IN THE SUPREME COURT OF IOWA

No. 21-1015

JAMES A. STOGDILL, MATHEW D. JOHNSON and KIRK R. 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 REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES, AND ORDINANCES

OTHER REFERENCES

SUMMARY OF THE ARGUMENT

The City of Windsor Heights ("City") recognizes that Iowa Code section 364.22(2) allows that a municipality may characterize an alleged violation of an ordinance as a municipal infraction subject to its provisions, but then ignores that the City has expressly done exactly that in its own Ordinance. The City further makes the bewildering argument that there is no distinction between a *threat* to do something and the actual *act* of doing that something. The law recognizes such a distinction, however: a *threat* and an *act* can constitute two separate and distinct injuries. And each injury, distinctly, can allow for a separate cause of action. Contrary to the City's assertion, this case does not involve a simple application of *Venckus v. City of Iowa City*, 930 N.W.2d 792, 808 (Iowa 2019), whose facts have no relevance, here. Rather, this case involves the attempted application of Iowa Code section 670.5 to insulate the City from its illegal use of the Offset Program, years after an alleged incident, to collect fines that had never been subjected to a municipal infraction process or resulting judgment, directly contrary to Iowa Code section 614.1(1) and Iowa Code section 364.22. These are "fundamental and urgent issues of broad public importance." Iowa R. App. P. 6.1101(2)(c), (d). The City's unlawful and coercive uses of governmental power must be addressed, and remedied.

The City also appears to argue that despite its contract with the Department of Administrative Services ("DAS") to seize income tax refunds for alleged automated traffic enforcement ("ATE") violations, it really has no role in the challenged Offset Program, and that, therefore, it gets to just sit back and accept money drained from the pockets of citizens without any responsibility. It cannot. Its use of the Offset Program must comply with the law. The City violated the law when it submitted to DAS "debts" arising from alleged ATE violations which had never been reduced to judgments for liability by the Iowa District Court, in violation of Iowa Code section 364.22 and *Behm v. City of Cedar Rapids*, 922 N.W.2d 524 (Iowa 2019).

For its part, there is no dispute that Defendant-Appellee Municipal Collections of America ("MCOA") has a direct financial interest in the City's mis-use of the Offset Program, by drawing a contingency fee of 10% of every penny that the City unlawfully collects through DAS. In the same way that the City cannot claim it is an innocent bystander to DAS's administration of the Offset Program, so, too, MCOA cannot legitimately disclaim its involved complicity with the wrongful seizures of taxpayers' refund monies. While MCOA may not be the entity seizing the funds of vehicle owners after its written threats and calls fail to lure payments, the company maintains its active monetary interest in the City's wrongful practice, and, therefore, its involvement in the collection process is also unlawful and must be stopped.

ARGUMENT

I. SEIZING FUNDS THROUGH THE OFFSET PROGRAM IS A NEW AND SEPARATE INJURY FOR WHICH A NEW CAUSE OF ACTION ARISES

When Plaintiff-Appellant Alesha Smith was mailed[1] a Notice of Violation ("NOV") of the City's ATE Ordinance for allegedly speeding "on or about" March 17, 2017, that document included an unlawful threat. (App. 269). Specifically, the NOV asserted that "[f]ailure 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." (*Id.*). Pursuant to *Behm*, this threat was unlawful, as "the *only* way to enforce a violation of an ordinance on a person who refuses voluntary payment is to launch a municipal infraction

[1] While it is not material to the issues before the Court, it is noteworthy that the City claims that it "mailed" the NOV in its recitation of facts. City's Brief, p. 13. This is not true, however, as the City contracted out even this task to another party not named in this litigation: American Traffic Solutions (now Verra Mobility). *See* Ian Richardson, DES MOINES REGISTER, *Windsor Heights Will Remove Its Speed Cameras in the Spring*, Dec. 4, 2019, *available at* https://www.desmoinesregister.com/story/news/local/windsor-heights/2019/12/04/windsor-heights-removing-its-speed-camera-spring/2611362001/) and Verra Mobility website, *available at* https://www.verramobility.com/history/. The City wrongfully disclaims responsibility for challenged acts when it suits it, and incorrectly claims responsibility for other acts when it does not feel at risk.

proceeding." 922 N.W.2d at 565 (emphasis added).[2] Similarly, the second, so-called "Delinquent Notice of Violation," contained the same unlawful threat. (App. 271). Ms. Smith, however, did not file a lawsuit to challenge this unlawful threat.[3]

Just under a year later, Ms. Smith received yet another notice, this one dated February 2018, informing her that her income tax refund was subject to a seizure under the Offset Program. (App. 282). This notice informed Ms. Smith that her entire income tax refund in the amount of $320 had been seized for an allegedly owed amount of $88.00; she subsequently received her refund less that amount in April 2019. (App. 282, 285). The amount of $88.00 clearly already included either amounts allegedly owed to American Traffic Solutions and/or MCOA for its/their participation in collection efforts, as the amount was greater than the original $65.00 fine imposed for the alleged speeding violation. (App. 269). This seizure constitutes a new and separate injury, and Ms. Smith challenged it in her December 2019 petition, filed well within the two-year statute of limitations in Iowa Code section 670.5. Clearly, when Ms.

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[2] It is further contrary to *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."). That is why, as Appellants have argued, the use of the Offset Program for this collection is preempted by Iowa law.

[3] As she informed the City, she was not the one driving the car, as it was being test-driven for sale. (App. 281).

Smith's income tax refund was seized based on the City's allegation that she had earlier violated its ATE Ordinance—although liability had never been established in a judgment—that seizure constituted a new and distinct injury. It was not an accrual of any injury, and it had not stemmed only from the NOV.

Indeed, even the initial threat contained in the NOV had been unclear, as it had also referenced the *possibility* that "[a]ction *may* also be taken in state district court." (App. 269) (emphasis added).[4] At that time, it would have been difficult for Ms. Smith to have decided which threat to have challenged if she had determined to have done so. The City seems to argue that "injury" and "accrual" are the equivalent of a threat and an actual injury. City's Brief, p. 19. That is absurd. By the City's argument, one would have to bring a lawsuit for theft after one was merely threatened with a theft, but if the actual theft occurred more than two years later, the statute of limitations would bar a lawsuit for that theft. Such is not, and could not be, the law.

The law is clear that a *threat* of a theft may be immediately actionable; there can be no doubt that an *actual* theft, one that occurs years later, would

[4] Of course, bringing a municipal infraction proceeding in state court is exactly what the City was required to have done in the first place. Iowa Code § 364.22(6), (7), (10); *Behm*, 922 N.W.2d at 562, 565. The City ignores this language and only focuses on the "will result in this penalty being forwarded to collections to the Iowa Income Tax Offset program" (City's Brief, p. 18) (emphasis removed), but that is the threatening language that is clearly unlawful, and the action is preempted.

result in an additional injury, a wrongful act allowing for a new cause of action to be filed within that injury's statute of limitations. The City's failure to distinguish between a threatened action and the act itself muddles the wrongfulness of its conduct. On the one hand, there is its threatened wrongful conduct (to seize income tax refund money) and, on the other hand, there is its actual seizure and receipt of income tax refund money, years later, without obtaining an order finding liability and entering a judgment for a specific amount of money. After receiving unlawful threats in 2017, Ms. Smith's injury challenged in this lawsuit—one based on the actual seizure of her funds from her income tax refund—actually occurred in April 2019, well within the two-year timeline required by Iowa Code section 670.5.

The City's continued reference to and reliance on *Venckus* entirely misses the difference between multiple, serial injuries, ones that might be discovered, or accrue, on different dates, as opposed to a single injury that has multiple facets, some of which may only be discovered at a later date. City's Brief, pp. 9, 17-21. Indeed, the *Venckus* Court recognized that each cause of action had to be assessed on its own, and it could not determine whether 670.5 barred the other claims on a motion to dismiss. 930 N.W.2d at 809 (reviewing defamation

claim first and finding that the last alleged defamatory act[5] had occurred more than four years prior to the filing of the petition, but finding insufficient evidence to determine whether other claims were time-barred).

In the same way, if Ms. Smith's claim, in this instance, had been based on the unlawful threat contained in the NOV she had received, alone, it is arguable that such a claim could be time-barred. But that is not what she has alleged; that is not the claim she has advanced. *Venckus,* therefore, does not in any way support the City's assertion that somehow the date of the *threat* of its potential use of the Offset Program is the date that started running the limitations clock. The clock starts running when the injury occurred. *Venckus*, 930 N.W.2d at 808. And the clock for Ms. Smith's claim in this lawsuit started to run when a new injury occurred—the date upon which Ms. Smith's income tax refund had been seized and taken by the City, in 2019, in a manner that violated Iowa law.

With respect to the City's taking of her income tax refund using the Offset Program, any *accrual* of the claim and the subsequent and separate *injury* are both within two years from the filing of her lawsuit. *Cf.* City's Brief, pp. 18-19. As Plaintiffs previously described, accrual generally describes the discovery

[5] Based on the City's logic here, even the test for defamation would be limited to the very first incident of defamation, as opposed to what the law requires as outlined in *Venckus*, which is the last alleged defamatory act.

rule, where "a cause of action based on negligence does not accrue until plaintiff has in fact discovered that he has suffered injury or by the exercise of reasonable diligence should have discovered it." *Callahan v. State*, 464 N.W.2d 268, 270 (Iowa 1990) (citation omitted); *see also Farnum v. G.D. Searle & Co.*, 339 N.W.2d 392, 396-97 (Iowa 1983) ("[C]ourts often hold that a claim does not accrue until it is discovered.") (citation omitted).

Plaintiffs do not dispute that the discovery rule does not apply to Iowa Code section 670.5 (formerly section 613A.5) pursuant to *Montgomery v. Polk County*, 278 N.W.2d 911, 914-16 (Iowa 1979) and as affirmed in *Doe v. New London Cmty. Sch. Dist.*, 848 N.W.2d 347, 353-54 (Iowa 2014). Rather, Plaintiffs dispute that there is any material difference between the injury and its accrual in this case, with respect to the City's directed seizure of funds through its use of the Offset Program. Two years from the date of the injury is two years from when DAS seized Ms. Smith's refund, providing a portion of it to the City. Ms. Smith therefore discovered her injury, the seizing of her funds, or it accrued, at the same time the injury had occurred: when the funds were taken. Her lawsuit in December of 2019 against the City for such actions was filed well within the two-year timeline created by Iowa Code section 670.5.

The City also relies on the language that the limitations period is to protect municipalities since they "operate under greater fiscal constraints." City's Brief, p. 19 (citing *Venckus*, 930 N.W.2d at 809). This is perhaps the

City's most disingenuous argument with respect to these claims, where it does not feel constrained by a statute of limitations imposed on collecting the "payment of a penalty or forfeiture under an ordinance, within one year" as required by Iowa Code section 614.1(1). The hypocrisy of the City arguing it has certain financial constraints requiring protection of cities while still taking people's money years after an alleged incident, unconstrained by the statute of limitations, is extraordinary.[6] The City is operating without legal constraints in this case, and certainly reaps substantial fiscal benefits by doing so, including its illegal collection of Ms. Smith's mischaracterized "debt" to the City from her income tax refund more than two years after the alleged traffic camera violation had occurred.

The City also appears to argue that since it did not create or administer the Offset Program, it cannot be held responsible for how the City uses it. City's Brief, p. 20-21. The City errs in at least three fundamental respects. First, the City illegally received the $88.00 fine, an amount seized by DAS, without a finding of liability or an entry of judgment by the Iowa District Court upon the conclusion of a municipal infraction lawsuit. The wrongfulness of that conduct

[6] *Venckus* in no way anticipated such an unjust result. *Cf.* City's Brief, p. 20 n. 2. The City again confuses the application of accrual and injury to the Offset Program's infliction of an injury caused by the seizure of funds—an injury separate and distinct from an earlier injury caused by a wrongful threat of an unlawful use of power. The accrual language is a red herring here, and meaningless in this context, as these are separate and distinct injuries.

is clear whether or not the City *administers* or *uses* the Offset Program. *Cf.* City's Brief, p. 20.

Second, the City seems to ignore the Memorandum of Understanding (MOU) it entered into with DAS to use the Offset Program, under which the City promised that it would comply with the law. (App. 294-299). Indeed, there is express indemnification language contained therein regarding the City's duty to indemnify and hold DAS and the State of Iowa harmless. (App. 298). It is the City that failed to actually establish proof of liability pursuant to Paragraph 6.3 of the MOU, as the ATE citations are not "legally enforceable" debts. (App. 296). The City similarly must comply with the law, pursuant to Paragraph 6.1. (App .295). It has not done so, in failing to establish the ATE penalties are a "liquidated sum due, owing, and payable" as required by Iowa Code section 8A.504(2)(a) applicable to this case.

Third, the Offset Program generally administered by DAS is not the illegal collection issue here; Plaintiffs-Appellants do not challenge the Program's operation, generally. Rather, the City's wrongful use of it is the problem. The City's failure to file a municipal infraction lawsuit to enforce the allegations made in its Notice of Violation documents, followed by the City's failure to obtain a judgment of indebtedness in a specific amount, as required by (former) Iowa Code section 8A.504, has resulted in the City's unlawful attempts to use the Offset Program to collect Ms. Smith's (and others,

similarly-situated) ATE fines and penalties. The City cannot disclaim all responsibility for the same and assert that these arguments are "not properly brought against the City" after it commands DAS[7] to collect these funds on its behalf. *Cf.* City's Brief, p. 21. The City is the one referring these claims to DAS unlawfully, and it is not DAS's responsibility to confirm that the debts are lawful and can be collected.

Ms. Smith's injury took place when her income tax refund was offset by the amount that the City had wrongfully alleged was owed to it and seized, in 2019.[8] (App. 282, 285). Ms. Smith and Plaintiffs filed suit in December of 2019, well within the two-year time period provided by Iowa Code section 670.5. The district court's determination that Iowa Code section 670.5 applied to preclude Ms. Smith's claims was error, and must reversed.

II. IOWA CODE SECTION 364.22 PREEMPTS THE CITY'S USE OF THE OFFSET PROGRAM FOR INVOLUNTARY PAYMENTS

While the principles of implied conflict preemption must be applied to each case, as Appellants argued in their opening brief, the preemption analysis

[7] Ironically, in the same breath, the City argues that the Notices were clear in instructing vehicle owners NOT to contact DAS. City's Brief, pp. 15, 30. It would be surprising indeed to blame DAS for the City's collection efforts where there is no right to even contact them to contest the unlawful collection.
[8] Perhaps it is best stated that the City's alleged injury occurred in March of 2017, when Ms. Smith was first wrongfully accused of violating its ATE ordinance, but Ms. Smith's injury occurred when her money was unlawfully taken, not just when she was wrongfully accused. *Cf.* City's Brief, p. 21.

as applied to the use of the Offset Program to seize involuntary ATE payments has already been presaged and undertaken by the Supreme Court. *Behm*, 922 N.W.2d at 559-567. The *Behm* Court could not have been clearer:

> 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.

Id. at 565 (emphasis added); *see also Behm* at 562 ("Under Iowa Code section 364.22, 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.") (citations omitted). The City's attempt to focus on the alternative administrative hearing process reviewed in *Behm*, and found not to be preempted, is unavailing. *Cf.* City's Brief, p. 22. That is not the claim made here. Ms. Smith is challenging the use of the Offset Program to collect an alleged ATE citation that was never rendered a municipal infraction judgment of indebtedness, not the administrative review process (which she was prevented from using because her mail requesting the same, sent to a Tempe, Arizona address, allegedly arrived too late).

The City then attempts to backtrack and argue that Iowa Code section 364.22(2) allows that it "may" provide that a violation of an ordinance is a municipal infraction, and boldly claims that the "City's ATE Ordinance *does not* provide that a violation is a municipal infraction." City's Brief, p. 24 (emphasis

added) (citing Windsor Heights Ordinance 60.02.08 (App. 289)). But the City's Ordinance does, in fact, clearly state that a violation of *any* ordinance—whether ATE or otherwise, no distinction is made—*is* a municipal infraction, as cited by Plaintiffs-Appellants. Specifically, Windsor Heights Ordinance section 4.01 reads as follows:

> **A violation of this Code of Ordinances or any ordinance or code herein adopted by reference or the omission or failure to perform any act or duty required by the same**, with the exception of those provisions specifically provided under State law as a felony, an aggravated misdemeanor, or a serious misdemeanor, or a simple misdemeanor under Chapters 687 through 747 of the *Code of Iowa*, **is a municipal infraction** punishable by civil penalty as provided herein.

Windsor Heights Ord. § 4.01 (emphasis added). (App. 287). The City cannot ignore the express language of its own Code of Ordinances. A violation of an ordinance is a municipal infraction, and that means Iowa Code section 364.22 governs its enforcement. This is the equivalent of the Cedar Rapids ordinance at issue in *Behm*, which also defined a violation of its ordinance as a municipal infraction. *Behm*, 922 N.W.2d at 562 (citing Cedar Rapids Code section 1.12).

There is therefore no distinction between the City's ordinance and the Cedar Rapids Ordinance (*cf.* City's Brief, p. 24), the focus of the *Behm* Court's decision. Windsor Heights has the same choice provided by the Iowa Supreme Court: "file a municipal infraction or abandon the citation (and associated fine) issued under the ordinance." *Behm*, 922 N.W.2d at 564. The use of the Offset

Program by the City to enforce an involuntary payment is directly inconsistent with this requirement, and therefore irreconcilable with it. *Behm*, 922 N.W.2d at 565 ("[T]he only way to enforce a violation of an ordinance on a person who refused voluntary payment is to launch a municipal infraction proceeding."). It is clearly preempted, and the City's use of different collection methods of an involuntary payment is unlawful. While alternative methods can exist for the collection of voluntary payments of ATE citations, as in *Rhoden v. City of Davenport*, 757 N.W.2d 239, 241 (Iowa 2008), where the payments are involuntary (and here directly challenged), *Behm* is clear. 922 N.W.2d at 565.

These are not the options that Cedar Rapids merely hemmed itself in with (*cf.* City's Brief, p. 24); this is what the law requires. To enforce an involuntary payment of a fine based on an allegation of a municipal code violation (such as the City's ATE Ordinance), a City must first file a municipal infraction lawsuit, pursuant to the requirements of Iowa Code section 364.22, and obtain a judgment from the Iowa District Court. *Weizberg*, 923 N.W.2d at 220. To the extent the City's ATE Ordinance attempts to provide alternative methods to collect involuntary penalties (City's Brief, p. 25; App. 292), the efforts are irreconcilable with Iowa Code section 364.22, and are preempted by it. The City's attempt to enforce its ordinance through clearly different means than that which is expressly provided by the Iowa General Assembly and as reinforced by the Iowa Supreme Court, cannot stand. *See James Enterprises, Inc. v.*

City of Ames, 661 N.W.2d 150, 153 (Iowa 2003) (holding an ordinance that prohibited smoking in restaurants during certain hours was preempted by a state law that allowed restaurants to have designated smoking areas); *cf. City of Davenport v. Seymour*, 755 N.W.2d 533, 543-44 (Iowa 2008) (holding that the use of ATE systems to enforce traffic laws was not preempted by Iowa state law where the legislature had not prohibited certain enforcement mechanisms). Iowa Code section 364.22, as interpreted by *Behm*, prohibits any enforcement mechanism of involuntary payments other than filing a municipal infraction and proving liability. *Behm*, 922 N.W.2d at 562, 565.

The City's attempt, further, to re-write its history is made clear by its inconsistent reliance on the NOV issued to Ms. Smith, pointing to language that "states that a civil infraction *may* be required to be filed in district court." City's Brief, p. 25. This is in stark contrast to its prior assertion with respect to the injury inflicted by the City, where it also threatened that "a failure to pay or contest liability by the due date . . . **will result in this penalty being forwarded to collections to the Iowa Income Tax Offset Program**." City's Brief, p. 18 (emphasis in original). The City wants to have it both ways, but it cannot. Either the Notice was clear in asserting that the Offset Program will be used, or it was ambiguous in threatening a variety of different future contingencies, one of which was a new unlawful injury. As noted above, the NOV threatens action that is preempted by state law; the threat to go

immediately to seizures through the Offset Program, without any court process, cannot be reconciled with Iowa Code section 364.22 and Iowa Code section 8A.504.

If there is no liability until the affirmative step is taken of filing municipal infraction lawsuit and obtaining a district court judgment (*Behm*, 922 N.W.2d at 562), then there can be no "proof of liability," or "debt" or "liquidated sum due owing and payable" that the Offset Program minimally requires. The City cannot choose its own Ordinance over Iowa law. To enforce an involuntary payment of a fine or penalty based its allegation that a person violated its ATE Ordinance, it had only one option: file a municipal infraction lawsuit; prove its case to an Iowa District Court judge based on clear, satisfactory and convincing evidence; and obtain a judgment for a specific amount. *Behm*, 922 N.W.2d at 565. The district court erred in failing to address the argument with respect to Ms. Smith and find preemption, and must be reversed.

III. THE CITY VIOLATES THE STATUTE OF LIMITATIONS IN COLLECTING ATE CITATION FINES FOR ALLEGED VIOLATIONS THAT OCCURRED MORE THAN ONE YEAR EARLIER

The City wrongfully uses its coercive powers of government to seize funds allegedly owed to it for alleged violations of a local ordinance that occurred more than one year prior to the City's seizure or taking of those

funds. Plaintiffs below sought a declaratory judgment, asserting that such enforcement was unlawful pursuant to Iowa Code section 614.1(1). (App. 7, 16). Given the declaratory judgment, it is therefore irrelevant whether it is an affirmative defense or not; Plaintiffs raised it at the earliest possible opportunity and could not have waived it. *Cf.* City's Brief, p. 34. Indeed, as has already been established, the problem is that the City failed to follow the requirements of the law by failing to file a municipal infraction lawsuit, at which time Plaintiffs could have asserted the limitations affirmative defense. While the statute of limitations does not impose direct liability on the City, it can certainly be determined as part of a declaratory judgment that the City is unlawfully violating the statute of limitations and therefore barred from all past and future attempts to do so. *See* Iowa R. Civ. P. 1.1101 ("Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further relief is or could be claimed.").[9]

As noted in Appellants' opening brief, this is particularly egregious given the inapplicable shield on which the City wrongfully relies in Iowa Code section 670.5. There would be no constraint on the coercive power of government if it could prosecute violations of its ordinances without reference to any limitations

[9] This is further evidence of Mr. Determan's right to assert such claims against the City on his behalf and for others, with respect to his status. *Cf.* City's Brief, p. 35.

period. Ms. Smith was subjected to the Offset Program more than two years after her initial receipt of an NOV. (App. 285). Mr. Determan brought his claims more than a year after his citation was sent, and was still subject to its potential enforcement.

The City argues that Iowa Code section 614.1(1) concerns the filing of a municipal infraction lawsuit, and therefore is not subject to it. City's Brief, p. 34. The City, however, again ignores the plain language of the statute itself. The statute of limitations applies to *any* enforcement of a penalty under an ordinance, and is not limited by any reference to a municipal infraction. Iowa Code § 614.1(1) ("[T]o **enforce** the payment of a penalty or forfeiture under an ordinance, within one year.") (emphasis added). The plain meaning of "enforce the payment" includes any and all means to do so, including the seizure of payments through the Offset Program. *See Rilea v. Iowa DOT*, 919 N.W.2d 380, 389 (Iowa 2018) ("When we are asked to interpret a statute, we first consider the plain meaning of its language.") (citation omitted).

More specifically, the plain meaning of "enforce" as applicable here, is to constrain or compel, which is exactly what the City is doing with respect to funds owned by vehicle owners, such as Appellants, through the Offset Program. *See* Merriam-Webster (1828), Online Edition, Enforce (3), *available at* https://www.merriam-webster.com/dictionary/enforce; *see also* Black's Law Dictionary Free Online, 2nd ed. (defining enforce as "[t]o put into execution; to

cause to take effect; to make effective; as, to enforce a writ, a judgment, or the *collection of a debt or fine*."), *available* at https://thelawdictionary.org/enforce/ (emphasis added). The City is collecting a fine through the Offset Program. It cannot reasonably argue that seizing the funds of an alleged debt is not an enforcement of the same. Indeed, it does not try to argue so, and instead only argues that Iowa Code section 614.1(1) only concerns the filing of municipal infractions. City's Brief, p. 34. The plain language of the statute demonstrates otherwise. Taking money directly without proving one's case or allowing any process is certainly enforcing a payment of a penalty. And the City is also clearly attempting to enforce its ordinance in using the Offset Program, as it has argued that it has the right to do so under Windsor City Heights Ordinance section 60.02.08.

Moreover, as argued above, of course, the City was *required* to file a municipal infraction lawsuit to *enforce* the involuntary payment of a fine or penalty resulting from an alleged violation of a municipal ordinance pursuant to Iowa Code section 364.22 and *Behm*. Therefore, such filing had to be within one year of the alleged violation. Ms. Smith and Mr. Determan sought to represent a class of citizens similarly situated, and both filed their lawsuits against the City more than a year after the initial NOV had been issued to each of them, which had either not been resolved or had been subject to the Offset Program. In a noteworthy illogical juxtaposition, the City argues that Mr.

Determan did not have standing to argue against the unlawful tax because he did not suffer any harm from offset (City's Brief, p. 36), but then argues at the same time that Ms. Smith *did* have standing to challenge the Offset Program prior to having paid the fine because of the alleged injury occurring years earlier when the NOV was received. City's Brief, p. 21. Those two positions cannot be reconciled. Either a plaintiff did not have standing to challenge the use of the Offset Program because that is when the injury occurred (the taking of the funds), or a plaintiff had standing when he or she received the NOV threatening the use of the Offset Program, in which case a plaintiff also had standing to challenge its use as an unlawful tax.[10] If the threat of an injury provides standing for the subsequent injury as the City argues for Ms. Smith (when making a defensive statute of limitations argument), then Mr. Determan would also have standing upon the threat of the use of the Offset Program, whether it were actually enforced or not. In any event, however, as described in his opening brief, Mr. Determan was still subject to Offset enforcement when he filed suit, and the now-former mayor of Windsor Heights' protestations

[10] The City continues to argue that the primary purpose of the ATE Ordinance is safety, and not revenue generation (City's Brief, p. 37); if that were the case, then the Ordinance would not have such a long section as to how to collect the fines unlawfully (App. 291), contrary to Iowa law. Moreover, it would not have been necessary to continue to revise its contract with MCOA and reduce the fees if revenue were not the main goal. *See* App. 261 and App. 266 (reducing contingent interest of MCOA in collection from 30% to 25%).

regarding its intended lack of enforcement occurred years after the NOV was issued.

The district court's determination with respect to the statute of limitations was erroneous, including the failure to address it with respect to Ms. Smith's claim, and must be reversed.

IV. DUE PROCESS IS VIOLATED WHERE THE OFFSET PROGRAM IS USED WITHOUT ANY HEARING

Appellants here challenge the City's use of the Offset Program as a violation of due process, and not the ATE Ordinance or administrative hearing generally. *Cf*. City's Brief, p. 27 (citing *Weizberg*, 923 N.W.2d at 214-15, and *Behm*, 922 N.W.2d at 569). And contrary to the City's assertion, Ms. Smith was not provided any opportunity to contest the underlying citation, which was how the Notice of Offset was actually being implemented, as MCOA informed her that she could not contest the actual fine at the time. (App. 284). The City changes tactics again and relies on its unlawful threats in its NOV that one will be subject "to formal collection procedures" (City's Brief, p. 29) years earlier as if that is sufficient notice and opportunity to be heard with respect to the use of the Offset Program. The City here does not bring up the vague reference in the same NOV that "[a]ction may also be taken in state district court" at the same time. (App. 011). It is difficult to fathom how such an ambiguous NOV, sent more than one year prior to the Offset Program's actual use, provided adequate

notice of that use. *See War Eagle Vill. Apartments v. Plummer*, 775 N.W.2d 714, 720 (Iowa 2009) (describing need for notice to "be of such nature reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance . . .") (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Indeed, the NOV was not even clear as to what might occur next, let alone providing notice that a matter was actually pending (where the Offset would not occur for more than a year) and one can "choose for himself [or herself] whether to appear or default, acquiesce or contest." *Id.*

Ms. Smith was deprived of any adequate notice of the Offset Program, or her ability to contest it. Even in the Notice of Offset, it was still unclear and ambiguous, as Ms. Smith contested it directly to DAS, as opposed to contesting through MCOA or the City. (App. 281, 282, 284). This is likely because MCOA told her on the phone that they would not accept any contest to the citation. (App. 284). This is not what Iowa Code section 8A.504(2)(f)(1) required, which expressly provided that one had to be given the "opportunity to contest the liability."[11] Ms. Smith received no such opportunity, in violation of her right to due process. Her funds were unlawfully seized without her ever having the opportunity to challenge the fact that she was not even driving the vehicle, or

[11] As noted in Appellant's initial Brief, this provision has been amended and is now located at Iowa Code section 421.65 (effective January 2021).

forcing the City to prove its case by a preponderance of clear, satisfactory, and convincing evidence, as required by Iowa Code section 364.22(6). The district court erred in failing to so-find, and should be reversed.

V. MCOA IS LIABLE FOR ITS DIRECT PARTICIPATION IN THE OFFSET PROGRAM

While MCOA also disclaims all involvement in the Offset Program, it ignores that it receives a defined contingency-fee benefit for each use of the program by the City. Moreover, MCOA was expressly delegated authority to participate in it. Specifically, as part of its "Collection Services Agreement Amendment," MCOA promised:

> **MCA will include all debts in the DAS offset program on behalf of the City of Windsor Heights** and the above fee structure will apply to all Automated Traffic Enforcement fines thru the offset program. **MCA shall retain 10% of the proceeds** from any delinquent ambulance bill, utility bill, or parking citation recovered thru the DAS offset program as a commission for the services provided. All remaining amounts shall be paid to the municipality.

(App. 267) (emphasis added). This was signed by MCOA President Jeff Wood. (*Id.*). Despite that, Mr. Wood has sworn to a different reality in his declaration. *Cf.* MCOA's Brief, p. 6 ("If the City decided to utilize the Program, the submission to the Program was made directly by the City. . . . In sum, MCOA has and had no involvement in the Offset Program.") (App. 236). Like the City, MCOA appears to be ignoring the facts, and arguing because DAS seized the funds, the fact that the City directed it to and MCOA assisted in it and

benefitted have no relevance.[12] That is not the case. The City and MCOA are directly involved and participating in the unlawful collection, directing DAS what to do despite not having the legal authority to do so, due to the City's failure to obtain a judgment of indebtedness for a specific amount from the Iowa District Court. Appellants are not asserting any sort of reverse vicarious liability (*cf.* MCOA's Brief, p. 9 n.6), which is a contradiction in terms, but rather, direct liability for MCOA's own actions. While the City may also be vicariously liable for the actions of MCOA, each party can be individually liable for its own unlawful actions as well. Indeed, the Indemnification provisions contained in Article VI of their Collection Services Agreement demonstrate and anticipate as much. (App. 262).[13] There is no need to find vicarious liability for an agent's own actions, as an agent is liable directly for the agent's own unlawful actions. *See, e.g., Peterson v. McManus*, 187 Iowa 522, 547, 172 N.W. 460, 469 (1919) ("[W]here an agent, by actual fraud, obtains money, he may be made to restore it in a suit to rescind, though he is not a party to the contract, and though he has turned the money over to his principal."); *Haupt v. Miller*, 514

[12] In a similar logical conundrum as that argued by the City, MCOA asserts that it cannot be held liable for the City's actions, but it is still protected by the statute of limitations applicable to the City. MCOA's Brief, p. 9. Of course, as Appellants argued, the statute of limitations has no application to these facts where there was a subsequent separate injury years later, and therefore MCOA is also not protected by it.

[13] How the parties address their liabilities and indemnifications between each other of course does not change that MCOA is a proper party to the case.

N.W.2d 905, 908-09 (Iowa 1994) ("[S]tatus as an agent does not insulate does not insulant an agent from liability for wrongful acts.") (citation omitted).

As described previously, when Ms. Smith contacted MCOA with questions about the Notice of Offset she had received, 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 document. (App. 284). This is further evidence of MCOA's direct participation in the illegal Offset Program, and whether the City is also liable for these additional actions will depend on whether MCOA had express or implied authority from the City to so indicate, or whether MCOA was acting outside of any such authority. *See Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 100 (Iowa 2011) (defining actual authority as composed of either express or implied authority, depending on the evidence demonstrating the same). MCOA clearly had express authority to "include all debts in the DAS offset program on behalf of the City of Windsor Heights[,]" pursuant to its contract with the City. (App. 267). Based on the Notice of Offset ("please contact the City's collection agency"), MCOA also had express authority to answer calls on behalf of the City regarding the same. (App. 282). Future discovery, upon the Court's remand of this case, will assist in the determination as to what instructions the City gave to MCOA, and whether, in turn, MCOA complied with those

instructions in representing to Ms. Smith that she could not contest the underlying citation. Again, however, that does not change that MCOA can be liable for its own unlawful actions in the collection process.

The district court's granting of summary judgment as to all claims preserved against the City should also therefore be reversed as to MCOA.

CONCLUSION

The City's and MCOA's use of the coercive power of government to seize funds to which neither has a proven right, often years after any alleged violation of a local ordinance has occurred, cannot be countenanced. The City cannot use the statute of limitations to protect itself where a new injury occurred in the wrongful seizure of citizens' income tax refund money, and then ignore the statute of limitations applicable to its own enforcement actions.

For one or more of these reasons, and those cited in Appellants' Proof Brief filed on November 29, 2021, Appellants respectfully request that the district court's decision be reversed as to all issues decided adversely to Appellants except as otherwise noted.

Dated this 28th day of January, 2022.

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on January 28th, 2022, I electronically filed the foregoing Final Reply Brief of Plaintiffs-Appellants with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Pursuant to Rule 16.317(1)(a), this constitutes service of the document on the following for purposes of the Iowa Court Rules.

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

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because: this brief contains 6,786 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.

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