In the
Supreme Court of Ohio

VILLAGE OF NEWBURGH HEIGHTS and CITY OF EAST CLEVELAND,	:	Case No. 2021-0247
	:	On appeal from the
Plaintiffs-Appellees,	:	Cuyahoga County
	:	Court of Appeals,
v.	:	Eighth Appellate District
	:	
STATE OF OHIO,	:	Court of Appeals
	:	Case Nos. 19-109106 and 19-109114
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT STATE OF OHIO

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INTRODUCTION

This case concerns the constitutionality of two provisions in Ohio's Traffic Camera Law.

One, the Spending Setoff, R.C. 5747.502, regulates distributions from the State's local government fund. A now-unchallenged portion of the law requires that municipalities file an annual report disclosing the revenue they collected through traffic cameras. R.C. 5747.502(B)(1). The challenged portion of the Spending Setoff requires the State to reduce each municipality's local-government-fund distributions by the amount the municipality reports having raised through its camera program. R.C. 5747.502(C). The amount of those reduced distributions is reallocated to a different fund that enhances public safety on public roads and highways. R.C. 5747.502(F).

The second challenged provision, the Deposit Requirement, regulates the process by which traffic-camera tickets are litigated in state court. More precisely, it requires that municipalities cover court costs and fees by providing "an advance deposit for the filing of the civil action" enforcing a traffic-camera ticket. R.C. 4511.099(A).

This case presents the question whether the General Assembly exceeded its lawful authority by enacting these laws. The plaintiffs—the City of East Cleveland and the Village of Newburgh Heights—bear a heavy burden in proving a constitutional violation. The "General Assembly of Ohio may enact any law which is not prohibited by the Constitution." *Angell v. Toledo*, 153 Ohio St. 179, 181 (1950). Thus, the City and Village

cannot prevail merely by showing that the Constitution contains no language expressly empowering the General Assembly to pass these laws. Instead, they must identify some provision in the Ohio Constitution that the Spending Setoff and Deposit Requirement violate.

The only candidate to which they point is the Home Rule Amendment. But that Amendment is irrelevant here. It vests municipalities with the powers "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Const. art. XVIII, §3. Thus, the General Assembly cannot pass laws that limit municipalities' powers except through "general laws." But neither the Spending Setoff nor the Deposit Requirement limit the municipalities' police power. True, both might discourage municipalities from adopting traffic-camera programs by making the programs less profitable than they would be otherwise. But neither challenged law limits the municipalities' power to create such programs if that is what they want to do. Nor do the challenged laws, in practical terms, leave the municipalities without a real choice. To the contrary, the record here shows that the Village makes many times more through the use of traffic cameras ($2.4 million in 2018) than it receives through local-government-fund distributions (about $60,000 the same year). Thus, the question whether to enact such programs remains "the prerogative of the" municipalities, "not merely in theory but in fact." *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987).

Because neither the Home Rule Amendment nor anything else prohibited the General Assembly from enacting the challenged laws, both pass constitutional muster. The Eighth District wrongly held otherwise. This Court should reverse.

ARGUMENT

A. The General Assembly may lawfully pass laws, like the Spending Setoff, that use financial incentives to encourage or discourage municipalities from doing things the State could not require or forbid them from doing.

The Spending Setoff gives municipalities an incentive not to exercise their home-rule authority in a particular way. The law is constitutional. This section lays out the governing principles, explains why the Spending Setoff is constitutional, and then turns to the City and Village's contrary arguments.

1. The Ohio Constitution gives the General Assembly plenary power to spend the State's treasury, subject only to those constitutional provisions that require, forbid, or otherwise direct certain types of funding. The plenary nature arises both from the general "legislative power of the state," Ohio Const. art. II, §1, and the specific power to appropriate. *Id.*, §22; *accord Grandle v. Rhodes*, 169 Ohio St. 77 (1959), syl. ¶2. In general, "the General Assembly of Ohio may enact any law which is not prohibited by the Constitution." *Angell*, 153 Ohio St. at 181. That principle, combined with the Constitution's express vesting of spending authority in the General Assembly, Ohio Const. art. II, §22, leaves no doubt that the General Assembly can, subject to limited exceptions, spend as it likes.

There are, to be clear, provisions that limit the General Assembly's spending power. Some require the legislature to fund certain matters; others forbid spending on certain issues; still others direct the manner in which the General Assembly must expend state funds. *See* State Br. 10 (citing, *e.g.*, Ohio Const. art. VII, §1 (requiring funds for schools for the blind and others); *id.*, art. II, §31 (barring funding perquisites for its own members); *id.*, art. XII, §5a (requiring fuel-tax revenue to be used only for roads and related uses)). But those provisions prove the otherwise-plenary nature of the General Assembly's spending power. They show that the People knew how to limit the legislature's spending authority. And they implicitly foreclose the possibility of inferring limits on the General Assembly's spending authority beyond those specifically enumerated. This follows from the interpretive principle "*expressio unius est exclusio alterius*," which "tells us that the express inclusion of one thing implies the exclusion of the other." *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 121 Ohio St. 3d 560, 2009-Ohio-1355, ¶42 (quoting *Myers v. Toledo*, 110 Ohio St. 3d 218, 2006-Ohio-4353, ¶24).

Key here, nothing prohibits the General Assembly from using spending to encourage or discourage behavior that it could not require or prohibit. For example, while the Ohio Constitution expressly bars the General Assembly from *ordering* individuals to buy health care, *see* Ohio Const. art. I, §21, the General Assembly may encourage people to purchase health insurance by offering a subsidy or a tax break to those who do. Along the same lines, while the U.S. and Ohio bills of rights bar the government from

requiring promotion of a government-approved message, Congress and the state legislatures can create a spending program that subsidizes only those who agree to promote that message. *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991).

No doubt, encouragement can "'turn[] into compulsion'" if the State threatens to withhold funds of such importance that the would-be recipient has "no real option but to acquiesce in" the State's demands. *NFIB v. Sebelius*, 567 U.S. 519, 580, 582 (2012) (op. of Roberts, C.J.) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). When *Congress* coerces *the States* with funding, it exceeds its constitutional authority. *Id*. It is questionable whether the same logic applies when *the State* coerces *municipalities*. *See* State Br. 14–15. But even if the same logic applies, financial inducements constitute coercion *only when* the would-be recipient has "no real choice" but to accept the terms of the deal—only when the supposed offer of funds is really a metaphorical "gun to the head." *NFIB*, 567 U.S. at 587, 581 (op. of Roberts, C.J.).

In sum, the Ohio Constitution permits the General Assembly to encourage that which it cannot require. It also permits the General Assembly to achieve in one way that which it cannot achieve in another. In fact, it is common for the legislature, after having a law struck down by this Court, to go back to the drawing board and succeed. *See* State Br. 11–12. For example, this Court invalidated Ohio's first school-voucher program as a single-subject rule violation, *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 17 (1999) (lead op.); *id*. (Douglas, Resnick, and F.E. Sweeney, JJ., concurring in judgment

only). But the lead opinion noted that re-enactment in a standalone bill would be fine. *See id.* at 9, 11, 14 (lead op.). The General Assembly quickly enacted just such a law. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 643 (2002).

2. These principles require upholding the Spending Setoff. Under this Court's precedents, the State cannot prohibit municipalities from running traffic-camera programs. *See generally City of Dayton v. State*, 151 Ohio St. 3d 168, 2017-Ohio-6909. But the Spending Setoff does not do that. Instead, it provides a (relatively modest) financial incentive not to run such a program: any municipality that chooses to do so will see its local-government-fund distributions reduced by the revenue raised and reallocated to enhance public safety on roadways. This offset does not come close to "coercing" anyone. Indeed, the record here shows that some municipalities make far more through their traffic-camera program than they receive from the State's local government fund. The Village itself, in 2018, earned *$2.4 million* from traffic-camera tickets and received a mere $60,000 from the local government fund. The latter is 2.5 percent of the former. No rational actor in that situation would feel compelled to opt out of the traffic-camera bonanza. An offer under which a municipality can have $60,000 if it agrees not to operate a program worth $2.4 million is far from a metaphorical "gun to the head." *NFIB*, 567 U.S. at 581 (op. of Roberts, C.J.). To the contrary, it is an offer no one would accept.

So, even assuming the coercion principle applies to the General Assembly's spending power, the Spending Setoff survives constitutional scrutiny: it leaves munici-

palities with a very real choice not to accept the General Assembly's encouragement, and is therefore non-coercive. *See id*.

3. The City and Village make various counterarguments, none persuasive.

First, they chide the State for failing to "cite any authority" supporting the proposition that the General Assembly may use funding to encourage that which it may not require. City & Village Br. 12. That gets things backwards. The General Assembly may pass any law not prohibited by the Ohio Constitution. *Angell*, 153 Ohio St. at 181. So *the City and Village* have to identify some provision in the Constitution that *prohibits* the General Assembly from using financial incentives to encourage behavior it cannot require. They fail to do so. Indeed, their arguments largely knock over straw men. For example, they note that the General Assembly's spending offers must comport with provisions in the Constitution, such as the Uniformity and Retroactivity Clauses. City & Village Br. 12–13 (citing *Tracy v. Village of Deer Park*, 114 Ohio St. 266, 269 (1926); *Village of Euclid v. Camp Wise Ass'n*, 102 Ohio St. 207, 216 (1921); *Bd. of Educ. of the Cincinnati Sch. Dist. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St. 3d 308, 317 (2001)); *see also* City & Village Br. 14, 18–19. That is true, but the State has never argued otherwise. It has never said that the General Assembly can violate express provisions in the Constitution when it offers financial incentives to municipalities. Instead, it argued that the General Assembly, *provided it complies with these express provisions*, may encourage or discourage that which it cannot require or prohibit. *See, e.g.*, State Br. 16.

Second, and along the same lines, the City and Village note that the State cannot "punish the exercise of a constitutional right." City & Village Br. 12 (citing *State v. Thompson*, 33 Ohio St. 3d 1, 4 (1987)); *accord id.* at 15. They say that municipalities have a right under the Home Rule Amendment to operate a traffic-camera program. And they say the Spending Setoff punishes municipalities that choose to do so.

This argument fails. The State agrees that, under this Court's precedent, the Home Rule Amendment entitles municipalities to run a traffic-camera program. The State further agrees that the government cannot punish the exercise of constitutional rights. The City and Village's argument fails, however, because the Spending Setoff does not punish municipalities for operating traffic-camera programs in the exercise of their home-rule powers. Instead, it provides them with an incentive not to exercise their right. This is not at all troubling; such offers are quite common in the law. For example, while the State cannot use enhanced sentences to punish a criminal defendant for deciding to go to trial, *see State v. O'Dell*, 45 Ohio St. 3d 140, 147 (1989) (cited at City & Village Br. 15), it is free to encourage the defendant not to go to trial by offering a favorable plea agreement. And while Congress cannot forbid private citizens from espousing positions on controversial issues, it can create and subsidize a federal program in which grantees agree not to espouse those positions while participating in the program. *Rust*, 500 U.S. at 193–94; *see also United States v. Am. Libr. Ass'n*, 539 U.S. 194, 212 (2003) (plurality op.); *Regan v. Tax'n With Representation of Washington*, 461 U.S. 540, 549

(1983).

To bring home the point, consider the inverse of this case. Suppose the State wanted to *encourage* the use of traffic cameras. And suppose it offered to increase local-government-fund distributions by whatever amount a municipality spends installing a traffic-camera system. Would this violate the municipalities' home-rule right *not* to have traffic cameras? Of course not. Those municipalities are not punished for declining to implement a traffic-camera program—they simply forfeit their ability to claim an additional benefit to which they have no entitlement. Similarly here, municipalities are free *to have* traffic cameras. The Spending Setoff encourages them to make another choice by offering more local-government funding to municipalities that opt not to have traffic-camera programs. But it does not punish those who decide to operate such programs.

Third, the City and Village stress that the General Assembly's spending power is not unlimited, since the Constitution contains many provisions expressly requiring funding, forbidding funding, or dictating the manner in which funding is to occur. In the City and Village's words, "the State does have a duty to appropriate funds in some circumstances." City & Village Br. 17 (capitalization altered). Another straw man. As the State explained in its opening brief, *see* State Br. 10, the State *is* prohibited from exercising its spending power in a way that contradicts the clauses expressly regulating that power. *See, e.g.*, Art. XII, §5a; Art. XII, §9; Art. XII, §4; Art. VI, §2; Art. VII, §1. But that

insight does not help the City and Village. For one thing, the express inclusion of some limits on the General Assembly's spending power implies the absence of any other limits not expressed. *See above* 3–4. For another, the Spending Setoff does not contradict any of these limits on the legislative authority to spend state funds. The City and Village do not argue otherwise.

Fourth, the City and Village note that the rules governing the limits on *Congress's* power to spend are "conceptually and categorically inapplicable" to this case. City & Village Br. 16. The State largely agrees. As it noted in its opening brief, Congress's powers are far more limited than the General Assembly's. Whereas "an act of Congress is not valid unless the federal Constitution authorizes it," the General Assembly "may enact any law which is not prohibited by the Constitution." *Angell*, 153 Ohio St. at 181. But that is what makes the federal Spending Clause cases relevant. The fact that the Spending Setoff accords with the principles governing Congress's more-limited spending authority suggests the General Assembly validly enacted the Spending Setoff under its far-broader spending authority. The City and Village could rebut that presumption by showing that the Spending Setoff violates something in the Ohio Constitution. But they have not done so.

Fifth, the City and Village argue that the Spending Setoff is unconstitutionally coercive. As the State explained in its opening brief, it is not obvious that the General Assembly is prohibited from exercising its spending authority in a manner that coerces the

municipalities to act one way or another. State Br. 15. But regardless, the Spending Setoff is not coercive for the reasons laid out above. *See above* 6.

Sixth, the City and Village protest that local-government-fund distributions are not as generous as anticipated by those who created the fund. City & Village Br. 18. Even if that is right, it implicates only policy issues and (perhaps) questions regarding the meaning of statutes the General Assembly has enacted to implement the local government fund. It has no conceivable relevance to the constitutional questions presented here.

Finally, the City and Village separately attack the aspect of the Spending Setoff that withholds local-government-fund distributions from any municipality that fails to report its traffic-camera revenue. City & Village Br. 18–19. Their argument is strange. They no longer challenge the underlying duty to report. *Id.* at 19. So they are, in essence, arguing that the State can require reports but cannot impose any consequences for failure to report. They insist that the State cannot use "unconstitutional means" to enforce the reporting requirement. *See id*. 19. But they nowhere explain why it would be unconstitutional to withhold funds from municipalities that violate a lawful reporting requirement. True, they allude to the possibility of an as-applied challenge. But this is not an as-applied challenge, and even plaintiffs who bring as-applied challenges must identify a constitutional defect. They have not done so. And it is hard to see how they could, since the State's power to require a report implies its power to effectively

enforce that requirement. *See J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

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At bottom, the City and Village claim that the Home Rule Amendment entitles them to state funding. This Court should reject their argument.

B. Neither the Spending Setoff nor the Deposit Requirement violates the Home Rule Amendment.

The City and Village contend that the Spending Setoff and Deposit Requirement violate the Home Rule Amendment. Ohio Const. art. XVIII, §3. Even though they have no right to the state funds that the Spending Setoff reallocates, and even though the Deposit Requirement regulates court proceedings to which the municipalities' home-rule powers do not extend, the City and Village maintain that both laws violate the Home Rule Amendment. They are wrong. And the Eighth District erred when it accepted their position. This Court should reverse.

1. Both challenged provisions survive scrutiny under this Court's home-rule cases.

Ohio's Home Rule Amendment vests two powers in Ohio's municipalities. First, the power of local self-government. Second, the power to "adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Const. art. XVIII, §3. In this case, the City and Village say that they exercised the second of these powers in adopting their traffic-camera programs. In other words, they argue that they exercised their local police power, *not* their power of

local self-government. That raises the following question: Do the challenged provisions infringe upon the City's and Village's authority to adopt local police-power regulations? Ohio Const. art. XVIII, §3. The answer is "no."

a. As an initial matter, neither the Spending Setoff nor the Deposit Requirement interferes with any powers reserved to municipalities under the Home Rule Amendment.

The City and Village wish to operate traffic-camera programs. They have the right to do so under the Home Rule Amendment and this Court's cases interpreting it. The Spending Setoff and Deposit Requirement, however, do not affect the municipalities' power to adopt such programs. The Spending Setoff and Deposit Requirement provide financial incentives to municipalities that do not operate traffic-camera programs, but they leave municipalities free to create these programs if they determine (as appears to be the case here) that the costs outweigh the benefits. Because state law leaves municipalities free to "adopt and enforce" a traffic-camera program, the City and Village's first attempt at proving a home-rule violation comes up short.

No doubt, the municipalities may wish to operate their traffic-camera programs without sacrificing their eligibility for state funds or having to comply with state laws governing court procedures. In other words, they want not to comply with the Spending Setoff or Deposit Requirement. But the State's interference with these preferences does not intrude upon the municipalities' home-rule powers. Municipalities are not en-

titled to state funds. *See* State Br. 17–21. Nor are they entitled to enforce municipal regulations in court without regard to state-court procedural requirements. *See* State Br. 29–30. Instead, the General Assembly has the power to decide how best to expend state funds and to announce procedural requirements to be followed in state-court proceedings. *See* State Br. 28–30. The Home Rule Amendment is simply beside the point; while that amendment empowers municipalities to "adopt and enforce within [municipal] limits such local police, sanitary and other similar regulations," Ohio Const. art. XVIII, §3, it does not entitle them to state funding or to litigate in state courts without regard to state laws regulating judicial procedure.

b. If the Court disagrees—if it concludes that the Spending Setoff and Deposit Requirement interfere with the municipalities' exercise of their local police power—that does not prove a home-rule violation. The reason is this: the State may pass "general laws" regulating matters that would otherwise fall within the municipalities' local police power. *Id*. So the question becomes whether the Spending Setoff and Deposit Requirement are "general laws." They are.

In answering that question, this Court applies the *Canton* test. (The State urges the Court to abandon that test in favor of a test more in line with the Home Rule Amendment's original meaning. *See* State Br. 31–33. But it will not belabor the point here.) Under *Canton*, a state law is "general" if it: (1) is "part of a statewide and comprehensive legislative enactment"; (2) applies "to all parts of the state alike and oper-

ate[s] uniformly throughout the state"; (3) "set[s] forth police, sanitary, or similar regulations, rather than purport[ing] only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations"; and (4) "prescribe[s] a rule of conduct upon citizens generally." *City of Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, ¶21. All agree that the challenged laws "satisfy the first and second prongs" of *Canton*. *See* City & Village Br. 25 n.3. So only the third and fourth prongs are at issue. This Court should hold that the Spending Setoff and Deposit Requirement satisfy both prongs. State Br. 30–35.

Start with the third prong. This prong excludes from the definition of "general laws" those laws that "only grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations." *Canton*, 95 Ohio St. 3d 149, ¶21. As already explained, the Spending Setoff and Deposit Requirement do not do that. They leave municipalities free to create traffic-camera programs in the exercise of their police power. They also leave municipalities free to operate those programs as they see fit. The challenged provisions simply regulate municipalities' entitlement to certain state funding and the procedures with which municipalities must adhere when enforcing traffic-camera tickets in state courts. Because municipalities have no power to regulate state funding or state-court procedures, the challenged provisions do not "grant or limit [the] legislative power of a municipal corporation" *at all*.

The challenged laws satisfy the fourth prong, too. To decide whether a law pre-

scribes "a rule of conduct upon citizens generally," courts look at the law as a whole, rather than looking at its isolated provisions. *See, e.g.*, *City of Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, ¶29. And the entire law in which the Spending Setoff and Deposit Requirement are included *does* regulate citizen conduct. Most relevant here, it tells citizens how and where to challenge a ticket (in court, not at a city-run hearing), and dictates the process by which the citizen may fight his dispute with the city. *See* State Br. 35. By regulating the manner in which traffic-camera disputes are resolved, the law passes *Canton*'s fourth prong.

c. *Even if* the Court finds a *Canton* violation, it cannot find a home-rule violation unless it also determines that the challenged provisions "conflict[]" with some municipal ordinance. Ohio Const. art. XVIII, §3; *see* State Br. 36–37. Here, there is no conflict, as municipalities lack the power to regulate the expenditure of state funds and the procedures in state courts.

2. The Village's and City's contrary arguments about home rule are mistaken.

The City and Village never seriously engage with the State's argument that the Spending Setoff and Deposit Requirement regulate matters (state funding and state-court procedures) that are not part of local police power *at all*. Instead, they simply *assume* that the challenged laws intrude on their home-rule authority, *assume* that *Canton* applies, and urge this Court to hold that the State can satisfy neither the third nor fourth prongs of the *Canton* test. Even if this Court agrees that the challenged laws intrude

upon municipal home-rule power, and even if it agrees that the *Canton* test applies, it should reject the City and Village's arguments for finding a home-rule violation under that test.

To prove violations of *Canton* prongs three and four, the City and Village rely almost entirely on *City of Dayton v. State*, 151 Ohio St. 3d 168, 2017-Ohio-6909 (discussed in City & Village Br. 24–29). Their reliance is misplaced. True, *Dayton* invalidated an earlier traffic-camera law. But that law went far beyond financially incentivizing municipalities not to operate traffic-camera programs (as the Spending Setoff does) or regulating state-court procedures (as the Deposit Requirement does). Instead, it mandated *the actual operation* of traffic-camera programs. A law like that can more plausibly be described as merely "grant[ing] or limit[ing]" the "legislative power of a municipal corporation," thus violating the third *Canton* prong. *Canton*, 95 Ohio St. 3d 149, ¶21. And because the law in *Dayton* regulated the manner in which municipalities exercise their police power, it was harder to argue that the law imposed "a rule of conduct upon citizens generally." But the Spending Setoff and Deposit Requirement, when placed in the context of the bill as a whole, do not have the same features. So *Dayton*, which produced no majority opinion, has little relevance to the present dispute.

The City and Village make a few other arguments, but each fails. For example, they argue that the Deposit Requirement fails the third prong. According to them, requiring municipalities to post a deposit in state court before enforcing a traffic-camera

ticket makes the system "economically impossible to operate." City & Village Br. 27. Accordingly, they say, the Deposit Requirement is a limit on municipal authority disguised as a procedural requirement. The trouble is, the record does not show that the Deposit Requirement makes these programs "economically impossible to operate." And, given the amount of money the Village earned through its program in 2018, it seems likely the costs of the Deposit Requirement would still be well worth the benefits.

The City and Village additionally argue that the State cited no case for the principle that *Canton*'s fourth prong is to be assessed considering the law as a whole, not based on consideration of a particular provisions viewed in isolation. City & Village Br. 28–29. That is not true. The State cited *City of Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, ¶29, and *American Financial Services Association v. City of Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043, ¶36, which say exactly that. *See* State Br. 34–35.

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In sum, the Court should hold that neither the Spending Setoff nor the Deposit Requirement violates the Home Rule Amendment.

CONCLUSION

For the above reasons, the Court should reverse the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

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