

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

June 11, 2012

No. 11-30711

Lyle W. Cayce
Clerk

EVELYN ALEXIS BEVIS, Individually and on behalf of a class of persons similarly situated; SCOTT I. ZATZKIS; JULIETTE M. NEVES; DAVID D. KERVIN, JR.; CHRISTINA H. COBLE,

Plaintiffs-Appellants

v.

CITY OF NEW ORLEANS, through its administration and its counsel;
AMERICAN TRAFFIC SOLUTIONS, INC.,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:10-CV-4161

Before REAVLEY, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

Plaintiffs-Appellants (“Plaintiffs”) appeal the district court’s judgment dismissing their constitutional challenge to Defendant-Appellee City of New Orleans’ “Automated Traffic Enforcement System Ordinance” (“the Ordinance”).

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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The Ordinance permits the city to use automated cameras to detect speeding violations and cars entering an intersection against a red light. The Plaintiffs contend on appeal that the district court erred in concluding that the Ordinance (1) is civil in nature, (2) affords constitutionally adequate due process, and (3) does not violate the Constitution's *Ex Post Facto* Clause. We AFFIRM.

I. Standard of Review

We review a district court's dismissal for failure to state a claim *de novo*. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 742 (5th Cir. 2008). We "accept[] all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff," *id.* (internal quotation marks and citation omitted), but "we are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986). Although the plaintiff's factual allegations need not be detailed, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964 (2007), he must go beyond legal "labels and conclusions" and relate the "circumstances, occurrences, and events" he believes support his claim. *Id.* at 555, 556 n.3, 1965 & n.3 (internal quotation marks and citation omitted).

II. Background

The City engaged a private contractor, Defendant-Appellee American Traffic Solutions ("ATS") to install and maintain the cameras. ATS staff view the footage and forward potential violations to the New Orleans Police Department, whose officers then decide whether to issue a citation to the vehicle's owner. The Ordinance states that "[t]he imposition of a civil penalty . . . is an alternative method of detecting and deterring red-light violations and speeding." Accordingly, no fine may be imposed if at the time of the violation the operator of the vehicle was pulled over and either arrested or issued a traffic ticket. Also, no fine may be imposed on the vehicle's owner if the vehicle was reported stolen and had not been recovered at the time the violation occurred.

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If the police decide to issue a citation, a notice is sent to the vehicle's registered owner charging that the violation occurred and stating the amount of the fine. The fine is \$105 for entering an intersection against a red light, and \$300 for overtaking a school bus while it's stop signals are active. For speeding, the fine is between \$45 and \$205, depending on the excess speed. The fine can also include up to \$80 in enforcement costs.

The notice relates the date, time, and location of the violation, and it includes images from the video recording of the violation, and a website address where the full video can be viewed. The notice also explains procedures for contesting the fine, and procedures for payment by mail, telephone, or through the website. The owner may contest the violation by appearing before an administrative officer on or before a hearing date stated in the notice. If the hearing date passes and the owner has failed to either pay the fine or to appear and contest liability, then \$75 is added to the fine and the City may initiate collection efforts. The notice is presumed to have been received by the owner five days after it was sent, but it is an affirmative defense if "[t]he person who received the notice of violation was not the owner of the motor vehicle at the time of the violation"

An administrative officer employed by the city presides at the hearing, where the owner may "respond and present evidence on all issues of fact involved and argument on all issues of law involved." The owner may request that witnesses be subpoenaed, and examine witnesses who testify. No mens rea is required for liability. Owner and operator are jointly and severally liable for the fine, except that it is an affirmative defense if the operator was driving the vehicle without the owner's consent. A non-operating owner who is held liable may recover the amount of the fine from the operator. The owner may seek judicial review of an adverse decision by filing a petition in the Orleans Parish Civil District Court within 30 days.

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An earlier version of the ordinance delegated the initial enforcement decision to the contractor, but that arrangement violated the City's Home Rule Charter, and a state court enjoined the law's enforcement until the current ordinance was passed. The current ordinance is retroactive to the date of the original law's passage.

III. Discussion

Plaintiffs contend that the district court erred in concluding that the Ordinance imposes civil rather than criminal penalties. That determination requires courts to look initially to the legislature's intention. *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 493 (1997). The Ordinance repeatedly describes the fine as a civil penalty. However, a penalty can be criminal in nature, notwithstanding the legislature's intention, if the statutory scheme is sufficiently punitive in purpose or effect. *Id.* The Supreme Court has articulated seven factors that serve as "useful guideposts" for that determination.¹ *Id.* The only factor favoring Plaintiffs' position is the fact that some of the conduct that violates the ordinance would also be punishable as a crime, if done with the requisite mental state. That is not enough to overcome legislative intent. *United States v. Ward*, 448 U.S. 242, 249-50, 100 S. Ct. 2636, 2642 (1980). We agree with the district court that the Ordinance imposes a civil penalty. That conclusion disposes of the Plaintiffs' contention that the

¹ The factors are:

- (1) Whether the sanction involves an affirmative disability or restraint;
- (2) whether it has historically been regarded as a punishment;
- (3) whether it comes into play only on a finding of *scienter*;
- (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence;
- (5) whether the behavior to which it applies is already a crime;
- (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and
- (7) whether it appears excessive in relation to the alternative purpose assigned.

Hudson, 522 U.S. at 99-100, 118 S. Ct. at 493 (internal quotation marks and citation removed).

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Ordinance violates the *Ex Post Facto* Clause, U.S. CONST. art. I, § 10, cl. 1, which applies only to criminal sanctions. *Smith v. Doe*, 538 U.S. 84, 105-06, 123 S. Ct. 1140, 1154 (2003).

We next consider Plaintiffs' contention that the Ordinance does not supply constitutionally adequate process. The constitutional adequacy of the Ordinance's procedures is assessed by balancing the private and governmental interests concerned. *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 902-03 (1976). We consider, first, "the private interest that will be affected by the official action." *Id.* at 335, 96 S. Ct. at 903. In this case, the maximum fine is the relatively minor amount of \$380, or \$455 if the payment is overdue. Next, we consider "the risk of an erroneous deprivation" under the procedures provided. *Id.* Plaintiffs do not challenge any specific aspect of the procedures governing the administrative hearing the Ordinance provides. They contend that the hearing officer is not neutral, but a presiding official's being an employee of the municipal executive does not alone offend due process.² Plaintiffs also argue that requiring a driver to file a civil action in order to challenge the outcome of the initial hearing deprives them of due process because of the expense of initiating the civil action. However, unless a fundamental interest is at stake, the due process clause allows states to restrict access to judicial review of civil administrative proceedings. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 113, 117 S. Ct. 555, 562 (1996). No fundamental interest is involved here.³

² *See SDJ, Inc. v. City of Hous.*, 837 F.2d 1268, 1278 (5th Cir. 1988) (ordinance giving police chief power to determine whether to issue license to sexually oriented businesses does not offend due process because ordinance allowed judicial review and there was no evidence that the police chief was "inherently not neutral").

³ *See Ortwein v. Schwab*, 410 U.S. 656, 659-60 93 S. Ct. 1172, 1174-75 (1973) (no due-process right to waiver of fees for judicial review of administrative welfare-benefits determination, because right to increased welfare payments not a fundamental interest); *Seoane v. Ortho Pharm., Inc.*, 660 F.2d 146, 151 (5th Cir. 1981) (right to recover for injuries

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Finally, the private interests and risk of error are balanced against “the Government’s interest, including the function involved and the fiscal and administrative burdens that . . . additional or substitute procedural requirement[s] would entail.” *Mathews*, 424 U.S. at 335, 96 S. Ct. at 903. The City’s interest is to reduce the risk of road accidents. Though only a fraction of traffic violations cause an accident, the costs of even a low-speed collision can be severe, particularly if a pedestrian is struck. The features of the Ordinance’s adjudicatory scheme raised in this appeal fall comfortably within the “great leeway” given to governments in “protect[ing] public health and safety.”⁴ *See Mackey*, 443 U.S. at 17, 99 S. Ct. at 2620.

AFFIRMED.

caused by medical malpractice not a fundamental interest).

⁴ We express no opinion regarding the due process adequacy of features of the Ordinance’s procedures that the plaintiffs did not specifically raise in their appellate briefing (e.g., the Ordinance’s distribution of burdens of proof and the potential liability for allowing another person to drive one’s vehicle).

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See FED. R. APP. P. & 5TH CIR. R. 39.* Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ v. _____ No. _____

The Clerk is requested to tax the following costs against: _____

COSTS TAXABLE UNDER Fed. R. App. P. & 5 th Cir. R. 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket Fee (\$450.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
Total \$ _____					Costs are taxed in the amount of \$ _____			

Costs are hereby taxed in the amount of \$ _____ this _____ day of _____, _____.

LYLE W. CAYCE, CLERK

State of _____
County of _____

By _____
Deputy Clerk

I _____, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This _____ day of _____, _____.

(Signature)

*SEE REVERSE SIDE FOR RULES
GOVERNING TAXATION OF COSTS

Attorney for _____

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than \$0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5th CIR. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5th CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise;

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) if a judgment is affirmed, costs are taxed against the appellant;
- (3) if a judgment is reversed, costs are taxed against the appellee;
- (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of costs: Objections; Insertion in Mandate.

- (1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.
- (2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.
- (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk's request – add the statement of costs, or any amendment of it, to the mandate.

(e) Costs of Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

- (1) the preparation and transmission of the record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
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NEW ORLEANS, LA 70130

June 11, 2012

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or
Rehearing En Banc

No. 11-30711, Evelyn Bevis, et al v. City of New Orleans, et
al USDC No. 2:10-CV-4161

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. RULES 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. RULES 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The judgment entered provides that appellants pay to appellees the costs on appeal.

Sincerely,
LYLE W. CAYCE, Clerk

By: 
Rhonda M. Flowers, Deputy Clerk

Enclosure(s)
Mr. Carl A. Butler
Mr. William Scarth Clark
Ms. Jessica L Coco

Mr. Michael L. Fantaci
Mr. Brian Arthur Gilbert
Mr. Detrich Delaine Hebert
Mr. Harry Alston Johnson III
Mr. Peter S. Koepfel
Ms. Patricia S. LeBlanc
Mr. Allen Christopher Miller
Mr. Darryl M. Phillips
Mr. Harry A Rosenberg