may impose no fine. There is not a hint of express authority given for this departure from state law.

The money a person pays for failing to obey a traffic signal should not depend on the whims of who is enforcing, and under which law, and which location a citizen travels in this state. Again, the City has entered an area which already is "covered" by the Legislature, without express authorization to increase the penalties for the identical conduct addressed under state law.

**7. The Ordinance Unlawfully Diverts Traffic Signal Related Fines from the Court Trust Fund Created by Chapter 2009-204, Laws of Florida**

Section 316.655(1), Fla. Stat., states that Chapter 316 infractions “are punishable as provided in chapter 318.” Section 318.18(15), sets out the fines “when a driver has failed to stop at a traffic signal,” with the \$125 fine to be distributed in the following manner: \$60 “shall be distributed as provided in s. 318.21,” and the remaining \$65 “shall be remitted to the Department of Revenue for deposit into the Administrative Trust Fund of the Department of Health.”

Chapter 316 penalties have long been an important source of funding for the court system through general revenue. That importance magnified four years ago, when the Legislature passed Chapter 2009-204, which created a dedicated funding source for Florida’s court system, the Clerks of the Court Trust Fund within the Justice Administration Commission. Section 12 of that Act amended §142.01, Fla. Stat., to provide that the “portion of the civil penalties directed to” each clerk’s fine and forfeiture fund “pursuant to s. 318.21” are required to “be remitted monthly . . . for deposit into the . . . Court Trust Fund.” Ch. 2009-204, §12, Laws of Fla. (creating §142.01(2), Fla. Stat. (2009)).

The City’s Ordinance involves traffic signals. Therefore, it addresses “a matter covered” by §316.002, §316.007, and §316.075 (the provision making it unlawful to disobey traffic signals). Nothing in §316.008 permits a municipality to convert the failure to stop at a traffic signal (for the identical driving conduct) into

an ordinance violation and divert money collected from vehicle owners away from the Trust Funds designated in Chapters 318 and 2009-204, Laws of Florida.

The City appears to rely on the fact that if the state had also issued citations, the City would not have enforced its citation. This entirely misses the point. The Legislature has “covered” this issue, by declaring that when a citizen drives through a steady red-light, the revenue will be directed to state agencies. The state did not authorize local municipalities (and private companies) to profit from their alternative “code enforcement citations” for the same driving conduct to the exclusion of the state. Section 316.007 expressly ensures the state is entitled to a share of the revenue for valuable purposes benefitting all citizens of this state.<sup>11</sup>

**8. The Ordinance Violates the Statutory Requirement that Traffic Signal Control Infractions be Charged by Uniform Traffic Citation**

Section 316.650, Fla. Stat., requires that all Chapter 316 traffic infractions be charged by uniform traffic citation. See also Fla.R.Traf.Ct. 6.320 (providing that “[a]ll citations for traffic infractions shall be by uniform traffic citation”). Failing to obey a traffic signal control is a Chapter 316 traffic infraction. The Notice of Infraction does not comply with §316.650.

Section 316.002, expresses the legislative goal of uniformity. There is no express approval for local municipalities to amend the manner in which citizens

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<sup>11</sup> The 2010 Legislature provides the state with a share of the revenue generated from traffic cameras.

are cited for the identical conduct as covered under state law. The Legislature was not required to forbid the City from taking this action. The Legislature had broadly prohibited any action without express authority.

This last departure from state law, in isolation, may not appear significant, but the City's disregard for Chapters 316, 318 and the Constitution was not expressly authorized. Private companies installed the cameras, and a small number of municipalities decided to enact Ordinances, under the auspice that this was outside of Chapters 316 and 318, and therefore permissible. It was not.

**B. This City's Ordinance is Unconstitutional and Unlawful When It Is Preempted by and in Conflict with State Law**

Because of the Ordinance's broad departures from Florida law, the Ordinance is in express and implied conflict with state law and the Constitution, and is preempted. Petitioner must only show one of these three is applicable.

**1. The Ordinance is Expressly Preempted**

The Fifth District correctly ruled that the Ordinance is expressly preempted. See Udowychenko, 98 So.3d at 595-597. Express preemption requires clear legislative language stating that intent, but the "preemption need not be explicit so long as it is clear that the Legislature has clearly preempted local regulation of the subject." Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So.3d 880, 886 (Fla. 2010) (citation omitted); and see Mulligan, 934 So.2d at 1243 (while this Court explained express preemption cannot be by implication or reference, this

Court also explained that, “[h]owever, ‘[t]he preemption need not be explicit so long as it is clear the Legislature has clearly preempted local regulation of the subject’”(citations omitted).

In the instant case, the Fifth District relied upon §§316.002 and 316.007, which, “clearly indicates the Legislature's intent to expressly preempt to the state the enforcement of traffic signal violations except for the limited local regulation allowed by the law.” Udowychenko, 98 So.3d at 595-596.

As the Court also noted, any reliance on §316.008 (1)(w) is misplaced, since its Ordinance “*enforces* traffic violations of a subject area that is covered and enforced by state law.” Id. at 596 (emphasis in original). Furthermore, the ordinance “regulates identical conduct that is covered by chapter 316.” Id. (comparing the language of §316.075(1)(c)(1) with the almost identical-language of the City’s Ordinance addressing the obligation to stop at red lights).<sup>12</sup>

The City asks this Court to allow it, and all municipalities in the state, to have their own hodgepodge of local ordinances, where each could significantly differ from one another and the uniform provisions under Chapter 316. The Cities before this Court have different fine schedules, and one threatens reporting to credit agencies, while the other denies occupational licenses and building permits.

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<sup>12</sup> The Masone majority concluded there had not been express preemption. See Masone, 89 So.3d at 239. However, the majority appears to have reached this conclusion without any analysis of the statutory text. Id.

No express authority was given. The cities took the identical driving conduct and tried to dramatically alter the manners in which it was charged, enforced and adjudicated. Mulligan presented an example where there was not express preemption. A state law declared that the forfeiture of contraband was a felony. The local ordinance made this same offense a misdemeanor. This Court noted that the state law did not express any intent to preempt the seizure and forfeiture of vehicles where a person was accused of non-felonies, or forfeiture of vehicles in general (934 So.2d at 1245-46). The particular statutory language was the guiding force for the Court's analysis. Given the Legislature only addressed particular conduct and particular remedies for that conduct, local municipalities had the authority to address different conduct and impose different remedies for that conduct.

By contrast here, the Legislature has unmistakably covered who would be ticketed with driving through red-lights, who would observe the behavior in question, the judge and court that would adjudicate this behavior, the burden of proof for this conduct, or how revenue for this behavior would be distributed. The Legislature has not given its express authority (pursuant to §316.008 or otherwise) to deviate from all of these issues, for the identical driving conduct. As the dissenting judge in Masone stated (89 So.3d at 246):

While the Legislature granted municipalities the authority to regulate, restrict, or monitor traffic within

their jurisdictions, the Legislature did not expressly grant municipalities the authority to enforce the same traffic infractions identified and already regulated in chapter 316 through their own “system of justice.” If that were the case, there would be no uniformity-only confusion.

Cited with approval by Udowychenko, 98 So.3d at 593 n.5.

## **2. The Ordinance is Also Impliedly Preempted**

Even if there were not express preemption in this case, the Fifth District correctly held there is implied preemption. Udowychenko, 98 So.3d at 596-597. In Browning, this Court reaffirmed that the focus of a preemption analysis is not limited to the language of the statute alone; such an analysis must include consideration of the breadth of the statutory scheme as well as the intent of the Legislature when enacting it. 28 So.3d at 886 (citing Phantom of Brevard, Inc. v. Brevard Cnty., 3 So.3d 309, 314 (Fla. 2008)).

In Browning, this Court held that the Florida Election Code did not impliedly preempt local laws regarding the counting, recounting, auditing, canvassing, and certification of votes (28 So.3d at 887-88). This Court reasoned that the statutory scheme recognized that local governments were in the best position to make some decisions for their localities (28 So.3d at 888).

The instant case is far different, because of the restrictive language of §316.007. While the Legislature has given local governments the ability to enact ordinances, there must be express authority for any matter already covered by the

Legislature. The City of Orlando has not been given express authority to deviate from any of the eight areas of the law covered above.

The City's argument could carry more weight if §316.002 and §316.007 did not exist. They do, and the City cannot overcome the legislative intervention, consistent with the purpose of Chapter 316's enactment.

The Fifth District reasoned that "the legislative scheme of enforcing traffic violations is pervasive; chapters 316 and 318 cover almost every area of traffic regulation and enforcement, encompassing 125 pages in the publication of the Florida Statutes," Udowychenko, 98 So.3d at 596.

The Fifth District did not impose a mathematical test; it is the broadness of the statutes which is the best indicia of legislative preemption. The ability to utilize red-light traffic cameras was not a green light for this extraordinary deviation from Chapters 316 and 318.

The Masone majority's conclusion that there is not implied preemption is not well-taken. Masone, 89 So.3d at 239. The majority viewed §316.108, Fla. Stat., in isolation. The issue is not whether the Legislature may permit municipalities to utilize red-light traffic cameras. The issue is that pursuant to §316.002 and §316.007, the Legislature must give its express authority on any matter covered, including within §316.008. The particular areas of vehicle driver enforcement, personal observation, a county court judge, proof beyond a

reasonable doubt, and so forth, reflect occupation of all of these particular areas. See also Masone, 89 So.3d at 243-44 (reasoning that the majority's focus on §316.008(1)(w) was misplaced) (Rothenberg, J., dissenting).

Any reliance on this Court's discussion in Phantom of Brevard, Inc., is unavailing. A municipality required insurance where the Legislature was silent on that issue. The municipality merely supplemented legislative endeavors into this realm (fireworks). The Legislature has been anything but silent in the eight areas of the law covering the offense Masone was charged with, and adjudicated and punished. To call this a supplementary Ordinance would shatter the legislative and constitutional structure of state and local government.

Finally on this point, the Fifth District wisely rejected the City's contention that the 2010 legislation proved municipal ordinances were not previously preempted (98 So.3d at 596-97). The Fifth District noted that the Legislature may enact statutes simply to "clarify that which previously existed," and the recent legislation appears to have been such an example. Id.

The City presents no evidence to warrant a different conclusion. As explained below in detail, IB 46-47, the evidence is that legislative statements within the 2010 Legislation at least partially resulted from expensive municipal lobbying as protection from litigation. Moreover, the 2010 Legislative Opinion is,

in any event, unhelpful to the statutory and constitutional viability of existing Ordinances. See IB 45-48.

### **3. The Ordinance is in Conflict with State Law and the Constitution**

The City's Ordinance is also unconstitutional and unlawful because it conflicts with state law. See Phantom of Brevard, Inc., 3 So.3d at 314 (noting that the test of conflict between an ordinance and statute is whether to comply with one, a violation of the other is required).

The City's Ordinance is invalid because it "cannot co-exist" with state law. Browning, 28 So.3d at 886. In Browning, this Court held that a county amendment requiring the county commission to utilize voter-verified paper ballots did not conflict with the state election code. This Court reviewed the code and reasoned that there were merely "minimum requirements for voting machines that have been enumerated by the Legislature," such that the "additional standards" in the amendment simply "complement[ed] the election code" (28 So.3d at 887).<sup>13</sup>

Likewise in Phantom of Brevard, Inc., this Court held that local ordinances requiring firework businesses to carry liability insurance did not conflict with the state chapter addressing this industry (Chapter 791), since the chapter evidenced an intent to be "silent" on this issue (3 So.3d at 314-15). Counties were simply choosing to legislate in an area that the Legislature did not legislate. Counties

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<sup>13</sup> This Court held that other provisions of the county amendment did conflict with the state election code. See Browning, 28 So.3d at 889-91.

were simply adding additional business requirements, and businesses could easily comply with these and those under Chapter 791.

Contrary to the Masone majority's conclusion, there is nothing about the City's Ordinance that "supplements" Chapters 316 or 318 (89 So.3d at 238). As the Fifth District explained, "the statute is not silent as to the conduct regulated. It is the same conduct but enforced inconsistently." Udowychenko, 98 So.3d at 597. The City's Ordinance "enforces identical conduct that is covered by" Chapters 316, 318. Id. at 597-598. The Ordinance "mimics the language of" §316.075(1)(c) and "enforces an area of the law that is *covered* within chapter 316." Id. at 598 (italics in original).

The City did not simply "add" regulations, it, inter alia, altered who was ticketed, the "witness" to those being ticketed, the person and "court" who would determine if there was a violation, the burden of proof to determine if there was a violation, the penalties to impose, and the distribution of revenue. See Udowychenko, 98 So.3d at 599 (finding conflict and preemption); and see Masone, 89 So.3d at 243-244 (dissent, in reasoning that the local ordinance conflicted with state law, states that municipalities did not have "the authority to enforce the state's uniform traffic laws by a totally separate, very different, unapproved method [of enforcement]." (Rothenberg, J., dissenting)).

The City's decision to label the identical conduct extensively covered under Chapter 316 as a code violation -- as if this was a local ordinance regulating dog waste or playing loud music -- is unsustainable. See Udowychenko, 98 So.3d at 599 (holding that the Ordinances were not authorized by §316.008(1)(w)).

C. **Attorney General Opinions Concluded That a Local Authority May Not Enact An Ordinance Using Cameras to Enforce Traffic Signal Violations**

Attorney General opinions are "entitled to careful consideration and generally should be regarded as highly persuasive." McKenzie Check Advance of Florida, LLC v. Betts, 928 So.2d 1204, 1214 (Fla. 2006) (citation omitted). Two Attorney Generals have signaled that an ordinance such as the City's is unlawful.

In 1997, the Attorney General was asked to render an opinion on whether a municipality could enact an ordinance authorizing the use of unmanned cameras to issue citations for violations of §316.075, Op. Att'y Gen. Fla. 1997-06 (1997). The Attorney General concluded (AA20):

[W]hile nothing precludes the use of unmanned cameras to record violations of section 316.075, Florida Statutes, a photographic record of a vehicle violating traffic control laws may not be used as the basis for issuing a citation for such violations. Rather, independent observation or knowledge of the infraction by the officer issuing the citation is required.

It is this reasoning which the circuit court relied upon in invalidating the City of Aventura's unmanned red-light camera ordinance (R1:180-84). The City

insists that the Attorney General only addressed whether the City could use its cameras and charge people for statutory offenses. This is a superficial interpretation of the Attorney General's Opinion. The underlying reasoning of the Opinion is that the City could not re-label traffic infractions as "code violations," and take these matters outside Chapters 316 and 318.

Subsequently, another Attorney General addressed a municipality's authority to enter the traffic arena (AA22-25). The Attorney General concluded that local municipalities had the authority to monitor, record, and advise car owners that they failed to obey traffic signals. However, regarding the punishment of these car owners, the Attorney General held such efforts would be unlawful.

The Attorney General referenced various statutes pertaining to red-light violations and observed that "Chapter 316 . . . contains enforcement and penalty provisions for violation of traffic control signal lights." *Id.* (citing §316.007 and §316.075). The Attorney General concluded that "legislative changes are necessary before local governments may issue traffic citations and penalize drivers who fail to obey red light indications on traffic signal devices" (AA24-25); see also AA34 (Florida Department of Transportation opined in 2007 that an ordinance utilizing and prosecuting traffic signal violators with unmanned cameras was illegal).

The City declined to lobby the Legislature to make those legislative changes, or while lobbying, declined to defer its Ordinance until the 2010 legislation. The Attorney General soundly examined the statutory framework of Chapter 316. The City's impatience is not a justification for violating the statute and the Constitution.

**D. Legislative Staff Members Have Recognized that Local Ordinances Are Unlawful in the Absence of Legislative Approval**

The Legislature considered legislation in 2009 to authorize municipalities to issue traffic-signal citations through unmanned traffic cameras (AA35-45).

As this legislation was considered, a Staff Analysis concluded that local municipalities could not enact red-light camera ordinances prosecuting and adjudicating citizens for failing to obey traffic signals (AA35-45). While the Analysis confirmed that some municipalities had implemented ordinances as code violations, it noted that many local governments had shown restraint by utilizing cameras for "pilot projects solely for data collection purposes or as a warning system to motorists" (AA38). The City should have shown this restraint.

**E. The 2010 Legislation Does Not Support the City's Position**

The City's reliance on the Legislature's recent endeavor into this area of the law is surprising. The City contends the 2010 legislation authorizing the use of unmanned cameras to cite drivers must mean the pre-2010 Ordinance is lawful and constitutional. The City effectively asks this Court to avoid its independent role in

the judiciary, and asks this Court to rubber-stamp the Legislature's views about pre-existing red-light camera ordinances. The City's invitation should be declined.

According to the City, because the state legislation explains that the state was preempting prior local legislation, this means that the prior ordinances were not preempted. See §316.0076, Fla. Stat. (2010). Hence, the City apparently believes that the Legislature (one Legislature, in 2010) determines whether prior, local legislation (by a different Legislature long ago) was constitutional and lawful.

The fact the state was intervening into the arena of unmanned traffic cameras does nothing to address whether the prior local legislation was lawful. The City contends that it would have been pointless to preempt an area of the law which it had already preempted. It is far more likely the Legislature simply wished to make expressly clear that this area of the law was being preempted to the state. See Udowychenko, 98 So.3d at 597 (the recent legislation appears to have merely clarified that the regulation of traffic is preempted to the state).

The City also ignores the fact that the legislation had failed in 2009 and, by 2010, was the subject of intense lobbying by municipalities and private vendors alike. One vendor, an amicus in the conflict case before this Court and "the main camera supplier in Florida," reportedly "spent as much as \$1.5 million dollars lobbying public officials and contributing to political campaigns" in this State, over a four-year period. See Sally Kestin & Ariel Barkhurst, Red Light Camera

Company Runs Up Big Lobbying Tab in Florida, Sun Sentinel (S. Fla.), Aug. 14, 2011, available at [http://articles.sun-sentinel.com/2011-08-14/news/fl-red-light-cameras-20110814\\_1\\_red-light-camera-camera-programs-american-traffic-solutions](http://articles.sun-sentinel.com/2011-08-14/news/fl-red-light-cameras-20110814_1_red-light-camera-camera-programs-american-traffic-solutions). The Petitioner does not suggest the Legislature had improper motivations in enacting the Legislation. However, the lobbying efforts help explain why the Legislature's Opinion on the legality of prior municipal ordinances is unhelpful to this Court's resolution of these cases.

More importantly than the 2010 legislative members' beliefs, the Legislature does not have the ability to dictate to this Court, in the judicial branch, that local legislation is lawful or constitutional. Cf. State Farm Mutual Automobile Insurance Co. v. Laforet, 658 So.2d 55, 61 (Fla. 1995) (in examining whether a law can be applied retroactively, commenting that, "Just because the Legislature labels something as being remedial, however, does not make it so").

The City does not explain why the judicial branch's review of municipal laws is influenced by what one Legislature thinks of the constitutionality and lawfulness of said local laws. If the Legislature decided whether (inferior) municipal ordinances were legal, the role of the judiciary would be feeble.

Indeed, in the (truly) seminal case of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), the Supreme Court held that it was solely "the province and duty of the judicial department to say what the law is." The framers of the Constitution

intended that the separation between the judiciary and Legislature be clear because they had “lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the revolution, and which after the revolution had produced fractional strife and partisan oppression.” Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995). As Madison noted in the Federalist Papers: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control.” Federalist No. 47 at 300 (quoting Montesquieu) (Clinton Rossiter ed., 1961).

The City also asserted that because the Legislature gave local authorities a grace period before replacing existing red-light camera technology with new requirements delegated to the Department of Transportation, this means that the prior red-light camera ordinances were lawful. The constitutionality or lawfulness of the City’s Ordinance is not dependent on the technology of its traffic cameras.

It is also unfair to subscribe any meaning to the Legislature’s statement of preemption, without the City mentioning the 2009 (and then the 2010) Staff Analysis that questioned the lawfulness of the local existing Ordinances (AA51-52). Again, the analyses noted that “the problem identified” by the Attorney General Opinions was that existing ordinances (similar to the City of Orlando’s here) were impermissible without express legislative authority (AA51).

**F. Safety Concerns are Irrelevant to the Legality of its Ordinance**

The Petitioner agrees that reducing the risk of red-light traffic accidents is a worthy undertaking. An ends justifies the means analysis does not work. The Ordinance cannot be saved because the City genuinely believes that the use of cameras improved safety.<sup>14</sup>

As documented above, it is not the use of cameras which is the fatal blow to the City's Ordinance. The City's goals could have been met without enforcement and adjudication [or even with enforcement in tandem with statutory and constitutional guarantees, such as a neutral judge, burden of proof beyond a reasonable doubt, and so forth]. Cameras also could have been utilized by the City to determine where red-light driving was most prevalent. Statistics gathered from using the cameras could have been used to lobby the Legislature to enact legislation -- legislation that was enacted.

There is also reason to believe that at least one motivation of the City was revenue collection. The City declined to share any proceeds with state agencies; instead the funds were exclusively shared with private companies. The City presented no evidence it took any steps to improve safety, other than these red-

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<sup>14</sup> Studies of red-light traffic cameras and their link to reducing traffic accidents is irrelevant, and their statistical veracity could be questioned. The Legislative Staff Analysis pointed out that studies diverge on whether red-light cameras actually do reduce the overall rate of car accidents (AA35-45).

light cameras to the exclusion of the state. The City declined to extend the time for yellow lights, or lobby the Legislature to be able to do so. As the Missouri Supreme Court recently suggested, increasing the timing of yellow lights can improve safety (and decreasing the timing often occurs to “trap motorists”). See City of Springfield v. Belt, 307 S.W.3d 649, 651 n.4 (Mo. 2010).

The Legislature continues to debate the public-policy benefit of the cameras. In this Legislative session, there is a push to eliminate the use of these cameras, arising from the 2010 Legislation. Red-Light Camera Repeal Moves Ahead, Associated Press, Feb. 15, 2013, available at <http://www.tallahassee.com/viewart/A9/20130215/NEWS01/302140064/Red-light-camera-repeal-moves-ahead>. Ultimately as the issues in this case, the City’s Ordinance must yield to the Constitution and state law.

### **CONCLUSION**

For the reasons stated above, this Court should quash the Third District’s 2-1 decision in this case, and affirm the Fifth District’s ruling in the conflict case, Udowychenko. The Ordinances at issue before this Court are unconstitutional and unlawful, under express and implied preemption, as well as conflict principles.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY a true copy of the foregoing was furnished to EDWARD G. GUEDES, ESQ.(eguedes@wsh-law.com), 2525 Ponce de Leon Blvd., Ste. 700, Coral Gables, FL 33134, and SAMUEL J. SALARIO, JR., ESQ. (ssalario@carltonfields.com, bsickimich@carltonfields.com, tpaecf@cfdom.net), JOSEPH HAGEDORN LANG, JR., ESQ. (jlang@carltonfields.com), AMANDA ARNOLD SANSONE, ESQ. (asansone@carltonfields.com, bsickimich@carltonfields.com, tpaecf@cfdom.net), 4221 W. Boy Scout Blvd., Ste. 1000, Tampa, FL 33607, by email, on February 25, 2013.

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