IN THE SUPREME COURT OF IOWA

No. 16-1031

MYRON DENNIS BEHM, BURTON J. BROOKS,
BOBBY LEE LANGSTON, DAVID LEON BRODSKY,
JEFFREY R. OLSON and GEOFF TATE SMITH,

Plaintiffs-Appellants,

v.

CITY OF CEDAR RAPIDS, IOWA
AND GATSO USA, INC.,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF LINN COUNTY
NO. CVCV083575
HON. CHRISTOPHER L. BRUNS, JUDGE

FINAL BRIEF OF PLAINTIFFS-APPELLANTS

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ROUTING STATEMENT

Plaintiffs-Appellants Myron Dennis Behm, Burton J. Brooks, Bobby Lee Langston, David Leon Brodsky, Jeffrey R. Olson, and Geoff Tate Smith ("Plaintiffs") assert that this case should be retained by the Supreme Court based on the "substantial constitutional questions" presented as to the validity of automated traffic enforcement ("ATE") provisions of Cedar Rapids Municipal Code section 61.138 ("Ordinance") implemented by Defendants-Appellees City of Cedar Rapids ("City") and Gatso USA, Inc. ("Gatso"). Iowa R. App. P. 6.1101(2)(a). In addition, Plaintiffs raise issues and present arguments of first impression[1] concerning municipal ATE ordinance enforcement on interstate highways located within a City's limits, thereby both affecting the rights and interests of thousands of unfamiliar vehicle owners and defining the limitations of powers of the City. Iowa R. App. P. 6.1101(2)(c). The public importance of considering these issues weighs in favor of retention pursuant to Iowa Rules of Appellate Procedure 6.1101(2)(d).

STATEMENT OF THE CASE

Since 2010, the City has made millions of dollars by unlawfully delegating police power to its for-profit contingency-fee joint partner, Gatso,

[1] A pending companion case to this one, *Marla Leaf v. City of Cedar Rapids, Iowa*, No. 16-0435, raises many, but not all, of these issues; but that case does not have the same factual record available here.

and by shunting those who dare to contest the accuracy of alleged violations of the Ordinance on I-380 away from Iowa District court proceedings, and into a haphazard, less protective administrative hearing process. (App. 017, 022, 027, 032, 034, 036, 041, 043-044, 048, 051, 054, 056, 062). Among other flaws, this administrative hearing allows for a lower burden of evidentiary proof on the City than Iowa law requires. The Linn County Courthouse could not begin to bear the weight of prosecuting—in the required manner—the huge volume of violations that Defendants' program creates. The City and Gatso know this, and, thus, the forceful shunting ensues.

This personal property taxing scheme, by another name, also operates in direct violation of the February of 2014 Iowa Department of Transportation ("IDOT's") guidelines, as adopted in Iowa Administrative Code provisions, and in stark defiance of that state agency's Orders issued to the City. In March of 2015, the IDOT eviscerated the only possible justification for the City's ATE program—safety—when it published its Evaluation of the ATE Ordinance, as applied to fixed speed camera locations on I-380. (App. 094-100). Despite being ordered to remove and/or move all four ATE speed cameras located on that highway segment, the City and Gatso have continued to operate them, collecting millions of dollars under an enforcement system in which the City and Gatso play police, prosecutor, judge, jury, and debt collector.

Plaintiffs filed their Class Action Petition, Request for Declaratory and Injunctive Relief, and Jury Demand ("Petition") in August of 2015. Plaintiffs' claims focused on the continued use of the ATE speed cameras on I-380 after the IDOT's March 2015 Order. (Petition). Defendants filed Answers on September 17, 2015. (Answers of City and Gatso). After the exchange of some limited discovery, in February of 2016, Defendants filed a Joint Motion for Summary Judgment on all of Plaintiffs' claims. Plaintiffs resisted in March of 2016. Defendants replied in April of 2016. On June 5, 2016, the Honorable Christopher L. Bruns issued a Ruling granting Defendants' Motion for Summary Judgment ("Ruling") in its entirety and entering judgment on all of Plaintiffs' claims. (App. 312-325). On June 14, 2016, Plaintiffs filed a timely Notice of Appeal. This appeal follows.

STATEMENT OF FACTS

a. Cedar Rapids Municipal Code Section 61.138

In 2009, the Cedar Rapids City Council passed and, thereafter, the City's staff and Gatso employees implemented, the Ordinance. (App. 003-012; 195-196, 231, 235). According to the Ordinance, the City "in accordance with its police powers, may deploy, erect or cause to have erected an automated traffic enforcement system for making video images of vehicles that . . . fail to obey speed regulations . . . in the city." Cedar Rapids Municipal Code ("Mun. Code")

§ 61.138(a). The ATE Contractor is the company "with which the City of Cedar Rapids contracts to provide equipment and/or services in connected with the Automated Traffic Enforcement System." Mun. Code §61.138(b)(3). "Vehicle Owner" is defined as the "person or entity *identified by the Iowa Department of Transportation* . . . as the registered owner of a vehicle." Mun. Code § 61.138(b)(4) (emphasis added). In actuality, a Vehicle Owner is any person identified by the Nlets system, from data provided by any government agency to which the City has delegated its access to Gatso. (App. 089-090).

A Vehicle Owner is liable if it is proven that he or she owned the identified Vehicle and that it traveled above the posted limit. Mun. Code § 61.138(c)(2). Fines can range from $25 to $750. Mun. Code § 61.138(c), (d). Gatso mails a Notice of Violation to each respective Vehicle Owner within 30 days after obtaining that person's identifying information. Mun. Code § 61.138(d)(1).

A Vehicle Owner may contest the citation by requesting an administrative hearing "held at the Cedar Rapids Police Department before an administrative appeals board (the "Board") consisting of one or more *impartial* fact finders." Mun. Code § 61.138(e)(1) (emphasis added). Upon receiving the decision of the Board, the Vehicle Owner must either pay the fine or "submit a request pursuant to the next paragraph, (e.)(2)." *Id.* That provision provides that a Vehicle Owner may request a municipal infraction citation from the City

to be filed with the Small Claims Division of the Iowa District Court in Linn County, a proceeding which requires "clear, satisfactory, and convincing evidence" that the Vehicle Owner's vehicle was traveling in excess of the posted speed limit. Iowa Code § 364.22(6)(a); Cedar Rapids Municipal Code § 61.138(c)(2). If the Court finds a Vehicle Owner guilty of the municipal infraction, "state mandated court costs will be added to the amount of the fine imposed by this section." Mun. Code § 61.138(e)(2).

b. Gatso's Contract with the City and Implementation of the Ordinance

Implementation of ATE by City and Gatso employees goes well beyond the terms of the Ordinance passed by the City Council. Defendants operate pursuant to a contract entitled, "2009 Agreement Between Gatso, USA, Inc. and the City of Cedar Rapids for Technology and Business Services Related to an Automated Traffic Law Enforcement System"("Contract"). In it, the two entities determined at which locations speed cameras would be installed. (App. 005). Gatso provides standard speed signage at fixed locations, if required, and warrants that those signs will comply with IDOT's standards. (App. 005-006). Gatso further promises to keep the ATE system in compliance with all City and IDOT standards. (App. 006).

Contrary to their contractual obligations, however, and to the detriment of Vehicle Owners, the City and Gatso, do not operate certain of their ATE

equipment in compliance with applicable laws. For instance, certain I-380 signs reducing traffic speed posted in advance of speed camera locations fall short of the minimum-required 1000-foot distance between a change-of-speed sign and the location of ATE equipment, as expressly set forth in the administrative rules promulgated by the IDOT. Iowa Admin. Code § 761-144.6(1)(b)(10).

Gatso has a financial incentive in reviewing every single alleged violation: it initially received $30.00 (later reduced to $25.00) per each paid citation. (App. 004, 486). The corporation has received the following Ordinance-generated fees: 2010: $817,960.00; 2011: $2,537,280.00; 2012: $2,152,650; 2013: $2,137,140; 2014: $1,1637,400; and 3/17/2015 – 1/26/2016: $1,749,143. (App. 089, 446).

On March 17, 2015, the IDOT ordered the removal or movement of all of Gatso's fixed speed cameras located at all four locations on I-380. (App. 094-100). The City appealed this decision; the IDOT issued its final decision on May 11, 2015, maintaining that: all speed cameras at two ATE fixed locations must be permanently removed from I-380; and all speed cameras at two other ATE fixed locations must be moved, and, if re-established, then, only to areas where there are legitimate safety concerns. (App. 101-111).

The fact that the ATE equipment on I-380 is unrelated to safety is also held by the only expert witness who has offered an opinion concerning this matter in this case, to date. If an ATE system is working properly, the number

of citations (and therefore income generated) should be reduced over time, as drivers modify their behavior. (App. 127-129). That has not occurred here. Interstate highways are designed to give a consistent driving experience to all drivers throughout the nation. If some are aware of an interstate speed camera and others are not, differentiation of speeds will be created, which is the most dangerous issue for traffic accidents. (App. 126).

Pursuant to their Contract, the City provides sworn police officers to Gatso in order to review each "Violation Package." If a package is rejected by the City, it must inform Gatso of the basis for the rejection. (App. 009). Gatso electronically sends the packages to the police officers to either approve or reject before the citation "is issued" by Gatso. (App. 006, 091). "If the City accepts a processed violation, Gatso issues a notice of violation." (App. 007, 091). Gatso uses the National Law Enforcement Telecommunications System ("Nlets")—which requires a law enforcement agency's ORI number—to identify license plates and registered owners. (App. 089-090). The City delegated Gatso the use of the City's ORI number. (*Id.*).

In contrast and in addition to the express language of the Ordinance, Gatso and the City have enacted a "Business Judgment Rule," holding that only Vehicle Owners allegedly traveling 12 mph or more over the speed limit should be issued citations. (App. 161, 163, 199, 463). Gatso's cameras and radar equipment, however, have an error rate of plus or minus 2 mph. (App. 161,

163). The IDOT's administrative rules require that the camera/radar equipment be calibrated at least *quarterly* by a local law enforcement officer of the City to ensure reliability. Iowa Admin. Code 761-144.6(4). However, Gatso (only) and not the police, calibrates the equipment, and, then, only *annually*. (App. 137-138, 177, 185, 197, 199, 205, 212, 216, 218, 264, 273, 322, 482-483). On those occasions upon which the City's police have participated in "testing" the accuracy of Gatso's speed cameras--by driving under fixed camera locations at rates of speed high enough to trigger citations--in most instances the radar-measured speeds have exceeded the actual driven squad car speeds. (App. 470-472). Based on this error rate, objective fact finders would presumably find it difficult for the City to prove one element of its cases: that the vehicles were traveling the actual alleged speeds.

In the Notice of Violation documents issued by Gatso to initiate the prosecutions of Vehicle Owners, the following options for challenging speed allegations are set forth (under the section "I Contest This Violation"): "You have the right to contest this violation in person at an administrative hearing or by mail if you reside outside the state of Iowa." (App. 017, 027, 034, 036, 054, 056). There is no reference made in the Notice of Violation to a Vehicle Owner's ability to access Iowa courts directly to contest the speeding allegation. This is entirely consistent with a straight-forward reading of Sections (e)(1) and (e)(2): that the administrative proceeding and access to the district court are not

alternatives courses of appeal, but, rather, sequential means (e.g., first, the administrative hearing; then, access to the district court) by which a Vehicle Owner may contest a violation.

Those who exercise the right to an administrative hearing encounter rough justice, to put it mildly. The police (who, in effect, also serve as judge and jury) offer legal advice to vehicle owners regarding the viability of the City's Ordinance, the invalidity of the IDOT's administrative rules, and the IDOT's lack of power to enforce administrative those rules over the City. (App. 273-274, 299, 379, 388). Administrative Hearing Officers have no letters of appointment; they are friends of police officers, frequently. (App. 416). Notwithstanding the informality of the appointment process, police officers sometimes wrongfully refer to them as Administrative Judges. (App. 187, 189). These "officials," in turn, issue officious "Orders" determining the liability of Vehicle Owners under a preponderance of evidence standard. (App. 032, 043, 044, 051, 062,).

If informed of the right, and if one has the wherewithal to continue to fight the citation after a Hearing Officer's adverse decision, a Vehicle Owner can appeal the case to Small Claims Court.

c. IDOT Evaluations and Plaintiffs

In March of 2015, the IDOT issued an Evaluation of the City's ATE program and determined that the fixed cameras (one per lane of traffic) at all

four exits on I-380 had to be removed: two sets, permanently (J Ave I380 NB and 1st Ave SW I380 SB); and the other two sets, if later re-instated, then, only at different locations, ones that were proximate to any danger actually posed by an S-Curve. (App. 094-100). The City appealed that decision. On May 11, 2015, in response to the City's appeal, the IDOT ordered the removal of the fixed camera/radar equipment at all I-380 locations, denying the City's argument that the ATE system on that highway segment, as then-configured, had enhanced public safety. (App. 101-111).

Plaintiffs, collectively, represent Vehicle Owners who have been prosecuted in administrative proceedings required under the City's Ordinance at each of the fixed camera locations on I-380. Myron Dennis Behm resides in Atwater, Minnesota, and on April 11, 2015, at approximately 1:57 p.m., a vehicle owned by him was alleged to have been operated in violation of the Ordinance, at I-380 Northbound, J Avenue Exit, Lane 1. (App. 016-017). Plaintiff Burton J. Brooks of Illinois received a Notice of Violation for an alleged speeding event from June 19, 2015, at I-380 Southbound at J Avenue. (App. 026-027). He was then issued a Notice of Determination 2nd Notice. (App. 028-029). He requested to contest his violation, as confirmed by a letter from Gatso's processing center from the City in Beverly, MA. (App. 030). Plaintiff Brooks contested his Notice of Violation by mail since he resided in Illinois by writing the following: "I can only suggest your camera

malfunctioned or it isn't allowing strangers to your city time enough to adjust to the speed limit?" (App. 031). Based on a preponderance of the evidence, Hearing Officer Chris Mayfield held that the "[e]vidence shown could not prove the citizen's fault." (App. 032).

Plaintiffs Bobby Lee Langston and David Leon Brodsky reside in Iowa City, Iowa. (App. 035). On April 25, 2015, a vehicle owned by them was alleged to have violated the Ordinance at 1-380 Southbound, 1st Avenue West Exit. (App. 035-036). Plaintiff Brodsky attended an Administrative Hearing. Without any distinction between the two, as a matter of evidence, one of Mr. Brodsky's citations was dismissed and the other was not. (App. 043-044).

Plaintiff Jeffrey R. Olson resides in Bloomington, Minnesota; on April 3, 2015, a vehicle owned by him (or, as named in the caption, "Jeffrey Ross") was alleged to have violated the Ordinance, at 1-380 Southbound, J Avenue Exit, Lane 2. (App. 085-086). He submitted a detailed analysis outlining why he believed the Violation should be dismissed. (App. 049-050). The Hearing Officer found him liable based on a "preponderance of the evidence." (App. 051).

Plaintiff Geoff Tate Smith resides in Aloha, Oregon. (App. 055). On June 8, 2015, a vehicle owned by him was alleged to have violated the Ordinance, at 1-380 Northbound, Diagonal Drive Exit, Lane 1 and, then, two minutes later, at I-380 Northbound, at J Ave. (App. 055-058). One Violation

was sustained by the Hearing Officer after a hearing was convened. The other Violation was not addressed. (App. 062).

Based on their varied respective treatments, Plaintiffs decided to pursue these constitutional claims.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE NOTICES OF VIOLATIONS WERE NOT MUNICIPAL INFRACTIONS AND PROCEDURAL DUE PROCESS RIGHTS WERE NOT VIOLATED

A. Standard of Review and Error Preservation

This Court reviews the district court's granting of summary judgment "for correction of errors at law." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007) (citation omitted). Constitutional claims are reviewed de novo. *Star Equip., Ltd. v. State*, 843 N.W.2d 446, 451 (Iowa 2014) (citation omitted). Plaintiffs have consistently maintained that violations of the Ordinance are municipal infractions and, as such, should have the applicable statutory framework applied; in addition, they argued the violation of procedural due process in the court below. Plaintiffs' Brief in Support of Resistance to Defendants' Joint Motion for Summary Judgment ("Plaintiffs' Resistance Brief"), pp. 12-22, 34-38.

B. ATE Citations are Municipal Infractions According to the City's Own Code

The premise of many of Plaintiffs' claims relies on the fact that the Notice of Violation of the Ordinance constitutes a municipal infraction (and therefore, the provisions of Iowa Code section 364.22 apply). Iowa Code section 364.22(2) provides that "[a] city by ordinance *may* provide that a violation of an ordinance is a municipal infraction." The City has so provided: "*any violation of a city ordinance*, city code, or any section, subsection, paragraph, subparagraph, or any other part thereof, *constitutes a municipal infraction* subject to all the penalties, and other relief provisions set forth in Section 364.22, Iowa Code." Mun. Code § 1.12 (emphasis added). Therefore, the City cannot argue that ATE citations (the Notice of Violation which informs a Vehicle Owner that they violated the Ordinance) are not municipal infractions (entitled to the procedures provided in Iowa Code section 364.22). Notwithstanding these legal definitions, Defendants, for the first time, in their Reply Brief to the district court, below, raised this argument expressly. The district court, in turn, erred in so-holding: that "ATE citations are *not* municipal infractions." (App. 515).

C. Procedural Due Process is Violated When the Statutory Process is Not Followed and by the Balance of Factors

Article I, section 9 of the Iowa Constitution protects against state action that "threatens to deprive [a] person of a protected liberty or property interest." *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 690-91 (Iowa 2002).

Procedural due process requires "notice and opportunity to be heard in a proceeding that is 'adequate to safeguard the right for which the constitutional protection is invoked.'" *Id.* (citation omitted). The "opportunity to be heard" must be "at a meaningful time and in a meaningful manner." *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 145 (Iowa 2013) (citation omitted).

The process that is "due" can first be determined by an applicable statutorily-required process. *See Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 330 (Iowa 2015) (describing the process by which the Iowa Supreme Court first looked for a legislative mandate in determining due process). Here, Iowa Code section 364.22 requires direct access to a "magistrate, a district associate judge, or a district judge" for violations of municipal infractions. Iowa Code § 364.22(6).[2] The General Assembly has determined the minimum process that is due to those who challenge municipal infractions; the City fails to abide by such process when it forces all charged Vehicle Owners who contest the allegations set forth in Notices of Violations to attend an administrative hearing. One does not even need to engage in the *Mathews* test, *infra*, if there is a legislative mandate of process. The City has therefore violated Plaintiffs' procedural due process rights. *Cf. Sindlinger v. Iowa State Bd. Of Regents*, 503 N.W.2d 387, 390 (Iowa 1993) ("In the absence of a discernible statutory right,

[2] Even in Gatso's own materials, it notes that upon a first notice, there will be a citation with the option to call in or schedule a hearing online. (App. 462).

petitioner's claim must rest on a constitutional entitlement to a contested case hearing."). Further the Ordinance promises access to an "impartial" administrative "Board." Mun. Code § 61.138(e)(1). No such Board exists. Even if the Hearing Officer who presides over the Board were assumed, *arguendo*, to be impartial, police officers can override their decisions. (App. 416-417). And that assumed impartiality is challenged by the fact that Hearing Officers are frequently friends or family members of police officers. (*Id.*).

Even assuming further, *arguendo*, that the City's failure to provide the statutorily-guaranteed process were insufficient on its own to demonstrate a violation of due process, such a violation has still occurred. In alternatively analyzing due process violations, the Court considers the interest protected, and then, if a protected interest is involved, the Court balances three competing interests:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Bowers, 638 N.W.2d at 691 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Iowa has recognized a protected property interest in "not being subject to irrational monetary fines." *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 345

(Iowa 2015). Further, and independently, as described below, Plaintiffs aver that their fundamental liberty interest, their right to travel, deserves due process protection. While the amount of the fine resulting from an Ordinance violation may not seem significant to some, due process should not depend on one's wealth, and that amount is certainly significant to others. In addition, the loss of time (and therefore income from employment) in the wasted "hearing" created by the City is significant to everyone.[3] There are related, intrinsic interests that are threatened, which are incredibly valuable, such as being "subject to collection procedures, including but not limited to being reported to a credit reporting agency, and a civil lawsuit." (Defendants' App 51, 52). One's credit rating is valued and protected; few would risk it to challenge a civil

[3] Based on this interest, the district court further erred in finding that Plaintiff Brooks had no standing to bring this challenge. (App. 515). Standing requires that Plaintiff meet two separate but related inquiries: "(1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." *Godfrey v. State*, 752 N.W.2d 413, 418 (Iowa 2008) (citation omitted). The injury need not be a violation of private right or suffering traditional damages, but rather, suffering differently than the general population. *Id.* at 420. The district court essentially held that he did not find a due process right in losing one's time to contest a violation as time would have been lost even using a constitutional process. (App. 515). That, however, goes to the merits of a due process violation, but not whether Mr. Brooks had a "specific personal interest" and had it "injuriously affected." This is not the same as a generalized taxpayer grievance (against the legislature for enacting a comprehensive statute during an extraordinary session), as found in *Godfrey*, 752 N.W.2d at 424. Mr. Brooks received a Notice of Violation from Gatso that directed him to appeal through the mail as he resided out of State. (App. 028-029). He went through that illegal process for contesting municipal infractions and was successful. (App. 032). Despite his success, he still has a specific interest in seeing that the process that is "due" is followed, however, and was injuriously affected by the loss of time.

penalty, even one assessed in error. Gatso and the City, in fact, use the actual process "due" to citizens as a threat, rather than a benefit, by ominously referring to the "civil lawsuit" to collect the fine.[4] (App. 016, 018, 024, 026, 033, 035, 053, 085).

The second consideration of *Mathews*—the risk of erroneous deprivation—is, in this instance, both serious and systemic, weighing in Plaintiffs' favor, on at least three different fronts. First, it is a private corporation's (Gatso's) employees, and not police officers, who make the initial determination to prosecute Vehicle Owners, and the standards used by Gatso, to discard 40% (or conversely, keep and prosecute 60%) of the captured images received are entirely unclear. *Cf. Booker v. City of St. Paul*, 762 F.3d 730, 735-36 (8th Cir. 2014) (finding that there would unlikely be erroneous deprivation where a police officer makes an initial determination of sobriety and then a prosecutor must establish probable cause at a preliminary hearing).

Second, the City and Gatso issue Notices of Violation to Vehicle Owners that threaten at the very onset collection actions for unpaid civil penalties. (App. 016, 026, 033, 035). Such threats deter and dissuade Vehicle

[4] Said "civil lawsuit" will also come with increased court costs, as does the "appeal" to the district court. (App. 022, 044, 051, 062). Those increased amounts are often double the citation amount one would have to pay without "appealing" a citation, which makes it really "no choice at all." *See Williams v. Redlfex Traffic Sys.*, 582 F.3d 617, 621 (6th Cir. 2009) (holding that challenging one's parking ticket where one would have to pay a non-refundable fee higher over and above the cost of the ticket received was "no choice at all.").

Owners from asserting their rights to contest the citations.

Third, the risk of erroneous deprivation is amplified by the use of Hearing Officers who convene the required administrative hearing processes, without power conferred to them by any official appointment. Those Vehicle Owners who are subjected to such proceedings are offered none of the protections that are routinely provided by a court of law. During the "hearing," a police officer presents evidence, including digital images and calculations of vehicular speed, all of which are provided by Gatso. (App. 464). No employee of Gatso is present. (App. 410, 464). No evidence is produced demonstrating that the cameras have been calibrated properly by a local enforcement officer. *Cf.* Iowa Admin. Code § 761-144.6(4). In fact, Gatso, and not a City employee, calibrates equipment annually. (App. 409). Despite asserting that "motions, evidence and argument" are presented, there are no such meaningful opportunities to make such presentations. Hearing Officers use the wrong burden of proof ("by a preponderance of the evidence and rules") to determine whether violations have occurred. (App. 022, 044, 051, 062). They then issue pre-printed "Findings, Decision and Order" documents, under which "the Administrative Body" purports to find liability, or not. (*Id.*). This is not merely an argument that a "fairer or wiser process" exists. *Cf. Holm v. Iowa Dist. Court*, 767 N.W.2d 409, 417-18 (Iowa 2009). The hearing processes are patently unfair. They are conducted in a manner expressly contrary to the

legal standard established by the General Assembly: Vehicle Owners prosecuted for violations of municipal infractions must be found liable based on "clear, satisfactory and convincing evidence." *See* Iowa Code § 364.22(6)(b); *cf. Seymour v. City of Davenport*, 755 N.W.2d 533, 538 (Iowa 2008) (holding that Davenport's ATE Ordinance was not preempted by Iowa law because it applied the appropriate clear, satisfactory and convincing burden of proof standard required).

With respect to the third and final prong of the *Mathews* procedural due process analysis, the government interest in prosecuting Vehicle Owners who travel on I-380 is not significant. The IDOT, the agency of government with authority over the movement of traffic on that highway segment, has unequivocally determined that there is no government interest in locating the radar equipment at each and every current I-380 location. (App. 094-100). For two of those locations, the IDOT determined there is no legitimate interest in having fixed ATE equipment. Despite tens of thousands of prosecutions and millions of dollars of civil penalties assessed, crashes have not been reduced and vehicular speeds have increased. (App. 94-111). For the other two locations, a government interest (safety) may be addressed, but only, the IDOT ordered, if the ATE equipment is placed proximately to the perceived dangerous conditions on the "S" curve. (App. 98). In addition, the City has unlawfully delegated, as described below, virtually all authority to protect its

ostensible government interest, to Gatso, its for-profit contingency-fee vendor, thereby negating any claim of true governmental importance. Moreover, the cost of using the statutory process provided (access to district court) is the cost to enforce any municipal infraction. It cannot be said to be unduly burdensome. If enhancing the financial self-interests of the City and Gatso were not the core and guiding purpose of this program, then the costs associated with enforcing the Ordinance by providing Vehicle Owners with direct access to the court system should not be viewed as a deterrent. Any claim by the City that using a constitutional system that does not discriminate among different types of Vehicle Owners (automobile owners versus semi-truck owners versus drivers of government vehicles), or that issues Notices of Violation by certified mail, or that requires local police officers, and not corporate employees in distant states to issue the citations, must certainly fall on deaf ears. If giving citizens required direct access to a court is characterized as creating too great of a burden, then the ATE system cannot function within a constitutional framework. In sum, all three factors of due process weigh in Plaintiffs' favor.

Due process always requires a "constitutional floor of a 'fair trial in a fair tribunal.'" *Botsko v. Davenport Civ. Rights Comm'n*, 774 N.W.2d 841, 848 (Iowa 2009) (citation omitted). As the *Botsko* Court recognized, in analyzing the U.S. Supreme Court's case of *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), where

pecuniary interest is involved, "experience teaches that the probability of actual bias on the part of the . . . decision maker is too high to be constitutionally tolerable." *Id.* Police officers and the Hearing Officers have a million reasons to be biased in these cases.[5] Defendants have received more than $4,000,000 in fines from the years 2012 to 2014. B.A. Morelli, THE GAZETTE, *Class action suit filed over Cedar Rapids traffic cameras*, September 2, 2014, *available* at http://thegazette.com/subject/news/class-action-suit-filed-over-cedar-rapids-traffic-cameras-20140902. There can be no appearance of fairness where the police present evidence created by a private corporation, to Hearing Officers, who themselves have no legal training. Having access to a proper tribunal at a later date does not satisfy the defective due process of the original administrative hearing. *See Ward*, 409 U.S. at 61 ("State's trial court procedure [could not] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication."). The damage is done once one is forced to attend an unconstitutional process.

Enforcement of the City's Ordinance also wrongfully relies on an

[5] While it is not a mayor who makes the decision that fills a city's coffers, the police officers receive direct benefit from the issuance of citations, and they are the ones directing and, sometimes even making final decisions at the administrative hearings. (App. 416-417); *See Rose v. Village of Peninsula*, 875 F. Supp. 442, 448-453 (N.D. Ohio 1995) (analyzing the revenues collected in an Ohio village's mayor's court and the deprivation of due process where the mayor "occupies two practically and seriously inconsistent positions, one partisan, and the other judicial") (citing *Ward v. Monroeville*, 409 U.S. 57 (1972)).

irrebutable presumption[6] that the Vehicle Owner is responsible for the infraction which, if accurately charged, may have been committed by someone else (in addition to relying on hearsay evidence). Such presumptions are "arbitrary" and "operate[] to deny a fair opportunity to rebut it," and therefore further violates Iowa's Due Process Clause. *See Hensler v. City of Davenport*, 790 N.W.2d 569, 586 (Iowa 2010) (holding that a presumption in a civil case violates due process where "it is arbitrary or operates to deny a fair opportunity to rebut it") (citation omitted). The City has attempted "take the place of fact in the judicial determination of issues involving life, liberty, or property." *Id.*

The Ordinance is therefore unconstitutional as a violation of Plaintiffs' due process rights pursuant to the Iowa Constitution. The district court's decision must be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THE ORDINANCE WAS NOT PREEMPTED BY IOWA CODE SECTIONS 364.22 AND 602.6101 AND THE IDOT'S EVALUATION AND ORDER

A. Standard of Review and Error Preservation

"A trial court's determination of whether a local ordinance is preempted by state law is a matter for statutory construction and is thus reviewable for correction of errors at law." *Jacobsma*, 862 N.W.2d at 339 (citation omitted).

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[6] The Iowa Supreme Court has held that a rebuttable presumption that the owner is the driver satisfies due process, but has not decided the issue of an irrebuttable presumption. *Jacobsma*, 862 N.W.2d at 342.

Plaintiffs raised this argument in their Petition and their briefing below. Plaintiffs' Resistance Brief, pp. 34-38.

B. The Ordinance is Irreconcilable With Iowa Code Sections 364.22(4), (6) and 602.6101

Municipalities have home rule authority to enact legislation that is "not inconsistent with the laws of the general assembly." *Baker v. City of Iowa City*, 750 N.W.2d 93, 99 (Iowa 2008) (quoting Iowa Const. art. III, § 38A and Iowa Code § 364.1). Based on this language, "the legislature retains the power 'to trump or preempt local law.'" *Id.* (citation omitted). Implied preemption, at issue here, "occurs when an ordinance prohibits an act permitted by statute, or permits an act prohibited by statute." *Seymour*, 755 N.W.2d at 538 (citation omitted); *see also Goodell v. Humboldt County*, 575 N.W.2d 486, 502 (Iowa 1998) (holding that the ordinance enacted by a county—pursuant to the county's home rule authority—was preempted as it allowed the county to do "what the statute directly forbids"). To prove this form of implied preemption, or conflict preemption, the "local law must be 'irreconcilable' with state law." *Id.* at 539 (citation omitted).

The Ordinance, ambiguous at best, provides that one may contest a citation by requesting an administrative hearing at the Police Department "before an administrative appeals board (the "Board")[.]" Mun. Code § 61.138(e)(1). Plaintiffs' Notices of Violation contained the following language:

"You have the right to contest this violation at an administrative hearing or by mail if you reside outside the State of Iowa." (App. 017, 027, 036, 054, 056). Nowhere on the Notice of Violation is direct access to the Iowa District Court referenced or suggested. This is irreconcilable with Iowa Code section 364.22(6) and 602.6101. Iowa Code section 364.22(6) does not indicate that a municipal infraction "may" be tried before a magistrate, it must: "In municipal infraction proceedings: [t]he matter *shall* be tried before a magistrate, a district associate judge, or a district judge in the same manner as a small claim." Iowa Code § 364.22(6) (emphasis added). This is mandatory. Using an administrative hearing process before a volunteer citizen with no legal training is not consistent with this language. It is irreconcilable. The Iowa District Court, moreover, has "exclusive, general, and original jurisdiction of all actions." Iowa Code § 602.6101. These are direct conflicts. Either the hearing is held before a magistrate or district judge or it is not.

As part of the preemption analysis, legislative intent is considered, and the local ordinance is required to "remain faithful to this legislative intent." *Baker*, 750 N.W.2 at 99. The legislative intent of these provisions, as determined through the amendments made, demonstrates that these were important distinctions to the General Assembly. In fact, the General Assembly specified different courts for civil proceedings depending on the jurisdictional limits (essentially, requiring a different "due" process depending on the amount

of penalty money was at issue). In its 1990 amendments, the General Assembly made it clear that contesting a municipal infraction would be tried directly to a district court judge if the jurisdictional amount had been met. 1990 Ia. ALS 1210, 1990 Iowa Acts 1210, 1990 Ia. Ch. 1210, 1990 Ia. HF 2412; *see also* 1996 Ia. ALS 1067, 1996 Ia. Ch. 1067, 1996 Ia. LAWS 1067, 1995 Ia. SF 2155. The General Assembly demonstrated care in the clarifying language it used to spell out jurisdictional requirements with respect to where alleged violations of municipal infractions would be venued. The legislature further limited the powers of cities when it allowed them to provide *more* procedural protections "than those imposed by state law," and not *less*. Iowa Code § 364.3. Allowing a "Hearing Officer" who is neither a magistrate nor district court judge to issue "Orders" based on the less protective "preponderance of evidence" standard than is required to be applied by sworn judicial officers in the Iowa District Court ("clear, convincing, and satisfactory") (App. 022, 032, 044, 051, 062) is irreconcilable with this intent, and therefore violates state law.[7] The Ordinance

[7] Additional careful amendments to this statute further demonstrate the importance of the process to the general assembly. *See* 2009 Ia. ALS 21, 2009 Ia. Ch. 21, 2009 Ia. LAWS 21, 2009 Ia. SF 118 (clarifying that in addition to the certified mail or other recognized service on a defendant, the original citation should be sent to the clerk of the district court and "a copy of the citation shall be retained by the issuing officer."). This language is irreconcilable with Gatso, a private entity, issuing by regular mail a citation to defendants and never sending it to any clerk.

permits a type of administrative hearing that the statute prohibits (by requiring a hearing before a magistrate or district associate judge).

The administrative process is irreconcilable with Iowa law because it cannot be rendered consistent. *See Iowa City v. Westinghouse Learning Corp.*, 264 N.W.2d 771, 773 (Iowa 1978) (quoting the definition of irreconcilable as "impossible to make consistent or harmonious"). *Westinghouse Learning Corporation* is instructive, in that the Court held that the statute had set forth a process, and the city, through an ordinance, did not follow that process, which rendered said ordinance preempted. *Id.* Similarly, Iowa Code section 364.22(4) and (6) set forth a very specific process to be followed by a city enforcing municipal infractions, but the City and Gatso have not followed it. Such an attempt is preempted. One must choose "one enactment over the other," *Seymour*, 755 N.W.2d at 541, and in such a case, state law preempts. *See also James Enters. v. City of Ames*, 661 N.W.2d 150, 153 (Iowa 2003) (holding that a local ordinance that prohibited designated smoking areas conflicted with Iowa Code section 142B.2, which expressly allowed such designations, was preempted). It is further clear that Gatso, and not a City police officer, issues the citations: "If the City accepts a processed violation, Gatso *issues* a notice of violation"). (App. 448) (emphasis added). This is irreconcilable with the express provisions and clear intent of Iowa Code sections 364.22(4).

More recently (since at least March 2015), any citations issued based on evidence created by ATE equipment located on I-380 are directly inconsistent and irreconcilable with the Evaluation and Order of the IDOT. This ATE equipment is therefore also preempted by that agency action. Several of the speed cameras on I-380 have also been located and operated in a manner violative of (and therefore preempted by) Iowa Administrative Code section 761-144.6(1)b(10) since February of 2014. *See Iowa Grocery Indus. Ass'n v. City of Des Moines*, 712 N.W.2d 675, 680 (Iowa 2006) (holding that a Des Moines ordinance was preempted where it allowed the City to establish a transfer fee for alcoholic beverage permits, which was patently inconsistent with the Iowa Alcoholic Beverages Division's ability to "establish a uniform transfer fee"). The Iowa Supreme Court held in *Iowa Grocery* that Des Moines had usurped the power granted to the agency by the General Assembly. *Id.* Similarly, here, the IDOT has determined that the ATE units on I-380 should be removed because of the low crash rate that had existed at that highway segment before the cameras, and the un-improved safety record after the Ordinance had been implemented. (App. 094-100, 112-121). The City's continued use of speed cameras on I-380, notwithstanding the IDOT's Order, and the City's assessment and collection of fines extricated from the motoring public, thereafter, is patently inconsistent and irreconcilable with this agency's decision. The City's conduct is preempted, and must be enjoined.

Plaintiffs also assert that Iowa Code section 321.230 preempts the City's exemption of thousands of government vehicles from Ordinance prosecution. (Plaintiffs' Resistance Brief, p. 38). Although the Ordinance does not allow for any such exemptions, the City and Gatso, *de facto*, in violation of state law and their own Ordinance, have exempted thousands of government vehicles from prosecution. These provisions cannot be reconciled with this implementation. The district court's decision on preemption should be reversed.

III. THE CITY HAS UNCONSTITUTIONALLY DELEGATED POLICE POWER TO GATSO

A. Standard of Review and Preservation of Error

Constitutional claims are reviewed de novo. *Star Equip., Ltd. v. State*, 843 N.W.2d 446, 451 (Iowa 2014) (citation omitted). Plaintiffs pled this claim and argued it in their Brief, below. Plaintiffs' Resistance Brief, pp. 39-43.

B. The City Unlawfully Delegated its Police Powers to Gatso to Make Discretionary Determinations

The district court held that "Plaintiffs did not set forth specific and material evidentiary facts" indicating an unconstitutional delegation of police power to Gatso. (App. 516). The district court further held that the acts by Gatso of calibrating ATE equipment (which was "also conducted by the City and tested by CRPD officers)[,]"[8] maintaining the information hotline for the

[8] There was no evidence in the record that the City conducts any calibration of ATE equipment; Plaintiffs assume the district court was referring generally to

City and FAQs webpage, and mailing out notices did not constitute "meaningful judgment or discretion," citing *Leaf*, No. CRCISC214393, at p. 10.[9] (App. 516). This was error.

The Iowa Supreme Court has recognized a "fundamental principle of government" in prohibiting the delegation of police powers. *Warren Cty. Bd. of Health v. Warren Cty. Bd. of Supervisors*, 654 N.W.2d 910, 913-14 (Iowa 2002). "As a general rule, a municipal corporation 'cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender' unless authorized by statute." *Warren Cty. Bd. of Health,* 654 N.W.2d 910 at 913-14 (citations omitted). A line is drawn between, on the one hand, delegating a right to perform acts involving "little judgment or discretion" and, on the other hand, delegating those acts that involve "discretionary power conferred by law." *Id.* (citations omitted). The latter is forbidden. *Id.*

The City has wrongfully delegated police powers to Gatso in no less than six fundamental ways. First, the City has allowed Gatso to make the initial, *discretionary* decision as to which Vehicle Owners should be considered by the City to receive potential citations, versus which should not receive such consideration. Gatso, acting without City supervision, makes initial screening

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the "testing" conducted by CRPD officers, which results in the finding of an error rate of 2 m.p.h. (App. 516).

[9] As Plaintiffs' noted, *Leaf* is also currently pending appeal.

determinations of every "event" sent electronically to Gatso's out-of-state facilities from its equipment located on I-380. These initial screenings are fundamental "prosecute" versus "don't prosecute" decisions that should be made by police officers only. "Screening," by its nature involves discretionary decisions. There is evidence that Gatso employees, without City supervision, reject up to 40% of the images that they receive, under standards that are entirely non-transparent to the outside and not addressed in the Ordinance. (App. 421). After a City police officer conducts a cursory review of approximately 60% of the images, Gatso then issues the Notices of Violation under City letterhead. Of the reasons that are given for potential rejections of citations, and, then, only a few involve an "Officer Reject" based on any criteria at all. (App. 450-451). Most of the rejections appear to have been applied by Gatso's, and not the City's Police Department, employees: "No Violation – Extreme Weather Conditions; No Violation – Vehicle Mismatch; No Violation – Vehicle Changed Lanes; Plate Not Readable – Blocked." (*Id.*). In fact, if the City rejects violations forwarded to it by Gatso, pursuant to its Contract with Gatso, the City must explain to Gatso (and not the other way around) why it did so. (App. 009). In fact, the "Supervisor Reject Review" and "Verify" portions of the process are "Performed by Gatso." (App. 463). The world of a local government's law enforcement efforts being accountable to citizens (as opposed to shareholders) is turned upside down.

Second, the City delegates fundamental police powers to Gatso by authorizing the corporation to access the Nlets database to run license plate queries on behalf of the City. (App. 447-448). Nlets was created by law enforcement agencies to "serve the law enforcement community." (App. 447). Not private for-profit corporate interests.

Third, in conjunction with Gatso, the City has established "business rules" under which, in direct contravention of Iowa's traffic laws and outside the scope of the Ordinance, it has been determined that only those vehicles allegedly traveling 12 mph or more over the speed limit (based on Gatso's radar equipment's calculations) should be issued citations. (App. 459-460, 463). It is questionable whether the City has the authority to do this at all, let alone delegate its enforcement power further by deciding with Gatso at what speed, other than legislated, posted speed limits, to enforce speed laws. Enforcement of this "rule" requires discretion and judgment, all of which has been delegated to Gatso. *See Bunger v. Iowa High Sch. Athletic Assoc.*, 197 N.W.2d 555, 559-560 (Iowa 1972) ("Rule-making by school boards involves the exercise of judgment and discretion" and cannot be "re-delegate[d]").[10]

[10] "[D]elegatus non potest delegate," or "a delegated power may not be further delegated by the person to whom such power is delegated." *Id.* (quoting 2 Am.Jur.2d Administrative Law § 222 at 52). Establishing and enforcing speed limits, like deliberations by a public board on reorganizing county employees, is a matter of "public policy involve[ing] judgment and discretion." *See Hutchison v. Shull*, 878 N.W.2d 221, 234 (Iowa 2016) (citation omitted) (noting that the open

Fourth, notwithstanding administrative rules issued by the IDOT (Iowa Admin. Code § 761-144(4)) that expressly impose a duty upon the City, through its law enforcement employees, to calibrate ATE equipment at least quarterly, here, Gatso's ATE's radar is calibrated by corporate employees, alone, and only annually. These are substantive, and not merely administrative, tasks. *See Bunger*, 197 N.W.2d at 560 (noting that merely ministerial functions may be delegated but "powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment" cannot be delegated).

Fifth, pursuant to its contract with the City, Gatso provides the points of contact with Vehicle Owners who have received Notices of Violation. It provides a hotline, the place listed on the Notice documents for Vehicle Owners to call and have questions answered about where, and how, to contest the alleged law violation, which communications constitute legal advice. Gatso maintains and runs the website for the City that provides all the FAQs and other information related to the Ordinance, as well as the payment portal. (App. 446-451, 464). To contest a citation, one has to send the mailed

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meetings law demonstrates that public policy debates involve judgment and "agents" cannot be used to deliberate these matters without becoming subject to open meetings requirements).

argument to Gatso's location in Beverly, Massachusetts. (App. 017, 027, 034, 036, 054, 056, 086).

Sixth, additional forms of unlawful delegation of police power arise in the context of administrative hearings to contest Notices of Violation. There, the City, without any formal process, delegates the power to determine civil liability to a Hearing Officer, a person without legal training, who, serving in a quasi-judicial capacity, convenes each administrative hearing. Such "quasi-judicial" delegation is proscribed. *Bunger*, 197 N.W.2d at 560. The Hearing Officer actually issues an "Order" determining civil liability and assessing fines and penalties. Judicial decisions could certainly never be considered "administrative" and involve the clear exercise of judgment. The fact that Iowa law assigns responsibility for making civil infraction decisions to magistrates and district judges demonstrates that this same government power cannot be delegated to an unsupervised layperson. Iowa Code § 364.22(6)(a).

In sum, a quintessential "police" power is the ability to police one's roads and determine who is issued (and then issuing) tickets. *See Marco Dev. Corp. v. Cedar Falls*, 473 N.W.2d 41, 42-43 (Iowa 1991) (holding that a contract between a city and private party that purported to "restrict the City's ability to decide whether to build a road, install a traffic device, and permit the development of a parking lot" was void as the city could not delegate such powers). Here, the City has unlawfully granted similar powers to a private entity

that has a contingent interest in every single citation generated by its own equipment and issued by its own employees.

Similarly, the fact that Iowa law requires Police Officers (and not for-profit corporations) to issue municipal infractions demonstrates a determination by the General Assembly that this is the type of police power that should not be otherwise delegated. Iowa Code § 364.22(4). Under a similar statute, a Florida district court held that an unlawful delegation had occurred. *See City of Hollywood v. Arem*, 154 So. 3d 359, 364-65 (Fla. Dist. Ct. App. 2014) (holding that based on a Florida statute where only law enforcement officers can issue citations for traffic infractions, the vendor (ATS) making the initial determination of which citations a traffic enforcement officer reviewed rendered the system an unlawful outsourcing of statutory authority). The *Arem* Court noted that the vendor initially determines who is subject to prosecution and then the officer clicks "Accept," which is exactly how the process works with Gatso. *Id.* at 365.

These delegated duties are not perfunctory; they are discretionary determinations, police and judicial acts. These delegations go beyond even making rules; they involve enforcing the law. *See Gabrilson v. Flynn*, 554 N.W.2d 267, 276 (Iowa 1996) (holding, after noting that [r]ule-making by school boards involves the exercise of judgment and discretion," that the determination of whether one would have access to school board records is "precisely the type

of discretionary decision the legislature has empowered the school board to make"). Contrastingly, Gatso keeps the images that it takes only during the time of its contract; therefore, even if one wanted to determine who should have access to them, they might not be available. (App. 462). There is no home rule exemption to the unlawful delegation of police power. *See Kennedy v. Civil Serv. Comm'n*, 654 N.W.2d 511, 512 (Iowa 2002) ("municipal home-rule amendment *only* grants authority to take action that is not inconsistent with state law") (emphasis added).[11]

Gatso, on behalf of the City, provides the cameras, the equipment, places the signs, calculates vehicular speeds, calibrates its own equipment, answers the phone, provides legal advice, processes the violation events, reviews the citations first, sends the electronic packages to the Police Department, mails the Notices of Violation to Vehicle Owners, provides the "trial" evidentiary packages for use by Police and Hearing Officers who present the materials, provides the Orders establishing liability and initiates collection efforts. It is clear which entity is in control of this system.[12] The district court's

[11] *Kennedy* is further instructive in noting that the civil service commission, as created by Iowa law, had jurisdiction to "hear and determine matters involving the rights of civil service employees under this chapter." *Id.* at 513. Iowa law has no such corresponding grant of jurisdiction to the "Board," however. Iowa Code § 364.22(6)(a).

[12] The data collected from the ATE program, normally of the type that one would view as public records, subject to being disclosed to the public upon reasonable requests, is stashed in Gatso's offices in The Netherlands.

decision, that such acts do not constitute unlawful delegation was wrong, and should now be reversed.

IV. THE DISTRICT COURT ERRED IN DENYING THAT THE ORDINANCE VIOLATED PLAINTIFFS' EQUAL PROTECTION, PRIVILEGES AND IMMUNITIES, AND SUBSTANTIVE DUE PROCESS RIGHTS

A. Standard of Review and Error Preservation

De novo review is applied to constitutional claims. *Homan v. Branstad*, 812 N.W.2d 623, 629 (Iowa 2012). Plaintiffs raised all of these constitutional arguments below. Plaintiffs' Resistance Brief, pp. 22-34.

B. Equal Protection Rights are Violated Where the Purpose of the Ordinance is Safety and the Classifications of Vehicle Owners Are Not Related to that Purpose

Article I, section 6 of the Iowa Constitution guarantees equal protection of the laws to all citizens. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 350-51 (Iowa 2013). Iowa courts, in evaluating equal protection claims, consider whether "laws treat all those who are similarly situated *with respect to the purposes of the law alike*." *Id.* (citation omitted) (emphasis in original). Upon a finding that the equal protection clause is implicated, the court will then apply the appropriate level of scrutiny. *Id.*

The ostensible[13] purpose of the Ordinance is safety. While the

[13] The "claimed state interest must be 'realistically conceivable'" and have a "basis in fact." *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7-8 (Iowa 2004) (citations omitted). Given the IDOT's findings, the City cannot continue to claim that safety is the true goal of its Ordinance. The City's assertion of

Ordinance does not make any enforcement distinctions amongst types of vehicles, the City and Gatso have created such distinctions—in fact, they eliminate tens of thousands of vehicles from possible prosecution, for reasons wholly unrelated to safety. By a discretionary choice in terms of the type of equipment it uses, the City and Gatso exclude from prosecution virtually all semi-truck owners pulling trailers whose *rear* license plates are not included in the chosen database; in addition, they exclude more than 3000 Iowa government vehicles (and perhaps other similarly-licensed federal vehicles and other-states' vehicles) whose license plates are not in the Nlets database at all. Petition, ¶7. With respect to any legitimate *safety* purpose of the Ordinance, there is no rational distinction between any class of motor vehicle (or vehicle owner); in fact, semi-trucks operated on primary highways could be considered a *greater* danger to safety on interstate highways than the cars operated by Plaintiffs. All Vehicle Owners—whether of in-state or out-of-state vehicles; whether of automobiles or of semi-trucks; whether owned by a government agency or by a private citizen—are therefore similarly situated for safety purposes. The safety difference between such vehicles is "so attenuated as to

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safety, in light of the IDOT's determination, is not "credible," or "plausible." *See Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 559-61 (Iowa 2013) (discussing the requirement of a "plausible policy reason for the classification" and defining it as "credible," or "capable of being credited or believed."). The City's justification has become definitively unbelievable.

render the distinction arbitrary or irrational." *Racing Ass'n of Cent. Iowa,* 675 N.W.2d at 8. Distinguishing between semi-truck trailers and cars is as arbitrary as distinguishing between racetracks and excursion boats for the purpose of taxes on gambling revenue. *See id.* at 15 (holding that such classifications for said purpose serve "no legitimate purpose . . . other than an arbitrary decision to favor excursion boats."). Exempting certain vehicles from prosecution under the Ordinance on the basis of license plate configuration is underinclusive[14] and irrational. Further, allowing out-of-state vehicle owners to participate in a different administrative process than is allowed to Iowa Vehicle Owners (by mail, rather than in-person) is also irrational: many Iowans live further away from Cedar Rapids than do many persons residing in parts of Minnesota, Wisconsin, or Illinois. But only Iowans are required to attend the administrative proceedings in-person. (App. 036, 196, 209).

Next, the level of scrutiny must be considered. While these classes of motor vehicles (and classes of Vehicle Owners) are not suspect (assuming the legitimate purpose of safety), given the fundamental right at issue (the right to

[14] The Court acknowledged that consideration of underinclusiveness is generally reserved for strict scrutiny, but still struck down the economic legislation at issue in *Fitzgerald* pursuant to the rational basis test where the "classification involve[d] extreme degrees of overinclusion and underinclusion in relation to any particular goal, [as] it cannot be said to reasonably further that goal." *Id.* at 10.

travel, described more fully below),[15] heightened scrutiny must apply. *King v. State*, 818 N.W.2d 1, 25-26 (Iowa 2012). The City must therefore demonstrate that the Ordinance is "narrowly tailored to a compelling state interest." *Wright v. Iowa Dep't of Corr.*, 747 N.W.2d 213, 216 (Iowa 2008). The City cannot do so.

The City's wrongful vehicular classification scheme is not entitled to any deference because it was the City and Gatso's employees, and not the City Council, who made the determination as to what groups of vehicles to burden, and which to exempt, with the ATE Ordinance's Application. Moreover, those classifications are based on a financial decision as to which of Gatso's equipment to deploy. The cases relied upon by the district court that describe deference to "statutory classifications" are inapposite; the Ordinance makes no distinction between Vehicle Owners. *Cf.* App. 513; *cf. Gallagher v. City of Clayton*, 699 F.3d 1013, 1020 (8th Cir. 2012) (holding that "*a legislative choice* is not subject to courtroom fact-finding and may be based on rational speculation."). There was no "legislative choice" to create these classifications in this situation.

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[15] The district court accepted that the right to travel was fundamental, but denied that it was infringed by the Ordinance. (App. 511-512) (citing, inter alia, *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817, 839 (N.D. Iowa 2015) (pending appeal)). However, the Iowa Supreme Court does not always apply the same standard to its equal protection analysis with respect to the Iowa Constitution as does the U.S. Supreme Court with respect to the United States Constitution. *See Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 4-5 ("While the Supreme Court's judgment on the constitutionality of Iowa's disparate tax rates under the federal Equal Protection Clause is persuasive, it is not binding on this court as we evaluate this law under the Iowa Constitution").

Moreover, the classifications are not narrowly tailored to any legitimate interest of safety.

Even if the fundamental right to travel were not at stake, the City's ATE Ordinance could still not pass a rational basis test where the IDOT, the agency of government with authority over I-380, has determined that there is no legitimate state interest achieved in the four placements of ATE equipment on I-380 (that is, there is no rational relationship between that placement and the legitimate interest of safety). (App. 094-121). While Plaintiffs agree that the Court makes the final determination as to whether rational basis (or strict scrutiny) is met (App. 514), and, therefore, whether a legitimate government interest is furthered by a particular ordinance, this is a rare situation in which the State authority in charge of the interstate roadway and the citizens being adversely affected by, a law and, therefore challenging it, agree. "[W]hen applying a rational basis test under the Iowa Constitution, changes in the underlying circumstances can allow us to find a statute no longer rationally relates to a legitimate government purpose." *Qwest Corp.*, 829 N.W.2d at 562 (citation omitted). The circumstances, as reviewed by the IDOT, demonstrate that there is no rational relationship between safety and fixed speed cameras on I-380 used by the City to prosecute each Plaintiff. As a result, the Court does not have to accept any claimed legitimate interests of the City when the State

(through the IDOT) has already spoken definitively on the issue.[16] The district court's decision on equal protection should therefore be reversed and remanded.

C. Substantive Due Process is Violated by the City's Continued Violation of State Law and the Offense to Judicial Notions of Fairness

The Due Process Clause of the Iowa Constitution has "both substantive and procedural components." *State ex rel. Miller v. Smokers Warehouse Corp.*, 737 N.W.2d 107, 111 (Iowa 2007). Plaintiffs have alleged a fundamental liberty right to interstate and intrastate travel and the property right in the fee charged for the citation. *See Zaber v. City of Dubuque*, 789 N.W.2d 634, 640 (Iowa 2010) (holding that the analysis for substantive due process begins with the nature of the right). The scheme set up by the City "interferes with rights 'implicit in the concept of ordered liberty.'" *Id.* (citations omitted). The right to travel is such a right.

The Iowa Supreme Court has recognized the fundamental right to *interstate* travel has three components: the right to enter and leave another state; the right to "be treated as a welcome visitor rather than an unfriendly alien

[16] The district court noted that there is litigation between the City and the IDOT on whether these cameras, among others, can remain in place on the interstate. (App. 514). While Plaintiffs assert that it cannot credibly be disputed whether the IDOT has the authority to make such determinations on primary highways such as interstates, the currently binding Evaluation and Order of the IDOT (unless overturned) support Plaintiffs' position.

when temporarily present" in another state; and the right to be treated like citizens of the state to which one recently moves. *Formaro v. Polk Cty.,* 773 N.W.2d 834, 839 (Iowa 2009) (citing *Saenz v. Roe*, 526 U.S. 489, 500 (1999)). Plaintiffs assert that the enforcement of the Ordinance on I-380 violates their fundamental rights to interstate and *intrastate* travel. Plaintiff Brooks, for example, clearly asserted that the camera at I-380 did not provide sufficient notice to those who are strangers to the City, as he was. He was not treated as a welcome visitor. Plaintiffs, many of them from other states, and, if from Iowa, from locations outside of the City's limits, have a fundamental right not to be subject to a speed trap in Cedar Rapids. Plaintiffs further assert that a part of the right to intrastate travel is similar to the property right of "not being subject to irrational monetary fines" (*Jacobsma*, 862 N.W.2d at 345): it encompasses not being subject to irrational speed law enforcement that deters the use of a public highway.

The district court noted, quoting *Hughes*, 112 F. Supp. 3d at 839, that not "everything that deters travel burdens the fundamental right to travel." (App. 512). The district court then references taxes on airports and motels. The key is that this ATE system is irrational, and therefore deters travel without any basis on which one could rely. A tax is standard and applicable to all who are similarly situated. This ATE system burdens some vehicles but not any semi-truck trailers or many government vehicles; Plaintiffs assert the law is

disproportionately applied to out-of-state or city vehicles. The radar equipment is inadequately calibrated and has an admitted error rate of 2%. If this were a tax, it would apply to all who travel through the roadways of Iowa. It would deter travel, essentially, equally. However, it is only a few cities holding onto these irrational interstate cameras. This is what deters travel irrationally, and unjustly.

Similarly, federal courts have considered what constitutes an unlawful infringement on the right to travel, and it is less than actual deterrence. *See, e.g.*, *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 257-60 (1974) (holding that one did not need to prove that they were "actually *deterred* from traveling by the challenged restriction") (analyzing *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Dunn v. Blumstein*, 405 U.S. 330 (1977) (holding that a classification that "operates to penalize those . . . who have exercised their constitutional right of interstate migration" requires a compelling state interest). As Plaintiffs' expert, Dr. Joseph L. Schofer, has noted, the purpose of an interstate highway is to provide a uniform experience for all those who travel upon it. (App. 126, 128). The interstate highway system, according to Professor Schofer, is designed to provide consistent quality of driving experience and expectations for motor vehicle operators across the nation. (*Id.*) Variation in speed among those on the interstate is often the most likely cause of accidents. (App. 126). This is consistent with the fact that "[a] burden may arise from a state statute which

requires interstate passengers to order their movements on the vehicle in accordance with local rather than national requirements." *Morgan v. Virginia*, 328 U.S. 373, 380-81 (1946) (analyzing a discriminatory law under the commerce clause).

While the Iowa Supreme Court has not yet recognized the *intrastate* right to travel as one that is protected under the Iowa Constitution, it is a "hallmark of a free society . . . perhaps the most cherished of all of our fundamental rights." *Formaro*, 773 N.W.2d at 839 (quoting *City of Panora v. Simmons*, 445 N.W.2d 363, 371 (Iowa 1989) (Lavorato, J., dissenting)). Plaintiffs discuss this right more fully below. The right to travel intrastate (and those from other cities to be treated as well as those from this City) should be recognized as a fundamental right.

When a fundamental right is involved, an infringement upon that right can only be constitutional if it is "narrowly tailored to serve a compelling state interest." *State v. Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000) (citation omitted). The City can make no such claim, and sharing fees with a private company certainly cannot be a part of any "compelling state interest." As described more fully below, the ATE scheme does not encompass many of the more dangerous offenders. The Ordinance as implemented by the City, in direct violation of State law, is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or a general welfare." *Bakken v. Council*

Bluffs, 470 N.W.2d 34, 38 (Iowa 1991). Based on the infringement of a fundamental interest, Plaintiffs' substantive due process rights were violated.

In addition, as noted above, even if a fundamental right were not involved and rational basis applied, the placement of the cameras on I-380 could not survive it. The IDOT has determined that the cameras and radar equipment fixed by the City at the I-380 locations are not necessary for public safety. When first giving permission to use its trusses on the interstate highway, the IDOT reserved the right to request that the City and Gatso remove the cameras therefrom upon 30 days' notice. (App. 467, 469). More than one year after having been ordered to remove them from I-380, the City and Gatso have still not removed the cameras. The latest crash data by the IDOT continue to demonstrate that there has been no benefit to the cameras located on I-380. (App. 094-111). The increased citations (and therefore revenues) retained by the City are further demonstrative that the system is not functioning as it should. It is impossible for the City to argue that it has a rational basis for the ATE on I-380 where the State entity with jurisdiction over the interstate highway has determined definitively that there is no such interest. In other words, the court does not even need to consider whether there is a rational basis (unlike most legislation where it is presumed that one exists based upon its passage) because it has already been decided that there is not one. The City Council did not set the locations of the cameras in the Ordinance. In fact,

Contract provisions directed that Gatso should decide where to put the ATE equipment, which is further evidence of unlawful delegation. (App. 005). Defendants do not receive any deference of exercising police powers because they have unlawfully delegated those powers to a private, for-profit company.

Finally, the City's violation of State law (IDOT regulations and then subsequent Evaluation and Order) offends judicial notions of fairness and human dignity: citizens cannot rely on their own laws to protect them, and are subjected to the City's and Gatso's whims. *See Blumenthal Inv. Trs. v. City of W. Des Moines*, 636 N.W.2d 255, 265-66 (Iowa 2001) (describing substantive due process violations as those that offend judicial notions of fairness and human dignity) (citation omitted). While violations of state law may not offend *federal* judicial notions of fairness (*cf. Hughes*, 112 F. Supp. 3d at 839-840),[17] surely they must offend *state* judicial notions. *See id.,* 636 N.W.2d at 267 (citing cases that those plaintiffs alleging violations of state law should do so in state court); *see also Chesterfield Dev. Corp. v. Chestfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) ("A bad-faith violation of state law remains only a violation of state law."). The State of Iowa provides one set of protections, and then the City violates those protections by placing the cameras on various locations of I-380 against the

[17] The test for substantive due process violations in federal court specifically holds that the government action must be "something more than . . . in violation of state law." *Christiansen v. West Branch Cmty. Sch. Dist.*, 674 F.3d 927, 937 (8th Cir. 2012).

State's Order. Vehicle Owners, whether from Iowa or any other state, are entitled to no fewer protections when traveling on interstate highways located in the City.

The City's continued violation of state law (and its own Ordinance) cannot be considered in good faith,[18] and is therefore a violation of Plaintiffs' substantive due process rights. The district court's decision finding no infringement on the fundamental right to travel, or finding that the Ordinance had a rational basis, must be reversed.

D. Privileges and Immunities are Violated by the Ordinance's Infringement Upon Fundamental Rights and Disparate Treatment Without Any Rational Basis

The Iowa Constitution requires that the "general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." IOWA CONST., Art. I § 6. The Iowa Supreme Court "test[s] privileges and immunities challenges by the traditional equal protection analysis." *Utilicorp United v. State Utils. Bd., Utils. Div., DOC*, 570 N.W.2d 451, 455 (Iowa 1997). Classifying citizens must not be done arbitrarily. *Id.* (citation omitted). For the same reasons that the Ordinance violates equal protection described above (classifying vehicle owners arbitrarily

[18] While Plaintiffs would not dispute the City's assertion of its due process rights to appeal the final order of the IDOT issued on May 11, 2015, the good faith course would be to suspend the operation of the cameras at I-380 until the matter is resolved, as the IDOT's Order stands until it is overturned.

with no relation to goal of safety), the Iowa Constitution's Privileges and Immunities Clause is violated. Moreover, the fundamental right to interstate travel is violated when the unfamiliar motorists are more likely subject to citation from the speed trap.

Plaintiffs aver that the Ordinance violates a state-based constitutional right to *intrastate* travel, a right grounded in Iowa's privileges and immunities clause, which predates that of the U.S. Constitution. *See King*, 818 N.W.2d at 65 (Appel, J., dissenting) (noting the different interpretation the Iowa Supreme Court has given to its privileges and immunities clause as compared to the U.S. Supreme Court). A bright legal arc connects some of the nation's foundational constitutional and legal documents involving the right to travel to the Iowa Constitution. Article IV of the Articles of Confederation expressly recognized and protected the right to travel, stating, "…the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively." Articles of Confederation of 1781, art. IV, para.1.

While not yet expressly recognized by Iowa Supreme Court precedent, Plaintiffs observe that, from the state's earliest days, Iowans and those traveling through Iowa have implicitly enjoyed a legally-protected right to intrastate travel, a right to be unfettered by unreasonable interference by state or

municipal legislation or ordinances. Therefore, whether Plaintiffs are from a different city in Iowa or from a different State in the United States, the right to travel should be protected from unconstitutional speed traps about which only locals know. Plaintiffs urge the Court expressly to recognize that that right is protected by the privileges and immunities clause of the Iowa Constitution. Several states in the Upper Midwest, a number of them sharing a common legal heritage dating back to the Northwest Ordinance—Michigan, Minnesota, Ohio, Wisconsin—have affirmed a constitutionally-protected right of intrastate travel. *See, e.g., Pencak v. Concealed Weapon Licensing Bd*, 872 F. Supp. 410, 414 (E.D. Mich. 1994) ("The right to intrastate travel is a basic freedom under the Michigan Constitution, and the analysis of government burdens on intrastate travel under the Michigan Constitution is identical to the analysis applied to government burdens on interstate travel under the United States Constitution."); *State v. Cuypers*, 559 N.W. 2d 435, 437 (Minn. Ct. App. 1997) ("Minnesota also recognizes the right to intrastate travel"); *State v. Burnett*, 755 N.E.2d 857, 865 (Ohio 2001) ([T]he right to travel within a state is no less fundamental than the right to travel between the states."); and, *Brandmiller v. Arreola*, 544 N.W.2d 894, 899 (Wis. 1996) ("[T]he right to travel intrastate is fundamental among the liberties preserved by the Wisconsin Constitution. This right to travel includes the right to move freely about one's neighborhood."). Although North Dakota was not a part of the Northwest Territory, but, rather,

shares Iowa's Louisiana Purchase heritage, its Supreme Court, too, recognizes a constitutionally-protected right to intrastate travel. *See State v. Holbach*, 763 N.W.2d 761, 765 (N.D. 2009) ("An individual has a constitutional right to intrastate travel, however that right is not absolute and may be restricted.").[19] At the very least, the recognition of such a right should at least grant Plaintiffs' access to a rational basis standard with bite. *See Jacobsma*, 862 N.W.2d at 347 n.3 (describing the possibility of applying the rational basis test more stringently or with "greater bite" to Iowa's due process clause).

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[19] So, too, have a number of states located in the far West recognized the fundamental right to intrastate travel, grounded in state constitutional law provisions: Alaska, California, Hawaii, Montana, Wyoming, and Washington. *See*: *Treacy v. Municipality of Anchorage*, 91 P. 3d 252, 264-65 (Alaska 2004) ("There is no question that the rights at issue in this case—the rights to move about, to privacy, to speak—are fundamental…. Accordingly, we assume that the right to intrastate travel is fundamental, but we do not address its scope."); *In re White,* 158 Cal. Rptr. 562, 566-67 (Ct. App. 1979) ("We conclude that the right to intrastate travel (which includes intra-municipal travel) is a basic human right protected by the United States and California Constitutions"); *State v. Shigematsu*, 483 P.2d 997, 1000-01 (Haw. 1971) (Intrastate travel is a fundamental right under the Hawaii State Constitution, "includ[ing] the right of men to move from place to place, to walk in the fields in the country or on the streets of a city, [and] to stand under open sky."); and, *In re Marriage of Guffin*, 209 P.3d 225, 227-28 (Mont. 2009) ("It is difficult to conceive that the right to travel protected by the United States Constitution does not include a right to freely travel within each of the sates….We hold, therefore, that the right to travel guaranteed by the United States Constitution includes the right to travel within Montana."); *Watt v. Watt*, 971 P.2d 608, 615 (Wyo. 1999) ("The right to travel freely throughout the state is a necessary and fundamental aspect of our emancipated society, and it is retained by the citizens."); and, *City of Seattle v. McConahy*, 937 P.2d 1133, 1141-42 (Wash. Ct. App. 1997) ("The right to travel, including the right to travel within a state, is a fundamental right subject to strict scrutiny under the United States Constitution.").

Given the fundamental right to intrastate travel, the Ordinance would fail to meet strict scrutiny (and, here, even rational basis). A private for-profit company is making police decisions, and in addition to being unconstitutional on its own, such choice receives no deference. *See Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 458-59 (Iowa 2013) ("[F]or state constitutional purposes, the *government* interest must be 'realistically conceivable'") (emphasis added). For equal protection (and therefore privileges and immunities), a government choice (which is not even at issue here) must not be "so overinclusive and underinclusive as to be irrational." *Id.* (citation omitted). If safety is the goal, excluding government vehicles, semi-truck trailers, and drivers as opposed to vehicle owners is underinclusive and wholly irrational.

And, in fact, in this instance, the City was required to present empirical evidence to the IDOT to demonstrate that these cameras actually improve safety; the City failed to do so. That is why the IDOT ordered their removal. The Ordinance also does not distinguish between in-state and out-of-state drivers in terms of the process that they are offered (by mail or appearance at the administrative hearing); Gatso and the packages it provides make that distinction. The City Council did not therefore rationally conclude that in-state recipients may live closer than out-of-state recipients. Gatso did. The ability to make that determination, as well as the conclusion itself, is constitutionally unsound. The district court's decision to the contrary should be reversed.

V. DEFENDANTS ARE UNJUSTLY ENRICHED BY THE IMPLEMENTATION OF THE UNLAWFUL ORDINANCE

A. Standard of Review and Preservation of Error

Claims of unjust enrichment are reviewed de novo given that they are "roted solely in equitable principles." *Iowa Waste Sys. v. Buchanan Cty.*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000). Plaintiffs argued below that Defendants had been unjustly enriched. Plaintiffs' Resistance Brief, pp. 43-44.

B. It is Unjust to Allow Defendants to Retain the Fines Collected

Given the district court's findings that the Ordinance was constitutional, the district court determined that Defendants were not unjustly enriched. (App. 517). For the reasons stated above regarding the constitutional infirmities of the Ordinance, this was error.

The equitable doctrine of unjust enrichment requires a plaintiff to "prove the defendant received a benefit that in equity belongs to the plaintiff." *Slade v. M.L.E. Inv. Co.*, 566 N.W.2d 503, 506 (Iowa 1997) (citation omitted). More specifically, the elements are: (1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances. *State ex rel. Palmer v. Unisys. Corp.*, 637 N.W.2d 142, 154-55 (Iowa 2001) (internal citation omitted). Below, Plaintiffs proceeded on behalf of a class of persons

who have received citations since the IDOT's March 17, 2015 Evaluation and Order to the City to move and/or remove the cameras from I-380, and for those who have been alleged to have been speeding 11 mph over the speed limit. (Petition, ¶86).

It cannot be disputed that Defendants have been enriched by the Ordinance. Gatso has received $1,749,143.00 since March 17, 2015, alone, comprising only one year of the five-year involvement in the City's ATE program. (App. 089). If they are accounting according to the Contract, the City likely has received well more than $3 million since the IDOT ordered the removal of the cameras on I-380.

This enrichment was, and is, at the expense of Plaintiffs and those whom Plaintiffs seek to represent, all of whom have been cited with Violations by a City using equipment unlawfully placed on I-380, and all of whom had to pay those fines subject to unlawful threats, and an unlawful process, with an admitted speed calculation error rate of 2 mph in their own system. In sum, it would be unjust to allow Defendants to retain amounts received based on the following circumstances: an unlawful delegation of police power; the enforcement of an Ordinance whose provisions are unconstitutional based on the procedural and substantive due process defects, privileges and immunities and equal protection violations—violations that cannot survive even the lowest

level rational basis review; and the preemption of the Ordinance by Iowa law (statutory and administrative). The district court's decision must be reversed.

VI. THE DISTRICT COURT ERRED IN HOLDING THAT THE IOWA CONSTITUTION DOES NOT CREATE A PRIVATE CAUSE OF ACTION

A. Standard of Review and Preservation of Error

Constitutional issues are reviewed de novo. *Star Equip., Ltd.*, 843 N.W.2d at 451. Plaintiffs asserted below that the Iowa Constitution must create a private cause of action. Plaintiffs' Resistance Brief, pp. 38-39.

B. The Iowa Constitution Must Provide Protection for Violations of its Provisions

The district court only dealt with Plaintiffs' request for declaratory judgment, and assumed that there was no private cause of action pursuant to the Iowa Constitution. (App. 507).[20]

The following test applies when there is no express private cause of action:

1. Is the plaintiff a member of the class for whose benefit the statute was enacted?
2. Is there any indication of legislative intent, explicit or implicit, to either create or deny such a remedy?
3. Would allowing such a cause of action be consistent with the underlying purpose of the legislation?
4. Would the private cause of action intrude into an area over which the federal government or a state administrative agency holds exclusive jurisdiction?

[20] While the Iowa Court of Appeals upon first impression has recently held that no such private cause of action exists in *Conklin v. State*, 863 N.W.2d 301 (Iowa Ct. App. 2015), the issue has not yet been decided by the Iowa Supreme Court.

Meinders v. Dunkerton Cmty. Sch. Dist., 645 N.W.2d 632, 635-36 (Iowa 2002) (citation omitted). Plaintiffs, citizens of Iowa and out of State citizens traveling through Iowa, are members of the class of citizens for whom the Iowa Constitution was created to benefit. The implication of such protective provisions is that they are meant to protect citizens from the encroachment of governmental power. Allowing a recourse for those whose constitutional rights have been violated would be consistent with the purpose of the passage of the Iowa Constitution. Such a remedy would not intrude on the federal government's protection of its own constitutional rights; rather, it would provide a parallel remedy.

More than a century ago, the Iowa Supreme Court upheld a claim for damages based on a deprivation of one's liberty (and corresponding loss of time). *See Young v. Gormley*, 120 Iowa 372, 374-80, 94 N.W. 922, 922-24 (1903) (upholding a jury verdict for special damages for the warrantless arrest of an individual by a marshal based on a deprivation of liberty that implied a loss of time). Violations of constitutional rights require a just remedy, and Plaintiffs should be entitled to seek damages from Defendants for these violations. The district court's decision should be reversed.

CONCLUSION

For one or more of these reasons, Plaintiffs respectfully requests that the district court's decision be reversed as to all issues decided adversely to Plaintiffs.

Dated this 12th day of October, 2016.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument.

CERTIFICATE OF COST

Plaintiffs will not submit a Certificate of Cost given the electronic filing of the final Briefs and Appendix.

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on October 12, 2016, I electronically filed the foregoing Final Brief of Appellant with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Pursuant to Rule 16.317(1)(a), this constitutes service of the document on the following for purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because: this brief contains 13,751 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 1997-2004 in size 14 Garamond.

Dated this 12th day of October, 2016.

Respectfully submitted,

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