IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-359

L.T. CASE NO. 4D13-1187

CITY OF FORT LAUDERDALE
(STATE OF FLORIDA),

Appellant,

v.

JUNE DHAR

Appellee.

REPLY BRIEF OF APPELLANT, CITY OF FORT LAUDERDALE

ON APPEAL AS OF RIGHT FROM A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

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INTRODUCTION

The Court should reverse the Fourth District Court of Appeal's decision finding the pre-2013 version of the Wandall Act unconstitutional, reinstate Dhar's citation, and remand this case for further proceedings. Without question, the lower courts improperly shifted to the City the burden to establish a rational basis for the statutory distinction between owners and renters of vehicles. As evidenced by the opinion under review, which required the City to persuade the court that the statutory distinction was "justif[ied]," the Fourth District improperly assumed the role of policymaker and substituted its judgment for that of the Florida Legislature.

Dhar's contention in her answer brief that the Fourth District's equal protection analysis in two other opinions concerning the Wandall Act evinces that it correctly placed the burden on Dhar in this case is without merit. That the Fourth District has rejected other constitutional challenges to the Wandall Act does not establish, let alone suggest, that it held Dhar to the requisite high "burden of negating every conceivable basis" for the statute. *Eastern Air Lines v. Dep't of Revenue*, 455 So. 2d 311, 314 (Fla. 1984) (citation omitted).

Indeed, although the City had *no* burden to articulate a rational basis for the statute, the City set forth three grounds establishing rational bases for the distinction, which were ignored by the Fourth District. These bases, which Dhar has not effectively negated, establish that considerations of culpability, deterrence, and administrative convenience warrant the different treatment of renters and owners under the pre-2013 Wandall Act. Accordingly, the statute does not offend

equal protection or due process rights, and the presumption of its constitutionality should be upheld.

ARGUMENT

I. THE LOWER COURTS IMPROPERLY ASSUMED THE ROLE OF POLICYMAKER IN ASSESSING THE CONSTITUTIONALITY OF THE PRE-2013 ACT.

It is well-settled that "[u]nder a rational basis standard of review, a court should inquire only whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose." *Fla. High Sch. Activities Ass'n, Inc. v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983) (citation omitted) (emphasis added). Dhar does not dispute that this is the applicable standard herein. AB at 5.

It is evident, though, from the Fourth District's opinion and the trial court's ruling that both courts disregarded the high standard applicable to equal protection challenges, and instead substituted their own judgment for that of the policymaker – the Florida Legislature – in concluding that the pre-2013 version of the Act is unconstitutional. Indeed, neither the Fourth District's opinion nor the trial court's ruling articulated, much less actually applied, the governing standard, which requires *not* that the City prove a rational basis for the disparate treatment caused by the statute, but rather that the court conclude that there is *no* conceivable basis for the difference. The City need not "justify the disparate treatment," nor must the City persuade the Fourth District of the basis for the treatment. *Cf. City of Fort Lauderdale v. Dhar*, 154 So. 3d 366, 367 (Fla. 4th DCA 2014) ("We find the

City's attempt to justify the disparate treatment given to short-term renters to be wholly *unpersuasive*.") (emphasis added). Instead, the burden is on Dhar to demonstrate the absence of any rational basis for the differentiation. *See, e.g., Fla. High Sch. Activities Ass'n*, 434 So. 2d at 308; *Duncan v. Moore*, 754 So. 2d 708, 712 (Fla. 2000). Because the lower courts did not require Dhar to meet her burden and, instead, shifted the burden to the City to demonstrate the constitutionality of the statute, the Fourth District's decision should be reversed.

Dhar contends that the Fourth District must have applied the correct standard in this case because it has *previously* found rational bases for two other provisions of the Act in *State v. Arrington*, 95 So. 3d 324 (Fla. 4th DCA 2012) and *City of Fort Lauderdale v. Gonzalez*, 134 So. 3d 1119 (Fla. 4th DCA 2014). *See* AB at 4, 6. This assertion amounts to attempted proof by lack of counter-example. The mere fact that the Fourth District may have conducted the proper analysis in other cases addressing other portions of the Act does not establish that the burden was properly allocated in this case. Further, that Judge May was a panel member in *Dhar* and *Arrington* was not "overlooked" by the City, A.B. at 4, but instead is irrelevant to the analysis. The Fourth District's opinion must be taken at face value, and its true meaning derived from its reasoning, not from inferences gleaned from *other* opinions and panel comparisons. The Fourth District's opinion in this case establishes that the court improperly assumed the role of policymaker and expressly required the City to offer a "persuasive" – as opposed to merely conceivable – justification for the disparate treatment at issue.

Moreover, Dhar's assertion, unsupported by fact or law, that she "was not burdened with negating bases that were inconceivable", AB at 6, misses the mark. The City did not proffer inconceivable bases, nor does the Fourth District's opinion indicate that it did; instead, the opinion is *devoid of any mention* of the articulated bases for the statute. Further, these bases, which the City was not required to "prove," are far from "inconceivable." The rationale bases for the Act advanced by the City are neither unrelated to nor removed from the facts at issue. This is not, as Dhar seems to suggest, a case where the stated bases for the statute are so divorced from reality as to render them outlandish or irrational.

Accordingly, the burden was improperly shifted to the City and the Fourth District's decision should be reversed.

II. DHAR FAILS TO REFUTE THE CONCEIVABLE RATIONAL BASES FOR THE STATUTORY PROVISION.

It is, at the very least, "conceivable" that the Legislature considered culpability, deterrence, and administrative convenience as rational bases for the pre-2013 Act's differentiation of owners and renters. And yet, these bases were not properly considered by the lower courts.

A. Culpability.

Culpability is a conceivable rational basis for the differentiation of owners and renters under the pre-2013 statute, because when a UTC is issued to a renter, there is *additional evidence of culpability* than when an NOV is issued to an owner. Specifically, when a camera captures an image of a vehicle violating red

light camera laws, the system can only determine the identity of the registered owner of the vehicle, but it cannot determine the identity of the driver of the vehicle. Accordingly, because the purpose of the Wandall Act is to penalize the drivers who have violated the law, the pre-2013 statute required that the City send an NOV to the owner of a vehicle before issuing a UTC. This preliminary step gave the owner the opportunity either to pay a fine of $158 or to submit an affidavit establishing a statutory exemption from liability (*i.e.*, that someone else was driving the vehicle at the time of the violation). R. 104; §§ 316.0083(1)(b)1.a, (d)1, Fla. Stat. (2012).

However, if the owner submitted a sworn affidavit establishing that a renter was, in fact, driving the vehicle at the time of the violation (as Dollar did in this case), the pre-2013 statute permitted the City to issue a UTC to the renter immediately. §§ 316.0083(1)(d)3, Fla. Stat. (2012). The Legislature could have conceivably believed that the immediate issuance of the UTC to the renter without the prerequisite of an NOV was warranted by the fact that there was additional evidence (and greater proof) of the renter's culpability in the form of a sworn affidavit from the vehicle's owner than in the case of the unidentified driver initially captured by the cameras.

Thus, that the renter was required either to pay a higher fine and costs of $263[1] or submit his or her own affidavit establishing a statutory exemption,

[1] The fine and costs associated with a UTC include the $158 fine, which is the same fine imposed upon issuance of an NOV, plus court costs.

§§ 316.0083(1)(d)1-2, Fla. Stat. (2012), is reasonable due to the additional evidence of culpability in the form of the registered owner's sworn affidavit.

Dhar fails to refute the City's rational basis of culpability. She claims, without citation to legal authority, that "[c]ulpability is not and cannot be a conceivable basis for different treatment where culpability applies 'across the board' – not just to short-term renters of motor vehicles." AB at 9. However, Dhar misses the point, because under the pre-2013 statute there was, in fact, additional evidence of culpability against the renter – a sworn affidavit establishing that the renter was driving the vehicle at the time of the violation. Thus, Dhar's contention that renters and owners are equally culpable under the statute – at least from a proof perspective – is incorrect.[2]

State v. Arrington, 95 So. 3d 324 (Fla. 4th DCA 2012) is instructive. There, the Fourth District addressed culpability as a rational basis for a distinction under the Wandall Act. Specifically, a motorist challenged the constitutionality of section 316.075, Florida Statutes, which authorizes a police officer to issue a citation and add points to a driver's license when the police officer personally observes the driver proceed through a red light. *Id*. at 325. The motorist claimed

[2] Dhar's related contention that the statute is unconstitutional because the conduct at issue (failing to comply with red light camera signals) is the same for renters and drivers, is inapt. In any situation in which the analysis proceeds beyond the question of whether two motorists are similarly situation, the conduct at issue will be the same or similar. Indeed, this is evident from *Arrington* and *Gonzalez*. However, the proper inquiry is then whether there is a conceivable rational basis for the differential treatment. The fact that the conduct is the same across the two classifications is no longer relevant to the analysis.

that the statute violated the Equal Protection Clause because it treated drivers observed by police officers differently from those captured on red light cameras engaged in the same unlawful conduct. *Id*. The trial court agreed with the motorist and held that "[a]lthough 316.0083 prohibits the exact conduct as 316.075, a driver who is observed by an officer committing the violation (in the traditional manner) is subjected to more severe penalties and ramifications than a driver who is fortunate enough to have committed the infraction at a 'red light camera' intersection." *Id*.

The Fourth District reversed the trial court on two grounds. First, court held that a motorist observed by a police officer violating the law is *not* similarly situated to a motorist captured by a red light camera engaged in the same conduct. *Id*. at 327. The Fourth District correctly relied on *Dixon v. District of Columbia*, 753 F. Supp. 2d 6 (D.D.C. 2010), in which the court held:

> Like other drivers who are seen by a [police] officer driving at speeds more than 30 mph over the speed limit, plaintiffs can be arrested within the bounds of the Fourth Amendment, as *the arresting officer has probable cause to believe that the driver committed a crime*. By contrast, when a vehicle is photographed for traveling 30 mph over the speed limit, there is no probable cause to believe that the owner of that vehicle was driving and therefore committed a crime, *because there is no additional evidence that the owner was in fact the driver*.

Arrington, 95 So. 3d at 326-27 (citing *Dixon*, 753 F. Supp. 2d at 9) (emphasis added).

Second, the Fourth District held that even if motorists cited for red light camera violations under section 316.075 are similarly situated to those cited for red light camera violations under section 316.0083, there is a rational basis for treating the two classes of motorists differently. Specifically, the court found:

> Pursuant to section 316.075, a law enforcement officer has to observe the violation, who then tickets the 'driver' of the car. However, under section 316.0083, because no one observes the driver, the 'owner' of the car is sent a notice [NOV]. The statute then provides a rebuttable presumption that the 'owner' was driving, and allows the 'owner' to rebut that presumption. For this reason, no points are assessed against the 'owner' because someone else may have been driving.

Id. at 327.

As in *Arrington*, with respect to the Wandall Act provision at issue here, owners and renters are not similarly situated. When an NOV is issued, the only identifying information available for the vehicle is the owner's registration, which fails to identify who was driving the vehicle at the time of the red light camera violation. By contrast, when a UTC is issued to a renter like Dhar, there is, in fact, additional evidence of culpability in the form of a sworn affidavit from the owner. Thus, owners and renters are not similarly situated under the statute.

Moreover, even if owners and renters were deemed similarly situated, the statutory distinction is warranted because a UTC is issued to a renter only after an owner, like Dollar, rebuts the presumption that it was driving the vehicle at the time of the red light camera violation by establishing by affidavit that, in fact, the

renter (Dhar) was driving. Thus, neither equal protection nor due process rights are offended by the issuance of UTCs to renters.

Dhar's assertion that a short-term rental agreement may include additional drivers aside from the primary renter (AB at 10-11) does not render the statutory distinction unconstitutional. That there may be instances in which an additional driver is operating the vehicle at the time of the violation does not negate that the Legislature may have conceivably believed that an affidavit from an owner that the primary renter was driving the vehicle at the time of the violation constitutes sufficient additional evidence of culpability to warrant the issuance of a UTC without first issuing an NOV.[3] *See, e.g.*, *City of Fort Lauderdale v. Gonzalez*, 134 So. 3d 1119, 1123 (Fla. 4th DCA 2014) (holding that "it was at least conceivable for the legislature to believe that, in the case of jointly owned vehicles, the first named owner on the vehicle registration is the person who drives the vehicle most frequently or who otherwise wishes to accept primary responsibility for the vehicle"). The Legislature need not provide for every exception and set of facts in drawing a statutory distinction; rather, there must be a "reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns., Inc*., 508 U.S. 307, 313 (1993); *see also, Heller v. Doe*, 509 U.S. 312, 321 (1993) (holding a classification does not fail rational basis review merely because it results in some inequality). Indeed, Dhar acknowledges that "in

[3] After receiving a UTC, the renter also has the option of submitting an affidavit to establish that someone else was driving the vehicle at the time of the violation. § 316.0083(1)(d)1.c, Fla. Stat. (2012).

the majority of instances, the person operating the vehicle when the alleged violation is observed by a red light camera is, in fact, the owner, lessee *or person that entered into a short-term rental agreement*." AB at 10 (emphasis added). Thus, Dhar does not even contend, let alone establish, that the rational basis of culpability is *inconceivable*.

Culpability constitutes a conceivable rational basis for treating renters of vehicles in a manner distinct from owners of vehicles under the pre-2013 version of the Act, and thus, reversal is warranted.

B. Deterrence.

Dhar challenges the Legislature's conceivable rational basis of deterrence on the same grounds that she contends culpability is an insufficient rationale for the distinction. Specifically, Dhar superficially and in conclusory fashion claims that deterrence applies to all, not just to renters. AB at 7-8. However, just as the degree of culpability is different for owners and renters, the nature of the deterrence is also distinct and provides a conceivable rational basis for the pre-2013 version of the statute.

Specifically, the Legislature could have conceivably believed that the immediate issuance of a UTC to a renter is warranted to actually deter a renter from violating red light camera laws. A renter who violates the law puts owners at increased risk of liability for behavior in which the owner did not engage. Risk of liability to the owner is heightened because a renter may violate the red light camera law leaving the owner responsible for paying the NOV, submitting an

affidavit, or ultimately paying the UTC. Further, the renter may subject the owner to liability by causing an accident as a result of a violation of red light camera laws. The Legislature could have reasonably believed that the immediate issuance of a UTC (and the higher fine associated with it) were necessary to incrementally deter renters from violating red light camera laws with vehicles for which they had little responsibility, and subjecting owners to the risk of liability for violations the owners did not commit.

C. Administrative convenience.

Finally, administrative convenience provides a rational basis for the pre-2013 statute. The Legislature could have conceivably believed that owners should be given the opportunity to pay the fine for an NOV without challenging the violation in court, which would reduce the administrative and financial burden on the system. The Legislature could have also conceivably believed that the majority of red light camera violations would be resolved in this fashion, and that only a minority of violations would result in affidavits naming renters as the drivers who were actually in the care, custody, or control of vehicles at the time of the violations. However, the Legislature had no obligation to extend the NOV option to all drivers, particularly where culpability and deterrence warrant differential treatment of owners and renters.

CONCLUSION

Because the lower courts improperly shifted the burden to the City to establish a "persuasive" basis for the statutory distinction between renters and owners, and neither the lower courts nor Dhar negated the conceivable rational bases proffered by the City for the pre-2013 statute**,** the presumption of constitutionality remains intact. The statute does not violate either equal protection or due process. Accordingly, the Fourth District's decision should be reversed, and the case remanded to the trial court for further proceedings.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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