Case No. SC21-159

In the

Supreme Court of Florida

STEVEN J. PINCUS,
individually and on behalf of all others similarly situated,

Plaintiff/Appellant,

v.

AMERICAN TRAFFIC SOLUTIONS, INC.,

Defendant/Appellee.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

INITIAL BRIEF OF APPELLANT STEVEN J. PINCUS

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STATEMENT OF THE CASE AND THE FACTS

This case is about a government contractor abusing its position to overcharge accused red light violators when they pay their traffic tickets. For years, Appellee American Traffic Solutions, Inc. ("ATS") has leveraged its role as a "vendor" for various Florida cities and counties to unlawfully extract millions of dollars from Floridians for its own profit, despite express statutory prohibitions on the same. This action aims to stop this practice and return ATS's ill-gotten gains to the citizens of Florida.

In Florida, the rules of the road are codified in a series of uniform statutes collectively known as the Florida Motor Vehicle Code. *See generally* Fla. Stat. Ch. 316-324. Chapter 316 is entitled the "Florida Uniform Traffic Control Law," and it sets forth the rules for operating motor vehicles throughout the state. *See* Fla. Stat. § 316.001. Chapter 318 is entitled the "Florida Uniform Disposition of Traffic Infractions Act," and it sets forth uniform rules for handling infractions of the code throughout the state. *See* § 318.11.

These are uniform statutes. Both Chapters 316 and 318 expressly preempt matters of traffic control to the Florida legislature and prohibit local governments from enacting their own rules without authorization. Fla. Stat.

§ 316.007, which is entitled "Provisions uniform throughout state," provides as follows:

> **316.007 Provisions uniform throughout state.** — The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized. However, this section shall not prevent any local authority from enacting an ordinance when such enactment is necessary to vest jurisdiction of violation of this chapter in the local court.

Concordantly, Fla. Stat. § 318.121, which is entitled "Preemption of additional fees, fines, surcharges, and costs," preempts matters of civil penalties for traffic infractions to the state:

> **318.121 Preemption of additional fees, fines, surcharges, and costs.** —Notwithstanding any general or special law, or municipal or county ordinance, additional fees, fines, surcharges, or costs other than the court costs and surcharges assessed under s. 318.18(11), (13), (18), (19), and (22) may not be added to the civil traffic penalties assessed under this chapter.

Under these uniform statutes, it is generally unlawful for a local government to enact traffic laws that are not expressly authorized by the legislature.

In 2010, Chapters 316 and 318 were amended by the Mark Wandall Traffic Safety Act (the "Act"). The Act amended the Florida Motor Vehicle Code to enable local governments to operate so-called "photo-enforced" red

light programs on their roadways, provided such programs comply with rigid statutory requirements.[1] *Id.*

ATS is a Kansas corporation engaged in the business of installing, operating, and managing photo-enforced red light programs on behalf of government bodies. In 2010, the City of North Miami Beach (the "City") executed an agreement with ATS to implement a photo-enforced red light program. (R. 140-173).[2] This agreement appointed ATS as the exclusive vendor for the City's program. *Id.* For performing this duty, the agreement specifies that ATS is to be compensated by the City in the amount of $4,750 per camera, per month. (R. 185, 205-06).

In 2013, the City and ATS executed their "Second Amendment to Professional Services Agreement," amending the original agreement to add a new provision stating that "ATS is authorized to charge, collect and retain a convenience fee of up to 5% of the total dollar amount of each electronic

[1] The statutory provisions of the Act can be found in Chapter 316 at §§ 316.0076, 316.008(8), 316.0081, 316.0083, and 316.00831, and the associated penalty provisions of the Act can be found in Chapter 318 at § 318.18(15)(a)2 and 3.

[2] The original 11th Circuit record contained inoperable bookmarks and was missing pages. In consequence, Appellant has filed an Appendix containing the 11th Circuit record and opinion with working bookmarks and all pages. References to this Appendix are designated (R. [page number]).

payment processed. Such convenience fees are paid by the violator." (R. 241).

It is this provision that is at the heart of this case. Despite what ATS contends, neither it nor the City are "authorized" to charge, collect, or retain any fines, fees, surcharges, or costs other than those fixed by state law. In flouting this rule, ATS has parasitized Florida's photo-enforced red light paradigm, inflating almost every single civil penalty by 5% for its own profit, in addition to its contractual remuneration for operating the City's camera program.

Appellant Steven J. Pincus ("Mr. Pincus") is a Florida citizen who allegedly ran a red light in the City of North Miami Beach on February 17, 2018. (R. 318-20). ATS sent Mr. Pincus a Notice of Violation alleging that he had been photographed running the red light, and demanding payment of a civil penalty in the amount of $158.00. *Id.* This amount, $158.00, is the civil penalty fixed by state law. *See* §§ 316.0083(1)(b), 318.18(15).

The Notice of Violation stated that the $158.00 civil penalty had to be paid using one of three payment methods: (1) online payment *via* credit card, debit card, or automated clearing house (ACH) transaction; (2) payment by phone *via* credit card, debit card, or automated clearing house (ACH) transaction; or (3) mailing a check directly to ATS. Notably, no payments

directly to the City are allowed, and cash is not accepted. (R. 254-55, 318-20).

On April 23, 2018, using the payment-by-phone option described above, Mr. Pincus used his personal credit card to pay the $158.00 civil penalty demanded in the Notice of Violation. (R. 318-20). At that time, Mr. Pincus was charged a separate "convenience fee" by ATS, in the amount of $7.90, or 5% of the $158.00 civil penalty, bringing the total penalty to $165.90. *Id.*

Mr. Pincus contends that this so-called convenience fee is not about "convenience" at all. On the contrary, it is a wholly arbitrary charge that ATS unilaterally imposes solely for its own profit. ATS has no legal authority to impose it, and multiple Florida statutes expressly prohibit it.

Since as early as June 1, 2014, ATS has imposed and collected these convenience fees on all electronic payments across Florida. (R. 322-29). Because ATS was prohibited from doing so under Florida law and has profited from its unlawful conduct, Mr. Pincus brought the instant lawsuit alleging that ATS was unjustly enriched, seeking disgorgement of the fees unlawfully imposed and collected by ATS in Florida.

On June 29, 2018, Mr. Pincus filed his putative class action lawsuit against ATS in the United States District Court for the Southern District of

Florida. (R. 125-38). On January 14, 2019, the Honorable District Judge Donald M. Middlebrooks granted ATS's motion to dismiss (R. 331-48), and Mr. Pincus timely filed a notice of appeal to the Eleventh Circuit Court of Appeals. (R. 350-51). On February 2, 2021, the Eleventh Circuit issued its non-dispositive opinion (R. 8-40), in which it certified the following questions to the Supreme Court of Florida:

(1) Did ATS violate Florida law when it imposed a five percent fee on individuals who chose to pay their red light traffic ticket with a credit card? In particular:
    a. Does the challenged fee constitute a "commission from any revenue collected from violations detected through the use of a traffic infraction detector" under Fla. Stat. § 316.0083(1)(b)(4)?
    b. Was the fee assessed under Chapter 318 and therefore subject to § 318.121's surcharge prohibition?
    c. Was ATS a "money transmitter" that was required to be licensed under Fla. Stat. § 560.204(1)?

(2) If there was a violation of a Florida statute, can that violation support a claim for unjust enrichment? In particular:
    a. Does Pincus's unjust enrichment claim fail because the statutes at issue provide no private right of action?

b. Does Pincus's unjust enrichment claim fail because he received adequate consideration in exchange for the challenged fee when he took advantage of the privilege of using his credit card to pay the penalty?

SUMMARY OF ARGUMENT

I. ATS Violated Florida Law When It Imposed a Five Percent Fee on Individuals Who Paid Their Photo-Enforced Red Light Traffic Tickets with Credit Cards.

a. The challenged fee constitutes a "commission from any revenue collected from violations detected through the use of a traffic infraction detector" under Fla. Stat. § 316.0083(1)(b)(4).

ATS's convenience fee is a prohibited "commission" under the Act, which provides: "[a]n individual may not receive a commission from any revenue collected from violations detected through the use of a traffic infraction detector." § 316.0083(1)(b)4, Fla. Stat. ATS's convenience fee is such a commission, and consequently, it is prohibited.

ATS argues that its fee is not prohibited because the statute only forbids commission payments taken from the $158 civil penalty itself. (R. 91). "In other words, a person cannot receive any portion ***of the $158 penalty*** as a commission." *Id.* (emphasis added). Because the additional $7.90 charge was not *deducted* from the $158, but was instead imposed on top of it, ATS contends that it did not violate the law.

This argument reflects ATS's strategy to narrowly define the word "commission" for its own benefit. But this is wrong. The word "commission" is not so narrowly defined in common parlance. There are many different payment arrangements that are commonly described as "commissions." The

one consistent element that makes for a "commission" is that it is a fee paid for completion of a task. ATS's fee satisfies that definition. Moreover, to the extent that the word is not defined, the statute should be liberally construed in favor of protecting the citizens of Florida. Accordingly, the Court should find that ATS's convenience fee is a "commission" within the meaning of § 316.0083.

b. The fee was assessed under Chapter 318 and is therefore subject to Section 318.121's surcharge prohibition.

ATS's convenience fee is also a prohibited additional fee, fine, surcharge, or cost under Fla. Stat. § 318.121. This statute expressly preempts civil traffic penalties to the state and prohibits such charges:

> **318.121 Preemption of additional fees, fines, surcharges, and costs.** —Notwithstanding any general or special law, or municipal or county ordinance, additional fees, fines, surcharges, or costs other than the court costs and surcharges assessed under s. 318.18(11), (13), (18), (19), and (22) may not be added to the civil traffic penalties assessed under this chapter.

This prohibition applies to ATS's fee. First and foremost, Section 318.121 itself exempts precisely one additional cost that may be added to photo-enforced red light penalties: the court costs specified in s. 318.18(22). ATS's surcharge does not fit this exemption, and consequently, it is prohibited.

More generally, under the Florida Motor Vehicle Code, Chapters 316 and 318 are thoroughly interrelated; it is not possible to consider the provisions of one without referring to the other. Under Florida's traffic law paradigm, all civil traffic penalties are assessed under Chapter 318, including those assessed for violations of photo-enforced red lights.

The civil penalty for photo-enforced red violations appears in both Chapters 316 and 318, and each of these chapters is a part of the larger, consolidated whole: the Florida Motor Vehicle Code. *See generally* Fla. Stat. § Ch. 316-324. These chapters contain many references to one another and are designed to be used together. It is unreasonable for a court to analyze either of them in a vacuum.

As the Eleventh Circuit observed, ATS's argument is that the words "assessed under" really mean "assessed *exclusively* under." (R. 12, 23). This is fatal to ATS, as the civil penalty here was not "assessed *exclusively* under" Chapter 318. At a minimum, the civil penalty was assessed under both Chapters 316 and 318. To hold otherwise would contradict the plain and obvious design of the Florida Motor Vehicle Code, and frustrate the manifest intent of the Florida legislature.

c. ATS is a "money transmitter" that was required to be licensed under Fla. Stat. § 560.204(1).

Finally, ATS is a "money transmitter" as defined by Florida law. Fla. Stat. § 560.204(1) states that, unless exempted, "a person may not engage in, or in any manner advertise that they engage in, the selling or issuing of payment instruments or in the activity of a money transmitter, for compensation, without first obtaining a license under this part." ATS conducts a large-scale money transmitter business in Florida without the requisite license, and consequently, ATS was prohibited from operating that business "for compensation." *See id.* In this case, the "compensation" at issue is the convenience fee imposed by ATS on Mr. Pincus and the putative class.

Accordingly, the Court should hold that ATS is subject to mandatory licensure under Section 560.204(1), Fla. Stat., and that ATS was prohibited from operating as a money transmitter for compensation without the aforementioned license.

II. ATS's Violations of Florida Law Support Mr. Pincus's Claims for Unjust Enrichment.

a. Mr. Pincus's unjust enrichment claims may proceed irrespective of whether the statutes at issue provide a private statutory right of action.

In Florida, it is well-settled that plaintiffs may bring common law claims based upon conduct that violates a state statute. This is true even if the statute expressly provides a separate statutory right of action: "Whether a statutory remedy is exclusive or merely cumulative depends upon the legislative intent as manifested in the language of the statute. The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard." *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990). "Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." *Id.*

Here, none of the statutes at issue trigger any changes to the common law. Similarly, none are "so repugnant to the common law that the two cannot coexist." On the contrary, all of the statutes invoked by Mr. Pincus are entirely consistent with his claims that ATS has been unjustly enriched by its own unlawful conduct.

Moreover, ATS's fee constitutes an illegal extraction under Florida law. Illegal extraction is a particularly egregious form of unjust enrichment where the deprivation is caused by the unlawful acts of local government. *See Parker v. American Traffic Solutions, Inc.*, 2015 WL 4755175 (S.D. Fla. Aug. 10, 2015). Consequently, Mr. Pincus's unjust enrichment claims should proceed.

b. Mr. Pincus's did not receive adequate consideration in exchange for the challenged fee, as using a credit card is not a "privilege," and the transmission of Mr. Pincus's civil penalty to the City is not "consideration."

Similarly, Mr. Pincus's unjust enrichment claims do not fail for "adequate consideration." This case is not about contract law. Mr. Pincus's decision to use a credit card to pay his civil penalty was not a "privilege," and ATS's transmission of the civil penalty to the City was not "consideration."

A traffic citation is a formal charging document by which the government accuses a driver of violating the law. *See, e.g.*, *Estate of Wallace v. Fisher*, 567 So. 2d 505, 506 (5th DCA 1990). This relationship is adversarial, much like a criminal case, and is typically styled the same way: "State versus Driver." In other words, the relationship is not arms-length. The government's role is *accuser*, while the driver is a *defendant*.

As the exclusive operator of the City's photo-enforced red light program, ATS takes on the government's role of accuser. Despite this, ATS

holds itself out as something like a merchant, performing a useful "service" for the accused, offering them a "bargain" for their "benefit." This is wrong.

An accused driver's duty to pay his or her fine is not a "benefit." On the contrary, it is an obligation enforced by law. Failure to meet this obligation results in serious consequences, including more severe penalties, driver license suspensions, and more. Similarly, ATS's act of relaying civil penalty payments to the City is not "consideration." Mr. Pincus's civil penalty payment was a guilty plea. ATS is obligated to transmit it to the City pursuant to its agreement with the City.

Thus, Mr. Pincus's unjust enrichment claims do not fail for adequate consideration, as the entire concept of contractual consideration is inapplicable to this case. There is no contract here. Mr. Pincus paid his civil penalty under threat of punishment, not voluntary exchange. In such a case, ATS, like the City, cannot unilaterally decide which payment methods are acceptable, which are unacceptable, and which are "privileges" that incur a higher penalty. The civil penalty is a statutory obligation, the terms of which are fixed by state law. It is not the "benefit" of any "bargain." Accordingly, the Court should reject ATS's arguments, and answer the Certified Questions in favor of Mr. Pincus.

ARGUMENT

The Court should answer each of the Eleventh Circuit panel's certified questions in favor of Mr. Pincus. ATS violated three distinct Florida statutes, and each violation independently avails Mr. Pincus of relief through his well-plead unjust enrichment claims. Accordingly, Mr. Pincus answers each of the Eleventh Circuit's certified questions in detail below.

I. ATS Violated Florida Law When It Imposed a Five Percent Fee on Individuals Who Paid Their Photo-Enforced Red Light Traffic Tickets with Credit Cards.

a. The challenged fee constitutes a "commission from any revenue collected from violations detected through the use of a traffic infraction detector" under Fla. Stat. § 316.0083(1)(b)(4).

When is a commission a commission? The first part of the Eleventh Circuit's certified questions asks whether ATS's fee constitutes a "commission from any revenue collected from violations detected through the use of a traffic infraction detector" under Fla. Stat. § 316.0083(1)(b)(4). The answer is yes under any reasonable definition of the word "commission."

As the district court itself concluded, "[c]ommission is not defined by the statute, § 316.003, so the plain meaning of the term must be given effect." (R. 340 at n. 3). The court then attempted to divine the "plain meaning" by referring to the Oxford English and Merriam-Webster dictionaries:

> Oxford English Dictionary defines "commission" as "[a] sum, typically a set percentage of the value involved, paid to an agent

> in a commercial transaction." OXFORD ENGLISH DICTIONARY. Merriam-Webster contains a similar definition: "[A] fee paid to an agent or employee for transacting a piece of business or performing a service. [*E*]*specially*: a percentage of the money received from the total paid to the agent responsible for the business." MERRIAM-WEBSTER.

Id. (hyperlinks omitted).

To begin, ATS's so-called convenience fee satisfies either of these definitions. Under the Oxford English Dictionary definition, ATS's convenience fee must be "a sum paid to an agent in a commercial transaction." The fee clearly satisfies this definition. The fact that such a sum is defined as "*typically* a set percentage of the value involved" does not transform ATS's commission into something else. On the contrary, ATS's fee is itself defined as a percentage of the underlying civil penalty. This squarely satisfies the Oxford English Dictionary definition.

Similarly, to satisfy the Merriam-Webster definition, the charge must be "a fee paid to an agent or employee for transacting a piece of business or performing a service." Again, ATS's convenience fee plainly meets the definition. The fact that this definition "especially" means sums that are "a percentage of the money received from the total paid to the agent responsible for the business" does not disqualify ATS's convenience fee from being a commission. Again, ATS's fee is itself defined as a percentage

of the underlying civil penalty. This easily clears the Merriam-Webster definition.

To be sure, this is also consistent with basic English. The word "commission" is not narrowly defined in common parlance. Sometimes it means a percentage of a sale paid to the agent from the sale revenue. Other times, it means a flat sum to be paid upon consummating a sale. Still other times, a commission is a payment that vests upon reaching certain sales milestones. There are many different payment arrangements in everyday commerce that are commonly described as "commissions." The one consistent element is a fee paid to an agent for completion of a task. That simple definition is easily satisfied by ATS's fee.

As the Eleventh Circuit observed, the district court interpreted the word "commission" to mean "only commissions derived from the statutory penalty, not surcharges that rest atop that penalty." (R. 16) (internal punctuation omitted). "Because ATS took no cut of Pincus's statutory penalty but rather charged him a fee in excess of that penalty, the district court concluded that ATS did not violate § 318.0083(1)(b)(4)." *Id.* In other words, because the convenience fee is not a percentage that is *deducted* from the $158.00 civil penalty, but a percentage that is *added* to it, the fee ceases to be a "commission" and formally becomes a "surcharge," somehow too different to

be prohibited under Florida law even though the amount added is paid to ATS. This was wrong.

Similarly, ATS argues, without authority, that the statutory prohibition means "a person cannot receive any portion ***of the $158 penalty*** as a commission." (R. 91) (emphasis added). In doing so, ATS draws an imaginary line through the $165.90 in order to distinguish its surcharge from the civil penalty, which it considers the "revenue." But this is a false distinction. The total "revenue" collected by ATS was $165.90. ATS's effort to classify its $7.90 fee as something other than "revenue" ignores every definition of revenue.

Black's Law Dictionary defines "revenue" as "income from any and all sources; gross income or gross receipts." *Black's Law Dictionary*, (11th ed. 2019). Merriam-Webster's dictionary defines it as "the total income produced by a given source." *Merriam-Webster.com*, Merriam-Webster, 2019. The Oxford English Dictionary defines it simply as "[i]ncome, especially when of an organization and of a substantial nature." *Oxford English Dictionary*, 2019. Under any of these definitions, all of the funds collected by ATS are "revenue." There is no alternate definition that somehow excludes ATS's fee while still including the civil penalty.

The statutory clause "…from any revenue collected from violations detected through the use of a traffic infraction detector" also supports Mr. Pincus. The statute expressly prohibits receiving a commission "from **any** revenue collected." (emphasis added). The term "any revenue" is telling. The statute does not prohibit commissions from "*some* revenue," or from "*civil penalty* revenue," but from **any** revenue. Both the $158 statutory civil penalty and ATS's surcharge clearly qualify, as they are both forms of revenue, and both were collected in connection with photo-enforced red light violations. ATS's suggestion to the contrary is inconsistent with any definition of "revenue." (R. 91).

Even the district court recognized the inequity of ATS's conduct, opining that "Defendant's surcharge may violate the *spirit* of the law, but it does not violate the *letter* of the law." (R. 341). At the same time, the district court also held "commission is not defined by the statute." (R. 340 at n. 3). But if that is true, then how can ATS's convenience fee violate the "spirit" of the law, but not the "letter?" The text of the statute—the "letter" of the law—does not define "commission." In other words, the "letter" of the law is missing. This is why the district court had to search for the plain meaning outside of the statute. Paradoxically, it then constructed its own definition of

"commission," and decided that ATS's surcharge does not qualify, even though it otherwise violated the "spirit" of the statute.

If ATS violated the *spirit* of the law, and the *letter* of the law is absent from the statute, how can ATS possibly be in compliance with it? The answer is that it is not. ATS's extra charge is a prohibited commission under any reasonable definition of that word. To the extent the word is not defined, the statute should be liberally construed in favor of protecting the citizens of Florida. ATS's surcharge is precisely the kind of conduct that the legislature sought to curb when it enacted Sections 316.0083(1)(b)(4) and 318.18(15)(d) in the first place. Indeed, the district court acknowledged this when it opined Defendant's surcharge violated "the *spirit* of the law." (R. 341).

Accordingly, the Court should answer the certified question in the affirmative, holding that ATS's convenience fee is a "commission" within the meaning of Section 316.0083.

b. <u>The fee was assessed under Chapter 318 and is therefore subject to Section 318.121's surcharge prohibition</u>.

The second part of the Eleventh Circuit's first certified question asks "was the fee assessed under Chapter 318 and therefore subject to §318.121's surcharge prohibition?" The answer to this question is also yes.

Section 318.121, entitled "Preemption of additional fees, fines, surcharges, and costs," expressly preempts civil traffic penalties to the state and prohibits attaching additional fees to civil traffic penalties, other than those specifically permitted:

> **318.121 Preemption of additional fees, fines, surcharges, and costs.** —Notwithstanding any general or special law, or municipal or county ordinance, additional fees, fines, surcharges, or costs other than the court costs and surcharges assessed under s. 318.18(11), (13), (18), (19), and (22) may not be added to the civil traffic penalties assessed under this chapter.

By its own terms, this prohibition applies to civil penalties assessed for photo-enforced red light violations.

ATS contends otherwise, focusing on the last four words of the statute: "assessed under this chapter." (R. 19). As the Eleventh Circuit noted, ATS's argument is that the words "assessed under" really mean "assessed *exclusively* under." (R. 12, 23). In other words, ATS contends that the civil penalty was assessed *exclusively* under Chapter 316, and definitely *not* under Chapter 318. This is wrong for several reasons.

i. Fla. Stat. § 318.121 prohibits unexempted fees, fines, surcharges, and costs assessed in connection with § 316.0083.

First, ATS's argument is directly contradicted by Section 318.121 itself. The statute exempts precisely <u>one</u> additional cost that may be added to the

civil penalty set forth in Section 316.0083. ATS's surcharge does not fit this exemption, and consequently, it is prohibited.

Section 318.121 broadly prohibits adding additional fees, fines, surcharges, or costs to civil traffic penalties, apart from those it specifically exempts:

> **318.121 Preemption of additional fees, fines, surcharges, and costs.** —Notwithstanding any general or special law, or municipal or county ordinance, additional fees, fines, surcharges, or costs other than the court costs and surcharges assessed under s. 318.18(11), (13), (18), (19), and (22) may not be added to the civil traffic penalties assessed under this chapter.

This short statute enumerates five exemptions to its broad prohibition: those "assessed under s. 318.18(11), (13), (18), (19), and (22)." *Id.* The last of these exemptions is specific to photo-enforced red light violations under Section 316.0083:

> **318.18 Amounts of penalties** —
> . . .
> (22) In addition to the penalty prescribed under s. 316.0083 for violations enforced under s. 316.0083 which are upheld, the local hearing officer may also order the payment of county or municipal costs, not to exceed $250.

This subsection permits local governments to add <u>one</u> additional cost to the civil penalty fixed by Section 316.0083: "county or municipal costs, not to exceed $250," which may be imposed when violations enforced under Section 316.0083 are upheld by a local hearing officer. *Id.* Section 318.121,

in turn, specifically exempts this additional cost from its prohibition, thereby allowing local governments to add it to civil traffic penalties. Section 318.121 contains no other exemptions for civil penalties assessed in connection with Section 316.0083.

This is the classic "exception that proves the rule." If Section 318.121 did not apply to the civil penalty set forth in Section 316.0083, then it would not carve out a specific exemption for it. Moreover, this particular exception was added to the statute in 2013, along with a number of other photo-enforced red light provisions. In light of this, it is clear that the legislature intended to permit only one additional cost on photo-enforced red light penalties: the one prescribed by Section 318.18(22).

ATS's surcharge does not fit this exemption, nor does it fit any other exemption appearing in Section 318.121. It is not a "county or municipal cost." § 318.18(22). It is not ordered by "the local hearing officer," nor is it imposed "for violations under s. 316.0083 which are upheld" by such an officer. *Id.* On the contrary, it is a wholly arbitrary sum, added by ATS, solely to enrich itself. Accordingly, this additional cost is clearly prohibited by Section 318.121.

ii. The civil penalty for photo-enforced red light violations is assessed under Chapter 318, Florida Statutes.

Even if the Court discounts the foregoing argument, Mr. Pincus's civil penalty still was not assessed *exclusively* under Chapter 316. At the very least, it was assessed under *both* Chapters 316 and 318. As the Eleventh Circuit explained, "ATS's argument requires us to place Chapters 316 and 318 in the context of Florida's Motor Vehicle Code." (R. 19).

The Florida Motor Vehicle Code is comprised of nine (9) chapters, with each chapter relating to a different component of Florida traffic law. *See generally* Fla. Stat. Ch. 316-324. All of these chapters are deeply interconnected. It is simply not possible to consider the provisions of any one chapter without making reference to others. For example, Chapter 316 is entitled the "Florida Uniform Traffic Control Law." *See* Fla. Stat. § 316.001. It sets forth the rules for operating motor vehicles throughout the state. Chapter 322, entitled "Driver Licenses," sets forth the rules for driver licenses in Florida. *See* Fla. Stat. Ch. 322. And Chapter 318, which is entitled the "Florida Uniform Disposition of Traffic Infractions Act," sets forth uniform rules for handling infractions of the rest of the code, including Chapter 316 and civil traffic penalties applicable thereto. *See* § 318.11. All civil traffic penalties are "assessed" under Chapter 318.

This is the nature of the Florida Motor Vehicle Code. Each chapter is replete with cross-references to provisions of the other chapters, and the Act is no exception. Even Section 316.0083 itself explicitly refers to Chapter 318 in defining the procedures following a violation:

> Within 30 days after a violation, notification must be sent to the registered owner of the motor vehicle involved in the violation specifying the remedies available under **s. 318.14** and that the violator must pay the penalty of $158 to the department, county, or municipality, or furnish an affidavit in accordance with paragraph (d), or request a hearing within 60 days following the date of the notification in order to avoid the issuance of a traffic citation. The notification must be sent by first-class mail. The mailing of the notice of violation constitutes notification.

§ 316.0083(b)1.a. (emphasis added). Accordingly, it would be erroneous to hold that the civil penalty here was assessed exclusively under Chapter 316.

iii. Holding that Section *318.121 does not apply leads to an absurd result.*

Further, ATS's argument cannot be correct because it would lead to an absurd result. Under ATS's interpretation, a local government or its vendors can impose literally *any* surcharge in connection with a civil penalty, inflating the $158.00 statutory penalty by any amount, rendering the statutory sum meaningless. This would eviscerate the manifest intent of the legislature and dissolve the uniformity of the Florida Motor Vehicle Code. This cannot possibly be correct, especially in light of the preemption paradigm described *supra*.

It is obvious that the Florida legislature intended to create uniform traffic laws applicable throughout the state. Under ATS's analysis, virtually all traffic matters in Florida are enforced through such uniform laws *except photo-enforced red light violations*, all because the civil penalty appears in both Chapters 316 and 318, rather than Chapter 318 alone. This cannot possibly be right.

Thus, ATS's argument that Section 318.121 does not apply because the civil penalty at issue was not "assessed under this chapter" is wrong. The Florida legislature clearly intended for traffic fines to be uniform throughout the state. Section 318.121 was specifically drafted to prevent exactly this kind of behavior by local governments and their confederates. Accordingly, the Court should answer the certified question in favor of Mr. Pincus.

c. ATS is a "money transmitter" that was required to be licensed under Fla. Stat. § 560.204(1).

The final subpart to the Eleventh Circuit's first certified question asks whether ATS is a "money transmitter" that was required to be licensed under Fla. Stat. § 560.204(1). Again, the answer is yes. To begin, ATS is a "money transmitter" as defined by Florida law. Fla. Stat. § 560.103(23) defines money transmitter broadly:

> "Money transmitter" means a corporation, limited liability company, limited liability partnership, or foreign entity qualified to do business in this state which receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means, including transmission by wire, facsimile, electronic transfer, courier, the Internet, or through bill payment services or other businesses that facilitate such transfer within this country, or to or from this country.

ATS clearly satisfies this definition, as it is "a corporation . . . which receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means . . . within this country." *Id.* ATS does not appear to dispute this.

Florida law requires money transmitter businesses like ATS to maintain a license. Section 560.204(1) states that, unless exempted, "a person may not engage in, or in any manner advertise that they engage in, the selling or issuing of payment instruments or in the activity of a money transmitter, for compensation, without first obtaining a license under this part." ATS conducts a large-scale money transmitter business in Florida without the requisite license, and consequently, it was prohibited from operating its business "for compensation." *Id.* In this case, the "compensation" at issue is the convenience fee imposed by ATS on Mr. Pincus and the putative class.

ATS advances two arguments in its defense: (1) that it is exempt from licensure under Chapter 560 because it is an agent of the City, and (2) that

in any case, it is not a "money transmitter" within the meaning of Chapter 560 because ATS never "received" any money.

"First, ATS points out that 'political subdivision[s],' including cities, are exempt from all provisions of Chapter 560, including § 560.204's licensing requirement." (R. 26). "From there, ATS contends that it enjoys the same exemption as the City because it is the 'exclusive vendor for the City.'" *Id.* ATS argues that "[b]ecause Pincus's theory is that ATS is an agent of the City, ATS is exempt." (R. 107).

This argument exposes ATS's duplicitous strategy of regarding itself as a private service provider when it is convenient to do so, but as a "political subdivision" when it is not. Here, ATS wants the Court to consider it an inseparable part of the City, enjoying all of the rights and immunities pertaining to government actors, even as it argues elsewhere that it is akin to a merchant that gave Mr. Pincus "what he bargained for." (R. 110).

While it is true that Section 560.104(3) exempts "[t]his state or any political subdivision of this state" from mandatory licensure as a money transmitter, ATS is not a "political subdivision of this state." Florida law defines "political subdivision" to mean "counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state." § 1.01(8), Fla. Stat. ATS is none of these

things. The fact that it is an exclusive vendor for the City does not transform it into a political subdivision in its own right. On the contrary, it is a foreign company under contract with the City to operate a government program on its behalf.

If the Florida legislature intended for city contractors to be included in its definition of "political subdivision," it surely would have said so. "Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." *Young v. Progressive Se. Ins. Co.*, 753 So. 2d 80, 85 (Fla. 2000) (quoting *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996)). The legislature did not include city vendors in its definition of "political subdivision," so they are excluded. ATS has no basis to claim otherwise.

Moreover, other companies that operate in the same space as ATS—*i.e.*, businesses that transmit payments from Florida citizens to county or local governments—are in fact licensed as money transmitters in Florida. For example, AllPaid, Inc.[3] permits the payment of bail money and court ordered child support payments within the State of Florida through its online portal at www.govpaynow.com. Another example is ACI Payments, Inc.,[4]

[3] Florida Money Transmitter Part II License Number FT230000251.
[4] Florida Money Transmitter Part II License Number FT230000103.

which allows Florida citizens to pay their property taxes in certain counties online via www.OfficialPayments.com. Clearly, ATS should not be able to skirt regulation when other similar companies are regulated.

Second, ATS doubles down by arguing "even if not exempt, there would still be no violation" because ATS never "received" money. (R. 107). In other words, because ATS is a vendor of the City, it was "impossible" for it to receive Mr. Pincus's money, because "receipt by ATS constitutes receipt by the City." *Id.* Somehow, this means that ATS never received any money at all.

This is preposterous. ATS does not dispute that it collected Mr. Pincus's civil penalty and $7.90 convenience fee payment. Nor does it dispute that *after* it received Plaintiff's money, it divided up the money it received and then ***transmitted the $158 civil penalty to the City***. ATS's suggestion that these events did not occur "as a matter of Florida law" is legal obfuscation at its worst. The fact that some of the money was later transmitted does not erase the fact that ATS received all of it.

Accordingly, the Court should hold that ATS is a money transmitter that is required to be licensed under Section 560.204, and answer the Eleventh Circuit's certified question in the affirmative.

II. ATS's Violations of Florida Law Support Mr. Pincus's Claims for Unjust Enrichment.

a. Mr. Pincus's unjust enrichment claims may proceed irrespective of whether the statutes at issue provide a private statutory right of action.

Under Florida law, it is well established a plaintiff may bring an unjust enrichment claim to recover a fee that was unlawfully imposed. This is true even where the fee was imposed under color of law and made illegal by statute, under Florida's doctrine of illegal extraction. Illegal extraction is "a particularly unjust form of property deprivation—because the Plaintiffs' deprivation was caused by the unlawful acts of the Local Governments." *Parker v. American Traffic Solutions, Inc.*, 2015 WL 4755175 (S.D. Fla. Aug. 10, 2015) (Moreno, J.). This is precisely the case here.

To be sure, Florida law generally permits plaintiffs to bring common law claims based upon conduct that violates a state statute. This is true even if the statute expressly provides a separate statutory right of action: "Whether a statutory remedy is exclusive or merely cumulative depends upon the legislative intent as manifested in the language of the statute. The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard." *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990). "Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common

law that the two cannot coexist, the statute will not be held to have changed the common law." *Id.* The statutes at issue in this case do not purport to change the common law. Accordingly, Mr. Pincus is not prohibited from asserting common law claims based upon violations of those statutes.

i. ATS's surcharge is an illegal extraction subject to redress via Mr. Pincus's unjust enrichment claims.

ATS's fee constitutes an illegal extraction under Florida law. Illegal extraction is a particularly egregious form of unjust enrichment where the unlawful deprivation is perpetrated under the guise of local government action. The Honorable Judge Federico A. Moreno explained this most succinctly in *Parker v. American Traffic Solutions, Inc.*, another case involving ATS:

> The Court, however, is bound by Florida precedent, and the Court is persuaded that under Florida law, state actors are not immune from suit for unlawful monetary extractions. Unjust enrichment is not a tort in the traditional sense, but it is a tool created by courts to provide a remedy for parties that have been unfairly deprived of their property. *E.g., Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co.*, 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997). **The Plaintiffs here have a particularly strong argument that their quasi-contractual claim moves into the realm of an illegal extraction—a particularly unjust form of property deprivation—because the Plaintiffs' deprivation was caused by the unlawful acts of the Local Governments.** In *Bill Stroop Roofing, Inc. v. Metropolitan Dade County*, Florida's Third District Court of Appeal held that the defendant county could not invoke sovereign immunity to retain money it obtained from charging a registration fee that was prohibited by state statute. 788 So. 2d

> 365, 367 (Fla. Dist. Ct. App. 2001). **In its reasoning, the court noted a sovereign cannot "improperly demand and extract monies from its citizens, then, when caught with its hand in the citizen's pocket, simply decline to return the funds."** *Id.* at 366.
>
> This type of unlawful extraction lies at the heart of the Plaintiffs' unjust enrichment claim: the Plaintiffs allege that "a county's refusal to obey a direct legislative mandate" resulted in the payment of an illegal fee. *Id.* at 367. Ultimately, the Plaintiffs suffered a loss of property caused by the wrongful acts of the Local Governments, Fla. Stat. § 768.28(1), and the Defendants are not entitled to immunity from suit on these grounds.

2015 WL 4755175 (S.D. Fla. Aug. 10, 2015) (Moreno, J.) (emphasis added). Here, as in *Parker*, Mr. Pincus's claim sounds in illegal extraction—"a particularly unjust form of property deprivation"—because the unlawful deprivation was perpetrated through the acts of a local government. ATS abused its position as the operator of the City's photo-enforced red light program to impose fees prohibited by law. *Id.* In consequence, Mr. Pincus's unjust enrichment claims may proceed.

Virtually all Florida cases confirm plaintiffs in illegal extraction cases may recover fees that were prohibited by Florida statute. For example, in *Bill Stroop Roofing, Inc. v. Metropolitan Dade County*, 788 So. 2d 365 (Fla. 3d DCA 2001), the court considered a fee charged by Miami-Dade County. The plaintiff alleged the fee was prohibited by a state statute and sought refunds of the previous payments. *Id.* at 366. The court held that the fee

was indeed prohibited by statute and ordered its refund: “there are numerous case examples in which the courts have mandated the refund of illegally extracted monies.” *Id.* “Thus we conclude that our governments are required to refund taxes and fees illegally exacted.” *Id.*

Similarly, in *Broward County, Fla. Bd. of County Comm'rs v. Burnstein*, 470 So.2d 793 (Fla. 4th DCA 1985), the Fourth DCA held that an occupational license tax was invalid because of the county's failure to follow the proper procedure in establishing it. The court ordered refunds for the years after the suit was filed. *See id.* at 796. In *City of Miami v. Florida Retail Fed'n, Inc.*, 423 So. 2d 991 (Fla. 3d DCA 1982), a suit was filed to recover excess payments of occupational license taxes. The court upheld the refunds ordered by the trial court. *Id.* at 993. In *Ves Carpenter Contractors, Inc. v. City of Dania*, 422 So. 2d 342 (Fla. 4th DCA 1982), the Fourth DCA concluded that a water and sewer impact fee was illegally charged, and that the payors were entitled to restitution of the fees. In *Broward County v. Mattel*, 397 So.2d 457 (Fla. 4th DCA 1981), excessive occupational license taxes charged to attorneys were ordered refunded. In *City of Jacksonville v. Jacksonville Maritime Ass'n*, 492 So. 2d 770 (Fla. 1st DCA 1986), a user fee on vessels anchored in port was determined to be an unconstitutional tax, and the shipowners were entitled to recover those fees. In *City of Miami*

Beach v. Jacobs, 315 So.2d 227 (Fla. 3d DCA 1975), the Third DCA upheld a trial court judgment which ordered the repayment of unconstitutional "fireline" fees and charges. In *Coe v. Broward County,* 358 So.2d 214, 216 (Fla. 4th DCA 1978), the court ordered refunds of excess taxes paid in violation of state legislation to the contrary.

Here, ATS's charge was an illegal extraction. ATS imposed the charge under color of law, relying on provisions of its contract with the City purportedly authorizing[5] it. It behaves as an outsourced "clerk of the court," filling the same ministerial role that duly-authorized City officials would. As such, ATS has no more authority than what the City has expressly granted it, and the authority for *any* charges imposed by ATS must originate from the City's own power. The City, in turn, has no more authority than what the state has afforded it, and cannot enact legislation in conflict with state law for the reasons stated above.

ATS's decision to impose a surcharge on civil penalty payments is no different than the City itself imposing such a charge. Because it would be unlawful for the City to impose such a charge, it is unlawful for ATS as well. Thus, the surcharge is an illegal extraction, "a particularly unjust form of

[5] ATS contends it is authorized to impose its surcharge pursuant to its agreement with the City, and the City's local laws. Thus, ATS is the City's agent.

property deprivation—because the Plaintiffs' deprivation was caused by the unlawful acts of the Local Governments." *Parker*, 2015 WL 4755175 at *4. Accordingly, the Court should hold that Mr. Pincus's unjust enrichment claim may go forward.

ii. A plaintiff may bring a common law claim based upon conduct that violates a state statute.

More generally, it is well-settled that plaintiffs in Florida may bring common law claims based upon conduct that violates a state statute. This is true even if the statute expressly provides a separate statutory right of action: "Whether a statutory remedy is exclusive or merely cumulative depends upon the legislative intent as manifested in the language of the statute. The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard." *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990). "Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." *Id.*

All Florida precedent confirms this. "Even where the legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise." *State v. Ashley*, 701 So.2d 338, 341 (Fla. 1997); *see also Essex Ins. Co. v. Zota*, 985 So.2d 1036, 1048 (Fla. 2008)

("A statute....designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard." (quoting *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla. 1977))).

Here, none of the statutes at issue inflict any changes to the common law. Similarly, none are "so repugnant to the common law that the two cannot coexist." On the contrary, all of the statutes invoked by Mr. Pincus are entirely consistent with his claims that ATS has been unjustly enriched at his expense. Consequently, Mr. Pincus's unjust enrichment claims should proceed.

ATS's argument to the contrary is that even if it did violate the Florida statutes discussed in section I, *supra*, it still was not unjustly enriched. ATS relies upon *Tilton v. Playboy Entertainment Group, Inc.*, No. 8:05-cv-692-T-30TGW, 2007 WL 80858, at *3 (M.D. Fla. Jan. 8, 2007), to make this argument. But *Tilton* does not support ATS's position.

In *Tilton*, the plaintiff brought an unjust enrichment claim against the defendant for illegally distributing a film of the plaintiff. *Id.* at *1. The court dismissed that claim, but only because "Plaintiff does not allege, and can not allege, that she conferred a direct benefit on the Defendants." *Id.* at *3. "Plaintiff has improperly based her claim for unjust enrichment upon the

wrongful conduct of Defendants," rather than upon a benefit conferred on the defendant by the plaintiff. *Id.* "The benefit conferred must be a direct benefit." *Id.* "An indirect benefit is not sufficient to support a claim for unjust enrichment." *Id.*

The *Tilton* court concluded the plaintiff did not confer a benefit on the defendant such that it would be inequitable for the defendant to retain it. In fact, the plaintiff in conferred *nothing* on the defendant. Here, by contrast, Mr. Pincus conferred a direct benefit upon ATS: an additional $7.90 fee that was illegal under Florida law. Mr. Pincus paid that fee directly to ATS. Thus, ATS has been unjustly enriched by exactly the amount of that fee. This is entirely distinguishable from *Tilton*, where there was no such direct benefit flowing from the plaintiff to the defendant.

Put another way, "[l]iability in unjust enrichment has in principle nothing to do with fault. It has to do with wealth being in one person's hands when it should be in another's." *Taxinet, Corp. v. Leon*, No. 16-24266-Civ-Moreno, 2018 WL 3405243, at *7 (S.D. Fla. July 12, 2018). This is precisely the case here. The "wealth" at issue is the illegal fee that Mr. Pincus conferred upon ATS. Under Florida law, it was illegal for ATS to demand, impose, or collect that sum, and consequently, that wealth should still be in Mr. Pincus's hands. It would be inequitable to permit ATS to keep it.

Accordingly, Mr. Pincus's well-plead unjust enrichment claims should go forward. None of the statutes at issue make any changes to Florida common law, and consequently, Mr. Pincus's common law claims are not barred. Moreover, ATS was unjustly enriched because Mr. Pincus conferred a direct benefit upon ATS in the form of an illegal 5% surcharge, and under the circumstances, it would be inequitable for ATS to retain that benefit. As all of the elements of Mr. Pincus's unjust enrichment claims are satisfied, the Court should answer the Eleventh Circuit's certified question in his favor, and hold that his unjust enrichment claims may proceed.

b. Mr. Pincus did not receive adequate consideration in exchange for the challenged fee, as using a credit card is not a "privilege," and the transmission of Mr. Pincus's civil penalty to the City is not "consideration."

The Eleventh Circuit's final certified question asks "does Pincus's unjust enrichment claim fail because he received adequate consideration in exchange for the challenged fee when he took advantage of the privilege of using his credit card to pay the penalty?" The answer is no. Mr. Pincus did not receive "consideration" in exchange for the fee, nor was the use of a credit card a "privilege."

i. The relationship between Mr. Pincus and ATS is not contractual.

A traffic citation is a formal charging document by which the government accuses a driver of violating the law. *See, e.g.*, *Estate of Wallace v. Fisher*, 567 So. 2d 505, 506 (5th DCA 1990). This relationship is adversarial, much like a criminal case, and is typically styled the same way: "State versus Driver." In other words, the relationship is not arms-length. The government's role is *accuser*, while the driver is a *defendant*.

As the exclusive operator of the City's photo-enforced red light program, ATS assumes the City's role in enforcing the law, and assumes the City's powers to do so. Thus, when performing these duties, ATS takes on the role of accuser and prosecutor, wielding the power of the state against accused drivers. As such, ATS becomes a sort of mercenary police department, deputized by the City to prosecute drivers as if it were a division of the City itself.

Despite this, ATS holds itself out as something very different. It depicts itself not as a government accuser, but as a friendly merchant, performing a useful "service" for the accused, offering them a "bargain" for their "benefit." This disingenuous argument aims to befuddle the Court into thinking that accused drivers interact with ATS voluntarily, rather than under threat.

This is profoundly wrong. An accused driver is *required* to interact with ATS. There is no alternative. Moreover, the accused driver's duty to pay a fine is not a "benefit." It is an obligation imposed by law. Failure to meet this obligation results in punitive consequences, including more severe penalties, driver license suspensions, and more. Thus, a civil penalty is more akin to a tax or criminal fine than "consideration" or a "benefit of the bargain," as ATS contends.

Similarly, ATS's act of transmitting civil penalty payments to the City is not "consideration." From Mr. Pincus's perspective, once the civil penalty had been paid to ATS, his legal obligation to answer the City's charge of running a red light had been satisfied. From there, ATS is obligated to transmit the civil penalty payment pursuant to its agreement with the City. (R. 151-52). ATS cannot hold an accused driver's payment hostage; to do so would be tantamount to the City refusing to accept civil penalty payments altogether.

Thus, transmitting a civil penalty payment to the City cannot be "adequate consideration" for paying an extra fee because ATS has an unconditional duty to remit these payments to the City as they are made. It cannot unilaterally invent additional fees and then condition performance of its duties on their payment. To do so would be tantamount to inflating the

statutory penalty fixed by state law, which neither ATS nor the City are permitted to do.

ATS's decision to designate some payment methods as a "privilege," and to further prohibit other payment methods altogether, is entirely arbitrary and self-serving. ATS carries out a government function, similar to a clerk of court. It is constrained by the same principles as a government body. It cannot arbitrarily encumber certain payment methods with additional fees for precisely the same reasons that the City itself cannot: "When the legislature takes action and enacts a statute, local government cannot adopt or enforce an ordinance that conflicts with the statute." *Phantom of Clearwater v. Pinellas County*, 894 So. 2d 1011, 1020 (Fla. 2d DCA 2005). The City does not possess the authority to inflate civil penalties, so neither does ATS. Worse, ATS did this for no other reason than to enrich itself at the expense of Florida drivers.

Thus, Mr. Pincus's unjust enrichment claims do not fail for adequate consideration, as the entire concept of contractual "consideration" is inapplicable to this case. There is no contract here. Mr. Pincus paid his civil penalty under threat of punishment, not voluntary exchange. In such a case, a state actor cannot unilaterally decide that some payment methods are acceptable, some are unacceptable, and some are "privileges." The civil

penalty is a statutory obligation, the terms of which are fixed by state law. It is most certainly not the "benefit" of any "bargain." Accordingly, the Court should reject ATS's arguments, and answer the Certified Questions in favor of Mr. Pincus.

ii. An illegal fee cannot be consideration.

Even if the Court finds that the relationship between ATS and Mr. Pincus is quasi-contractual or contractual, the unjust enrichment claims still survive. ATS's fee is illegal for all of the reasons explained in section I, *supra.* A payment made in conjunction with an illegal contract is void and may be recovered by the affected party. *See generally, Steinberg v. Brickell Station Towers*, 625 So.2d 848, 849 (Fla. 3d DCA 1993) (finding contract by unlicensed mortgage broker illegal and void); *Pidcock v. Sunnyland America, Inc.,* 854 F.2d 443, 446–47 n. 7 (11th Cir. 1988) (citing *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965) and noting that application of the disgorgement remedy is not limited to the facts of that case)); *S.E.C. v. Kirkland*, 521 F. Supp. 2d 1281, 1306 (M.D. Fla. 2007) ("The equitable 'remedy of disgorgement is designed both to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws.'") (citing *S.E.C. v. Friendly Power Co., LLC*, 49 F.Supp.2d 1363, 1372 (S.D. Fla. 1999)); *In re Ripon City*, 102 F. 176, 183 (5th Cir. 1900) ("any contract

which undertakes ... to put in charge ... any unlicensed person—no matter how well qualified otherwise ...—ought to be held void"); *see also,* Annot., *Recovery Back of Money Paid to Unlicensed Person Required by Law to Have Occupational or Business License or Permit to Make Contract,* 74 A.L.R.3d 637 (1976).

The overwhelming weight of Florida supports this conclusion. In *Vista Designs, Inc. v. Silverman*, the plaintiff sought disgorgement of an attorney's fee paid to a lawyer who later turned out to be unlicensed in Florida. 774 So. 2d 884 (Fla. 4th DCA 2001). The trial court below ruled that the underlying contract for legal services was void due to illegality. *Id.* at 886. On appeal, the defendant argued, as ATS does, that "because there is no regulatory measure requiring the forfeiture of fees where a contract has been declared void, disgorgement is improper." *Id.* at 887. The court disagreed and directed the defendant to reimburse plaintiff his legal fees, holding that "regulatory measures make it a criminal offense to practice law without a license," and that "public policy dictates that a party should be unable to benefit in any way as a result of one's wrongdoing." *Id.*

In *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 320 (S.D. Fla. 2001), the court considered, among other things, a plaintiff's effort to obtain restitution of premiums paid on an insurance contract that was illegal under

Florida law. The Court held that "Florida law is well-settled that where the law requires licenses to conduct business, the contracts by the unlicensed to perform licensed services are illegal and void." *Id.* And in *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1248 (11th Cir. 2003), another case involving restitution of premiums on an illegal insurance contract, the court held that "Florida courts recognize paying consideration for an illegal contract as an injury per se." *Id.* at 1252. "Thus, by asserting that he was an innocent party to an illegal contract, London asserts the invasion of an interest legally protected by Florida's common law of contracts and thereby obtains standing." *Id.*

To be clear, each of these cases involved work done and consideration for the fees charged. Yet, these cases all support Mr. Pincus's position there was no *adequate* consideration to trump the practice of the fee unlawfully imposed on him.

As the Eleventh Circuit observed, ATS relies on *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2001), to support its argument. But *Baptista* is entirely distinguishable from the instant case. In *Baptista*, one of Chase Bank's account holders gave the plaintiff a check for $262.48. *Id.* at 1196. The plaintiff was not a Chase customer, so she brought the check in person to Chase in order to cash it. *Id.* "Chase charged a $6.00

fee to provide cash immediately." *Id.* In response, the plaintiff sued the bank, claiming unjust enrichment because the $6.00 fee was illegal. *Id.*

Baptista is fundamentally different from this case because the *Baptista* court held that the $6.00 fee was lawful. *Id.* The court found that federal regulations preempted the state statute that made the fee illegal. *Id.* "We adopt the reasoning of the Fifth Circuit and hold that Fla. Stat. § 655.85 is preempted by the OCC's regulations promulgated pursuant to the NBA." *Id.* at 1198. "The state's prohibition on charging fees to non-account-holders ... is in substantial conflict with federal authorization to charge such fees." *Id*.

In other words, the plaintiff in *Baptista* failed because she could not satisfy the bedrock elements of her unjust enrichment claim. *Id.* at n. 3. "We would also conclude that Baptista's unjust enrichment claim fails as a matter of law because Baptista cannot prove each element of the claim." *Id.* While she could prove the first two elements, she could not prove the last: that "it would be inequitable for the defendant to retain the benefit without first paying the value thereof to the plaintiff." *Id.* at n. 3. This was because the $6.00 fee was not otherwise illegal. *Id.*

Unlike *Baptista*, all elements of Mr. Pincus's unjust enrichment claims are satisfied. Moreover, holding otherwise would lead to a bizarre outcome where an illegal fee may nonetheless be lawfully imposed and collected, as

in all of the above examples there was consideration for the unlicensed work. The charge would be *de jure* unlawful, but *de facto* lawful. This cannot possibly be right. Accordingly, the Court should answer the Eleventh Circuit's certified question in favor of Mr. Pincus, and permit his unjust enrichment claims to go forward.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that the Court should answer the Eleventh Circuit's certified questions as follows:

1. ATS violated Florida law when it imposed a five percent fee on individuals who chose to pay their red light traffic tickets with a credit card because:
    a. the challenged fee constitutes a "commission from any revenue collected from violations detected through the use of a traffic infraction detector" under Fla. Stat. § 316.0083(1)(b)(4);
    b. the fee was assessed under Chapter 318 and was therefore subject to § 318.121's prohibition on additional fees, fines, surcharges, and costs; and
    c. ATS was a "money transmitter" that was required to be licensed under Fla. Stat. § 560.204(1).
2. Each of the aforementioned violations of Florida law support a claim for unjust enrichment because:
    a. ATS committed an illegal extraction by imposing its convenience fee, and in any case a claim for unjust enrichment does not require an express statutory cause of action, and

b. Mr. Pincus did not receive adequate consideration in exchange for the challenged fee, as payment of the civil penalty via credit card is not a privilege.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Notice has been E-filed using the E-filing Portal and that a copy has been sent via email to the following parties this 11th day of March, 2021: Kevin P. McCoy (kmccoy@carltonfields.com), Joseph H. Lang (jlang@carltonfields.com), and David R. Wright (DWright@carltonfields.com).

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.045(e) and 9.210 of the Florida Rules of Appellate Procedure, the undersigned counsel hereby certifies that this Brief is submitted in 14 point Arial font, and contains 10,360 words, exclusive of caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, and signature block.

/s/ Bret L. Lusskin, Esq.