IN THE SUPREME COURT OF IOWA
No. 17-1489

REUVEN WEIZBERG, DAVID PETER VENG-PEDERSEN,
and JACOB PATRICK DAGEL,

Plaintiffs-Appellees/Cross-Appellants,

v.

CITY OF DES MOINES, IOWA,

Defendant-Appellant/Cross-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY

HONORABLE LAWRENCE P. MCLELLAN

FINAL BRIEF FOR APPELLEES/CROSS-APPELLANTS

James C. Larew AT0004543
504 E. Bloomington Street
Iowa City, IA 52245
Telephone: (319) 337-7079
Facsimile: (319) 337-7082
E-Mail: James.Larew@LarewLawOffice.com

ATTORNEY FOR APPELLEES/CROSS-APPELLANTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....5

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....9

ROUTING STATEMENT.....15

STATEMENT OF THE CASE.....15

STATEMENT OF FACTS.....17

A. ATE Ordinance……...17

B. DOT Evaluations and Order……...18

C. Plaintiffs and the Process…….....19

D. Gatso's Contract with the City and Implementation of the Ordinance ……24

E. Plaintiffs' Expert Witnesses……25

ARGUMENT.....26

I. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS' DUE PROCESS RIGHTS WERE VIOLATED BY THE CITY'S ORDINANCE

A. Standard of Review and Error Preservation ……26

B. Forcing a Different – and Less Protective – Process than that Provided in the Ordinance is a Violation of Due Process…….28

C. The Ordinance and its Implementation Further Violate Due Process by Failing the Balancing Test of Mathews.....38

II. THE DISTRICT COURT PROPERLY FOUND THAT THE CITY WAS UNJUSTLY ENRICHED BY ITS ATE ORDINANCE, BUT IMPROPERLY FOUND THAT GATSO WAS NOT…….49

A. Standard of Review and Error Preservation…….49

B. The City and Gatso Were Unjustly Enriched by the Invalid Enforcement of this Ordinance……....49

III. THE DISTRICT COURT LIMITED THE CLASS DEFINITION IN ERROR...…....52

A. Standard of Review and Preservation of Error…… 52

B. The Class Should Include all Vehicle Owners who Were Subject to the City's Unlawful Ordinance…..…….……...…...52

IV. THE DISTRICT COURT ERRED IN HOLDING THE ORDINANCE WAS NOT PREEMPTED BY IOWA CODE SECTIONS 364.22 AND 602.6101 AND THE IDOT'S ORDER……... …….....54

A. Standard of Review and Error Preservation…….54

B. The Implementation of the Ordinance is Irreconsilable with With Iowa Code Sections 364.22(4), (6) and 602.6101...…..……..55

V. THE CITY HAS UNCONSTITUTIONALLY DELEGATED POLICE POWER TO GATSO……... …….……..58

A. Standard of Review and Error Preservation……..58

B. The City Unlawfully Delegated its Police Powers to Gatso to Make Discretionary Determinations…….....…..58

VI. THE DISTRICT COURT ERRED IN DENYING THAT THE ORDINANCE VIOLATED PLAINTIFFS' EQUAL PROTECTION, PRIVILEGES AND IMMUNITIES, AND SUBSTANTIVE DUE PROCESS RIGHTS……61

A. Standard of Review and Error Preservation ……61

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……61

C. Substantive Due Process is Violated by the City's Continued Violation of State Law and the Offense to Judicial Notions of Fairness ……..65

D. Privileges and Immunities are Violated by the Ordinance's Infringement Upon Fundamental Rights and Disparate Treatment Without Any Rational Basis ……67

VII. The District Court Erred in Holding that the Iowa Constitution Does not Create a Private Cause of Action**……..**…….....69

A. Standard of Review and Error Preservation……..69

B. The Iowa Constitution Provides Protection for Violations of its Provisions……...…….....69

CONCLUSION.....69

REQUEST FOR ORAL ARGUMENT.....70

CERTIFICATE OF COST 70

TABLE OF AUTHORITIES

Page(s)

CASES

B. & H. Invs. v. City of Coralville, 209 N.W.2d 115 (Iowa 1973)…….33

Bakken v. Council Bluffs, 470 N.W.2d 34 (Iowa 1991).....66

Behm v. City of Cedar Rapids, No. 16-1031, *further review from* 898 N.W.2d 204 (Iowa Ct. App. 2017)…….....54, 58

Blanchard v. City of Ralston, 559 N.W.2d 735 (Neb. 1997)……..36

Bowers v. Polk Cty. Bd. of Supervisors, 638 N.W.2d 682 (Iowa 2002) ...28, 38, 44, 47

Brooks v. City of Des Moines, 844 F.3d 978 (8th Cir. 2016)……..38

Bunger v. Iowa High Sch. Athletic Asso., 197 N.W.2d 555 (Iowa 1972) 59, 60

Cascaden v. City of Waterloo, 77 N.W. 333 (Iowa 1898)……...34

City of Cedar Rapids v. Leaf, No. 16-0435, *on further review* 898 N.W.2d 204 (Iowa Ct. App. 2017) ……...55, 58

City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008) 35, 55

City of Panora v. Simmons, 445 N.W.2d 363 (Iowa 1989) 66

City of Sioux City v. Jacobsma, 862 N.W.2d 335, 339 (Iowa 2015) 39, 54

Comes v. Microsoft Corp., 696 N.W.2d 318 (Iowa 2005)……...52

Conklin v. State, 863 N.W.2d 301 (Iowa Ct. App. 2015)……69

Edwards & Browne Coal Co. v. Sioux City, 240 N.W. 711 (Iowa 1932)……36

Formaro v. Polk Cty., 773 N.W.2d 834 (Iowa 2009) 66

Gabrilson v. Flynn, 554 N.W.2d 267 (Iowa 1996) ……..60

Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013) 61

Ghost Player, L.L.C. v. State, 860 N.W.2d 323 (Iowa 2015) 28

Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)……...69

Hancock v. City Council of Davenport, 392 N.W.2d 472 (Iowa 1986)……...31, 32

Hensler v. City of Davenport, 790 N.W.2d 569 (Iowa 2010)..... 44, 45

Homan v. Branstad, 812 N.W.2d 623 (Iowa 2012) 61

Hughes v. City of Cedar Rapids, 112 F. Supp. 3d 817 (N.D. Iowa 2015),
aff'd in part and rev'd in part by 840 F.3d 987 (8th Cir. 2016)…37, 38, 62, 65

Iowa Waste Sys. v. Buchanan Cty., 617 N.W.2d 23 (Iowa Ct. App. 2000).....49

Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771 (Iowa 1978) 57

Iowa Grocery Indus. Ass'n v. City of Des Moines, 712 N.W.2d 675 (Iowa 2006)…..57

James Enters. v. City of Ames, 661 N.W.2d 150 (Iowa 2003)……....56

King v. State, 818 N.W.2d 1 (Iowa 2012).....64

Mathews v. Eldridge, 424 U.S. 319 (1976) 38, 49

McManus v. Hornaday, 68 N.W. 812 (Iowa 1896)……...33

Meyer v. Jones, 696 N.W.2d 611, 614 (Iowa 2005)……..43

More v. State, 880 N.W.2d 487 (Iowa 2016)……..28

Patten v. Patrick, 276 N.W.2d 390 (Iowa 1979)……..40

Qwest Corp. v. Iowa State Bd. of Tax Review, 829 N.W.2d 550 (Iowa 2013)….63, 64

Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004) 63

Riley v. City of Hartley, 565 N.W.2d 344 (Iowa 1997).....32, 33

Ryce v. City of Osage, 55 N.W. 532 (Iowa 1893).....34

Saenz v. Roe, 526 U.S. 489 (1999) 66

Silvernail v. County of Kent, 385 F.3d 601 (2004).....45, 46

Slade v. M.L.E. Inv. Co., 566 N.W.2d 503 (Iowa 1997).....50

Star Equip., Ltd. v. State, 843 N.W.2d 446 (Iowa 2014) 28, 56, 69

State ex rel. Miller v. Smokers Warehouse Corp., 737 N.W.2d 107 (Iowa 2007) 65

State ex rel. Palmer v. Unisys. Corp., 637 N.W.2d 142 (Iowa 2001) 50

State v. Klawonn, 609 N.W.2d 515 (Iowa 2000) 66

Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823 (Iowa 2007) 26

Utilicorp United v. State Utils. Bd., Utils. Div., DOC,
570 N.W.2d 451 (Iowa 1997).....67

Veatch v. City of Waverly, 858 N.W.2d 1 (Iowa 2015).....38

Ward v. Monroeville, 409 U.S. 57, 60, 93 S. Ct. 80 (1972).....44

Warren Cty. Bd. of Health v. Warren Cty. Bd. of Supervisors,
654 N.W.2d 910 (Iowa 2002) 59

Williams v. Redflex Traffic Sys., 582 F.3d 617 (6th Cir. 2009) 45

Wright v. Iowa Dep't of Corr., 747 N.W.2d 213 (Iowa 2008).....64

Zaber v. City of Dubuque, 789 N.W.2d 634 (Iowa 2010).....65

CONSTITUTIONS AND STATUTES

IOWA CONST., art. I, § 6 ..... 49, 67

IOWA CONST., art. I, § 9 28

IOWA CONST., art. III, §38A 55

Iowa Code § 306.4……..64

Iowa Code § 364.1……..55

Iowa Code § 364.2(1)…….….32

Iowa Code § 364.3…….32, 34, 36, 56

Iowa Code § 364.22(4) …….…….55-58

Iowa Code § 364.22(6) ……..…….....29, 32, 36, 40, 41, 46, 56

Iowa Code § 380.2……..35

Iowa Code § 602.6101 ……..54-56

Iowa Administrative Code § 761-144 ……...….45, 59

Des Moines Municipal Code § 1.5……...35

Des Moines Municipal Code § 114-243 …….....*passim*

OTHER AUTHORITIES

Iowa R. App. P. 6.907…….49

10 Eugene McQuillin, *The Law of Municipal Corporations* § 29.26 (3d ed. 1990)..33

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS' DUE PROCESS RIGHTS WERE VIOLATED BY THE CITY'S ORDINANCE**

Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 827 (Iowa 2007)

Star Equip., Ltd. v. State, 843 N.W.2d 446, 451 (Iowa 2014)

Iowa Code § 364.22

IOWA CONST., art. I, § 9

Bowers v. Polk Cty. Bd. of Supervisors, 638 N.W.2d 682, 690-91 (Iowa 2002).

More v. State, 880 N.W.2d 487, 499-500 (Iowa 2016)

Ghost Player, L.L.C. v. State, 860 N.W.2d 323, 330 (Iowa 2015)

Des Moines Mun. Code § 114-243(d)

Hancock v. City Council of Davenport, 392 N.W.2d 472, 473, 477 (Iowa 1986)

Iowa Code § 364.3(1)

Iowa Code § 364.2(1)

Riley v. City of Hartley, 565 N.W.2d 344, 347-48 (Iowa 1997)

B. & H. Invs. v. City of Coralville, 209 N.W.2d 115, 117-18 (Iowa 1973)

McManus v. Hornaday, 68 N.W. 812, 814 (Iowa 1896)

Iowa Code § 364.3

Ryce v. City of Osage, 55 N.W. 532 (Iowa 1893)

Cascaden v. City of Waterloo, N.W. 333 (Iowa 1898)

Iowa Code § 380.2

Des Moines Mun. Code § 1.5(c)

City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008)

Iowa Code § 364.3(4)

Edwards & Browne Coal Co. v. Sioux City, 240 N.W. 711, 718-19 (Iowa 1932)

Blanchard v. City of Ralston, 559 N.W.2d 735 (Neb. 1997)

Hughes v. City of Cedar Rapids, 112 F. Supp. 3d 817, 846-47 (N.D. Iowa 2015), *aff'd in part and rev'd in part by Hughes v. City of Cedar Rapids*, 840 F.3d 987 (8th Cir. 2016)

Brooks v. City of Des Moines, 844 F.3d 978, 980 (8th Cir. 2016)

Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

Veatch v. City of Waverly, 858 N.W.2d 1, 7 (Iowa 2015)

City of Sioux City v. Jacobsma, 862 N.W.2d 335, 345 (Iowa 2015)

Patten v. Patrick, 276 N.W.2d 390 (Iowa 1979)

Hensler v. City of Davenport, 790 N.W.2d 569, 589 (Iowa 2010)

Ward v. Monroeville, 409 U.S. 57, 61 (1972)

Williams v. Redlfex Traffic Sys., 582 F.3d 617, 621 (6th Cir. 2009)

Silvernail v. County of Kent, 385 F.3d 601 (2004)

Iowa Admin. Code § 761-144.6

II. **THE DISTRICT COURT PROPERLY FOUND THAT THE CITY WAS UNJUSTLY ENRICHED BY ITS ATE ORDINANCE, BUT IMPROPERLY FOUND THAT GATSO WAS NOT**

Iowa Waste Sys. V. Buchanan Cty., 617 N.W.2d 23, 30 (Iowa Ct. App. 2000)

Iowa R. App. P. 4 (now 6.907)

Slade v. M.L.E. Inv. Co., 566 N.W.2d 503, 506 (Iowa 1997)

State ex rel. Palmer v. Unisys. Corp., 637 N.W.2d 142, 154-55 (Iowa 2001)

III. **DISTRICT COURT LIMITED THE CLASS DEFINITION IN ERROR**

Comes v. Microsoft Corp., 696 N.W.2d 318, 320 (Iowa 2005)

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

City of Sioux City v. Jacobsma, 862 N.W.2d 335, 339 (Iowa 2015)

Behm v. City of Cedar Rapids, No. 16-1031, *on further review from* 898 N.W.2d 204 (Iowa Ct. App. 2017)

City of Cedar Rapids v. Leaf , No. 16-0435, *on further review from* 898 N.W.2d 204 (Iowa Ct. App. 2017)

City of Davenport v. Seymour, 755 N.W.2d 533, 538 (Iowa 2008)

Baker v. City of Iowa City, 750 N.W.2d 93, 99 (Iowa 2008)

IOWA CONST. art. III, § 38A

Iowa Code § 364.1

Iowa Code § 364.22

Iowa Code § 602.6101

James Enters. v. City of Ames, 661 N.W.2d 150, 153 (Iowa 2003)

Iowa Code § 364.3

Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771, 773 (Iowa 1978)

Iowa Grocery Indus. Ass'n v. City of Des Moines, 712 N.W.2d 675, 680 (Iowa 2006)

V. THE CITY HAS UNCONSTITUTIONALLY DELEGATED POLICE POWER TO GATSO

Star Equip., Ltd. v. State, 843 N.W.2d 446, 451 (Iowa 2014)

Warren Cty. Bd. of Health v. Warren Cty. Bd. of Supervisors, 654 N.W.2d 910, 913-14 (Iowa 2002)

Behm v. City of Cedar Rapids, No. CVCV083575, at 11 (Linn Cty. Dist. Ct. June 5, 2016), *aff'd* by *Behm*, 898 N.W.2d 204, *pending further review*

Cedar Rapids v. Leaf, No. CRCISC214393, *aff'd by Leaf*, 898 N.W.2d 204, *pending further review*

Bunger v. Iowa High Sch. Athletic Assoc., 197 N.W.2d 555, 559-560 (Iowa 1972)

Gabrilson v. Flynn, 554 N.W.2d 267, 276 (Iowa 1996)

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

Homan v. Branstad, 812 N.W.2d 623, 629 (Iowa 2012)

A. 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

IOWA CONST., art. I, § 6

Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 350-51 (Iowa 2013)

Behm v. City of Cedar Rapids, No. 16-1031, *on further review from* 898 N.W.2d 204 (Iowa Ct. App. 2017)

Hughes v. City of Cedar Rapids, 112 F. Supp. 3d 817, 839 (N.D. Iowa 2015), *aff'd in part and rev'd in part by Hughes v. City of Cedar Rapids*, 840 F.3d 987 (8th Cir. 2016)

Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 7-8 (Iowa 2004)

Qwest Corp. v. Iowa State Bd. of Tax Review, 829 N.W.2d 550, 559-61 (Iowa 2013)

King v. State, 818 N.W.2d 1, 25-26 (Iowa 2012)

Wright v. Iowa Dep't of Corr., 747 N.W.2d 213, 216 (Iowa 2008)

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

State ex rel. Miller v. Smokers Warehouse Corp., 737 N.W.2d 107, 111 (Iowa 2007)

Zaber v. City of Dubuque, 789 N.W.2d 634, 640 (Iowa 2010)

Hughes, 112 F. Supp. 3d at 839

Formaro v. Polk Cty., 773 N.W.2d 834, 839 (Iowa 2009)

Saenz v. Roe, 526 U.S. 489, 500 (1999)

City of Panora v. Simmons, 445 N.W.2d 363, 371 (Iowa 1989)

State v. Klawonn, 609 N.W.2d 515, 519 (Iowa 2000)

Bakken v. Council Bluffs, 470 N.W.2d 34, 38 (Iowa 1991)

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

IOWA CONST., art. I § 6

Utilicorp United v. State Utils. Bd., Utils. Div., DOC, 570 N.W.2d 451, 455 (Iowa 1997)

King v. State, 818 N.W.2d 1, 65 (Iowa 2012)

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

Conklin v. State, 863 N.W.2d 301 (Iowa Ct. App. 2015)

Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)

ROUTING STATEMENT

Plaintiffs-Appellees/Cross-Appellants Reuven Weizberg, David Peter Veng-Pederson and Jacob Patrick Dagel ("Plaintiffs") agree with Defendant-Appellant/Cross-Appellee City of Des Moines ("City") that given the substantial constitutional issues raised as to the validity of an ordinance and its implementation, this case should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2)(a). These constitutional questions raise fundamental and urgent issues requiring determination by the Iowa Supreme Court. Iowa R. App. Civ. 6.1101(2)(d).

STATEMENT OF THE CASE

Since 2011, the City has made millions of dollars by unlawfully delegating police power to its for-profit contingency-fee joint partner, Defendant-Cross-Appellee Gatso USA, Inc. ("Gatso")[1] and by forcing those Vehicle Owners who contest alleged ATE violations on Interstate Highway I-235 Eastbound into a haphazard administrative hearing process. (Appendix ("App.") 467-477). Among other flaws, the City's administrative hearing process results in Orders based on the application of a lower burden of evidentiary proof than Iowa law requires. (App. 512). The City and Gatso know

[1] The City notes that claims against Gatso were dismissed pursuant to Gatso's motion for summary judgment. Proof Brief for Appellant/Cross-Appellee ("City's Brief"), p. 7. These claims are subject to Plaintiffs' Cross-Appeal.

that they could not profit in such a manner if forced to try each of these cases in court, thus, contesting Vehicle Owners are mandatorily shunted to the administrative hearing process, where the City and Gatso ("Defendants") play prosecutor, judge, jury, and debt collector. The evidence used in this scheme derives entirely from automated traffic enforcement ("ATE") radar whose placement at I-235 Eastbound is in express violation of the Iowa Department of Transportation's ("IDOT") determination that the equipment be removed, finding no safety justification for locating them at that location. (App. 32-36).

In addition to the procedural history noted by the City regarding Plaintiffs' claims against the City regarding Des Moines Municipal Code section 114-243 ("Ordinance"), Plaintiffs filed a motion for class certification on January 2, 2017. On February 2, 2017, the Honorable Lawrence P. McLellan granted Plaintiffs' motion for class certification, narrowing the class definition as described below. The court ordered issuance of the Class Notice pursuant to Plaintiffs' Motion, which was distributed to the class members (over 1000 known individuals) on May 1, 2017.

On September 5, 2017, Judge McLellan granted summary judgment in favor of Plaintiffs. (App. 504-522). The Court found that the City violated Plaintiffs' due process rights by failing to follow its own Ordinance in forcing a less protective administrative hearing than is a municipal infraction filed in the Iowa District Court. (App. 520). In addition, the district court held that the

City was unjustly enriched and must therefore reimburse the penalty from Vehicle Owners who contested the violation, and release any such persons' funds held by the Iowa Tax Setoff Program. (App. 520-521). The City filed its Notice of Appeal on September 20, 2017. Plaintiffs filed the Notice of Cross-Appeal on September 29, 2017. This appeal follows.

STATEMENT OF FACTS

A. ATE Ordinance

The Des Moines City Council, in 2011, passed the Ordinance authorizing ATE. The Ordinance imposes liability on the *owner* if his/her "vehicle travels at a speed above the posted speed limit." Des Moines Mun. Code ("Mun. Code") § 114-243(c)(2). The City Council contemplated only one means to contest an alleged citation: having the matter heard in the Iowa District Court in the context of a municipal infraction lawsuit. Mun. Code § 114-243(d)(2) (2016). The Ordinance reads[2] as follows:

> (d) *Penalty and Appeal.*
>
> (1) 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 of Des Moines at the city's finance department or a designee.
>
> ***(2)* A recipient of an automated traffic citation may dispute the citation by requesting an issuance of a municipal infraction**

[2] As the City notes, it amended its Ordinance; but such post-hoc amendment is not the focus here. City's Brief, p. 17 n.1.

> **citation by the police department. Such request will result in a required court appearance by the recipient and in the scheduling of a trial before a judge or magistrate at the Polk County Courthouse.** The issuance of a municipal infraction citation will cause the imposition of state mandated court costs to be added to the amount of the violation in the event of a guilty finding by the court.
>
> *(3)* **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**.

(App. 355-356) (emphasis added). The Ordinance makes no reference to any alternative, non-district court processes to contest an alleged citation, nor does it create any Administrative Body to determine liability. *Id.*

B. DOT Evaluations and Order

To implement its Ordinance, the City placed a series of fixed cameras and radar equipment on I-235. (App. 49-66). The IDOT's 2015 Evaluation of the City's use of that equipment at that location and found that the devices should be removed. (App. 32-36). In response to the City's appeal, this the IDOT, in, a final agency action, concluded that "the data does not provide convincing evidence that this location is unsafe for motorists and law enforcement conducting routine police work." (App. 37-42). Defendants defied the IDOT's order, continuing to operate the ATE program and issuing citations (municipal infractions) to each of the Plaintiffs. (App. 357-391). In

collateral litigation, three Iowa cities who contracted with Gatso to perform ATE—Cedar Rapids, Muscatine and Des Moines—joined forces to challenge similarly-adverse IDOT determination-and-removal decisions. On April 27, 2017, the Polk County District Court ruled that the IDOT has jurisdiction over these roads, that the agency had properly implemented administrative rules governing the use of ATE equipment on state primary and interstate highways, and that it had properly ordered each of the cities to remove speed cameras from specified locations, including I-235. (*City of Des Moines v. IDOT*, CVCV049988 Order). The Court noted that the IDOT's evaluation recognizes that "it is possible that ATEs will result in unfamiliar drivers braking too quickly or frequently, causing greater risk for accidents." (Order). The cities's appeal is now pending. (Case No. 17-0686).

C. *Plaintiffs and the Process*

Plaintiff Reuven Weizberg was a brief visitor to the Des Moines area, a member of a traveling Broadway Tour group. (App. 291). Daily, feeling safe and comfortable, he drove easterly on I-235 with the flow of traffic between his hotel and the performance hall. (App. 291).

Given his experience, many weeks later, Mr. Weizberg was flabbergasted to receive at his New York address several "Notice of Violation" ("NOV") documents. (App. 292). He thought the speeding allegations must be a mistake. (App. 292). To contest the alleged violations, he attempted to follow

procedures outlined in the NOVs and the cited webpage: www.viewcitation.com. (App. 292). Mr. Weizberg called the Des Moines Police Department and Traffic Violations Bureaus and learned that his challenge must proceed through the administrative hearing process. (App. 292). "Hearings" for each of the three Violations, which had allegedly happened within less than a two-week period, were convened over fifteen weeks, conducted by two different "Administrative Hearing Officer." (App. 357-376). In three separate "Orders," each hearing officer, citing "a preponderance of the evidence," entered a "Judgment" against Mr. Weizberg in the amount of $65.00 apiece. (App. 361, 367, 375).

Each identical "Judgment" at the top read: "City of Des Moines, Petitioner An Iowa Municipal Corporation v. Reuven Weizberg," and then:

> This matter coming for hearing, notice having been given and the Administrative Body being fully advised in the premises, having considered any motions, evidence and arguments presented, IT IS ORDERED: As to the count(s), this Administrative Body finds by a **preponderance of the evidence** and rules as follows:
> …
> Disposition Reason:
> The owner of the vehicle is liable for a civil penalty even if they are not operating the vehicle at the time of the **infraction. The Iowa Supreme Court ruled the cameras to be legal in 2008**.
>
> JUDGMENT TOTAL: $65.00
>
> Failure to pay the total amount specified by August 2, 2015 **will result in the possible imposition of the Iowa Income Tax Offset Program**, collection efforts and legal action. This ruling constitutes the final administrative decision by the City of Des Moines.

(Weizberg Hearing Orders) (emphasis added). Each Judgment named a "Administrative Hearing Officer, but none of them were signed. (App. 361, 367, 375).

On the second identical page of each "Judgment" document a "Right of Appeal" was described, informing Mr. Weizberg that he could request a lawsuit be filed against him in Polk County District Court within ten days. (App. 362, 368, 376). Further, he was informed that, "An $85.00 filing fee and other court costs plus the fine amount [$65.00] will become a judgment against [Mr. Weizberg] if the Court finds [him] liable for the violation. (*Id.*). Mr. Weizberg did not invite the Police Department to file a lawsuit against him; he viewed the scheme as an invisible tollbooth, one creating an unfair driving environment in Des Moines. (App. 294). He was surprised later when he read in the newspaper that Des Moines officials reported that those Vehicle Owners unfamiliar with I-235 who receive multiple citations usually have some of them dismissed—an outcome contrary to his own experience. (App. 293).

Plaintiff David Peter Veng-Pedersen (Mr. Veng-Pedersen), lives in Waukee, Iowa. (App. 471). While driving on the interstate, he attempts to travel with the flow of traffic, particularly when it involves large trucks. (App. 471). In June 2015, Mr. Veng-Pedersen received an NOV alleging that on May 7, 2015, a vehicle owned by him had been traveling in excess of the speed limit.

(App. 471). Believing that the allegation was in error, he went to the website described in the NOV; he was directed to contest the matter in-person at an Administrative Hearing, and was offered very limited options for scheduling the same. (App. 472). When trying to re-schedule the hearing by telephone, he was required to request the schedule change in writing; and the offered scheduling options were again extremely limited. (App. 472).

The Administrative Hearing was convened in the City Council chambers. (App.472). A city employee, introducing himself as the Hearing Officer, talked about issues unrelated to Mr. Veng-Pedersen's case: that a finding of liability would not have an effect on insurance rates. (App. 472). In defending himself, Mr. Veng-Pederson was not allowed to ask questions about evidence produced by the Police Officer. (App. 472-473). Mr. Veng-Pedersen had not been shown evidentiary documents prior to the hearing nor had he been given time to examine them during the hearing. (App. 472-473). His offered remarks were quickly dismissed by the Hearing Officer. (App. 473).

Mr. Veng-Pedersen was told by the Hearing Officer that he was liable, and that he could now appeal the decision by requesting the City to file a lawsuit against him; however, he could not afford to take more time off of work to pursue justice in yet another proceeding. (App. 473). In Mr. Veng-Pedersen's case, the "Hearing Officer," had found "by a preponderance of the evidence," that Mr. Veng-Pedersen was "liable" and a "Judgment Total" of

$65.00 was entered. (App. 383). Given Mr. Veng-Pedersen's experience, he believes that it is a waste of time for a Vehicle Owner to contest wrongfully-alleged ATE Violations. (App. 473). He avoids driving on I-235 Eastbound and cautions others he knows against traveling on that "speed trap." (App. 473). Mr. Veng-Pedersen believes the scheme is all about making money for the City and Gatso. (App. 473).

Plaintiff Jacob Patrick Dagel ("Mr. Dagel") resides in Urbandale, Iowa. (App. 475). On August 17, 2016, a motor vehicle owned by him is alleged to have been operated in violation of the City's Ordinance at I-235, Eastbound, Lane 1. (App. 475). The NOV informed him that he was "liable" for a civil penalty of $65.00 unless he requested an administrative hearing by the "due date" of October 9, 2016. (App. 385). The NOV indicated that he could contest the violation, in-person, "by an administrative hearing." (App. 386). He was warned that any unpaid civil penalty would "result in this penalty being forwarded to collections and to the Iowa Income Tax Offset Program or for filing in state district court." (App. 385). He was warned, further, that any judgment would result in liens registered in Polk or Warren County. (*Id.*). Mr. Dagel timely filed a written appeal. He challenged the speeding allegation and noted that the IDOT had ordered the removal of the equipment the City was using to prosecute him. (App. 475). On November 2, 2016, "the Administrative Body," issued an Order, ruling Mr. Dagel "Liable," in the amount of $65.00,

based on a "preponderance of the evidence and rules." (App. 390). Mr. Dagel was warned that the "failure to pay" by December 3, 2016, "will result in the possible imposition of the Iowa Income Tax Offset Program, collection efforts and legal action." (App. 390). Rather than to be exposed to further risk of loss and inconvenience, Mr. Dagel paid the amount demanded, noting on the check: "Paid in protest." (App. 476).

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

In a document captioned, "Agreement Between Gatso and the City for Technology and Business Services Related to an Automated Public Safety Traffic Law Enforcement System" ("Contract"), signed as of January 4, 2011, the City hired Gatso as its "private contractor." (App. 49-66). The Contract may be terminated for cause if "Iowa law or Federal law is amended to prohibit the operation of automated traffic law enforcement systems . . .". (App. 49). Upon termination, Gatso is required to remove its hardware and equipment installed pursuant to the Contract. (App. 50).

Gatso received "$27.00 [$26.00 as of 2014] per paid citation for Red Light Cameras and $25.00 [$24.00 as of 2014] per paid citation for Speed-on-Green, Fixed Speed Cameras, and Mobile Speed Camera violations." (App. 50, 65). Gatso is responsible for installing, operating and maintaining the GATSOMETER enforcement system. (App. 51). Gatso covenants that its

System Plans for size and location of all of its equipment and signs are to be compliant with the requirements of the City and the DOT. (App. 52).

Gatso correlates video images that it uploads to a Gatso server with Department of Motor Vehicles ("DMV") records and combines that into a Violation Package. (App. 53). Gatso provides these packages to the Police Department so that its employees can approve or reject each violation. (App. 54). Gatso works with NLETS (National Law Enforcement Telecommunications System) on behalf of the City. (App. 53). Gatso sends all citations (Notices of Violation) to accused Vehicle Owners by mail and maintains a toll free help desk to "discuss citations and make payments." (App. 53). Gatso will "re-issue" a citation by re-sending it if a Vehicle Owner disputes responsibility and a different violator is identified. (App. 53). Gatso accepts payment amounts made by accused Vehicle Owners on behalf of the City in the form of mail, over the phone, or by web. (App. 53).

E. *Plaintiffs' Expert Witnesses*

Expert witnesses retained by Plaintiffs affirmed the essential flaws in the ATE scheme. Professor Joseph L. Schofer, Northwestern University, independently reviewed the ATE on I-235 Eastbound and concluded that the location has had very little, if any, relationship to modifying motor vehicle speed or to improving traffic safety. (App. 113-119). Moreover, he found that the fixed placement of ATE at that location (the only one on an interstate in

the nation other than similarly-situated radar camera units in Cedar Rapids) is contrary to sound transportation policy as applied to interstate highway travel, which is predicated on creating a consistent quality of driving experience and expectation across the nation. (App. 114-118).

Expert Carl J. Reichers opined that there is no evidence that Gatso calibrates its ATE to a known national standard with a known uncertainty rate, as normally required for legal measurements (App. 147-165). That Gatso's equipment is neither certified by an independent body nor calibrated to a known national standard, in Mr. Reichers' opinion, places the interests of those who are subject to the City's Ordinance prosecution at unfair risk. (App. 152).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS' DUE PROCESS RIGHTS WERE VIOLATED BY THE CITY'S ORDINANCE

A. Standard of Review and Error Preservation

Plaintiffs agree with the City (City's Brief, p. 11) that while generally grants of summary judgment are reviewed "for correction of errors at law[]" *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007), given that constitutional claims are raised, the review is de novo. *Star Equip., Ltd. v. State*, 843 N.W.2d 446, 451 (Iowa 2014) (citation omitted).

Plaintiffs agree that the City preserved error generally on the argument that the Ordinance did not violate due process. However, Plaintiffs assert that

the City did not preserve the ability to dispute facts that it did not dispute below. Specifically, for the first time on appeal, the City claims that Plaintiffs wrongfully alleged that the administrative hearing process was mandatory. City's Brief, pp. 23-26.[3] In fact, the City misrepresents the administrative hearing process as "voluntary" or "supplemental" or an alternative "opportunity" throughout its Brief. City's Brief, pp. 9, 11-13, 16, 18, 20, 23, 27, 31. The district court properly found that the fact that the administrative hearing process was mandatory was undisputed. (App. 509-510) ("These factual assertions regarding the administrative hearing process were not disputed by the City in the form of an affidavit."). The City did not file a resistance to Plaintiffs' Cross-Motion for Summary Judgment or statement of disputed material facts below, as required by Iowa R. Civ. P. 1.981(3). The City therefore did not preserve the ability to newly dispute facts that were (and are)

[3] The City newly challenges the language of affidavits as not standing for the proposition that the administrative hearing was mandatory. First, the City challenges Mr. Weizberg's affidavit as not containing the quoted language, but that was a filing error that had already been corrected in the class certification briefing. Appendix in Support of Class Certification, at 84. Second, the City argues (City's Brief, p. 24) that Mr. Veng-Pedersen's affidavit does not stand for the proposition that he was directed that he must contest the NOV through an administrative hearing. However, the language of the affidavit cited by the City indicates exactly that: "The website instructed me that if I wanted to challenge the alleged Violation I needed to attend an administrative hearing in-person." (App. 472). How Mr. Veng-Pedersen learned of this required attendance is less important than the message (from the website or a Gatso employee, as described below) that he *must* attend the administrative hearing. The district court properly so held.

undisputed below. Moreover, the City still does not (as it could not at this stage) present any admissible evidence to dispute the mandatory nature of the administrative hearing as expressly described in its own Ordinance.

B. Forcing a Different—and less Protective—Process than that Provided in the Ordinance is a Violation of Due Process

The district court properly held that the City's failure to follow the process set forth in its own Ordinance and required by Iowa law was a violation of due process. (App. 511). The City, by asserting that the district court erred in so deciding, is arguing in favor of violating its own laws, and is seeking this Court's approval of it. This is untenable.

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). "Due process requires fundamental fairness in a judicial proceeding." *More v. State*, 880 N.W.2d 487, 499-500 (Iowa 2016).

The process that is "due" can first be judged by the applicable statutorily-required process. *See Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 330 (Iowa 2015) (describing the Iowa Supreme Court's analysis in first looking

for a legislative mandate in determining due process in reviewing an agency action). 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)(b). The General Assembly has determined the minimum process due to those who challenge municipal infractions; the City fails to abide by such process when it forces all charged Vehicle Owners who contest an NOV to attend an administrative hearing.

The district court's finding that the administrative hearing process was required is clearly supported by the factual record. Vehicle Owners who wish to contest the alleged violation of the Ordinance are directed to call a telephone number answered by Gatso employees. (App. 53, 292, 472). Those employees, in turn, refer to guideline materials provided to them by Gatso, which under "Contests," indicate that Gatso employees are told to "[a]lways provide them [Vehicle Owners] with dates, times and location of the [administrative] hearing." (App. 483). The guidelines further instruct, in part, as follows:

> There are two ways for a citizen to contest a ticket
> 1. In person
> 2. By mail

(App. 496). Nowhere in any of these documents are Gatso employees trained to tell Vehicle Owners that an appearance in a court of law is recognized or anticipated. Consistently, the City's NOV document, initially sets forth the following language:

> **You have the right to contest this violation at an administrative hearing or by mail.** . . .
>
> 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 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. 358, 364, 372, 378, 386). There are additionally two large boxes set forth in the NOV form, entitled, respectively, "In-Person Administrative Hearing request" and "Contest-By-Mail option[.]" (*Id.*). In addition, the guidelines produced by Gatso are borne out by the experiences of Plaintiffs. Mr. Weizberg made phone calls to ask about options and learned that he had to proceed through the administrative hearing process. (App. 292). Similarly, when Mr. Veng-Pedersen reviewed the website listed on the NOV, it instructed that he must contest the matter in-person at an Administrative Hearing. (App. 472).

Moreover, even if, arguably, it were not mandatory, the City would still not be complying with its own Ordinance in offering the administrative hearing. As the district court found, the City's Ordinance requires that a municipal infraction be filed to contest an NOV:

> (2) **A recipient of an automated traffic citation may dispute the citation by requesting an issuance of a municipal infraction**

citation by the police department. . . .

(App. 355-356) (emphasis added).[4]

The district court cited a variety of cases standing for the proposition that a city's failure to follow its own law (and the process it sets forth) is invalid, and constitutes a violation of due process. (App. 513-516). For instance, in *Hancock v. City Council of Davenport*, this Court held that Davenport's procedures in declaring a building a nuisance failed to comply with the city's own ordinances and failed to satisfy procedural due process requirements. 392 N.W.2d 472, 473, 477 (Iowa 1986); App. 514-515). Even though the owner had actual notice of the hearing on whether the city would condemn the building, and even attended it, the fact that the notice provided prior to the hearing did not set forth the deficiencies that might lead to demolition rendered the notice deficient as inconsistent with its ordinance (which required a "detailed statement . . . as to the deficiencies"). *Id.* at 476-48. As the district court correctly noted, "the city's failure to follow its own notice requirement resulted in the city not providing 'a meaningful opportunity to be heard which its ordinances contemplated and constitutional due process requires.'" (App. 515,

[4] Astoundingly, even on appeal, the City continues to attempt to claim that this is not a municipal infraction case. City's Brief, p. 20 ("It is important to distinguish that the NOV is not the same as a municipal infraction case."). The City, however, cannot claim that challenging the NOV could be categorized as anything other than a municipal infraction, however, because it is directly in its own Ordinance, in the bolded section quoted above.

citing *Hancock*, 392 N.W.2d at 479).

The cases cited—for the seemingly axiomatic proposition that cities are bound by their own law and State law—are also consistent with the requirements of Iowa Code section 364.6: "A city shall substantially comply with a procedure established by a state law for exercising a city power. If a procedure is not established by state law, a city may determine its own procedure for exercising the power." There is no indication, however, that a city may determine a procedure (identical to State law: Iowa Code § 364.22(6)) and then violate the procedure it set forth at its whim.

This is further consistent with the requirements of Iowa Code section 364.3(1), imposing limitations on cities: "[a] city council shall exercise a power only by the passage of a motion, a resolution, an amendment, or an ordinance." The City cannot therefore post-hoc attempt to create a process that does not exist in its ordinance, which the City Council, who was delegated such authority (Iowa Code § 364.2(1)), did not approve. This is the equivalent of a city's attempt to enter into a contract without following the procedures prescribed in its charter, which renders the action (and therefore contract) invalid. *See Riley v. City of Hartley*, 565 N.W.2d 344, 347-48 (Iowa 1997) (applying the "general rule [] that if a contract is within the corporate power of a municipality but the contract is entered into without observing mandatory legal requirements specifically regulating the mode by which it is to be exercised, there can be no

recovery under the contract.") (quoting 10 Eugene McQuillin, *The Law of Municipal Corporations* § 29.26, at 366 (3d ed. 1990)). The *Riley* Court noted that invalid contracts are those "*contracts not authorized by ordinance*." *Id.* (emphasis in original); *see also B. & H. Invs. v. City of Coralville*, 209 N.W.2d 115, 117-18 (Iowa 1973) ("[W]hen a council or similar body does not comply with such a statute [requiring notice of amendments to property interests] the purported zoning change is void."). In the same manner, the City Council set forth the process that it found was "due" to recipients of the traffic citations, and the City's later attempt to create a new process outside of the Ordinance was invalid. The process was *not authorized* by the Ordinance. The reason for the requirement that municipal powers are to be effectuated in ordinances is clear: protecting the public's interest. "The public's rights cannot be waived by the council's improper exercise of city powers." *Riley*, 565 N.W.2d at 348. Even more clearly, the City cannot waive the public's rights by failing to obey the exercised city powers.

The City's attempt to distinguish the cases relied upon by the district court is unavailing. City's Brief, pp. 13-16. In fact, at each turn, the City proves Plaintiffs' point: that the fundamental problem with failing to follow one's own laws is that the process provided was less protective than that guaranteed by the city's ordinances (or State law). For instance, the City notes that in *McManus v. Hornaday*, 68 N.W. 812, 814 (Iowa 1896), the Court held that "when a certain

mode is promised by a city, it cannot later usurp the former by using a lesser mode." City's Brief, p. 13. This situation is identical. The City promised that it would provide access to a court of law for a violation of the Ordinance, subject to the "clear, convincing and satisfactory" burden of proof, and it provided an administrative hearing held by a layperson subject to a "preponderance of evidence."[5] The City is expressly prohibited from providing less protection than that guaranteed by State law. Iowa Code § 364.3 ("A city may not set standards and requirements which are lower or less stringent than those imposed by state law[.]"). Similarly, the City summarizes *Ryce v. City of Osage*, 55 N.W. 532 (Iowa 1893), by describing that following the formal procedure of passing an ordinance prevents abuses, and that the "city abridged process which was ultimately not condoned by the court." City's Brief, p. 14. This is exactly what the City has done in this instance: abridged the process set forth in its Ordinance and required by State law; it cannot be condoned. Finally, the City describes *Cascaden v. City of Waterloo*, noting that an ordinance could not be repealed or amended using a resolution given that it provided less notice (and therefore less process) than the required passage of an ordinance. City's Brief, p. 15 (citing 77 N.W. 333 (Iowa 1898)). While Plaintiffs dispute whether the

[5] As the district court noted, the City was attempting to remedy some of these issues during the pendency of these proceedings, by starting to hire administrative law judges to convene the administrative hearings. (App. 511, n. 39). As the district court noted, however, this was not a material fact given the other deficiencies of the process.

City can continue to violate State law by providing an administrative hearing process in its amended Ordinance, the City Council at least complied with the required process by later amending the Ordinance to institute a new process after the incidents giving rise to this litigation had occurred. That is exactly what the City Code requires: "Amendments to provisions of this Code shall be made in accordance with I.C. § 380.2 with regard to amendatory language." Des Moines Mun. Code § 1.5(c). Correspondingly, Iowa Code section 380.2 requires that an "amendment to an ordinance . . . must specifically identify the ordinance . . . to be amended, and must set forth the ordinance . . . as amended, which action is deemed to be a repeal of the previous ordinance[.]" The City did not comply with this requirement until Plaintiffs challenged it in court. This does not satisfy the minimum due process owed to Plaintiffs. (App. 507, n. 17).

The City also cites *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008) for the broad proposition that "[t]here is no question that cities have the general authority to regulate speed through the use of automated traffic cameras." City's Brief, p. 14. The City has made the same sweeping statements to Plaintiffs in their administrative hearings. *See* Weizberg Order. The *Seymour* Court's holding is in fact directly contrary to the City's position in this case: it held that Davenport's ATE Ordinance was not preempted by Iowa law because it had utilized the required clear, convincing, and satisfactory burden of proof applicable to the prosecution of all municipal infractions. 755 N.W.2d at

538. The City has flaunted those requirements in this instance.[6]

The City is arguing in favor of its ability to violate its own laws, and State law, by denying necessary and adequate process, which is due. In addition, the City is violating State law by attempting to enact a tax or a toll on an interstate highway, which it is clearly prohibited from doing. *See* Iowa Code § 364.3(4) ("A city may not levy a tax unless specifically authorized by a state law."). The City was not authorized to extoll these sums from interstate drivers on I-235. In fact, the IDOT expressly told the City that they could not do this since March of 2015, no matter what process it provided. The City's justification of its actions—an ostensible exercise of police power is untenable, as "its real purpose—no matter what verbiage is employed to conceal it—is to raise revenue . . . [and therefore], the courts will hold it to be unauthorized and void." *Edwards & Browne Coal Co. v. Sioux City*, 240 N.W. 711, 718-19 (Iowa 1932). Moreover, given that the amount of the fine is "in excess and out of proportion to the expense incurred, it generally regarded as a revenue

[6] The City further attempts to distinguish a Nebraska case cited by the district court (City's Brief, pp. 15-16), but the facts are directly on point: a city failed to follow the process set forth in its ordinance for emergency condemnations, and correspondingly denied an owner due process by failing to provide notice and an opportunity to be heard (or correct the deficiencies). (App. 515-516) (citing *Blanchard v. City of Ralston*, 559 N.W.2d 735 (Neb. 1997). Here, the City failed to follow the procedure it provided in its own Ordinance (direct access to court) and denied adequate notice to vehicle owners and an opportunity for them to be heard by an impartial court. Witnesses could not even be called in the administrative hearing, as required by Iowa Code section 364.22(6)(c). (App. 511).

measure." *Id.* (citations omitted). This revenue-raising tax on the interstate highway is greatly in excess of the cost to the City, as Gatso absorbs the costs pursuant to its contract with the City, and based on Gatso's own great compensation from the scheme. (App. 50-51). The City's entire ATE scheme is likely invalid, but the district court properly held that the City could not violate due process by forcing Vehicle Owners to a less protective administrative hearing process that was not enacted in its Ordinance (or anticipated in State law). This finding was not inconsistent with the district court's finding in *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817, 846-47 (N.D. Iowa 2015), *aff'd in part and rev'd in part by Hughes v. City of Cedar Rapids*, 840 F.3d 987 (8th Cir. 2016). *Hughes* did not involve an administrative process used to implement an ATE scheme in a manner directly contrary to the process provided by the City of Cedar Rapids's Ordinance. It is therefore wholly inapposite to the district court's reasoning in this case. Moreover, the Eighth Circuit expressly held that the state constitutional claims based on law violations of IDOT rules and Order were not yet ripe, and dismissed those without prejudice. 840 F.3d at 997.[7]

[7] The City cites the *Hughes* district court's reference to "a government entity's regulations do not set the legal standard for procedural due process, and their mere violation does not constitute a federal due process violation." City's Brief, p. 18 (quoting *Hughes*, 112 F. Supp. at 846-47). First, the same arguments were not before the *Hughes* court given its different ordinance and procedural posture in late 2014/early 2015. (App. 517) (noting that the fact that the

C. The Ordinance and its Implementation Further Violate Due Process by Failing the Balancing Test of *Mathews*

Even assuming, *arguendo*, that the City's failure to provide the process its Ordinance provided were insufficient on its own to demonstrate a violation of due process, such a violation has still occurred.[8] In alternatively analyzing due process violations, courts consider the interest protected, and if a protected interest is involved, three competing interests are balanced:

> 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)).

---

administrative hearing in Des Moines was mandatory was not before the district court in *Brooks v. City of Des Moines,* 844 F.3d 978, 980 (8th Cir. 2016). (and therefore *Hughes*, decided earlier). Second, the City misunderstands what the *Hughes* district court was referencing in that passage, which was to the IDOT regulations requiring 1000 foot of distance from the speed limit change to the cameras being installed. *Hughes*, 112 F. Supp. 3d at 846. Third, the fact that violating those regulations may not violate federal due process but may violate state law is one of the reasons that the district court in *Hughes* was reversed, and the state law claims were dismissed without prejudice. *Hughes*, 840 F.3d at 997.

[8] The City questions the district court for not engaging in the balancing test of *Mathews*. City's Brief, p. 11-12. While Plaintiffs do not believe there was any error in such, this Court could of course affirm summary judgment "on a ground not relied upon by the district court provided the ground was urged in that court and is also urged on appeal." *Veatch v. City of Waverly*, 858 N.W.2d 1, 7 (Iowa 2015).

1. Private Interest Affected

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). Plaintiffs have each been assessed a $65.00 fine per occurrence. (App. 357, 363, 369, 371, 377, 385). Therefore, there is a private interest affected in the property right. While the amount may not seem significant to some, due process should not depend on one's wealth, and that amount of money is certainly significant to others. ATE speed enforcement fines can range from $65.00 to $80.00 plus $2.00 for each mph in excess of 21 mph over the posted speed limit. (App. 358, 364, 370, 372, 378, 386). Multiplied by the thousands, as the City did with its continued issuance of citations from I-235, renders the collective property interests of those similarly-situated incredibly significant. A part of the success of the City's ATE scheme is that since the amount for one individual municipal infraction fine is not extremely high, it dissuades individuals from exercising the right to contest it. The City's ability to leverage the time-value of money should not go unchecked. An action by the City violating its own Ordinance and Iowa law is not less violative of rights because it involves an individual property interest valued at less than $100. Whether it is a $65 or $650 civil fine, it is significant that the City is taking away a property interest without due process. It may not be worth the average individual's time to attend an unlawful administrative hearing, but that does not

make the hearing lawful.[9]

2. The Risk of Erroneous Deprivation is Substantial

The second factor to consider in analyzing procedural due process violations is the risk of erroneous deprivation. *Patten v. Patrick,* 276 N.W.2d 390 (Iowa 1979). There are four main factors here that demonstrate the substantial risk of erroneous deprivation: 1. The lower burden of proof applied; 2. additional flaws of the administrative hearing process that are less protective than a court of law; 3. the flaws in the citation issuing process and query process directing all Vehicle Owners to the administrative hearing; and 4. the non-rebuttable presumption that a cited Vehicle Owner is liable for the infraction.

First, as noted above, the administrative hearing officer imposes a lower burden of proof to the evidence than that which is required in court by Iowa Code section 364.22(6)(b). Specifically, each decision issued by the administrative hearing officer reads as follows:

> As to the count(s), this Administrative Body finds by a **preponderance of the evidence** and rules as follows:
> …
> Liable

[9] The City goes even further than this amount, by using a Setoff program against tax refunds of individuals who have not paid their citations. This is the subject of parallel litigation in the Iowa District Court for Polk County, *Fett et al. v. City of Des Moines,* No. CVCV053512. As alleged in that Petition, the City sometimes holds more than a thousand dollars to leverage its ability to obtain $65.00. That sum is certainly significant.

(App. 361, 367, 375, 383, 390). Contrastingly, Iowa Code section 364.22(6)(b) imposes on the City a "clear, satisfactory and convincing evidence" burden for it to prove a municipal infraction has occurred.

Second, the administrative hearing process does not offer the same protections as a court of law. For example, the "Order" by a hearing officer may not even have the name of the individual who issued the ruling, let alone that person's signature. (App. 361, 367, 375, 383, 390). The hearing officers were previously not judges or even trained in the law. And the new administrative law judges still use the exact same Gatso form used by all other hearing officers, and such rulings are still often unsigned. In fact, in this *entire* proceeding, below, the City did not produce for the record a single *signed* copy of an "Order." Moreover, the hearing process still does not allow motions to be presented or an examination of additional witnesses whom a Vehicle Owner might want to have testify. (App. 511). Such is consistent with Mr. Veng-Pederson's experience, where he was not able to examine carefully, or to ask questions about evidence produced by, the prosecuting Police Officer concerning the accuracy of the speed camera presented to the Hearing Officer. (App. 472-473).

Additionally, the decisions of the hearing officers are also wildly divergent, without any footing in principles of *stare decisis*. On one hand, a

hearing officer might recognize the 1% error rate of the cameras, and based on the business judgment rule that citations will be issued to those going 11 mph or above, someone who allegedly traveled 11 mph exactly should not receive a citation. (App. 167).[10] On the other hand, Vehicle Owners such as Plaintiff Veng-Pedersen are found liable for owning a vehicle that was allegedly traveling 71 mph in a 60 mph zone. (App. 383). There is no rhyme or reason to the variability of these decisions.

The third indicator of the risk of erroneous deprivation arises from the flawed process used by the City to direct Vehicle Owners to administrative hearings. First, the City provides no proof that individuals actually receive the NOVs, as they are not sent by certified mail. In addition, none of the NOVs were issued by a police officer making the initial determination to prosecute. Therefore, even at the front end of the City's Ordinance's enforcement, there is a serious risk of error. Gatso's own materials indicate that "[f]rom time to time the quality of the plate leads to the incorrect number being run but *most often* those are rejected by the police." (App. 488). Moreover, when one calls to contest even the basic information used by the City (that the image of the vehicle does not match his or her own vehicle), Gatso has "no way to determine whether this is a valid claim." (App. 488). On the other hand, Gatso

[10] Despite this clear evidence to the contrary, the City astonishingly asserts that: "There is no Risk of Erroneous Deprivation." City's Brief, p. 22.

has the discretion to withdraw citations in "one instance" – "if an egregious processing error was made." (App. 486). It is unclear what such a processing error would constitute, and such an "instance" is certainly not transparent to any adversely affected Vehicle Owner. But transparency is not the name of *this* game, a flaw which further risks erroneous deprivation, as Gatso's employee manual instructs: "Anonymity is best – both in terms of Gatso and yourself." (App. 486). In addition, Gatso employees who receive the calls are provided information regarding "Transfer of Liability," which ostensibly allows Vehicle Owners to claim that there was a "sale, lease or rental" to disclaim liability. (App. 498). These defenses are not described in, and, therefore, should have no place in, the City's enforcement of its own Ordinance. The notice requirements of due process include apprising "the affected individual of, and permit adequate preparation for, an impending hearing." *See Meyer v. Jones*, 696 N.W.2d 611, 614 (Iowa 2005) ("Notice must be reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). The City and Gatso fail to comply with even the notice requirements, let alone the adequate hearing prong.

Finally, fourth, the risk of erroneous deprivation is increased by the reliance on a non-rebuttable presumption that the Vehicle Owner is responsible for the infraction that may have been committed by someone else. Such presumptions are "arbitrary" and "operate[] to deny a fair opportunity to

rebut it," and therefore further violates Iowa's Due Process Clause. *Hensler v. City of Davenport*, 790 N.W.2d 569, 586 (Iowa 2010).

The next consideration of the due process balance, on the other hand, reviewing the "the probable value, if any, of additional or substitute procedural safeguards," (*Bowers*, 638 N.W.2d at 691), is extremely powerful, and weighs in favor of Plaintiffs' concerns. The procedures actually required to enforce municipal infractions under Iowa law, providing direct access to the district court, have incredible value. They are fundamental to our system of government. Having deferred access to a proper tribunal at a later date does not satisfy the defective due process of the original administrative hearing. *See Ward v. Monroeville*, 409 U.S. 57, 61 (1972) (holding that the "State's trial court procedure [could not] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication."). The administrative hearing process invoked by the City is no "process" at all. It is less protective of citizens than that minimally required by Iowa law. In fact, the "due" process—access to the district court—is used as a threat to dissuade Vehicle Owners from invoking the appeal of the administrative hearing in the "Order" issued by the hearing officer: "An $85.00 filing fee and other court costs plus the fine amount [$65.00] will become a judgment against you if the Court finds you liable . . ." (App. 362, 368, 376, 384, 391). It is difficult to imagine someone who would choose to be sued and potentially pay $85.00 on

top of a $65.00 fine. This is really "no choice at all." *See Williams v. Redflex 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 above the cost of the ticket received was "no choice at all.").

As it did below, the City again relies on a different Sixth Circuit case to support its argument that it is operating in a manner consistent with due process in forcing individuals to attend an administrative process. City's Brief, p. 27-28 (discussing *Silvernail v. County of Kent*, 385 F.3d 601 (2004)). This case involved a county infraction assessed to individuals who executed bad checks. *Silvernail*, 385 F.3d at 603. First, Plaintiffs argue that the Iowa Constitution provides different and more protections than that provided by the U.S. Constitution. *See Hensler*, 790 N.W.2d at 579 n.1 (noting that the Iowa Supreme Court "jealously guard[s] it as [their] right and duty to differ from the Supreme Court, in appropriate cases, when construing analogous provisions in the Iowa Constitution."). Moreover, the *Silvernail* case is readily distinguishable in at least three material respects. First, the proof needed to demonstrate a violation in that case was the actual bad check, which cannot be disputed. *See Silvernail*, 385 F.3d at 605. This is not the same as a speed camera with known inaccuracies[11] and exceptions to liability existing for Gatso's employees to determine,

[11] It is undisputed that the radar equipment is not calibrated according to the IDOT's requirements. Iowa Admin. Code § 761.144(4). See also App. 160.

including an "egregious processing error." (App. 486). Second, unlike this case, the recipients in *Silvernail* did not actually engage in the process provided by the county (namely, calling the number provided). *Id.* at 604. They therefore did not invoke the process provided to be able to argue that it was deficient. The district court here, however, limited this class action to those Vehicle Owners who actually invoked the administrative hearing. (App. 520). Third, if the individuals in the *Silvernail* case did not pay the fee, they would be criminally prosecuted, and entitled to a trial. *Id.* at 605. Plaintiffs have no such guarantee of later adequate process if they fail to pay or contest the citation in this case. Despite the City's Ordinance's language indicating that the City will file a lawsuit against Plaintiffs if they fail to pay, this is not what the City, in fact, does. Mun. Code § 114-243(d)(3) (App. 356). The district court was clearly troubled by this additional lack of due process. App. 512 ("More importantly, if an individual does not pay the fine after the administrative hearing, the City *does not* file a civil infraction, despite the Municipal Code's clear statement . . .") (emphasis in original). Instead, the City uses other equally troublesome processes to collect the money without obtaining any preceding judgment, such as its use of the Setoff Program, described in note 12, above. In sum, this case does not provide any support for the proposition that an administrative hearing process without any basis in the Ordinance and in violation of Iowa Code section 364.22(6) is due process. The City's argument that citizens are choosing

to forego the district court process because of "cost and consequence" and choose the "informal resolution" (City's Brief, p. 28) ignores that there is no choice, and that the City does not follow any process if the administrative hearing is not invoked. The City just wrongfully goes after the contested liability amount in other ways.

3. There is No Government Interest in the Issuance of these Fines

The final prong to consider under procedural due process is 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. The City does not actually claim any government interest in these cameras, although it references a burdened court system, which of course it cannot claim to support its invalid implementation of the Ordinance. City's Brief, pp. 29-30. And even if the City tried to claim an interest in safety, the radar cameras at issue on I-235 do not promote it. As described above, the IDOT, the state executive agency with jurisdiction over Iowa's primary and interstate highways, has unequivocally determined that there is no safety interest in locating the radar equipment on I-235. (App. 35, 42). The Iowa District Court, in a separate case, has upheld the IDOT's authority to make this determination, and while the City has appealed that decision, at it now stands (and since March of 2015), the State agency with authority to decide has held that there is no safety interest in locating the radar

cameras on I-235 that had produced all evidence used by the City to prosecute its violations against Plaintiffs.

The City also turns the government interest upside down by paternalistically claiming that it is assisting Vehicle Owners by their avoiding being "further prosecuted or assessed any costs or other expenses for such violation." City's Brief, p. 29 (citing Mun. Code section 1-15(e)). It is clear, however, that the City is doing this for itself, just as Gatso is assisting for its own self-interest. These NOVs would not be the profit-making machine that they are if the City had to obtain a district court judgment to impose a fine–as is required under Iowa law for municipal infractions and by the express language of its Ordinance—for each contested NOV. The administrative hearing is a "no-cost, no-risk method" (City's Brief, p. 29) *for the City*, but not for Vehicle Owners. Vehicle Owners' constitutional rights are being violated. This is a significant cost. And there is a high risk to Vehicle Owners: they do not receive the same protections, such as the same burden of evidentiary proof, to be found liable in an administrative hearing. The City's claim that it is concerned with the workload on "already burdened state courts" (City's Brief, p. 30), must fall on deaf ears. The City is concerned with its own workload and its own pocketbook.

The cost of using the statutory process provided (direct access to district court) is a measure of the importance given by the Iowa General Assembly to

the protection of due process rights when citizens are charged with municipal infraction violations. Following minimum due process standards cannot be said to be unduly burdensome to the City's quest to raise revenues. The *Mathews* factors clearly balance in Plaintiffs' favor. The City is violating their procedural due process rights. The district court's Order holding the same should be affirmed.

II. THE DISTRICT COURT PROPERLY FOUND THAT THE CITY WAS UNJUSTLY ENRICHED BY ITS ATE ORDINANCE, BUT IMPROPERLY FOUND THAT GATSO WAS NOT

A. Standard of Review and Error Preservation

The district court rightly held that the City was unjustly enriched at the expense of Plaintiffs. (App. 520). As an equitable determination, this is subject to *de novo* review. *Iowa Waste Sys. v. Buchanan Cty.*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000) (citing Iowa R. App. P. 4 (now 6.907)). Plaintiffs also alleged that Gatso was unjustly enriched by its participation in the ATE scheme, preserving this error for review. (Plaintiffs' Resistance to Gatso's MSJ, pp. 50-52).

B. The City and Gatso Were Unjustly Enriched by the Invalid Enforcement of this Ordinance

The district court held that those Vehicle Owners who invoked the administrative hearing process, were adjudicated liable, and then paid the penalty, should be reimbursed by the City. (App. 520 (citing Plaintiffs' Brief, pp. 33-34)). For those who were adjudicated liable but did not pay, the district

court enjoined the City from any collection efforts (and to release any funds being held either by the Tax Setoff program or other collection agencies). (App. 520-521).

The City has been unjustly enriched by "receiv[ing] a benefit that in equity belongs to the plaintiff." *Slade v. M.L.E. Inv. Co.*, 566 N.W.2d 503, 506 (Iowa 1997). The elements of unjust enrichment 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) (citation omitted). Below, Plaintiffs initially proceeded on behalf of a class of persons who have received citations since the IDOT's March 17, 2015 Evaluation to move and/or remove the cameras from I-235, and for those who have been alleged to have been speeding 11 mph over the speed limit. (Petition, ¶86). Plaintiffs later expanded their proposed classes. (App. 350). The district court narrowed the class to those who had actually invoked the unlawful administrative hearing process, only, and errantly refused to include those who had paid penalties without contesting citations.

As the City has undeniably been unjustly enriched by the Ordinance, so, too, has its for-profit partner. The district court dismissed this claim against Gatso given that no Plaintiff at the time of the Ruling had paid the citation. (App. 285). Plaintiff Dagel was subsequently made a party to this litigation and

he has paid the citation amount. Moreover, a large number of class members have also paid, thereby enriching both the City and Gatso.

The City anticipated taking in about $2.9 million in ATE fines in 2015 alone (after the March 2015 IDOT order to remove the tickets). Lee Rood, DES MOINES REGISTER, *Reader's Watchdog: Traffic Cameras Net $19.7 million*, March 10, 2014, *available at* http://www.desmoinesregister.com/story/news/investigations/readers-watchdog/2014/03/10/readers-watchdog-traffic-cameras-net-197-million/6247189/. As noted above, for every citation paid, Gatso now receives $24.00.

This enrichment was, and is, at the expense of Plaintiffs and those whom Plaintiffs represent, who have been cited with violations by a City using radar camera equipment unlawfully placed on I-235. The district court properly held that it would be unjust to allow the City to retain funds owed or paid based on an unlawful administrative hearing, but Plaintiffs seek further relief: that it would be unjust to allow Gatso to retain the benefit of the unlawful system. The district court's order finding that the City has been unjustly enriched has been affirmed, but the finding that Gatso has not been enriched, should be reversed.

III. DISTRICT COURT LIMITED THE CLASS DEFINITION IN ERROR

A. Standard of Review and Preservation of Error

"A district court's decision on class certification is reviewed for abuse of discretion." *Comes v. Microsoft Corp.*, 696 N.W.2d 318, 320 (Iowa 2005) (citation omitted). Plaintiffs agree that class certification was appropriate, but preserved error by arguing below that the class should be broader than that certified (first based on claims that were dismissed, and later based on the procedural due process claims remaining). (App. 349-350); Plaintiffs' Brief in Support of Class Certification, pp. 17-18.

B. The Class Should Include All Vehicle Owners who Were Subject to City's Unlawful Ordinance

The district court certified, modifying the definition as requested by the City, the following class:

> 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 and then did not pursue a district court action.

(App. 394).

Plaintiffs assert, as described more fully below, the City's implementation of its Ordinance was preempted by Iowa law, as well as in violation of their constitutional rights, and therefore void *ab initio*. Therefore, all Vehicle Owners should be included in the class who had their constitutional

rights violated and should be protected from collection efforts or have their paid fines reimbursed. Plaintiffs assert that it was unnecessary even for those who suffered a procedural due process violation to have invoked the administrative hearing process: the fact that it was the only "process" any Vehicle Owner who contested the NOV learned about, or readily understood, contrary to the terms of the Ordinance itself and Iowa law, renders the harm complete upon receiving the unlawful NOV. Going through the unlawful process was not necessary to be harmed by it.

Similarly, if the class is to include all Vehicle Owners who received citations from the ATE scheme and proceeded through the administrative hearing process, its membership should not be limited to only those who received citations from the City's I-235 Eastbound fixed radar camera location, alone. Plaintiffs anticipated this in their Amended Petition. (App. 350). The class should include all Vehicle Owners from any ATE camera/radar placed in the City who contested the citation and were forced to attend the administrative hearing process. They have the same common facts and legal questions applicable to their case as the class certified in this instance. (Plaintiffs' Brief in Support of Motion for Class Certification, pp. 17-18).

Finally, the fact that the IDOT determined that the cameras on I-235 Eastbound have no legitimate government purpose and must be removed demonstrates that an appropriate class would include all those Vehicle Owners

who received citations from I-235—not just those who contested those citations in administrative hearings. An additional class could therefore include any and all I-235 Eastbound-based NOV recipients for alleged violation occurring from December 2011 to December 2015. Given the City's required unlawful administrative process, whether invoked or not (as well as other deficiencies of the Ordinance described below), all recipients who paid ATE fines should have their funds released, and all collection efforts should be enjoined. Alternatively, if the invoking of the administrative process is key to obtain a remedy, then anyone who invoked it (whether from I-235 or not), should be included in the class. The district court's February 2017 Order should be amended, accordingly.

IV. THE DISTRICT COURT ERRED IN HOLDING THE ORDINANCE WAS NOT PREEMPTED BY IOWA CODE SECTIONS 364.22 AND 602.6101 AND THE IDOT'S 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). Plaintiffs raised this argument in their briefing below. (Plaintiffs' Resistance Brief to City's Motion to Dismiss, pp. 11-19). These issues, along with the other similar constitutional issues raised below, are also currently before the Iowa Supreme Court in *Behm v. City of Cedar Rapids,* No. 16-1031, *on further review*

from 898 N.W.2d 204 (Iowa Ct. App. 2017) and No. 16-0435, *on further review from City of Cedar Rapids v. Leaf*, 898 N.W.2d 204 (Iowa Ct. App. 2017).

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

In granting the City's motion to dismiss on this issue, the district court held that the Ordinance is not preempted as it is consistent with Iowa Code section 364.22, requiring direct access to the courts, and the administrative process was not expressly or impliedly precluded by chapter 364. (App. 280 (citing, *inter alia, Seymour*, 755 N.W.2d at 550-45)). As described above, the district court analyzed the issue as one of procedural due process, and not preemption. (App. 281).

Plaintiffs assert that this constituted error. 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). Implied preemption "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). To prove this form of implied preemption, the "local law must be 'irreconcilable' with state law." *Id.* at 539.

Here, the City should receive no home rule deference because it did not enact legislation inconsistent with State law, but rather, implemented a process

with Gatso that was irreconcilable with state law: requiring an administrative hearing for municipal infractions. One cannot simultaneously have an administrative hearing to determine a Vehicle Owner's liability, but then confer exclusive original jurisdiction (Iowa Code section 602.6101) on the Iowa District Court (and specifically to a magistrate, district associate judge, or district judge) to determine that same liability. The Iowa General Assembly has made it clear that "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)(a). That directive is irreconcilable with the City's and Gatso's requirement that the matter be tried before a hearing officer. These are direct conflicts. They would be preempted even if the City had used its home rule authority by enacting the provision for the administrative hearing in the Ordinance itself. *See 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). The City is granting less protection to Vehicle Owners than those that are provided by state law (rights to impartial court, notice by certified mail from an officer[12]), which is clearly prohibited by Iowa law. *Id.* (citing Iowa Code 364.3(3)).

[12] The implementation of the Ordinance is also preempted by Iowa Code section 364.22(4), which requires that an officer issue a "civil citation" to those

These Plaintiffs' citations from I-235 Eastbound after March 17, 2015, are also irreconcilable with the IDOT Order to remove such ATE equipment, and are preempted by that agency action. *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 administrator of the Iowa Alcoholic Beverages Division's ability to "establish a uniform transfer fee"). The Iowa Supreme Court held in *Iowa Grocery* that the City had usurped the power granted to the agency by the General Assembly. *Id.* Similarly, the IDOT has determined that the cameras and radar units at I-235 Eastbound should be removed because of the low crash rate that had existed at that highway, the un-improved safety record after the Ordinance had been implemented, and due to the IAC provision requiring a very limited use of fixed ATE equipment on interstate highways. (App. 35). The City and Gatso's use of the cameras on I-235 and the assessment and acceptance of fines issued therefrom (until April of 2017) is patently inconsistent and irreconcilable with this agency decision. It is preempted, and must be enjoined.

In sum, the entire process used by the City and Gatso to implement the Ordinance is irreconcilable with Iowa law. *See Iowa City v. Westinghouse Learning*

---

who commit municipal infractions, and for it to be served personally, by certified mail, or by publication. Iowa Code § 364.22(4). In this instance, however, it is Gatso that issues the NOV, via regular mail.

Corp., 264 N.W.2d 771, 773 (Iowa 1978) (quoting the definition of irreconcilable as "impossible to make consistent or harmonious"). Iowa Code section 364.22(4) and (6) set forth a process to be followed with municipal infractions by a city, and the City and Gatso have not followed it.

V. 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.*, 843 N.W.2d at 451. Plaintiffs pled this claim and argued it in their Brief, below. Plaintiffs' Resistance Brief, pp. 36-39.

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

The district court erred in holding that Plaintiffs did not set forth a claim upon relief could be granted regarding the unlawful delegation of power. Ruling, p. 27. The district court relied on several Iowa cases that had held similarly at the time, two of which were the district court cases of *Behm v. City of Cedar Rapids,* No. CVCV083575, at 11 (Linn Cty. Dist. Ct. June 5, 2016), *aff'd* by *Behm*, 898 N.W.2d 204, and *Cedar Rapids v. Leaf*, No. CRCISC214393, *aff'd by Leaf*, 898 N.W.2d 204. As this Court is aware, both of these cases are currently pending further review based in part on a claim regarding unlawful delegation of police power.

A "fundamental principle of government" subsists 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). Delegating the right to perform acts involving "discretionary power conferred by law" is forbidden. *Id.*

The City has wrongfully delegated police powers to Gatso in no less than four fundamental ways. First, by allowing Gatso to make the initial, *discretionary* decisions as to which Vehicle Owners should be considered by the City to receive potential citations. Second, by allowing Gatso, alone, to calibrate the radar equipment used to capture citations, and, then, only annually, is in direct contravention of Iowa Admin. Code § 761-144(4). These are substantive, and not merely administrative, tasks. *See Bunger v. Iowa High Sch. Athletic Assoc.*, 197 N.W.2d 555, 560 (Iowa 1972) (noting that merely ministerial functions may be delegated but "powers and functions which are discretionary or quasi-judicial in character" cannot be delegated). These initial screenings are fundamental "prosecute" versus "don't prosecute" decisions that should be made by police officers only.

Third, by authorizing Gatso to apply the City's "business rules," in direct contravention of Iowa's traffic laws, providing that only those who travel 11 mph or more over the speed limit should be issued tickets. (App. 206). After an additional, cursory review of approximately 60% of images by a police officer, Gatso then mails the NOV to Vehicle Owners under City letterhead. A quintessential "police" power is the ability to police one's roads and determine who is issued (and then issuing) tickets.

Fourth, the work of the Hearing Officer is clearly "quasi-judicial," (as proscribed from delegation in *Bunger*, 197 N.W.2d at 560): by issuing Orders ("IT IS ORDERED[,]" purporting to assign liability on behalf of the City after a hearing. The City, despite no authority to do this itself, has delegated it to a citizen with no legal training (at that time) or jurisdiction over such issues. Judicial decisions clearly involve the exercise of judgment.

These are discretionary determinations, police and judicial acts. They are beyond even making rules; they are 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"). Gatso, on behalf of the City, provides the cameras, the equipment, places the signs, calculates vehicular speeds, calibrates its

equipment, answers the phone, provides legal advice, reviews the violations first, sends the electronic packages to the Police Department, mails the NOV to Vehicle Owners, provides the "trial" evidentiary packages for use by Police and Hearing Officers, provides the Orders establishing liability and initiates collection efforts. (App. 51-54). It is clear which entity is in control of this system. This is not just "Gatso's participation" in the process: Gatso *is* the process. *Cf.* App. 283. The City has unlawfully granted those powers to a private entity that has a contingent interest in every single citation. The district court's decision to the contrary should now be reversed.

VI. 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. 21-34. The district court ruled against Plaintiffs on each of these issues. (App. 271-278).

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.*

Plaintiffs assert that the Ordinance's implementation, which does not capture semi-trucks and thousands of government vehicles, violates equal protection. The district court, in dismissing this claim, held that "the City 'could rationally conclude a system that only photographs rear license plates is less expensive and that it is more cost-effective to capture fewer people who violate the Ordinance with a less expensive system." *Id.* at 21 and n. 91 (citing *Behm*, which quoted *Hughes*, 112 F. Supp. 3d at 842). It is important to note who bears the cost (and therefore any increased cost) of this system, however. It is not the City, but its for-profit partner, Gatso. Gatso agrees to provide all the equipment used in the ATE scheme. (App. 51). Therefore, there is no increased cost to the City. Moreover, in relying on federal case law (that was later reversed with respect to state constitutional claims, as described above), the district court ignored the strength of Iowa's rational basis test.

There is no relation between the purpose of safety and exempting certain vehicles. 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 whose license plates are not in the NLETS database. There is no rational reason to do so related to any purpose of the Ordinance. Presumably, the purpose of the Ordinance is safety,[13] although it has the hallmarks of a revenue-making scheme, described above. With respect to any legitimate *safety* purpose, 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 interstates than cars. All Vehicle Owners are therefore similarly situated for safety purposes. The safety difference between such vehicles is "so attenuated as to render the distinction arbitrary or irrational." *Racing Ass'n,* 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. *Id.* at 15. Exempting certain vehicles from prosecution on the basis of license plate

[13] The City, below, argued that there were several purposes, including public health and safety in enforcing speeding laws, as well as the "state interest in providing a cost effective means to control speed." City's Brief in Support of Motion to Dismiss, p. 10. As noted, the City does not have any cost associated with this system, and only benefits. Therefore, the "claimed state interest" is not "realistically conceivable," or have any "basis in fact." *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7-8 (Iowa 2004) (citations omitted). Additionally, 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 safety, in light of the IDOT's determination, is not "credible," or "plausible." *Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 559-61 (Iowa 2013).

configuration is underinclusive and irrational.

Next, the level of scrutiny must be considered. While these classes of motor vehicles are not suspect (assuming the legitimate purpose of safety), given the fundamental right at issue (the right to travel, described more fully below), 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 classifications are not narrowly tailored to any legitimate interest of safety.

Even if the fundamental right to travel were not at stake, however, the City's Ordinance could still not pass a rational basis test where the IDOT, with authority over I-235 (Iowa Code § 306.4), has determined that there is no legitimate state interest achieved from the I-235 cameras. (App. 32-36). "[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. The circumstances, as reviewed by the IDOT, demonstrate that there is no rational relationship between safety and fixed speed cameras on I-235 used by the City. The district court's decision on equal protection should therefore be reversed.

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 citation fee. *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 district court erred in relying on *Hughes*, 112 F. Supp. 3d at 839, in holding that the "City's ATE system does not directly impair plaintiffs' fundamental right of travel whether it is interstate or intrastate[.]" (App. 272). Moreover, the district court erred in holding that the City's system on I-235 could survive even the rational basis test despite holding that "the placement of the camera at its present location may not lower accidents and may not lower the incidents of speeding[.]" (App. 274).

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 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-235 violates their fundamental rights to interstate and *intrastate* travel. Plaintiff Weizberg did not feel as if he were treated as a welcome visitor, being unaware of the cameras and not learning of them until a month later, when it was too late to affect any behavior. (App. 293). Plaintiff Veng-Pedersen now avoids traveling on the interstate because of the speed trap. (App. 473).

While the Iowa Supreme Court has not yet recognized the *intrastate* right to travel as one 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)). The right to travel intrastate should be recognized as a fundamental right.

When a fundamental right is involved, an infringement upon that right must be "narrowly tailored to serve a compelling state interest." *State v. Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000). The City can make no such claim. The Ordinance as implemented by the City 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. Alternatively, as noted above, even if a fundamental right were not involved and rational basis applied, the placement of the cameras on I-235 could not survive it.

The City's continued violation of state law (and its own Ordinance) is a violation of Plaintiffs' substantive due process rights. The district court's decision 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 district court erred in dismissing Plaintiffs' privileges and immunities claim. (App. 278). 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.* For the same reasons that the Ordinance violates equal protection described above, 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 the speed trap.

Plaintiffs further 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). While not yet expressly recognized by Iowa Supreme Court precedent, from the state's earliest days, Iowans and those traveling through Iowa have implicitly enjoyed a 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, 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.

Given the fundamental right to intrastate travel, the Ordinance would fail to meet strict scrutiny (and, here, even rational basis). If safety is the goal, excluding government vehicles, semi-truck trailers, and drivers as opposed to Vehicle Owners is underinclusive and wholly irrational. The City could not present empirical evidence to the IDOT to demonstrate that these cameras actually improve safety. The IDOT therefore ordered their removal. The district court's decision to the contrary should be reversed.

VII. 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 violations of the Iowa Constitution creates a private cause of action. Plaintiffs' Resistance Brief, pp. 34-36.

B. The Iowa Constitution Provides Protection for Violations of its Provisions

The district court granted the City's motion to dismiss Plaintiffs' claim for damages pursuant to the private cause of action for violations of the Iowa Constitution. (App. 283-284) (relying on *Conklin v. State*, 863 N.W.2d 301 (Iowa Ct. App. 2015)). Since the district court's ruling (July of 2016), however, the Iowa Supreme Court has held that Articles I, sections 6 and 9 are self-executing and provide a private cause of action for money damages. *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017). The district court's contrary decision should therefore be reversed.

CONCLUSION

Plaintiffs respectfully request that the district court's determination on procedural due process and unjust enrichment be affirmed. For one or more of the foregoing reasons, Plaintiffs further respectfully request that the district court's decision regarding all issues decided adversely to Plaintiffs—equal protection, substantive due process, class definition, privileges and immunities,

unlawful delegation of police power, and private cause of action pursuant to the Iowa Constitution—be reversed.

Dated this 9th day of March, 2018.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument.

CERTIFICATE OF COST

Plaintiffs-Appellees/Cross-Appellants will not submit a Certificate of Cost given the electronic filing of the final Briefs and Appendix.

Respectfully submitted,

LAREW LAW OFFICE

/s/ James C. Larew

James C. Larew AT0004543
504 East Bloomington Street
Iowa City, IA 52245
Telephone: 319-541-4240
Facsimile: 319-337-7082
Email: james.larew@larewlawoffice.com
ATTORNEY FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF FILING/SERVICE

I hereby certify that on March 9, 2018, I electronically filed the foregoing Proof Brief of Appellees-Cross-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.

Michelle R. Mackel-Wiederanders
400 Robert D. Ray Drive
Des Moines, IA 50309
Telephone: (515) 283-4121
Facsimile: (515) 237-1665
E-Mail: dpphiliph@dmgov.org
E-Mail: tgfisher@dmgov.org
ATTORNEY FOR
APPELLANT/CROSS-APPELLEE
DES MOINES, IOWA

Paul D. Burns
Laura M. Hyer
BRADLEY & RILEY PC
Tower Place
One South Gilbert Street
Iowa City, IA 52240
Telephone: (319) 358-5561
Facsimile: (319) 358-5560
E-Mail: pburns@bradleyriley.com
ATTORNEY FOR APPELLEE
GATSO USA, INC.

/s/ Andrew Kramer
Andrew Kramer

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 13,885 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 9th day of March, 2018.

Respectfully submitted,

LAREW LAW OFFICE

/s/ James C. Larew

James C. Larew AT0004543
504 East Bloomington Street
Iowa City, IA 52245
Telephone: 319-541-4240
Facsimile: 319-337-7082
Email: james.larew@larewlawoffice.com
ATTORNEY FOR PLAINTIFFS-APPELLANTS