IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 17-1489

CITY OF DES MOINES, IOWA,
Appellant/Cross-Appellee,

vs.

REUVEN WEIZBERG and
DAVID PETER VENG-PEDERSEN, JACOB PATRICK DAGEL
Appellees/Cross-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE LAWRENCE MCLELLAN

FINAL REPLY BRIEF FOR APPELLANT AND FINAL BRIEF OF CROSS-APPELLEE

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ROUTING STATEMENT

The City of Des Moines stands on its previous statement that retention by the Iowa Supreme Court is appropriate.

STATEMENT OF THE CASE

The City reiterates its statement of the case as set forth in its proof brief and adds that the district court granted class certification, and later, narrowed the class definition based on motion of the City. The City will continue to refer to the Representatives in the case below as "Representatives".

STATEMENT OF THE FACTS

In 2011, the City of Des Moines adopted an ordinance allowing it to engage in Automated Traffic Enforcement ("ATE") pursuant to DES MOINES, IOWA MUNICIPAL CODE section 114-243.[1] The ordinance was enacted under the City's police powers:

> *General.* The City of Des Moines, in accordance with the police powers authorized it by the state of Iowa for governing safe traffic flow, may deploy, erect or cause to have erected an automated traffic enforcement system for making video images of vehicles that fail to obey red light traffic signals at

[1] Des Moines ordinances may be found at:
<https://www.municode.com/library/ia/des_moines/codes/code_of_ordinances>

> intersections designated by the city manager or his designee or fail to obey speed regulations at other locations in the city. The system may be managed by the private contractor that owns and operates the requisite equipment with supervisory control vested in the city's police department. Video images shall be provided to the police department by the contractor for review. The police department will determine which vehicle owners are in violation of the city's traffic control ordinances and are to receive a notice of violation for the offense.

DES MOINES, IOWA MUN. CODE § 114-243(a). This ordinance authorized the City to install and operate an electronic system to automatically produce digital images of vehicles violating a speed limit or a red light traffic signal. *Id*. The code also creates a system of assessing penalties for civil violations for various traffic offenses:

> *Offense.*
>
> (1) The vehicle owner shall be liable for a civil penalty as imposed below if such vehicle crosses a marked stop line or the intersection plane at a system location when the traffic signal for that vehicle's direction is emitting a steady red light or red arrow.
>
> (2) The vehicle owner shall be liable for a civil penalty as imposed below if such vehicle travels at a speed above the posted speed limit.
>
> (3) The violation may be rebutted by a showing that a stolen vehicle report was made on the vehicle encompassing the

time period in question.

(4) The citation will in no event be sent or reported to the Iowa Department of Transportation or similar department of any other state for the purpose of being added to the vehicle owner's driving record.

DES MOINES, IOWA MUN. CODE § 114-243(c).

The City entered into a contract with Gatso, a private company, to assist the City in installing and operating the ATE system in exchange for compensation. If a person receives a citation under the ordinance and wishes to challenge the ordinance, he or she may request the issuance of a municipal infraction. DES MOINES, IOWA MUN. CODE § 243(d)(1). If a person requests the issuance of an infraction, the City will then pursue the infraction in order to enforce the penalty. Municipal Infraction proceedings are governed by Iowa Code section 364.22, which includes provisions requiring that the case be heard by a judge and have a right to appeal from an adverse ruling. Iowa Code § 364.22(10)(c). This is one avenue a person may pursue.

An alternate avenue to demanding a municipal infraction be filed is the option of contesting the violation at an administrative proceeding. A person can pursue the administrative hearing prior to or instead of a municipal infraction—or the person can just request that the infraction be

filed in lieu of pursuing an administrative hearing, meaning a person is free to avoid the administrative process altogether.

Under the ordinance, when an ATE camera captures an image of a vehicle either running a red light or speeding, a "Notice of Violation" (hereafter NOV) is mailed to the vehicle owner. *See* DES MOINES, IOWA MUN. CODE § 114-243(d)(1). [App. 356, 357-391]. The NOV details the date, time, location, and speed of the vehicle in violation of the posted speed limit of 60 mph. The NOV spells out the procedures that may be followed to contest the violation, including either an administrative hearing followed by a right to request a municipal infraction to be filed in small claims court or alternatively to request a municipal infraction be filed in lieu of an administrative hearing. [App. at 357-391]. Iowa Code section 364.22 allows for municipal infractions to be appealed the same as any small claim action. Iowa Code section 364.22(11)(2015). The right to contest the violation by way of filing of a municipal infraction is codified at DES MOINES, IOWA MUN. CODE § 114-243(d)(2). [App. 256]. The right to have an administrative hearing to contest the violation is not codified.

ARGUMENT

I. Procedural due process is not violated when the City of Des Moines provided a supplemental and voluntary opportunity to be heard, in addition to the opportunity to go to district court to litigate automatic traffic enforcement tickets.

a. Error Preservation

The City reiterates that all matters asserted in its proof brief and herein have been preserved for review. The Representatives argue that the City has not preserved error as to the voluntariness of the process. That issue was at the core of every single stage of the proceedings below. The affidavits submitted, as outlined by Iowa Rule of Civil Procedure 1.981(5), serve as the supporting evidence of the Representatives. The City does not dispute the contents of the affidavits themselves. The City does, however, dispute the characterization or conclusion that the affidavits describe a mandatory process.

That issue was thoroughly argued before the district court, and it was no secret that the City disagreed with the Representatives about the characterization of the process as "mandatory." The district court adopted the conclusion that the process was mandatory, and the City continues to disagree. Manifestly, the district court's adoption of this position means that it was a matter argued before it.

The concept of error preservation is based on several principles. One is that an adverse party should not be surprised by new arguments or issues on appeal. *Patterson v. Stiles*, 6 Iowa 54, 56 (Iowa 1858). Also, it is unfair to reverse a trial court based on arguments not before it. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). The record, arguments, and decision below, demonstrate that the City raised the argument that the administrative process it offered was voluntary. The entire matter and argument offered by the City has been preserved for appeal. It is appropriate for the City to point to the actual record on summary judgment in support of the arguments raised here and below.

b. Scope and Standard of Review

The City reiterates its scope and standard of review as stated in its proof brief.

c. Argument

i. <u>The District Court erred by relying on antiquated and dissimilar Iowa cases</u>.

Representatives offer nothing new in response to the City's arguments under this section. They merely echo the district court's decision that was based on outdated and off-point cases. None of these cases answer

the question of whether a city may provide additional options or process to resolve an automated traffic enforcement ticket, or any other dispute with a municipality. The City of Des Moines ordinance, at the time these tickets were issued, stated:

> If a recipient of an automated traffic citation does not pay the civil penalty by the stated due date or request a trial before a judge or magistrate, a municipal infraction citation will be issued to the recipient by certified mail from the police department. Said municipal infraction citation will result in a mandatory court appearance by the recipient as well as imposition of state mandated court costs if a finding of guilty is made by the court.

DMMC 114-243(d)(3) (2015).

In a footnote in its initial brief, the City indicated that the ordinance has since been changed. Representatives refer to that as "ad hoc" rationalization. Courts are certainly able to review statutory history. A legislative body is presumed to know the existing state of the law when the new statute is enacted, and in the absence of any express repeal, the new provision is presumed to accord with the legislative policy embodied in prior statutes. *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014). What we know from the history of the ordinance is that City Council has,

since the time of this case, altered the ordinance. It was not repealed. The amended ordinance reads, as follows:

> *Penalty and appeal.*
>
> Any violation of subsection (c)(1) or subsection (c)(2) above shall be considered for a notice of violation for which a civil penalty in the amount specified in the schedule of administrative penalties adopted by city council by resolution shall be imposed, payable to the city at the city's finance department or a designee.
>
> A recipient of an automated traffic enforcement notice of violation may dispute the notice of violation by requesting an administrative hearing pursuant to chapter 3 or by requesting issuance of a municipal infraction by the police department. The request for an administrative hearing or issuance of a municipal infraction must initially be made within 30 days of the date that the notice of violation is issued. If the recipient of an automated traffic notice of violation who requests an administrative hearing is not satisfied with the determination of the hearing officer, he or she may request the police department to issue a municipal infraction within 30 days of the date of determination. If a timely request is made to the police department for the issuance of a municipal infraction, the city may issue a municipal infraction or dismiss the notice.

DMMC 114-243(d)(2017). If we read these ordinances together, we are to assume that the latter is in accord with the legislative policy embodied in the prior ordinance. The harmonious policy is that the City Council does not mandate prosecution of ATE tickets.

That is where the district court erred in asserting that when a city lists one procedure for resolution that procedure is to the exclusion of all other potential resolutions. Under the district court ruling, the City could not plea bargain because that would be something other than a full district court hearing, which would accordingly violate procedural due process. The City could not mediate tickets because that would violate procedural due process. To read this ordinance to mean that nothing less than mandatory prosecution is appropriate and to equate other resolution opportunities, in addition to district court litigation, to be a violation of procedural due process leads to absurdity and impracticality.

ii. There is no risk of erroneous deprivation.

The City re-asserts its arguments as to erroneous deprivation and responds specifically to matters omitted from the Representatives' summary judgement documents. The City argued, in part, that the allegations in the Representatives' Motion for Summary Judgment and the subsequent district court order that parroted them were actually not present in the summary judgment record. The Representatives argue that the omission of portions from Mr. Weizberg's affidavit, as filed with the

Motion for Summary Judgment, "had already been corrected in the class certification briefing." The class certification briefing was in January 2017. Materials for the Representatives' Motion for Summary Judgment were filed in May 2017. It is a stretch to aver that the error was already corrected before it was made.

The fact is that Weizberg's affidavit, as submitted with the relevant material, did not include the allegations as set forth by the Representatives. These are not the City's rules. Iowa Rule of Civil Procedure 1.981(8) states, "there shall be annexed to the motion a separate, short and concise statement of the material facts as which the moving party contends there is no genuine issue to be tried, including answers to interrogatories, admissions on file, and affidavits which support the contentions and the memorandum of authorities." Iowa Rule of Civil Procedure 1.981(5) states, "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or filed therewith." If it isn't part of the summary judgment's "annexed" documents as they "shall" be, the district court shouldn't have relied upon them, as least to the extent of the portions that were missing. The fact that a page was buried in a 46-page filing four months earlier is not sufficient to meet the requirements of the rule.

To the extent that it is considered by this Court, it is simply a disputed fact. The City's NOVs indicate that the administrative process is voluntary and optional. [App. at 357-391]. As to the Representatives' statements about voluntariness, we look to the record. Weizberg's assertion—assuming the Court allows for an assertion that was not contained in the summary judgment's annex—that somebody, somewhere in the City told him he had to go through an administrative hearing is disputed by the NOV. Veng-Pedersen's affidavit is similarly disputed.

The reality is that Dagel indicated by affidavit that his NOV directed him that he could contest the alleged Violation "by an administrative hearing" which could be in-person or "by mail." His actual NOV, which is in the record states:

> You have the right to contest this violation at an administrative hearing or by mail. Before contesting your violation it is recommended that you review the local ordinance, images and the actual recorded video of the infraction to determine if you have a valid defense supporting dismissal of this citation.
>
> **Note: If the administrative hearing does not resolve the issue, a civil infraction (lawsuit) may be requested to be filed in state district court and a court hearing date will be scheduled. Additional costs including an $85.00 filing fee, and other court costs will be assessed if you are found liable or you pay the civil penalty before the court hearing date. If you fail to appear for the court hearing, you will be responsible for**

paying the fine and court costs. If you are found not liable, the fees will be paid by the city. Alternatively, you may request a civil infraction (lawsuit) in lieu of an administrative hearing.

[App. at 357-391, emphasis added]. That is a disputed fact. Even further, Mr. Dagel's averment about what his NOV stated—to the extent it is meant to say that the only directive on the NOV was to the administrative process—is disproven. There is no risk of erroneous deprivation based on the NOVs in the record. To the extent this Court views the affidavits to be at odds with the NOVs, then there exists a genuine issue of material fact and summary judgment should not have been granted.

II. The City was not unjustly enriched.

a. Error Preservation

This matter has been preserved through arguments made before the district court and the rulings that flowed therefrom.

b. Scope and Standard of Review

The claim of unjust enrichment is an equitable claim that is reviewed de novo. *See* Iowa R. App. P. 6.907; *Iowa Waste Sys., Inc. v. Buchanan Cty.*, 617 N.W.2d 23, 30 (Iowa App. 2000).

c. Argument

First, contrary to the assertions in the Representatives' brief, the separate claim of unjust enrichment was dismissed as to the City and Gatso, in an order dated July 25, 2016. The district court erred in allowing that claim to be revived post-dismissal. Arguably, the court's reference to unjust enrichment was dicta rather than an analysis of the merits of an already-dismissed claim. However, it is acknowledged that a district court has the power to correct any of the rulings, orders or judgments it has entered. *Hayes v. Kerns,* 387 N.W.2d 302, 308 (Iowa 1986). To the extent it can be perceived that the district court was changing its previous order under this doctrine, the City asserts the following.

Unjust enrichment is an equitable principle that "serves as a basis for restitution." *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 (Iowa 2001). The three elements a plaintiff must prove to recover under unjust enrichment are: "(1) [the] 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." *Id*. at 154-55, cited by *Hunting Sols. Ltd. Liab. Co. v. Knight*, 902 N.W.2d 592 (Iowa App. 2017). "It is essential merely to prove that a

defendant has received money which in equity and good conscience belongs to plaintiff." *Iconco v. Jensen Construction Company*, 622 F.2d 1291, 1295 (8th Cir. 1980) (citations omitted).

Representatives Weizberg and Veng-Pedersen have not paid any monies to defendants, therefore they fail on any claim of unjust enrichment. [App. at 9]. These named Representatives, and any class members similarly situated, don't meet the first prong of the unjust enrichment test where the defendant was enriched by the receipt of a benefit. The Representatives' brief on summary judgment stated, "Defendant City has been enriched by the benefit of a collection of fines from Representatives and the class members whom they represent." [App at 430]. The City has never collected fines from these Defendants. As such, the theory of unjust enrichment does not apply—even under the district court's ruling that the City's administrative process was flawed.

Plaintiff Dagel paid his penalty "under protest" and did not appeal to district court. [App. at 9]. He failed to state a claim of unjust enrichment because voluntary payment is a complete defense. *See, Meyer v. Gotsdiner*, 226 N.W. 38, 39 (Iowa 1929*); Murphy, Neal & Co. v. Creighton,* 45 Iowa 179, 183 (Iowa 1876). This doctrine was thoroughly discussed in a similar

Missouri case. *Blair v. City of Hannibal*, 179 F. Supp. 3d 901, 913 (E.D. Mo. 2016). "If a plaintiff has voluntarily paid money with full knowledge of all of the facts in the case, he or she cannot then recover the payment." *Ballard v. City of Creve Coeur*, 419 S.W.3d 109, 123 (Mo. App.2013). Money cannot be recovered if the payment was made under a mistake of law. *Id.* "A mistake of law occurs where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect." *Id.* [quoting *Am. Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 811 (Mo. App. 1969)], cited by *Blair v. City of Hannibal*, 179 F. Supp. 3d 901, 912 (E.D. Mo. 2016). As such, Dagel and all other class members who paid voluntarily should not be entitled to repayment under an unjust enrichment theory.

As a final matter, the City reasserts that the ordinance and the administrative process is lawful. All monies collected were due and lawfully owed to the City of Des Moines based on the unlawful and unsafe conduct of the drivers. It is not unjust to collect fines from people breaking speed limits when they have had notice and ample opportunity to be heard. "While Defendants may have been enriched at the expense of some Representatives, such enrichment was not unjust because the Ordinance is constitutional."

Hughes v. City of Cedar Rapids, 112 F. Supp. 3d 817, 848 (N.D. Iowa 2015), aff'd in part, rev'd in part sub nom. *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987 (8th Cir. 2016), as cited by *Brooks v. City of Des Moines, Iowa*, 844 F.3d 978, 981 (8th Cir. 2016) ("Based on Part V of *Hughes*, the drivers have not stated an unjust enrichment claim.")

III. The class was properly defined by the district court.

a. Error Preservation

This matter has been preserved through arguments presented to the district court and the rulings that flowed therefrom.

b. Scope and Standard of Review

The Court reviews a district court's rulings on certification of a class for an abuse of discretion. *Kragnes v. City of Des Moines*, 810 N.W.2d 492, 498 (Iowa 2012). The district court "enjoys broad discretion in the certification of class action lawsuits." *Legg v. W. Bank*, 873 N.W.2d 756, 758 (Iowa 2016) (quoting *Vos v. Farm Bureau Life Ins.*, 667 N.W.2d 36, 44 (Iowa 2003)), cited by *Kline v. SouthGate Prop. Mgmt., LLC*, 895 N.W.2d 429, 436 (Iowa 2017).

c. Argument

Initially, in an order dated February 2, 2017, the district court defined the class as:

> Any vehicle owner who received a NOV between December 11, 2013 and the present based upon a claim of speeding from one of the speed cameras mounted at the I-235 eastbound location and who appealed the decision, went through the administrative process, was adjudicated liable and ordered to pay a penalty.

[App. at 296]. The City filed an I.R.C.P. 1.904(2)(b) motion requesting the court amend its ruling pursuant to arguments made at hearing that did not appear to be ruled upon in the above order. Specifically, the City argued and incorporates those arguments herein, as set forth below:

> 3. At hearing, the Court appeared to give consideration to excluding individuals from the class if they pursued district court process after the administrative process.
>
> 4. A party who availed himself of a district court process allowed under the Iowa Code is significantly differently situated from a party who did not avail himself of a district court process.
>
> 5. The Representatives have not argued that the state process is deficient. As such, it is untenable to characterize someone who has pursued district court process to have been deprived due process.

6. A primary point of contention regarding class certification was whether common questions of law or fact predominate over any questions affecting only individual members pursuant to Iowa R. Civ. P. 1.263.

7. Underlying a court's inquiry into the predominance issue is the recognition that the class action device is appropriate only where class members have common complaints that can be presented by designated representatives in the unified proceeding. *Luttenegger v. Conseco Financial Servicing Corp.*, 671 N.W.2d 425, 437-438 (Iowa 2003).

8. As described in the Representatives' Amended Petition, none of the three class representative Representatives availed themselves of the district court process.

9. The City of Des Moines asserts that this is a factual error regarding whether the class definition reflects the characteristics of the class representatives.

10. The City further asserts that class inclusion of individuals who went to district court is inconsistent with Iowa Rule of Civil Procedure 1.263 and creates such conflict within the class as to make the named Representatives *unrepresentative* of the class.

11. As such, the Defendant City of Des Moines respectfully requests the class be defined as follows:

Any vehicle owner who received a NOV between December 11, 2013 and the present based upon a claim of speeding from one of the speed cameras mounted at the I-235 eastbound location and who appealed the decision, went through the administrative process, was adjudicated liable, ordered to pay a penalty ***and then did not pursue a district court action.*** [App. at 309].

The district court accepted the arguments above, as should this Court, and amended the class definition, based on the following statement,

> At the time of the hearing Representatives' counsel could not articulate any specific relief these individuals would be entitled to if they remained members of the class. From the court's perspective it appears their damage would be the inconvenience of going to an administrative hearing before obtaining the procedural due process outlined under the ordinance.

[App. at 392]. The court went on further to state:

> These individuals' liability/damages ultimately were established by the district court not the administrative hearing. Consequently, they received the procedural due process that was provided under the ordinance when they proceeded to district court. Thus they have no injury-in-fact. The only damage they would have attributable to the administrative hearing was the time they spent handling this matter in that process.

[App. at 392]. Representatives fail to articulate how the district court's amended class definition rises to the level of action beyond the bounds of fair discretion or exceeding the bounds of reason. *Scope of appellate review – Review of discretionary orders and rulings – Abuse of discretion defined*, 12 Ia. Prac., Civil & Appellate Procedure § 42:16 (2017 ed.). An abuse of discretion is "an erroneous conclusion and

judgment, one clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *McFarlan v. Fowler Bank City Trust Co.*, 214 Ind. 10, 12 N.E.2d 752, 754 (1938). The district court found a fundamental difference between a group of people who may have a remedy versus those who do not. The narrowed class definition should be affirmed.

IV. The City's ordinance and implementation is not preempted by state law.

a. Error Preservation

The City agrees that this matter has been preserved for review.

b. Scope and Standard of Review

"A trial court's determination of whether a local ordinance is preempted by state law is a matter of statutory construction and is thus reviewable for correction of errors at law." *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 339 (Iowa 2015), internal citations omitted.

c. Argument

The Iowa Constitution sets forth a "home rule" amendment that states, "Municipal corporations are granted home rule power and

authority, *not inconsistent with the laws of the general assembly*, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly. I.C.A. Const. Art. 3, § 38A (emphasis added). The City enacted an Automated Traffic Enforcement (ATE) ordinance found at Sec. 114-243 of the Municipal Code.

Iowa Code section 602.6101 states in part, "The district court has exclusive, general, and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile, except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal or administrative body." Iowa Code § 602.6101. Iowa Code section 364.22(6) states in part, "In municipal infraction proceedings: a. The 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). That section continues on to set out the prescribed procedure for municipal infraction proceedings. *Id*.

Representatives argue that the additional administrative process—whether codified or not—is what creates a preemption problem. To the contrary, this optional administrative system—codified or not— does not

interfere with the jurisdiction of the Iowa District Court and the process for municipal infractions as outlined under Iowa Code section 364.22.

On this issue, the court in *Hughes* analyzed a similar ATE administrative system which is codified in local ordinance and found, "Contrary to Representatives' assertion, the ATE system does not "tak[e] jurisdiction for traffic enforcement matters away from the Iowa District Court." *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817, 820 (N.D. Iowa 2015).

Rather, the ATE system allows a person who receives a Notice of Violation an opportunity to object to the alleged violation at an administrative hearing before proceeding to the Iowa district courts, or eschewing the administrative process and opting for district court. "Such a system amounts to, at most, concurrent jurisdiction over alleged municipal violations. *See Iowa v. Stueve,* 260 Iowa 1023, 150 N.W.2d 597, 602 (1967)" cited by *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817, 820 (N.D. Iowa 2015).

Local ordinances, such as the one at issue here, are granted the presumption of validity. *Iowa Grocery Indus. Ass'n v. City of Des Moines,* 712 N.W.2d 675, 680 (Iowa 2006). Whenever possible, courts should "interpret

the state law in such a manner as to render it harmonious with the ordinance." *City of Des Moines v. Gruen,* 457 N.W.2d 340, 342 (Iowa 1990). Implied preemption occurs when a local law is "irreconcilable" with state law. *Id.* "The phrase 'irreconcilable' used in preemption analysis is a hard-edged term. In order to be "irreconcilable," the conflict must be unresolvable short of choosing one enactment over the other." *City of Davenport v. Seymour*, 755 N.W.2d 533, 539 (Iowa 2008).

The City asserts that the issue of preemption was settled with regard to a virtually identical ordinance to the City of Des Moines' ordinance, in *City of Davenport v. Seymour*, 755 N.W. 2d 533 (Iowa 2008). Representatives concede that the City's ordinance, as written, is not preempted by state law. Specifically, Representatives' brief characterizes the ordinance itself to be consistent with the Iowa Code section in question, 364.22 and 602.6101. Rather, the Representatives attempt to draw distinctions between the City's processes to those in the *Seymour* case. These distinctions are hollow and ultimately fail to support a claim.

As an initial matter, Representatives incorrectly characterize the ruling in the *Seymour* case as relating only to the standard of proof required to demonstrate fault of the vehicle owner. The Court in *Seymour* looked at

several Iowa Code sections and characterized the core question as "whether state law prohibits municipal authorities" from creating and using ATE in the absence of permissive statutory language. *Seymour*, 755 N.W.2 at 543. Notably, the Court focused on the express and broad grant of authority to municipalities to enact traffic ordinances. As such, in analyzing the core question, the Court found that no such "bitter choice" was presented in the context of Iowa Code chapter 321, and stated that for implied preemption to occur based on conflict with state law, "the conflict must be obvious, unavoidable, and not a matter of reasonable debate." *City of Davenport v. Seymour*, 755 N.W.2d 533, 539 (Iowa 2008).

One of the distinctions raised by Representatives is that the City provides for an informal administrative process for owners to attempt resolution of citations, in addition to the option of challenging the action in district court. This is *extra* process that is less expensive and completely optional for owners to utilize, which is made abundantly clear on the face of the citation. Using the principals set forth in the *Seymour* case, there is no possible reading of the Iowa Code that prohibits the City from providing an informal resolution process with an informal hearing officer. As such, there is no "bitter choice" between the informal process offered by the City

in addition to an owner's option to use district court as the statute provides. Further, a substantially similar administrative process was approved in *City of Sioux City v. Jacobsma*, 862 N.W. 2d 335 (Iowa 2015). Finally, the Representatives cite no authority to support the contention that informal resolution processes must be enacted pursuant to an enabling provision. "The fact that state law does not authorize the state to enforce its statute through certain remedial options does not mean that it forbids municipalities from the same course of action." *City of Davenport v. Seymour*, 755 N.W.2d 533, 542 (Iowa 2008).

In the context of state-local preemption, the silence of the legislature is not prohibitive but permissive. *See Cameron v. City of Waco,* 8 S.W.2d 249, 254 (Tex.Civ.App.1928) (holding that rule of *expressio unius est exclusio alterius* does not apply in determining scope of municipal powers under home rule). *City of Davenport v. Seymour*, 755 N.W.2d 533, 543–44 (Iowa 2008). The law, ordinance and process are entirely reconcilable.

As a practical matter, the Representatives seem to be suggesting that anything other than mandatory prosecution under Iowa Code section 364.22 is preempted. That can't be right. The City has the right to prosecutorial discretion. Like any other prosecutor, the City can negotiate,

accept plea agreements, mediate, or use an administrative process to review tickets, if an owner so chooses. None of these actions are preempted by the statute.

Representatives also raise a specter of passing jurisdiction by way of the City's use of a private agency to facilitate its ATE system. This is addressed in more detail below under the response regarding the delegation of police power. However again, for purposes of preemption analysis, the question is whether state law prohibits municipal authorities from using ATE, specifically in contracting with a private entity to administer the equipment, process visual images, perform initial review, and pass information along to the City's law enforcement officer for evaluation and issuance of citations. Contrary to Representatives contention, the City— more to the point, a City law enforcement officer— is clearly the issuer of the citations, as can plainly be seen on the citations. The City's use of a private entity to facilitate the ATE program is not irreconcilable with the statute in any way and as such, is not preempted.

The last preemption argument the Representatives make relates to ongoing litigation between the City and the Iowa Department of Transportation (IDOT) about placement of one ATE system in one specific

location. The legality of the IDOT's directive to the City to remove one ATE unit remains contested and is pending before the Iowa Supreme Court. As such, Representatives' suggestion that the ongoing use of the contested ATE system supports a claim of preemption is without merit. First, the regulations and the ordinance are not irreconcilable. What is at issue is a dispute about an agency directive based on its interpretation of a regulation. The City asserts that even in the event it is unsuccessful in the ongoing case with IDOT, preemption would not exist. Nevertheless, that argument is purely academic at this point. Representatives' use of preemption principles with regard to disputed agency action stretches the purpose of preemption beyond any reasonable scope.

Finally, Representatives' reliance on *Iowa Grocery Industry Association v. City of Des Moines*, in support of an agency action preemption argument is misplaced. 712 N.W. 2d 675 (Iowa 2006). That case examined a very detailed and prescriptive state statute against a local ordinance related to liquor licensing and the power of taxation. *Iowa Grocery* had nothing to do with agency action or regulations. Rather, it is a straightforward preemption case where the Court found a local ordinance irreconcilable with a statutory scheme that was designed to severely limit the role of local

government. For all of the above reasons, the Representatives' deficient claim based on preemption were properly dismissed by the district court.

V. The City did not unlawfully delegate police powers.

a. Error Preservation

The City agrees that this matter has been preserved for review.

b. Scope and Standard of Review

To the extent Representatives are arguing this is an unlawful delegation of the municipal powers set forth in the Constitution of the State of Iowa, the standard of review for Constitutional claims is de novo. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 339 (Iowa 2015).

c. Argument

Representatives claim that the ATE Program constitutes an unlawful delegation of police powers to Gatso and to the administrative hearing officer. Cases involving delegation of police power in Iowa have generally been cases before Home Rule powers were granted to municipalities, *Downey v. Sioux City,* 208 Iowa 1273, 227 N.W. 125, 126 (1929) ("in the absence of an expressed or necessarily implied power, municipal corporations cannot lawfully exercise the police power"), or cases in which the court analyzed the scope of the exercise of power itself, *see e.g. State v.*

Steenhoek, 182 N.W.2d 377, 381 (Iowa 1970) ("In applying this test, we find the collective benefits to public health outweighs the restraint of obtaining a license and the means used is rationally related to the end sought. The statute constitutes a proper delegation of police power.")

If Representatives are implying that the City exceeded its Home Rule Powers as granted by the Iowa Constitution Article III in section 38A, the allegations have no merit and must be dismissed. The Iowa Supreme Court has already ruled that a nearly identical ATE Program adopted by the City of Davenport is not preempted by state law. *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008). The analysis in *Seymour* recognizes municipal Home Rule stating in part, "…as long as an exercise of police power over local affairs is not 'inconsistent with the laws of the general assembly,' municipalities may act without express legislative approval or authorization." *Id*. at 538.

In 2015 the Iowa Supreme Court, reaffirmed its decision in *Seymour* and upheld a district court's decision that Sioux City's ATE ordinance was rationally related to the public welfare, a reasonable regulation of traffic, and a valid exercise of police power. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335 (Iowa 2015) (held no violation of substantive due process, nor

Inalienable Rights Clause of the Iowa Const., nor preemption.) The *Jacobsma* Court specifically found the Seymour preemption analysis controlling, finding a valid exercise of Home Rule power. *See, Jacobsma* at 353-54. Iowa case law upholds ordinances authorizing ATE systems such as Des Moines ATE system under authority granted by the Iowa Constitution's Home Rule Amendment.

Representatives misapply the cases of *Warren Cty. Bd of Health v. Warren Cty. Bd. of Supervisors* 654 N.W.2d 910 (Iowa 2002), and *Bunger v. Iowa High Sch. Athletic Assoc.*, 197 N.W.2d 555 (Iowa 1972) arguing GATSO is delegated power which is forbidden under those cases. The court in *Warren County* considered whether the specific power granted by the legislature to the board of health to "employ persons as necessary for the efficient discharge of its duties" was in turn allowed to be re-delegated absent a legislative declaration. *Warren Cty. Bd of Health* at 914. (quotation from Iowa Code § 137.6(4)). The court found "[A]s a specific enumerated power, it generally would not be subject to delegation absent a legislative declaration." *Id*. The court in *Bunger* was considering whether rule making authority specifically granted to school boards by the legislature may be re-delegated to the Iowa High School Athletic Association. See,

Bunger at 560-563 (Holding that since the rule making authority of the school board or state board could not be re-delegated, the IHSAA rule was invalid.)

The present case is about a valid exercise of Home Rule Power under Iowa Const. art. III, § 38A and not any specifically delegated power by the legislature found elsewhere in the Iowa Code. Home Rule is very broad. As stated in *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008), "…as long as an exercise of police power over local affairs is not 'inconsistent with the laws of the general assembly,' municipalities may act without express legislative approval or authorization." *Id*. at 538. See, Iowa Const. art. III, § 38A. The screening functions performed by GATSO clearly fall within this broad power.

Concerning the administrative hearing process, Home Rule does not operate to prevent a voluntary alternative method to contest a notice of violation. A person receiving a notice of violation has a choice to go directly to court or first go before the administrative hearing officer. Representatives' allegations of unlawful delegation have no merit and were appropriately dismissed.

VI. The City's ATE system does not violate Constitutional rights of Equal Protection, Substantive Due Process, or the Privileges and Immunities Clause.

a. Error Preservation

The City agrees that this matter has been preserved for review.

b. Scope and Standard of Review

The standard of review for Constitutional claims is de novo. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 339 (Iowa 2015).

c. Argument

i. The City's ATE Ordinance and its Implementation Do Not Violate Equal Protection.

Representatives claim that the ATE system used by the City violates Equal Protection because the cameras don't capture all speeders, specifically vehicles without rear license plates. Iowa courts apply the same test and analysis to equal protection claims as federal courts. *Perkins v. Bd. of Supervisors*, 636 N.W.2d 58, 72-73 (Iowa 2001). The Equal Protection clause essentially directs that all persons similarly situated should be treated alike. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Unless a suspect classification or fundamental right is at issue, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440-42. Representatives have not alleged any suspect classification and only allude to a classification of license plates on trailers or licenses not in a database, neither of which are suspect classifications such as race, alienage, or national origin. Even if the allegations are taken as true, "A statutory classification that neither proceeds along suspect lines nor infringes fundamental rights must be upheld against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). These classifications bear "a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *Id*. at 315.

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the

classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 425 (1961).

Since the Representatives only complain that using the NLETS license plate data base does not capture semi-truck vehicles or certain government vehicles not in the database and none of the allegations involve suspect classifications such as race, alienage, or national origin, the proper standard is rational basis. Under rational basis review, a "legislative choice is not subject to courtroom fact-finding, and may be based on rational speculation unsupported by evidence or empirical data." *Id.* "If the classification has some, 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *U.S.R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 175 (1980) (quoting *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911). *See also, Sanchez v. State*, 692 N.W.2d 812, 818-19 (Iowa 2005)

(holding the burden under rational basis is to negate all reasonable basis); *and Hughes v. City of Cedar Rapids,* 112 F. Supp. 3d 817, 848 (N.D. Iowa 2015) (Cedar Rapids ATE system upheld by rational basis analysis applied to claims under equal protection, privileges and immunities).

The City has a rational basis for use of the ATE system in place that satisfies many legitimate state interests. For example, the ordinance authorizing the ATE system is rationally related to public health and safety in enforcement of speeding laws.[2] Also the manner in which the City has chosen to enforce the laws, utilizing radar and cameras to photograph vehicles exceeding the speed limit and utilizing available license plate data bases, is rationally related to the state interest in providing a cost effective means to control the dangers of speeding. In addition, the ATE system is safer for law enforcement officers in heavily-travelled, high speed interstates while enforcing speed laws.

There is ample rational basis supporting the operation of the ATE Program. The Representatives have failed to carry the "heavy burden of…

[2] Insurance Institute for Highway Safety, 2010 Statement before the US House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Highways and Transit.

negat[ing] every reasonable basis upon which the classification may be sustained." *Bierkamp v. Rogers*, 293 N.W. 2d 577, 579-80 (Iowa 1980). Therefore, the equal protection allegations were properly dismissed.

ii. The City's ATE Ordinance and its Implementation Do Not Violate Substantive Due Process.

A violation of substantive due process can be shown in two ways: (1) by showing that the challenged conduct "infringes 'fundamental' liberty interests, without narrowly tailoring that interference to serve a compelling state interest" or (2) by showing that the challenged conduct "is so outrageous that it shocks the conscience or otherwise offends "judicial notions of fairness, [or is] offensive to human dignity.'" *Weiler v. Purket*, 137 F.3d 1047, 1051 (8th Cir. 1998). While Representatives allege a fundamental liberty interest of a right to travel, the allegation that travel is interfered with lacks any supporting evidence in the record.

Even if there was evidence in the record, case law supports the principle that enforcement of a valid traffic law does not violate a motorist's right to travel. *C.F. United states v. Hare*, 308 F. Supp. 2d 955, 1001 (D. Neb. 2004) ("The constitutional right to travel through Nebraska is not a right to travel in any manner one wants, free of state regulation, and it does not give

defendants the right to ignore Nebraska's traffic laws at their discretion.") *See also, Idris v. City of Chicago, Ill.* 552 F.3d 564, 566 (7th Cir. 2009) ("No one has a fundamental right to run a red light or avoid being seen by a camera on a public street. The interest at stake is a $90.00 fine for a traffic infraction, and the Supreme Court has never held that a property interest so modest is a fundamental right.") The right to travel does not prevent toll roads, speed limits, or travel-related taxes. *Matsuo v. United States*, 586 F.3d 1180, 1183 (9th Cir. 2009) ("[N]ot everything that deters travel burdens the fundamental right to travel. States and the federal government would otherwise find it quite hard to tax airports, hotels, moving companies, or anything else involved in interstate movement."), cited by *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987, 995 (8th Cir. 2016).

Also there is nothing about the alleged shortcomings of the administrative process, nor the ability for one receiving a notice of violation to proceed directly to a hearing before a state court judge, that is "so severe…so disproportionate to the need presented, and …so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to brutal and inhumane abuse of official power literally shocking to the conscience." *See*, *Christianson v. West Branch Cmty. Sch. Dist.*,

674 F.3d 927, 937 (8th Cir. 2012). To say it another way, it is not so shocking to the conscience that if one is either not satisfied with the outcome of the administrative process provided, or wishes to forego the administrative review and proceed directly to district court where all process afforded to any party, that one could reasonably consider the choices provided to amount to a violation of constitutional due process rights.

iii. The City's ATE Ordinance and its Implementation Do Not Violate the Privileges and Immunities Clause.

The Privileges and Immunities Clause is contained in Article IV, sec. 2 of the U.S. Constitution and states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV. Iowa's Privileges and Immunities Clause is similar stating: "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." I.C.A. I, sec. 6. Iowa Courts analyze these clauses similarly. *Perkins v. Bd. of Supervisors*, 636 N.W.2d 58, 72-73 (Iowa 2001).

The arguments under the equal protection section above also apply here for analysis of the Privileges and Immunities Clauses. *Borden v. Selden*,

146 N.W. 2d 306, 311 (Iowa 1966). "As an initial matter, the court must decide whether the ordinance burdens one of those privileges and immunities protected by the Clause." *United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 218 (1984). In this case, the Representatives argue there is an infringement on the right to interstate travel—because out-of-state drivers are less likely to be familiar with speed requirements. They also assert a hypothetical right of intrastate travel.

Representatives "do not allege that the ATE system issues citations discriminatorily based on whether a vehicle has in-state or out-of-state registration… The drivers note that the ATE system allows out-of-state residents to contest, by mail, a Notice of Violation. This convenience for non-residents does not burden the right to travel." *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987, 996 (8th Cir. 2016). Further, there is no right to travel in excess of a posted speed limit.

Likewise under the facts plead in this case, there is no burden placed upon the right to travel by implementation of the ATE system to assist enforcement of the speeding law on I-235 in Des Moines. As the district court aptly noted, "Plaintiffs also allege that the ATE program disproportionately

and disparately imposes civil fines and penalties upon vehicles operated by residents living outside of the City. However, plaintiffs do not allege how this occurs." [App. at 278]. These are mere conclusory statements without any factual allegations to support them. The Representatives claims for a violation of the Privileges and Immunities clause was properly dismissed.

As to the issue of the right of intrastate travel, one has not been explicitly recognized in the state of Iowa. Even if one is recognized by this Court, the precedent set forth in *City of Davenport v. Seymour*, 755 N.W. 2d 533 (Iowa 2008) and *Sioux City v. Jacobsma*, 862 N.W.2d 335 (Iowa 2015) demonstrates that cities have the right to control speed by use of automated traffic enforcement, just like any other form of speed enforcement. There is no fundamental right to travel in excess of posted limits.

iv. <u>The Iowa Department of Transportation rules do not create a baseline for Constitutional analysis.</u>

Here, as in *Hughes*, Appellants have pled the ATE system violates the Iowa Department of Transportation Rules and this violates Appellants rights because the IDOT rules were not followed. The court in *Hughes* aptly points out that:

> To the extent that Representatives argue that the IDOT regulations 'provide the baseline of notice,'…required for due process, the court disagrees. Whether the process provided is compliant with IDOT regulations is not relevant to the procedural due process question. That is, the ATE system may comply with procedural due process even if it is not compliant with IDOT regulations. Conversely, if the ATE system complies with IDOT regulations, the ATE system may still not provide citation recipients with procedural due process. Representatives, provide no authority for the proposition that noncompliance with state regulations implicates the Due Process Clause, and the court is aware of none.

Hughes v. City of Cedar Rapids, 112 F. Supp. 3d 817 (N.D. Iowa 2015), aff'd in part, rev'd in part sub nom. *Hughes v. City of Cedar Rapids, Iowa,* 840 F.3d 987 (8th Cir. 2016).

Appellants also argue that the IDOT rules and findings establish the rational basis holding, standard or test this court must use to decide the rational basis question presented by the analysis required by due process, equal protection, or privileges and immunities clauses. The court is not so limited and is guided by *any* rational basis to sustain the government action. *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012)("Where a law neither implicates a fundamental right nor involves a suspect or quasi-suspect classification, the law must only be rationally

related to a legitimate governmental interest."); *See also, Idris v. City of Chicago*, 552 F.3d 564, 566 (7th Cir. 2009)("A system that simultaneously raises money and improves compliance with traffic laws has much to recommend it and cannot be called unconstitutionally whimsical."). The dismissal of the Representatives' Privileges and Immunities claim was appropriate.

VII. A private right of action under the Iowa Constitution is not available to the representatives.

a. Error Preservation

The City agrees that this matter has been preserved for review.

b. Scope and Standard of Review

The Court reviews constitutional claims within a motion to dismiss de novo. *McGill v. Fish*, 790 N.W.2d 113, 116–17 (Iowa 2010); *State v. Taeger*, 781 N.W.2d 560, 564 (Iowa 2010) cited by *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017).

c. Argument

In paragraph 71 of the Representatives' Petition, they allege that the City is violating the Iowa Constitution by violating the Iowa Department of Transportation Rules. [App. at 9]. Again, that dispute is pending before the

Iowa Supreme Court; it has yet to be determined if the City was in violation of anything. Aside from a failure to cite the constitutional provision being violated, the rules at 761 Iowa Administrative Code Chapter 144, do not provide for a private cause of action. There is no cause of action available to the plaintiffs under the rules. *See Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 254 (Iowa 2012) ("Not all statutory violations give rise to a private cause of action. A private statutory cause of action exists "only when the statute, explicitly or implicitly, provides for such a cause of action." Citing *Sanford v. Manternach*, 601 N.W.2d 360, 371 (Iowa 1999)).

Later, in their Resistance to the City's Motion to Dismiss, the Representatives appeared to roll this argument back and argue that the constitutional arguments made for procedural due process, substantive due process, equal protection, and privileges and immunities could be the basis for a civil suit for damages, citing the then-pending case *Godfrey v. State*, 898 N.W. 2d 844 (Iowa 2017).

It is something of a leap the Respondents take in their brief by merely stating that *Godfrey* recognizes a private right of action exists under the Iowa Constitution's Equal Protection and Due Process clauses, and therefore, the district court's decision should be reversed without any

substantive argument as to whether the Representatives are entitled to the same relief as someone who is claiming loss of income and reputation due to discrimination based on sexual orientation and political affiliation. Very little was offered below by the Representatives as to legal analysis. At the time, controlling law was *Conklin v. Stat*e, 863 N.W. 2d 301 (Iowa App. 2015), and the Court ordered accordingly. That wasn't an error.

As was noted in Godfrey, the Court has long recognized injunctive and declaratory relief under the Iowa Due Process and Equal Protection Doctrines. While the City respectfully disagrees with the district court's decision in favor of the Representatives regarding procedural due process, as argued above and in the City's initial brief, ATE tickets should not be the basis for private causes of action for damages, especially given the immunities as provided in Iowa Code section 670.4, which include:

> c. Any claim based upon an act or omission of an officer or employee of the municipality, exercising due care, in the execution of a statute, ordinance, or regulation whether the statute, ordinance or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.
>
> e. Any claim for punitive damages.

Iowa Code § 670.4.

To the extent the *Godfrey* case has opened the door to private rights of action under the Iowa Construction's Due Process and Equal Protection Clauses, this case presents no plausible Constitutional violations, as argued above. This issue was properly dismissed, though the reason for dismissal should have been that there are no Constitutional violations so a private cause of action is consequently unavailable.

Conclusion

For the reasons stated herein, the City of Des Moines respectfully requests that the decision of the District Court in favor of the Representatives regarding Procedural Due Process be reversed and the decisions in favor of the City of Des Moines as to Substantive Due Process, Equal Protection, Privileges and Immunities, Lawful Delegation, Preemption, and a private cause of action be affirmed.

Oral Argument Request

The City of Des Moines respectfully requests oral argument.

Respectfully Submitted,

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CERTIFICATIONS

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1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 9,352 words.

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the typestyle requirement for Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Book Antiqua 14 point font.

Service. On March 5, 2018, this Brief was filed with the Clerk of the Iowa Supreme Court on the Appellate Court EDMS system, and a copy of the same was served to Appellee/Cross-Appellant's attorney via EDMS.

/s/Michelle Mackel-Wiederanders
Michelle Mackel-Wiederanders