No. 116054

In the

Supreme Court of Illinois

ELIZABETH KEATING, PAUL W. KETZ, RANDALL D. GUINN, CAMERON W. MALCOLM, JR., CHARLIE PEACOCK, SHIRLEY PEACOCK and JENNIFER P. DiGREGORIO, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO, a Municipal Corporation,

Defendant-Appellee.

On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-11-2559.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 10 CH 28652.
The Honorable Michael B. Hyman, Judge Presiding.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Defendant-Appellee City of Chicago offers three substantive arguments -- that it always had the authority to adopt its red-light camera Ordinance; that the legislation it subsequently secured that purported to authorize the Ordinance is constitutionally valid; and that it was not required to re-enact its Ordinance once it obtained authority for it (assuming it did) – and three roadblocks designed to prevent these issues from being addressed. None of the roadblocks, however, has merit and none should prevent this Court from reaching the three substantive issues at the heart of this dispute.

First, Chicago contends that the Plaintiffs lack standing to challenge the validity of the Ordinance as originally enacted. But the Ordinance originally enacted is the same Ordinance under which Plaintiffs were issued the tickets they challenge here. There can be no doubt that Plaintiffs have standing to challenge the validity of the very law under which they were fined. Second, the City contends that Plaintiffs have forfeited the opportunity to argue that Chicago was required to re-enact its red-light camera ordinance. But this issue, which was mentioned by Plaintiffs in their Petition for Leave to Appeal, was fully briefed by the parties below (and now in this Court), so there is no possibility of surprise or prejudice. In any event, forfeiture is not a limitation on this Court. Finally, the City argues that none of the important statutory and constitutional questions presented here need be answered, because, Chicago contends, Plaintiffs' payments of their fines were "voluntary" and preclude them from challenging Chicago's Ordinance on any ground. As demonstrated below, however, Plaintiffs' payments cannot be deemed voluntary because Plaintiffs acted under duress, coerced by the City's considerable authority.

Because Chicago's attempts to forestall adjudication of this case are meritless, this Court should reach each of the substantive issues presented. Upon reaching those issues, this Court should find that Chicago lacked home-rule authority to adopt its Ordinance in 2003; that Public Act 94-795 (the "Enabling Act") which purported to provide that missing authority is unconstitutional local legislation; and that, even if the Enabling Act is not unconstitutional, Chicago's failure to adopt a valid ordinance pursuant to the authority of that law means that its current Ordinance and ticketing program is as invalid today as it was when it was adopted in 2003.

ARGUMENT

I. CHICAGO LACKED HOME RULE AUTHORITY TO ADOPT THE ORDINANCE IN 2003

A. Plaintiffs Have Standing to Challenge Chicago's Claim of Home Rule Authority

Chicago claims that Plaintiffs lack standing to challenge Chicago's claim of home rule authority to enact its 2003 Ordinance because Plaintiffs were not ticketed until after the enactment of the 2006 Enabling Act. But *when* Plaintiffs received their tickets is not dispositive; the question is *under what authority* did Chicago issue red light camera tickets to the Plaintiffs? The tickets sent to each Plaintiff were issued under the 2003 Ordinance and Program, *for there is no other.* There is only one Chicago red-light camera ordinance, which was exactly the same in 2003 as it was in July 2006 (when Charlie Peacock was first ticketed, C570) and still the same (except for amendments not pertinent here) when other Plaintiffs received their tickets. That, after all, is Plaintiffs' point in arguing that Chicago failed to re-enact the 2003 ordinance. *See* Point III, *infra.* "Elementary justice requires" that Plaintiffs have standing to challenge the Ordinance under which they were ticketed. *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 488

(1988). Because Plaintiffs received their tickets under the very ordinance they are challenging, they have standing to assert that the Ordinance was, and remains, void, and to challenge each and every basis on which Chicago defends its validity. *See People v Olender*, 222 Ill. 2d 123, 130 (2005) (where plaintiffs challenged a tax penalty law nine years after it was enacted, the court concluded "a party has standing to challenge the validity of a statute if he has sustained some direct injury as a result of the enforcement of the statute" and parties did not sustain injury "until they were indicted"); *Ross v. City of Geneva*, 71 Ill. 2d. 27,33 (1978) (plaintiffs "acted with prudence" in paying and were allowed to challenge City's authority to collect electricity surcharge assessed under an ordinance enacted 13 years before challenge); *see also* Appellate Court Order. (A56)

Chicago claims that an opinion on home rule would be merely "advisory," but that is not so. On the contrary, were the Court to declare the Enabling Act unconstitutional, that opinion would afford Plaintiffs no relief at all if the Court did not also decide whether Chicago had authority to enact the Ordinance in the first place. For if the Ordinance was valid when adopted (a point on which Chicago insists), then Plaintiffs' tickets, issued under the Ordinance, would be valid whether or not the Enabling Act provided Chicago with additional, but unneeded, authority; Chicago could (and no doubt would) refuse to refund the fines it collected pursuant to the Ordinance. In such a circumstance, it is an opinion on the constitutionality of the Enabling Act that would be, by Chicago's logic, "advisory," because the outcome of the case would not depend on it.

Significantly, Chicago defends its Ordinance here on *both* grounds, arguing not only that the Ordinance was valid when adopted, but also that, if it was not, it was

somehow authorized by the Enabling Act. So long as Chicago offers both arguments, Plaintiffs have standing to address them both. Indeed, these issues are inter-twined – the constitutionality of the Enabling Act may be dispositive if the Ordinance is invalid; the validity of the Ordinance under Chicago's home-rule authority would be dispositive if the Enabling Act is unconstitutional. The question is not one of standing, but something more mundane and well within the discretion of this Court-- which issue should the Court address first? As a matter of logic and policy, Plaintiffs submit that it makes sense for this Court to address first whether the Ordinance was a valid exercise of Chicago's home-rule authority, before turning to the constitutionality of the Enabling Act.

This Court has frequently reaffirmed the principle that "cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort." *People v. Hampton*, 225 Ill. 2d 238, 243-44, (2007), *citing In re E.H.*, 224 Ill.2d 172, 178 (2006). The lower courts "must avoid reaching constitutional issues when a case can be decided on other, nonconstitutional grounds." *Id.* (citation omitted). This principle is especially applicable in this case, which presents two important issues, the extent of home-rule authority in light of express legislative limitation, and the constitutionality of a facially local law, the Enabling Act. Only if the Ordinance was an invalid exercise of Chicago's home-rule authority might this Court need to reach the question whether the Enabling Act, which belatedly purported to confer such authority, was constitutional.[1]

[1] Even if the Ordinance was invalid when adopted in 2003, as described below, *see infra* at IIB, the constitutional question can still be avoided because Chicago never re-enacted its Ordinance and thus never availed itself of the authority purportedly conferred by the 2006 Enabling Act.

This is especially true because the extent of home-rule authority, and the degree of specificity required when the Legislature limits that authority, has consequences broader than the context (red-light camera ordinances) in which they arise. The sequence is logical, too, because Chicago adopted the Ordinance first in 2003, and only later could claim back-up, statutory authorization for its red-light camera program. If Chicago has always had the power to enact the Ordinance, then other home-rule units have it, too, and the Enabling Act, constitutional or not, was a largely unnecessary exercise. Because that question logically arises first, Plaintiffs turn to it now.

B. The Ordinance Conflicts with the Vehicle Code and Is Expressly Precluded by the Legislature's Clear Statements Prohibiting Municipalities from Adopting Alternative Enforcement Schemes

As Plaintiffs explained in their principal brief, two sections of the Vehicle Code require uniformity in enforcement of the Rules of the Road, a third expressly applies these uniformity requirements to home rule units, and a section in the Municipal Code specifically prohibits home-rule municipalities from administratively adjudicating ordinances enforcing Chapter 11's rules of the road, or any similar regulations "governing the movement of vehicles." Chicago offers three novel arguments why these limitations do not apply, but none has merit and all should be rejected this Court.

First, Chicago argues that the proscription on administrative enforcement of any ordinance that regulates the "movement of vehicles" does not apply because, Chicago claims, its red-light camera Ordinance does not regulate the *movement* of vehicles, but rather regulates the *ownership* of vehicles. *See* Brief of Defendant-Appellee City of Chicago ("City Br.") 35-36. This is sophistry, not argument. As Plaintiffs have already explained, *see* Appellants' Br. at 18-19, a regulation that requires a vehicle to stop under

prescribed circumstances presupposes that the vehicle is moving, penalizes its failure to stop moving, and self-evidently regulates the movement of such a vehicle.

Moreover, the plain language of the Ordinance clearly shows that the conduct being regulated is the underlying red-light incursion, not the act of owning the vehicle. The Ordinance provides that:

> For each violation of Section 9-8-020(c) or 9-16-030(c), recorded by a traffic control signal monitoring device, the traffic compliance administrator shall mail an automated red light violation notice . . . to the registered owner of record of the vehicle used in the commission of the violation.

(C334). Thus, the violation notice is issued "for" violation of the underlying proscription on driving through a red light. The Ordinance further provides that the photos and videos generated by the cameras are prima facie evidence of a violation. *Id.* If *prima facie* evidence of the violation is a picture of the vehicle entering an intersection against a red light, (rather than of a person caught in the "act" of owning the vehicle) it is simply false to say that the ordinance regulates "ownership" and not the movement of vehicles. This Court should assess what conduct is being regulated by what the Ordinance actually does, not by the Chicago's self-serving, after-the-fact claims. *See Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458, 464 (2000) ("a tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.").

Second, Chicago argues that its red light Ordinance is *so different* from the Code's uniform red light statute that "the purpose behind uniform enforcement is missing." City Br. 36. This argument, too, is based largely on the contention that the Ordinance regulates vehicle *ownership*, and nothing else, and should similarly be rejected. Chicago's argument confuses the enforcement mechanism in the ordinance with the underlying conduct being punished. As the above quotations make clear, Chicago's

ordinance expressly incorporates and punishes the uniform red-light *violations* described in CMC Sec 9-8-020(c) and 9-16-030(c) -- provisions that mirror Chapter 11 of the Vehicle Code, 625 ILCS 5/11-306(c)(1) and (c)(3). Identical conduct is punished, but Chicago's ordinance provides a novel enforcement scheme that is at odds with the existing system prescribed by the Vehicle Code. Indeed, *the decision to ticket the owner, instead of the driver, is itself a deviation from the uniform enforcement scheme prescribed for the underlying conduct.*[2] Changing the identity of the party who gets the ticket changes the enforcement without in any way altering the underlying conduct that is being regulated. Thus, not only has Chicago adopted a wholly deviant enforcement scheme for the proscribed conduct of entering an intersection against a red light, it now seeks to use that very deviance to exempt itself from the requirements of uniformity prescribed by the legislature. This is *Alice in Wonderland* logic, where the less uniform the enforcement, the less the requirement of uniformity applies. If the Ordinance were truly so different that uniformity was unnecessary, it would regulate different conduct. Since it doesn't, the uniformity provisions apply and Chicago lacked the power to deviate from the Vehicle Code's carefully crafted uniform enforcement scheme.

Finally, the City argues that the General Assembly's comprehensive attempts to prevent municipalities from creating alternative traffic enforcement schemes fail because, Chicago asserts, none of the uniformity provisions *specifically* prohibits the use of red-light cameras and/or enforcement against the owner, rather than the driver, According to

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[2] Plaintiffs do not argue that red-light violations could never be enforced against owners, rather than (or in addition to) drivers, only that the uniformity provisions in the Vehicle Code would require that such an enforcement scheme be uniform and properly authorized by the General Assembly. This was clearly not the case in 2003.

Chicago, the legislature "was 'required to think of whatever traffic laws it wanted to preempt' and prohibit each type specifically." City Br. 34. This is nonsense: the uniformity provisions and restrictions on home-rule powers cited in Plaintiffs' principal brief are clear and express limitations on home-rule authority. Indeed, in *City of Chicago v. Roman*, 184 Ill. 2d 505, 517-18 (1998), this Court cited Section 208.2 of the Vehicle Code as an example of a proper limitation on home-rule authority. The City concedes this, even as it argues that the limitation is ineffective. City Br. 33. To the extent that Chicago's enforcement scheme "disrupt[s] the uniform enforcement of the Code's rules of the road" it falls afoul of those specific and express limitations. *People ex rel Ryan v. Vill. of Hanover Park,* 311 Ill. App. 3d 515, 533 (1st. Dist. 1999).

Beyond the Vehicle Code restriction cited with approval in *Roman,* the Municipal Code restriction on which Plaintiffs rely specifically and expressly limited home-rule authority in 2003 to adopt administrative enforcement schemes for regulations governing the movement of vehicles. This, too, is broadly worded, prohibiting not just Vehicle Code violations but any municipal regulation "governing the movement of vehicles" – language obviously intended to prevent just the hair-splitting Chicago urges.

Chicago's reliance on *City of Chicago v. StubHub, Inc*, 2011 IL 111127 (mod. on denial of reh'g), and *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2013 IL 110505, as support for its claims of home rule authority here is misplaced, as neither case involved an exercise by the General Assembly of its constitutional authority to exclude or limit the concurrent exercise of otherwise valid power by home rule units, enshrined in Sections 6(h) and 6 (i) of the Constitution. Those cases involved assertions of an "implied" preemption that is not at issue here.

Moreover, Chicago's argument that it had unrestricted home rule authority before the Enabling Act, if accepted by this Court, would greatly erode the General Assembly's constitutional authority to limit and exclude home rule powers. It would also result in just the scenario the Vehicle Code sought to avoid: a whole new set of traffic laws, run in parallel to the uniform system by a patchwork of home rule units, each enforcing the same rules of the road as the Code -- but each assessing a "different kind of liability" (to owners) and using differing means of detection and forms of adjudication (administrative hearings). This cannot have been the legislature's intent when it decided to enact limits on home rule authority to differentially enforce the rules of the road.

II. THE ENABLING ACT IS UNCONSTITUTIONAL "LOCAL" LEGISLATION

Chicago argues that this Court should apply a deferential "rational basis" test to the Enabling Act, but its concession that the "Enabling Act is a local law" (City Br. at 24) forecloses its argument. Even under the 1870 Constitution this Court recognized:

> [T]he words "local" and "special" are frequently used interchangeably, although it is clear they do not have the same meaning. The word "local" signifies belonging to or confined to a particular place. When applied to legislation it signifies such legislation as relates to only a portion of the territory of the state. *The word "local" is used as a counter-term to "general".*

People v. Wilcox, 237 Ill. 421, 424 (1908)(emphasis added). This definition has not changed, *see Best v. Taylor Machine Works*, 179 Ill. 2d 367, 392 (1997). The deferential standard that Chicago argues is applicable would have, in this case, applied only to "the definition of when a law is 'general and uniform,' 'special,' or 'local.'" *Bridgewater v. Hotz*, 51 Ill. 2d 103,110 (1972). While this standard of review may apply where a court is asked to distinguish a "special" law from a "general" one, it is of no use here where the Enabling Act is on its face "local" --*and where Chicago concedes that it is*. Put another

way, this Court may assess a classification to determine if a rational basis underlies it, and thus whether it is "general" (treating like things alike) or "special" (treating like things differently) -- but the Enabling Act contains no classification at all, only a list of counties and the municipalities therein. It is by definition "local," and not "general."

That leaves only the issue of whether the Enabling Act could have been made general, the very question where the "scope of judicial review" was "enlarged" by the new constitution, *id.*, and where, as the Court recently noted, "the *deference* previously accorded the legislative judgment whether a general law could be made applicable has been *largely eliminated*". *Board of Ed. of Peoria School Dist. 150 v. Peoria Federation of Support Staff*, 2013 Ill 114853 ¶ 50 (quoting *People ex rel. East Side Levee & San. Dist. v. Madison Cty Levee & San. Dist.* 54 Ill 2d 442, 447 (1973) (emphasis added)). The legislative judgment here – or, more correctly, the City's speculation as to what judgment might best retroactively justify the list of localities covered by the Enabling Act -- is simply not entitled to the deference Chicago urges.

The City never responded to the argument that the Enabling Act could easily have been made general, and never explains why the claimed benefits of red light cameras should not (or could not) be available to the other 94 counties in the state, or the hundreds of municipalities located therein. Chicago claims that urban traffic "disproportionately inflicts the evils of red light violations" City Br. 19, on the favored counties and municipalities and that the problem is "most acute" there. City Br. 20. But many statewide criminal and quasi-criminal problems are more acute in urban areas; that does not justify true local legislation. Red light violations create problems everywhere

and a general law can be made to address the problem – and any municipality that does not want these cameras simply need not enact an ordinance, incurring no costs.

Chicago further attempts to justify the Enabling Act by noting that the legislature may generally consider "degrees of evil" and that legislative reform may "take one step at a time," City Br. 37, 39, but those general rules of statutory review cannot justify constitutional violations of Article 4, Section 13 ("Section 13"). This Court has held repeatedly that it "cannot rule that the legislature is free to enact special [or presumably, local] legislation simply because 'reform may take one step at a time.'" *Best,* 179 Ill. 2d at 398 (quoting *Grace v. Howlett,* 51 Ill. 2d 478, 487); *Cutinello v. Whitley*, 161 Ill. 2d 409, 420 (Freeman, J., dissenting); *In re Belmont Fire Prot. Dist*, 111 Ill. 2d 373, 386 (1986). A majority of senators in the 94th General Assembly simply did not want red light cameras in their jurisdictions. The Enabling Act should not have been made "local" merely to secure its passage into law.

Chicago argues, however, that, even if the Enabling Act is a "local" law, and even if it could have been made general, the law should not be stricken if the legislature had some reason to prefer a local law. This argument finds no support in the text of Section 13, nor in the intent of its drafters. Indeed, the City criticizes Plaintiffs for basing their arguments on *both* the text of the Constitution, *see* City Br. at 8, 13, *and* the drafters' intent, *see* City Br. at 16 n.9, and suggests that neither is dispositive. The City proposes to substitute, in lieu of both textual expression and legislative (or more accurately, constitutional) intent, little more than a broad deference to the General Assembly that eviscerates the restriction on "local" legislation plainly set forth in Section 13. The Constitution requires courts to strike local laws that could have been made general.

In its effort to turn Section 13 into a dead letter, the City badly misreads Braden & Cohn[3] and that treatise's example of a law giving an extra dogcatcher only to one named city, Onetown. Chicago claims Braden & Cohn believed that a true local law, allowing additional dogcatchers only in "Onetown" would pass constitutional muster, so long as only that named town truly did border a wilderness harboring wild dogs. But the whole point of the Onetown example was that a law simply *naming* Onetown would be an "obvious violation" of the rule against local legislation, whereas a law allowing an extra dogcatcher generally in "any city bordered by an uninhabited wilderness" would be constitutional, even if the condition existed, at the time of enactment, only in Onetown, and nowhere else in the state. *Id.* at 209.

Finally, even if the Enabling Act is analyzed under the "two prong" version of the rational basis test, applied in the past to special legislation challenges involving population and territorial differences, it fails. Chicago admits that a large number of the populous, congested, heavily trafficked municipalities do not get red light cameras (City Br at 20-21) and yet makes no effort to square that reality with this Court's holding that when a statute purports to distinguish municipalities

> it would rationally follow that the statute in question should be based on either the population urbanization, or density of the municipality involved, not the population [or other characteristic] of the county in which the municipality lies.

In re Belmont, 111 Ill. 2d 373, 382 (1986). The Enabling Act names counties in order to distinguish municipalities. Even under Chicago's deferential standard, this does not pass

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[3] George R. Braden & Rubin G. Cohn, Ill. Constitutional Study Comm'n, *The Ill. Constitution: An Annotated & Comparative Analysis* 206–07 (Univ. of Ill. Inst. of Gov't and Pub. Affairs (1969)

muster. Indeed, this Court has never upheld a statute that distinguishes municipalities by the county in which they are located. *See* Appellants' Br. at 30-36.

III. CHICAGO'S FAILURE TO ENACT A COMPLIANT ORDINANCE AFTER THE ENABLING ACT TOOK EFFECT RENDERS ITS PROGRAM INVALID IN ANY EVENT

The City claims that even if it lacked legal authority in 2003, its red-light camera program has been valid since May 22, 2006. In its *reply brief* in the Circuit Court, the City first claimed, citing no authority, that "once plaintiffs' constitutional challenges ... are rejected, it follows that the [Enabling Act] has provided the City with authority to utilize its own Red Light Ordinance since May 22, 2006." (C623) The Circuit Court accepted that claim and opined that once the Enabling Act became law, Chicago's ordinance, *ipso facto*, "was indisputably authorized." (C768) This Court should consider whether that is in fact correct. Chicago urges the Court not to even reach this issue because, it argues, Plaintiffs forfeited the question by failing properly and timely to raise it. This Court should reach the issue because Plaintiffs did raise it, Chicago has been neither surprised nor prejudiced by this issue, the question is important, and forfeiture is not a limitation on the Court. Upon reaching the issue, the Court should conclude that Chicago's failure to re-enact its Ordinance renders its program void because the Enabling Act authorized Chicago to enact a red-light camera program, (which it did not do) but it could not revive an Ordinance that was void *ab initio*.

A. This Court Should Not Ignore, on Grounds of Forfeiture, Chicago's Failure to Re-Enact Its Ordinance After Passage of the Enabling Act

Chicago asserts that Plaintiffs' Petition for Leave to Appeal ("PLA") did not raise the re-enactment question "in either their points relied upon in seeking review or their argument." City Br. 45. Although this is, strictly speaking, correct, Chicago fails to

inform the Court that this issue was in fact raised in the PLA, in the Statement of Facts, where Plaintiffs explained:

> In the Appellate Court, Plaintiffs also argued that, even if the Enabling Law was constitutional, Chicago's failure to re-enact or re-adopt a red light camera program after the passage of the statute meant that its RLC program, void *ab initio*, was not revived. The Court ruled that Plaintiffs had waived this argument (APL 8)

(PLA at p. 6, fn 2) Chicago clearly finds fault with the placement of this point, but cannot deny that it is specifically mentioned in the PLA.

Second, review by this Court is appropriate because

> When an issue is not specifically mentioned in a party's petition for leave to appeal, but it is inextricably intertwined with other matters properly before the court, review is appropriate.

People v. Alcozer, 241 Ill. 2d 248, 253 (2011). If this Court determines that Chicago did not have the authority to enact its ordinance in 2003, it should, before deciding the constitutionality of the Enabling Act, first decide whether even a constitutional Enabling Act somehow authorized Chicago's pre-existing Ordinance and Program. The issue of whether the City needed to enact or reenact a new ordinance is inextricably intertwined with the general question of Chicago's authority to ticket the plaintiffs, and with both the specific question of whether Chicago had authority to enact its ordinance in 2003, and the follow-on question of whether the 2006 Enabling Act is constitutional. These issues are clearly before this Court, and the issue of necessary reenactment should be considered.

Further, as Chicago conceded in the Appellate Court, another case is pending in the Circuit Court which quite clearly asserts allegations relating to Chicago's failure to reenact a post-enabling act red light camera ordinance and program. (Appellee's Brief,

No. 11-2559 p. 26)[4] Accordingly, this is an issue likely to come up again if not resolved here.

Finally, as this Court well knows, forfeiture is a limitation on parties, not on this Court. *Jackson v. Bd of Election Comm'rs*, 2012 IL 111928 ¶ 33. Plaintiffs' counsel wish they had done a better job of responding to the City's last-minute claim that the Enabling Act automatically authorized Chicago's ordinances in the Circuit Court, and that they had fleshed out this issue better in their PLA, but Chicago cannot point to any prejudice it suffered as a result; it has had the opportunity to fully brief these issues in both the appellate court and here. Nor can it claim surprise; even in the Circuit court, Chicago fully appreciated that Plaintiffs "claim the Red Light Ordinance is void *ab initio*." (C625) Had the Circuit Court not dismissed this case *with prejudice*, this theory would doubtless have been articulated fully below. In light of the above, Plaintiffs request that this Court consider the points immediately below:

B. Chicago Needed to Fully Reenact Its Ordinance

The City seesaws between claiming it always had home rule authority for its ordinance, and arguing, in the alternative, that several amendments to the ordinance, mostly minor, "clearly [reflect] the City Council's intent...to continue the law in effect to take advantage of the legislature's authorization for red light camera ordinances."[5] But the only way to show clear intent to revive a void law is to reenact it. By the City's own

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[4] That case, also a putative class action, is pending in the Circuit Court of Cook County. *Terie L. Kata et ano. v. City of Chicago*, No. 12 CH 14186. Proceedings in that case have been stayed pending this appeal.

[5] The 2007, 2009 and 2011 amendments to the Ordinance are exceedingly minor, changing or adding a few words. The Ordinance was somewhat restructured in 2012, but only then to make room for Chicago's "Children's Safety Zone [Speed Camera] Program" *Journal of Proceedings*, City of Chicago, April 18, 2012 at 23762.

admission it was not until a fourth amendment in April 2012, that its Ordinance, as amended, even *referenced* any portion of the Enabling Act. Chicago cites no authority that amendments can equate to re-enactments. City Br. 49-50

Chicago then makes a novel argument, citing no authority, that if its Ordinance is within the "inherent power" of a home rule unit, even though the specific power it sought to exercise had *previously* been validly limited or excluded by the General Assembly pursuant to Section VI (h) or (i) of the Constitution, that ordinance somehow enjoys a different status than any other ordinance enacted without legal authority, and somehow is not void *ab initio,* and so was automatically "enacted" by the Enabling Act.

The City claims that *Lily Lake Road Defenders v. County of McHenry,* 156 Ill. 2d. 1 (1993) and *City of Burbank v. Czaja*, 331 Ill. App. 3d 369, 375-78 (1st Dist. 2002) support its argument that proper reenactment is not necessary, but those cases did not turn on whether a municipality was exercising "inherent power." Each involved the absolutely critical distinction that the ordinances in question were *valid* at inception, *later* preempted, and then the preemption was later lifted. The fact that once-valid ordinances may be rendered unenforceable while preempted does not save Chicago's ordinance, which was *never valid*, from the requirement that a legislature "must expressly reenact" an invalid enactment *U.S. Bank N.A. v. Clark*, 216 Ill. 2d 334,354-55 (Statute on Statutes is a "general rule" and its requirement of reenactment of invalid ordinances not limited to case of implicit repeal; distinguishing *Davis v. City of Chicago*, 59 Ill. 2d 439 (1974)).

Chicago attempts to distinguish cases where the lack of authority was of constitutional dimension, from this case, where the lack of authority came from a valid

legislative restriction on home rule authority. But a lack of authority is a lack of authority:

> "Jurisdictional requirements, whether statutory or constitutional, cannot be waived by subsequent curative legislation." . . .The subsequent enabling legislation could not and did not bring vitality to the otherwise barren attempt of the municipality to regulate the social evil.

Two Hundred Nine Lake Shore Drive Bldg. v. Chicago, 3 Ill. App. 3d 46, 51 (1971)(*quoting People ex rel Rhodes v. Miller*, 392, Ill. 445, 449 (1946)). Chicago was required to reenact its invalid Ordinance, and never did so. The General Assembly cannot, years later, fix the stillbirth of that 2003 ordinance, and this Court has acknowledged that the legislature cannot "confer posthumously the power." *See People ex Rel. Larson v. Thompson*, 377 Ill. 104, 114 (1941). No intent to reenact or validate can even be inferred: "a validating statute must name or in some way identify the void ordinance, or clearly indicate that the statute is to validate it." *Village of River Forest v Midwest Bank,* 12 Ill App. 3d 136, 140 (1st Dist 1973). The City derides as a mere "technicality" or "formality" what is a core principle of the rule of law: that it was required to wait until it had proper legal authority and only *then* enact and enforce an ordinance.

IV. THE "VOLUNTARY PAYMENT" DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS

Chicago asks this Court to hold that that, even if each of its tickets made an illegal demand for payment, Plaintiffs can be afforded no remedy because their payments were, according to the City, "voluntary." City Br. 40, fn 20. Chicago is wrong: just because Plaintiffs paid their fines does mean their payments were "voluntary." As this Court has explained, payment alone is not enough to avoid equitable restitution under the voluntary payment doctrine: "[i]t must also be shown that the [paying] plaintiff had knowledge of

the facts upon which to form a protest and also that the payments were not made under duress or compulsion." *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393 (1989). A voluntary payment defense can only be made absent coercion, fraud, misrepresentation, or a superior bargaining position by the transferee. *King v. First Capital Fin. Svcs. Corp.*, 215 Ill. 2d 1, 3 (2005); *Ill. Graphics Co. v. Nickum* 157 Ill. 2d 469, 494 (1994). Here, the Plaintiffs lacked the requisite knowledge to make their payments voluntary. The key fact here -- that Chicago's Ordinance, program, and resulting payment demands, were not legally authorized – could not realistically be known by Plaintiffs; had they known the demands were illegal, they would not have paid.

The existence of duress is generally a question of fact, *see Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 805, and this Court has recognized that arguing for the voluntary payment doctrine as a matter of law on a motion to dismiss "would only throw unnecessary technical obstacles" in the plaintiff's path. *Geary*, 129 Ill. 2d at 407-08. Moreover, "if the duress is exerted by one cloaked with official authority or who is exercising a public appointment, less evidence of compulsion or pressure is required." *People ex rel Carpentier v. Arthur Morgan Trucking*, 16 Ill. 2d 313, 319 (1959). *See also Ball v. Village of Streamwood* (281 Ill. App. 3d 679 (1st Dist 1996)(payment of transfer tax involuntary where municipal code provided civil penalties and fines for failure to pay.); *Norton v. City of Chicago* 293 Ill. App 3d 620, 628 (1st Dist 1997)(notices demanding payment of a "court cost" fee that was legally unauthorized "were coercive enough" to render plaintiffs' payments involuntary).

Chicago characterizes Plaintiffs' claim of coercion as "rest[ing] on the belief plaintiffs could not have pursued administrative review without facing penalities". (City

Br. at 41). Even if that were so – and Plaintiffs' claim of coercion is considerably broader – it would not help Chicago. The existence of administrative review (or Chicago's ill-defined "procedures for judicial review") does not preclude a finding of coercion if the costs of such review are prohibitive and/or disproportionate to the fine being exacted. Here, in order to challenge the red-light camera ticket as Chicago proposes, each plaintiff would have had to hire counsel expert within days of receiving her ticket, present all her challenges to Chicago's legal authority at an administrative hearing where the legal challenges could not in fact, be considered, and then file an appeal of the inevitable loss in the Circuit Court, paying *three times the amount at issue* in filing fees for the privilege. The Seventh Circuit has already termed the availability of circuit court review an "illusory remedy" when filing fees exceed ticket value. *Van Harken v. City of* Chicago, 103 F. 3d 1346, 1353 (7th Cir. 1997) Further, two of the Plaintiffs, Jennifer DiGregorio and Charlie Peacock, did challenge their tickets, and the payments by these Plaintiffs, after failed challenges, cannot be considered voluntary.

Chicago claims that "the choice to pay a red light camera fine rather than pursue a challenge to the ordinance is still a choice, and thus a voluntary decision," but as this Court has held, "Conduct under duress always involves a choice, but this Court has held that the making of that choice under such circumstances does not estop the person acting under duress from later asserting his rights." *People ex rel. Carpentier v. Treloar Trucking*, 13 Ill. 2d 596, 600 (1958) Chicago seeks refuge in *Berg v. City of Chicago,* 97 Ill. App. 2d 410, 424 (1st Dist. 1968) which held payments were voluntary when the accused (issued an illegal parking ticket by the City) had the option to pay the fine or to appeal. But *Berg* did not rely on Illinois law, instead citing treatises and other authorities

dating back decades, and Plaintiffs have found no Illinois decisions (except the Circuit Court opinion below) which have ever followed *Berg* on that theory of voluntary payment. As one court later noted:

> The *Berg* proposition on voluntarism is unwarranted. It is highly fictitious to say that one charged with violating a speeding ordinance should later be precluded from recovering fine money paid under the void ordinance simply because he voluntarily paid it. The reasoning merely assumes the conclusion.

Johnston v. City of Bloomington, 61 Ill. App. 3d 209 212-13 (4th Dist. 1978) *reversed on other grounds*, 71 Ill. 2d 108 (1979) (citing *People v. Meyerowitz*, 61 Ill. 2d 200 (1975)).

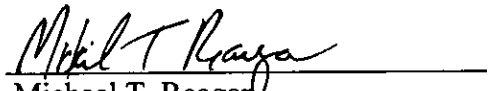
Finally, even if Chicago's argument were correct under this Court's existing precedents – and it is not – this Court should recognize the "[m]odern trend against a harsh application of the ancient common law voluntary payment doctrine" and conclude, as did the Appellate Court, that to find these payments "voluntary is to ignore the practical reality of duress to pay such citations issued by the City under the City's ordinances" (A82; see generally A71-83) *See* RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT, §19, comment H (2011) (voluntary payment has "no possible application" in cases of unauthorized taxes, fees and fines); *see also Harrison Sheet Steel v. Lyons*, 15 Ill. 2d 532, 536 (1959) (questioning "whether the rigid distinctions that have sometimes been drawn between the right to recover money paid under mistake of fact and the right to recover money paid under mistake of law ever had historical justification as common-law doctrines.").

CONCLUSION

Plaintiffs respectfully request that this Court reverse the judgments of the Appellate and Circuit courts, issue such Orders as are appropriate, and remand this matter to the circuit court for further proceedings.

Respectfully Submitted,

Patrick J. Keating



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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 20 pages.

Respectfully Submitted,

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