Case No. S202483

IN THE SUPREME COURT

OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

STEVEN EDWARD GRAY,

Defendant/Appellant

After a Decision by the Court of Appeal
Second Appellate District, Division Three
2nd Civ. No. B236337; App. Div. No. BR048502;
Trial Court Case No. C165383 – Hon. Lawrence H. Cho

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

California's Automated Traffic Enforcement System ("ATES") legislation (Vehicle Code, §21455.5[1]) was enacted to prevent drivers from running red lights, in an effort dedicated to saving lives and avoiding injuries on the streets of our cities. Since the enactment of section 21455.5 in 1995, the ATES has been found to be remarkably effective in reducing the incidence of traffic accidents resulting from red light violations.

A proper construction of the provisions of section 21455.5, of course, must be informed by its clear and laudable purpose. In the present case, however, Appellant – convicted of running a red light as recorded by the ATES -- champions an overly-narrow reading of the statute that would fly in the face of the strong, safety-minded purpose of the ATES program. Specifically, Appellant argues that the warning notices and public announcements provided for in 21455.5(b)[2] -- and intended to avoid unfair surprise by giving one-time, advance general notice to the public of the arrival of the ATES program in a locality -- must be given anew each time a municipality adds a ATES intersection to its program. That interpretation is patently wrong. Appellant's theory would amount to a "get out of jail free" card for red light violators for a month at each new intersection added to a city's program. It is clear from the language and legislative history of section 21455.5(b) that our Legislature never intended a result that would so patently frustrate the purpose of the ATES legislation.

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[1] Unless otherwise indicated, all subsequent statutory references are to the California Vehicle Code.

[2] Section 21455.5 provides: "Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program."

Specifically, section 21455.5(b) provides for the giving of warning notices rather than citations for the first thirty (30) days after the overall ATES program is introduced in a municipality, as well as a public announcement of its presence thirty (30) days before citations are issued. As established in this brief, the warning notices and public announcement provisions of the ATES are "programmatic" rather than intersection specific. In this case, the Second Appellate District of the Court of Appeal so decided, holding that a local jurisdiction must comply with section 21455.5(b) only once, *i.e.*, when the ATES program is initiated in a locality. (*People v. Gray* (2012) 204 Cal.App.4th 1041, 1051). Finding that the City had complied with the section 21455.5(b) requirements when it first implemented its ATES program in 1998, the Court of Appeal rejected Appellant's contention that the City should have issued warning notices and made a public announcement *again* when the intersection of his violation was added to the City's program eight years later. In any event, Appellant would not have benefited from an intersection-specific interpretation of section 21455.5(b), given that he received his citation almost two years after the expiration of the thirty (30) day period following installation of the ATES equipment at the intersection of his violation.

Moreover, the Court of Appeal held that even if the City had not complied with warning notices and public announcement requirements, that fact would not – as Appellant argues – suggest that the trial court was without jurisdiction to hear his section 21453a violation nor would it affect the admissibility of the ATES evidence supporting his violation. In prosecuting Appellant's violation of the red light law --section 21453a -- the People had no burden to prove compliance with the administrative provisions of section 21455.5 because such compliance does not constitute an element of the prima facie case of violation of section 21453a. Nor does section 21455.5(b) contain any remedy of or consequence for noncompliance by a municipality. Thus, even a finding of noncompliance by the

City would – at most – suggest harmless error providing no basis for reversal of the judgment of conviction against Appellant.

Similarly, Appellant's constitutional arguments provide no grounds for reversal of his conviction because, as noted above, Appellant is without standing to make such a challenge relative to section 21455.5(b). Appellant received his citation long after the expiration of the thirty-day period following installation of the ATES equipment at the intersection of his violation. As a result, Appellant cannot argue – as he must – that the law he is challenging injuriously affected him because even if intersection-specific warning notices had been given, Appellant would not have been among the drivers receiving such a notice in lieu of a citation. In any event, Appellant's void-for-vagueness, discriminatory enforcement and due process claims are unsupported by the facts of this case or any applicable law.

Indeed, as detailed below, each of Appellant's arguments contradicts the plain language and the legislative history that express the purpose of section 21455.5, which give overwhelming support to the decision of the three courts that have decided this case. It is fitting that Appellant's interpretation fails because programmatic -- rather than intersection-specific -- notice has the beneficial effect of enhancing the deterrent effect of the program across the entire jurisdiction making drivers more vigilant at intersections throughout the city. This Court should refuse to adopt Appellant's "beat the system" per-intersection interpretation of section 21455.5(b) because it contravenes the letter and the spirit of section 21455.5.

Accordingly, Respondent, the People of the State of California, respectfully requests that this Court affirm the judgment of conviction against Appellant and order that this case be republished.

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SUMMARY OF FACTS
& PROCEDURAL HISTORY

Enactment Of The Automated Traffic Enforcement System

The ATES was enacted in 1995, having developed from similar legislation applied to railroad grade crossings and extended the use of automated systems to, ***inter alia***, intersections. Section 21455.5 included, *inter alia*, a 30-day public education/publicity program to alert the public prior to the arrival of the ATES program in a locality. That thirty day advance program – provided for in section 21455.5(b) includes the issuance of warning notices rather than citations during the first thirty days of the operation of the ATES program in a locality as well as public announcement prior to the giving of citations. (*Id.*).

The current iteration of section 21455.5(a) establishes the authority for the ATES, stating "[t]he limit line, the intersection, or a place designated in Section 21455, where a driver is required to stop, may be equipped with an automated enforcement system ..."

Section 21455.5(b), the provision at issue in this appeal, provides, as follows:

> "Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program."

The Effectiveness of the ATES In California

In July 2002, the California State Auditor completed its rigorous study of the efficacy of the ATES programs operating in California that the Legislature had ordered undertaken by that office.[3] The CSA's report concluded that the number

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[3] See, Assembly Third Reading, Assembly Bill No. 1022, attached to the People's concurrently-filed Request to Take Judicial Notice as Exhibit A. The CSBA report can be found at (http://www.bsa.ca.gov/pdfs/reports/2001-125.pdf).

of accidents related to red light violations usually declined after the introduction of red light cameras. (Assembly Third Reading, Assembly Bill 1022, p. 3).[4] The CSA also reported that five local governments visited had decreased accidents traffic lights between 3% and 21% after the implementation of the ATES in those localities. And "[e]ven more telling, after San Diego suspended use of its program...accidents caused by red light violations increased citywide by 14%, based on four months of data." (*Id.*).

How The ATES Operates in the City

Evidence of the manner of operation of the ATES equipment was presented at the trial of Appellant's infraction (Clerk's Transcript ("C.T.") pp. 652-654), as noted by the Court of Appeal: "[s]everal "loop" metal detectors buried underneath the roadway that sense the presence of vehicles approaching a lighted intersection, and are linked to cameras programmed to take still photographs and a video of a suspected violator. Those cameras are activated when the traffic light at the intersection turns red for oncoming traffic. The sensors detect the presence of oncoming cars, calculate their speed, and send timed signals to the cameras to shoot photos and videos to capture evidence of the suspected offender. The ATES places a date and time stamp on the photographs and videos along with recorded electronic data showing the speed of the suspect as calculated by the buried loop sensors, the amount of time the light was red when each photograph was taken, and the time each photograph was taken. This information is stored digitally and transmitted through the Internet to the company in Arizona with which Culver City has contracted to operate the ATES. Company employees review the information and transmit it to Culver City police officers to review for red light violations." (*People v. Gray*, *supra*, 204 Cal.App.4th at 1048).

[4] Attached as Exhibit A to the People's concurrently-filed Request to Take Judicial Notice.

The City's Compliance With Section 21455.5(b)

In compliance with the requirements of section 21455.5(b), the City issued warning notices in lieu of citations for thirty days after the implementation of the ATES program in the City and made the requisite a public announcement regarding the advent of the program. These facts were the subject of a stipulation at Appellant's trial. (CT, p. 631.)

> "Culver City has only conducted such warning notices and public announcements prior to the commencement of the entire program in Culver City in 1998, and that no such notices or announcements were done specifically for the intersection (at the intersection of Washington Boulevard and Helm[s] Avenue, Culver City) at which defendant was photographed running a red light." (CT. p. 631). [5]

Appellant's Violation and Court Proceedings Regarding The Violation

Appellant was charged on November 21, 2008 with an infraction for violation of section 21453a, *i.e.*, failure to stop at a red light signal at the intersection of Washington Boulevard and Helms Avenue in the City. His violation was recorded by ATES equipment at the intersection of his violation.

At trial, Appellant moved to dismiss on the ground that the 30–day warning notice period and public announcement requirements of the ATES enabling statutes, as provided in section 21455.5(b), require that warning notices should have been issued and a public announcement should have been made when ATES equipment was installed at the particular intersection of Appellant's violation. The City stipulated that it had issued warning notices and public announcements prior to the commencement of the entire program in the City in 1998, and that no such notices or announcements were done specifically for the intersection of Appellant's violation. (CT. p. 631). The trial court found that in so doing, the City had complied with section 21455.5(b) and denied Appellant's motion, holding that warning notices and public announcements are required only prior to a locality's

[5] To the extent that Appellant has argued that the City stipulated to noncompliance with section 21455.5(b), that assertion misstates the record.

implementation of the overall ATES system and not anew for and at each intersection added to the program. The trial court held that the ATES evidence was admissible and found Appellant guilty under section 21453a of violating the red light law. (see, *People v. Gray, supra,* 204 Cal.App.4th at 1052.).

The Appellate Division of Los Angeles County Superior Court affirmed the trial court's judgment of conviction in *People v. Gray* (2011) 199 Cal.App.4th Supp. 10, agreeing with the trial court's holding that the warning notices and public announcement requirements are programmatic rather than intersection-specific. (*People v. Gray, supra,* 199 Cal.App.4th Supp. 10, 13-15).

The Second Appellate District Court of Appeal ordered the case transferred, ultimately affirming the judgment of conviction against Appellant in its published opinion, and stating that as to section 21455.5(b) "[w]e hold that the local jurisdiction need only provide one 30–day warning notice period and one 30–day public announcement" (*Id.* at p. 1045) such that the City had complied with that requirement. The Court of Appeal also held that compliance with section 21455.5(b) is not an element of violation of section 21453a and that noncompliance therewith provides no basis for the exclusion of evidence obtained from the ATES. (*People v. Gray, supra*, 204 Cal.App.4th at p. 1051). In so holding, the Court of Appeal in *Gray* expressly disapproved the holding by the Orange County Superior Court Appellate Division in *People v. Park* (2010) 187 Cal.App.4th Supp. 9 that section 21455.5(b) should be interpreted in an intersection-specific manner. (*Id.* at p. 1045).

This Court granted Appellant's Petition for Review on June 20, 2012.

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LEGAL AUTHORITY

I.

THE CITY COMPLIED WITH THE WARNING NOTICES AND PUBLIC ANNOUNCEMENT REQUIREMENTS OF SECTION 21455.5(b) SUCH THAT APPELLANT'S SOLE ARGUMENT ON APPEAL DOES NOT SUPPORT REVERSAL OF HIS CONVICTION

A. The Clear Purpose Of Section 21455.5(B) Is To Give The Public Advance General Notice Of The Arrival Of An ATES Program In A Locality By Giving Warning Notices And Making A Public Announcement At The Inception Of The Overall ATES Program In A Locality And Not Each Time It Adds Another Intersection To The Program

The statutory provisions underlying the ATES legislation establish that Appellant's contention that the warning notices and public announcements requirements of section 21455.5(b) are intersection-specific is patently wrong.

Vehicle Code, §21455.5 provides, *inter alia*, that an intersection "may be equipped with an automated enforcement system" and articulates various requirements for a locality's implementation of the system. (Section 21455.5(a)). Section 21455.5(b), at issue in this appeal, provides, as follows:

> "Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program."

A statute must, of course, be construed in light of the purpose it seeks to achieve. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530, citing *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124.) Here, the warning notices and announcement requirements of section 21455.5(b) constitute a public education program to inform the citizenry of the arrival of the ATES in a locality in advance of its implementation in order to alert the public of the presence of this

new program in their city. (Bill Analysis, Senate Bill 833, p. 2)[6] The purpose of advance general notice is best achieved by serving warning notices and making a public announcement *once* – at the time a jurisdiction implements the program and not – as Appellant would have it -- each time a jurisdiction adds another intersection to that program. That interpretation is clearly borne out, as discussed below, by the plain language of section 21455.5(b) and other provisions of the ATES statutory scheme, as well as the legislative history underlying enactment of the ATES legislation. Importantly, the traffic light enforcement by way of the ATES was not a program well-known at the time of enactment of the ATES legislation. The sole exposure that the driving public had had to automated red light enforcement was by way of Vehicle Code § 22451, subd. (c)), which provided for automated enforcement at railroad crossings and which was enacted only a year earlier. (*Id.*). The purpose of section 21455.5(b) was to vitiate the novelty of the new legislation and avoid surprise, not at individual intersections but as to the ATES program as a whole in each city in which it was implemented. For this reason, the Legislature expressly provided for "a 30-day public education program and 30-day warning period." (SB 833 Senate Bill, Bill Analysis)[7].

Under section 21455.5(b), warning notices are to be given 30 days "[p]rior to issuing citations under this section". Because the word "section" refers to section 21455.5, which authorizes implementation of the ATES program in a locality, that phrase necessarily must refer to the time period prior to initiating the *overall* program because there can be only one point in time that is "prior to issuing citations under this section." Once notices during that period are given, there can be, by definition, no other time "prior to issuing citations under this section" and thus no requirement for any additional 30–day warning notice period and public announcement. (*Gray, supra*, 204 Cal.App.4th at p. 1049.)

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[6] Attached as Exhibit B to the People's concurrently-filed Request to Take Judicial Notice.

[7] See, the People's concurrently filed Request to Take Judicial Notice.

Further, the fact that the warning period of section 21455.5(b) is designed to give advance notice of the ATES at the time that the entire program is established in a jurisdiction is illustrated by the public announcement provision, which states "[t]he local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program." (Section 21455.5(b)[emphasis added]). A plain reading indicates that this section requires one public announcement to be made prior to commencement of the entire program. In turn, the fact that the warning notices requirement was intended to operate in tandem with the public announcement provision is clear from the public announcement language providing that the jurisdiction "shall *also* make a public announcement..." (section 21455.5(b)[emphasis added]). Both warning notices and the public announcement requirements envision the same thirty-day period, *i.e.*, the thirty days prior to giving citations under a newly-implemented ATES program. To conclude otherwise would contravene the fundamental caveat of statutory construction providing that a court must avoid a statutory construction that would produce absurd consequences. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908.) Here, it would be palpably absurd to interpret differently the warning notices and public announcement requirements which both serve the purpose of advance notice of the implementation of the overall ATES system in a locality in an effort to educate the public and avoid surprise.

B. The Signage Requirement Shows The Intent To Give Programmatic And Not Intersection-Specific Notice Of The ATES

The fact that the Legislature intended that section 21455.5(b) provide general advance notice of the arrival of the ATES in a city is further demonstrated by section 21455.5(a)(1). Specifically, section 21455.5(a)(1) states that a local jurisdiction should do the following: "(1) Identif[y] the system by signs that clearly indicate the system's presence and are visible to traffic approaching from

all directions, or posts signs at all major entrances to the city, including, at a minimum, freeways, bridges, and state highway routes." (section 21455.5(a)(1)).

The fact that section 21455.5(a)(1) gives cities a choice to post warning signs at a city's major entrances rather than at a particular intersection evinces the general, citywide nature of the warnings intended. Put another way, if each intersection were to be treated independently, the Legislature would not have allowed the posting at entrances to a city in lieu of posting signs at each intersection. This confirms that the intent of the Legislature was to require general notice – whether by signage, warning notices or public announcements -- that the ATES program itself is present in a global, citywide manner rather than notice of its presence at a particular intersection. As discussed below, interpretation of section 21455.5(b) in light of other provisions of the statute – here, section 21455.5(a)(1) is appropriate because statutes are properly construed "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. " (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) Moreover, provisions relating to the same subject must be harmonized to the extent possible. (*People v. Anderson* (2002) 28 Cal.4th 767, 776).[8]

C. Section 21455.5(B) Does Not Require Warning Notices Or Public Announcements Each Time An Intersection Is Added Because The Word "System" In The Provision Pertains To The Overall ATES Program And Requires Notice Only When The Program Is First Implemented

The City met the requirements of a thirty-day warning notices period and the public announcement of Section 21455.5(b) in 1998 when the ATES program

[8] To the extent that Senate Bill No. 1303 (see Exhibit E to the People's concurrently-filed Request to Take Judicial Notice), chaptered in September, 2012, changed the signage provision to require signs without 200 feet of an ATES intersection, that fact does not alter the programmatic nature of warning notices and public announcements of section 21455.5(b), which remain unchanged in the new legislation. (see, *supra,* Section IC(3)).

was initiated in the City. (CT, p. 631.) Appellant's argument that the City did not comply is predicated on his erroneous interpretation of the word "system" in the statute to mean the individual camera equipment at each intersection rather than the citywide ATES program as a whole. The latter interpretation is correct; as detailed below, the language of the statute and analogous provisions, its legislative history and long-settled principles of statutory interpretation support that determination.

1. The Term "System" Refers To The Overall ATES Program

In construing section 21455.5(b), a court must, as always, apply the fundamental rule of statutory construction that requires [the] court to first look to the words of a statute and to give those words their usual and ordinary meaning. (*People v. Arias* (2008) 45 Cal.4th 169, 177). Here, construing of section 21455.5(b) begins with a determination of the meaning of the word "system" because both the warning notices and public announcement requirements of the provision are timed according to the date the local jurisdiction first issues citations generated by "the automated traffic enforcement *system.*"[9] (Section 21455.5.(b) [emphasis added]). For that determination, reference to the dictionary definition of "system" is appropriate because "[a] dictionary is a proper source to determine the usual and ordinary meaning of a word or phrase in a statute." (*County of Sacramento v. State Water Resources Control Bd.* (2007) 153 Cal.App.4th 1579, 1592).

In turn, the dictionary definition of "system" is "a regularly interacting or interdependent group of items forming a unified whole." (Merriam–Webster's Collegiate Dict. (10th ed. 1993) p. 1197). It is clear that "system" in section 21455.5(b) must refer to the overall program in a locality because ATES equipment at an intersection is not "a unified whole" but rather is a component of an interdependent group forming a part of that whole. (*Gray, supra*, 204

[9] This was the reasoning used by the Court of Appeal in the present case. (*Gray, supra*, 204 Cal.App.4th at 1047).

Cal.App.4th at 1048). Specifically, the ATES equipment at an intersection gathers information as to red light violations and places a date and time stamp on the photographs and videos along with recorded electronic data showing the speed of the suspect as calculated by the buried loop sensors, the amount of time the light was red when each photograph was taken and the time each photograph was taken. (*Id.* at 1048). The information gleaned at the intersection is stored digitally and transmitted through the Internet to Redflex, the company in Arizona with which the City has contracted to assist with certain aspects of the ATES. Redflex employees review the information and transmit it to Culver City police officers to review for red light violations. (*Id.*).

Thus, the actual operation of the ATES establishes that the equipment at each intersection is not an independent unit and cannot function as a "unified whole" or "system" because it operates by transmitting information to computers at a remote location, information critical to establishing the violation. (*People v. Gray, supra,* 204 Cal.App.4th at 1048). Accordingly, the reference to an "automated traffic enforcement system," in section 21455.5(b) and the thirty–day preconditions for using the "system" cannot refer to each individual intersection but must refer to the entire group of technological components linked electronically and digitally and forming the "unified whole", *i.e.*, the overall ATES program.

Given these facts, it is clear that Appellant's reliance on *People v. Park* (2010) 187 Cal.App.4th Supp. 9 (Brief on the Merits ("BOM") pp. 12, 15, 22-25) does not to support his argument relative to section 21455.5(b) is intersection-specific. In holding that section 21455.5(b) is intersection-specific, the Orange County Superior Court Appellate Division misapprehended the manner in which the ATES actually functions. Indeed, as the Court of Appeal in this case pointed out, the idea that the ATES equipment at each intersection comprises a "unified whole" simply because it does not have to interact with ATES installations at other intersections (*Park, supra,* 115 Cal.Rptr.3d at 340) ignores the actual

relationship among the components of the ATES program. (*Gray, supra*, 204 Cal.App.4th at 1048). Such theorizing in *Park* ignores the fact that the equipment at each ATES intersection must interact with the central computer processing installations of the system that convert the digital codes from the intersection into photographs at a remote location. Absent that critical connection, the ATES as a whole cannot accomplish its fundamental purpose, *i.e.*, generating red light violations. Thus, *Park* provides no support for Appellant's claim that "system" in section 21455.5(b) should be read to mean every intersection at which an ATES is present.

2. Several Provisions in the ATES Statutory Scheme Support The Fact That "System" Pertains To The Overall ATES Program In A Locality

As noted above, statutes are not construed in isolation, but are harmonized as a whole to encourage their effectiveness (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) Reference to other provisions in the ATES statutory scheme serves to establish the meaning of "system" in section 21455.5(b) because "when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute." (*People v. Dillon* (1983) 34 Cal.3d 441, 468). Here, numerous provisions of section 21455.5 support the interpretation of the warning notices and public announcement provisions as being programmatic rather than intersection-specific.

a. Section 21455.5 (c) Shows That "System" Means The Overall ATES Program

Evidence of the programmatic meaning of the word "system" is found in section 21455.5(c), which states: "[o]nly a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system." Section 21455.5(c) goes on to define the activity that constitutes the operation of an ATES, which includes, *inter alia*, "[d]eveloping uniform guidelines for screening and issuing violations and for the processing and storage of confidential

information, and establishing procedures to ensure compliance with those guidelines" and performing administrative functions, including "[e]stablishing guidelines for selection of location." (*Id.* subds. (c)(1) and (c)(2)(A).) Clearly, "developing uniform guidelines" is -- by definition -- activity that goes to the system as a whole; the development of "uniform guidelines" for screening and issuing violations would be unnecessary if the ATES referred to something other than the *entire* ATES program used at multiple intersections. The term "uniform" only has meaning if it is referring to more than one location.

Further, the fact that operation of a "system" is defined to include "establishing guidelines for selection of location" demonstrates that "system" must refer to the overall program. If an ATES were defined as the ATES equipment installed at a single intersection, the establishing of "guidelines for selection of location" would be superfluous and the "selection of location" would not make sense. It is a settled principle of statutory construction that courts should "strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous" (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80; accord, *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063) and each statutory provision, if possible, should be given full effect. (*Cacho v. Boudreau* (2007) 40 Cal.4th 341, 352.) Application of these principles requires that section 21455.5(c) uses "system" to mean the whole of an ATES program in a locality.

b. Section 21455.5(d) Demonstrates That "System" Means The Overall ATES Program

Section 21455.5(d) states that "[t]he activities listed in subdivision (c) that relate to the operation of the system may be contracted out by the governmental agency, if it maintains overall control and supervision of the system." The word "system" in section 21455.5(d) must refer to the entire ATES enforcement program rather than to ATES equipment at an individual intersection because it would be inefficient and illogical to expect a local jurisdiction to contract the

operation of an ATES at each individual intersection to a different contractor. (*Gray, supra*, 204 Cal.App.4th at 1050). Even more illogical and inefficient is to imagine that the cities would be required to enter into a new contract with the same contractor for each additional intersection. Absent any indication that the Legislature intended such "intersection-specific" contracting, it is clear that that both references to "the system" in section 21455.5(d) refer to the ATES as a whole, not to particular equipment at a particular intersection.

c. Section 21455.6 Establishes That "System" Means The Overall ATES Program

Section 21455.6(a) also supports the interpretation that "system" refers to the ATES as a whole. That section provides that "[a] city council or county board of supervisors shall conduct a public hearing on the proposed use of an automated enforcement system authorized under section 21455.5 prior to authorizing the city or county to enter into a contract for the use of the system." In providing for "**a** public hearing" on the initial proposed "use" of an ATES before a locality enters a contract for the "use" of an automated enforcement "system", it is clear that a single hearing is anticipated. (section 21455.5(a)(emphasis added). After contracting for use of that "system", section 21445.6(a) does not require a further public hearing each time that ATES equipment is placed in operation at a particular intersection. This is consistent with the use of "the system" in section 21455.5(b) to refer generally to the commencement of an ATES enforcement program in a locality.

d. The ATES Statutory Scheme Establishes That "System" Means The Overall ATES Program Because When The Legislature Meant "Intersection" It Expressly So Stated

When the ATES statutory scheme refers to the presence of the ATES at a particular intersection, it specifically uses the term "intersection." In this regard, section 21455.5(a) states "the intersection . . . may be equipped with an automated enforcement system." Additionally, section 21455.7(a) refers to "an intersection

at which there is an automated enforcement system in operation", joining the word "intersection" to "system" to refer to the particular equipment at an intersection. Had the Legislature intended that the thirty (30) day warning notices period and public announcement provisions apply to anew to each and every intersection, it would have expressly used the word "intersection", as it has done consistently throughout the entire statutory scheme when it intended to refer to an individual intersection rather than the "system" as a whole.

The Legislature also specified "intersection" when it referred to individual intersections equipped with ATES equipment in section 21455.7, relative to yellow light duration. Section 21455.7(a) provides that "[a]t an intersection at which there is an automated enforcement system in operation, the minimum yellow light change interval shall be established in accordance with the Traffic Manual of the Department of Transportation." (section 21455.7(a)(emphasis added)). Indeed, Appellant's argument that this language supports his claim that "system" means intersection (BOM, p. 16) is without merit; "system" here only refers to an intersection because it is preceded by the word "intersection." (Section 21455.7(a)).

In addition to the statute's use of "intersection" when "intersection" is intended – and in contrast to its use of the term "system" -- section 21455.5 uses the word "equipment" when it means the ATES at an individual intersection. For example, section 21455.5(c)(2)(B), provides that only a government agency in cooperation with a law enforcement agency may have the task of "[e]nsuring that the equipment is regularly inspected" (section 21455.5(c)(2)(B(emphasis added))," clearly referring to the equipment at each intersection. Similarly, section 21455.5(c)(2)(C) requires that only a government agency may have the task of "[c]ertifying that the equipment is properly installed and calibrated, and is operating properly" (section 21455.5, subd.(c)(2)(C)(emphasis added).

Because a court must presume that just as every word of a statute has been used for a purpose, every word excluded from a statute has been excluded for a

purpose. (*Arden Carmichael, Inc. v. County of Sacramento* (2001) 93 Cal.App.4th 507, 516). The absence of any reference to "intersection" or "equipment" in section 21455.5(b) supports the City's position that the warning periods and public announcements are programmatic and not intersection specific such that the City complied with the requirements of section 21455.5(b) when it gave warning notices and made a public announcement at the time the ATES program was initiated in the City. (CT, pp. 632.)

3. The Legislative History of Section 21455.5 Establishes That The Legislature Intended That Warning Notices and Public Announcements Be Given Only Once, *i.e.*, When The Entire ATES Program Is Initiated In a Locality

The legislative history of section 21455.5(b) establishes that the policy driving that provision was a desire to create a public education program furnishing advance general notice to the public of the arrival of the ATES in a locality. Indeed, the Senate Bill Analysis of Senate Bill (Statutes of 1995, Chapter 922, §§ 4, 8) provides that the newly enacted section 21455.5 would include "a 30-day public education program and 30-day warning period." (SB 833 Senate Bill, Bill Analysis, p. 3).[10] Clearly, the Legislature's stated intention was to provide the public with an advance education program -- by way of warning notices and public announcements -- in a single thirty-day period prior to the giving of citations under the overall ATES in a locality. There is no suggestion – nor would it be logical to imagine – that the envisioned "30 –day public education program" was to be undertaken anew, each time a municipality adds an intersection to its program. This is especially true in light of the fact that the novelty of the ATES program (see, *supra*, Section IA), it was important that the community be made aware of its introduction, not in a piecemeal per-intersection

[10] See, Exhibit B to the People's concurrently filed Request to Take Judicial Notice.

basis but in a "public education program" that would be undertaken once, upon its implementation in a locality.

Moreover, the recently passed Senate Bill No. 1303 – which did not in any way alter the programmatic nature of the warning notices and public announcement provisions of section 21455.5(b) -- gives further support to the fact that our Legislature intended that that section continue to be construed as the Court of Appeal decided in this case. Had the Legislature meant to alter the programmatic requirements of section 21455.5(b) it would have done so in this most recent legislation. (Senate Bill No. 1303.)[11] Indeed, the failure of the Legislature to change the law in one respect when it makes changes in other respects indicates legislative intent to leave the law as it stands in those matters not amended. (*Reese v. Wong* (2001) 93 Cal.App.4th 51, 59). Courts will assume that the Legislature has in mind existing laws when it enacts or amends a statute and the failure of the Legislature to change the law in one respect when it makes changes in other respects indicates legislative intent to leave the law as it stands in those matters not amended. (*Id.*, citing *Estate of McDill* (1975) 14 Cal.3d 831, 837–838.) When courts have construed a statute and the Legislature thereafter reenacts that statute without changing its language, the Legislature is presumed to have been aware of and acquiesced in the judicial construction. (*Ibid.* at p. 60, citing *People v. Bouzas* (1991) 53 Cal.3d 467, 475; *People v. Weidert* (1985) 39 Cal.3d 836, 845–846.)

Here, the Court of Appeal decided the present case on April 3, 2012 (modifying it on April 12, 2012). Senate Bill No. 1303 was in the early stages of its consideration at that time, having been introduced on February 23, 2012. (Bill History, Senate Bill 1303). [12] Senate Bill No. 1303 was approved and filed on

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[11] Attached as Exhibit E to the People's concurrently-filed Request to Take Judicial Notice.

[12] Attached as Exhibit D to the People's concurrently-filed Request to Take Judicial Notice.

September 28, 2012. (*Id.*). Accordingly, at the time Senate Bill 1303 was passed by the Legislature, the Court of Appeal had already decided this case, holding that the requirements of section 21455.5(b) are programmatic and not intersection-specific. (*People v. Gray, supra*, 204 Cal.App.4th 1049-1050). Accordingly, the Legislature is assumed to have been aware of and acquiesced in that judicial construction when it passed Senate Bill 1303. (*Reese, supra*, 93 Cal.App.4th at 59).

Indeed, Senate Bill No. 1303 establishes the Legislature's intent to see that the ATES legislation is inclusive rather than being narrowly construed, as Appellant would have it here by requiring warning notices and public announcements be undertaken anew at each intersection. For example, any hearsay issues that had existed as to the admissibility of the ATES were put to rest by that section of Senate Bill No. 1303 providing that "the printed representation of computer-generated information, video, or photographic images stored by an automated traffic enforcement system does not constitute an out-of-court hearsay statement by a declarant." (Senate Bill No. 1303, p. 2). It is clearly the purpose of Senate Bill No. 1303 to indicate that the ATES is here to stay and that its administration should be undertaken in a way that will most efficiently support its goal preventing death and injury on California's streets.

4. Appellant's Arguments As to the Legislative History of Section 21455.5 Do Not Support His Claim of Intersection-Specific Warning Notices

Appellant repeats the erroneous argument made in *Park, supra,* 115 Cal.Rptr.3d 340-41, stating that the Legislature intended to avoid linking the thirty-day warning period with a municipality's initial installation of automated enforcement equipment simply because language providing for warning notices "during the first 30 days after the first recording unit is installed" which had been proposed in 2003 (Sen. Bill No. 780 (2003-2004 Reg. Sess.)) was not included in the final version of the statute. (BOM 15-16).

In fact, Senate Bill 780 – in an amended form or otherwise – was never passed.[13] Unpassed bills usually have little value as evidence of legislative intent.[14] (*Miles v. Workers' Compensation Appeals Bd.* (1977) 67 Cal.App.3d 243, 248, fn. 4, citing *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41. In *Sacramento Newspaper Guild*, the Court of Appeal stated that "the light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidences of legislative intent they have little value." (*Id.* at p. 58, citing *Ambrose v. Cranston* (1968) 261 A.C.A. 155, 161-162; Willard and MacDonald, The Effect of An Unsuccessful Attempt to Amend a Statute, 44 Cornell L.Q. 336 (1958); see, *People v. Anderson* (2002) 28 Cal.4th 767, 780 ["legislative inaction is a weak indication of intent at best"]). Clearly, then, Appellant's reliance on phrasing in a proposed amendment to unpassed Senate Bill 780 does nothing to bolster his argument that section 21455.5(b) should be read as requiring intersection-specific warning notices and public announcements.

Similarly, Appellant's reliance on *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74 is unavailing. In *Santa Cruz*, language included in the initial drafts of a statute requiring personal knowledge for certain types of declarations had been subsequently stricken and not included in the final version. (*Id.* at p. 89). A committee staff report accompanying the Assembly amendments in *Santa Cruz* explained that the original language was "dropped" and stated the reason the personal knowledge language had been replaced by a requirement of materiality. (*Id.*). Thus, the legislative intent to reject the requirement was expressly established in *Santa Cruz*. Here, in addition to the fact that Senate Bill 780, unlike

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[13] See, Exhibit C, the People's concurrently filed Request to Take Judicial Notice.(http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0751-0800/sb_780_bill_20040202_history.html)

[14] The court in *Miles* rejected the insurance carrier's argument that because bills including clinical psychologists within the meaning of workers' compensation laws failed to pass, that meant that the Legislature intended to exclude clinical psychologists from coverage. (*Miles, supra*, 67 Cal.App.3d at 248, fn. 4).

the bill in *Santa Cruz*, was never passed, Appellant provides no language from the legislative history of Section 780 to suggest any express rejection of the idea that warning notices are to be given only during the first 30 days after the first recording unit is installed at an intersection. Accordingly, *Santa Cruz* provides no support for Appellant's theory. Quite to the contrary, as established throughout this brief, it is exactly to that thirty-day period after the installation of the first recording unit that the warning notices requirement of section 21455.5(b) applies.

In sum, the City complied with the requirements of section 21455.5(b) when it gave warning notices and made a public announcement of the implementation of the ATES in the City because a proper construction of the statute and its legislative history establish that that such advance general notice need be given only once, when the overall ATES program is initiated in a City.

II.

EVEN IF THE CITY DID NOT COMPLY WITH THE WARNING NOTICES/PUBLIC ANNOUNCEMENT PROVISION –AND IT DID – NONCOMPLIANCE WOULD NOT COMPEL REVERSAL OF APPELLANT'S CONVICTION

A. The Prosecution Was Not Required To Show That The City Complied With Section 21455.5 In Order to Prove Violation Of Section 21453a.

Appellant's contention that reversal of his conviction is mandated by the City's purported failure to comply with section 21455.5(b) is without merit because proof of compliance with that provision is not required in order to establish a prima facie case of violation of the red light law under section 21453a (BOM, p. 28). Rather, the People's burden is to prove each element of the charged offense beyond a reasonable doubt (Penal Code § 1096; *People v. Montalvo* (1971) 4 Cal.3d 328, 334), that a crime was committed and that the defendant committed it. (*People v. Stacey* (2010) 183 Cal.App.4th 1229, 1236; *People v. Alvarez* (2002) 27 Cal. 4th 1161, 1164). Here, the People had the burden

of establishing that Appellant "(1) while driving a vehicle; (2) faced a steady circular red signal; and (3) failed to stop (a)(1) at the marked limit line, (2) at the near side of the crosswalk before entering the intersection, or (3) before entering the intersection; or (b) failed to remain stopped until an indication to proceed was shown." (Section 21453a). Appellant does not argue – nor could he -- that the People failed to prove these elements of his violation. (*Gray, supra*, p. 4:16-17).

If the Legislature had intended that compliance with section 21455.5(b) constituted part of the People's burden in proving a prima facie case of a Section 21453a violation, it would have expressly so provided. Such omission must be deemed purposeful because every word excluded from a statute has been excluded for a purpose. (*Arden Carmichael, Inc., supra,* 93 Cal.App.4th at 516). Indeed, when the Legislature intends that a prima facie case requires a showing of compliance with an administrative statute, the Legislature so states. For example, Vehicle Code, §§ 40803 et seq. mandates that the prosecution must establish -- as part of its prima facie case of a speed violation -- that the evidence or testimony presented is not based upon a speedtrap..." (*Id.*) Additionally, under speedtrap legislation, it is the People's burden, as a part of their prima facie case when prosecuting an offense involving vehicle speed, to produce a traffic and engineering survey that justifies the posted speed limit. (Veh.Code, §§ 40801, 40802, subd. (b), 40803. In contrast, there is no language in section 21455.5(b) requiring that proof of compliance with the administrative provisions of the statute constitutes part of a prima facie case for proving violation of section 21453a.

Here, all of the necessary elements for establishing a prima facie case of violation of section 21453a were either proven or stipulated to at trial. (*Gray, supra*, p. 4:16-17). Accordingly, even if section 21455.5(b) were read to require warning notices each time an intersection was added to a locality's ATES program, a failure to comply with such a requirement would not compel reversal of Appellant's conviction because it did not fall within the People's burden of proof to prove compliance. (*Id.* at pp. 4:21-23.)

Further, even if Appellant had established noncompliance and argued it as a special defense, such a contention would not support reversal of his conviction. When, as here, an affirmative defense is one that presumes that the prima facie elements of the crime are true but exculpates the defendant because of an excuse or justification, the defendant bears the burden of persuasion. (*People v. Frye*, (1992) 7 Cal App. 4th 1148, 1158; *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1600-1601). Stated another way, such defenses do not negate any element of the crime, but are new matters that excuse or justify conduct that would otherwise lead to criminal responsibility. (*Frye, supra*, 7 Cal App. 4th at 1158; *Bolden, supra*, 217 Cal. App.3d at 1600-1601).

1. Lack of Remedy For Noncompliance Indicates That Failure To Comply Does Not Support Reversal of Appellant's Conviction

In addition to the fact that compliance with section 21455.5 does not constitute part of a prima facie case for violation of section 21453a, there is no language in section 21455.5(b) to suggest that noncompliance with the warning notices or public announcement provision should result in acquittal of a red light violation recorded by the ATES. In fact, the statute does not provide any consequence or remedy for noncompliance. In this way, section 21455.5(b) is distinguishable from speed trap legislation in which use of a speed trap requires exclusion of the evidence obtained (section 40803(a)) and renders incompetent a person testifying to such evidence. (section 40804(a)).

When, as here, a statute does not provide any consequence for noncompliance, and there is no indication that the Legislature intended to strip the court of jurisdiction for noncompliance, the statute is to be considered directory rather than mandatory. (*In re C.T.* (2002) 100 Cal.App.4th 101, 111; *In re M.F.* (2008) 161 Cal.App.4th 673, 680.) The designations "mandatory" and "directory" should be construed to mean whether the failure to comply with a particular procedural step will invalidate the governmental action to which the procedural requirement relates. (*In re Charles B.* (1986) 189 Cal.App.3d 1204, 1209). In this

regard, "[t]he lack of strict compliance with [a statute], in the absence of prejudice, does not render the subsequent proceedings void. [Citation.]" (*In re Melinda J.,* at p. 1419; *In re M.F.,* at p. 680.) Here, there is no basis upon which Appellant can argue that failure to give warning notices or make a public announcement invalidates the governmental action, *i.e.,* prosecution for violation of the red light law. Indeed, allowing Appellant's argument to absolve him of guilt for his violation would itself invalidate the government's action as well as its interest in punishing red light offenders and discouraging future violations.

The clear purpose of the ATES program is to ticket red light violators for the purpose of preventing red light running and the accidents and deaths that result inevitably therefrom. Consequences not intended to be part of the ATES enforcement statute should not be read into it. It is the duty of the courts to construe statutes in a manner that comports most closely with the apparent intent of the legislature, with a view to promoting rather than defeating the general purpose of the statute. (*In re Cheri T.* (1999) 70 Cal.App.4th 1400). In that regard, Code of Civil Procedure, § 1859, provides, as follows:

> "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code of Civ. Proc., § 1859; see also, *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365-366).

Put another way, "[a] court may not change or add to procedural requirements established by statutory provision. An order attempting to add requirements to those prescribed by statute is to such extent a nullity and void" (*Conae v. Conae* (1952) 109 Cal.App.2d 696, 697).

Appellant presents neither law nor fact supporting a contention that the Legislature intended that noncompliance with section 21455.5(b) be a basis to compel a judgment of acquittal or reversal. In short, had the Legislature so

intended, it would have included such language in section 21455.5 (*Gray, supra*, p. 5:3-8).

2. Compliance Or Noncompliance With Section 21455.5(b) Goes To The Weight Of The Evidence And Is Not Jurisdictional

It is well settled that violation of a statute does not render evidence inadmissible unless the statute so provides or there is a constitutional basis for exclusion. (Evid.Code, § 351.) "Where a statute ... does not specifically provide that evidence shall be excluded for failure to comply with said statutes and there are no constitutional issues involved, such evidence is not inadmissible. Statutory compliance or non-compliance merely goes to the weight of the evidence." (*People v. Sangani* (1994) 22 Cal.App.4th 1120, 1137). Moreover, the exclusion of relevant evidence in a criminal case is barred unless otherwise compelled by the federal Constitution. (Cal. Const., art. I, § 28, subd. (d); *People v. Williams* (2002) 28 Cal.4th 408, 415).

More particularly, noncompliance with regulations or the language of the enabling statutes such as the ATES statute does not render evidence obtained thereby inadmissible per se "unless the violation also has a constitutional dimension." (*People v. Brannon* (1973) 32 Cal.App.3d 971, 975; *People v. Adams* (1976) 59 Cal.App.3d 559).

In *Brannon*, the court of appeal held that violation of a statute requiring that a person arrested for an alcohol related offense be advised of a choice between a test of blood, breath or urine does not render the results of the test inadmissible nor does it raise a constitutional issue. (*Id.* at p. 975). As in the present case, in *Brannon*, the evidence gained by way of one statute served as evidence in prosecution of another. The court of appeal held that while compliance with the choice of tests was desirable that failure to offer a choice did not rise to the level of a constitutional deprivation of rights. (*Id.*) In turn, "absent an express statutory provision making the evidence obtained as a result of such statutory violation inadmissible, the evidence was properly admitted." (*Id.*)

Similarly, in *Adams*, in which the crime laboratory had failed to comply with the mandatory calibration procedures relative to a breathalyzer test, the court of appeal held that when a statute does not specifically provide for exclusion of evidence in the case of a failure to comply and when there are no constitutional issues involved, such evidence is admissible because noncompliance merely goes to the weight of the evidence. (*Adams, supra*, 32 Cal.App.3d at pp. 566-567.)

As detailed below, Appellant fails to establish, as in *Brannon* and *Adams*, any deprivation of constitutional rights relative to the warning notices and public announcement provisions. And, unlike speedtrap legislation providing for the inadmissibility of evidence and incompetence of witnesses testifying based on speedtrap evidence (sections, 40803(a), 40804(a), section 21455.5 contains no exclusionary rule. Accordingly, even if Appellant had proved the City's noncompliance with the provisions of section 21455.5(b), that would not render the evidence of his red light violation inadmissible nor compel a judgment of acquittal or reversal of the judgment of conviction against him.

III.

NONE OF APPELLANT'S CONSTITUTIONAL ARGUMENTS SUPPORTS HIS REQUEST FOR REVERSAL OF HIS CONVICTION

A. Appellant Has No Standing To Make A Constitutional Argument

Despite his effort to argue constitutional issues as to section 21455.5(b), Appellant is without standing to do so. In order to raise a constitutional question "the party complaining must show that his rights are injuriously affected by the portion of the law he is attacking; it must appear he is aggrieved by the operation of that particular part of the law.'" (*People v. Hicks* (1963) 222 Cal.App.2d 265, 270[citations omitted]). In *Hicks*, the court of appeal rejected Hicks's argument that the statute making it a crime to offer to furnish narcotics to a person and delivering a substance other than a narcotic was unconstitutionally vague because it did not require a determination of intent such and might apply to innocent

conduct. (*Id.*). The Court of Appeal stated that Hicks could not attack the law on that basis because there was no evidence that his offer to sell drugs was innocent, such that he did not fall within the category of one whose rights would have been affected by the purported vagueness of the statute. (*Ibid* at p. 270).

Here, as in *Hicks*, Appellant cannot attack section 21455.5(b) because even if the warning notices and public announcement requirements were held to be intersection-specific, Appellant would not have benefited therefrom, given that he did not receive his citation within thirty days after the June, 2006 installation of the ATES equipment at the intersection of his violation but rather two years later on November 21, 2008. (BOM, p. 9). In short, Appellant is not within the category of those whose rights were arguably affected by his purported constitutional claims relative to section 21455.5(b) and he has no standing to make any constitutional argument on that basis.

B. Appellant's Claim That The Statute Is Void For Vagueness Is Without Merit

Appellant argues that section 21455.5(b) is void-for-vagueness and relies on a case that itself reveals the error of that assertion, *i.e.*, *Kolender v. Lawson* (1983) 461 U.S. 352, 356-357; BOM, p. 23). In fact, *Kolender* explains that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender, supra,* 461 U.S. at 357[citations omitted].) There is no such issue in the present case. The City's manner of complying with section 21455.5(b) is in no way related to articulating the conduct prohibited by the red light law, *i.e.*, section 21453a. In contending otherwise, Appellant mixes apples and oranges.

In *Kolender*, an individual convicted for violating Penal Code, § 647 requiring persons loitering on the streets to provide "credible and reliable identification" to the police challenged the statute's constitutionality. (*Kolender,*

supra, 461 U.S. at 352). The Supreme Court held that the statute was unconstitutionally vague because it failed to clarify what was contemplated by the words "credible and reliable" identification. (*Kolender, supra,* 461 U.S. at 353). In the present case, the statute that proscribed the conduct underlying Appellant's red light violation -- section 21453a -- is crystal clear in giving notice of the conduct forbidden by that law. (see, *supra*, Section IIA). Appellant's claim that there was insufficient "notice" because the City gave warning notices and made a public announcement at the inception of its ATES program rather than at each intersection in no way suggests insufficient notice of the charging statute, section 21453a.

Also unavailing is Appellant's reliance on *United States v. L. Cohen Grocery Co.* (1921) 255 U.S. 81 (BOM 24) because the facts of *Cohen* are readily distinguishable from those in the present case. In *Cohen*, the United States Supreme Court held void a statute making it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," because the statute did not fix an ascertainable standard of guilt adequate to inform persons accused of violation of the nature of the accusation against them (*Id.* at p. 89) and was so indefinite as not to provide notice of what conduct was forbidden thereunder. (*Id.* at pp. 86-87, 93).

In the present case, there is no argument that section 21455.5 attempts to explain the nature of a red light violation or to provide notice of the elements of that or any other crime. The warning "notices" issued by virtue of section 21455.5(b) have nothing to do with the sort of "notice" constitutionally required to define proscribed conduct and no due process implications can be drawn from differences in construction of such an administrative provision. Drivers are not required to comply with section 21455.5(b) but they are required to comply with 21453a, the elements of which are clearly articulated therein. (see, *supra*, Section IIA).

Similarly without merit is Appellant's citing of *FCC v. Fox TV Stations, Inc.* (2012) 132 S. Ct. 2307 (BOM, p. 25, fn.8). In *Fox TV Stations*, the United States Supreme Court held that a network did not have sufficient constitutional fair notice that its broadcast could be found indecent because a prior administrative ruling of the episode had deemed its broadcast of nudity not actionably indecent. (*Id.* at pp. 2319-2320). As in *Cohen*, the failure of notice in *FCC v. Fox TV Stations, Inc.* involved the very elements of the violation charged and not a separate enabling statute. Accordingly, none of the cases upon which Appellant relies supports his contention that failure to comply with the warning notices and public announcement provisions of the section 21455.5(b) statute establishes any suggestion of actionable vagueness in the statute, much less one that rises to the level of a due process violation.

1. Conflict As To The Interpretation of An Enabling Statute Does Not Establish Constitutional Vagueness

Appellant's theory that disagreement among lower courts on the interpretation of section 21455.5(b) renders the statute unconstitutionally vague (BOM, p. 20) is both factually and legally erroneous. It hardly needs stating that a difference in statutory interpretation is endemic to our judicial system and does not provide a basis for holding a statute, *ipso facto*, vague or ambiguous. Rather, harmonizing conflicting decisions is a function of this Court. (*In re Shannon's Estate* (1965) 231 Cal.App.2d 886, 890).[15] Moreover, the present case is the sole

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[15] Appellant's reliance on *Cohen, supra*, 255 U.S. 81, does not support his theory. In *Cohen*, as described above, the Court considered the conflicting judicial results which had arisen *vis a vis* the interpretation of the elements of the "necessaries" charging statute, finding that such conflict demonstrated that the statute was too vague to give notice of the conduct proscribed by the statute. (*Id.* at p. 90). While the Court noted that the particular efforts of other courts in published opinions to interpret the necessaries statute suggested vagueness as to that statute, it made no pronouncement that conflicting decisions mandate –as Appellant argues -- a

proceeding in which the Court of Appeal has addressed section 21455.5(b). In this case, each of the three courts construing section 21455.5(b)– the trial court, the Los Angeles Superior Court Appellate Division and the Court of Appeal -- agreed that that provision requires warning notices and public announcement on a programmatic rather than intersection-specific basis.

2. There Is No Conflict At The Court of Appeal Level As To Interpretation of Section 21455.5(b)

As noted above, the present case constitutes the sole authority at the Court of Appeal level on the issue of the section 21455.5(b) requirements, providing guidance to courts and litigants should this issue arise in the future.[16] Indeed, prior to the publication of *People v. Gray*, the court in *Park, supra,* 115 Cal.Rptr.3d, *supra*, conceded that "no published decision has directly addressed the meaning of subdivision (b) of section 21455.5..." (*Park, supra*, 115 Cal.Rptr.3d 339). Accordingly, even if Appellant were legally correct – and he is not -- there is no factual support for his theory that dueling judicial interpretations show that section 21455.5(b) is vague or ambiguous.

Appellant's reliance on *Leonte v. ACS State and Local Solutions, Inc.* (2004) 123 Cal.App.4th 521 for the contention that Division Three of the Second Appellate District Court of Appeal has arrived at contradictory holdings relative to the question of whether section 21455.5(b) is programmatic or intersection-specific misstates the holding of *Leonte*. (BOM, p. 20). In fact, *Leonte* held only that the use of private contractors by a locality did not violate section 21455.5 because the City of West Hollywood had retained oversight and control over the vendor. (*Leonte, supra,* 123 Cal.App.4th at 528). Notwithstanding the clarity of

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finding of vagueness. (*Id.* at p. 89.) The Court made no pronouncement that conflicting decisions of courts relative to a statute would demonstrate vagueness.

[16] The People will request that that opinion be republished if this Court affirms that decision here.

that holding, Appellant invokes the erroneous reasoning in *Park* in an unsuccessful attempt attempts to demonstrate an internal conflict in Division Three of the Second Appellate District Court of Appeal as to the meaning of "system" in section 21455.5. In that effort, Appellant relies on the Court of Appeal's statement in *Leonte* that the red light camera statute permits "the use of automated traffic enforcement systems at intersections." (BOM at p. 20, quoting *Leonte, supra,* 123 Cal.App.4th at 526 [emphasis Appellant's]). In so observing, the court in *Leonte* did not intended to define "system" but was merely quoting from the initial ATES statute, noting that "[f]ormer Vehicle Code section 21455.5 (Stats.2001, ch. 496, § 1) authorized the use of automated traffic enforcement systems at intersections where drivers are required to stop." (*Leonte, supra*, 123 Cal.App.4th at 526). The court's referring to that language in passing and in the context of its inquiry as to what the word "operate" means in determining the legality of a city's hiring private vendors does not constitute a holding that conflicts with the determination that "system" applies to the overall ATES program and not to each intersection as Division Three held in the present case. (*Gray, supra,* 204 Cal.App.4th at 1048).

In sum, the present case remains the only one to date decided at the Court of Appeal level with a holding relative to the issue of whether "system" refers to the equipment at an intersection or the overall ATES program. Thus, there is no conflict among courts at the court of appeal level on this issue nor any support for Appellant's assertion that conflict among courts suggests that the statute is ambiguous.

People v. Park, supra, is the only other reported case specifically deciding the section 21455.5(b) issue. As noted above, the Court of Appeal in the present case expressly disapproved the holding in *Park, i.e.,* that section 21455.5(b) is intersection-specific. (*Gray, supra,* 204 Cal.App.4th at 1045). Contrary to Appellant's assertion, the fact that a lower appellate court's interpretation of section 21455.5(b) differs from that of a later, Court Appeal opinion certainly does

not in and of itself suggests that the statute is constitutionally vague or ambiguous. Indeed, such a disparity does not even rise to the level of a conflict because appellate division opinions are neither binding on either of the higher reviewing courts nor regarded as controlling in the appellate division. (Witkin, Cal. Proc. 5th (2008) Appeal, § 503, pp. 565-566).

Accordingly, Appellant's argument that purported differences in court interpretations of section 21455.5(b) renders the statute vague and ambiguous is without merit.

C. There Is No Merit To Appellant's Claim of Discriminatory Enforcement

To establish the defense of discriminatory enforcement, a defendant must prove: (1) that he has been deliberately singled out for prosecution on the basis of some invidious criterion'; and (2) that the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 298). Here, Appellant claims that section 21455.5(b) is "potentially subject to discriminatory enforcement" (BOM, p. 23) but offers neither fact nor law to support that defense.

Simply put, none of Appellant's attempted constitutional claims, whether as to vagueness, due process or discriminatory enforcement provide any basis for reversal of his conviction.

IV.

APPELLANT'S ARGUMENT THAT THE COURT LACKED JURISDICTION BECAUSE THE COMPLAINT WAS INSUFFICIENT IS WITHOUT MERIT

For his erroneous assertion that his citation was somehow insufficient as a complaint, Appellant relies on *Ralph v. Police Court of City of El Cerrito* (1948) 84 Cal.App.2d 257. (BOM, p.28). In *Ralph*, the court applied Penal Code, § 1426, which provides that all proceedings before the court for a public offense "must be commenced by complaint under oath, setting forth the offense charged, with such

particulars of time, place, person, and property as to enable the Appellant to understand distinctly the character of the offense complained of..." The Court of Appeal in *Ralph* issued a writ to prevent further proceedings in his prosecution because no written complaint was ever filed as required by Penal Code, § 1426. (*Ralph, supra*, 84 Cal.App.2d at pp. p. 257, 259).

As readily distinguishable from the facts in *Ralph*, in the present case, the Notice to Appear was duly filed. (See CT, p. 1 – Traffic Notice to Appear). Moreover the Notice to Appear comports with Penal Code, § 1426 in setting forth the offense as well as the particulars of time, place, person and property required by the statute. (*Id.*) Accordingly, there is no insufficiency in Appellant's Notice to Appear and no basis to support his claim that such imagined insufficiency deprived the court of jurisdiction.

V.

APPELLANT'S ARGUMENT THAT THE COURT OF APPEAL'S INTERPRETATION OF SECTION 21455.5(B) AS PROGRAMMATIC CONSTITUTES AN EXPANSION OF JUDICIAL CONSTRUCTION IS WITHOUT MERIT

Appellant argues erroneously that the determination that the warning notices and public announcement provision is programmatic constitutes improper "judicial expansion" of section 21455.5(b) (BOM, p. 26). Once again, Appellant confuses the effect of an administrative statute such as section 21455.5 with that of a charging statute. Appellant's reliance on *Bouie v. City of Columbia* (1964) 378 U.S. 347 demonstrates his confusion and provides no support for his argument.

In *Bouie*, the United States Supreme Court held that even when a statute is precise on its face, an impermissible deprivation of the right of fair warning can result from an unforeseeable and retroactive judicial expansion of narrow statutory language. (*Bouie, supra*, 378 U.S. at 352). The South Carolina Supreme Court in *Bouie* had applied a statute prohibiting entry on lands of another as a basis for affirming convictions of African-Americans who remained in a luncheonette

booth after being asked to leave constituted improper judicial expansion of the statute and plaintiffs of liberty and property without due process of law. (*Id.* at p. 348) In so holding, the high Court held that the statute did not give fair warning that the act for which the demonstrators were convicted was rendered criminal by the statute. (*Id.* at pp. 355, 362).

The present case differs dramatically from *Bouie.* In *Bouie*, it was the charging statute itself that was expanded by the appellate court to include remaining at a public lunch counter in the prohibition against entry on the lands of another. Here, Appellant's argument goes not to the charging statute (section 21453a), which defines the crime of running a red light and describes its elements, but rather to section 21455.5, an enabling statute that is separate and apart from the charging statute. There can be no argument that the definition of running a red light is expanded by interpreting the time period of the enabling statute. Appellant tries to obfuscate the indisputable difference between a charging statute and an enabling statute and to mix the due process requirement of "notice" in a charging statute with the "warning notices" provided for in section 21455.5(b).

VI.

APPELLANT'S LENITY ARGUMENT PROVIDES NO BASIS FOR REVERSAL OF THE JUDGMENT OF CONVICTION

As with his arguments on the issue of vagueness, due process and judicial expansion, Appellant attempts unsuccessfully to argue that the principle of lenity demands reversal of his conviction. (BOM, pp. 21-22). Application of the rule of lenity is inappropriate here because that rule is intended to ensure that criminal statutes will provide fair warning concerning the nature of the conduct rendered illegal by a statute. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305). Section 21455.5 does not seek to define or describe red light running but is simply part of the ATES enabling statute that records such a violation and has no bearing whatever on a defendant's knowledge or understanding of the elements of that crime (*People ex rel. Lungren v. Superior Court, supra*, 14

Cal.4th at 305). In short, section 21455.5 does not "define criminal activity" (*United States v. Bass* (1971) 404 U.S. 336, 348), as required for application of the rule of lenity.

Moreover, invoking the rule of lenity is inappropriate in the present case because that principle applies only when the statute contains "an egregious ambiguity and uncertainty to justify invoking the rule." (*People v. Canty* (2004) 32 Cal.4th 1266, 1277). No such ambiguity – egregious or otherwise—is present in section 21455.5(b). Rather, as detailed above, the language of the statute clearly expresses the Legislature's intent that the requirement of warning notices and a public announcement of the ATES be fulfilled once, when an ATES is first introduced in a locality. Accordingly, Appellant's lenity rule argument provides no support for reversal of his conviction.

VII.

APPELLANT'S CLAIM OF "PUBLIC OUTCRY" PROVIDES NO GROUNDS FOR REVERSAL OF HIS CONVICTION

Appellant's contention that there has been a "public outcry" against the use of the ARLES (BOM, p. 17) does nothing to support his bid for reversal. Responding to public sentiment is not the province of the Legislature and not our judicial system. Second-guessing the Legislature's policy determination is not an appropriate task for a court. (*Rhiner v. W.C.A.B.* (1993) 4 Cal.4th 1213, 1225-1226). In *Rhiner*, this Court held that, under workers' compensation law, an employer who unreasonably delays payment of benefits to an injured worker must pay a penalty applied to the full amount of the award without deduction of pre-award payments. (*Rhiner, supra*, 4 Cal.4th at 1216). The Court declined the invitation to rewrite the statute based on the WCAB's policy argument against requiring payment without the deduction for payments made prior to the award. (*Id.* at p. 126). As in *Rhiner*, this Court should decline to rewrite section 21455.5 to require per-intersection warning notices and public announcements as Appellant demands.

Importantly, too, our Legislature recently responded to public concerns relative to the ATES by way of Senate Bill No. 1303 (2011-2012 Regular Session), chaptered and filed on September 28, 2012.[17] Importantly, Senate Bill No. 1303 did not alter section 21455.5(b) in any manner, thus leaving it to require programmatic warning notices and public announcement. In any event, that legislation underscores the fact that this Court should decline Appellant's invitation to address public reaction to the ARLES and should allow the Legislature to act in regard to public sentiment.

VIII.

THIS COURT SHOULD AFFIRM THE JUDGMENT OF CONVICTION BECAUSE APPELLANT HAS FAILED TO ESTABLISH ANY MISCARRIAGE OF JUSTICE SUPPORTING REVERSAL

Only a clear miscarriage of justice permits reversal of a judgment. (Cal. Const., art VI, § 13). In turn, a miscarriage of justice should be declared only when the court is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error..." (*People v. Watson* (1956) 46 Cal.2d 818, 836). Here, the undisputed evidence showed that Appellant failed to stop at a steady red signal in violation of Section 21453a (CT, p. 662). Moreover, Appellant was not cited during the thirty (30) day period prior to issuing citations at the intersection of his violation but two years later. Appellant would never have been entitled to receive a warning notice in lieu of a citation even if his intersection-specific argument were correct. Accordingly, Appellant cannot show he would have had a more favorable result if the City had issued warning notices given warnings in an intersection-specific manner. Absent any showing of a miscarriage of justice in his case, this Court should refuse to reverse the judgment of conviction against him.

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[17] See, Exhibit E to the People's concurrently-filed Request to Take Judicial Notice.

CONCLUSION

There is no question that the Automated Traffic Enforcement System saves lives and prevents injuries on the streets of California's cities. But Appellant's effort to reverse his conviction here invites this Court to engage in an overly-narrow construction of the warning notices and public announcement provision of the ATES statute that would frustrate that commendable purpose and contravene the intent of the Legislature as expressed in clear language of section 21455.5(b).

As established in this brief, Appellant's sole theory on appeal that the City should have given intersection-specific warning notices and made an intersection-specific public announcements is without merit. As the Court of Appeal held in this case, when the City issued warning notices and a public announcement at the time of the initiation of the ATES, it complied with those requirements. Indeed, the plain language of the statutory scheme and its legislative history as well as the application of fundamental principles of statutory construction establish that the warning notices and public announcement provisions of section 21455.5(b) were intended to comprise a public education program prior to the inception of an ATES program. The intention was to introduce the citizenry to this brand new program from the outset by informing the community of the presence of the system and the need *–at every intersection in the city–* for increased care and vigilance. The giving of warning notices anew each time an intersection is added to the ATES program in a municipality would have the harmful effect of giving violators a free pass to violate the red light law and convey to drivers a feeling that they only have to observe the red light law at certain intersections rather than throughout the City. This frustrates the intended effect of the ATES legislation, which is to enhance the deterrent effect of the program across the entire jurisdiction rather than at particular intersections.

Indeed, as the Court of Appeal held, even if Appellant's theory of intersection-specific warning notices and public announcements were correct, noncompliance would not compel reversal of the judgment of conviction or render

the ARLES evidence inadmissible, much less deprive the trial court of jurisdiction to render its judgment of conviction against Appellant. In this case, the alleged administrative noncompliance went neither to the violation itself nor to the proof thereof such that the credibility of the evidence is not implicated. The purpose of the criminal sanction is to prevent dangerous operation of a vehicle that may cause death or injury. An overly-narrow interpretation of administrative provisions such as warning notices and public announcements is wholly irrelevant to that goal.

The People ask that this Court decline Appellant's invitation to frustrate the purposes of ATES legislation by interpreting section 21455.5(b) in a constricted and unintended fashion. In turn, the People respectfully request that because Appellant has failed to establish any reversible error, this Court affirm the judgment of conviction against Appellant and order that the opinion of the Court of Appeal in *People v. Gray* be republished.

Dated: November 15, 2012

Respectfully submitted,

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[Certificate of word count on the following page]

CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.520(d)]

The text of this ANSWER BRIEF ON THE MERITS consists of 12300 words as counted by the Microsoft Word X word-processing program used to generate the brief.

Dated: November 14, 2012

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11500 W. Olympic Blvd., Suite 550, Los Angeles, CA 90064-1524.

On November 12, 2012, I served the foregoing document described as **ANSWER BRIEF ON THE MERITS** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon full prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on November 12, 2012 at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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