COUNTY COURT City and County of Denver, Colorado Court Address: 1437 Bannock Street, Room 109 Denver, Colorado 80202	
Plaintiff(s): The City and County of Denver **Defendant(s):** GARY PIROSKO, ADELL B. SHAFIEE AND STUART G. BARR	☐**COURT USE ONLY**☐
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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER came on to be heard by the Court on Defendants' Motions to Dismiss. The Court has reviewed Defendants' Motions and the City Attorneys' Response; the parties

respective briefs; has heard extensive oral argument, and makes the following findings of fact, conclusions of law, and Orders:

1. These consolidated cases challenge the constitutionality of both the Denver Revised Municipal Code, §§54-830 *et. seq.* and C.R.S. §§42-4-100, *et. seq.* (known as photo radar laws) as written and as applied, on the grounds of Equal Protection; Procedural and Substantive Due Process; Separation of Powers and violations of State Constitutional and Statutory Law. These issues appear to come before the Denver County Court as matters of first impression.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

2. The City and County of Denver ("the City") contracted for a vehicle identification system ("photo radar") with Lockheed Martin IMS Corporation ("Lockheed") in 1998 and amended the contract in 1999. The contract provided the City with system equipment, system hardware, system software, database management functions, communication networks, reporting and record functions, training services and materials, public information services and materials, and all other technical, legal, maintenance and support services necessary to operate the "Program". ACS State and Local Solutions ("ACS") presently services that contract with the City. There was no evidence presented of a direct agreement between the City and ACS . It was assumed that Lockheed assigned their agreement with the City to ACS sometime in 2001. The contract incorporated by reference a Request for Proposals, ("RFP") which called for the creation of the Interagency Staff Task Force ("ISTF") to oversee the operation of the Program. The ISTF was also charged with establishing general guidelines for the deployment, operation, enforcement, thresholds, and administration of the Program. The witnesses presented, Sergeant Rowe (the Police Department Supervisor for Photo Radar, (hereinafter "Sgt. Rowe"), and William Heaney (County Court Supervisor for Photo Radar) did not know whether ISTF had been formed or had met.

3. ACS provides the City with three technologically equipped vans for taking images of vehicles. The vans are deployed to many areas in the City based upon information received from Traffic Operations, neighborhood groups, City Council, and the Mayor's Office. On a daily basis, Sgt. Rowe reviews the number of images taken prior to making his decision as to whether to deploy the vans to high or low violation areas. ACS receives from the City approximately $136,000 per month for up to 12,099 images taken plus the cost of postage for sending notices to the registered owners of the vehicles. The fee incrementally increases with the number of images taken. For example, if the City takes 12, 100 images, the fee increases by $1,000 per month. There is a policy made by someone in a higher level position than Sgt. Rowe not exceed 12,099 images per month. To maximize the cost benefit to City's flat rate payment to ACS, there is a goal to take as close to 12,099 images without exceeding it. Sometimes a technician may leave an area or go to a low violation area if the images exceed the monthly cap of 12,099.

4. The photo radar technicians are Denver Career Service employees who are hired by the Denver Police Department ("technicians") and trained by ACS to operate the vans. The technicians use blue-lettered reflective signs that read "Photo Radar in use Ahead". Where poles are available, they place the signs high on the pole about half-way in the block that they are monitoring. If there is no pole available, they place a sandwich board sign in the same area as

close as practicable to the street. The technicians sit in seats placed in the back portion of the van facing the back windows. The technicians check for posted speed limit signs, test the equipment and set the equipment to take images at a selected speed. This is usually ten miles per hour or more over the posted speed limit. Images are taken of each vehicle which exceeds the selected speed. In some instances vehicles slow down when they are aware that a photo radar van is in sight. Sometimes the van is not visible to traffic. The technicians observe and monitor the traffic and log visual estimates. If they do not observe the vehicle and an image is taken, the technician places a "DNO" (did not observe) on the log. The "cosine-effect" is not accounted for in photo radar cases as are in conventional radar cases. The technicians provide ACS with their logs and the reels of images. ACS processes the images. It is not known whether this service is subcontracted by ACS.

5. ACS reviews the photos and the technician logs for equipment/environment and operator error and reviews DMV information. Based upon this review ACS rejects some photos and send notices of the violation for the remaining images. ACS sends registered owners of the observed vehicles a Notice of Traffic Violation by certified mail followed by a Courtesy Reminder Letter and by a Failure to Respond Letter. ACS also prepares the citation for service of process by the City. ACS does not issue any notices on DNO cases. People who receive notices have the option to pay the fine; ignore the notices; provide a picture identification to the photo radar counter to prove their innocence; "nominate" who the operator of vehicle was if it were not them; or set the matter for a final hearing. If all the notices are ignored, personal service is attempted. If service is accomplished and still ignored a fine is assessed and the vehicle may be booted if found within the City. Fleet vehicle companies such as rental car companies or taxi cab companies may also nominate the driver and in some cases may pay the fine, however, if they fail to nominate the driver, service is not pursued. Emergency vehicles, in some instances, may not be cited. A determination is made "on the spot" or through conversation with the appropriate agency to determine whether there was indeed an emergency. Only if there were an emergency situation, the vehicles are not cited. There is some question as to whether all of the out of the state owners receive the notices because DMV information from other states may not be available to Colorado. Out of state drivers who ignore the notices are not pursued for personal service due to cost and difficulty in utilizing a boot. The photo radar laws permit the assessment of service of process costs. The City also provides supervision of the technicians by the Denver Police Department, payment access, denials of identification and Final Hearings through the Denver County Court. The supervision is related to deployment matters.

6. In the year 2000 Lockheed received approximately 3 million dollars from the City based upon the images taken plus postage. In the year 2000, the City received approximately $3,049,000 in revenue from photo radar. Due to various errors, in 2000 there was an approximate image rejection rate of 47%. In December, 2000, the rejection rate was 58%. From January 2001 through March 31, 2001 the rejection rate was 53%. In March 2001 the rate was 60%. The largest number of images taken in 2000 were 21,548 in January which generated $435, 325.00 gross for the City. The lowest number of images taken in 2000 were 8,388 in April which generated $197,420.00 gross for the City. According to the contract between the City and ACS, ACS would have received compensation of $136,000 for the month of April, 2000 and $211,000 for the month of January, 2000. Although there is a correlation between the images

taken and the increased gross revenue generated for the months of January and April 2000, there was no information provided regarding the number of citations issued for those months.

JURISDICTION

7. All parties agree that this Court has jurisdiction to hear all matters presented including but not limited to the constitutional challenges to the CR.S., §§42-4-100 *et seq.* (See City Attorney's Brief at page 2 and Defendants' respective Briefs).[1] All pleadings in this matter have been forwarded to the Attorney General's Office for the State of Colorado by the Defendant Mr. Porosko, who has been in communication with the Attorney's General's Office regarding the same. This Court concludes that the Attorney General's Office has received adequate notice of the pending matter.

STANDING

8. The City argues that these Defendants do not have standing to bring their Motion to Dismiss because they have not personally suffered injury in fact. *See State Board of Community Colleges v. Olson*, 687 P.2d 429 (Colo. 1984). The City claims that the defendants have not been injured in fact because they have not been convicted of violating D.R.M.C. §54-156; that no points have been assessed against their driving records and that no fines have been assessed. The City further states that the pertinent photo radar ordinance and statutes merely regulate the procedures for the State's photo radar program and thereby its provisions do not directly apply to the Defendants. This Court is left to speculate that the City is then arguing that if the ordinances and statutes merely regulate, then the Defendants cannot be directly injured by them. The Defendants argue that they clearly have standing because they have a personal stake in the outcome and that their interests and rights are directly threatened by the government action. *See Goldsmith v. Pringle*, 399 F. Supp. 620 (D.Colo. 1975) and *People v. Fuller*, 791 P.2d 702 (1990). What is required for standing is that defendants have a personal stake in the outcome and that their interests or personal rights are directly threatened by the State action they are challenging. *See, e. g., Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

9. While it is true that the pertinent ordinances and statutes "regulate" photo radar, they also have a direct application to these defendants. The rights and procedures applicable to photo radar speeding cases appear in D.R.M.C. §54-156, D.R.M.C.§§54-830 *et seq.* and C.R.S. §§42-4-110,.*et. seq.* and must be read together. As such, they apply to these defendants and may thereby impact these defendants. The defendants argue that the photo radar statute and ordinance laws, which constitute state action, are violative of their constitutional rights under separation of powers, equal protection, due process, and various violations of the federal and state constitution and statutes. The defendants have a direct stake in the outcome of these laws and their rights are

[1] The Denver County Court jurisdiction extends to a determination of constitutional questions. See Colorado Constitution, Article VI, Sec. 1. See also *People v. Western Union Tel Co.*, 198 P. 146 (Colo. 1921); *Blackman v. County Court ex rel. City & County of Denver*, 169 Colo. 345, 455 P.2d 885 (1969). This matter is brought before the Court, *inter alia*, by a responsive pleading, Defendant's Motion to Dismiss. The Court may, sua sponte, consider the constitutionality of a statutory provision that is implicitly involved in the issues before it. See C.J.S., *Constitutional Law*, Sec. 93, and cases therein; *Howell v. Woodlin School District R-104*, 598 P. 2nd 56 (Colo. 1979).

directly threatened by them because they may be found guilty of the charges on the facts while the applicable laws may be unconstitutional or violate state statutes.

10. If the Court denies these defendants standing to bring their Motion to Dismiss it would obviate review of the pertinent laws and evade these challenges unless the defendant is convicted and brings an appeal. Using this logic, if the defendants are found not guilty on other grounds, unconstitutional laws and/or statutory violations may continue *ad infinitum* without any scrutiny. Further it would mean that a constitutional or statutory challenge would only be available to those defendants who are found guilty. More importantly, a Motion to Dismiss on the grounds of a constitutional or statutory challenge would never be available as a remedy to any defendant. A Motion to Dismiss is a valid procedure for defendants who wish to make a constitutional or statutory challenge to a law which may find them guilty of an offense. C.M.C.R.P., Rule 212. In fact, if the defendants fail to present their defenses and objections by virtue of a Motion to Dismiss, it may constitute a waiver of those defenses and objections under C.M.C.R.P., Rule 212(d).

11. The City goes on to argue that, under the defendants' equal protection challenge, the defendants are alleging standing based upon the "expanded third party standing rule" as set forth in *People v. Blue*, 544 P.2d 385, 390 (Colo. 1975). The City's argument that the defendants are averring third party standing rights is spurious. The Defendants are asserting a defense by virtue of a Motion to Dismiss the action against **them, not third parties**, on an action that is directly related to them. Third parties may indeed benefit from the outcome of this matter but third parties do not form the foundation for standing. Assuming, *arguendo*, that it is third party standing, although the general rule is that a party may not base standing on injury to the legally protected interest of third parties. *Parrack v. Town of Estes Park*, 628 P.2d 1014, 1016 (Colo. 1981), the rules of standing may be relaxed when constitutional challenges are involved. *See e.g., Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973); *State Bd. for Community Colleges v. Olson*, 687 P.2d 429, 435 (Colo. 1984). *See generally* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 87-91 (2d ed. 1984). For reasons stated above, the Court finds that these Defendants have standing.

EQUAL PROTECTION

12. Defendants argue that the photo radar laws violate the right to equal protection of the law as applied and as written. *See Bath v. Department of Rev. Motor Veh. Div.*, 758 P.2d 1381 (Colo. 1988) (hereinafter "*Bath*") [2]The defendants state that the effect of the statute and ordinance subjects individuals to different procedures, different penalties, different applications

[2] The *Bath* case was an equal protection challenge that argued that there was a disparity between how and when the Department of Motor Vehicles issued a probationary drivers' licenses under C.R.S. Sec. 42-2-122.1. Drivers who lost their license due to an alcohol related offense were not able to apply for a probationary license while drivers who lost their license due to excessive points based upon a variety of violations were able to apply. The State Supreme Court found that the alcohol suspensions and the point suspensions did not deal with similarly situated persons and that the criminal penalties provided by each statute were significantly different. The Court concluded that the district Court erred in declaring that C.R.S. Sec. 42-2-122.1 was a violation of equal protection and reversed the decision. Unlike the *Bath* case where the conduct involved an alcohol offense verses excessive points on the basis of a variety of offenses, these persons are similarly situated.

and different enforcement for identical conduct, to wit speeding less than 25 miles per hour, all in violation of equal protection.

13. The equal protection guarantees of the United States and the Colorado constitutions require like treatment of persons who are similarly situated *Clark v. Jeter*, 486 U.S. 456, 108 S. Ct. 1910, 100 L.Ed. 2d 465 (1988); *Tassian v. People*, 731 P.2d 672 (Colo. 1987); *Board of County Comm'rs v. Flickinger*, 687 P.2d 975 (Colo. 1984); *People v. Marcy*, 628 P.2d 69 (Colo. 1981). A threshold determination of whether persons allegedly subjected to disparate treatment by governmental acts are in fact similarly situated must be made in every equal protection case. *See, Board of County Comm'rs v. Flickinger*, 687 P.2d at 982. The citations issued to these defendants are traffic infractions for speeding under D. R.M.C §§54-156 and 54-830 . Speeding violations are also issued under D.R.M.C. §54-156 as traffic infractions without the use of photo radar. Under the latter, along with visual estimates, radar and pacing may be used by a police officer. Regardless of the method used, photo radar, police radar or pacing, the conduct of the driver is the same: speeding.

14. The treatment, however, is disparate for a number of reasons as argued by the defendants. The monetary and point assessment penalties are different. The manner of the issuance of the citation and obtaining personal jurisdiction is different. *See*, Denver Ordinance §54-30 *et. seq.* The defendant in a photo radar case has a presumption that he/she was the operator of the vehicle where the defendant in "non" photo radar cases do not carry that presumption. The police officer in a conventional radar speeding case issues the citation on the spot while in photo radar cases ACS determines who receives the citation. Typically an officer issues a speeding citation to a defendant immediately following an assessment of speeding. A defendant dealing with a photo radar citation may be unaware of the violation until a notice is received by mail and/or by personal service of a citation. Thereby, the time lapse between the alleged violation and the awareness of the infraction may differ.[3] There is also a distinction between out of state defendants, fleet vehicles and emergency vehicles and these individual defendants. Fleet vehicle and emergency vehicles may not be issued notices and out-of-state vehicles are not pursued for personal service. Lastly there is a difference in the radar "cosine effect." For these reason, the Court finds that there is disparate treatment and therefore a classification. If such a classification does exist, the Court must next determine what level of judicial scrutiny applies to the classification. *Tassian v. People*, 731 P.2d at 674. The defendants are not a suspect class or an intermediate class under *San Antonio Indep. School Dist. V. Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969); *Tassian v. People*, 731 P.2d at 674; *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984). If no suspect class exits then the Court must determine whether a fundamental right is involved. *Austin v. Litvak*, 682 P.2d 41, 49 (Colo. 1984) and/or *Lujan v. Colorado State Bd. Of Educ.*, 649 P. 2d 1005, 1o15, n.7 (Colo. 1982).

15. The defendants present various arguments related to the existence of fundamental rights; however, the arguments are disjointed and unclear. The defendants argue that there is an

[3] The Court agrees that because of the lapse in time between the alleged violation and notice of the alleged violation, drivers may be hampered in their ability to defend themselves.
This may place the photo radar defendant at a disadvantage in preparing a defense because their recollection of the incident may be hampered. *See City of Commerce City* at 584.

illegal seizure under the Fourth Amendment and that the Fourth Amendment rights are fundamental rights. They state that D.R.M.C. §54-833 allows citing the registered owner of a vehicle on the presumption that he or she was the person operating the vehicle at the time of the violation. This, they assert, is an illegal seizure. A person cannot be deprived of his life or liberty based upon a presumption, unless the presumption and fact are in agreement. *Du Bois v. Clark*, 12 Colo. App. 220, 55 P. 750 (1898). *Du Bois* did not involve an ordinance or statute regarding a presumption, it addressed whether a personal knowledge recital by an officer in a return of service was a valid presumption that the officer indeed had personal knowledge. The defendants also argue that the wording of the notices is a show of authority which also constitutes a seizure under *People v. Carillo-Montes*, 796 P.2d 970 (Colo. 1990).

16. The City cites several cases that discuss the types of "seizures" under the Fourth Amendment. In all of those cases, there has been in-person contact between police officers and defendants. There is no in-person contact with these defendants. Furthermore, the test for whether police contact with a citizen constitutes a "seizure" within the meaning of the Fourth Amendment is whether under the totality of circumstances, a reasonable person would not feel free to leave. *People v. Archuleta*, 980 P. 2d 509 (Colo. 1999). A notice and/or a presumption hardly constitute a seizure. No reasonable person would believe that the presumption or notice would restrict their movement. The Court need not determine whether a seizure violation is a fundamental right violation under the Fourth Amendment since there is no seizure in this case.[4]

17. The defendants did not provide any supporting authority establishing or identifying any other fundamental rights. They intertwine their seizure argument and presumption argument. They also allege that the fair administration of justice is a fundamental right without supporting authority, and intertwine that argument with the presumption argument. The presumption argument is more in line with a substantive due process argument not a "seizure" argument. (see due process argument below). Lastly, within the context of their equal protection argument, they argue that there is a violation of a liberty interest under due process. "Liberty" they state, connotes far more than freedom from physical restraint, it protects one from governmental interference in matters of purely personal concern. *Zavilla v Masse*, 112 Colo. 183, 147 P. 2d 823 (1944). The citing of registered owners who were not involved in the citation, they argue, interferes with matters of their personal concern. This argument is without merit because the registered owner's vehicle is involved with the citation.

18. Since there are no fundamental rights or suspect classes involved, the statute need not be narrowly drawn to effect the legislative purpose as argued by the defendants under *City of Lakewood v. Pillow*, 180 Colo. 20, 501 p. 2d 744 (1972) and the standard of review is rational

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[4] Fundamental rights are essentially those rights which have been recognized as having a value essential to individual liberty in our society. For example, *see Carey v. Population Services Intern.*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (right of privacy: to bear or beget children); *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1974) (right to marriage); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (right of a uniquely private nature--abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (right of privacy--contraception); *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) (right of interstate travel); *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) (rights guaranteed by the First Amendment); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (right to procreate); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (right of parents to direct the upbringing of their children).

relationship. Under this standard the classification must be reasonable not arbitrary, *Hurricane v. Kanover, Ltd.*, 651 P.2d 1218, 1222 (Colo. 1982) or have some rational basis in fact, *People v. Vasquez*, 666 P.2d 567, 569 (Colo. 1983), and must also bear a rational relationship to a legitimate state objective, *Hurricane v. Kanover, Ltd.*, P.2d at 1222., or must be reasonably related to a legitimate governmental interest *Tassian v. People*, 731 P.2d at 675. Different classes of persons may be treated differently without violation of equal protection when the classification is reasonable, not arbitrary, and bears a rational relationship to legitimate State objectives. *See* e.g.. *People v. McKnight*, 200 Colo. 486, 617 P.2d 1178 (1980).

19. The legislative intent behind the photo radar laws is to enforce the speed laws and thereby create safer roads. Photo radar is viewed to be an effective tool to slow down drivers and prevent accidents.[5] The enforcement of speed laws for safety purposes is a legitimate concern for the City. *See, People v. Hizhniak*, 579 P.2d 1131,1132-33 (Colo. 1978) and *Denver v. Henry*, 38 P.2d 895, 897 (Colo. 1934) (cases holding that municipalities have a right to regulate their own street and roads), and, for the State of Colorado under the police powers related to safety. *See People v. Hupp*, 53 Colo 85, 123 P.. 653 (?); *See e.g. People v. Nothhaus*, 147 Colo. 210, 363 P.2d 180 (1961); *People v. Love*, 171 Colo. 27, 465 P.2d 118 (1970). The City argues that there is a rational relationship of the photo radar laws to the legitimate governmental interest of roadway safety. In support of their argument they point to the fact that vehicles slow down when photo radar vans are in sight. The defendants argue that the facts that there are restraints on the number of images taken and that sometimes the vans are not visible to the traffic, defeat the objective of safety. Thereby there is no rational relationship of the law to the objective. The fact that not all of the vehicles slow down, that the vans may not be visible all the time, and that the vans may be deployed to only low violation areas in an attempt to comply with restraints on images taken, does not contravene safety. It may not be an optimum operation for meeting the safety objective, the laws do, however, accomplish safety objectives.

20. The defendants further argue that the classification is not reasonable. They state that there is no rational reason for treating speeders detected through photo radar differently than speeders detected through conventional radar. The City argues that the lower fine assessment and zero point assessment for photo radar speeders were put in place so that cities would not use the technology primarily as a revenue device. The defendants also argue that there is no rational reason to treat out of state violators, fleet vehicles, and emergency vehicles differently from in-state individual drivers. The defendants state that not pursuing the City emergency vehicles is done to avoid assessing the cost to the City as the employer. The City argues that service of process is not pursued against out of state drivers because it would be difficult and expensive. The defendants counter that the photo radar laws allow for the collection of the cost of service of process against the defendant and that service could easily be accomplished in another state. The defendants seem to ignore the fact that even if it were easy to serve out-of-state vehicles and assess them the cost of personal service, the only remedy available if the defendant is in default or is found guilty is a boot. The boot can only be utilized if that defendant's vehicle is found within the City. Further, the collection of the cost for personal service would be difficult to collect against an out of state defendant. With regard to emergency vehicles, the City argues that

[5] In San Diego, California, there is some contention however that the roads are not safer with the use of photo in red light violations. *See* Statement of San Diego Chief of Police David Benjarano (Nightline, July 30, 2001)

a determination is made "on the spot" or through conversation with the appropriate agency to determine whether there was indeed an emergency. Only if there were an emergency situation, the vehicles are not cited. The defendants further argue that there is no rational basis for not pursuing fleet vehicles such as rental car companies and taxi-cab companies who fail to pay the fine or to nominate the driver. The same rationale for not pursuing any out-of-state vehicle applies to out-of-state fleet vehicles. There is also a rational basis for not pursuing the in-state fleet vehicles such as taxi cabs because of the potential difficulty in obtaining the drivers' information from the taxi cab companies. Lastly, as the City argues, the "cosine effect" difference is an evidentiary argument that can be raised at a final hearing as an attack on the accuracy of the radar results.

21. The burden falls upon the defendants to prove equal protection violations beyond a reasonable doubt under a rational basis test. *Lying v. International Union*, 485 U.S. 360, 108 S. Ct. 1184, 99 L. Ed. 2d 380 (1988); *Lujan v. Colorado State Bd. Of Educ.*, 649 P. 2d at 1015. The defendants have not convinced the Court beyond a reasonable doubt that the classification is unreasonable and not related to a legitimate governmental interest. Therefore there is no violation of equal protection under the state and federal constitution.

DUE PROCESS (Presumption of Guilt)

22. The defendants argue that the D.R.M.C. §54-833 violates due process by shifting the burden of proof to the registered owner of the vehicle to prove their innocence. They further argue that our established system of justice is predicated on the presumption of innocence until proven guilty. D.R.M.C. §54-833 creates a presumption "...that the registered owner of the vehicle ...was the person who was committing the violation." Pursuant to D.R.M.C. §54-832 when and if personal service is established, the defendant must pay the penalty or set a final hearing. If the defendant was not the operator of the vehicle he/she has the burden to prove it. Penalties may therefore be imposed on innocent owners who may lack the knowledge or ability to challenge the presumption of guilt. In Denver it is automatically presumed that the owner of the car is the guilty party. This shifting of the burden, the defendants argue, flies in the face of the fundamental fairness doctrine offered under due process. A person cannot be deprived of his life liberty based upon a presumption, unless the presumption and fact are in agreement. *Du Bois, supra.*

23. A rebuttable presumption has become an issue in two photo radar cases in Oregon. In substantially similar language to the Denver provision, the presumption is part of the statutory photo radar scheme in Oregon. In *State of Oregon v. Corinne Weber*, 172 Ore. App. 704; 19 P.3d 378 (2001), the defendant appealed a conviction under photo radar laws claiming that the Court's denial of defendant's demurrer and motion to dismiss was in error. Defendant presented various arguments which included a constitutional challenge to ORS 810.439(1)(b) (the presumption provision) which they argued unconstitutionally "creates presumptions, shifts the burden of proof..." at 711. The State responded by arguing that, because the traffic violation charged in the case was not a criminal offense, the constitutional protections did not apply, and, if they had applied, the presumption was constitutional. The Court never reached the merits of the arguments and upheld the lower Court's denial of the defendant's demurrer and motion to dismiss on procedural grounds. Although the presumption was not challenged under a

constitutional argument, in *State of Oregon v. Sara Clay*, the State Supreme Court addressed the then operative Oregon photo radar presumption. The provision stated that "[A] rebuttable presumption exits that the registered owner of the vehicle was the driver of the vehicle when the citation is issued and delivered..." ORS 579, §2(F)(b) (amended 1997 ORS 810.439(1)(b)). The Court in reversing the District Court and the Court of Appeals overturned a conviction and concluded that the presumption was not enough to convict the defendant. The State had to present an evidentiary basis that would permit a trier of fact to find that the defendant was the registered owner of the vehicle. *Circuit Court, Multnomah County* {PR023404}; 160 Or. App. 438, 987 P. 2d 517, (Ore. App. 1999)}; and {SC S46559}, August 9, 2001

24. The Denver ordinance may allow the City to bypass the requirement of proving that the registered owner of the vehicle was the actual driver who violated the law, however, this is only **in the first instance**. Like Oregon, the presumption is an evidentiary matter that may be addressed at a final hearing. The City still bears the burden of proof to prove that the defendant was the operator of the vehicle at the time of the violation. Because the burden is on the City at final hearing, the presumption is rebuttable not mandatory. *See N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000). The rebuttable presumption is also constitutional, as the City argues, under the three part test under *Barnes v. People*, 735 P. 2d 869 (Colo. 1987). The presumption is rebuttable, it is rational and reasonable to believe that the owner or operator of the vehicle is probably the driver (the issuance of parking tickets make the same presumption), and although the language of D.R.M.C §54-833 seems mandatory, it is not binding on the trier of fact. In Boulder, B.R.C. 7-4-74(d) also creates a rebuttable presumption.

25. The State of California matches up a license photo from the Department of Motor Vehicles records to the photo taken by photo radar prior to issuing a red light photo citation to the registered owner. *See* Prepared Testimony for the House Transportation Subcommittee on Highways and Transit, *Hearing on Red Light Camera*, Dick Army, July 31,2001. Perhaps Colorado should consider California's position and avoid a potential evidentiary issue at a final hearing. In the City's initial proposal in its search for a vendor it was seeking a system of matching DMV photos with the photo radar photos but it did not materialize. Although Denver's approach may not be as efficient as California's approach, however, does not make the presumption unconstitutional.

DUE PROCESS (Vagueness)

26. Defendants argue that C.R.S. §42.4.110.5 is vague, arbitrary and capricious and thereby violate due process principals of fundamental fairness under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article XI, Sec. 25 of the Colorado Constitution. In particular the defendants state that the provision prohibits the use of an automated vehicle identification system unless an "appropriate" sign is posted in a "conspicuous place" that a devise is in use "immediately ahead". They argue that there are no statutory definitions or guidelines provided for the terms "appropriate" and "conspicuous place" and "immediately ahead".

27. The basic inquiry to a vagueness challenge is whether the law forbids or requires the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess as

to its meaning and differ as to its application. The statutory language must be specific enough to give fair warning of the prohibited conduct, yet must be general to address the problem under varied circumstances and during changing times. *Robertson v. City and County of Denver*, 978 P.2d 156 (Colo. 1999). Less specificity is required when a statute or ordinance is an economic regulation, imposes civil penalties, does not contain a scienter requirement and does not threaten to inhibit a constitutionally protected right. *Robertson at* 157. In *Robertson, supra*, a case challenging a Denver ordinance banning assault weapons, the Court Stated that the ordinance *implicated* the constitutional right to bear arms and thereby required greater specificity even though it was an economic regulation and did not require scienter. The citations issued to these defendants are traffic infractions under Denver Ordinance §54-156 and §54-830. Traffic infraction matters are civil in nature. *See* Colorado Rules for Traffic Infractions, 1-15 ("C.R.T.I"); *See also People v. Lewis*, 745 P. 2d 668, 671 (Colo.1987). There was no argument that the law was an economic regulation, there is no requirement of scienter, and there is no implication of a constitutional right. Further, the language and terms are not so vague that a person of ordinary intelligence would be required to guess their meanings.

28. What is an "appropriate" sign, where is a conspicuous place", and what is meant by "immediately ahead"? What can the general public expect the sign to look like? The defendants argue that pursuant to the Manual on Uniform Traffic Control Devises, a manual applicable to the City under C.R.S. §42-4-105, photo radar signs should be regulatory signs such as speed limit signs with black lettering and a white background. The City argues that the photo radar signs are informational signs such as hospital signs with white lettering and a blue background. What is the proper sign? Where is a conspicuous place? Is the current placement on a pole or a sandwich board conspicuous? What is "immediately ahead"? Is placement in the middle of the block immediate enough? All of these questions may be raised as issues in a final hearing as they are raised by defendants charged with other traffic infractions matters such as a stop sign violation under D.R.M.C §54-208. For these reasons the due process vagueness argument is rejected.

DUE PROCESS (Selective Prosecution)

29. The defendants argue that by not pursuing out of state vehicles, fleet vehicles and emergency vehicles and only pursuing in state individuals is selective prosecution in violation of due process. Defendants do not present supporting authority for this claim. The City argues that under the two-part test in *United States v. Salazar*, 720 F. 2d 1482 (10th Cir. 1983), there is no selective prosecution. The defendants under *Salazar* did not prove that they were singled out for prosecution and that the selection, if any, was in bad faith or based upon impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights. The rationale for the disparity is set forth above under the equal protection analysis. The Court does not find selective prosecution under due process.

DUE PROCESS (Privacy)

30. On page 8, paragraph 2 of defendants' brief they allude to a due process right to privacy argument but never fully develop it or present legal authority for it. Therefore the Court will not address this potential argument.

FIFTH AMENDMENT (Taking)

31. In a footnote, the defendants argue that private property shall not be taken for public use without compensation The defendants state that booting an innocent owner's vehicle goes too far under *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158 (1922). The vehicle is only susceptible to a boot if: (1) there is personal service, (2) there is a default judgment, (3) the fine goes unpaid and (4) the vehicle is found within the jurisdiction. The utilization of a boot is not a taking and there are reasonable safeguards prior to the use of the boot. Defendants' did not establish a taking violation under the 5th Amendment of both the State and Federal constitution.

SEPARATION OF POWERS

32. The Defendants argue that D.R.M.C §54-834 violates the separations of powers because the provision mandates judicial notice of automated vehicle identification systems and the admissibility of the results from the use of such systems. The defendants argue that judicial notice is discretionary not mandatory and to make it mandatory violates the separation of powers between the legislature and the judiciary. D.R.M.C §54-834 does not mandate that the Court takes judicial notice of automated vehicle identification systems and the admissibility of the results from the use of such systems. It merely sets forth the parameters for establishing judicial notice. As the City states, the prosecution must lay an evidentiary foundation at trial prior to admissibility of those principles. The Court must also consider whether the radar unit was tested and functioning properly and whether it was operated accurately under *People v. Walker, supra.* All of these are preliminary determinations are made prior to judicial notice of the scientific principles. The defendants cite *Durban v. Bonanza Corporation*, 716 P.2d 1124 (Colo. App. 1986) to persuade the Court that by mandating judicial notice is an interference with the Court's functions. *Durban, supra,* involved a Motion for a New Trial that requested that the trial Court take judicial notice of a Clerk and Recorder' s real property records. The Appellants did not provide the trial Court with the real property records or any reference to the recording information. The Court of Appeals found that for a Court to be required to take judicial notice **upon the request of a party**, it must be supplied with specific information that is the subject of the request. In this matter, neither party is requesting that judicial notice be taken. Instead these defendants are arguing that an applicable ordinance is wrongfully mandating judicial notice. The *Durban* case is therefore distinguished. Further, in Colorado, the Courts have upheld evidentiary statutes against the claim that they violate separations of powers (See City's Response Brief at page 11 and 12 for citations to supporting cases).

33. The defendants further argue that the recent ruling in *People v. Schreck*, 22 P.3d 68 (Colo. 2001) prohibits a blanket acceptance of the reliability of the scientific principles related to automated vehicle identification systems as set forth in D.R.M.C §54-834. D.R.M.C. §54-834 does not *carte blanche* mandate judicial notice of the scientific principles of automated vehicle identification systems. As the City argues, the reliability of the scientific principles are only admissible upon laying a proper foundation. The City is required to establish the foundation in evidence as set forth in D.R.M.C. §§54-834 (b) 1-5 and (c). The *Schreck, supra* case requires that the focus should be on the reliability and relevance of the scientific principles and held that CRE

702 and CRE 403 should be taken under consideration when deciding the admissibility of scientific principles. These rules of evidence are consistent with those foundation requirements in D.R.M.C. §54-834 (b)&(c). Additionally it is not the automated vehicle identification systems that are generally accepted in the scientific community, it is scientific principles and techniques **underlying** automated vehicle identification systems. These are the same principles used in conventional speeding cases: the Doppler effect. *See People v. Walker*, 199 Colo. 475, 610 P2d. 496 (1980) citing Kopper, *The Scientific Reliability of Radar Speedometers*, 16 Md. L. Rev. 1 (1956) and *Commonwealth v. Whynaught*, 384 N.E. 2d 1212 (1979). The defendants' separation of powers arguments are therefore rejected.

34. However, there is a separation of powers violation with regard to the photo radar laws on other grounds. In The *City of Commerce City et. al.. v. State of Colorado et. al.*, Case No. 98CV108, Courtroom 19, dated December 7, 2000 (Appeal case number 01-CA-144)(hereinafter "*City of Commerce City*"), the Plaintiffs, the cities of Colorado Springs, Commerce City, Fort Collins and Westminster challenged the constitutionality of certain provisions of CRS § 42-4-100.5 and related provisions known as the "photo radar" statute. The Plaintiffs argued that the provisions violated their right to exercise their home rule powers; that they violated the separation of powers doctrine; and that they violated their constitutional rights to due process and equal protection.

35. The Court determined that there was a conflict between Rule 204(e) of the Colorado Municipal Court Rules of Procedure, as adopted by the Supreme State Supreme Court, and the statutory provisions concerning photo radar under C.R.S. §42-4-110.5(2)(a)(I)(A) as adopted by the legislature. The Court found that C.R.S. §42-4-110.5(2)(a)(I)(A) clearly reduced the methods by which service of process may be made under Rule 204(e) of the C.R.S. §42-4-110.5(2)(a)(I)(A) was thereby an unconstitutional encroachment upon the exclusive powers of the Colorado Supreme Court set forth in Article VI, Sec. 21 of the Colorado Constitution in violation of the separation of powers doctrine established by Article III of the Colorado Constitution.

36. Based upon C.A.R., Rule 50, the Court of Appeals dismissed the pending action and the State Supreme Court granted certiorari on case number 01SC281. The State elected not to appeal the decision holding that C.R.S. §42-4-110.5(2)(a)(I)(A) was an unconstitutional encroachment upon the exclusive powers of the Colorado Supreme Court set forth in Article VI, Sec. 21 of the Colorado Constitution in violation of the separation of powers doctrine established by Article III of the Colorado Constitution. This essentially nullifies that provision of the State statute. All remaining issues were presented on oral argument on December 6, 2001.

37. Denver's photo radar ordinance is under the purview of D.R.M.C. §54-830 *et seq.* Pursuant to D.R.M.C. § 54-830(c), "A copy of the summons and complaint shall be served upon the defendant in compliance with Colorado Municipal Court Rules of Procedure."{Emphasis Added}. This is the same rule, Rule 204(e) of the Colorado Municipal Court Rules of Procedure, found to be in conflict with C.R.S. §42-4-110.5(2)(a)(I)(A) in *City of Commerce City.* Therefore, this Court also finds that C.R.S. §42-4-110.5(2)(a)(I)(A) of the photo radar statute is unconstitutional.

THE CITY VIOLATES C.R.S. §42-4-110.5(5) BECAUSE IT COMPENSATES ACS FOR MATTERS OTHER THAN EQUIPMENT

38. The defendants argue that the City violates C.R.S. §42-4-110.5 (5) because it compensates ACS for matters other than equipment. C.R.S. §42-4-110.5 (5) states in pertinent part that "...no potion of any fine collected through the use of such system may be paid to the vendor of the automated vehicle identification system equipment. The compensation paid by the City and county, or municipality for such equipment **shall be based upon the value of such equipment** and may not be based upon the number of traffic citations issued or the revenue generated by such equipment." {Emphasis added}. In *People of the State of California v. John Allen, et. al.*, Superior Court of the State of California, County of San Diego, Case No. 579275D, September 4, 2001, the Court found that evidence presented by Lockheed Martin, the red light photos contractor, was not admissible. The evidence was found to be untrustworthy because Lockeed received a fee based upon the outcome of the ticket in violation of the legislature. That Court thew out 400 red light photo radar tickets. *See also People of the State of California v. Steven Robert Harmon*, Superior Court of the State of California, County of San Diego, Case No: 97371SD, August 3, 2001, the Court in reviewing a challenge to red light photos, found the defendant not guilty on the basis that documentation and affidavits submitted by Lockheed Martin, who was the State contractor, were biased. The Court noted that Lockheed Martin was compensated based upon the outcome of photo radar tickets and that they previously violated protocol causing the City of San Diego to discontinue enforcement. Lockheed Martin was the original photo radar contractor for Denver. Under C.R.S. §42-4-110.5 (5) the City and County of Denver may not pay a portion of any fine collected to the manufacturer or vendor of the photo radar equipment. The compensation must be based upon the value of the equipment.

39. Although there is a correlation between the number of images taken and the compensation received by ACS in the highest and lowest months for the year 2000, there was no evidence available to establish that there is a correlation between the number of citations issued and the compensation paid to ACS. However, the City pays ACS based upon the images taken not the fair market value of the equipment and ACS provides the City with far more than the fair market value of the equipment even under the broadest definition of the word. Pursuant to the contract with the City, ACS provides system equipment, system hardware, system software, database management functions, communication networks, reporting and record functions, training services and materials, public information services and materials, and all other technical, legal, maintenance and support services necessary to operate the "Program". Under a strict construction of the provision, these services are contrary to the language of the pertinent statutory provision. However the Court must look to the intent of the statute. By basing the compensation paid to the Vendor on the fair market value of the equipment and not the citations

or revenues generated by the equipment, the legislature removed potential bias. The City is clearly in violation of C.R.S. §42-4-110.5 (5).

40. The City argues that even if the Court finds a violation of that statutory provision, Denver is not under the auspices of the State photo radar laws because Denver is a home rule City. C.R.S. §42-4-110.5 (1) States as follows: ***"Automated vehicle Identification Systems.*** (1) The general assembly hereby finds and declares that the enforcement of traffic laws through the use of vehicle identification systems under this Section. is a matter of statewide concern and is an area in which uniform State standards are necessary." [6] The Home Rule Amendment, *Colo. Const.* art. XX recognizes three broad categories into which subjects may be classified in matters of: (1) exclusive local and municipal concern; (2) exclusive State-wide concern; and (3) mixed local and State-wide concern. *Woolverton v. City and County of Denver,* 146 Colo. 247, 361 P.2d 982 (1961). In matters involving exclusive local and municipal concern, home-rule charter provisions and ordinances supersede conflicting State statutes. *DeLong v. Denver,* 195 Colo. 27, 576 P.2d 537 (1978); *Vela v. People,* 174 Colo. 465, 484 P.2d 1204 (1971). In matters of exclusive state-wide concern, State statutes supersede home-rule charter provisions and ordinances. *Century Electric v. Stone,* 193 Colo. 181, 564 P.2d 953 (1977); *Pierce v. Denver,* 193 Colo. 347, 565 P.2d 1337 (1977). If, however, the matter is of mixed local and state-wide concern, it must be determined whether there is a conflict between the charter provisions or ordinances and the State statute. If, for example, there is no conflict, the charter provisions and State statute may coexist. *Greeley Police Union v. City Council,* 191 Colo. 419, 553 P.2d 790 (1976); *DeLong v. Denver, supra.* If, on the other hand, there is a conflict, the statute supersedes the home-rule charter provisions. *Century Electric v. Stone, supra; Denver v. Bossie,* 83 Colo. 329, 266 P. 214 (1928); *DuHamel v. People ex rel. Arvada,* 42 Colo. App. 491, 601 P.2d 639 (1979); *see generally* Klemme, *The Powers of Home Rule Cities in Colorado,* 36 U. Colo. L. Rev. 321 (1964). There is no conflict between the City photo radar ordinances and the State photo radar statutes related to compensation, therefore, the pertinent stautory provision may co-exist and is applicable. Therefore, the City is in violation of the C.R.S. §42-4-110.5(5).

THE CITY DOES NOT VIOLATE C.R.S. SECTIONS 16-2-102 through 16-2-114.

41. The defendants argue that the City is in violation of C.R.S. §§16-2-102 through 16-2-114. The City argues that Title 16 does not apply to cases involving municipal violations such as D.R.M.C. §54-156, speeding. The City states that speeding is not a misdemeanor or petty offense under C.R.S. sec. 16-2-103(1), and that the Denver County Court is sitting as a Municipal Court over ordinance violations under the Denver City Charter. *See Blackman v. County Court,* 455 P. 2d 885, 887 (Colo. 1969). The City's position is substantiated by the fact that Pursuant to D.R.M.C. §54-830[c], "A copy of the summons and complaint shall be served upon the defendant in compliance with **Colorado Municipal Court Rules of Procedure**" {Emphasis added}. Therefore, there are no violations of C.R.S. §§16-2-102 through 16-2-114.

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[6] In *City of Commerce City, supra,* Judge Markson stated that " {C}learly the use of photo radar systems is not limited to the boundaries of the particular municipalities, and the drivers subject to these systems are not merely local..." The parties in that case stipulated to the fact that between 1996-98, 20% of Fort Collins photo radar citations were issued for violations that occurred on State highways. Although Judge Marxian addressed the "extraterritorial impact " of the photo radar laws in the context of state verses local government, because people who drive on State highways may be out-of-state residents, photo radar laws may have both intrastate and interstate extraterritorial impact.

THE CITY DOES NOT VIOLATE THE COLORADO CONSTITUTION ARTICLE V, SECTION 35 BY WRONGFULLY DELEGATING MUNICIPAL FUNCTIONS

42. The defendants argue that the services provided by ACS have been wrongfully delegated to ACS under Colo. Const., Art. V, Sec. 35, which states as follows: **"Delegation of Power**. The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform municipal function whatever" The defendants state that by permitting ACS to review the images for errors, determine which violations are pursued, interface with the Department of Motor Vehicles, mail the notices, and prepare the citation are municipal functions.

43. The City argues that this constitutional provision mandates that **the general assembly** shall not delegate municipal functions and thereby it is not a prohibition applicable to municipalities. The defendants argue that this constitutional provision also mandates that a municipality shall not delegate municipal functions. *Town of Holyoke v. Smith*, 75 Colo. 286, 226 P. 158 (1924) (where the Court noted that the purpose of this provision was to prevent any organization being authorized by law to control or interfere with municipal matters). The defendants also cite *Munson v. City of Colorado Springs* 35 Colo. 506, 84 P. 683 (1906). The *Munson* case predates the "Home Rule" amendment to the Colorado Constitution and is thereby inapplicable. In the *Holyoke* case, *supra*, the defendant argued that the rates for utilities were governed by the City as opposed to the Public Utilities Commission and to assess the Commission rates would be a wrongful delegation of power by the State over the City in violation of Colo. Const., Art. V, Sec. 35. This case is distinguished from the defendants' cases in that it is not the State that is delegating municipal functions, it is the City of Denver. There is no constitutional provision prohibiting municipalities from employing private contractors from assisting in processing violations of municipal ordinances. Therefore there is no violation of Colo. Const., Art. V, Sec. 35.

THE CITY VIOLATES D.R.M.C SECTION 54.19 BY WRONGFULLY DELEGATING POLICE DEPARTMENT DUTIES

44. The defendants argue that the Denver Police Department is the agency directly authorized to enforce speed limits within the City and County of Denver. D.R.M.C §54.19 states that " It shall be the duty of the **police department** to enforce the street traffic regulations of this City...and assist in the prosecution of persons charged..." {Emphasis added} The defendants state that by permitting a non-police officer, in this case a Career Service employee as a technician, to enforce photo radar, serves to wrongfully delegate that responsibility. The defendants cite Oregon Laws 1995, chapter 579, section 2 that mandates that the photo radar equipment be operated by a uniform police officer as support for their position.
The defendants point to the Request for Proposals in which the City initially provided police officers to run the photo radar vans. This change by the City, the defendants state, was done in order to save the City money.

45. The facts that these Career Service employees hold Denver Police Department identifications, are supervised by the Denver Police Department, and are trained in the use of radar by ACS's qualified (unknown whether they are certified on traditional radar) operator on the operation of the automated vehicle identification system may suffice. It is not necessary for a police officer to serve as the technician as supported by the language of D.R.M.C §54-834 (b)(1) which states that "The person setting up or operating the ...system was qualified to do so through training and experience. Completion of four (4) or more hours of training by a qualified operator on the operation of the ...system...shall be deemed prima facie proof of such qualifications..." This provision does not require the operation of the system by a police officer and since it was adopted specifically for photo radar and is subsequent to D.R.M.C §54.19, it is applicable. Further, the City of Boulder has had their automated system in place longer than Denver and also uses an "Automated Enforcement System Operator" who is hired by the City of Boulder and is not a police officer.

46. ACS reviews the photos and technician logs for equipment/environment and operator error; reviews DMV information; determines who is pursued; sends vehicles a Notice of Traffic Violation by certified mail followed by a Courtesy Reminder Letter and by a Failure to Respond Letter; and prepares the summons and complaint for service of process by the City. These acts are performed by a police officer in conventional speeding cases. As stated above, although there is not a constitutional provision prohibiting municipalities from employing private contractors from assisting in processing violations of municipal ordinances, the ultimate responsibility for the prosecution of a violation is with the Police Department and the Court. The Court is charged with accepting fines and conducting a Final Hearing and the police department is charged with service of process and prosecuting the case under C.R.T.I. Rule 4.

47. With regard to the notices issued by ACS, D.R.M.C. §54-822 (e) states that the penalty assessment procedures under D.R.M.C. §54-821 shall not apply to any traffic infraction detected by the use of photo radar. D.R.M.C Sec. 54-1(40.5)states that "*Notice of violation* shall mean a notice mailed to the registered owner of a vehicle involved in any traffic infraction...detected by automated vehicle identification system advising that the violation has been detected..." D.R.M.C. §54-821(a) states in pertinent part "... The penalty assessment notice shall contain all the information required by section 54-823. D.R.M.C §54-823(a) states in pertinent part "A penalty assessment notice shall be **signed and served** on the defendant by a **police officer** and shall contain...The required law to convert the penalty assessment notice into a summons and complaint, should the penalty not be paid within the time allowed." {Emphasis added}

48. What is the difference between a notice under D.R.M.C. Sec. 54-1 (40.5) and a penalty assessment notice under D.R.M.C Sec. 54-823? Is the Notice of Traffic Violation sent by certified mail by ACS a notice or a penalty assessment notice? Is the Courtesy Reminder Letter or Failure to Respond Letter sent by ACS a notice or a penalty assessment notice? One thing is certain, a notice and/or a penalty assessment are not a summons and complaint. D.R.M.C. §54-823(a) distinguishes between a penalty assessment and a summons or complaint as does C.R.S. Sec. 42.4.110.5 (6) and (6)(b) which state in pertinent part "...As used in this section...a penalty assessment notice **or** summons and complaint is issued to the registered owner of the motor vehicle." Even if there is no delegation of police duties related to the notices

sent by ACS under any definition of "notices", there is no provision in either the statutory photo radar scheme or the City photo radar ordinances that grant ACS the authority to prepare the summons and complaint.

49. The Court is then left with the only applicable law related to the enforcement of speeding laws, *inter alia*, D.R.M.C §54.19 which states that " It shall be the duty of the **police department** to enforce the street traffic regulations of this City...and assist in the prosecution of persons charged..." {Emphasis added} Does the prosecution include the preparation of the summons and complaint? There is no statutory or ordinance authority for ACS to perform this function. The only provision that permits a delegation of Police Department duties is found in parking violations pursuant to D.R.M.C. Sec. 54-839 "...If the penalty assessment... are not paid with in 20 days...the clerk of the Court **or his designated agent** shall mail the notice..." {Emphasis added}. Perhaps the City should consider including the language "**or a designated agent** in D.R.M.C. Sec. 54-19 to allow for ACS to perform the function of preparing the summons and complaint. Until such time there is no statute or ordinance that grants that authority. ACS is in violation of D.R.M.C §54.19. In the City of Boulder, B.R.C. 7-4-74 (j) it is the city manager who sends letters concerning these type violations. As long as "it is "clear that such letters are not the formal process of the municipal Court." Why did the Boulder ordinance make a distinction? Perhaps because the formal process is a summons and complaint and can only be issued by the municipality. Under B.R.C. 7-4-74[c] "... the peace officer may issue, or cause to issued **through a contractor designated by the city manager, a summons and complaint**..." {Emphasis added} Unlike Denver's parking ordinance D.R.M.C. §54-839 that permits a designated agent and unlike Boulder's ordinance that permits a designated agent to issue the summons and complaint, Denver's photo radar ordinance does not include such a delegation. While the Court believes that ACS may issue the notices, the Court believes that to permit ACS to prepare the summons and complaint is a wrongful delegation. It is in violation of D.R.M.C. §54.19, police duties, and, a wrongful delegation of a City function.

THE DISCOVERY PROCESS PREVENTS A PROPER DEFENSE

50. The defendants argue that they were prevented from presenting a proper defense because the Colorado Traffic Infraction Rules provide only limited discovery. C.R.T.I. Rule 8 states that discovery shall not be available prior to the final hearing. In *City of Greenwood Village ex rel. State v. Fleming*, 643 P 2d. 511, 518 n. 11 (Colo. 1982), the Colorado State Supreme Court recognized that the legislature could choose to decriminalize certain types of traffic violations and to develop an alternative method of adjudication. These statutory schemes have been uniformly held to be constitutional. See, e.g., *State v. Anton* 463 A. 2d 703 (Me. 1983); *Nettleton v. Doughite*, 373 So. 2d 667 (Fla. 1979); *People v. Schomaker*, 116 Mich. App. 507, 323 N.W. 2d 461 (Mich. Ct. App. 1982). The Colorado State Supreme Court upheld this scheme against a challenge to its constitutionality in *People v. Lewis*, 745 P. 2d 668, 671 (Colo.1987).

51. This Court in its Order dated August 8, 2001 permitted these defendants to issue subpoenas consistent with C.R.T.I Rule 9(a). The discovery cut-off was November 30, 2001, almost 4 months after the discovery order. Defendants served six

subpoenas duces tecum in this case, three of which were withdrawn and/or resolved, including a *subpoena duces tecum* on ACS. The Court listened to approximately 16 hours of testimony, most of which related to discovery. The Court was liberal with regard to discovery in this matter due to the complexity and potential impact of this case, all in an effort to insure fairness under C.R.T.I Rule 11 (a).

CONTRACTUAL ISSUES

52. The defendants bring to the Court's attention several contractual issues between ACS and the City. For example, an Interagency Staff Task Force may not have been formed or met; that there is not sufficient oversight; no goals; improper record keeping; and a high volume of images that are rejected. While these are legitimate concerns, they either apply to potential breaches of the contract or the City's possible inattentive performance under the contract. These are not matters for judicial review.

MATTERS FOR FINAL HEARING

53. The defendants' argument that there is a conflict of interest between the vendor and the police department; that there is an appearance of impropriety because the vendor's actions interfere with law enforcement functions; that ACS is not credible; that the radar findings are not corroborated; and that the cosine–effect is unfair to a defendant, have either been addressed above or are evidentiary matters relevant to a final hearing.

CONCLUSION

54. The parties have standing and the Court has jurisdiction to hear the challenges to both the applicable City and State photo radar laws. Even though the treatment under photo radar laws is disparate, there is a rational relationship between the photo radar laws and the legitimate governmental interest of safety, and, rational reasons for treating the classes differently. Thereby there is no violation of Equal Protection under state and federal law. There is no violation of Due Process under the presumption argument, the vagueness argument, the selective prosecution argument and the privacy argument.[7] The defendants did not establish a taking under the Fifth Amendment of the state and federal constitution. The City does not violate CRS §§116-2-102 through 16-2-114, because those provisions are not applicable. The City does not violate the Colorado Constitution, Art. V, Sec. 3 because the State is not delegating municipal functions. C.R.S. §42-4-110(2)(a)(I)(A) is unconstitutional under a Separation of Powers argument. The City violates C.R.S. §42-4-110.5(5) because it compensates ACS for matters other than equipment and violates D.R.M.C §54-19 by wrongfully delegating police duties. Discovery did

[7] There have been additional arguments under due process analysis involving notice requirements; right to confrontation; and, self incrimination and privacy protections that will not be addressed as they were not proffered by these defendants. Those arguments included both photo radar and red light photos. *See*, ACLU Urges Halt to Use of Red-Light Cameras Until Privacy and Fairness Issues Are Addressed, Barry Steinhardt, August 22, 2001; Prepared Statement of Jim Harper, Hearing on Red-light Cameras, U.S. House of Representatives Committee on Highways and Transit, July 31, 2001; Photo-Radar: What's Wrong With This Picture, Frederick Grab, GLENDALE L. REV., Vol. 10, Nums: 1-2 (1991).

not prevent a proper defense, there are concerns regarding some contractual issues but they are not the subject of judicial review, and there are some arguments brought forward that are the subject of a final hearing not this Motion to Dismiss.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by this Court that the Defendants' Motions to Dismiss are granted for the reasons stated above, effective this date.

DONE AND SIGNED IN CHAMBERS ON THIS 28TH DAY OF JANUARY, 2002.

BY THE COURT:

Mary A. Celeste,
Denver County Judge

CC: Counsel of Record