

IN THE SUPREME COURT OF FLORIDA

CITY OF ORLANDO,

Petitioner,

vs.

Case No. SC12-1471

MICHAEL UDOWYCHENKO,  
et al.,

Respondent.

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ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL

**PETITIONER'S INITIAL BRIEF ON THE MERITS**

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## STATEMENT OF THE CASE AND THE FACTS

This appeal arises from an order granting summary judgment and final judgment in favor of Respondent, Michael Udowychenko (“Udowychenko”). (R. 899-905, 1055-56).<sup>1</sup> The facts are not in material dispute.

### *The City’s Red Light Ordinance*

The City of Orlando (the “City”) enacted Chapter 5, Article III of the Orlando City Code (the “Ordinance”) to enhance road safety by installing automated cameras to capture vehicles running red lights in the City. (R. 159-60).<sup>2</sup> In 2008, more than 429 accidents caused by red light runners occurred in the City, and red light violations account for at least 100 fatalities and 6,300 injuries every year throughout the state. (R. 159). Red light running is among the most common causes of collisions, and those collisions tend to be the most deadly. (R. 159).

Under the Ordinance, the City sent code infraction notices to the owners of vehicles photographed running red lights. § 5.22, Ordinance. A designated code enforcement officer reviewed the recorded images, identified the motor vehicle,

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<sup>1</sup> References to the original record on appeal are designated (R. [page number]). References to the appellate record developed in the Fifth District are designated (A.R. [page number]). References to the briefs filed with the Fifth District, identified as pages A-C in the index to the appellate record, are designated (A.R. [A, B, or C]:[page number]). The City has also filed an Appendix with the district court opinion (Tab 1) and legal authorities that may not be readily obtainable.

<sup>2</sup> The Ordinance is cited herein as “§ \_\_, Ordinance” and is included as Tab 2 of the Appendix.

and confirmed the red light violation before sending a notice of infraction. *Id.* The notice identified the vehicle and the infraction, enclosed copies of the images showing the violation, explained the procedures for paying or contesting the fine, and warned of the consequences of a failure to respond. § 5.23, Ordinance.

The owner was required to pay the assessed fine or submit a notice of appeal with a notarized statement of the grounds for appeal. §§ 5.24, 5.25(a), Ordinance. Any good cause could support an appeal, including that (i) the vehicle was not legally under the owner's care, custody, or control, (ii) the vehicle violated the traffic signal to comply with other laws or to protect the property or person of another, or (iii) the signal was inoperable or malfunctioning. § 5.25(b), Ordinance.

If the infraction was not dismissed based on the notarized statement, the City scheduled a hearing on at least ten days' notice. *Id.* The code enforcement officer who reviewed the violation was required to testify at the hearing, and the owner could present testimony and evidence in support of his or her appeal. § 5.25(c), Ordinance. The Ordinance required that the vehicle's owner be afforded procedural and substantive due process at the hearing. § 5.25(f), Ordinance.

The hearing officer would then issue a written order granting or denying the appeal. § 5.25(g), Ordinance. If the officer denied the appeal, the owner was required to pay the fine, *i.e.*, \$125.00 for the first two violations and \$250.00 for the third and further violations within three years, plus costs. § 5.26, Ordinance.

### *Udowychenko's Red Light Violation and the Resulting Appeal*

On May 23, 2009, a camera videotaped Udowychenko's vehicle running a red light at Conroy and Vineland Roads in Orlando, Florida. (R. 160). After a personal review of the video by a code enforcement officer, the City sent Udowychenko a notice of infraction under the Ordinance. (R. 160, 170-71). Udowychenko then delivered a notice of appeal to the City. (R. 160, 173-74).

On August 20, 2009, the City heard Udowychenko's appeal. (R. 161, 182, 229-41). When Udowychenko's case was called, a compliance officer for the City testified that he personally watched the video capturing Udowychenko's vehicle running a red light and, based on his review, determined that a citation under the Ordinance was warranted. (R. 238). The City also introduced photographs and a video showing the infraction, over Udowychenko's objection. (R. 239).

Udowychenko declined to offer testimony or to cross-examine the compliance officer. (R. 234-37). Instead, Udowychenko orally moved to dismiss the infraction, arguing that the City did not establish his ownership of the vehicle. (R. 240). The hearing officer denied the motion to dismiss and issued a written order directing Udowychenko to pay a \$125 fine and \$30 in costs. (R. 184).

### ***The Circuit Court Proceedings***

After denial of his appeal, Udowychenko filed a putative class action lawsuit against the City and Lasercraft, Inc., the vendor that operated the cameras, alleging that state law preempted the Ordinance. (R. 83-106). The parties each moved for summary judgment, and a hearing was held on July 23, 2010. (R. 131-57, 463-91, 492-688, 871-98). The circuit court granted Udowychenko's motion for summary judgment and denied Defendants' motions, finding express preemption. (R. 899-905). By separate order, the circuit court denied Udowychenko's request for class certification. (R. 1032-39).<sup>3</sup> The circuit court then entered final judgment in favor of Udowychenko for \$131.00 plus interest. (R. 1055-56).

### ***The Fifth District's Opinion and Certification of Conflict***

The City and LSI timely appealed to the Fifth District Court of Appeal. The Fifth District affirmed the circuit court's finding of express preemption and also determined that state law impliedly preempted, and directly conflicted with, the Ordinance. *City of Orlando v. Udowychenko*, 98 So. 3d 589, 596-98 (Fla. 5th DCA 2012). The Fifth District certified conflict with the Third District's opinion in *City of Aventura v. Masone*, 89 So. 3d 233 (Fla. 3d DCA 2011), which rejected a

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<sup>3</sup> In denying class certification, the circuit court held that Udowychenko "does not meet the commonality, typicality, and adequacy requirements" for certification because he "is the only member of the group who sufficiently protested his fine and thereby arguably overcomes the voluntary payment defense to his damages claim." (R. 1034). Udowychenko has not appealed the denial of certification.

preemption challenge to a similar red light camera ordinance enacted by the City of Aventura. *See Udowychenko*, 98 So. 3d at 599.<sup>4</sup>

The City timely filed a Notice to Invoke the Discretionary Jurisdiction of this Court. (A.R. 37-56). On November 6, 2012, this Court accepted jurisdiction pursuant to Article V, Section 3(b)(4) of the Florida Constitution.

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<sup>4</sup> *Masone* is currently on appeal before this Court as Case No. SC12-644.

## SUMMARY OF ARGUMENT

In 2010, the Legislature amended state law to clearly and specifically preempt regulation of red light cameras to the state. Before these amendments resolved the division of state and local authority, the City and other municipalities adopted red light camera ordinances as an innovative solution to the public safety problem of red light running. At issue in this appeal is the validity of a fine imposed under the City's Ordinance before the 2010 amendments to state law.

The lower tribunals erred by finding that the pre-2010 version of the Florida Uniform Traffic Control Law (chapter 316, Florida Statutes) expressly preempted the use of cameras to regulate red light violations. Preemption must be viewed, first and foremost, through the lens of home rule. In Florida, municipalities wield broad police powers to promote the health, safety, and welfare of their citizens, including in the area of traffic control. To deprive a municipality of these powers through preemption, the Legislature must use clear and specific language, with all reasonable inferences drawn in favor of the challenged ordinance's validity.

Before the 2010 amendments, the Legislature did not clearly preempt local regulation of traffic using red light cameras. Chapter 316 delineated certain areas of traffic control for statewide uniformity, while permitting municipalities to adopt local traffic ordinances using their police powers in many other areas. Among the areas reserved for local action was the regulation of traffic using "official traffic

control devices” and “security devices” such as red light cameras. Because the Legislature expressly granted this local authority, state law did not preempt municipalities from using cameras to record and enforce red light infractions.

The lower tribunals similarly erred in finding implied preemption. Implied preemption requires pervasive state regulation intending to preclude all local action. Implied preemption cannot exist where, as here, the Legislature expressly authorized municipalities to act in the particular field.

Finally, the Ordinance did not conflict with state law. The Legislature expressly authorized municipalities to regulate traffic using “official traffic control devices” and “security devices,” but remained silent on the form that local regulation could take. The City was, therefore, entitled to adopt a red light camera program that complemented state law by issuing local code infraction notices when cameras captured red light violations, while continuing to utilize state uniform traffic citations when law enforcement officers contemporaneously observed violations. For these reasons, this Court should reverse the lower tribunals.

## ARGUMENT

### **I. STANDARD OF REVIEW**

Review of a grant or denial of summary judgment is *de novo*. See *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001); *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1241 (Fla. 2006). Because Udowychenko claims preemption of the Ordinance, he must overcome a presumption of validity with all reasonable inferences drawn in favor of the Ordinance. See *City of Kissimmee v. Fla. Retail Fed'n, Inc.*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005); *Lowe v. Broward Cnty.*, 766 So. 2d 1199, 1203-04 (Fla. 4th DCA 2000).

### **II. STATE LAW DID NOT EXPRESSLY PREEMPT THE ORDINANCE**

The lower tribunals ruled that the Uniform Traffic Control Law expressly preempted the Ordinance because red light infractions are “covered by” chapter 316, and local regulation using cameras is not expressly authorized. In so ruling, the lower tribunals adopted an unduly narrow reading of the express grants of local authority in chapter 316 and failed to give proper consideration to the City’s home rule powers. This Court should reverse the finding of express preemption.

## **A. Municipal Home Rule and Express Preemption**

Any preemption-based challenge to municipal action must begin with the fundamental principle of home rule. In Florida, a municipality may exercise *any* power for municipal purposes unless otherwise provided by law. *See* Art. VIII, § 2(b), Fla. Const. (2012). In granting this authority, the citizens of Florida intended for municipalities to have “broad home rule powers to protect the general health, morals, safety, and welfare of the residents of the municipality.” *M&H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 77 (Fla. 1st DCA 2009).

The home rule principle is codified in the Municipal Home Rule Powers Act, which provides that municipalities may enact legislation on any subject upon which the Legislature may act, unless expressly preempted by the Florida Constitution or general law. *See* § 166.021(3)(c), Fla. Stat. (2012). In so providing, the Legislature intended to expand the reach of municipal authority and to remove judicial and other barriers imposed on municipal action. *See* § 166.021(4), Fla. Stat. (2012); *see also Mulligan*, 934 So. 2d at 1243 (holding that municipalities are permitted to “legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State”).

For a municipality to be deprived of this authority through preemption, a “specific legislative statement” using “clear language” is required; implication or inference will not suffice. *Sarasota Alliance for Fair Elections, Inc. v. Browning*,

28 So. 3d 880, 886 (Fla. 2010). Giving due regard to home rule, courts must draw every reasonable inference in favor of an ordinance's constitutionality. *See Lowe*, 766 So. 2d at 1203-04. An ordinance is presumed valid, and the party claiming preemption bears the burden of establishing the ordinance's invalidity. *Id.*

### **B. The Florida Uniform Traffic Control Law**

For nearly a century, this Court has held that traffic regulation is an integral part of the police powers of municipalities. *See, e.g., Taylor v. Roberts*, 94 So. 874, 876 (Fla. 1922); *Duval Lumber Co. v. Slade*, 2 So. 2d 371, 372 (Fla. 1941). In 1971, the Legislature adopted several statewide traffic control measures in chapter 316, but made clear that the statute was not meant to eliminate municipal police power. Indeed, the Legislature specifically recognized that "there are conditions which 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." § 316.002, Fla. Stat. (2009).

To strike a balance between statewide uniformity in certain areas of traffic control and traditional local authority in other areas, the Legislature provided that "no local authority shall enact or enforce any ordinance on a matter covered by [chapter 316] unless expressly authorized." § 316.007, Fla. Stat. (2009). The Legislature then directed that chapter 316 "shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within

the reasonable exercise of the police power from” taking action in twenty-three areas of traffic regulation. § 316.008(1), Fla. Stat. (2009). Local regulation in the enumerated areas was meant to be “supplemental to the other laws or ordinances of [chapter 316] and not in conflict therewith.” § 316.002, Fla. Stat. (2009).

**C. Chapter 316 Expressly Authorized the City to Regulate Traffic Using Official Traffic Control Devices and Security Devices**

To show express preemption, Udowychenko must identify clear, specific language in chapter 316 reserving traffic regulation by red light cameras to the state. He cannot rely on implication or inference; any doubt is resolved in favor of the Ordinance’s validity. *See Browning*, 28 So. 3d at 886; *Lowe*, 766 So. 2d at 1203. In lieu of meeting this burden, Udowychenko loosely argues that red light regulation was “covered by” chapter 316. This, however, does not conclude the analysis. Udowychenko must also show that the Ordinance did not fall within any of the *twenty-three* areas of reserved municipal authority in section 316.008.

The City’s use of red light cameras to enforce compliance with stoplights was authorized by at least two of these statutory grants of municipal power:

- (i) “Regulating traffic by means of . . . official traffic control devices”; and
- (ii) “Regulating, restricting, or monitoring traffic by security devices . . . on public streets and highways . . . .”

§ 316.008(1)(b) & (w), Fla. Stat. (2009); *see also* § 316.008(1)(a), Fla. Stat. (2009) (authorizing municipalities to regulate or prohibit stopping, standing, and starting).

Udowychenko relies on a perceived distinction between “regulation” and “enforcement” to argue that these provisions do not apply. Accepting this distinction, the circuit court found that the Ordinance “goes far beyond ‘regulating conduct’ by means of traffic control devices or ‘monitoring traffic’ by security devices” and “regulates conduct, adjudicates violations, and fines vehicle owners, in a manner not expressly authorized by the Legislature . . . .” (R. 875). The Fifth District likewise determined that the Ordinance impermissibly “*enforces* traffic violations of a subject area that is covered and enforced by state law.” *Udowychenko*, 98 So. 3d at 596 (emphasis in original).

The misargued distinction between “regulation” and “enforcement” is illusory. In construing section 316.008, this Court must look first to the actual language used in the statute. See *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000). Here, the Legislature elected to use the word “regulate,” and this Court has long recognized that the “verb ‘regulate’ embraces the fixing of limitations and restrictions and also the *enforcement* of them.” *Nichols v. Yandre*, 9 So. 2d 157, 159 (Fla. 1942) (emphasis added). There is good reason for treating enforcement as an integral part of regulation. If a municipality cannot enforce its ordinances, the power to regulate becomes largely meaningless, and the municipality is reduced to a toothless tiger rather than sovereign authority. Absent enforcement, ordinances are mere recommendations to be ignored with impunity.

By permitting municipalities to “regulate” – not merely “monitor” or “advise” – with official traffic control devices and security devices, section 316.008 authorized the City to use cameras to capture red light runners and to penalize violations through local fines.<sup>5</sup> The Third District agreed in *Masone*:

[S]ection 316.008 specifies that no provision of chapter 316 prevents local authorities, within the reasonable exercise of their police power from regulating, restricting, or monitoring traffic by security devices. This is precisely what the City has done. The City, via image capture technologies, monitors intersections it has determined to be of particular concern for traffic accidents, and regulates and restricts red light infractions at those intersections through the issuance of its notices of violation. Doing so is well within the City’s exercise of its broad home rule power and falls squarely within the specific authority carved out in section 316.008(1)(w) by the Florida legislature.

*Masone*, 89 So. 3d at 239 (citation omitted).<sup>6</sup>

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<sup>5</sup> “Official traffic control devices” are “devices . . . for the purpose of regulating, warning, or guiding traffic.” § 316.003(23), Fla. Stat. (2009). Chapter 316 does not define “security device.” Applying the ordinary meaning of these words, *see Lowe*, 766 So. 2d at 1209, “security” is “[t]he condition of being protected from or not exposed to danger; safety.” Oxford English Dictionary 853 (2d ed. 1989). A “device” is “an invention, contrivance; *esp.* a mechanical contrivance . . . for some particular purpose.” *Id.* at 567. Red light cameras satisfy these definitions as mechanical inventions designed to regulate, warn, or guide traffic and for safety.

<sup>6</sup> The Fifth District disagreed with this conclusion, reasoning that “the state’s authorization to municipalities to regulate traffic in section 316.008(1)(w) appears to contemplate only unique situations for which a statewide law is lacking or is inadequate.” *Udowychenko*, 98 So. 3d at 599. The actual language of chapter 316, however, contains no such limitation. If the Legislature intended to restrict municipal police powers as the Fifth District suggests, it was incumbent upon the Legislature do so with clear, specific language. *See Browning*, 28 So. 3d at 886.

Apart from relying on the spurious distinction between “regulation” and “enforcement,” Udowychenko argues that each particular enforcement mechanism must be “expressly authorized” under chapter 316 to be valid. (A.R. B:17-18). Thus, fining the vehicle’s owner (rather than the driver) could not be “expressly authorized” unless chapter 316 specifically stated that municipalities may regulate traffic using security devices “by fining the owner,” and so on for each of the alleged differences between the Ordinance and chapters 316 and 318.<sup>7</sup>

The Legislature, however, cast section 316.008(1)(b) and (w) in general terms, allowing regulation without limiting the permissible enforcement mechanisms. If the Legislature intended to exclude particular regulations or enforcement mechanisms from these grants of local authority, the Legislature must have used specific language and not left the issue to implication or inference. *See Mulligan*, 934 So. 2d at 1243. Because the Legislature elected not to do so, chapter 316 expressly authorized and, therefore, did not preempt the Ordinance.

**D. The 2010 Amendments to Chapter 316 Show That the Ordinance Was a Permissible Exercise of Municipal Power**

This Court repeatedly has recognized that “courts may consider subsequent legislation to determine the intended result of a previously enacted statute.” *Palma Del Mar Condo. Ass’n No. 5 of St. Petersburg, Inc. v. Commercial Laundries of W. Fla., Inc.*, 586 So. 2d 315, 317 (Fla. 1991); *see also Gay v. Canada Dry Bottling*

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<sup>7</sup> Chapter 318 specifies procedures and penalties for violations of chapter 316.

*Co. of Fla.*, 59 So. 2d 788, 790 (Fla. 1952) (“The court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation.”); *Ivey v. Chicago Ins. Co.*, 410 So. 2d 494, 497 (Fla. 1982) (relying on subsequent amendment to construe language in statute).

In 2010, the Legislature enacted the Mark Wandall Traffic Safety Act, which amended chapter 316 to regulate the use of red light cameras. *See* Ch. 2010-80, Laws of Fla.; § 316.008(8), Fla. Stat. (2012). The Legislature specified various requirements governing the installation of red light cameras and the enforcement of violations. *See, e.g.*, §§ 316.003(87), 316.0083, 316.0745, 316.0776, 316.650(3)(c), Fla. Stat. (2012). The Legislature also provided a grace period of six to twelve months so that existing red light camera programs could be brought into compliance with the new statute. *See* § 316.07456, Fla. Stat. (2012).

The 2010 legislation contains the sort of specific statement, necessary for express preemption, that was previously absent from chapter 316. The Legislature directed that “[r]egulation of the use of cameras for enforcing the provisions of this chapter is expressly preempted to the state.” § 316.0076, Fla. Stat. (2012). Courts must give significance and effect to every word in a statute if possible, leaving nothing as surplusage. *See Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009). The Legislature must have intended the new preemption provision to have meaning – *i.e.*, to expressly preempt an area

in which state law previously authorized municipalities to act. If, as Udowychenko insists, chapter 316 preempted the use of red light cameras before the 2010 amendments, this new language would be mere surplusage.<sup>8</sup>

Udowychenko posits that the Legislature did not intend the new preemption provision to have any independent significance, but “simply wished to make expressly clear that this area of the law was being preempted to the state.” (A.R. B:33). The Fifth District agreed, concluding that “[s]ection 316.0076 appears to have merely clarified that the regulation of traffic [through red light cameras] has been preempted to the state.” *Udowychenko*, 98 So. 2d at 597. However, claims that the 2010 amendments made “express” what had been implied, or “clarified” what had been unclear, are self-defeating. First, express preemption requires clarity and specificity – without resort to implication or inference. *See Browning*, 28 So. 3d at 886; *Mulligan*, 934 So. 2d at 1243. Second, language in chapter 316 sufficiently ambiguous to require clarification by the 2010 amendments must be construed in favor of the Ordinance’s validity because municipalities have the power to act unless it is clear that they cannot. *See Lowe*, 766 So. 2d at 1203.

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<sup>8</sup> If the Legislature merely intended to reiterate disapproval of earlier red light camera programs, it could have said so – as it did, for example, in preempting local regulation of ammunition. *See* § 166.044, Fla. Stat. (2012) (“Any such ordinance in effect on June 24, 1983, is void.”). The Legislature did not adopt this approach in the 2010 amendments and, instead, allowed municipalities a transitional period to bring their existing programs, adopted under the prior statutory scheme, into compliance with new uniform standards. *See* § 316.07456, Fla. Stat. (2012).

Thus, there was no express preemption even if the statutory language before 2010 was merely “unclear” as to municipal authority over red light cameras.

### **III. STATE LAW DID NOT IMPLIEDLY PREEMPT THE ORDINANCE**

State law impliedly preempts local action when a legislative scheme is “so pervasive as to evidence an intent to preempt the particular area” and “strong public policy reasons” support preemption. *Browning*, 28 So. 3d at 886 (citation omitted). Courts disfavor implied preemption because it “is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.” *Phantom of Clearwater, Inc. v. Pinellas Cnty.*, 894 So. 2d 1011, 1019 (Fla. 2d DCA 2005). Because the Legislature can easily include clear and specific language of preemption, “there is little justification for the courts to insert such words into a statute.” *Id.*; *see also Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 211 (Fla. 2012) (expressing reluctance to find local action preempted by implication without express legislative directive).

Delegation of local power precludes implied preemption regardless of the length of a statute. In *Browning*, this Court found no implied preemption in elections law despite a “detailed and extensive” statewide election code:

[T]he Legislature clearly did not deprive local governments of all local power in regard to elections. To the contrary, the Election Code specifically delegates certain responsibilities and powers to local authorities . . . . This statutory scheme undoubtedly recognizes that local governments are in the best position to make some decisions for

their localities. In light of this, we conclude that the Election Code does not impliedly preempt the field of elections law.

*Browning*, 28 So. 3d at 887-88; *see also Phantom of Clearwater*, 894 So. 2d at 1019 (finding no preemption where firework statute delegated enforcement and other issues to local authorities); *GLA & Assocs., Inc. v. City of Boca Raton*, 855 So. 2d 278, 282 (Fla. 4th DCA 2003) (rejecting claim of preemption where coastal rehabilitation statute deferred to local setback requirements and building codes).

Here, the Fifth District provided only the following rationale for its finding of implied preemption: “[T]he 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. Although the Florida Uniform Traffic Control Law is admittedly extensive, this Court has instructed that detail and page length are not the tests for implied preemption. *See Browning*, 28 So. 3d at 886-87.<sup>9</sup>

In chapter 316, the Legislature authorized municipalities to regulate traffic within their boundaries in at least *twenty-three* areas. § 316.008(1), Fla. Stat. (2009). Many of these reservations of local authority are exceptionally broad, such as “[r]egulating or prohibiting stopping, standing, or parking,” “[r]estricting the use

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<sup>9</sup> This Court was coincidentally faced with the exact same page count – 125 pages – when it found no implied preemption in the field of elections law. *See Browning*, 28 So. 3d at 886 (noting that the Florida Election Code encompasses “chapters 97 through 106 and 125 pages of the Florida Statutes”).

of streets,” and “[r]egulating or prohibiting the turning of vehicles.” § 316.008(1)(a), (g), (i), Fla. Stat. (2009). By carefully dividing state and local authority in this manner, the Legislature did not deprive municipalities wholesale of their police powers in the area of traffic control. Accordingly, the Fifth District erred in finding that chapters 316 and 318 impliedly preempted the Ordinance.

#### **IV. THE ORDINANCE DID NOT DIRECTLY CONFLICT WITH CHAPTERS 316 AND 318**

Apart from the issue of preemption, an ordinance is invalid if it “directly conflicts” with a state statute. *Phantom of Brevard, Inc. v. Brevard Cnty.*, 3 So. 3d 309, 314 (Fla. 2008). Conflict for this purpose has a “very strict and limited meaning.” *F.Y.I. Adventures, Inc. v. City of Ocala*, 698 So. 2d 583, 584 (Fla. 5th DCA 1997). A conflict arises when “one must violate one provision in order to comply with the other” or “two legislative enactments cannot co-exist.” *Laborers’ Int’l Union of N. Am., Local 478 v. Burroughs*, 541 So. 2d 1160, 1161 (Fla. 1989) (citation omitted). The Legislature codified this concept in chapter 316 by precluding municipalities from passing or attempting to enforce “any ordinance in conflict with the provisions of this chapter.” Fla. Stat. § 316.002 (2009).

Conflict does not arise merely because an ordinance is “more stringent than the statute or regulates an area not covered by the statute,” *Fla. Retail Fed’n*, 915 So. 2d at 209, or applies to “a wider and broader class” of persons, *Laborers’ Int’l*, 541 So. 2d at 1161. An ordinance with different requirements can thus

“complement” a statute without “conflicting with” it. *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1150 (Fla. 2d DCA 2006).

In *Phantom of Brevard*, an ordinance required firework sellers to carry certain levels of liability and property damage insurance. *See Phantom of Brevard*, 3 So. 3d at 310-11. The Fifth District, as here, invalidated the ordinance based on the lack of express authority for the local insurance requirement in a statute governing firework sales. *Id.* This Court reversed, finding no direct conflict:

While [the ordinance] imposes an additional requirement on businesses that sell fireworks in Brevard County beyond the requirements imposed by chapter 791, this additional requirement does not directly conflict with any requirement, prohibition, or exemption in chapter 791. Businesses that sell fireworks in Brevard County can comply with the county’s additional insurance requirement without violating any provision of chapter 791.

*Id.* at 315. This Court further observed that the firework statute required a bond of at least \$500 from licensees, but did not address the issue of insurance at all. *See id.* at 314-15 There was no direct conflict because, “when enacting [the financial responsibility provision] of its firework ordinance, the county simply chose to legislate in an area where the Legislature chose to remain silent.” *Id.* at 315.

**A. Differences Between the Ordinance and Chapters 316 and 318 Do Not Create Conflict in Light of the Legislature’s Silence on How Municipalities May Regulate Traffic Under Section 316.008**

In finding conflict, the Fifth District noted that the Ordinance “mimics the language of the statute and enforces an area of law that is *covered* within chapter

316.” *Udowychenko*, 98 So. 3d at 598 (emphasis in original). The Fifth District reasoned that the Ordinance and chapters 316 and 318 conflicted because they address “the same conduct,” but are “enforced inconsistently.” *Id.* at 597. The Fifth District highlighted the following differences between the two schemes:

- (i) Review of recorded images could support a fine under the Ordinance, while chapter 316 requires observation of the violation. *See* § 5.22(b), Ordinance; § 316.640(5)(a), Fla. Stat. (2009).
- (ii) The Ordinance did not, like chapter 318, specify a proof beyond a reasonable doubt standard. *See* § 318.14(6), Fla. Stat. (2009).
- (iii) The Ordinance initially imposed a fine on the owner, rather than the driver, of the vehicle. *See* § 5.22, Ordinance; § 316.075, Fla. Stat. (2009).
- (iv) A municipal hearing officer, rather than a judge or legislative hearing officer, heard appeals under the Ordinance. *See* § 5.22, Ordinance; §§ 318.14, 318.30-318.36, Fla. Stat. (2009).
- (v) The Ordinance imposed a fine of \$125 for the first two violations and \$250 for the third and further violations, while chapter 318 limited civil traffic penalties imposed under state law to \$125. *See* § 5.26(a), Ordinance; § 318.18(15), Fla. Stat. (2009).
- (vi) The Ordinance did not distribute funds received from fines in the same manner as chapter 316. *See* § 318.18(15), Fla. Stat. (2009).

*See Udowychenko*, 98 So. 3d at 598-99.

The Fifth District’s observation that the Ordinance addresses conduct “covered by” chapter 316 does not establish conflict. The Legislature expressly authorized municipalities to regulate conduct “covered by” chapter 316 using official traffic control devices and security devices. *See* § 316.008(1)(b) & (w),

Fla. Stat. (2009). At the same time, the Legislature did not specify the form that ordinances adopted under section 316.008(1)(b) and (w) could take, or limit the enforcement mechanisms available at the local level.<sup>10</sup> Because the Legislature “chose to remain silent” on *how* municipalities could regulate traffic under section 316.008(1)(b) and (w), the City was free, in the exercise of its broad police powers, to adopt an Ordinance with enforcement mechanisms differing from chapter 316, as long as the two schemes could co-exist. *Phantom of Brevard*, 3 So. 3d at 315; *cf. City of Davenport v. Seymour*, 755 N.W.2d 533, 543 (Iowa 2008) (holding that “the silence of the legislature is not prohibitory but permissive” in regard to the treatment of automated enforcement programs under similar Iowa statute).

Although different standards and procedures admittedly governed the two regulatory schemes, the Ordinance did not require violation of state law and was fully compatible with chapters 316 and 318. The Ordinance penalized only red light infractions captured by camera through local fines, while law enforcement officers continued to issue uniform traffic citations for violations that they observed. The Ordinance did not impede or vary the statutory procedures applicable to red light violations captured by a police officer as opposed to an

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<sup>10</sup> If the Legislature wished to restrict local authority in particular areas, it certainly knew how to do so – as it did for parking infractions. *See* § 318.325, Fla. Stat. (2009) (requiring that violations of parking ordinances referred to hearing officers “must be enforced and disposed of in accordance with the provisions of general law applicable to parking violations” as well as local law).

official traffic control device or security device. As a result, the City did not “violate” state law when it, for example, fined the owner of the vehicle or adjudicated violations of the Ordinance using municipal hearing officers.<sup>11</sup>

The Third District described this division of state and local responsibility in rejecting a conflict challenge to the City of Aventura’s red light ordinance:

Essentially, the Ordinance supplements law enforcement personnel in the enforcement of red light infractions by issuing a notice of infraction under the City’s Code of Ordinances . . . . The Ordinance does not prohibit law enforcement officers from issuing a citation in accordance with the Uniform Traffic Control Law, nor does it supersede, infringe, curtail or impinge upon state or county laws related to red light signal violations. Rather, the Ordinance’s utilization of image capture technologies is meant to serve as an ancillary deterrent to red light infractions.

*Masone*, 89 So. 3d at 238 (citations omitted); *see also Mendenhall v. City of Akron*, 881 N.E.2d 255, 264 (Ohio 2008) (finding no conflict between speeding ordinance and Ohio law, despite differing penalties for “identical conduct,” because “the city ordinance does not replace traffic law,” but “merely supplements it”).

Udowychenko also suggests that the Ordinance undermined the statutory goal of uniformity. In *Phantom of Brevard*, the plaintiff similarly argued that a

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<sup>11</sup> For the same reason, the Ordinance did not run afoul of section 318.121, which provides that “additional fees, fines, surcharges, or costs other than the court costs and surcharges assessed under s. 318.18(11), (13), (18), and (19) may not be added to the civil traffic penalties assessed in [chapter 318].” Udowychenko did not receive a civil traffic penalty under chapter 318 for violation of the Florida Uniform Traffic Control Law. Accordingly, the fine imposed by the Ordinance did not constitute an “additional” penalty for violation of chapter 316.

local financial responsibility requirement for firework sellers conflicted with a statute providing for statewide uniformity. This Court disagreed:

[F]ocusing on potential differences caused by varying local requirements confuses the issue. Because chapter 791 does not include an insurance coverage standard or requirement, chapter 791 is not being applied disparately. In other words, a state statute is not being applied in a non-uniform manner when a locality enacts a regulation on a particular matter that is not addressed in the statute. The statute is being applied uniformly. It is the local ordinance that is creating any variance between counties.

*Phantom of Brevard*, 3 So. 3d at 315. Although the Ordinance expanded the City's ability to deter red light running, the Florida Uniform Traffic Control Law still applied uniformly across the state. If a police officer witnessed a driver running a red light in the City or any other municipality, the driver received a uniform traffic citation under state law. Local variation arose only as to enforcement programs using official traffic control devices and security devices – which were expressly reserved for municipal regulation. Accordingly, the Ordinance did not undermine the statutory goal of uniformity or otherwise conflict with chapters 316 and 318.

**B. The Attorney General Opinions Cited by the Lower Tribunals Do Not Support Invalidation of the Ordinance**

Opinions of the Attorney General “are not statements of law.” *Bunkley v. State*, 882 So. 2d 890, 897 (Fla. 2004). They are merely “guides for state executive and administrative officers in performing their official duties until superseded by judicial decision.” *State v. Family Bank of Hallandale*, 623 So. 2d

474, 478 (Fla. 1993). Courts should not follow an Attorney General opinion when it fails to consider all relevant arguments or is simply incorrect. *See, e.g., Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 473-74 (Fla. 2005) (declining to follow opinions that ignored plain language of statute); *Edney v. State*, 3 So. 3d 1281, 1283-84 (Fla. 1st DCA 2009) (declining to follow opinion that interpreted statute in unduly restrictive manner).

The lower tribunals referred to two inapposite Attorney General opinions addressing red light cameras. In Opinion 97-06, Palm Beach County sought guidance on a proposed ordinance authorizing the use of cameras “for the purpose of issuing citations for violations of section 316.075, Florida Statutes.” *Op. Att’y Gen. Fla. 97-06*, 1997 WL 43197, at \*1 (1997). The Attorney General concluded that red light cameras are “security devices” within the meaning of section 316.008(1)(w) and that their use is expressly authorized to record violations of chapter 316. *See id.* The Attorney General, however, opined that recorded images could not be used as the sole basis for citations because chapter 316 requires an officer to observe the violation. *See id.* at \*2-\*3. This conclusion was reaffirmed in 2005. *See Op. Att’y Gen. Fla. 2005-41*, 2005 WL 1650328 (2005).<sup>12</sup>

Unlike Palm Beach County’s proposed ordinance, the City did not use cameras to issue uniform traffic citations for violation of section 316.075. Instead,

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<sup>12</sup> The 1997 and 2005 Attorney General opinions are included as Tabs 3 and 4 of the Appendix, respectively.

the City issued code infraction notices to red light runners for violation of the Ordinance. Even assuming that the City could not issue uniform traffic citations based on recorded images, the City was free to impose code-based penalties using cameras under the express authority provided by section 316.008(1)(b) and (w).

If, however, the Attorney General opinions can be read to suggest that municipalities cannot use cameras to impose code-based fines for red light violations, then the opinions misstate the law. Section 316.008(1)(w) authorizes municipalities to regulate, restrict, *or* monitor traffic using security devices. The words “[r]egulating” and “restricting” would be mere surplusage if the Legislature intended to permit only the “monitoring” of violations with security devices.

Reading section 316.008(1)(w) as Udowychenko suggests does not give meaning to every word in the statute, *Sch. Bd. of Palm Beach Cnty.*, 3 So. 3d at 1233, or resolve reasonable doubt in favor of municipal authority, *Lowe*, 766 So. 2d at 1203. This Court should reject such an unduly restrictive interpretation. *See Am. Home Assurance*, 908 So. 2d at 473-74; *Edney*, 3 So. 3d at 1284.

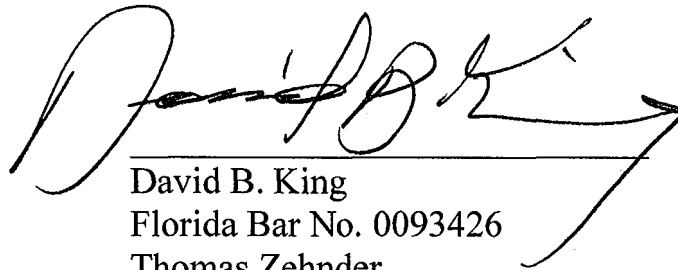
## CONCLUSION

The Legislature has now made it clear that state law preempts local regulation of red light cameras. Before the 2010 amendments, the City relied on its police powers and statutory authority to adopt an innovative local solution to the public safety problem of red light running. Absent limitations on how the City could regulate traffic using official traffic control devices and security devices, the City properly employed different, but complementary, enforcement mechanisms for red light violations caught by cameras rather than law enforcement officers.

For these and all of the reasons discussed herein, the lower tribunals erred in finding that state law preempted and conflicted with the Ordinance. Accordingly, the City respectfully requests that this Court reverse the decisions of the lower tribunals and remand for entry of final judgment in favor of the City.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail and e-mail (.pdf) to: **Charles T. Wells, Esq.** and **Richard E. Mitchell, Esq.**, Gray Robinson, P.A., P.O. Box 3068, Orlando, FL 32802; **Jason D. Weisser, Esq.**, Schuler, Halvorson & Weisser, P.A., 1615 Forum Place, Suite 4-D, West Palm Beach, FL 33401 and **Bard D. Rockenbach, Esq.** and **Andrew A. Harris, Esq.**, Burlington & Rockenbach, P.A., 444 W. Railroad Avenue, Suite 430, West Palm Beach, FL 33409, this 2nd day of January, 2013.

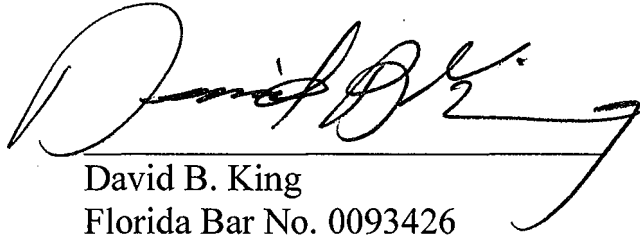


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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Initial Brief complies with the font requirement and uses 14-point Times New Roman.



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