

ORIGINAL

No. 21-*664*

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

Patrick J. Downey,

Petitioner,

v.

City of Toledo,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Do federal courts have legal authority to alter or amend the plain meaning of a lawfully-enacted statute of a sovereign state or a lawfully-enacted ordinance of a sovereign municipality that were an exercise of the state or municipality's police powers?

Issue Reserved on Remand if Court Rules for Petitioner on Question 1

A. Did the City of Toledo's ("Respondent") ordinance (TMC § 313.12) and hearing ("Hearing"), under color of law, unconstitutionally force Patrick J. Downey ("Petitioner") to choose between exercising his right to due process of law under the Fourteenth Amendment and his right against self-incrimination under the Fifth Amendment?

2. Did *Parratt v. Taylor*, 451 U.S. 527 (1981) provide legal authority for the circuit court to enter judgment against Petitioner, a non-prisoner plaintiff, for failing to exhaust state court remedies when Petitioner's Declaratory Judgment Act complaint alleged violations of his right to due process of law under the Fourteenth Amendment and 42 United States Code ("USC") § 1983?

**Issue Reserved on Remand if Court Rules for
Petitioner on Questions 1 & 2**

A. Did Respondent, under color of law, violate Petitioner's right to due process of law under the Fourteenth Amendment by assessing penalties against Petitioner when TMC § 313.12 did not provide it with legal authority to operate a civil traffic enforcement program that deployed police officers operating mobile cameras and its program exceeded its Home Rule authority under Ohio's Constitution?

**Issues Reserved on Remand if Court Rules for
Petitioner on Question 2**

A. Did Respondent, under color of law, violate Petitioner's right to due process of law by assessing an additional penalty under TMC §313.12(d)(5) when the penalty, under the facts presented, was not authorized by its ordinance, which Respondent admitted in its appellate brief?

B. Would Respondent, under color of law, violate Petitioner's right to due process of law by towing or immobilizing his vehicle when the action, under the facts presented, was not authorized by its ordinance, which Respondent admitted in its appellate brief?

C. Did the Hearing provided by Respondent under TMC § 313.12 violate, under color of law,

Petitioner's right to procedural due process of law?

3. In light of Respondent's admission that it did not have legal authority to take the actions complained of in the third and fourth issues of Petitioner's declaratory judgment action, did the circuit court have legal authority to grant judgment to Respondent on those issues?

II. RELATED PROCEEDINGS

Patrick J. Downey v. City of Toledo, administrative hearing under TMC § 313.12 on Notice # SH00269831

Patrick J. Downey v. City of Toledo, case # 3:18-cv-2403, declaratory judgment action filed in United States District Court for the Northern District of Ohio

Patrick J. Downey v. City of Toledo, case # 20-3894, appeal of District Court's decision filed in the United States Court of Appeals for the Sixth Circuit

Patrick J. Downey v. City of Toledo, case # 20-3894, petition for *en banc* rehearing filed with the United States Court of Appeals for the Sixth Circuit

TABLE OF CONTENTS

| | Page |
|--|-------------|
| QUESTIONS PRESENTED | i |
| RELATED PROCEEDINGS | iv |
| TABLE OF AUTHORITIES | vi |
| PETITION FOR WRIT OF CERTIORARI ... | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE | 2 |
| INTRODUCTION AND STATEMENT OF THE CASE | 4 |
| A. Factual Background | 4 |
| B. Proceedings in the District Court and Court of Appeals | 5 |
| REASONS FOR GRANTING THE PETITION..... | 15 |
| CONCLUSION | 32 |

APPENDIX

| | |
|--|------|
| Opinion of the Court of Appeals | A-1 |
| Memorandum Opinion of the District Court | A-12 |
| Order Denying Petition for <i>En Banc</i> Rehearing..... | A-20 |
| Constitutional Provisions, Statutes, and Ordinances | A-22 |

TABLE OF AUTHORITIES

| | Page |
|--|-------------------|
| Cases | |
| <i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954)... | 16 |
| <i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)... | 23 |
| <i>Davidson v. New Orleans</i> , 97 U.S. 97 (1878)... | 6, 12, 14, 19 |
| <i>Dayton v. State of Ohio</i> , 151 Ohio St.3d 168 (2017)... | 8 |
| <i>Gardner v. City of Cleveland</i> , 656 F.Supp.2d 751 (N.D. Ohio 2009)... | 28 |
| <i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)... | 21, 24, 25, 26 |
| <i>Hudson v. Palmer</i> , 468 U.S. 517 (1984)... | 29 |
| <i>I.N.S. v. Phinpathya</i> , 464 U.S. 183 (1984)... | 17-18, 22 |
| <i>Marbury v. Madison</i> , 5 U.S. 137 (1803)... | 16, 17, 22, 27 |
| <i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)... | 7, 10, 15, 29, 30 |
| <i>Mendenhall v. Akron</i> , 117 Ohio St.3d 33 (2008)... | 6, 12-13, 19, 20 |

| | |
|--|-------------------|
| <i>Murray v. Hoboken L. & I. Co.</i> , 59 U.S. | |
| 272 (1855)... | 16 |
| <i>Muskrat v. U.S.</i> , 219 U.S. | |
| 346 (1911)... | 22 |
| <i>Parratt v. Taylor</i> , 451 U.S. | |
| 527 (1981)... | i, 13, 28, 29, 30 |
| <i>Perez v. Ledesma</i> , 401 U.S. | 82 |
| (1971)... | 13 |
| <i>Patsy v. Bd. of Regents</i> , 457 U.S. | |
| 496 (1982)... | 13, 30 |
| <i>Richards v. U.S.</i> , 369 U.S. | |
| 1 (1962)... | 18 |
| <i>Rivers v. Roadway Express Inc.</i> , | |
| 511 U.S. 398 (1994)... | 22, 23 |
| <i>Simmons v. U.S.</i> , 390 U.S. | |
| 377 (1968)... | 5, 19 |
| <i>Speiser v. Randall</i> , 357 U.S. | |
| 513 (1958)... | 7 |
| <i>Steffel v. Thompson</i> , 415 U.S. | |
| 452 (1974)... | 13, 14, 31-32 |
| <i>United Savs. Assn. of Tex. v. Timbers</i> | |
| <i>of Inwood Forest Assoc., Ltd.</i> , 484 | |
| U.S. 365 (1988)... | 20 |
| <i>U.S. v. Missouri Pac. R. Co.</i> , 278 | |

| | |
|-------------------------------------|------------|
| U.S. 269 (1929)... | 17, 19 |
| <i>U.S. v. Morrison</i> , 529 U.S. | |
| 598 (2000)... | 26-27 |
| <i>Younger v. Harris</i> , 401 U.S. | |
| 37 (1971)... | 26 |
| <i>Zinermon v. Burch</i> , 494 U.S. | |
| 113 (1990)... | 13, 28, 29 |

United States Constitution

| | |
|--------------------------------|--------------------|
| U.S. Const. art. I, § 1... | 21 |
| U.S. Const. art. I, § 8... | 21 |
| U.S. Const. art III, § 1... | 22 |
| U.S. Const. art. III, § 2... | 22 |
| U.S. Const. art IV, § 4... | 25, 26, 27 |
| U.S. Const. amend. V... | i, 5, 9, 14, 16-19 |
| U.S. Const. amend. X... | 24, 25, 26, 27 |
| U.S. Const. amend. XIV, § 1... | i, ii, 5, 10, 14 |

Federal Statutes

| | |
|------------------------|------------------|
| 28 U.S.C. § 1254(1)... | 1 |
| 28 U.S.C. § 2201... | 14, 30-31 |
| 28 U.S.C. § 2202... | 14, 30-31 |
| 42 U.S.C. § 1983... | i, 5, 28, 29, 30 |

Federal Rules of Civil Procedure

| | |
|------------|----|
| FRCP 12... | 29 |
| FRCP 36... | 7 |

Ohio Constitution

| | |
|--------------------------------|--------|
| Ohio Const. art. XVIII, § 3... | 19, 20 |
|--------------------------------|--------|

Ohio Statutes

| | |
|-----------------------------|------------------|
| O.R.C. § 1.47(A)... | 10, 20 |
| Former O.R.C. § 4511.092... | 8, 9, 11, 17, 18 |
| | 18, 20-21, 27 |
| Former O.R.C. § 4511.093... | 8, 18 |
| Former O.R.C. § 4511.099... | 8-10, 17-20, 27 |
| O.R.C. § 4511.21... | 20 |

City of Toledo Ordinances

| | |
|---------------------------|---------------|
| T.M.C. § 303.98... | 6, 12 |
| Former T.M.C. § 313.12... | <i>passim</i> |

Miscellaneous

| | |
|---|-------|
| <i>Amicus</i> brief filed by Respondent in <i>Mendenhall v. Akron</i> on April 17, 2007 found in the Ohio Supreme Court's on-line docket for case #2006-2265... | 20-21 |
|---|-------|

| | |
|---|-------|
| <i>Due Process of Law Under the United States Constitution</i> , H.E. Willis, 74 U. of Penn. L. Rev. 331 (Feb. 1926)... | 15-16 |
| <i>The American Heritage Dictionary of the English Language, New College Edition</i> , Morris, W., ed. 1981... | 8, 18 |
| <i>The Federalist No. 45</i> , J. Madison, Rossiter, C. ed., 1961... | 24 |
| <i>The Federalist No. 57</i> , J. Madison, Rossiter, C. ed., 1961... | 25 |

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Appellate Circuit.

OPINIONS BELOW

The unpublished panel opinion of the Court of Appeals (“OCA”) is included in Petitioner’s Appendix (“Pet. App.”) at Appx. A. The order denying the petition for an *en banc* rehearing is included in Pet. App. at Appx. C. The unpublished opinion of the District Court is included in Pet. App. at Appx. B (“ODC”).

JURISDICTION

On August 10, 2020, the district court granted Respondent’s summary judgment motion on the first issue raised in Petitioner’s complaint, as amended (“Complaint”). Petitioner filed a timely appeal to the Sixth Circuit Court of Appeals, which affirmed the district court’s grant of summary judgment on April 16, 2021. The circuit court also granted summary judgment to Respondent on the four issues the district court did not substantively address. Petitioner timely filed a petition for an *en banc* rehearing. The circuit court denied the petition on June 10, 2021. This Court has jurisdiction under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. art. I, § 1 provides:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. I, § 8 is set forth in Appendix D:

U.S. Const. art. III, § 1 provides in part:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 2 provides in part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States....

U.S. Const. art. IV, § 4 provides in part:

The United States shall guarantee to every State in this Union a Republican Form of Government....

U.S. Const. Amend. V provides in part:

No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

or property, without due process of law....

U.S. Const. Amend. X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend XIV § 1 provides in part:

...[N]or shall any State deprive any person of life, liberty, or property, without due process of law....

28 USC § 2201(a) is set forth, in part, in Appendix D.

28 USC § 2202 is set forth in Appendix D.

42 USC § 1983 is set forth in Appendix D.

Ohio Const. art. XVIII, § 3 provides:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

ORC § 1.47 is set forth, in part, in Appendix D.

Former Ohio Revised Code (ORC") § 4511.092 is set forth, in part, in Appendix D.

Former ORC § 4511.093 is set forth in Appendix D.

Former ORC § 4511.097 is set forth, in part, in Appendix D.

Former ORC § 4511.098 is set forth, in part, in Appendix D.

Former ORC § 4511.099 is set forth, in part, in the Appendix.

ORC § 4511.21 is set forth, in part, in Appendix D.

TMC § 303.98 is set forth, in part, in Appendix D.

Former TMC § 313.12 is set forth in Appendix D.

INTRODUCTION AND STATEMENT OF THE CASE

A. Factual Background

This is a tale of lawlessness. Without an authorizing ordinance and in violation of Ohio's Constitution, Respondent implemented a civil traffic enforcement program deploying police officers using hand-held speed cameras. Its operation of the program violated the fundamental federal constitutional rights of automobile owners, including

Petitioner. It does not appear these facts gave any pause to the lower courts.

On June 4, 2018, an officer of the Toledo Police Department (“TPD”) photographed Petitioner’s automobile allegedly travelling above the speed limit. Under TMC § 313.12, a civil traffic ordinance, Respondent sent Petitioner a notice of liability (“Notice”). Petitioner appealed the Notice and attended the Hearing on July 19, 2018. Petitioner filed a motion to dismiss alleging violation of his Fifth and Fourteenth Amendment rights, which was denied. On September 24, 2018, Respondent sent a Petitioner a default notice imposing a \$145 fine and threatening to file suit or tow or immobilize Petitioner’s vehicle to collect the fine. In response, Petitioner filed a Declaratory Judgment Action with the Federal District Court for the Northern District of Ohio on October 16, 2018.

B. Proceedings in the District Court and Court of Appeals

Petitioner’s declaratory judgment Complaint raised five separate constitutional issues under the Fifth and Fourteenth Amendments of the U.S. Constitution. Each issue implicated 42 USC § 1983.

Petitioner’s first issue alleged Respondent, under color of law, unconstitutionally forced him to choose between exercising his right to due process of law and his right to not incriminate himself. *Simmons v. United States*, 390 U.S. 377, 394 (1968).

Petitioner’s second issue alleged TMC § 313.12 did not authorize Respondent to deploy police officers operating mobile cameras to civilly enforce its traffic

laws. It further alleged Respondent's deployment of police officers to civilly enforce traffic laws decriminalized the offense and thereby exceeded its Home Rule authority under Ohio's Constitution. *See Mendenhall v. Akron*, 117 Ohio St.3d 33, 41 - 42 (analyzing whether Akron had decriminalized traffic violations). Consequently, Respondent's imposition of penalties, under color of law, violated Petitioner's right to procedural due process because Respondent lacked legal authority, both under its ordinance and Ohio's Constitution, for this civil traffic enforcement program. *Davidson v. New Orleans*, 97 U.S. 97, 102 (1878).

Similarly, Petitioner's third and fourth issues alleged Respondent, under color of law, violated his right to due process because, under the facts presented, its ordinance did not give it legal authority to impose an additional \$25 penalty and immobilize or tow Petitioner's vehicle. *Id.* Respondent, in its appellate brief, acknowledged it lacked legal authority for those actions.

Petitioner's fifth issue alleged Respondent's Hearing, under color of law, did not afford Petitioner with procedural due process because the ordinance and Hearing¹ presumed Petitioner had violated its

¹ The City of Toledo recently enacted TMC § 303.98, a new civil traffic enforcement ordinance, to replace TMC § 313.12. The new ordinance incorporates much of the language of TMC § 313.12. However, it does add language that establishes a presumption that its notice is *prima facie* evidence of the facts set forth in the notice. TMC § 303.98(c)(4). Respondent's Notice stated its recorded images constituted *prima facie* evidence of the violation but TMC § 313.12 did not provide it with a legal basis for that assertion.

ordinance but did not provide him with a means to contest those presumptions and the Hearing did not provide sufficient protection to Petitioner's right against self-incrimination. *Speiser v. Randall*, 357 U.S. 513 (1958), *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (establishing a three-factor due process analysis).

During discovery, Petitioner served Respondent with four admissions requests under Rule 36 of the Federal Rules of Civil Procedure ("FRCP"). On May 9, 2019, the district court held a conference regarding Respondent's failure to timely respond to Petitioner's first three requests. The court ordered the facts in the first three requests deemed admitted. They included: 1) Respondent did not present evidence at the Hearing to establish the camera operated by the officer was operating properly and was capable of accurately capturing the speed of Petitioner's vehicle; and 2) the officer who operated the camera did not attend the Hearing and could not be questioned.

Petitioner filed for summary judgment on May 10, 2019. On June 25, 2019, Respondent filed for judgment on the pleadings or, in the alternative, for summary judgment. Respondent and Petitioner filed memoranda in opposition.

The district court granted Respondent summary judgment on the first issue in Petitioner's Complaint on August 10, 2020. ODC at A-18. It held Respondent had not forced Petitioner to choose between his right to due process and his right against

self-incrimination because ORC § 4511.099(H)² would have barred Respondent from using Petitioner's testimony in another judicial proceeding. *Id.* The court did not explain how ORC § 4511.099(H) applied to cameras operated by police officers. *See id.* at A-18 -19 (acknowledging Petitioner's argument the statute did not extend to cameras operated by officers but failing to address it).

ORC § 4511.099(H) only excluded from use as evidence in other judicial proceedings admissions made and decisions rendered in response to tickets issued by operation of "traffic law photo-monitoring devices". That term was defined as "an electronic system consisting of a photographic, video, or electronic camera and *a means of sensing the presence of a motor vehicle that automatically produces recorded images*". ORC § 4511.092(K)(emphasis added).

Automatic is defined as, "acting or operating in a manner essentially independent of external influence or control". *The American Heritage Dictionary of the English Language, New College Edition*, Morris, W., ed., 1981. The ordinance's definition only includes cameras triggered by sensors, i.e., self-actuated cameras. ORC § 4511.093(B)(1)³ supports this reading. It required a law enforcement

² This statute was a part of S.B. 342, the Ohio General Assembly's attempt to regulate the civil traffic enforcement programs of Ohio's political subdivisions.

³ This division of the statute was held unconstitutional by the Ohio Supreme Court as an impingement on the Home Rule authority of municipalities. *Dayton v. State of Ohio*, 151 Ohio St.3d 168 (2017).

officer be present at the location of a traffic law photo-monitoring device “*at all times* during the operation of the device” (emphasis added). A camera system operated by an officer would not operate if he was not present so it logically follows these were cameras that operate without human input.

From this we understand ORC § 4511.092(K) expressly excluded cameras operated by human beings and the Notice was not a ticket defined by ORC § 4511.092(J). Consequently, Petitioner’s Fifth Amendment rights were at risk because the protection of ORC § 4511.099(H) only extended to admissions made in response to or decisions rendered on tickets issued through the operation of a traffic law photo-monitoring device.

With respect to Petitioner’s second issue the court stated:

I need not answer the question of whether Toledo Municipal Code § 313.12 permitted the use of handheld speed cameras because tickets issued following the use of a handheld camera *remain subject to the same administrative hearing procedure*, and Ohio law prohibited the future use of allegedly-incriminating statements made during the administrative process, *without regard to the validity or invalidity of the underlying citation*. See former Ohio Rev. Code § 4511.099(H).

ODC at A-18 (emphasis added). The district court assumed TMC § 313.12 and the administrative

hearing created thereunder applied to mobile cameras operated by police officers, the very issue it was asked and declined to decide! It also assumed the Ohio General Assembly would pass a law that applied to Respondent's deployment of officers to civilly enforce Ohio's traffic laws if such action was illegal. This is contrary to the legal presumption that the General Assembly's enactments comply with Ohio's Constitution. ORC § 1.47(A).

Without any legal or factual analysis, the court stated Respondent's "administrative procedures provided a mechanism by which [Petitioner] could challenge the citation he received, including by challenging the manner in which the administrative hearing was conducted. Thus, [Petitioner] fails to establish the City's procedures violated his Fourteenth Amendment rights." ODC at A-18-19. It is not clear which of Petitioner's issues this statement was intended to address. However, it fails as a *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), three-part due process analysis. Petitioner believes it is telling that at no time did Respondent or either lower court rebut his detailed and substantive *Mathews* analysis of the Hearing with their own analysis. The district court also failed to substantively address Petitioner's third and fourth issues. ODC at A-18-19.

Petitioner appealed to the sixth circuit court of appeals on August 24, 2020. On April 16, 2021, after briefing, the circuit court ruled for Respondent on all five issues. OCA at A-7-11.

The circuit court upheld the district court's ruling that ORC § 4511.099(H) protected Petitioner's Fifth Amendment rights. *Id.* at A-8. The court

acknowledged Petitioner's argument the statute did not apply to officer-operated cameras. *Id.* at A-6. It ignored Petitioner's statutory exegesis claiming "...he cites no authority to support this assertion." *Id.*

The circuit court also misread TMC § 313.12 in ruling for Respondent on Petitioner's second issue. *Id.* at A-6-7. It again ignored Petitioner's detailed analysis of the ordinance and substantive explanation of the limitation placed on Respondent's civil traffic enforcement authority by its status as a Home Rule municipality under Ohio's Constitution. Again, it claimed, "[Petitioner] offered no support for his assertion that the City's enforcement system did not allow for the use of a mobile speed camera." *Id.* at A-9.

TMC § 313.12 authorized Respondent's "**automated** red light and speeding system" (emphasis added). The ordinance defined that term as "a system consisting of a photographic, video, or electronic camera and a vehicle sensor **that works alone or in conjunction with an official traffic control** that produces a photograph, video, or digital image of traffic law violations." TMC § 313.12(b)(1)(emphasis added). This does not describe a camera operated by a police officer. This system, like the one described in ORC § 4511.092(K), utilizes a sensor to trigger its operation, i.e., it is automated.

TMC § 313.12(b)(3) provides further support the ordinance does not authorize officer-operated cameras by defining the term "system location" as "...the location where the **automated camera system** is installed or otherwise being used..." *Id.* (emphasis added). The use of the word "automated"

in these definitions expressly excluded camera systems operated by police officers.

Consequently, Respondent's ordinance did not authorize the use of cameras operated by police officers to civilly enforce its traffic laws.⁴ A taking of property without legal authority is a violation of due process of law. *Davidson v. New Orleans*, 97 U.S. 97, 102 (1878).

The circuit court's reading of *Mendenhall v. Akron*, 117 Ohio St.3d 33 (2008) was also in error. It stated *Mendenhall* "said nothing about whether a municipal speed-enforcement program that allows for the use of mobile or handheld cameras violates home rule authority." OCA at A-7. This is contradicted by *Mendenhall*'s holding - "[a]n Ohio municipality does not exceed its home rule authority when it creates an **automated system** for enforcement of traffic laws that imposes civil liability upon violators, **provided that the municipality does not alter statewide traffic regulations**". *Mendenhall* at 33 (emphasis added). The *Mendenhall* court's approval of an automated civil enforcement program did not authorize a program using cameras operated by police officers. In fact, the *Mendenhall* court noted, "**Only when no police officer is present and the automated camera** captures the speed infraction

⁴ As was noted above, the City of Toledo recently enacted TMC § 303.98, a new civil traffic enforcement ordinance. It added language to expressly authorize the use of hand-held cameras operated by TPD officers. TMC §§ 303.98(a)(2) and (b)(2). This is a tacit admission TMC § 313.12 did not authorize the use of hand-held cameras operated by TPD officers. The ordinance also bars Respondent from pursuing criminal charges for a civil violation. TMC § 303.98(c)(7).

does the Akron ordinance apply...." *Id.* at 42 (emphasis added). The circuit court also ignored that Respondent's deployment of police officers to civilly enforce the speeding laws altered Ohio's statewide criminal traffic regulations. The laws against speeding are generally enforced by police officers in marked cars using radar guns. By deploying officers in marked vehicles to civilly enforce the laws against speeding Respondent intentionally decriminalized this offense. This violates its Home Rule authority. *See id.* at 41 – 42 (analyzing whether Akron's civil traffic enforcement program decriminalized Ohio's traffic laws)

The circuit court, relying on *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981),⁵ also ruled against Petitioner on his second, third, fourth, and fifth issues for failing to exhaust state court remedies. OCA at A-8. This ignored this Court's *Zinermon v. Burch*, 494 U.S. 113 (1990) clarification of *Parratt* and its *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982) decision.

As this Court has noted, the Declaratory Judgment Act is a "congressional scheme that makes the federal courts the primary guardians of constitutional rights..." *Steffel v. Thompson*, 415 U.S. 452, 463 (1974) (citing separate opinion of Brennan, J. in *Perez v. Ledesma*, 401 U.S. 82, 104 (1971)). Although a federal court has discretion to decline to

⁵ The district court's opinion, citing to *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982), ruled that Petitioner was not obligated to exhaust state remedies before filing his federal suit. ODC at A-15-16. The circuit court overlooked the district court's correct statement of the law to rely on *Parratt* in granting judgment to Respondent on Petitioner's second, third, fourth, and fifth issues.

hear a declaratory judgment action, once it takes such an action it is tasked with declaring the rights of the parties before it and granting appropriate relief against any adverse party. 28 USC §§ 2201(a) and 2202.

Respondent acknowledged Petitioner's allegation that it lacked legal authority to assess the additional \$25 penalty was true stating, “[a] *miscalculation of the fine* is not a violation of the Fifth and Fourteenth Amendment....” Respondent Appellate Brief (“RAB”) at 15 (emphasis added). Respondent's appellate brief also acknowledged that it lacked legal authority to immobilize or tow Petitioner's vehicle. RAB at 16. A taking without legal authority is a violation of due process of law. *Davidson v. New Orleans*, 97 U.S. 97, 102 (1878).

In addition, with respect to Petitioner's fourth issue, the circuit court found it important that Respondent had not (yet) immobilized or towed Petitioner's vehicle. OCA at A-10. But, as this Court explained in *Steffel v. Thompson*, 415 U.S. 452, 467 (1974), one of the major purposes of the Declaratory Judgment Act was “to provide a milder alternative to the injunction remedy.”

Despite these facts, the circuit court granted summary judgment to Respondent on Petitioner's third and fourth issues. OCA at A-9–10. In light of Respondent's admissions and Congress's intent in enacting the Declaratory Judgment Act, the circuit court erred by granting judgment to Respondent on Petitioner's third and fourth issues. 28 USC §§ 2201(a) and 2202.

Although Petitioner did not assert a substantive due process claim, the circuit court addressed the issue. We now know that a taking without due process of law is evidently not a violation of fundamental rights and liberties in the Sixth Circuit. OCA at A-9.

Although it does not appear the circuit court based its ruling on Petitioner's fifth issue on this "analysis", it stated "[s]ection 313.12 gave [Petitioner] notice, a hearing, and an opportunity to be heard." *Id.* at A-10-11. This perfunctory statement does not suffice as a *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) three-part due process analysis.

A broken clock is correct twice each day. The circuit court's opinion failed to reach that low standard. It brings to mind Mary McCarthy's description of Lillian Hellman's writing, "every word she writes is a lie, including 'and' and 'the'." If this is what passes for justice in our legal system today, our country is in serious trouble.

REASONS FOR GRANTING THE PETITION

Is the rule of law still operative in our federal judicial system? Stripped to its essence, this is the issue presented to the Court by this petition.

Since the Magna Carta, the rule of law has been the bedrock on which the Anglo-American legal system is based. The Magna Carta's "law of the land" replaced the arbitrary rule of one man (the king) with a legal system based on the law. *Due Process of Law Under the United States Constitution*, H.E. Willis, 74

U. of Penn. L. Rev. 331, 333 (Feb. 1926). The United States Constitution's due process clauses are synonymous with the Magna Carta's "law of the land." *Murray v. Hoboken L. & I. Co.*, 59 U.S. 272, 276 (1855). Chief Justice Marshall stated in *Marbury v. Madison*, 5. U.S. 137, 163 (1803), "[t]he Government of the United States has been emphatically termed a government of laws, and not of men."

Fixed legal rules allow citizens to know and comply with the law. Everyone is expected to abide by the endless laws, rules and regulations imposed by the myriad levels of government. This is rendered impossible if the law does not have a fixed meaning. In such a circumstance, a citizen would be just as well served by reading chicken entrails as by reading and applying the law to determine a correct legal course of action.

The rule of law provides predictable legal results. This enables individuals and entities to plan and achieve desired and avoid unwanted results. It promotes a more efficient legal system because parties are better able to predict how they will fare if they take an action. The rule of law facilitates our free enterprise system. People who invest time or money in a business prefer a stable legal environment and predictable risks. Predictability is eliminated if judges are not required to follow and apply the law to matters before them.

The rule of law also plays a fundamental role in providing equal protection of the law. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (stating that the Fifth Amendment's due process clause overlaps with the concept of equal protection). The law does not

apply equally if its meaning is not fixed. Petitioner's case presents a perfect example. A judge applying the plain, clear language of ORC §§ 4511.092(K) and 4511.099(H) would have held ORC § 4511.099(H) did not protect Petitioner's Fifth Amendment rights. The district and appellate courts ruled ORC § 4511.099(H) applied to cameras operated by police officers and therefore Petitioner's Fifth Amendment rights were not at risk. A system capable, under the same set of facts, of producing results that are polar opposites does not provide equal protection of the law. It is the arbitrary and capricious rule of man, something our Constitution was supposed to guard against. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) (stating that our government is one of laws, not men).

Whether ORC § 4511.099(H)'s protection extended to Petitioner's case is an issue of statutory construction. There is no question the courts have the power to say what the law is. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). But, as this Court has noted, "[i]n all cases involving statutory construction [the] starting point must be the language employed...." *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). In analyzing a statute, a court should first determine whether the statute's language is clear. *United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 277 (1929). If it is, the court is obligated to enforce the statute in accordance with its terms unless impossible or unreasonable results follow. *Id.* When the meaning is clear a court is "not at liberty to conjure up conditions to raise doubts in order that resort may be had to [statutory] construction." *Id.* Courts are to "assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Phinpathya* at

189. This Court has noted that, “a section of a statute should not be read in isolation from the whole [a]ct...” *Richards v. United States*, 369 U.S. 1, 11 (1962). Proper construction should “look to the provisions of the whole law....” *Id.*

As discussed above, ORC § 4511.092(K)’s definition of “traffic law photo-monitoring device” expressly excluded cameras operated by police officers. As an automated system, it was one that “act[ed] or operat[ed] in a manner essentially independent of external influence or control”. *The American Heritage Dictionary of the English Language, New College Edition*, Morris, W., ed., 1981. The self-actuated nature of these camera systems was made plain by the fact their operation was triggered by a sensor.

It is not just the statutory definition of traffic law photo-monitoring device that supports Petitioner’s assertion. *Richards*, 369 U.S. at 11. Other sections of S.B. 342 support that its provisions did not apply to human-operated cameras. As discussed above, ORC § 4511.093(B)(1)’s requirement that a law enforcement officer be present “at all times” during their operation also indicates the subject camera systems did not include cameras operated by police officers.

It follows ORC § 4511.099(H) did not protect Petitioner’s Fifth Amendment rights because the Notice was not a ticket, i.e., “any traffic ticket, citation, summons, or other ticket issued in response to an alleged traffic law violation detected by a **traffic law photo-monitoring device**, that represents a civil violation”. ORC § 4511.092(J) (emphasis added).

Therefore, ORC § 4511.099(H) did not protect Petitioner's Fifth Amendment rights because it only applied to admissions regarding and hearings held on tickets issued by operation of traffic law photo-monitoring devices. Consequently, Respondent's Hearing unconstitutionally forced Petitioner to choose between two fundamental constitutional rights – the right to due process of law and the right against self-incrimination. *Simmons v. United States*, 390 U.S. 377, 394 (1968).

As was detailed above, the language used by TMC § 313.12 also excluded cameras operated by police officers from its ambit. The camera systems authorized by the ordinance only encompassed automated systems utilizing a sensor. TMC § 313.12(b)(1). A camera operated by a police officer is not one that "*works alone or in conjunction with an official traffic control.*" *Id.* (emphasis added). Further, the ordinance only authorized camera systems placed in fixed locations. TMC §§ 313.12(a)(2) and (b)(3). As a consequence, Respondent's ordinance did not provide it with the legal authority to deploy police officers to civilly enforce its laws against speeding. A taking of property without legal authority is a violation of due process of law. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1878).

The language of both the statute and the ordinance is clear and unambiguous. Further analysis should not be required. *United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 277 (1929). However, Article XVIII, Section 3 of the Ohio Constitution, its Home Rule provision, and *Mendenhall v. Akron*, 117 Ohio St.3d 33 (2008)

provide legal context that supports the argument that the lower courts' readings of ORC §§ 4511.092(K) and 4511.099(H) and the circuit court's reading of TMC § 313.12(b)(1) were in error. As this Court has noted, "a provision... is often clarified because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law...." *United Savs. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Home Rule limits the scope of Ohio municipalities' police powers by providing their exercise of those powers cannot conflict with Ohio's general law. Ohio Const. Article XVIII, § 3 and *Mendenhall*, 117 Ohio St.3d at 36. Consequently, an Ohio municipality cannot decriminalize behavior Ohio's general law classifies as a crime. *Mendenhall* at 41 – 42. Ohio's general law criminalizes speeding offenses. ORC section 4511.21. This explains why the camera systems authorized by ORC § 4511.092(K) and TMC § 313.12(b)(1) are so similar – they both were intended to operate within the legal framework established by Ohio's Home Rule.

Ohio law presumes a law enacted by the Ohio General Assembly complies with Ohio's Constitution. ORC § 1.47(A). Consequently, an interpretation of ORC §§ 4511.092(K) and 4511.099(H) that results in their application to a program that violates Home Rule is presumed to be in error. It appears Respondent, at one time, understood that Home Rule placed strictures on its civil traffic enforcement program as it drafted TMC § 313.12 to comply with its requirements. In fact, Respondent represented in its *Mendenhall amicus* brief that its ordinance did not

exceed its authority under Home Rule. *See amicus* brief filed by Respondent on April 17, 2007 found in the Ohio Supreme Court's on-line docket for case #2006-2265 at 2 (stating Respondent's ordinance did not attempt to decriminalize traffic offenses).

Having demonstrated the language of both ORC § 4511.092(K) and TMC § 313.12(b)(1) did not include cameras operated by police officers, the issue becomes – did the district and circuit courts have the authority to change the plain meaning of those enactments?

Our Constitution established a representative republic. In order to prevent a concentration of power that can easily result in tyranny, the Constitution established three branches of the federal government, each serving a distinct role and possessing distinct powers. As this Court noted in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), "... the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch..." This compartmentalization is sometimes termed the "separation of powers".

Our Constitution vests the power to make federal law in Congress. U.S. Const. art. I, § 1. The scope of Congress' lawmaking authority and the federal government's authority is limited by art. I, § 8 of the Constitution. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (stating "[t]he Constitution created a Federal Government of limited powers").

The judiciary is vested with the judicial power to hear all Cases, in Law and Equity, arising under

the Constitution and the laws of the United States. U.S. Const. art. III, §§ 1 and 2. Judicial power is “the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it.” *Muskrat v. United States*, 219 U.S. 346, 356 (1911).

The judiciary has the power to say what the law is. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). But, in exercising its power a court is tasked to give effect to legislative intent when it is called upon to apply statutory law. *See INS v. Phinpathya*, 464 U.S. 183, 189 – 190 (1984) (applying the ordinary meaning of Congress’ wording of the statute). Once this Court has construed a statute, its meaning is set. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). As the *Rivers* Court noted, no subsequent amendment of this Court’s statutory construction has the force of law “unless it is implemented through legislation.” *Id.* at 313. It follows that, although a court has the ability to say what the law is, it is the legislature, alone, that has the power to enact or amend a law. The courts, in exercising their power to say what the law is, are the instrument by which the legislature’s intent is implemented.

The power of the courts only extends to the parties before the court. *Muskrat*, 219 U.S. at 356. A court’s construction of a statute is both prospective and retrospective. *Rivers*, 511 U.S. at 311 - 312. This is consistent with the scope of the judiciary’s authority. Although the courts are the ultimate arbiters of a statute’s meaning, *Marbury v. Madison*, 5 U.S. 137, 177 (1803), a statute’s meaning is fixed when it is enacted. Its retrospective application to all

matters pending when a court construes its meaning gives effect to the legislature's intent. It follows the power to say what the law is cannot be construed to include the power to amend or alter the plain meaning of statutory law. That power lies with the legislature. *Rivers*, 511 U.S. at 313.

This Court has relied on the separation of powers doctrine to strike down one governmental branch's exercise of authority that impermissibly intrudes on the authority of another branch. *See Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (ruling that Congress's reservation of the ability to remove an executive officer invalidated the Graham-Hollings-Rudman Act because it violated the separation of powers). A court's alteration of the plain meaning of a federal statute would constitute the exercise of the legislative power, would similarly violate the separation of powers, and should not be given effect. *See Rivers*, 511 U.S. at 313 (stating only the legislature can amend the meaning of a statute constructed by this Court).

The foregoing demonstrates federal courts do not have the authority to alter the plain meaning of an act of Congress. So, we now must determine whether the same restriction applies to the enactments of state or municipal legislatures. Spoiler alert – it does, as the following analysis details.

In addition to separating the powers of the federal government, our Constitution further diffused governmental power by granting only limited authority to the national government, continuing the States' status as separate co-sovereigns, and reserving to the States (or the People) the authority

over all matters that do not involve the nation as a whole. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse....”).

The Tenth Amendment to the Constitution succinctly describes the federal system established by the Constitution. It provides that the States or the People are the supreme authority in all matters to which the Constitution does not grant the federal government authority or deny it to the States. U.S. Const. Amend. X. Madison noted in *The Federalist No. 45*:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the *internal order*, improvement, and prosperity of the State.

The Federalist No. 45, pp. 292 - 293 (C. Rossiter ed. 1961) (J. Madison) (emphasis added).

In *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991), this Court stated the determination of the qualifications of States' most important government officials is a power that lies "at the heart of representative government." The States' governments are republican governments. See *The Federalist No. 57*, pp. 350 - 351 (C. Rossiter ed. 1961) (J. Madison) (stating, "[t]he elective mode of obtaining rulers is the characteristic policy of republican government"). Under a republican form of government, the people of each State indirectly govern through elections and thereby are able to hold their representatives accountable for the laws they enact.

Article IV, § 4 of the Constitution provides, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government...." This Court has long recognized that Article IV, § 4 of the Constitution obligates the Federal Government to protect the representative governments of the States. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). At the very least, this guarantee should bar the federal government from taking actions that undermine the republican governments of the States.

The issue before the *Gregory* Court involved a Missouri constitutional amendment that effected a mandatory retirement age for judges. The Court noted, "...[t]he authority of the people of the States to determine the qualifications of their most important government officials... lies at the heart of representative government." *Id.* The *Gregory* court continued, "[i]t is a power reserved to the States under the Tenth Amendment and guaranteed them

by that provision of the Constitution under which the United States, 'guarantee[s] to every State in this Union a Republican Form of Government'...." *Id.*

A State or municipality's enactment of laws governing its citizens does not just "lie at the heart of representative government", it is representative government. *See id.* It, also, is reserved to the States by the Tenth Amendment and is the very thing (republican government) guaranteed to the States by Article IV, § 4 of our Constitution. *Id.* at 463. If federal courts have the power to change the plain meaning of a state statute or a municipal ordinance, they have the power to deprive the States' citizens of republican government. The rules of construction require legal effect be given to all a law's provisions. A reading of the Constitution that granted federal courts the power to amend or alter a state statute or municipal ordinance would render the Guarantee Clause a nullity.

Federal courts have long shown deference to the legal actions of the States. This largely stems from the fact that the fifty States are sovereigns that retain exclusive authority over their own affairs. This Court has sometimes termed this deference as comity but anchors it in the Federal system established by our Constitution. *Younger v. Harris*, 401 U.S. 37, 44 (1971). As the *Younger* Court noted, "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*

This Court has long recognized that one of the areas reserved to the States by our Constitution is the police power. *United States v. Morrison*, 529 U.S. 598,

617- 619 (2000). The *Morrison* Court noted, “[w]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power”. *See id.* at 618 - 619. If Congress cannot exercise a police power, it logically follows the federal judiciary lacks the authority to amend or alter the plain meaning of a state’s or municipality’s enactment in furtherance of those police powers. *See Marbury v. Madison*, 5 U.S. 137, 174 (1803) (stating that negative inferences assist in understanding a governmental branch’s scope of authority).

The elected representatives of the State of Ohio enacted S.B. 342, which included ORC §§ 4511.092(K) and 4511.099(H). S.B. 342 regulated the civil traffic enforcement programs of political subdivisions of the State of Ohio. The elected representatives of the City of Toledo, Ohio enacted TMC § 313.12. This ordinance regulated motor vehicle traffic within Toledo. These laws were an exercise of the State of Ohio’s and the City of Toledo’s police powers, a power reserved to them by the Tenth Amendment and guaranteed by Const. art. IV, § 4. As such, it logically follows these legislative enactments could not be altered by the federal courts. *Morrison* at 618 – 619.

Stare decisis is a critical component of the rule of law. If lower courts are not bound by controlling precedent issued by this Court, its guidance is meaningless and federal litigants are subject to the arbitrary whims of the judge(s) to whom they are assigned. This creates all of the problems that arise from abandonment of the rule of law that were discussed above.

The circuit court's reliance on *Parratt v. Taylor*, 451 U.S. 527 (1981) and its progeny is not an isolated incident. Its citation to *Gardner v. City of Cleveland*, 656 F. Supp.2d 751 (N.D. Ohio 2009) provides a prime example. Gardner alleged the City of Cleveland's civil traffic enforcement program denied him procedural due process, which implicated 42 USC § 1983. *Id.* at 755 - 756. Long after this Court's *Zinermon v. Burch*, 494 U.S. 113 (1990) clarification of *Parratt*, the *Gardner* district court, relying on *Parratt*, ruled against Gardner because he had failed to exhaust state court remedies. *Gardner* at 759. A citation check of *Gardner* reveals federal district courts in Ohio have continued to rely upon *Parratt* (via *Gardner*) to dispose of challenges to civil traffic enforcement programs in Ohio.

The circuit court relied on *Parratt v. Taylor*, 451 U.S. 527 (1981) for the proposition that "a due process claim is barred if the State provides an adequate post-deprivation remedy." OCA at A-9. The issue before this Court in *Parratt* was whether providing only a post-deprivation remedy for the negligent loss of Parratt's hobby materials by the prison mailroom was a violation of his right to due process of law giving rise to a 42 USC § 1983 claim. *Parratt* at 530. The Court held that there was no due process violation because it was not practicable for the state to provide a pre-deprivation hearing and the post-deprivation remedy was sufficient. *Id.* at 543. Absent the due process claim there was no basis for Parratt's 42 USC § 1983 claim. *Id.* at 544.

Subsequently, this Court granted certiorari in *Zinermon v. Burch*, 494 U.S. 113, 116 (1990) to clarify

the scope of the *Parratt* rule. In *Zinermon*, Burch filed suit alleging state mental hospital officials, under color of law, had deprived him of liberty without due process of law because he was incapable of consenting to his voluntary admission. *Id.* at 114-115. The state argued it would not have been possible to provide a hearing for Burch prior to his commitment because it was a random, unauthorized, violation of state law governing admissions to mental hospitals, which the state could not have anticipated. *Id.* at 115. The Court found that *Parratt* and *Hudson* [*v. Palmer*, 468 U.S. 517 (1984)] did not apply and Burch's claim should not have been dismissed under FRCP 12(b)(6) because the state could have provided Burch a pre-deprivation hearing. *Id.* at 136-139. The Court noted "*Parratt* and *Hudson* represent a special case of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the state could be expected to provide." *Zinermon* at 128.

In the case at bar, Respondent provided and Petitioner attended the pre-deprivation Hearing. TMC § 313.12(d)(4). Consequently, *Parratt* and *Hudson* are not applicable, *Zinermon* at 136-139, and Petitioner's case presented a general *Mathews v. Eldridge* analysis. *Zinermon* at 128. The fact Petitioner may have had recourse to a state court remedy did not deprive him of the right to file his suit in federal court raising claims under 42 USC § 1983. *Id.* at 124.

This Court has also ruled non-prisoner plaintiffs alleging violations of constitutional rights

implicating 42 USC § 1983 are not obligated to exhaust administrative or state court remedies before filing suit in federal court. *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982). The district court, citing *Patsy*, denied Respondent's argument that it was entitled to summary judgment because Petitioner had not exhausted state court remedies. ODC at A-15-16. The circuit court overlooked this correct statement of the law to rely on *Parratt*. OAC at A-9.

The circuit court relied upon *Parratt* to rule against Petitioner on his fifth issue. *Id.* at A-11. It also noted "Section 313.12 gave [Petitioner] notice, a hearing, and an opportunity to be heard." *Id.* It does not appear that it based its decision on Petitioner's fifth issue on those grounds. This Court has long required courts utilize a detailed three-factor analysis when determining whether procedural due process has been afforded. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The court's perfunctory statement failed to apply the *Mathews* three-factor analysis to Petitioner's fifth issue. *Id.* at 335.

Petitioner's Complaint requested relief under the Declaratory Judgment Act, 28 USC §§ 2201 and 2202. When a plaintiff files a complaint for declaratory judgment the courts should "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 USC § 2201(a). Under 28 USC § 2202, courts can grant "[f]urther necessary or proper relief..., after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment."

As was detailed above, Respondent's appellate brief acknowledged, as Petitioner alleged in his third issue, Respondent lacked legal authority to impose the additional \$25 penalty of TMC § 313.12(d)(5). RAB at 15. In light of Respondent's admission, the circuit court did not have authority to grant judgment to Respondent on Petitioner's third issue. 28 USC §§ 2201(a) and 2202.

Respondent also acknowledged, as Petitioner alleged in his fourth issue, it lacked authority to tow/immobilize Petitioner's vehicle. RAB at 16. The circuit court acknowledged this fact but granted Respondent judgment on Petitioner's fourth issue because "his vehicle was never immobilized or towed." OCA at A-10. It further explained, "[a]nd under the City's ordinance, the City would have been precluded from any such towing or immobilization because it opted to assess a penalty." *Id.* But, as this Court has explicated, the Declaratory Judgment Act was intended to provide "a milder alternative to the injunction remedy." *Steffel v. Thompson*, 415 U.S. 452, 467 (1974).

Respondent assessed a \$145 penalty against Petitioner that is outstanding as of the filing of this Petition. As a result of its refusal to fulfill its duties under 28 USC §§ 2201(a) and 2202 the circuit court has left Petitioner at the mercy of a Respondent that is not all that punctilious about abiding with the law. Petitioner sought declaratory judgment, in part, to ensure that Respondent did not violate his Fourteenth Amendment rights by towing or immobilizing his vehicle. *See Steffel v. Thompson*, 415 U.S. 452, 463 (1974)(stating that the Declaratory

Judgment Act made the federal courts the primary guardians of constitutional rights).

CONCLUSION

The buck stops with this Court. The rule of law is essential to the protection of our rights as citizens. The lower courts' rulings imply they do not feel bound by the rule of law. This does not bode well for our future as a self-governing republic. This Court should take this opportunity to provide clear direction to the lower courts.

Respectfully submitted,
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