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ELECTRONIC TOLL COLLECTION AND VIOLATION ENFORCEMENT

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Until a few years ago, toll collection was a simple matter: queue up, hand cash or tokens to an attendant or toss them into a basket, wait for a green light, and go. Crash gates stopped any non-payers, in the same way that cops on the scene can chase down speeders and red-light runners. Today, authorities are looking to replace toll collectors and policemen with electronic tolling and roadway cameras, but face challenges from two groups, (a) those that equate data collection with government surveillance and (b) those that pay tolls only under duress, reportedly as high as 8% of the motorists on electronic tollways.²

To fully realize the benefits from improved mobility, air quality, revenues and public service, states are taking measures to improve collections and re-examine their data privacy policies. Effective July 2007, Florida's legislature has enhanced penalty payment incentives and sanctions.³ On the same date, Ohio, which currently does not use electronic tolls, gave the Ohio Turnpike Commission the power to collect tolls electronically and reclassified non-payment from a minor misdemeanor to a civil penalty under rules that the Commission will write.⁴

Whether created by a legislature or an agency, any toll enforcement and data system in the United States operates under two primary constitutional and statutory restraints: (1) the separation and limitations of executive, legislative, and judicial powers under federal and state constitutions and (2) the preservation of individual liberty and due process rights.

In the context of toll systems, those limitations can be found in (a) the Eighth Amendment's prohibition of excessive fines, (b) the Fifth and Fourteenth Amendments' protection of life, liberty, and property from deprivation "without due process of law," (c) the Fourth Amendment's prohibition of unreasonable searches and seizures, (d) the Dormant Commerce Clause prohibition on state interference with interstate commerce, and (e) federal and state data privacy laws.

After reviewing those limitations to government actions, we surveyed recent court decisions that dealt with enforcement using data and photo image systems in order to gauge the judiciary's response to electronic enforcement systems when a potential "liberty" interest is at stake.

Toll Legislation and Authority or Agency Rules

Most court challenges to government action, do not raise constitutional issues, but concern an agency's interpretation of a statute. Even for the U.S. Supreme Court, less than half of the cases concern constitutional issues.⁵ In regard to toll authorities, the three most important statutes to review are their enabling statutes, the state's criminal statutes, and a federal data privacy statute that will be discussed in more detail later in this paper.

As a result, the government's first order of business is to identify the protected rights that its actions may impinge upon, and how those rights are protected in the state's criminal statutes. The toll authority will need to provide the right to challenge penalties ("due process"), the degree of which is a function of the significance of the claimant's loss and the government's interest.⁶ The next decision is how to set penalty amounts. The third is how to obtain, protect and use the state's data about the motorist. To reiterate, however, the greatest risk is the most obvious one: the authority's failure to comply with its own laws.⁷

1. Challenges to Toll Legislation

Whether the toll penalties are enacted by the legislature, as in Florida, or issued as rules, as in Ohio, can make a difference to the legal fortunes of our vigilant "a" group or non-paying "b" group of motorists. If embodied in statutory law, citizen suits are largely restricted to questioning whether the toll is really a tax prohibited from pledge to bondholders by the state constitution.⁸ Repealing or revising statutes by voting in new legislators can be cumbersome, but a citizen's primary right is to representation in government. Courts, however, will look harder at statutes that lack at least some form of individualized due process.⁹ More process is due for criminal matters than for civil matters, where only property interests are at stake.¹⁰

2. Challenges to Agency or Authority Rules

In contrast, when the legislature delegates rule-making to an agency, the permissible bases for legal challenges expand. When the legislature reserves toll rules to itself, what it loses in administrative flexibility and expertise, it gains in conformity to law and judicial deference. However, non-delegation has a price. The opportunity for broad public input and agency expertise can be lost, along with the chance for better rules from collecting data over a longer period of time. Technical innovations that the agency can implement quickly may also be missed.

When legislators do instruct an agency to use its administrative and fact-finding expertise to set up a civil penalty system, courts will generally defer to the agency's rules. The standard is generally known as the "delegation doctrine," derived from the U.S. Constitution's recognition that the law-making power is reserved to the legislature. If the legislative guidance is sketchy, or the agency is filling a "gap" in the statute, the court will take a deferential attitude in its examination whether the agency's rules are reasonable.¹¹ As we saw with statutes, that deference will end if the plaintiffs can identify a constitutional issue, such as the Eighth Amendment's prohibition of excessive fines, or a liberty interest that requires a right to be heard that has not been provided.

In the next sections, we examine data privacy, fines and relevant criminal enforcement procedure decisions.

Data Privacy

When a driver sets up a transponder account, he uses his credit card or check and thus provides personal identifying information.¹² Alternatively, a toll authority might take images of license plates at the toll gantry. Authorities can use transponder data or license plate images to trigger an electronic toll transaction by matching the data to existing motorist account records. That same process can also serve to track the movement of the vehicle and its owner. In either event, if a car fails to pay toll, a license plate image is available to use.¹³ Once forwarded to law enforcement, either state authorities or contractor collection agencies can determine who is the registered owner of the car and take appropriate action, typically beginning with a formal violation notice and request for payment of the unpaid toll plus a penalty.¹⁴ As a result, privacy concerns range from objections to roadway surveillance to data processing and vehicle identification errors to release of motorist data to third parties.¹⁵

1. Consumer Privacy Statutes and Civil Actions

To continue using Florida as an example, the state's agreement with transponder users provides that personal information will not be shared.¹⁶ Florida in addition follows the federal Driver's Privacy Protection Act of 1994. The Act was passed by Congress to regulate the disclosure of personal information obtained by states through driver license applications and vehicle registration. The Act prohibits the release and use of certain personal information from state motor vehicle records, and provides for criminal and civil penalties plus a civil cause of action for any violations.¹⁷ (A copy of the Act is attached to this article.)

Toll authorities have implemented data privacy policies to help comply with their motorist agreements and the Act. In addition to personal data, cameras can also be a form of "data collection" that present privacy concerns. For example, the Garden State Parkway asked internet sites to remove a video of a dramatic crash at a toll booth that was released without authorization. The authorities reasoned that the cameras were for "operation, law-enforcement reasons, not for entertainment value." At that time, a dozen employees had access to the footage. Since then the policy has been changed to limit access to fewer employees.¹⁸

Despite that driving is a privilege, and not a right, and thus a property interest subject to widespread regulation, the Driver's Privacy Protection Act and related state and tort law protections will likely continue to be used by citizens to challenge civil enforcement procedures that collect data from motorists.

The privacy rights analysis is complicated by the fact that toll enforcement is partly run by non-government parties such as contractors and collection agencies. The Fourth Amendment only protects citizens from *governmental* intrusion, while the commercial use of personal information is controlled through the civil law of torts designed to prevent unwanted publication by private parties. Safeguards from governmental intrusion differ in intent and effect, and do not establish a general constitutional right to privacy. The Fourth Amendment, for example, may

prohibit or sanction one action that would be treated differently if taken by a private party. For example, a toll authority might be able to release commercial truck traffic “E-ZPass” data which a competitor might be barred from obtaining under a state trade secret law.

2. State and Federal “Constitutional” Privacy Rights

State constitutions and state courts have also addressed data privacy. For example, the Florida Constitution provides that “[e]very natural person has the right to be let alone and free from governmental intrusion into the person’s private life....”¹⁹ Ohio courts have interpreted federal constitutional provisions as a springboard to articulate a “federal constitutional privacy right.”²⁰ These alleged constitutional rights might be used by citizens who allege that their privacy is being invaded when a toll agency photographs their license plates and accesses their personal information without their permission.

The law to date largely turns on how much privacy one can expect in a certain place. As one commentator has written, whether a person can expect information to be private depends upon such factors as “(1) the person’s relationship with the state; (2) the extent to which the person had prior notice of the possibility of a privacy intrusion (a person is held not to have a reasonable expectation of privacy in things voluntarily held out to the general public); and (3) ... a diminished expectation of privacy for a person who engages in a heavily regulated industry.”²¹

3. Data Use in Criminal Enforcement

To the extent that a toll civil enforcement program imposes potential criminal sanctions, the law of privacy blurs with rights protected under the Fourth Amendment. Essentially, the burden shifts to the state to prove that its actions in obtaining and using personal information are reasonable.

For example, a court will need to find some rationale for a police officer reaching into a car and moving some papers to look at the vehicle identification number (VIN). A court may ultimately hold that the expectation of privacy is diminished since the VIN is part of the state’s regulation of cars and is required to be visible from outside the car. While a VIN may not lead to obtaining more personal information, a license plate number certainly will. Thus a citizen may succeed in a privacy lawsuit if he can show that the threat of invasion of privacy outweighs any reason the state provides for relying on license plates for enforcement.²²

Ohio courts have held that a driver has no reasonable expectation of privacy in his license plate.²³ However, the cases involve criminal enforcement. In *Hogan*, for example, a police officer randomly entered the license plate number of defendant’s car on a slow night and discovered that the owner’s license was suspended. The court reasoned that “[o]ne does not have any expectation of privacy in a license plate number which is required to be openly displayed on his vehicle.” The court concluded that “a scan of a computer data bank...involves no intrusion” so that “[s]uch a ‘search’ does not interrupt a driver in his travel, nor restrain his person or detain him” and “does not constitute a ‘stop[.]’”

Arguably the court considered this use of the information as legitimate because a police officer was providing safety and law enforcement. However, if license plate information is

captured by the cameras of a private contractor, and further personal information is extracted from a database using the license plate number, and then used for non-enforcement and non-government purposes, the privacy concerns of toll customers may outweigh any economic reason for using plate numbers.

In short, a citizen may be successful in arguing that a private company does not have the right to randomly access their private information, even if a police officer does. For example, a D.C. court did not allow access to personal license information to a lawyer seeking new clients. Arguably, the court would find release of the information to other businesses also impermissible.²⁴

Excessive Fines

In an attempt to collect or deter unpaid toll fees, toll authorities can impose increased fines on their customers for non-payment. A system that imposes steep penalties faces the threat of being invalidated on either constitutional grounds or as arbitrary and capricious. In California, as of the date of this article, a couple faces \$90,000 in fines for failure to pay tolls.²⁵ The drivers continued to drive after their transponders expired claiming they were not aware of the expiration nor notices that the Orange County Transportation Authority says that it sent to them. While the fees the drivers face amount to \$739.83, the fines are \$90,000 because fines increase each time the driver gets a new notice for repeat and unpaid violations.

A class-action lawsuit was also filed in California against the Orange County Transportation Authority where the plaintiffs allege they have incurred \$336,000 in penalties after failing to pay \$2,500 in toll fees.²⁶ Plaintiffs question whether penalties up to \$500 per violation can be assessed when an owner fails to pay the fine. A treasurer at the transportation authority in turn claimed that plaintiffs are “using a commodity that they are not paying for,” and that “penalties escalate to \$500 only if the violator fails to deal with the problem[.]”

The Eighth Amendment prohibits the imposition of excessive fines.²⁷ The Ohio Constitution also provides that “excessive fines” shall not be imposed.²⁸ The Florida Constitution similarly provides that “[e]xcessive fines...are forbidden.”²⁹ Most state governments seek to protect their citizens from punishments that outweigh the wrong committed. As the Supreme Court has held, “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”³⁰ The Court has also held that the issue is not whether a particular act is a criminal or civil penalty, but whether it is a “punishment,” and, therefore, subject to review under the Eighth Amendment’s prohibition of “cruel and unusual punishments.”³¹

If a penalty system is reviewed under administrative law principles, a court will normally review the fine along with any other rules that a citizen chooses to challenge to determine if it is “arbitrary and capricious.” That review requires the citizen to meet a higher burden, with the presumption that the agency’s rules are reasonable. Courts also will frequently affirm agency decisions in the face of a challenge that the agency has gone beyond the authority confirmed upon it by the legislature. A citizen wishing to challenge a toll rule that permits high penalties,

therefore, faces a high hurdle. Moreover, administrative courts that typically hear appeals of agency decisions do not have the power to address constitutional challenges.

Civil v. Criminal Enforcement Procedures

Although a toll agency differs from a traffic enforcement agency, whose concern is public safety, the combination of cars and cameras in both allows us to draw certain comparisons. In both systems, citizens are “caught” by camera or video images and mailed letters reciting their violation and option to either pay or obtain a hearing. Several recent opinions from various jurisdictions have reviewed civil penalty schemes in electronic traffic or toll infractions enforcement. While some lower courts simply held the scheme unlawful due to the government’s failure to follow its own notice requirements, the bulk of the cases examine how the systems fit within general state enforcement laws for similar or identical activity.³²

The combination of venter contracts, cash-strapped cities, and politics can be potent. For example, in Ohio, where its Supreme Court will rule on a citizen challenge this year to Cleveland’s “electronic” civil enforcement system, the Ohio legislature passed restrictions on such speed and red-light camera systems in December 2006 due to political pressure brought by constituents. The out-going governor vetoed the legislation in part because it would have impaired Cleveland’s five-year, \$3.3M a year contract with ACS State & Local Solutions, which installed the cameras.

One core challenge to these systems is unique to cities that establish them. Given their limited “home rule” authority, cities have only such power to make laws as is expressly granted to them under the state constitution and not in conflict with general state law. Plaintiffs have challenged that the cities have transformed violations under state uniform traffic codes from criminal into civil penalties in violation of their home rule power. While those limitations do not apply to toll authorities, which are created by the legislature or a state’s constitution, the cases nonetheless are instructive if only to illustrate the willingness of some courts to invalidate high dollar government contracts.

Ohio

A city may by ordinance create an administrative proceeding where red light camera tickets (a civil liability) can be contested by owners who can avoid monetary liability by rebutting the presumption that the owner was the driver at the time.³³ In *Scott*, the Ohio Supreme Court affirmed dismissal of a writ of prohibition sought by car owners who received tickets for traffic violations caught by camera because “an adequate remedy in the ordinary course of law by way of administrative proceedings...and by appeal of the city’s decision to the common pleas court” existed. The Ohio Supreme Court will decide this year whether the electronic civil violation systems violates the state constitution’s ‘home rule’ provisions³⁴ The plaintiff in the case alleges that “the cities have turned a criminal violation into a civil matter with a sole purpose of making money.”³⁵

Minnesota

The Minnesota Supreme Court has struck down red light camera systems which impose a petty misdemeanor liability on owners of cars through a rebuttable presumption that the owner was the driver at the time.³⁶ In *Kuhlman*, the owner asserted that the ordinance conflicted with state law which did not provide for owner liability. The court reasoned that ordinances are not valid if they are in conflict with state law which “imposes a uniformity requirement on traffic regulations throughout the state” unless the ordinance is expressly authorized. The court concluded that state law only permitted regulation of traffic by ordinance “by means of police officers or traffic-control signals,” and held that the ordinance was in conflict with state law because the ordinance imposed more general liability on car owners than state law. Moreover, the court held that “an ordinance cannot provide less procedural protection to the person charged than would be available if the person were charged under [state law].” Thus although a petty misdemeanor is not a crime, “the rules of criminal procedure specifically apply to petty misdemeanors” and require “that a defendant be ‘presumed innocent until proven guilty beyond a reasonable doubt.’”

District of Columbia

The District of Columbia Appellate Court held that due process is not violated when civil liability for traffic violations caught on camera is preliminarily imposed on the registered owner of the car although he may not be driving the car at the time.³⁷ In *Agomo*, an owner whose car was caught speeding eighteen times asserted that he was not driving the car at the time nor knew who was. He asserted that civil liability for these tickets violated his due process rights. The court reasoned that a rebuttable presumption that the owner of the car was driving at the time of the violation and imposition of vicarious liability on the owner met due process.³⁸

The court did not find that the rebuttable presumption violates due process by impermissibly shifting the burden of proof to the car owner. The court noted that presumption of innocence is inapplicable to civil proceedings and that a “presumption of liability is not a novel concept in civil cases.” The court reasoned that the state could presume one fact from another (the owner of the car is the person driving) as long as there is “some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be purely arbitrary and mandate.” The court also noted that “a presumption is valid as long as it does not preclude a defense.” Here, the driver can “rebut the presumption by identifying a third-party driver.”

Plaintiffs also asserted that their due process rights were violated because a private company was administrating and profiting from the traffic enforcement system. The court noted that the company “merely makes factual determinations about violations of speed or red-yellow light laws” so that “any financial compensation received by [the company] has no effect on the adjudicatory process.”

Iowa

An Iowa district court declared a red-light camera system illegal because it conflicts with Iowa law which provides license points and criminal penalties.³⁹ The driver paid the \$45 civil

fine after receiving notice in the mail stating that she would face a \$130 penalty and mandatory court appearance if she failed to pay. The driver sued claiming that the municipal code conflicted with Iowa law. The city argued that the plaintiff had already voluntarily paid the fine. The court ruled that the decision to pay was not voluntary because she decided to pay in light of the mandatory penalty and court appearance she otherwise faced. Under Iowa law, running traffic lights is considered a misdemeanor. Under municipal law, the driver faces a civil penalty. The court reasoned that because the municipal ordinance conflicted with state law by having a different fine structure it also conflicted with the uniformity in traffic laws requirement and was “of no force or effect.”⁴⁰

Conclusion

The Florida Turnpike Enterprise and the Tampa-Hillsborough County Expressway Authority reported at least \$16 million in lost toll revenues in FY 2004-05, while the Orlando-Orange County Expressway Authority reported a \$6 million loss. These agencies also reported spending more money last fiscal year to contact and litigate toll-plaza violators than they collected.⁴¹

Florida’s 2007 legislative amendments provide a number of incentives for motorists to pay faster and avoid court hearings, if the driver elects not to pay the penalty, and requests a court hearing, he or she is faced with a mandatory \$100 fine. Any settlement before the hearing requires payment of a minimum \$50 fine, and imposes a risk of license suspension if the person is convicted of 10 violations within a 36 month period.⁴² The reason for the legislative changes appear to be the increase in the number of motorists, particularly repeat offenders, speeding through toll plazas without paying tolls or without transponders, or obscuring license plates.

Given the constitutional and statutory limitations discussed in the cases we reviewed, the line between permissible and impermissible use of the civil process can be difficult to find at times. Individual violations of privacy, libel and slander, false arrest, and malicious prosecution claims need to be guarded against. In addition, class actions brought to challenge agency rules or due process are foreseeable.

Ever since the U.S. Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), asserted the power to declare legislation unconstitutional, citizens have used the courts to redress claims of excessive government intrusion. As these legislative changes and judicial disputes demonstrate, states with extensive toll authorities are looking for ways to lessen their administrative burden and increase their collections. We expect the questions presented in this article to be resolved over time as both government and the transportation industry address the country’s critical transportation issues in the coming years.

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contractors and consultants that he spoke with in the preparation of the article. The views and opinions in the article, however, are his alone.

² Richard K. Carrier & Martin B. Greenbaum, Tackling Enforcement and Collection in Today's Tolling Environment, Tollways, Spring 2007. In Florida, drivers can pay their toll by using coins. They can also pay toll by purchasing transponders that are attached to the windshield of the car. As the car moves through the toll lanes, it transmits radio signals to sensors in the toll booth. Through the signals, the proper amount of toll is deducted from the account of the owner. A credit card or check information is needed to set up a transponder account. Sun Pass website: <http://www.sunpass.com/howitworks.cfm>.

³ Fla. Sess. Law Serv. Ch. 2007-196 (C.S.C.S.H.B. 985).

⁴ OHIO REV. CODE ANN. §§5537.04, 5537.16, and 5537.99.

⁵ Linda Greenhouse, *A Devil in the Details, But Not the Constitution*, N.Y. TIMES, May 28, 2007.

⁶ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁷ If private parties are involved in collections and enforcement, contract rules will also incorporate state constitutional prohibitions such as the general ban on giving or loaning credit to private enterprise or pledging the state's general revenues in a for-profit venture. *Taylor v. Commr's of Ross County*, 23 Ohio St. 22, 78 (1872).

⁸ Legislative publication of a statute satisfies the notice requirement of procedural due process. The leading court decision is *Bi-Metallic Ins. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915), in which Supreme Court Justice Holmes held that "it is impracticable that every one should have a direct voice in [a rule's] adoption." Challenges to toll fees as unconstitutional taxes meet with mixed results, even within the same state. For example, in *State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1994), an action was brought challenging the legality of the city's transportation utility bonds. The Florida Supreme Court held that "transportation utility fees used to finance bonds were unauthorized tax, rather than valid user fee, and thus bond issue was unauthorized and invalid." In contrast, in *Gargano v. Lee Cty. Bd. of Cty. Comm'rs*, 921 So. 2d 661, 668 (Fla. Dist. Ct. App. 2006), the court held that toll at issue was a user fee and not a tax. The court reasoned:

"Ms. Gargano argues that the bridge toll is really a tax because she does not pay it 'by choice.' It is true that anyone who lives on Sanibel Island or Captiva Island and does not own a boat or helicopter must pay this toll to reach their home from the mainland. This is not a situation in which the traveler has other, longer roadways to reach the same location. However, the concept of "choice" for defining user fees is designed to distinguish a tax whose payment can be compelled from charges for services that one can avoid. Ms. Gargano can live elsewhere in Lee County. She can choose to stay on the island and not visit the mainland. The County cannot compel her to use the bridge or pay the fee. As a practical matter, she may not see many available options, but as a legal matter this charge is not a tax." *Id.* at 668.

⁹ In *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989), the Court upheld a statute authorizing an agency to set user fees for pipeline companies, and in *National Cable Television Ass'n v. U.S.*, 415 U.S. 336 (1974), the Court permitted fees that were set to recoup the costs of regulatory benefits for the communication industry as calculated by the agency. The leading administrative due process case is *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁰ In *Austin v. U.S.*, 509 U.S. 602, 608 n.4 (1993), the Court summarized these differences as follows: As a general matter, this Court's decisions applying constitutional protections to civil forfeiture proceedings have adhered to this distinction between provisions that are limited to criminal proceedings and provisions that are not. Thus, the Court has held that the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings. . . but that the Sixth Amendment's Confrontation Clause does not. . . It has also held that the due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt . . . does not apply to civil forfeiture proceedings.

Id. at 608 n.4 (internal citations omitted).

¹¹ See *Chevron v. NRDC*, 467 U.S. 837 (1984), in which the Court first announces its two-step analysis that generally defers to agency discretion. However, in its recent decision on “global warming,” the Supreme Court showed that it would equally severely test an agency’s rationale for non-action if it found clear legislative direction to the contrary. *Massachusetts v. EPA*, ___ U.S. ___, 127 S. Ct. 1438 (2007).

¹² FLA. STAT. § 338.155(6) (2007). The statute provides that:

Personal identifying information provided to, acquired by, or in the possession of the Department of Transportation, a county, or an expressway authority for the purpose of using a credit card, charge card, or check for the prepayment of electronic toll facilities charges to the department, a county, or an expressway authority is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

FLA. STAT. § 338.155(6).

California, another state that uses electronic toll payment, also has a privacy policy which provides that: “Any information obtained pursuant to this article through the use of automated devices shall not be used for any purpose other than to identify, and obtain the mailing address information of, toll evasion violators, to facilitate the serving of notices of toll evasion violations and notices of delinquent toll evasion violations.”

CAL. VEH. CODE § 40273 (2007).

¹³ FLA. STAT. § 14-100.002(2)(b) (2007).

¹⁴ § 14-100.002(1)(b).

¹⁵ Thus privacy concerns about “roadway surveillance” include “interests in precluding misuse of information regarding one’s location, as well as autonomy interests in not having one’s activities on the road scrutinized and information about them collected without one’s consent.” Dorothy J. Glancy, *Privacy on the Open Road*, 30 OHIO N.U. L. REV. 295, 365 (2004).

¹⁶ The SunPass Customer Agreement posted on the website of the transponder service provider states that: “FDOT respects the privacy of all account holders. FDOT does not sell or share its customer list with outside marketers. In addition, Prepaid Account information is exempt from disclosure under Florida’s public records law, pursuant to Section 338.155(6), Florida Statutes, and can be obtained by persons outside of FDOT or authorized law enforcement agencies only by a lawfully issued subpoena or court order.”

SunPass Website: <http://www.sunpass.com/agreement.cfm>.

¹⁷ 18 U.S.C. §§ 2721 – 2725. Prior to the passage of the Act, information of drivers was public information and states routinely sold the information to businesses and charities. Heather Hayes, *U.S. Supreme Court Takes up Driver’s License Data Privacy*, CNN.COM, May 21, 1999. Some argue that the Act was passed in the aftermath of the murder of an actress whose home address was obtained through the California Department of Motor Vehicles. *Id.* The Supreme Court, in *Reno v. Condon*, 528 U.S. 141 (2000), found the Data Protection Act of 1994 to be constitutional. There are a number of exemptions from the general prohibition on disclosure. The data can be used for law enforcement by the state or private contractors acting on behalf of the state. In addition, “authorized recipients,” a term not defined by the statute, can resell or redisclose personal information for any purpose. However, the penalties for wrongful interpretation of the statute’s meaning are (1) actual damages (not less than liquidated damages in the amount of \$2,500); (2) punitive damages; (3) attorneys’ fees and other litigation costs; and (4) preliminary and equitable relief.

¹⁸ Thomas Barlas, *Parkway Limits Access to Road Video After Crash*, PRESS OF ATLANTIC CITY, May 24, 2007. Contractors working for the government are similarly at risk. In nine currently pending class actions, motorists

asserts that a company illegally mailed vehicle registration notices that included advertisements. Melissa Campanelli, *Motorists sue Imagitas Over Use of Personal Information*, DM NEWS, April 11, 2007. Plaintiffs claim that their privacy is invaded when the company is allowed access to names and addresses of drivers. The defendants assert that the advertisement comply with exceptions in the Driver's Privacy Protection Act. The contractor pays the state to do the mailing and, in turn, gets paid by advertisers, who do not have access to the information received by the contractor from the state.

¹⁹ FLA. CONST. art. I, § 23. However, most civil rights claims under 42 U.S.C.A. § 1983 against state governmental officials for public disclosure of private matters have failed because there was no reasonable expectation of privacy in information disclosed to the police or medical staff when seeking their help. *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202 (3rd Cir. 1991).

²⁰ *Johnson v. Ferguson-Ramos*, No.04AP-1180, 2005 WL 1515324, at *9-10 (Ohio Ct. App. 2005) (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)) (“[T]he federal constitutional privacy right protects against the government disclosing highly personal information[.]”). Such constitutionally protected personal information depends, in part, upon the intimate, personal nature of the material that the government possesses. *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998)(quoting *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986)). As an example, the federal constitutional privacy right prohibits the government from releasing to the public an individual's social security number. *State ex rel. Beacon Journal Publishing Co. v. Akron*, 70 Ohio St. 3d 605, 607 (1994).

²¹ Mary Lehman, *Are Red Light Cameras Snapping Privacy Rights?*, 33 U. TOL. L. REV. 815, 817 (2002).

²² See *New York v. Class*, 475 U.S. 106, (1986).

²³ *Akron v. Hogan*, No. 23149, 2006 WL 3208591, at *6 (Ohio Ct. App. 2006).

²⁴ *Wemhoff v. District of Columbia*, 887 A.2d. 1004 (D.C. 2005). In *Wemhoff*, an attorney requested from the D.C. Department of Motor Vehicles (DMV) “[a]ll records- with redactions as necessary... to protect personal identity- of all motorists who were caught” by red-light cameras at a certain street including addresses under the D.C. Freedom of Information Act. The DMV responded that even if it could fulfill the request, it would not disclose the address information. While D.C. law allows access to driving records of any person including accidents and convictions information, the court restricted such use to people who may have been injured and were seeking compensation. Since the plaintiff wanted information “to solicit persons for his lawsuit” the court concluded that he “cannot gain access to the information he desires for his stated purpose[.]” The court also did not grant access to the addresses under the Driver's Privacy Protection Act exception “[f]or use in connection with any civil... proceeding” because such use, the court reasoned, is limited to using the information as “background work or search for material which would determine, substantively, whether one has a viable theory of litigation” but not to solicit clients. The court held that private information could to be accessed by “government agencies or their agents... [and] licensed private investigative or security entities... for the purpose of ensuring driver or public safety... or accuracy in legitimate business records... and to investigate . . . insurance claims.”

²⁵ Dana Parsons, *Pair of Commuters Find Themselves in Fine Mess*, L.A. TIMES, March 6, 2007.

²⁶ Phil Pitchford, *Drivers Strike Back at 91 Toll Fines*, INLAND NEWS, March 7, 2007.

²⁷ U.S. CONST. amend. VIII.

²⁸ OHIO CONST. art. 1, § 9.

²⁹ FLA. CONST. art. I, § 17.

³⁰ *U.S. v. Bajakajian*, 524 U.S. 321, 327-328, 334, 336 (1998), citing, *Austin v. United States*, 509 U.S. 602, 609-610 (1993). See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *United States v. Ward*, 448 U.S. 242 (1980).

³¹ Id. at 610.

³² In *Stern v. City of Steubenville*, Ohio (March 15, 2006) (see www.sternlawyer.com), the court invalidated all citations issued through Steubenville's automated speed camera enforcement program, based, in part on the City's failure to notify the public in advance of the location of the cameras. Plaintiff also alleged that unlike the state's Uniform Traffic Code, Steubenville's system does not impose points on a driver's record. Susan Vinella, *Red Light Cameras Face Challenge in Lawsuit*, Plain Dealer, Dec. 12, 2005, at B1. Notice provisions are not uncommon in toll statutes. For example, in Florida, citations for speeding within a toll collection zone are twice the normal fine, but only if the authority posts a warning. FLA. STAT. § 318.18.

³³ *State ex rel. Scott v. City of Cleveland*, 112 Ohio St. 3d 324 (2006).

³⁴ Reginald Fields, *High Court to Hear Camera Challenge*, PLAIN DEALER, Feb. 8, 2007.

³⁵ Duane Pohlman, *Woman's Lawsuit Threatens to Remove Red-Light Cameras*, NEWSNET5, Feb. 4, 2007.

³⁶ *State v. Kuhlman*, 729 N.W.2d 577 (Minn. 2007).

³⁷ *Agomo v. Fenty*, 916 A.2d 181 (D.C. Ct. App. 2007).

³⁸ In order to determine if due process is violated the court looks at "what process the State provided, and whether it was constitutionally adequate." Id. at 191. As part of a balancing test, the court looks at the private interest affected, the risk of erroneous deprivation of the interest through the current procedure, the probable value of additional procedures, and the government's interest and burden in getting additional procedures. Id.

³⁹ *Iowa: Court Declares Photo Enforcement Illegal*, THENEWSPAPER.COM, Jan. 2, 2007.

⁴⁰ *Rhoden v. City of Davenport*, No. 106960, Iowa District Court, Scott County (Jan. 2, 2007). The city plans to appeal the decision to the Iowa Supreme Court. *Davenport Keeps Traffic Cameras Despite Judge's Ruling*, SIOUX CITY JOURNAL, Jan. 5, 2007. The city plans on holding onto citations and issuing them retroactively if the Supreme Court rules in its favor. Id.

⁴¹ Fl. Senate Professional Staff Analysis and Economic Impact Statement, S.B. 1928 (April 25, 2007).

⁴² Fla. Sess. Law Serv. Ch. 2007-196 (C.S.C.S.H.B. 985).