

### **III. REQUEST FOR EXPEDITED CONSIDERATION AND EXTENSION OF EMERGENCY STAY ORDER**

The City of New Orleans (the "City") makes this Request for Expedited Consideration of its Application for a Supervisory Writ of *Certiorari* and extension of the Emergency Stay Order issued by the Fourth Circuit Court of Appeal to avoid the extreme harm to the safety of the public that will result if the lower court's ruling is not reversed. The ruling of the Fourth Circuit affirms the district court's granting of a preliminary injunction, which prohibits the City from enforcing the Automated Traffic Enforcement System Ordinance (the "ATES Ordinance"). However, the lower court's ruling is legally erroneous. In so ruling, the Fourth Circuit erroneously concluded that the ATES Ordinance is unlawful because it authorizes the Department of Public Works to enforce traffic regulations. However, pursuant to the City's Home Rule Charter, it was permissible for the City to place the ATES Ordinance under the direction of the Department of Public Works. Further, it was erroneous for the lower court to issue the preliminary injunction without requiring petitioners to show that they will suffer irreparable injury, loss, or damage if the City continues to operate the ATES Ordinance. Moreover, the lower court wrongfully issued the preliminary injunction without requiring petitioners to post security.

By prohibiting enforcement of the ATES Ordinance, the lower court's ruling immediately puts at risk the lives of the public. The primary goal of the ATES Ordinance is to create safer streets in the City by protecting the public from crashes and injuries caused by drivers who run red lights and speed. Notably, the use of the automated safety cameras by the City to detect red-light violators and speeders has been successful in improving public safety and reducing crashes and injuries. Since the launch of the program in April 2008, violations have decreased by more than 90 percent (90%) at the intersections where the automated safety cameras are located. Pre-enforcement data indicated that 986 red-light violations were taking place daily at seventeen monitored intersections. In April, immediately after enforcement was announced, the number of violations dropped to 130 per day. In June 2008, violations dropped to 90 per day. By December 2009, the violations further dropped to 87 per day, a decrease of 91 percent.<sup>1</sup>

---

<sup>1</sup> In its original writ application to the Fourth Circuit, the City based the 91 percent decrease on pre-enforcement data, which indicated that 205 red-light violations were taking place at nine monitored intersections. This underlying figure is accurate. However, the 91 percent decrease cited by the City is based on the pre-enforcement data applicable to seventeen monitored intersections.

The statistics for speeding violations are even more compelling. Pre-enforcement data indicated that approximately 842 speeding violations were taking place daily at the monitored intersections. By December 2009, the number of violations had dropped to 41 per day, a decrease of 95 percent.<sup>2</sup>

In the Fourth Circuit, petitioners attempted to call into doubt the goal of the ATES Ordinance to create safer streets in the City. However, in attempting to challenge the validity of such goal, petitioners relied upon purported studies concerning other jurisdictions, and not the City. For instance, in their response to the City's writ application, petitioners cited an article from the Washington Post regarding the District of Columbia's automated safety camera program. (Response, Exh. 2) As a further example, petitioners referenced a news release concerning Fairfax County, Virginia. (Response, Exh. 3) These studies are irrelevant to the current matter, which concerns the use of automated safety cameras in the City.

On October 1, 2010, the City filed with the Fourth Circuit a request for expedited consideration and emergency stay of the District Court's October 1, 2010 ruling. Presumably recognizing the public safety concerns implicated by the preliminary injunction issued by the district court, the Fourth Circuit granted the City's request, staying the preliminary injunction until 10:00 a.m. on October 4, 2010. On October 4, 2010, the Fourth Circuit extended the stay indefinitely. However, on October 7, 2010, after affirming the district court's granting of a preliminary injunction, the Fourth Circuit ordered that the stay would expire in seven days. (Appendix, Tab 2) As a result, the current stay will expire on October 14, 2010. The City respectfully requests an extension of the Fourth Circuit stay order.

If the lower court's ruling prohibiting the City from enforcing the ATES Ordinance is not reversed, the safety of the public will be jeopardized as drivers will be more prone to run red lights and speed. It is urgent that this Court extend the existing emergency stay order issued by the Fourth Circuit, grant this application for writ of *certiorari*, and rectify the erroneous ruling of the Fourth Circuit by vacating the district court's ruling issuing a preliminary injunction.

---

<sup>2</sup> In the Fourth Circuit, petitioners contended that this 95 percent decrease "only reflects that drivers have learned to slow down when they get to the cameras . . ." Petitioners' argument in this regard is speculative, at best, and insufficient to contradict the statistics presented by the City in this regard. In support of its opposition to petitioners' request for a preliminary injunction, the City submitted the affidavit Richard Boseman, who attested to the public safety goal of the ATES Ordinance, and further confirmed the reduction in violations since the commencement of the automated safety camera program.

**IV. STATEMENT OF CONSIDERATION FAVORING THIS COURT'S GRANTING THE APPLICATION FOR WRIT OF *CERTIORARI***

The City respectfully submits that the following considerations favor this Court granting its application for *writ of certiorari*. Importantly, this Court should rectify the erroneous decision of the Fourth Circuit Court of Appeal affirming the district court's granting of a preliminary injunction prohibiting the City from enforcing the ATES Ordinance. The erroneous decisions by the lower courts warrant review by this Court for multiple reasons under Rule X.

The decision of the Fourth Circuit involves significant unresolved issues of law that this Court should resolve. In particular, this is the first Louisiana appellate decision to address the issue of whether the City's Home Rule Charter allows the City to place the ATES Ordinance under the direction of the Department of Public Works. Further, so far as counsel for the City can determine, this is also the first Louisiana appellate decision to address the issue of whether an applicant may be relieved of his obligation to post security prior to the issuance of a preliminary injunction on the grounds that the act sought to be enjoined is allegedly *ultra vires*. These issues have not been addressed, much less resolved, by this Court, but should be for the guidance of Louisiana appellate and district courts in this new area of the law.

Further, this Court should grant this application for *certiorari* review because the Fourth Circuit erroneously interpreted and applied the City's Home Rule Charter, and the decision will cause material injustice or significantly affect the public interest. The clear and unambiguous language of the City's Home Rule Charter allows the City to place the ATES Ordinance under the direction of the Department of Public Works. Pursuant to Section 4-901 of the Home Rule Charter, the Department of Public Works has the authority to collect and compile traffic data; prescribe regulations governing traffic and parking on streets and other public places; and determine the type, need and location of all traffic control devices and markings and install, design, construct, operate, and maintain them. The enforcement of the regulations prescribed by the Department of Public Works utilizing automated safety cameras established by the Department of Public Works based on the traffic data collected by the Department of Public Works is undoubtedly commensurate with the above-mentioned functions of the Department of Public Works. The Home Rule Charter at Section 4-901 also states that the Department of Public Works shall "[p]erform such other duties as are required by this Charter or **assigned in writing by the Mayor.**" (emphasis added) Thus, it was permissible for the Mayor of the City to

place the automated camera safety program under the direction of the Department of Public works when he ratified the ATES Ordinance.

The Fourth Circuit erroneously applied provisions of the City's Home Rule Charter, and, in doing so, essentially rewrote provisions of the Home Rule Charter.

The Fourth Circuit's opinion also erroneously interpreted plainly worded Louisiana statutory law. Specifically, the Fourth Circuit relieved petitioners of their obligation to post security prior to the issuance of the preliminary injunction on the grounds that the act sought to be enjoined is allegedly *ultra vires*. However, Article 3610 of the Louisiana Code of Civil Procedure recognizes no exception for purported *ultra vires* acts. To the contrary, Article 3610 clearly and simply states that a "preliminary injunction shall not issue unless the applicant furnishes security . . . ." If not rectified, the decision of the Fourth Circuit would juridically rewrite provisions of the City's Home Rule Charter and Louisiana statutory law. Consequently, this Court should reverse the decision of the lower court and vacate the district court's ruling issuing a preliminary injunction.

## **V. STATEMENT OF THE CASE**

### **A. Factual Background**

The City Council passed the ATES Ordinance on February 1, 2007. The Mayor of the City ratified the ATES Ordinance on February 22, 2007. (Appendix, Tab 3). The primary goal of the ATES Ordinance is to create safer streets in the City by protecting the public from crashes and injuries caused by drivers who run red lights and speed. Statistics show that drivers who run red lights are the leading cause of urban crashes. Notably, intersection safety cameras are proven to reduce crashes caused by drivers who run red lights and speed. Thus, in furtherance of its goal to create safer streets in the City, the ATES Ordinance allows for automation of traffic signal and speed limit violations. In particular, the ATES Ordinance provides for a system that employs a combination of digital and video cameras and detection equipment at a given signal approach or span of roadway as an alternative method of detecting and deterring red-light violations and speeding. (See City Ord. §§ 154-1701-1704) The ATES Ordinance provides for only civil penalties for speeding or running a red light within the City. (See City Ord. §§ 154-1703, 154-1704(a))

Each day, a commissioned police officer reviews all alleged violations and relevant images and video to determine if a violation has occurred. Only when the police officer

determines that a violation has occurred, is a Notice of Violation issued to the registered owner of the vehicle. (City Ord. § 154-1701)

Under the ATES Ordinance, the vehicle owner has a right to contest the imposition of the civil penalty. (City Ord. §§ 154-1701-1702) In particular, the ATES Ordinance provides for a live hearing via an adjudicatory hearing process which is carried out by the parking adjudication bureau. (City Ord. § 154-1702) In the event a vehicle owner seeks to contest the imposition of a civil penalty, the vehicle owner may do so by simply going to the administrative adjudication bureau any time before the hearing date indicated on the Notice of Violation. (City Ord. § 154-1702(a)) If the vehicle owner is dissatisfied with the result of the administrative hearing, he can seek further review of the decision by filing a petition for judicial review in the Orleans Parish Civil District Court. (City Ord. § 154-1702(h))

The use of the automated cameras by the City to detect red-light violators and speeders has been extremely successful in improving public safety and reducing crashes. Since the launch of the program in April 2008, violations have decreased by more than 90 percent (90%) at the intersections where the automated cameras are located. Pre-enforcement data indicated that 986 red-light violations were taking place daily at seventeen monitored intersections. In April, immediately after enforcement was announced, the number of violations dropped to 130 per day. In June 2008, violations dropped to 90 per day. By December 2009, the violations further dropped to 87 per day, a decrease of 91 percent.

The statistics for speeding violations are even more compelling. Pre-enforcement data indicated that approximately 842 speeding violations were taking place daily at the monitored intersections. By December 2009, the number of violations dropped to 41 per day, a decrease of 95 percent.

Apparently unhappy with the Notices of Violation they received pursuant to the ATES Ordinance, on September 20, 2010, petitioners filed a Petition for Preliminary and Permanent Injunction (the "Petition"). In their Petition, petitioners seek a preliminary and permanent injunction prohibiting the City from enforcing the ATES Ordinance. In particular, petitioners allege that the ATES Ordinance violated the City's Home Rule Charter because the ATES Ordinance authorizes the Department of Public Works to enforce traffic regulations. Petitioners are wrong.

## **B. The District Court's Erroneous Ruling**

The City opposed petitioners' request for a preliminary injunction. In its memorandum in opposition, the City maintained that petitioners failed to show that they would suffer any irreparable injury, loss or damage if the City continued to operate the ATES Ordinance. The City further argued that, should the District Court issue a preliminary injunction, petitioners should be required to post security pursuant to Article 3610 of the Louisiana Code of Civil Procedure.

In response, petitioners did not dispute that they failed to show that they would suffer any irreparable injury, loss or damage if the City continued to operate the ATES Ordinance. Instead, petitioners maintained that the ATES Ordinance is unlawful, and thus, they did not have to make a showing of irreparable harm in order to obtain a preliminary injunction. Petitioners further contended that, despite the clear language of Article 3610, they did not have to furnish security in order for the preliminary injunction to issue.

On October 1, 2010, Judge Irons held a hearing on petitioners' request for a preliminary injunction. At the hearing, the City argued that the ATES Ordinance falls squarely within the powers of the City under its Home Rule Charter, and does not conflict with any provision of the Home Rule Charter.

Despite the evidence to the contrary, at the hearing, Judge Irons granted petitioners' request and issued a preliminary injunction, without bond, prohibiting the City from enforcing the ATES Ordinance. Judge Irons subsequently issued a *per curiam* opinion providing the reasons for her ruling. The errors in the district court's ruling are immediately apparent. In particular, the district court concluded that the ATES Ordinance is unlawful because it authorizes the Department of Public Works to enforce traffic regulations. However, in doing so, the district court wrongfully ignored the language of Section 4-901 of the Home Rule Charter, and essentially rewrote provisions of the Home Rule Charter. Moreover, contrary to the clear language of Article 3610 of the Louisiana Code of Civil Procedure, the district court erroneously issued the preliminary injunction without requiring petitioners to post security. In support of its holding in this regard, the district court relied upon the decision of the Second Circuit Court of Appeals in *Parish of Ouachita v. Town of Richwood*, 29,617 (La. App. 2d Cir. 6/18/97), 697 So.2d 623. Notably, the issue of whether it was proper for the district court to issue a

preliminary injunction without first requiring the plaintiff to post security was not before the court in *Parish of Ouachita*.

As a result of the district court's erroneous ruling, on October 1, 2010, the City filed a notice of intent to apply for supervisory writ and motion to stay.

**C. Action of the Fourth Circuit Court of Appeal**

The City's writ to the Fourth Circuit focused on two assignments of error: (1) the district court erred when it issued the preliminary injunction because the ATES Ordinance is lawful and petitioners failed to show that they will suffer irreparable injury, loss or damage if the City continues to operate the ATES Ordinance; and (2) the district court erred when it issued the preliminary injunction without requiring petitioners to first furnish security. Astonishingly, on October 7, 2010, a panel of the Fourth Circuit chose not to rectify the district court's erroneous ruling.

In a brief two-page order, the Fourth Circuit simply adopted the incorrect findings of the trial court, and, in doing so, ignored the clear language of the Home Rule Charter and Louisiana law. Indeed, as to the issues concerning irreparable injury, loss or damage, and the posting of security, the Fourth Circuit only stated that it rejects the City's arguments for the same reasons as those detailed by the district court. With regard to the highly debated issue concerning the lawfulness of the ATES Ordinance, the Fourth Circuit found "no error in the trial court's determination that it [the Home Rule Charter] provides no authority for the City to place the enforcement and adjudication of traffic camera violations under the auspices of the Department of Public Works." Outside of this conclusory statement, the Court provided no detailed explanation for its holding in this regard. Notably, as with the district court, the Fourth Circuit completely ignored key language in the Home Rule Charter, and condoned the rewriting of the City's Home Rule Charter by the district court.

The City urges this Court to grant its application for *certiorari* review, reverse the decision of the lower courts, and vacate the preliminary injunction.

**VI. ASSIGNMENTS OF ERROR**

The lower court erred in issuing the preliminary injunction. The lower court erroneously ignored the clear language of the Home Rule Charter in concluding that the ATES Ordinance is unlawful because it authorizes the Department of Public Works to enforce traffic regulations. Further, since the ATES Ordinance is lawful, it was erroneous for the lower court to issue the

preliminary injunction without requiring petitioners to show that they will suffer irreparable injury, loss or damage if the City continues to operate the ATES Ordinance. Finally, the lower court wrongfully issued the preliminary injunction without requiring petitioners to post security. The City respectfully requests that this Court reverse the lower court's decision and vacate the preliminary injunction.

## VII. SUMMARY OF THE ARGUMENT

The City's position is straightforward. Pursuant to the City's Home Rule Charter, it was permissible for the City to place the ATES Ordinance under the direction of the Department of Public Works. The Home Rule Charter does not give the Department of Police the sole authority to enforce traffic regulations. *See* Home Rule Charter, § 4-501. In addition, pursuant to Section 4-901 of the Home Rule Charter, the Department of Public Works shall "[p]erform such other duties as are required by this Charter or **assigned in writing by the Mayor.**" (emphasis added) Thus, it was permissible for the Mayor of the City to place the automated camera safety program under the direction of the Department of Public works when he ratified the ATES Ordinance.

Moreover, since the ATES Ordinance is lawful, it was legally erroneous for the lower court to issue the preliminary injunction without requiring petitioners to show that they will suffer irreparable injury, loss or damage if the City continues to operate the ATES Ordinance. Notably, petitioners cannot make the required showing of irreparable injury because they can be compensated monetarily for any alleged damages.

Finally, the lower court's issuance of the preliminary injunction without requiring petitioners to post security sufficient to indemnify the City was contrary to well-established codal and decisional law. Article 3610 of the Louisiana Code of Civil Procedure clearly states that a "preliminary injunction shall not issue unless the applicant furnishes security . . . ." There is no law which relieves petitioners of their obligation to post security prior to issuance of a preliminary injunction.

For the foregoing reasons, the City respectfully requests that the Court reverse the lower court's erroneous decision and vacate the preliminary injunction.

## VIII. LEGAL ARGUMENT

### A. **The Trial Court and Fourth Circuit Court of Appeal Erred in Holding That the City's Home Rule Charter Does Not Allow the City to Place the ATES Ordinance Under the Direction of the Department of Public Works.**

The district court committed clear and manifest error in ignoring the unambiguous language of the Home Rule Charter, and holding that the City's Home Rule Charter does not



allow the City to place the ATES Ordinance under the direction of the Department of Public Works. The Home Rule Charter plainly authorizes the Mayor of the City to place the automated camera safety program under the Department of Public Works.

Section 4-501 of the Home Rule Charter provides, in pertinent part, that the Department of Police shall “[e]nforce traffic regulations and investigate traffic accidents.” Petitioners maintain that this provision gives the Department of Police the sole authority to enforce traffic regulations. However, noticeably absent from Section 4-501 is any language suggesting that the Department of Police was vested with authority to enforce traffic regulations to the exclusion of other departments. Simply, Section 4-501 does not state that “only” the Department of Police shall enforce traffic regulations.<sup>3</sup>

Further, the lower court erroneously ruled that the ATES Ordinance involves the reassignment of powers currently assigned to the Department of Police, and thus, requires an amendment to the Home Rule Charter. The ATES Ordinance does not divest the Department of Police of any authority to enforce the traffic regulations, nor does it “reassign” any of the duties of the Department of Police to the Department of Public Works. In particular, the ATES Ordinance does not change the ability of police officers to cite offenders for traffic violations or change the methods by which criminal traffic citations are adjudicated. To the contrary, pursuant to the ATES Ordinance, a person who runs a red light or speeds and is observed by a police officer remains subject to the criminal penalties provided in the Louisiana Highway Regulatory Act. City Ord. § 154-1704(b). Only when no police officer is present and the automated camera captures a red light or speeding violation does the ATES Ordinance apply, not to invoke criminal traffic laws, but to impose a civil penalty on a vehicle’s owner. City Ord. § 154-1704(a)-(b). Section 154-1703 of the ATES Ordinance clearly states that “the owner of the vehicle is liable for a **civil penalty**, plus cost of enforcement, plus any applicable late payment penalties.” (emphasis added). The ATES Ordinance further states that “[t]he imposition of a civil penalty under this article shall **not** be considered a criminal conviction.” (City Ord. § 154-1704(a) (emphasis added)) Moreover, the violation is a “non moving infraction” for which “[n]o points will be assessed and the infraction will not be reported to” the vehicle owner’s insurance company. (See Petition, Exh. 1-5)

---

<sup>3</sup> In their Fourth Circuit brief, petitioners also argued that the ATES Ordinance is unlawful because it violates Section 154-51 of the City Code, which governs the establishment of the Traffic Bureau. Like the language in Section 4-501 of the Home Rule Charter, there is a complete absence of any language in Section 154-51 suggesting that the Traffic Bureau is vested with the sole authority to enforce traffic regulations.

In addition, although the ATES Ordinance is under the direction of the Department of Public Works, the Department of Police has an active and critical role in the enforcement of the ATES Ordinance. An actual commissioned police officer is the person who determines if a violation has occurred.<sup>4</sup> In particular, each day, a commissioned police officer reviews all alleged violations and relevant images and video. If the police officer determines that a violation has occurred, it is the police officer who approves the Notice of Violation issued to the registered owner of the vehicle. (City Ord. § 154-1701)

Moreover, pursuant to Section 4-901, it is permissible for the City to place the automated camera safety program under the direction of the Department of Public Works. Among the functions of the Department of Public Works, Section 4-901 states that the Department of Public Works shall “[p]erform such other duties as are required by this Charter or **assigned in writing by the Mayor.**” (emphasis added) The Mayor of the City ratified the ATES Ordinance on February 22, 2007. (Appendix, Tab 3) Notably, in ratifying the ATES Ordinance, the Mayor executed a **written** document reflecting his approval of the ATES Ordinance, and the placement of the automated camera safety program under the direction of the Department of Public Works. Pursuant to Section 4-901(9), this was permissible. However, neither the district court nor the Fourth Circuit made any mention whatsoever of Section 4-901(9).

The ATES Ordinance is very similar to the enforcement and administration of parking violations, which are also under the direction of the Department of Public Works and have been in place for years. (See City Ord. § 154-681) Indeed, the ATES Ordinance specifically references the procedures applicable to parking violations. (City Ord. §§ 154-696, 154-1702(a)). As with parking violations, violations of the ATES Ordinance are civil in nature and no criminal penalty is imposed for its commission. Notably, as with the duties of the Department of Public Works under the ATES Ordinance, the enforcement and administration of parking violations are not among the functions specifically enumerated in Section 4-901. Nevertheless, it was permissible for the City to place the enforcement and administration of parking violations under the direction of the Department of Public Works. The same is true for the ATES Ordinance.

The district court and Fourth Circuit rulings completely disregard Section 4-901(9) of the Home Rule Charter, and, in doing so, unilaterally amend the Home Rule Charter to remove the

---

<sup>4</sup> In their Fourth Circuit brief, petitioners argued that the deposition testimony of Robert Mendoza, the Director of the Department of Public Works, in another matter contradicted the City’s statement in this regard. However, this is not correct. Mr. Mendoza testified that “a commissioned law officer reviews the individual recorded alleged violation and determines whether or not it constitutes an actual violation or not.”

provision. However, as the Court is aware, this is not permissible. Indeed, petitioners and the lower court emphasize that the City must formally amend the Home Rule Charter in order for the City to place the automated camera safety program under the Department of Public Works. However, pursuant to Section 4-901(9) of the Home Rule Charter, the Mayor already has the authority to place the program under the Department of Public Works, and therefore, no such amendment is necessary in this regard. Petitioners are the ones who must advocate for an amendment to the Home Rule Charter if they want to divest the Mayor of his authority to place the automated camera safety program under the direction of the Department of Public Works. Petitioners must also advocate for an amendment to the Home Rule Charter if they want to give the Department of Police the sole authority to enforce traffic regulations. If the City had intended to vest the Department of Police and Traffic Bureau with authority to enforce traffic regulations to the exclusion of the other departments, it could have easily done so. The City chose to adopt provisions in the Home Rule Charter, which do not provide for such exclusive authority.

To the extent the lower courts' holdings suggest that the City cannot place the automated camera safety program under the direction of the Department of Public Works because such a program allegedly involves duties not customarily performed by the Department of Public Works, the courts are once again impermissibly rewriting the language of the Home Rule Charter. Section 4-901(9) does not state that the Department of Public Works shall perform such other duties **"commensurate with other authorized functions of the Department of Public Works."** As mentioned, Section 4-901 simply states that the Department of Public Works shall "[p]erform such other duties as are required by this Charter or **assigned in writing by the Mayor.**" (emphasis added)

Further, the placement of the automated safety camera program under the direction of the Department of Public Works is commensurate with the enumerated functions of the Department of Public Works.<sup>5</sup> Pursuant to Section 4-901, the Department of Public Works has the authority to collect and compile traffic data; prescribe regulations governing traffic and parking on streets and other public places; and determine the type, need and location of all traffic control devices and markings and install, design, construct, operate, and maintain them. The enforcement of the

---

<sup>5</sup> On page 20 of their response to the City's Fourth Circuit writ application, petitioners contended that the Department of Public Works has historically been an equipment and streets maintenance department and noted that it was formerly named the Department of Streets. However, petitioners failed to recognize that the department was renamed the Department of Public Works so its name would fairly reflect the broadening of the department's duties.

regulations prescribed by the Department of Public Works utilizing automated safety cameras established by the Department of Public Works based on the traffic data collected by the Department of Public Works is undoubtedly commensurate with the above-mentioned functions of the Department of Public Works.

In the lower courts, petitioners have proposed extreme hypotheticals in an attempt to convince the courts to rewrite the language of the Home Rule Charter and to divest the Mayor of the City of his power to place the automated camera safety program under the direction of the Department of Public Works. For instance, petitioners maintained that the language of Section 4-901 permits the Mayor to authorize the Department of Public Works to fight fires, collect taxes, and issue building permits. As an initial matter, this hypothetical is not persuasive, as the example advanced by petitioners is not the situation currently before this Court, nor is there any evidence that the City has ever attempted to authorize the Department of Public Works to perform the duties listed by petitioners. Moreover, even assuming petitioners are correct in this regard, which the City disputes, it is for the City, and not the courts, to amend the language of Section 4-901 to address the petitioners' hypothetical.<sup>6</sup>

The lower courts erred in finding that the ATES Ordinance is unlawful. The clear and unambiguous language of the City's Home Rule Charter allows the City to place the ATES Ordinance under the direction of the Department of Public Works. The Fourth Circuit erroneously applied provisions of the City's Home Rule Charter, and, in doing so, essentially rewrote provisions of the Home Rule Charter. Thus, the City requests that this Court grant *certiorari* review to address the unresolved issue of law inherent in the lower courts' and rectify the courts' erroneous decision, which would authorize courts to juridically rewrite provisions of the Home Rule Charter. This Court should reverse the lower courts' erroneous decisions and vacate the preliminary injunction.

---

<sup>6</sup> Petitioners also argued in the Fourth Circuit that the Director of the Department of Public Works sets enforcement policy and exercises discretion reserved to law enforcement officers. However, this is not the case. Although Mr. Mendoza agreed to consider relaxing violations concerning a rolling stop to a right turn on a red-light, Mr. Mendoza never agreed to implement such a policy.

**B. Since the Lower Courts Erred in Holding That the ATES Ordinance Is Unlawful, Petitioners Must Show They will suffer irreparable injury, loss or damage if the City continues to operate the ATES Ordinance, Which Petitioners Are Unable to Do.**

Apparently recognizing the fact that they cannot show that they will suffer irreparable injury, loss or damage if the City continues to operate the ATES Ordinance, in both the district court and the Fourth Circuit, petitioners focused solely on the purported unlawfulness of the ATES Ordinance, and made no attempt whatsoever to prove irreparable injury, loss or damage. The City does not dispute that, if the ATES Ordinance is unlawful – which it is not – then petitioners would not be required to show irreparable injury, loss or damage. However, as demonstrated above, because the ATES Ordinance is lawful, pursuant to Article 3601 of the Louisiana Code of Civil Procedure, it was contrary to the law for the lower court to issue the preliminary injunction without requiring petitioners to make such a showing.

Generally, a party seeking the issuance of a preliminary injunction must show that he will suffer irreparable injury, loss, or damage during the pendency of the litigation, if the injunction does not issue. La. Code Civ. Proc. art. 3601; *General Motors Acceptance Corp. v. Daniels*, 377 So.2d 346, 348 (La. 1979); *HANO Services, Inc. v. Secure Computing Systems, Inc.*, 1996-1753 (La. App. 4 Cir. 4/2/97), 693 So.2d 835. An injunction is an extraordinary remedy and should only issue where the party seeking it is threatened with irreparable loss without adequate remedy at law. *Dauphine v. Carencro High School, 2002-2005* (La. 4/21/03), 843 So.2d 1096, 1102. Irreparable loss or injury is considered to be “a loss sustained by an injured party, which cannot be adequately compensated in money damages or for which such damages cannot be measured by a pecuniary standard.” *Shaw v. Hingle*, 94-1579 (La. 1/17/95), 648 So.2d 903, 905; *see also Licfro, Inc. v. State, ex rel Dept. of Revenue, Office of Alcohol and Tobacco Control, 2003-0737* (La. App. 4 Cir. 10/1/03), 859 So.2d 739. Thus, if the party seeking injunctive relief can be compensated monetarily for his alleged injuries, there can – by definition – be no irreparable injury. In such a situation, an injunction cannot issue.

In the present case, in addition to the preliminary and permanent injunction, petitioners seek money judgment, praying specifically for “all damages allowable by law, damages for annoyance, inconvenience, and mental distress . . . .” Therefore, the injunction requested by petitioners is not one to enjoin conduct which will result in damages insusceptible of being measured by pecuniary standards – as is required for an injunction to issue.

The lower courts committed reversible error when issuing the preliminary injunction without requiring petitioners to prove the irreparable loss or injury required by Article 3601. As a matter of law, this Court must reverse the lower court's ruling and vacate the preliminary injunction.

**C. The Lower Court Erred in Issuing the Preliminary Injunction Without First Requiring Petitioners to Furnish Security.**

The lower court issued the preliminary injunction without requiring petitioners to first furnish security, which is contrary to well-established codal and decisional law.

Pursuant to Article 3610 of the Louisiana Code of Civil Procedure, the district court is not at liberty to issue a preliminary injunction without first requiring petitioner to post security. Article 3610 provides, in pertinent part:

A temporary restraining order or preliminary injunction *shall* not issue unless the applicant furnishes security in the amount fixed by the court, except where security is dispensed with by law.

(emphasis added)

Notably, neither petitioners, the district court, nor the Fourth Circuit have identified any law which relieves petitioners of their obligation to post security prior to the issuance of a preliminary injunction, and the City is aware of no such law. The lower courts relieved petitioners of their obligation to post security prior to the issuance of the preliminary injunction on the grounds that the act sought to be enjoined is allegedly *ultra vires*. However, in support of its holding in this regard, the lower courts relied solely upon the decision of the Second Circuit Court of Appeals in *Parish of Ouachita v. Town of Richwood*, 29,617 (La. App. 2d Cir. 6/18/97), 697 So.2d 623. Notably, although the district court in *Parish of Ouachita* issued a preliminary injunction without requiring the plaintiff to post bond, the defendant did not challenge that aspect of the district court's ruling on appeal. See *Parish of Ouachita*, 697 So.2d at 625. As a result, the Second Circuit never addressed the issue of whether it was improper for the district court to issue the preliminary injunction without first requiring the plaintiff to post security. Thus, the lower courts' reliance on the decision in *Parish of Ouachita* in freeing petitioners of their obligation to post security is erroneous.

Presumably discovering that there is no law to relieve petitioners of their obligation to post security prior to the issuance of a preliminary injunction, in their Fourth Circuit brief, petitioners relied upon federal cases applying Rule 65(c) of the Federal Rules of Civil Procedure to justify the court's failure to require them to post security. However, as the Court is aware,

case law applying the federal rules is inapplicable to the instant case, which involves Louisiana law. Article 3610 clearly states that a “preliminary injunction **shall** not issue unless the applicant furnishes security. . . .” (emphasis added). Petitioners cannot exempt themselves from this requirement by relying on exceptions to the federal rule, which have yet to be recognized by the Louisiana courts.

In any event, none of the exceptions to the federal rule requiring that an applicant post security is applicable to the instant case.<sup>7</sup> The City strongly disputes that petitioners have a high probability of succeeding on the merits of their claim. As shown above, the ATES Ordinance does not conflict with any provisions of the City’s Home Rule Charter. In addition, if the preliminary injunction is not reversed, there is much more at stake than costs and monetary damages. In particular, if the District Court’s ruling prohibiting the City from enforcing the ATES Ordinance is not reversed, the safety of the public will be jeopardized as drivers will be more prone to run red lights and speed. Finally, requiring a bond from petitioners would not injure the constitutional rights of petitioners or the public. The issue is whether the constitutional rights of petitioners or the public would be injured by requiring them to post a bond, and not whether the ATES Ordinance itself is constitutional (which it is), as argued by petitioners.

Simply, the lower court’s issuance of the preliminary injunction without requiring petitioners to post security sufficient to indemnify the City was contrary to well-established codal and decisional law. The preliminary injunction was therefore wrongfully issued and should be vacated as a matter of law.

## **IX. CONCLUSION**

The lower courts incorrectly concluded that the ATES is unlawful because it places the automated camera safety program under the Department of Public Works instead of the Department of Police. The lower courts’ decisions are contrary to the plain language of the Home Rule Charter, and effect an impermissible judicial revision to the provisions of the Home Rule Charter. Pursuant to the City’s Home Rule Charter, it was permissible for the City to place the ATES Ordinance under the direction of the Department of Public Works. Accordingly, the ATES Ordinance is lawful. Moreover, since the ATES Ordinance is lawful, it was legally

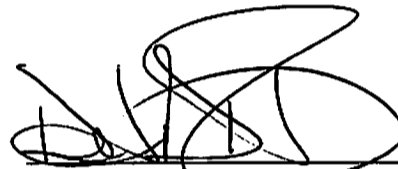
---

<sup>7</sup> According to petitioners, under federal law, an applicant is not required to post security when (1) the party seeking the injunction has a high probability of succeeding on the merits of his claim; (2) the party to be enjoined is a municipality or county government that likely would not incur any significant cost or monetary damages from the issuance of the injunction; or (3) when demanding a bond from the party seeking the injunction would injure the constitutional rights of the party ~~of~~ the public.

erroneous for the lower court to issue the preliminary injunction without requiring petitioners to show that they will suffer irreparable injury, loss or damage if the City continues to operate the ATEs Ordinance. In any event, petitioners cannot make the required showing of irreparable injury because they can be compensated monetarily for any alleged damages. Finally, the lower court's issuance of the preliminary injunction without requiring petitioners to post security sufficient to indemnify the City was contrary to well-established codal and decisional law. The City respectfully requests that this Court grants its application for *certiorari* review, reverse the decision of the lower courts and vacate the preliminary injunction.

Respectfully submitted,

BY:



**Nannette Jolivet Brown, Bar Roll No. 18967**  
City Attorney

**Darryl M. Phillips, Bar Roll No. 19736**  
Chief Deputy City Attorney

**Detrich D. Hebert, Bar Roll No. 26325 (T.A)**  
Assistant City Attorney  
1300 Perdido Street  
Room 5E03, City Hall  
New Orleans, Louisiana 70112  
Telephone: (504) 658-9800  
*Email: ddhebert@nola.gov*

**ATTORNEYS FOR DEFENDANT  
THE CITY OF NEW ORLEANS**



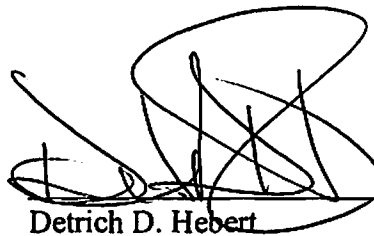
**X. VERIFICATION**

BEFORE ME, the undersigned authority, personally came and appeared Detrich D. Hebert, in her capacity as appellate counsel for the Defendant-Applicant the City of New Orleans in the foregoing writ application for supervisory writ of *certiorari*, who declares that all of the allegations contained in the foregoing Application for Supervisory Writ of *Certiorari* are true and correct to the best of her knowledge, information and belief.

Appearer further declares and certifies that a copy of the foregoing application has been delivered to the presiding district court judge, the appellate court and to opposing counsel, whose names, addresses and telephone numbers are:

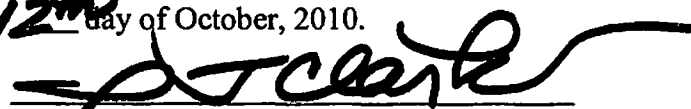
Hon. Paulette Irons  
District Judge  
Civil District Court, Parish of Orleans  
421 Loyola Ave., Room 303  
New Orleans, LA 70112

Mr. Edward R. Washington, III  
The Washington Law Group, LLC  
11200 Hayne Boulevard  
New Orleans, LA 70128



Detrich D. Hebert

Sworn to and subscribed before me,  
the undersigned Notary Public, this  
12<sup>th</sup> day of October, 2010.



NOTARY PUBLIC  
My commission expires:

**L.I. Clark**  
Attorney & Notary Public - State of Louisiana  
Lifetime Commission  
Bar Roll #: 29043  
Notary ID#: 77423

**APPENDIX 1**

<b><u>Description</u></b>	<b><u>Tab</u></b>
Civil District Court Judge Paulette Irons Judgment and Reasons of Trial Court.....	1
4 <sup>th</sup> Circuit Court of Appeals Opinion.....	2
Ordinance (As Amended) City of New Orleans No. 22536.....	3

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2010-9732

DIVISION "M"

DARLENE WASHINGTON-WAPEGAN, CAROLYN BLACKMAN, JOSEPH E.  
ALVEREZ AND CORINNE DUCRE

VERSUS

CITY OF NEW ORLEANS

FILED: \_\_\_\_\_

\_\_\_\_\_  
DEPUTY CLERK

JUDGMENT

This cause came on this day, October 1, 2010 for trial.

Present: Edward R. Washington III, Attorney for Petitioners  
Detrich D. Hebert, Attorney for Defendant

After consideration of the pleadings, evidence and argument of counsel and law presented:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the Petitioners, Darlene Wapegan, Carolyn Blackman, Joseph E. Alvarez, and Corinne Ducre and against Defendant, the City of New Orleans, as follows:

A preliminary injunction is hereby issued, enjoining and prohibiting the City of New Orleans and all other city or municipal officials, agents, officers, employees, boards, or corporations, departments and all others claiming to act in their behalf from implementing the Automated Traffic Enforcement System or otherwise issuing speeding or red-light tickets using an automated commercial ticketing system.

JUDGMENT READ, RENDERED AND SIGNED, in New Orleans, Louisiana,  
this 1<sup>st</sup> day of October, 2010.

  
Judge Paulette Irons

VERIFIED

Cynthia L. Mollare  
Deputy Clerk

10/1/10

OCT 04 2010  
ENTERED ON MINUTES

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2010-9732

DIVISION "M"

DARLENE WASHINGTON-WAPEGAN, CAROLYN BLACKMAN, JOSEPH E. ALVEREZ AND CORINNE DUCRE

VERSUS

CITY OF NEW ORLEANS

FILED: \_\_\_\_\_

DEPUTY CLERK

WRITTEN REASONS FOR PRELIMINARY INJUNCTION

This case involves several plaintiffs with tickets challenging the legal validity of the City's Automated Traffic Enforcement System (ATES). Plaintiffs argue that the automated enforcement and distribution of tickets from the Department of Public Works is in direct violation of the City Charter.

The Home Rule Charter of the City of New Orleans empowers the Department of Police with the authority to enforce traffic regulations such as running red lights or speeding as follows:

Chapter 5. Department of Police

Section 4-501: Functions

The Department of Police, headed by the Superintendent of Police, shall:

- 2) Enforce traffic regulations and investigate traffic accidents

The Home Rule Charter does not empower the Department of Public Works with the same authority. Specifically, Chapter 9 of the City Charter Entitled: Department of Public Works states the following under Section 4-901:

The Department of Public Works, headed by a Director of Public Works, shall:

- (1) Provide for the design, construction, paving, maintenance, and marking of streets, bridges, and related structures and approaches.
- (2) Supervise, regulate and control installations in, above or under streets.
- (3) Establish elevations and control grades of streets.
- (4) Collect and compile traffic data as directed by the Mayor or by ordinance; prepare engineering studies with regard to vehicular and pedestrian traffic as directed by the Mayor or by ordinance; prescribe regulations governing traffic and parking on streets and other public places; and determine the type, need, and location of all traffic control devices and markings and install, design, construct, operate, and maintain them.
- (5) Coordinate construction and maintenance projects with other departments, boards, and agencies of government and public utilities.
- (6) Coordinate or manage public works projects in the process of construction or acquisition and monitor their present status, the amounts spent or to be spent thereon, and the work required to complete each undertaking with a schedule for such completion.

VERIFIED  
Cynthia L. McPherson  
Deputy Clerk  
17/6/10

- (7) Keep the Mayor, the Council, the Chief Administrative Officer, and the City Planning Commission informed as to the status of public construction and maintenance projects.
- (8) Recommend terms to be incorporated in contracts for supplying utility services for City buildings or facilities and for supplying street lighting services to the City and shall supervise performance under such contracts.
- (9) Perform such other duties as are required by this Charter or assigned in writing by the Mayor.

The City Charter empowers each Office, Department, etc. in New Orleans to carry out its functions – and only those functions. Amendments to the Charter must be made in accordance with Section 9-201(1) and Section 9-201(2).

The City argues that 9-201(4) allows the Department of Public Works to issue tickets based upon the Department's ability to compile data. However, the enforcement of traffic laws requires a judicial determination of probable cause. It requires an opportunity for a hearing where individuals may seek redress before guilt. Nowhere in the ordinance is there an authorization allowing for the Department of Public Works to regulate, enforce and collect monies based upon violations of the law.

Therefore, this Court must order that based upon the legal standing of the plaintiffs and the unlawful conduct of the Department of Public Works, that the City is enjoined from issuing or collecting upon any tickets generated from any ATES camera until the City comes into compliance by amendment of its charter within the parameters of either Section 9-201(1) or Section 9-202(2).

OCT 04 2010

  
Judge Paulette Irons

OCT 04 2010  
ENTERED ON MINUTES