IN THE SUPREME COURT OF IOWA

No. 21-1015

JAMES A. STOGDILL, MATHEW D. JOHNSON and KIRK E. YENTES,
Plaintiffs,
CHRISTOPHER DETERMAN and ALESHA SMITH,
Plaintiffs-Appellants,

v.

CITY OF WINDSOR HEIGHTS, IOWA, and MUNICIPAL COLLECTIONS OF AMERICA, INC.
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
NO. CVCV059435
HON. HEATHER LAUBER (MOTION TO DISMISS, FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT), HON. CELESTE GOGERTY (SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT), JUDGES

FINAL BRIEF OF PLAINTIFFS-APPELLANTS

JAMES C. LAREW
DEBORAH SVEC-CARSTENS
CLAIRE M. DIALLO
Larew Law Office
504 E. Bloomington Street
Iowa City, Iowa 52245
Ph: (319) 337-7079
Fax: (319) 337-7082
Email: James.Larew@LarewLawOffice.com
Email: Deborah.Svec-Carstens@LarewLawOffice.com
Email: Claire.Diallo@LarewLawOffice.com
ATTORNEYS FOR PLAINTIFFS-APPELLANTS

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ROUTING STATEMENT

This case presents a fundamental issue of broad public importance and first impression in the State of Iowa: whether a municipality, on the one hand, can ignore the one-year statute of limitations applicable to its prosecution of municipal infractions against vehicle owners arising from automated traffic enforcement ("ATE") citations, but also, on the other hand, be protected by a two-year statute of limitations for claims made by vehicle owners against the same municipality. The claims made by vehicle owners arise from the municipality's attempt to forfeit the vehicle owners' state income tax refunds to collect fines for their respective ATE citations when no district court order established liability for them. Thus, retention and ultimate determination by the Iowa Supreme Court is appropriate. Iowa R. App. P. 6.1101(2)(c), (d). An important question of standing and when the injury occurs when a portion or all of someone's state income tax refund is taken by the municipality is also presented, which is of broad public importance. Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the various collection efforts undertaken by Defendants City of Windsor Heights ("City") and Municipal Collections of America, Inc. ("Municipal Collections" or "MCOA") to obtain payments from

vehicle owners who were issued citations via the City's ATE system. (Petition). The ATE system makes video and/or photographic images of vehicles that allegedly fail to obey red light traffic signals at designated intersections or that allegedly fail to obey speed regulations at designated locations in the City. Windsor Heights Code of Ordinances § 60.02.08. The collection efforts undertaken by Defendants include, but are not limited to: (1) direct mail to, and telephone communication with, vehicle owners, through which Defendants inform vehicle owners they are "liable" for payment of specified amounts, even though no municipal infraction proceeding pursuant to Iowa Code section 364.22 has been initiated and no Iowa District Court judgments against said vehicle owners have been entered; and (2) the unlawful seizures of alleged amounts due and owing to the City through the State of Iowa's Income Tax Offset Program (formerly Iowa Code section 8A.504), even though such amounts have never been adjudicated by the Iowa District Court as debts due and owing by vehicle owners to the City pursuant to the municipal infraction litigation processes outlined in Iowa Code section 364.22. (Appendix pages ("App.") 11-15).

Plaintiffs each received a Notice of Violation of the City's ATE Ordinance and subsequently were subject to various collection actions by the City and/or its agent, Municipal Collections. (App. 7-8). The alleged violations were never reduced to judgment through the municipal infraction process of

Iowa Code section 364.22. (App. 7-8). Certain Plaintiffs later received a Notice of Offset, informing them that their Iowa state income tax refunds were being held because they allegedly owed money to the City due to alleged ATE violations. (App. 150).

B. Course of the Proceedings

On December 19, 2019, Plaintiffs James A. Stogdill, Christopher Determan, Mathew D. Johnson, Alesha Smith, and Kirk E. Yentes filed a Petition at Law for Declaratory Judgment, Injunctive Relief, Damages and Class Action ("Petition") in order to secure a judgment that certain actions by the City and/or its agent, Municipal Collections, were unlawful, and that Plaintiffs and similarly-situated subclasses have suffered potential and real injuries through said actions. (App. 7-25). Plaintiffs' claims focused on efforts undertaken by Defendants to collect payments from vehicle owners in respective amounts described as fines or penalties in citations issued by the City under its ATE Ordinance. (*Id.*). Specifically, Plaintiffs alleged that: (I) the Defendants' efforts to collect the fines or penalties allegedly owed for violations of the City's ATE Ordinance resulting from alleged occurrences that had happened more than one year earlier violates the limitations period of Iowa Code section 614.1(1); (II) the City's ATE Ordinance is, *de facto,* a revenue-generating personal property tax imposed in a manner that is inconsistent with the City's police powers and not authorized by state law pursuant to Iowa Code

section 364.3(4); (III) the Defendants' collection of amounts allegedly owed by vehicle owners under the ATE Ordinance without first establishing liability by filing a municipal infraction lawsuit pursuant to Iowa Code section 364.22 and, second, obtaining judgments from the Iowa District Court for fines against vehicle owners, are preempted by section 364.22 and, therefore, are unlawful; (IV) Defendants have been unjustly enriched at Plaintiffs' expense by obtaining funds through unlawful means; (V) Defendants unlawfully exerted control over vehicle owners' state income tax refunds to which vehicle owners had a possessory right; (VII)[1] Defendants acted together to conspire to threaten vehicle owners with the unlawful collection of fees; and (VIII) as applied to Plaintiffs, the City's failure to provide Plaintiffs who received a Notice of Offset an opportunity to be heard in a proceeding that was substantially equivalent to that provided in Iowa Code chapter 17A violated Plaintiffs' due process rights under Article I, Section 9 of the Iowa Constitution. (App. 16-25). Plaintiffs also sought class treatment of their lawsuit in accordance with Iowa Rules of Civil Procedure 1.262 and 1.263. (App. 22-25).

The City and, later, Municipal Collections, filed Pre-Answer Motions to Dismiss, arguing that the two-year limitations period applicable to actions against municipalities found in Iowa Code section 670.5 applied, barring the

[1] Plaintiffs voluntarily dismissed claim VI, violation of state credit protection laws. (App. 72). Accordingly, that claim is not at issue on appeal.

claims of Plaintiffs Stogdill, Johnson, and Yentes. (App. 26-35; 56-64). Plaintiffs resisted the Motions.[2] The District Court issued its ruling on the partial Pre-Answer Motions to Dismiss on March 8, 2020, granting the motions to dismiss as to Plaintiffs Stogdill, Johnson, and Yentes, in their entirety. (App. 71-76).

On March 27, 2020, the City filed a Motion for Partial Summary Judgment, arguing that the limitations period of Iowa Code section 670.5 also barred Plaintiff Smith's claims. (App. 77). Municipal Collections joined the City's motion. (App. 115-116). Plaintiffs resisted the motions. (App. 122-162).

On February 8, 2021, the District Court filed its Ruling on the Motions for Partial Summary Judgment, granting the motions and dismissing all of Plaintiff Smith's claims except her Due Process claim. (App. 195-201). Following Motions to Reconsider, Enlarge or Amend filed by both parties, the District Court granted the Defendants' motion, clarifying that the claims remaining were all those of Plaintiff Determan and the due process claim of Plaintiff Smith. (App. 214-216). The court denied Plaintiffs' motion. (*Id.*).

Subsequently, Defendants filed separate Motions for Summary Judgment on all remaining claims, which Plaintiffs resisted. (App. 217-237; 238-315; 325-

[2] Plaintiffs did not resist the dismissal of Plaintiff Yentes' claims or the dismissal of Claim VI (State Credit Protection Laws) as to all Plaintiffs. (App. 39-50; 65-69). Thus, these claims are not subject of this appeal.

397; 398-446). A hearing on both motions was held on April 29, 2021. On June 23, 2021, the District Court filed its Ruling, granting both motions for Summary Judgment and dismissing the Petition. (App. 454-497).

On July 22, 2021, Plaintiffs filed a timely Notice of Appeal. (App. 498-500). This appeal follows.

STATEMENT OF FACTS

Plaintiffs, in their Petition, requested relief including, but not limited to, injunctive relief, declaratory judgment, and damages. (App. 7-25). Among their requests, Plaintiffs asked the Court to enter an order "directing the Defendants to cease and desist the use of legal process to advance claims for the payment of fees, fines, and penalties for occurrences that happened more than one year prior to the initiation of said process." (App. 16). In effect, Plaintiffs requested injunctive relief to assure that the City no longer initiated enforcement actions that violated the one-year statute of limitations period set forth in Iowa Code section 614.1(1) (actions to enforce "the payment of a penalty or forfeiture under an ordinance" must be initiated within one year "after their causes accrue"). (App. 7-25).

The Ordinance. The City enacted a new Automated Traffic Enforcement Ordinance ("ATE Ordinance") as a part of its Municipal

Ordinances in approximately 2012. (App. 141-145). Until November 2018, the ATE Ordinance provided, in pertinent part, as follows:

> 6. Failure to Pay or Appeal in a Timely Manner. If the recipient of an automated traffic citation either does not pay the civil penalty when due or does not contest the automated traffic citation as provided herein, the City may:
>
> > A. Attempt to collect the payment via a second and final notification with a service fee added to the civil fine. If the end of an additional thirty (30) day period given for the second notification is reached and the vehicle owner does not pay the fine or request a trial pursuant to paragraph 4(B) of this section, the vehicle owner shall be deemed guilty of the violation and be held liable for the fine amount plus any additional service fees.
> >
> > B. The City may then refer the vehicle owner to a private service agent for collection of the civil penalties imposed under the provisions of this section, together with any interest and service fees thereon, by either the private agency on behalf of the City or by civil suit; and/or
> >
> > C. Refer the vehicle owner to the State's income offset billing program for payment; or
> >
> > D. File a municipal infraction, and a corresponding fine sought, pursuant to Chapter 4 of this Code of Ordinances. If the Court finds the vehicle owner guilty of the municipal infraction, State mandated court costs will be added to the amount of the fine imposed.

Windsor Heights Code of Ordinances § 60.02.08(6) (Subchapter 60.02 – Ord. 16-02, Feb. 16 Supp.) (App. 141-148). In November 2018, the City Council of Windsor Heights amended the ATE Ordinance, reportedly in order to comply with Iowa Supreme Court opinions issued on August 31, 2018. Windsor

Heights Ord. No. 18-16. (App. 15). The City's amended ATE Ordinance provided, in pertinent part, as follows:

> 6. Failure to Pay or Appeal in a Timely Manner. If the recipient of an automated traffic citation either does not pay the civil penalty when due or does not contest the automated traffic citation as provided herein, the City may file a civil municipal infraction citation, which shall be served and filed with the courts in the manner prescribed by the applicable provision(s) of this Code. Such municipal infraction citation may seek a penalty and/or additional relief to the extent permitted by law. If at trial the Court finds the vehicle owner guilty of the municipal infraction, State-mandated court costs will be added to the amount of the fine imposed by the applicable provision(s) of this Code.

Windsor Heights Code of Ordinances 60.02.08(6) (App. 146). The amendment removes all alternative options of enforcement and only describes filing a civil municipal infraction lawsuit as the viable method of collection if the penalty is not paid or contested.

Automated Traffic Enforcement Citations. Each Plaintiff received a mailed Notice of Violation (citation) document issued by the City, which document included reference to the City's possible future use of the state Income Tax Offset Program to collect the fine and penalty described in the citation, as follows:

> Failure to pay the penalty or contest liability by the due date is an affirmation of responsibility to pay the listed fine amount and will result in this penalty being forwarded to collections and or submitted to the Iowa Income Tax Offset program. Action **may** also be taken in state district court. Any fees related to these actions are due and owing to be paid by the offender. Failure to appear for court hearings will result in

> judgment being issued against the responsible party and liens registered in Polk County.

(App. 161) (emphasis added). Plaintiffs each received a Notice of Violation prior to the November 2018 amendment to the Ordinance.

State of Iowa Income Offset Program. In 2015, the City of Windsor Heights and the Iowa Department of Administrative Services (DAS) entered into a Memorandum of Understanding (MOU) for Participation in the State's Income Tax Offset Program, formerly Iowa Code section 8A.504. (App. 155-160). The statute allows public agencies, including cities, to utilize the power of state agencies to seize and forfeit funds owed by a "debtor" to a public agency. Iowa Code § 8A.504 (2018). The MOU requires the City to provide an appeal process for debtors to challenge a potential offset after being notified of the offset action, and requires the City to place into the offset program only those debts that have been "confirmed by mutual agreement of the parties or have been reduced to a final judgment or final agency determination that is no longer subject to appeal, certiorari, or judicial review, or has been confirmed through appeal, certiorari, or judicial review." (App. 157).

Upon receipt of data transferred by the City to DAS, that state executive department seizes any and all funds owned by the identified vehicle owners, but held by the Iowa Department of Revenue in the form of State Income Tax refunds. (App. 13). Because no effort is made to calibrate the alleged amounts

of "debt" owed to the City with the amounts of money held by DAS at the City's request, it is frequently the case that thousands of dollars of vehicle owners' personal property (money) are held by DAS to be used as leverage to force vehicle owners to pay the much smaller amounts of alleged debts owed to the City. (App. 13).

The Plaintiffs-Appellants.

Plaintiffs Stogdill, Johnson, and Yentes do not join in this appeal, and their claims are therefore not described.

On May 18, 2018, the City issued to **Plaintiff Christopher Determan** a Notice of Violation, alleging that Mr. Determan had violated the City's ATE ordinance on May 15, 2018, and was being fined $65. (App. 300). The Notice informed Mr. Determan that failure to pay the penalty or contest "liability" by the due date would result in the penalty being forwarded to collections and/or submitted to the Iowa Income Tax Offset program. (*Id.*) Mr. Determan engaged the services of an attorney, who mailed a request for hearing on June 15, 2018. (App. 305). The request was addressed, as required, to the City of Windsor Heights Speed Enforcement Program at a P.O. Box in Tempe, Arizona. (*Id.*) Mr. Determan was subsequently informed that his request, which was due on Sunday, June 17, 2018, was "received too late." (App. 302, 310). When he inquired, Mr. Determan was told that his request was received in Tempe, Arizona on June 25, 2018. (App. 310). A Second Notice of Violation,

issued on June 26, 2018, again informed Mr. Determan that his failure to pay the fine would subject him to formal collection procedures, which might include the Income Tax Offset Program. (App. 303-304). After protest, Mr. Determan eventually obtained an administrative review in August of 2018. (App. 310, 314). Following the review, Mr. Determan received a Notice of Determination of Administrative Review informing him that he had been "found liable," and was therefore required to remit payment by a date certain. (App. 315). The alleged violation was never reduced to judgment through the municipal infraction process of Iowa Code section 364.22. (App. 8-9). Mr. Determan has not paid the fine assessed for the ATE infraction; the fine assessed has not yet been put into collections or offset through the Iowa Income Tax Offset Program. (App. 385-386). An affidavit from Windsor Heights Mayor Dave Burgess, submitted by Defendants on May 17, 2021, disclaimed any intention to proceed against Plaintiff Determan for the ATE violation, stating that the City would not pursue any fines, collections, or actions connected to the ATE violation in the future. (App. 452-453).

In a Notice of Offset, dated February 27, 2018, the City informed **Plaintiff Alesha Smith** that her Iowa state income tax refund of $320.00 was being held because she owed $88.00, plus any additional charges, to the City as a result of an alleged ATE violation. (App. 153). The Notice of Offset informed Ms. Smith if she had "any questions on the amount you owe or why

you owe the money, please contact the City of Windsor Heights's collection agency," identified in the letter as MCOA, at the phone number provided. (*Id.*).

According to the Notice, Ms. Smith's alleged ATE violation was to have occurred on or about March 17, 2017. (App. 153). The alleged violation had never been the subject of a municipal infraction lawsuit, nor had it been reduced to judgment by the Iowa District Court, pursuant to Iowa Code section 364.22. (App. 151). Ms. Smith called MCOA to inquire about the money allegedly owed by her, as she had been directed to do in the Notice of Offset, and was told by MCOA that she was responsible for the alleged debt referenced in the Notice of Offset, regardless of her circumstances. (App. 150). Ms. Smith also responded to the Notice of Offset with a letter to the Iowa Department of Administrative Services, Legal Counsel, dated March 15, 2018, in which she objected to the offset and provided details related to an ATE Citation she had received in March 2017. (App. 154). In the letter, she explained that the person driving her car on the date in question was someone who had been test-driving the vehicle, which she had listed for sale on Craig's List. (*Id.*). Ms. Smith had sold the vehicle on March 20, 2017. (*Id.*). Ms. Smith further explained that she was out of state from April 5 to April 12, 2017, when the ATE Notice of Violation had been delivered to her home. (*Id.*). Upon her return to Iowa and discovery of the ATE Notice of Violation, Ms. Smith submitted an appeal, but was informed that it was untimely. (*Id.*). No contested

case hearing, or its equivalent, was ever held following Ms. Smith's appeal of the Notice of Offset, as required by Iowa law and pursuant to the contract between DAS and the City of Windsor Heights. (App. 154). Nevertheless, the money was taken out of Ms. Smith's Iowa state income tax refund. (*Id.*).

Defendants' Pre-Answer Motions to Dismiss. The City filed a Pre-Answer Motion to Dismiss, asserting that the two-year limitations period of Iowa Code section 670.5 of the Iowa Municipal Tort Claims Act—which, the City argued, had started to run on the date the Notice of Violation (Citation) was issued—barred the claims asserted, respectively, by Plaintiffs Stogdill and Johnson. (App. 26-35). Municipal Collections subsequently filed its Pre-Answer Motion to Dismiss, arguing that Stogdill's and Johnson's claims against it were similarly time-barred by Iowa Code section 670.5. (App. 56-64).

Plaintiffs resisted the motions, arguing the losses giving rise to Plaintiffs' claims occurred upon being wrongfully deprived of their property (money placed in the Offset Program). (App. 47). In other words, an individual suffers a loss when (1) the State, on behalf of the City, wrongfully seizes an individual's state income tax refund through the Offset Program or (2) MCOA threatens action and/or collects money from an individual based on an unpaid ATE citation that was never properly reduced to judgment through the municipal infraction process under Iowa Code section 364.22. (App. 47-48). Otherwise, Plaintiffs argued, "the City would have every incentive to wait two years and

one day to initiate its collection actions, thereby barring vehicle owners from bringing action against the City." (App. 48).

The district court concluded that the collections efforts undertaken by the City and/or Municipal Collections "stem from and begin with the issuance of the automatic traffic enforcement citations." (App. 74). Therefore, the district court concluded, "it is the citation, and with it the first request for payment, that constitutes the date of injury for purposes of Iowa Code § 670.5." (*Id.*) Applying this date of injury to Stogdill's and Johnson's claims—their citations had been issued in March and September 2017, respectively—the district court agreed with Defendants that those Plaintiffs' claims were barred by the two-year statute of limitations and dismissed them.[3]

Defendants' Motions for Partial Summary Judgment – Plaintiff Smith.

The City, later joined by Municipal Collections, filed a Motion for Partial Summary Judgment, seeking dismissal of Plaintiff Smith's claims on the same grounds urged in its Pre-Answer Motion to Dismiss: that Smith's claims were barred by Iowa Code section 670.5 because the Petition was filed more than two years after a March 2017 Notice of Violation had been issued to Smith by the City. (App. 77-85; 115-121).

[3] Plaintiffs-Appellants argue herein that the district court erred in concluding Plaintiff Smith's claims were barred by Iowa Code section 670.5. Plaintiffs-Appellants do not appeal the district court's ruling as to the dismissal of Plaintiffs Stogdill and Johnson.

Plaintiffs resisted, arguing that a separate and distinct injury occurred on the date that the entirety of Plaintiff Smith's $320.00 state income tax refund had been unlawfully seized. (App. 129). The City had failed previously to have filed a municipal infraction lawsuit in district court and to have obtained a judgment, as required under Iowa Code sections 364.22 and 602.6101. (*Id.*) Because there had been no underlying judgment entered, the debt had not been eligible for placement in the Iowa Income Tax Offset Program, Plaintiffs argued. (*Id.*)

The district court reaffirmed its previous decision, concluding that "it is the citation, and with it the first request for payment, that constitutes the date of injury for purposes of Iowa Code § 670.5." (App. 199). Accordingly, the court dismissed all of Smith's claims, except her allegation of a due process violation, which the court found was "a separate claim, and alleges a separate injury." (App. 200).[4] Given the importance of the issue to the case and more generally, Plaintiffs filed an application for interlocutory appeal on March 10, 2021. This Court denied the same on May 3, 2021.

[4] Following the ruling, Plaintiffs and the City filed separate Motions pursuant to Iowa Rule of Civil Procedure 1.904(2) to enlarge, amend, or reconsider; the court denied Plaintiffs' motion and granted the City's, clarifying that the only claims remaining were those of Plaintiff Determan and Plaintiff Smith's due process claim. (App. 202-210; 211-213; 214-216).

Defendants' Motions for Summary Judgment on all remaining claims – Plaintiffs Determan and Smith. Municipal Collections filed a second Motion for Summary Judgment on March 26, 2021, seeking dismissal of the remaining claims against it because (1) Plaintiff Determan's account was never transferred to MCOA and (2) Plaintiff Smith's due process claim did not involve MCOA. (App. 217-237). The City subsequently filed its Motion for Summary Judgment on all remaining claims. (App. 325-397). Plaintiffs resisted both motions. (App. 238-315; 398-446).

Following a hearing on both motions, the district court filed a ruling granting the motions and dismissing the remaining claims against Defendants. (App. 454-497).

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DATE OF INJURY FOR PURPOSES OF IOWA CODE SECTION 670.5 WAS THE DATE THE ATE NOTICE OF VIOLATION WAS ISSUED, RATHER THAN THE DATE PLAINTIFFS WERE DEPRIVED OF THEIR PROPERTY.

A. Standard of Review and Preservation of Error

The lower court's ruling on a motion for summary judgment is reviewed "for correction of errors at law." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007) (citation omitted). Summary judgment is proper when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*,

925 N.W.2d 793, 800 (Iowa 2019). In determining whether summary judgment was appropriate, the court views the record in the light most favorable to the nonmoving party. *Id.*

Plaintiffs raised this claim and argued it in its Resistances to Defendants' Pre-Answer Motions to Dismiss, its Resistances to Defendants' Motions for Summary Judgment, and its Motion to Reconsider, Enlarge or Amend. (App. 39-50; 65-70; 122-162; 202-210).

B. Argument

1. The district court erred in concluding the "date of injury" for purposes of Iowa Code section 670.5 was the date the ATE Citation was issued to Plaintiffs.

Iowa Code section 670.5 provides that "a person who claims damages from any municipality or any officer, employee or agent of a municipality for or on account of any wrongful death, loss, or injury … shall commence an action therefor within two years after the alleged wrongful death, loss, or injury." The limitations period in section 670.5 "commences on the date of injury[,]" rather than the date of accrual. *Venckus v. City of Iowa City*, 930 N.W.2d 792, 808 (Iowa 2019).[5]

[5] Based on this language, one can query whether the Iowa Municipal Tort Claims Act even applies to several of Plaintiffs' claims, including those for equitable and declaratory relief, pursuant to Iowa Code section 670.2. However, given that constitutional violations are included as a tort, or "every civil wrong," (*Venckus*, 930 N.W.2d at 808), and Plaintiffs also had claims for conspiracy and conversion, which are clearly torts, Plaintiffs accept *arguendo* that

The district court, in its ruling on Defendants' Partial Motions to Dismiss, concluded that the date of injury for purposes of Iowa Code section 670.5 was the date an ATE Citation was issued. (App. 74). Applying its conclusion, the court dismissed Plaintiffs Stogdill, Johnson, and Yentes. (App. 75). The district court reiterated its conclusion in its later ruling on Defendants' Motions for Partial Summary Judgment: the citation, and with it the first request for payment, constitutes the date of injury for purposes of Iowa Code section 670.5. (*Id.*). Based on that determination, the district court granted summary judgment as to all but one claim brought by Plaintiff Smith.[6] (App. 76).

The district court erred in concluding that the "date of injury" for purposes of Iowa Code section 670.5 was the date the ATE Citation was issued to Plaintiffs. The ATE Citation was the initial threat, and only described what might happen in the future, vaguely, including the possible use of the Offset Program. (App. 161). While the initial threat can also be an injury, Plaintiffs have consistently argued that a separate and distinct injury occurs when the

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Iowa Code section 670.5 applies. But, even in such instances, the types of injuries complained of surely do not occur until a vehicle owner's state income tax money is actually taken, as described below—and not when an ATE citation is issued which merely describes the possibility of a state income tax seizure taking place in the undefined future.

[6] The district court later granted summary judgment as to Plaintiff Smith's remaining due process claim, which is raised as a separate issue herein.

entirety of an individual's state income tax refund is seized through the Offset Program (formerly Iowa Code section 8A.504) for payment of an alleged debt that has not been reduced to judgment through the municipal infraction process of Iowa Code section 364.22. (App. 129-130). There were multiple wrongs committed by the City and MCOA in this case, and the injury at issue for several of the claims (preemption, violation of the statute of limitations, etc.) was when the City actually took the money from Plaintiffs' state income tax refund. Indeed, here, contrary to the discussion in *Venckus*, 930 N.W.2d at 807-08, there is no distinction between the "injury" and the date of accrual,[7] which is when it "comes into existence[.]" *Iowa DOT v. Iowa Dist. Court*, 587 N.W.2d 774, 776 (Iowa 1998) ("'[A]ccrue' is defined as 'to come into existence as an enforceable claim: vest as a right.") (citation omitted). The date that Plaintiffs were subsequently injured—having their funds seized without any district court judgment determining liability against them or establishing a valid debt owed by them—was when the state income tax refund offset actually took place. Plaintiffs believe that the date of seizure is also the date that their cause of action to challenge the Offset Program came into existence, as they could

[7] Accrual is often used to reference the more elastic discovery rule. *See Venckus*, 930 N.W.2d at 808. Again, here, the discovery of an additional harm and the harm itself occurred at the same time: when the funds were seized.

not have advanced a legal claim prior to their property having been subjected to the seizure.

As to Plaintiff Smith's claims, in particular, the *entirety* of her $320.00 state income tax refund had been seized on or about February 27, 2018; the Petition was filed in December of 2019, within the two-year time limit of Iowa Code section 670.5. (App. 153). At the time of DAS's seizure of her funds, on behalf of the City, she had allegedly owed *only* $88.00, plus any additional charges, to the City. (*Id.*) There was no real enforcement of Ms. Smith's ATE Citation until her state income tax refund had been offset. The separate injury occurred when the money had been taken.

The ATE Citation Ms. Smith received in March 2017 merely alluded to the City's potential future use of the Offset Program. (App. 161). The district court's conclusion that the income tax refund offset is "one step in a continuum of alleged illegal collections" (App. 200), in its application, would have required Plaintiffs to have acted preemptively to prevent the City's *possible* use of the Offset Program, which the City may or may not have ever initiated. There were no "illegal collections" at the time of the ATE Citation's original issuance, only the City's threat of potential future illegal collections efforts. If the City had done what it also had threatened to do in the Notice of Violation—filed a municipal infraction lawsuit, proven its case to a district court judge, and obtained a resulting judgment for a sum-certain, as required by

Iowa Code section 364.22—no illegal collection actions would have resulted. In fact, the City's initiation of the Offset Program, under an arrangement it had made with DAS, was completely discretionary, and not a foregone conclusion as part of the ATE Citations issued to any of the Plaintiffs.

Plaintiff Smith could not have contested the City's use of the Offset Program, at the earliest, until after she had actually received the Notice of Offset, in February 2018, informing her that that the *entirety* of her state income tax refund had actually been seized and that only a *portion* of the seized funds would be applied to reduce the alleged "debt" she owed to the City. That action constituted a *separate* moment when the City's *new* harm to her property interests had occurred. As a consequence, there had been no cause of action to have challenged the City's use of the Offset Program until the damage or harm had actually occurred to her property interests. The new injury occurred upon DAS's seizure of *all* state income tax refunds owed to her, including amounts above and beyond which the City had claimed was owed, even though no preceding municipal infraction lawsuit had been filed, litigated, or resulted in a judgment establishing Ms. Smith's liability for a debt.

Without this separate, later injury to her legal interests, Ms. Smith would not have had standing to have challenged the Offset Program. *See Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434-35 (Iowa 2008) ("Standing refers to the question of whether a party has an actual demonstrable injury for purposes of a

lawsuit") (citation omitted); *see also Hawkeye Foodservice Distribution v. Iowa Educators Corp.*, 812 N.W.2d 600, 606 (Iowa 2012) (describing the two elements to determine private standing to challenge governing action: "A plaintiff 'must (1) have a specific personal or legal interest in the litigation, and (2) be injuriously affected.'") (citation omitted). Without the specific injury, i.e., the actual taking of funds from Ms. Smith, she would not have had standing to have filed a lawsuit challenging the *possible*, future use of the Offset Program. The City would have certainly claimed, in such an instance, that there was no harm from any threatened use of the Offset Program, so that the claims were either not ripe for declaratory judgment or that Ms. Smith had no standing to assert the same. *See Wesselink v. State Dep't of Health*, 248 Iowa 639, 643-44, 80 N.W.2d 484, 486-87 (1957) (reviewing declaratory judgment requests and the requirement of genuine controversies or ripeness, "with a plaintiff and defendant having actually or potentially opposing interests, with *a res* or other legal interest definitely affected by the judgment rendered[.]"); *see also Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 474-75 (Iowa 2004) (holding that citizens' claims were not ripe to challenge revenue bonds the city there "*intend[ed] to sell*" prior to a hearing and counsel vote on the same, which were prerequisites) (emphasis in original).

Indeed, if she had filed a lawsuit against the City upon her mere receipt of the original ATE Citation, prior to her loss of property rights by the City's

use of the Offset Program, Ms. Smith would have been seeking redress from a harm that had not yet occurred, or an advisory opinion, which, as a corollary to standing, is not allowed. *See Iowa Citizens for Cmty. Improvement & Food & Water Watch v. State*, 962 N.W.2d 780, 791 (Iowa 2021) ("If the court can't fix your problem, if the judicial action you seek won't redress it, then you are only asking for an advisory opinion . . . 'We do not issue advisory opinions.'") (citation omitted). The Court, in such an instance, would not have been able to have returned Ms. Smith's funds prior to them having been taken, or in any other way to have redressed her harm. There was no enforcement of the ATE Citation until Plaintiff Smith's state income tax refund actually had been offset. Therefore, there is no need to apply the discovery rule to this cause of action. It is not that Ms. Smith did not know of the ATE Citation issued to her, it is that there had been no enforcement of it—and therefore no illegal collection injury caused by it—unless and until the City had acted on it (i.e., by filing a municipal infraction against Plaintiff, or by taking her money without any process through the Offset Program).

Applying the district court's legal conclusion to the undisputed facts, Ms. Smith should have contested the application of the Income Tax Offset Program upon her receipt of the original ATE Citation in March 2017, and before an offset seizure had been initiated against her income tax refund. This conclusion leads to a nonsensical result, however, as described above, because

Ms. Smith, at that time, would not have had standing to have contested the *possible future* use of the Income Tax Offset Program at that point. It is not the discovery rule analysis that is required to toll this action, it is the harm itself, which, in fact, gives rise to the action. The date upon which the Offset Program is used against a vehicle owner's property in violation of his or her rights is *both* the date of injury *and* the date of accrual. Limitation dates related to challenges to the Income Tax Offset Program cannot stem from the ATE Citation issuance dates because the prosecution of an alleged ATE violation is an entirely different one from the seizure of income tax refund monies—the latter process being one that the municipality can determine to use well after any Notice of Violation has been served. Indeed, Ms. Smith could not have sued MCOA at the time of her receipt of the ATE Citation because notice of MCOA's involvement had not yet been provided in *any* way, including on the face of the ATE Citation. (App. 161-162). The district court presumed that each Plaintiff's injury had occurred upon his or her respective receipt of an ATE Citation, but that is not when the actual harms from the Offset Program were inflicted upon them. All that the Notice of Violation documents, such as that mailed to Ms. Smith, included were vague threats[8] of *possible* future harms through the City's *possible* initiation of the Offset Program.

[8] Of course, there could be other causes of action related to the unlawful threat included in the ATE Citation, but Plaintiffs specifically challenged the use of

The unlawful seizure of the *entirety* of Ms. Smith's state income tax refund in February 2018 was a separate and distinct injury suffered by her, the harm in fact that gives rise to her claim. Ms. Smith filed suit within the two-year time limit of *that* harm. Under the district court's reasoning, the City, if it were cleverly inclined to do so, could otherwise avoid *ever* being challenged for its illegal actions by, for example, sending out ATE Citations, waiting two years and one day to invoke the Offset Program, and then claiming that any challenge to its conduct was subject to a two-year statute of limitations that had started to run before the City even had used the Offset Program. Such cannot be the result. The district court's determination, in effect, that the ATE Citation's issuance constituted a series of continuous, although separate, illegal collection actions was error; it invites a corrupt use of power, and must be overturned. The injury challenged by citizens cannot be sustained prior to any actual resulting harms-in-fact, i.e., losses of seized funds through the Offset Program. For the reasons set forth herein, the district court's conclusion that Iowa Code section 670.5 applied to bar Plaintiff Smith's claims should be reversed.

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the Offset Program without having obtained a judgment or valid debt, in violation of Iowa Code section 364.22 and *Behm v. City of Cedar Rapids*, 922 N.W.2d 524 (Iowa 2019) ("Under Iowa Code section 364.22, no liability arises until the city takes the affirmative step of filing an enforcement action in the district court and obtains a judgment against the defendant.") (citing Iowa Code § 364.22(4), (5)(b), (6)(f), (10)(a)).

2. The district court failed to address the City's failure to seek a judgment through the timely filing of a municipal infraction proceeding prior to placement of the alleged debt in the Offset Program and the applicable statute of limitations to the City's enforcement of ATE Citations.

The City failed to file a municipal infraction lawsuit to establish liability, and to reduce the Ms. Smith's alleged debt to judgment, as required by law, prior to seizing her state income tax refund. (App. 151). Without an underlying judgment, Ms. Smith's alleged debt was not eligible for placement in the Iowa Income Tax Offset Program. Iowa Code § 8A.504(1)(d)(3) (2018) (defining "qualifying debt" to include "[a]ny debt which is in the form of a liquidated sum due, owing, and payable to the clerk of the district court.").[9] The district court erred in applying the two-year statute of limitations to Plaintiffs' claims related to the City's use of the Offset Program, ostensibly starting on the date that ATE Citations are issued.

The district court also did not address the City's corresponding failure to seek a judgment through the timely filing of a municipal infraction enforcement

[9] It is noteworthy that the General Assembly recently changed this language, effective in January 2021, to include a broader definition of debt, perhaps to cover ATE Citations. *See* Iowa Code § 421.65(1)(d)(3) (amending the definition of "qualifying debt" to include "Any liquidated sum certain, owing, and payable to a public agency…"). Of course, even if now applicable to ATE Citations, this revised language was not retroactive and therefore cannot save the City here. All references herein are therefore still to the version of Iowa Code section 8A.504 in effect at the time of, and, therefore, which applied to, Plaintiffs' claims.

action within one year of the date of the alleged law violation, as is required by Iowa Code sections 364.22[10] and 614.1(1). *See Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 562 (Iowa 2019) ("Under Iowa Code section 364.22, no liability arises until the city takes the affirmative step of filing an enforcement action in the district court and obtains a judgment against the defendant.") (citing Iowa Code § 364.22(4), (5)(b), (6)(f), (10)(a)) [11]; *see also* Windsor Heights Code of Ordinances § 4.01 ("A violation of this Code of Ordinances … is a municipal infraction punishable by civil penalty as provided herein."). The *Behm* Court therefore already determined what process must be followed in order to enforce a violation of a municipal ordinance. *Behm*, 922 N.W.2d at 562. Any other process for the enforcement, or collection of the penalty, is therefore preempted by Iowa Code section 364.22 and Iowa Code section 602.6101. *Id.* at 564-66.

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*,

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[10] The district court did address this preemption argument of Iowa Code section 364.22 with respect to Plaintiff Determan (App. 478-486), but Mr. Determan was not subject to the Offset Program, and therefore the clear implications of preemption by *Behm* were not applicable to his claims. Mr. Determan therefore does not appeal the preemption finding with respect to his claim.

[11] This language is further evidence of Plaintiff's argument above, as the enforcement of the ATE citation does not occur until a judgment is obtained, or at a minimum, the Offset Program is used, and there is therefore no harm until then.

750 N.W.2d 93, 99 (Iowa 2008) (quoting Iowa Const. art. III, § 38A and Iowa Code § 364.1). Based on this language, "the legislature retains the power 'to trump or preempt local law.'" *Id.* (citation omitted). Implied preemption, at issue here, "occurs when an ordinance prohibits an act permitted by statute, or permits an act prohibited by statute." *City of Davenport v. Seymour*, 755 N.W.2d 538 (Iowa 2008)(citation omitted); *see also Goodell v. Humboldt County*, 575 N.W.2d 486, 502 (Iowa 1998) (holding that the ordinance enacted by a county—pursuant to the county's home rule authority—was preempted as it allowed the county to do "what the statute directly forbids"). To prove this form of implied preemption, or conflict preemption, the "local law must be 'irreconcilable' with state law." *Id.* at 539 (citation omitted).

While the *Behm* Court determined that the City could also use alternative methods of obtaining "voluntary" payment of an ATE citation, 922 N.W.2d at 565, it further expressly held that "no liability of any kind attaches to a vehicle owner without the filing of a municipal infraction." *Id.* at 564. Here, the City's Notice of Violation indicates the opposite, by informing vehicle owners that unless they contest, they will be considered liable for the amount due, which is directly contrary to *Behm*, and therefore preempted. Indeed, the Notice asserts that "[f]ailure to pay the penalty or contest liability… is an affirmation of responsibility . . . and will result in this penalty being forwarded to collections and or submitted to the Iowa Income Tax Offset Program." (App. 161). The

statutory requirements of Iowa Code section 364.22 and 602.6101 and the use of the Offset Program are irreconcilable, as already determined by *Behm*. Indeed, the City amended its Ordinance in recognition of the same, by taking out all the options that it might have to enforce the ordinance (i.e., collect the penalty) in November of 2018, and only referencing the filing of a municipal infraction, as required by *Behm:*

> We interpret the provision to state that the failure to timely pay or appeal gives the City a choice: **file a municipal infraction or abandon the citation (and associated fine) issued under the ordinance**. Thus, no liability of any kind arises until Cedar Rapids files a municipal infraction.

922 N.W.2d at 564-65 (emphasis added). Therefore, the choice is clear: the City had to file a municipal infraction or abandon its right to collect the fine. It failed to do either. Instead, it did an end-run around all legal processes and the law and seized the fine without ever having filed a municipal infraction. This is impliedly preempted, as presaged by *Behm*.

Given the City must enforce a violation (i.e., obtain the penalty) of an Ordinance through the filing of a municipal infraction pursuant to Iowa Code section 364.22 (and *Behm*), then the City must also comply with the statute of limitations applicable to filing municipal infractions pursuant to Iowa Code section 614.1(1). The district court erred in failing to so find. If the City cannot enforce its ordinance through filing a municipal infraction more than a year later, it certainly cannot just seize funds for an alleged violation more than one

year later. But implausibly, instead, the district court's ruling holds Plaintiffs to the strict two-year time limit of Iowa Code 670.5, while ignoring the City's failure to obtain a judgment on the underlying debt within the one-year time limit of Iowa Code section 614.1(1), which time period the district court held had started to run on the date of the Citation, prior to the City's taking any collection action through the Offset Program.

Allowing the City to apply a two-year statute of limitations to its defense against actions against it, but not to protect citizens from stale prosecutions of municipal infractions, which involves a one-year statute of limitations, leads to extremely unjust and inconsistent results, ones that the Iowa General Assembly could not have intended. Under such a scenario, if allowed, the City could then enforce an ATE citation, which is a municipal infraction,[12] for, say, ten years (under Defendants' argument, as adopted by the district court, no applicable period of limitation is suggested or applied) by delaying use of the Offset Program (or other collection efforts), but then invoking the two-year statute of limitations as a defense.

The statute of limitations has two purposes: (1) a "penalty for laches and [2] protection against stale claims, the latter as a shield against fraud." *Higbee v. Walsh*, 229 Iowa 408, 421, 294 N.W. 597, 604 (1940). There is no concern for

[12] Windsor Heights Code of Ordinances § 4.01.

laches or fraud in this instance, as Plaintiff Smith did not have an injury until the Offset Program was used. Moreover, the district court's ruling allows the City to raise the statute of limitations as a sword, not a shield, without providing any such protections to vehicle owners. Vehicle owners who receive Citations that are more than one year old, the statute of limitations applicable to the City pursuing and enforcing an ATE Citation, can be subjected to its enforcement without the City having to prove who owned the vehicle, whether it was speeding, etc. Such claims are certainly subject to becoming stale, and laches should also apply to the City's and MCOA's actions. The district court's ruling, in effect, gives the City and MCOA *carte blanche* to collect on a Citation that was never proven, or reduced to judgment, for years, without any stale-claim protection allowed to vehicle owners.

The law, as outlined herein, required the City to have obtained a judgment establishing liability for paying the underlying debt (within the one-year statute of limitations of Iowa Code section 614.1(1)) *prior* to seeking a forfeiture payment from Ms. Smith through the Offset Program. Any other application of the law to these facts leads to these extremely unjust results, a legal battleground where the City has multiple shields and swords, and vehicle owners have none.

The Defendants' unlawful placement in the Offset Program of an alleged debt that had not been reduced to judgment through the municipal

infraction process of Iowa Code section 364.22 was preempted, and resulted in the unlawful seizure of the *entirety* of Ms. Smith's state income tax refund, thus wrongfully depriving her of her property. The Defendants should not be permitted—and without the imposition of any limit on when they can act—to seize and retain citizens' property without, first, seeking and obtaining an underlying judgment through the timely filing of a municipal infraction enforcement action.

As described above, at the time of the City's issuance of an ATE Citation to Plaintiff Smith, she was in no position to have anticipated the City's failure to properly reduce the alleged ordinance violation to a debt via a judgment following its filing of a municipal infraction lawsuit. Nor could she have anticipated that such a failure to act would have been augmented by a subsequent unlawful initiation of the Offset Program's process. This scenario is the equivalent of requiring a citizen to file suit for a nuisance action that they believe might occur sometime in the future—something that Iowa law, understandably, does not allow. Citizens are not clairvoyant. The district court's ruling, implicitly, required that Plaintiff Smith, and others similarly situated, must anticipate, upon receiving traffic camera citations, what unlawful action(s) the City, or its agents, will, or will not, take. In the same way that the City cannot enforce—through any means, including use of the Offset Program—its ATE Citations without first filing municipal infraction lawsuits

and obtaining judgments, it also cannot be permitted to continue to do so for years after the one-year time limit to file such municipal infraction actions has passed.

For the reasons set forth herein, the district court's failure to find that Iowa Code section 364.22 barred and preempted the City from using the Offset Program prior to filing a municipal infraction and obtaining a judgment, should be reversed. Similarly, the district court's failure to find that a one-year statute of limitations pursuant to Iowa Code section 614.1 applied to any enforcement action, including collection through the use of the Offset Program, should be reversed.

II. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF SMITH'S DUE PROCESS CLAIM.

A. Standard of Review and Error Preservation

The Court reviews constitutional claims de novo. *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 31 (Iowa 2019).

Error was preserved by filing in the district court resistances to Defendants' Motions for Summary Judgment. (App. 122-162; 238-315; 398-446).

B. The State Income Tax Offset Program Violated Plaintiffs' Due Process Rights

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).

Plaintiffs' Petition raised the following arguments with respect to their due process claim: (1) the City used the State Income Tax Offset program to seize and forfeit private funds owned by Plaintiffs over which the City had no lawful claims; (2) the City seized funds through the Offset Program in excess of the amounts allegedly owed by Plaintiffs to the City; and (3) the City failed to provide an opportunity for Plaintiffs to contest the amounts of any alleged debts to be offset through a contested case procedure substantially equivalent to that provided in Iowa Code chapter 17A, in violation of the City's MOU with DAS, Iowa Code section 8A.504(2)(f) (2018), and Iowa Administrative Code 11---chapter 40. (App. 22).

In its ruling on Plaintiff Smith's due process claim, the district court did not address the allegation that the City had no right to seize Plaintiff Smith's funds, based on its earlier summary judgment ruling that these claims were barred by the statute of limitations. (App. 461). As argued above, this should be reversed. As to Plaintiffs' second argument, the district court concluded that the language of Iowa Code section 8A.504(2)(h), "coupled with the provision

that an individual has fifteen days to contest the allegation, suggests that the City and the Department at the very least have that period of time during which they may hold the entire amount. There is no apparent rule stating that the City and the Department may only hold the disputed portion of the income tax refund." (App. 462).

As to the third argument, the district court concluded Plaintiff Smith had sufficient opportunity to contest the amount of debt to be offset in accordance with Iowa Code section 8A.504(2)(f)(1), and that the process to challenge the offset satisfied due process requirements of the Iowa Constitution. (App. 462-469). Specifically, the district court concluded: (1) Iowa Code § 8A.504, rather than Iowa Administrative Code rule 11—40.4, provided the relevant requirements for contesting the Notice of Offset because the statutory provisions prevailed over the conflicting administrative rules (which require a procedure substantially equivalent to a contested case procedure under Iowa Code chapter 17A); (2) the City provided Smith with an opportunity to contest the liability by filing written notice of the appeal to MCOA or the City within 15 days[13]; and (2) there was no constitutional due process violation, per the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). (App. 461-469).

[13] The district court noted that Plaintiff Smith sent a letter to DAS, which the Notice of Offset clearly stated was not the contact for disputing the amount in question; and even if she had directed her letter to the City or MCOA, the

Ms. Smith's Notice of Offset informed her she could appeal the offset "by filing a written notice of appeal to MCOA or the Windsor Heights Police Department" within fifteen (15) days. (App. 153). The notice further provided that if Ms. Smith had any questions "on the amount you owe or why you owe the money, please contact the City of Windsor Heights' collection agency," and provided the phone number for MCOA. (*Id.*). The Notice reiterated, in closing, that Municipal Collections "handles the collection of all debt for the City of Windsor Heights." (*Id.*). When Ms. Smith contacted MCOA with questions about the Notice of Offset, she was informed that the debt referenced in the Notice of Offset related to an ATE violation that had allegedly occurred on or about March 17, 2017, and that, *regardless of her circumstances*, Ms. Smith was responsible for the alleged debt referenced in the Notice of Offset. (App. 150).

The City's agent, Municipal Collections, therefore misinformed Plaintiff Smith that she was unable to contest the debt referenced in the Notice of Offset under any circumstances. Without any ability to contest the underlying liability for the Offset—which was never rendered a judgment—there was no hearing provided on the issue of her liability for the alleged debt. The denial of the opportunity to be heard violated the directives of due process provided by Code, in addition to the general requirements of the Iowa Constitution.

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letter was sent more than 15 days after the date of the Notice and would likely have been deemed an untimely appeal. (App. 466).

A vehicle owner's learning that he or she may have been mailed a Notice of Violation several months[14] previously, when the vehicle owner first learns of the City's use of the Offset Program to collect a fine arising from the months-ago alleged violation, does not satisfy procedural due process. *See Hancock v. City Council of Davenport*, 392 N.W.2d 472, 478 (Iowa 1986) (rejecting city's argument that learning of relevant information in a separate proceeding "is not the same as being given due process notice of a specific problem before a due process hearing."). Of course, here, the problem is that the City skipped the due process trial required by law (the municipal infraction lawsuit proceeding) entirely. *Behm*, 922 N.W.2d at 564 ("Further, under our interpretation of the ordinance—notwithstanding what might be inconsistently asserted by various notices[15] in the administrative process—no liability of any kind attaches to a vehicle owner without the filing of a municipal infraction."). If a municipal infraction enforcement lawsuit must be filed to enforce the ordinance and the City must, first, obtain a judgment establishing a vehicle owner's liability for a debt, due process is denied when that step is skipped entirely, and the equivalent of a judgment is obtained and collected without any court

[14] In the case of Plaintiff Smith, the Notice of Offset, dated February 27, 2018 was sent nearly one year after the initial Notice of Violation (Citation), dated March 23, 2017. (App. 153, 161).

[15] Based on this language alone, it is clear that the injury or harm does not only occur from the initial inaccurate notices from the City, as they are often wrong and inconsistent with the law.

involvement. *Behm*, 922 N.W.2d 2d at 565 ("In order to *enforce* the ordinance and impose liability on an alleged violator, Cedar Rapids must follow the process for municipal infractions outlined in Iowa Code section 364.22, which means filing an action that is consistent with Iowa Code section 602.6101."). There is therefore often no notice at all, let alone an opportunity to be heard, to contest liability arising under a citation in the appropriate forum prior to having one's income tax return refund held hostage.

Under the three-part balancing test of *Mathews*, the court considers "(1) the nature of the interest involved; (2) 'the risk of an erroneous deprivation of such interests through the procedures used'; and (3) 'the [g]overnment's interest, including function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.'" *Behm*, 922 N.W.2d at 567 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The district court concluded Plaintiff Smith had a property interest in avoiding the fine, although it was not a "particularly weighty property interest," given the $65 fine plus $23 in additional fees; a total of $88. (App. 468). But this ignores that Ms. Smith's *entire* refund had been held for a period of time, amounting to $320, which is a significant property interest. People often wait for and count on their use of those income tax refunds, and any delays in obtaining them creates a burden. The property interest in receiving a timely and full income tax refund is therefore weighty; holding and delaying payment of an entire refund,

one held hostage to cause a vehicle owner to pay an alleged debt that the City has never proven to the satisfaction of a district court judge, is unlawful. The method of the City's coercive efforts to take the property, in whatever amount, also renders the interest weightier.

As to the second factor of the balancing test, the district court concluded "the risk of erroneous deprivation of this property interest is minimal as the City's ATE ordinance provides individuals with two avenues to contest the fine: submitting a form for an administrative review or requesting a municipal infraction citation to be filed in district court." (App. 468). This ignores that Plaintiff Smith, like others she sought to represent, never had the opportunity to challenge the underlying debt, as she was out of town when the Notice of Violation was received at her address. (App. 154). Indeed, she was not even driving the car that had been the subject of her alleged Citation, as it was being test-driven by the purchaser of the vehicle, which she sold just three days later. (*Id.*). It is not Ms. Smith's burden to request to be sued, for the City to file a municipal infraction; rather, it is the City's burden file and prove its case and to be able to actually obtain the penalty ordered, if any. Iowa Code § 364.22(2), (4), (7), (8), (10). The risk of erroneous deprivation is extremely significant when the City was never required to prove its case to a magistrate or district court judge as required.

Finally, the district court determined that "requiring the government to allow citations to be contested only through the court system would impose a significant additional workload on already burdened state courts." (App. 468) (quoting *Behm*, 922 N.W.2d at 541). Accordingly, the district court concluded, the options offered recipients of ATE Citations for contesting alleged violations met the requirements of due process. (App. 468-469). While Plaintiffs understand that requiring the City to prove liability for fees and penalties resulting from Citations through the filing of municipal infractions processes could impose burdens on an already burdened court, that is the requirement of the law. *Behm*, 922 N.W.2d at 564-65. The City, presumably, if it were forced to prove its case in every instance, would forego even filing the municipal infraction, and therefore this is likely a null set. The *Behm* Court expressly recognized that option, as described above. It would also be a burden on the City to undertake such actions in each instance. But the City is not allowed, in the name of efficiency, to collect alleged debts by bypassing the municipal infraction lawsuit altogether. It is when the City, by invoking the power of a state agency, can take a citizen's funds without any process that the Defendants can maximize the efficiency of their collection efforts. The fact that it would be a burden to invoke due process cannot be the reason to deny it, however. The Iowa Supreme Court has determined what process is due to *enforce* a municipal infraction (i.e., seize funds allegedly owed pursuant to one),

and that is therefore what due process requires. *Behm*, 922 N.W.2d at 562 ("no liability arises until the city takes the affirmative step of filing an enforcement action in district court and obtains a judgment against the defendant."); *see also Hancock*, 392 N.W.2d at 475-76 (holding that a municipality's power to abate nuisances in enforcing ordinances was limited by procedural due process, requiring notice and a hearing, and the right to appeal). The City's power to enforce its ordinances through actually seizing funds allegedly owed to it is limited by filing a municipal infraction, and proving its case to the satisfaction of an impartial Iowa district court judge. Ms. Smith did not receive any process, let alone an adequate one, before her funds were seized and then taken, in violation of the Iowa Constitution's due process protections. *See Bowers*, 638 N.W.2d at 690-91 (requiring an "opportunity to be heard in a proceeding that is 'adequate to safeguard the right for which the constitutional protection is invoked.'").

The district court's ruling granting the Defendants' Motion for Summary Judgment on Plaintiff Smith's Due Process claim should be reversed.

III. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFF DETERMAN'S CLAIMS ON THE STATUTE OF LIMITATIONS AND THAT THE CITY'S ATE ORDINANCE WAS AN UNLAWFUL PERSONAL PROPERTY TAX.

A. Standard of Review and Error Preservation

This Court reviews the district court's granting of summary judgment "for correction of errors at law." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007) (citation omitted). In determining whether summary judgment was appropriate, the court views the record in the light most favorable to the nonmoving party. *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.,* 925 N.W.2d 793, 800 (Iowa 2019).

Error was preserved by filing in the district court resistances to Defendants' Motions for Summary Judgment. (App. 238-315; 398-446).

B. Argument

The district court granted Defendants' Motions for Summary Judgment on each of Determan's seven claims. On appeal, Plaintiffs ask this Court to review the district court's ruling on two of those seven claims.[16]

Statute of Limitations (Iowa Code § 614.1(1)). The district court found there was "no possibility of future action by the City" based on an affidavit of

[16] Plaintiffs do not appeal the district court's ruling on summary judgment for Determan's state law preemption, conversion, conspiracy, unjust enrichment, and due process claims.

the City's mayor,[17] stating that the City relinquished the right to proceed with any action against Plaintiff Determan for his ATE Citation, as well as generally the right to pursue any fines, collections or actions connected to ATE citations in the future. (App. 474-475; 452-453). With no possibility of future action by the City, all actions taken by the City against Plaintiff Determan were within the one-year limitation period of Iowa Code section 614.1(1); accordingly, the district court concluded, summary judgment was appropriate. However, this determination is in error as it ignores several crucial points, including: (1) The City only issued the affidavit a year and a half after a lawsuit had been filed, and nearly three years to the day after the Notice of Violation had been issued to Mr. Determan; (2) The City did not disclaim collection efforts against all those similarly-situated to Mr. Determan; and (3) The City's mayor could not swear on behalf of all other parties who may seek enforcement against Mr. Determan in the future—including other City personnel or future mayors, employees at DAS, or the City's own collection agents—to confirm that Mr. Determan's claim should not be subject to the Offset Program.

Mr. Determan filed a class action lawsuit seeking to represent his own claims and those of similarly-situated individuals. He filed his lawsuit more than

[17] The affidavit, attached to the City's Reply Brief in support of its Motion for Summary Judgment on All Remaining Claims, was filed on May 17, 2021, almost three years to the day after the Notice of Violation had been mailed threatening offset.

18 months after receiving his Notice of Violation in May of 2018. The City's mayor did not disclaim any right to use the Offset Program against Mr. Determan as part of its pre-answer motion to dismiss, or initial motion for summary judgment, but rather, waited more than 18 months after litigation had been instituted to assert tactically that Mr. Determan would not be subject to the Offset Program in order to win on summary judgment. By that token, a defendant could in every instance avoid class treatment by disclaiming that the defendant would enforce any objected-to ordinance or law against a named plaintiff, without any intention of disclaiming the right to its use against all other similarly-situated putative class members. That is an abuse of the system. Moreover, there is no guarantee that despite the mayor's best intentions, Mr. Determan's claim would not still be subject to the Offset Program some years later by a new mayor, or other City employee who was unaware of the affidavit in litigation, as there is no statute of limitations according to the City. The City cannot have it both ways: either there is a statute of limitations applicable to both the City and vehicle owners (one year and two years, respectively), or there is not. As articulated by the City, the law of statutory limits would appear to be without any coherent meaning.

As described above, it is preposterous to claim that one has to bring a case against a vehicle owner in court to prove and collect a municipal infraction judgment for the ATE citation within one year, pursuant to Iowa Code section

614.1(1), but pretend that the City can avoid all of those requirements and, instead, seize money through DAS, under the Offset Program, for an indeterminate amount of time after the alleged citation.

Iowa Code section 614.1(1) describes the requirements when one wishes to "enforce the payment of a penalty or forfeiture under an ordinance, within one year." Iowa Code § 614.1(1) (emphasis added). The statute is clear and specific: enforcing the payment of a penalty—by *any* means where no means are expressly listed—requires that it be done within one year. The public policy reasons for the same are clear, and the same as applicable to all statutes of limitations: to avoid loss of memory, lost evidence, lost witnesses, and the corresponding inability to defend. *See Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 448 (Iowa 2008) (describing the purpose of statutes of limitations to protect courts and defendants from issues such as faded memories, witnesses disappearing, or lost evidence). A vehicle owner's efforts to defend against an ATE citation years after a violation had allegedly occurred would raise each of these public policy concerns.

For the foregoing reasons, the district court erred in failing to find that the one-year statute of limitations applied to all of the City's enforcement actions, including its illegal collection efforts through the Offset Program.

Unlawful personal property tax. The district court concluded "that even though the city generated income from ATE Citations, their purpose was

traffic regulation." (App. 477). Accordingly, the ATE ordinance was not a personal property tax imposed in a manner inconsistent with the City's police powers and not authorized by the General Assembly. (*Id.*).

Only the Iowa General Assembly can assess a tax. *See* Iowa Code § 364.3(4) ("A city may not levy a tax unless specifically authorized by a state law."). This restriction is also expressly laid out in the Iowa Constitution, as part of granting municipalities the home rule amendment, cities did "not have power to levy any tax unless expressly authorized by the general assembly." Iowa Const. art. III, § 38A. A tax is defined as "a charge to pay the cost of government without regard to special benefits conferred[,] . . . [i]n other words, taxes are for the primary purpose of raising revenue." *Home Builders Ass'n v. City of W. Des Moines*, 644 N.W.2d 339, 346 (Iowa 2002) (citation omitted).

While described as a public safety program, the enforcement of the ATE Ordinance has generated millions of dollars for the City in its years of operation.[18] The revenue raised through the ATE Ordinance has been used by the City for its General Fund and Police Department.[19] This is a revenue-

[18] For example, in a 2019 Fiscal Note, the State Legislative Services Agency reported that Windsor Heights collected more than $2 million in revenue from ATE devices in Fiscal Year 2018. Fiscal Note, SF343 (Automated Traffic Law Enforcement Ban), February 27, 2019, *available at* https://www.legis.iowa.gov/docs/publications/FN/1038490.pdf (accessed November 17, 2021).

[19] *Id.*

raising program applied to vehicle owners without consideration of whether they are even operating the vehicle allegedly unlawfully-driven. Instead, it is whether a person actually own the cited-vehicle, and therefore, has no relation to safety, as only punishing the driver would be related to safety. Accordingly, the ATE Ordinance is *de facto* a revenue-generating personal property tax imposed in a manner that is inconsistent with the City's police powers. *See, e.g. Auto Club of Mo. v. St. Louis*, 334 S.W.2d 355, 363 (Mo. 1960) (describing one important factor to consider in determining whether "the primary and fundamental purpose of the ordinance is regulation under the police power or revenue under the tax power" is to consider the "amount of revenue brought in by the ordinance"). Whatever ostensible purpose may be described by the City, the fact that it is collecting these fines as part of the Offset Program years after a violation of its traffic ordinance is alleged to have occurred is further evidence that its entire purpose of the ordinance is to raise revenue, as opposed to preventing alleged speeding.

If safety were the core purpose of the Ordinance, the City would take the time to file municipal infraction lawsuits against these individuals, within one year of the alleged infraction having occurred, consistent with the mandates of Iowa Code section 614.1(1), thereby showing vehicle owners the errors of their ways in the course of district court proceedings. The judicial process, requiring personal service of original Notice and an opportunity to be

heard before a district court judge within a reasonable time frame, would establish whether the vehicles cited in Notices had, in fact, been operated in excess of posted speed limits. And, if so, fines could be imposed and, if unpaid, forcibly collected under the Offset Program, or otherwise. The process of going through a court proceeding would assist in deterrence of any additional violations.

There is no safety benefit by using the "coercive power of government" to enforce an Ordinance without affording alleged violators with any protections of the law. *See Weizberg v. City of Des Moines,* 923 N.W.2d 200, 220 (Iowa 2018) ("[T]o the extent a municipality seeks to assert the coercive power of government to enforce payment of a penalty for a municipal infraction, a municipality must pursue a municipal infraction under Iowa Code section 364.22.") (emphasis added) (citation omitted).

3. Conclusion

The entire summary judgment record, when considered in the light most favorable to Plaintiffs, leads to the conclusion that summary judgment was not appropriate as a matter of law. The district court's summary judgment decision as to the preceding claims of Mr. Determan should be reversed.

CONCLUSION

For one or more of the foregoing reasons, Plaintiff respectfully requests that the district court's decision be reversed as to the issues raised herein, decided adversely to Plaintiffs, and the case be remanded for further proceedings before the district court.

REQUEST FOR ORAL ARGUMENT

Plaintiff respectfully requests oral argument.

CERTIFICATE OF COST

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

Submitted this 28th day of January, 2022.

Respectfully submitted,

/s/ James C. Larew

JAMES C. LAREW
DEBORAH SVEC-CARSTENS
CLAIRE M. DIALLO
Larew Law Office
504 E. Bloomington Street
Iowa City, Iowa 52245
Ph: (319) 337-7079
Fax: (319) 337-7082
Email: James.Larew@LarewLawOffice.com
Email: Deborah.Svec-Carstens@LarewLawOffice.com
Email: Claire.Diallo@LarewLawOffice.com
ATTORNEYS FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF SERVICE

The undersigned certifies a copy of Plaintiff's Final Brief was served on the 28th day of January, 2022, upon the clerk of the supreme court and upon the following persons:

Attorneys for Appellees:

Michael C. Richards, AT0010828
Daniela Erickson, AT0013848
DENTONS DAVIS BROWN, P.C.
215 10th Street, Suite 1300
Des Moines, Iowa 50309
Telephone: 515/288-2500
Facsimile: 515/243-0654
Email: MikeRichards@dentons.com
Email: DanielaErickson@dentons.com
ATTORNEYS FOR DEFENDANT
CITY OF WINDSOR HEIGHTS, IOWA

Benjamin P. Roach
Nyemaster Goode, P.C.
700 Walnut Street, Suite 1600
Des Moines, Iowa 50309
Email: bproach@nyemaster.com

Michael A. Klutho
Jessica L. Klander
Bassford Remele
A Professional Association
100 South 5th Street, Suite 1500
Minneapolis, MN 55402-1254
Email: mklutho@bassford.com
Email: jklander@bassford.com
ATTORNEYS FOR DEFENDANT
MUNICIPAL COLLECTIONS OF AMERICA, INC.

By: EDMS

/s/ *Andrew Kramer*

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

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Dated this 28th day of January, 2022.

Respectfully submitted,

/s/ James C. Larew

JAMES C. LAREW
DEBORAH SVEC-CARSTENS
CLAIRE M. DIALLO
Larew Law Office
504 E. Bloomington Street
Iowa City, Iowa 52245
Ph: (319) 337-7079
Fax: (319) 337-7082
Email: James.Larew@LarewLawOffice.com
Email: Deborah.Svec-Carstens@LarewLawOffice.com
Email: Claire.Diallo@LarewLawOffice.com
ATTORNEYS FOR PLAINTIFFS-APPELLANTS