IN THE SUPREME COURT OF IOWA

No. 22-0536

FRANCIS LIVINGOOD, CHRISTOPHER MAURY, AND DANIEL ROBBINS,

Plaintiffs-Appellants,

v.

CITY OF DES MOINES, IOWA,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
NO. CVCV053512
HON. SCOTT D. ROSENBERG, JUDGE

FINAL BRIEF OF PLAINTIFFS-APPELLANTS

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ROUTING STATEMENT

This case involves substantial issues of first impression—along with a companion case of *Stogdill v. Windsor Heights*, No. 21-1015—regarding a city's—here, Des Moines ("City")—use of a state government agency's (Iowa Department of Administrative Services ("DAS")) power to seize income tax refunds to pay fines for which the City has not first obtained a judgment of liability under the City's automated traffic enforcement ("ATE") Ordinance. Iowa R. App. P. 6.1101(2)(c).

This case, in addition, presents substantial due process questions regarding the validity of a municipal Ordinance. Iowa R. App. P. 6.1101(2)(a).

Finally, this case implicates the trial court's mis-application of the Iowa Supreme Court's decision in *Behm v. City of Cedar Rapids*, 922 N.W.2d 524 (Iowa 2019), under which the appellate court had determined that no involuntary penalty could be enforced for an alleged ATE violation without a district court judgment. The district court's opinion allowing the City to enforce the collection of penalties without preceding judgments after *Behm* therefore presents substantial questions of enunciated legal principles pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(f).

For these reasons, this case should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(a), (c), and (f).

STATEMENT OF THE CASE

Plaintiffs Jason Fett, Andrea Schram, and Francis Livingood filed this action in February of 2017, on behalf of themselves and those similarly situated, seeking injunctive relief against the City's use of the Iowa Income Tax Offset Program ("Offset Program"). The City used the Offset Program to seize income tax refund money held by the Iowa Department of Revenue ("IDR"), but allegedly owed to the City under its ATE Ordinance. In addition, Plaintiffs sought a declaratory judgment that the City's use of the Offset Program was unconstitutional and amounted to an unfair debt collection practice. Defendant sought a motion for partial summary judgment as to Plaintiffs Fett and Schram, asserting their claims were moot, which the district court granted in May of 2017. [1] Plaintiffs filed an amended petition in March of 2017, adding Plaintiff Christopher Maury and unlawful taking and unjust enrichment claims, and removing the unfair debt claim.

On March 31, 2017, Plaintiffs filed a motion for a preliminary injunction, seeking to halt the Offset Program collection of ATE citation fines that had not been reduced to a judgment, which motion was denied on May 30, 2017. On June 9, 2017, Plaintiffs filed a motion to amend and enlarge the

[1] Plaintiffs Fett and Schram did not appeal the district court's decision regarding their claims; their names were removed from the caption pursuant to the district court's order of May 30, 2017.

district court's ruling. On July 5, 2017, the district court denied Plaintiffs' motion.

On October 25, 2017, Plaintiffs filed a second motion to amend their petition, adding Plaintiff Daniel Robbins and a claim for declaratory judgment that the City's enforcement of ATE citations that were more than one year old violated the statute of limitations (Iowa Code section 614.1(1)). The district court granted Plaintiffs' motion to amend on November 30, 2017. After Plaintiffs filed some discovery requests in early 2018, the Court granted the City's motion for protective order in May of 2018. In July of 2018, Plaintiffs filed an unresisted motion to stay the case given the pending cases of *Behm v. City of Des Moines* (Supreme Court No. 16-1031), *Leaf v. City of Cedar Rapids* (Supreme Court No. 16-0435), and *Weizberg v. City of Des Moines* (Supreme Court No. 17-1489), which raised some similar issues to those advanced in this proceeding. The district court granted the stay on August 13, 2018.

After the opinions in the cases above were issued, Plaintiffs filed a motion to lift the stay and third amended petition in September of 2019, attaching the *Behm* decision and a DAS Ruling from September of 2019. Plaintiffs added claims, including that prosecutions of the Ordinance violated due process, and that the Offset Program's use was preempted by state law. The district court granted Plaintiffs' motion to lift the stay in November of 2019. On January 31, 2020, Plaintiffs filed a motion for summary judgment as

to their claims. The district court granted Plaintiffs' motion to amend and third amended petition on February 1, 2020. Defendant filed its motion for summary judgment on February 10, 2020. A hearing took place on March 13, 2020, regarding the pending cross-motions.

In June of 2021, Plaintiffs filed a motion for a status conference. In August of 2021, the district court ordered that newly-assigned Judge Rosenburg would rule on the pending summary judgment motions. On November 6, 2021, the district court granted the City's motion for summary judgment in its entirety, dismissing all of Plaintiffs' claims. On November 11, 2021, Plaintiffs filed a motion to amend and enlarge. On March 5, 2022, the district court denied Plaintiffs' motion to amend and enlarge. On March 21, 2022, Plaintiffs filed this appeal.

STATEMENT OF FACTS

A. Plaintiffs

1. Francis Livingood

In March of 2014, Plaintiff Francis Livingood was licensed to operate motor vehicles. (Amended Appendix page ("App.") 106, ¶3). Mr. Livingood occasionally uses I-235 Eastbound in Des Moines. (App. 106, ¶4). Mr. Livingood never received any Notice of Violation in 2014. (App. 106, ¶5). Mr. Livingood never received by certified mail a civil infraction from the City's

police department that he had violated the City's ATE Ordinance. (App. 106, ¶6). Rather, on a document dated March 30, 2015, issued by the City's Finance Director, and captioned, "NOTICE OF INTENT TO OFFSET AMOUNT OWING CITY OF DES MOINES AGAINST STATE INCOME TAX REFUND," Mr. Livingood was informed of the City's intent to take $65.00 of his funds held by the IDR. (App. 106, ¶7). According to the Offset Notice, Mr. Livingood had been found liable for violating and failing to pay a citation fine under the City's ATE Ordinance. (App. 107, ¶8). The Notice included documents in which the City alleged that, more than one-year earlier, on or about March 14, 2014, while traveling Eastbound I-235, Mr. Livingood's vehicle had been traveling at 71 mph, or 11 mph over the speed limit. (App. 107, ¶9). The City claimed that a document styled "2nd and Final Notice" had been mailed to him one year earlier. (App. 107, ¶9).

The Offset Notice had further stipulated that Mr. Livingood could not then contest the underlying liability for the alleged infraction. (App. 113). Rather, Mr. Livingood could only contest whether the amount "due" was correct under the City's Municipal Code/Schedule of Fees. (App. 113). Upon receipt of the Offset Notice, Mr. Livingood immediately contacted the City and told City employees what had happened—that he had never received the initial Notice documents and had never had an opportunity to contest the alleged

ATE violation. (App. 107, ¶¶10-12). The City employee with whom Mr. Livingood had spoken told him that it was too late for him to contest the speeding allegation. (App. 107, ¶13). Rather, that person told Mr. Livingood that all he could do was to challenge whether he had owned the truck and the amount of the penalty. (App. 107, ¶13). Mr. Livingood felt the situation was completely unjust, and retained the services of an attorney, who corresponded with the City. (App. 107, ¶14).

The City initially declared that it would convene a hearing at Mr. Livingood's request. (App. 107, ¶15). However, the City then changed its mind and, on May 27, 2015, agreed not to proceed with the use of the Offset Program; it directed the IDR to release the funds. (App. 107, ¶16). In doing so, however, the City indicated that there was "no need for a hearing on the matter *at this time*[.]" (emphasis added). (App. 127).

The City (and its corporate partner, GATSO, USA, Inc.) thereafter argued in a related action (*Brooks v. City of Des Moines*, 2016 U.S. App. LEXIS 21454 (8th Cir. Dec. 1, 2016)), that any claim by Mr. Livingood as to the City's efforts to seize his property were rendered moot because the City had disclaimed its intent to use the Offset Program against him. (App. 107-108, ¶16). Many years ago, however, nearly one and one-half years after the statement in *Brooks*, Mr. Livingood received a <u>new</u> Notice from the City, indicating that he owed the same money for the same March 14, 2014 alleged

violation that he had earlier tried to contest. (App. 108, ¶19). In this new Offset Notice, the City warned that if he did not pay the $65.00 demanded by the end of 2016, the City would initiate collection proceedings against him or use the Offset Program. (App. 108, ¶19). Upon information and belief, the City has not been able to seize Mr. Livingood's income tax refund because he has not had to pay into the system for the past two years, or 2017 and 2018. (App. 108, ¶22).

2. Christopher Maury

Plaintiff Christopher Maury and his wife Stephanie live in Manchester, Iowa. (App. 129, ¶1-3). Mr. Maury prepares and electronically files their joint state and federal income tax returns each year. (App. 129, ¶4-5). Normally, Mr. Maury promptly receives income tax refunds from the Internal Revenue Service ("IRS") and the IDR. (App. 129, ¶6). Given this pattern, Mr. and Ms. Maury normally plan their household budget anticipating that they will receive their tax refunds in February. (App. 129, ¶7).

When applying for their drivers' licenses, as required, Mr. and Ms. Maury had provided the Iowa DOT with their address and Social Security Numbers. (App. 129, ¶9). The Maurys jointly own several motor vehicles, and at the time of this alleged ATE violation, that ownership had included a 2012 Toyota Sienna. (App. 129, ¶10). On February 28, 2015, on Eastbound I-235, Mr.

Maury presumes that he was operating his vehicle—although, due to the passage of time, he does not remember the exact event. (App. 130, ¶13). While he did not originally recall it, he does now vaguely remember receiving an initial Notice of Violation document. (App. 130, ¶14).

In the first week of February 2017, Mr. Maury submitted the couple's 2016 joint state and federal tax returns. (App. 130, ¶15). As anticipated, the Maurys received their federal income tax refund almost immediately. (App. 130, ¶17). However, the Maurys heard nothing about their anticipated Iowa income tax refund. (App. 130, ¶18). On Friday, February 17, 2017, Mr. Maury decided to check the IDR's "Where's My Refund" website. (App. 130, ¶19). It confirmed that the Maurys' state income tax overpayment in the amount of $877 had been approved, but was being held "by the agency[,]" listed as Des Moines, and included a phone number to call. (App. 130, ¶20). Mr. Maury was not aware of any known obligation to the City. (App. 130, ¶21).

Mr. Maury called the number listed and was given three options: traffic citations; ambulance fees; and property fines. (App. 130, ¶22). In choosing the "traffic citations" option, Mr. Maury spoke with a City employee. (App. 131, ¶24). The City employee asked for Mr. Maury's SSN to look up his information. (App. 131, ¶25). Mr. Maury was informed that an I-235 ATE citation that had been generated on February 28, 2016, resulting in an alleged "debt" of $65.00 to the City. (App. 131, ¶25). The City employee stated further

that ATE Notices had been sent to Mr. Maury on March 4, 2016, and April 6, 2016. (App. 131, ¶26). Not, at that moment, recalling any prior Notices, Mr. Maury told the City employee that he was not aware of any traffic violation until this call. (App. 131, ¶27). Mr. Maury was informed that under the Offset Program his options were limited to: (1) paying the fine over the phone; or (2) continuing to have the $65.00 amount withheld along with the rest of the refund. (App. 131, ¶28).

The time lapse since the alleged speeding incident was so significant that Mr. Maury did not believe he could remember enough to defend himself. (App. 131, ¶29). Because the couple's entire tax refund of $877 was being held, Mr. Maury felt he had no option other than to grant permission to pay the $65.00 fine so that the remaining $812 refund would be released to pay bills. (App. 131, ¶30). Upon further reflection, Mr. Maury believed that the City's practice of withholding refund amounts of any alleged "debt" was egregious, and he would seek redress. (App. 131, ¶31).

Mr. Maury investigated and, on the Notice documents that the City employee had emailed to him, there was a website link to look up the ticket. (App. 131, ¶32). On www.viewcitation.com, a link was posted to the ATE Ordinance: Sec. 114-243. (App. 131, ¶33). There, Section D (3) of the Ordinance read that, "If a recipient of an automated traffic citation does not pay the civil penalty by the stated due date or request a trial before a judge or

magistrate, *a municipal infraction citation will be issued to the recipient by certified mail from the police department."* (emphasis added). (App. 132, ¶36). Such a certified mailing had never happened. (App. 132, ¶37).

3. Daniel Robbins

In 2013, Plaintiff Daniel Robbins was alleged to have been the owner of a vehicle that had violated the City's ATE Ordinance on two occasions: Citation No.0180152619 and Citation No.0180312406. (App. 134, ¶2). Mr. Robbins denied liability and, believing the alleged Violations were in error, did not pay the demanded civil penalties. (App. 134, ¶3).

Approximately *four years later*, on April 28, 2017, the City sent Mr. Robbins by regular mail a "NOTICE OF INTENT TO OFFSET AMOUNT OWING CITY OF DES MOINES AGAINST STATE INCOME TAX REFUND." (App. 134, ¶4). That Notice informed Mr. Robbins that the City had placed on hold Mr. Robbins' *entire* state income tax refund to secure payment of the alleged amount owed to the City from the alleged ATE Violations in 2013. (App. 134, ¶4). The Notice further informed Mr. Robbins that he had "exhausted [his] legal remedies regarding the validity of this debt," and that he could request a formal hearing, but only if he believed: that he was not the person who owed the demanded payment; that there was an error in the amount; or that the alleged debt was not properly in the offset program.

(App. 134, ¶5). In response, Mr. Robbins sent a letter to the Finance Director highlighting his opinion regarding Iowa Code 614.1(1), stating that "[a]n action to enforce the payment of a penalty under ordinance may be brought within one year after their causes accrue, and not afterwards, pursuant to Iowa Code Section 614.1." (App. 134, ¶6). The City denied Mr. Robbins' defense, claiming that Iowa Code section 614.1 only applies to "actual court actions," and "not to offset proceedings themselves." (App. 135, ¶7). As the City had never filed a municipal infraction lawsuit against Mr. Robbins, he had never been found liable for the alleged ATE violations. (App. 135, ¶8). In the months after receiving the notice from the City in 2017, DAS, acting along with the IDR and the City, seized $130 from Mr. Robbins' $205 income tax refund, for two penalties of $65.00 each. (App. 135, ¶10). Mr. Robbins believed that this was an unlawful action, and contacted counsel. (App. 135, ¶11).

B. City's ATE Ordinance

On September 14, 2009, the Des Moines City Council legislated a new Ordinance, which now appears at Des Moines Municipal Code section 114-243. (App. 140-142). With respect to the imposition of penalties and challenging the same, the Ordinance now read as follows:

(d) *Penalty and appeal.*

. . .

> (3) ***If a recipient of an automated traffic citation does not pay the civil penalty by the stated due date or request a trial before a judge or magistrate, a municipal infraction citation will be issued to the recipient by certified mail from the police department.*** Said municipal infraction citation will result in a mandatory court appearance by the recipient as well as imposition of state mandated court costs if a finding of guilty is made by the court.

App. 141-142 (emphasis added). This is the language applicable to this action.

The City subsequently amended the Ordinance and other related chapters. In July of 2017, years after it had entered into the agreement with DAS and implemented the program, the City Council published a so-called State Income Tax Offset Procedures Ordinance. (App. 530-531 ("Offset Ordinance")). That Ordinance established certain minimum standards that must be applied before the City implements income tax offset procedures; it characterized claims obligations arising under the ATE Ordinance as a "debt." The use of DAS to collect ATE penalties has been challenged in administrative proceedings before DAS, but, after several cities (including Des Moines) contested jurisdiction to consider that and similar issues, during which time there were cases pending before the Iowa District Court, such as this case, DAS declined to review the matter. (DAS Order).

The City's ATE Ordinance was amended again in 2019. The language regarding penalty reads:

> (e) *Penalty and appeal.*
> . . .

> (2) A recipient of an automated traffic enforcement notice of violation may dispute the notice of violation by requesting an administrative hearing pursuant to chapter 3 or by requesting issuance of a municipal infraction by the police department. … If the recipient of an automated traffic notice of violation who requests an administrative hearing is not satisfied with the determination of the hearing officer, he or she may request the police department to issue a municipal infraction within 30 days of the date of determination. If a timely request is made to the police department for the issuance of a municipal infraction, the city may issue a municipal infraction or dismiss the notice.

App. 183-184. Section 1-15 of the Des Moines Municipal Code, entitled "General penalty," reads that municipal infractions could initially be brought upon simple notice and payment made where admitted. It further reads that:

> (e) . . . Where a municipal infraction is not admitted upon simple notice by the person charged . . . an action seeking a penalty shall be brought in the state district court. … Municipal infractions that are not brought upon simple notice may be brought pursuant to Section 364.22 of the Iowa Code, and the civil citation shall serve as notification that a civil offense has been committed.

App. 185-186.

C. Offset Program Statute

Former Iowa Code Chapter 8A.504 (now Iowa Code section 421.65)[2] allows public agencies such as the City to utilize the power of state agencies to

[2] The statute was amended during the pendency of the decision in this case, in 2020, and took effect in January of 2021. *See* 2019 Ia. HF 2565, 2020 Ia. LAWS 1045, 2020 Ia. Ch. 1045, 2020 Ia. ALS 1045, § 28 ("This Act takes effect January 1, 2021."). It therefore does not apply to Plaintiffs' claims, and Plaintiffs generally refer to the statute as it existed at the time (8A.504).

seize funds owed by a "debtor" to a public agency. The administrative rules established by DAS to implement the statute, at IAC 11-40.1, provide an expansive definition of "debt":

> *"Liability"* or *"debt"* means a "qualifying debt" as defined in Iowa Code section 8A.504(1)*"c"* or any liquidated sum due, owing, and payable by a debtor to a public agency. Such liquidated sum may be accrued through contract, subrogation, tort, operation of law, or any legal theory regardless of whether there is an outstanding judgment for that sum.

App. 187-192. The City entered into a contractual agreement ("Contract") with the State of Iowa, through DAS, in October of 2015. (App. 194-199). Pursuant to the Contract, the City and DAS agreed that the City could submit identifying information about certain "debts" owed, or alleged penalties arising from the City's ATE enforcement. (App. 194, ¶3). DAS, in turn, would locate any funds owned by vehicle owners (characterized as "debtors" by the City) but held by a state agency, and then notify the City. (App. 195, ¶5.3). The City would then notify vehicle owners that the funds were being held, subject to vehicle owners' invocation of certain "appeal" procedures. (App. 196, ¶6.8). The Contract requires that, consistent with the Iowa Administrative Code, prior to invoking the Offset, the City make a good faith effort to collect "debts." (App. 195-196, ¶6). In 2014, prior to the filing of this case, the Iowa General Assembly amended Iowa Code Chapter 8A.504 to include a due process provision under which individuals who were made subject to the setoff provisions had notice of

alleged debts, along with an opportunity to contest the liability before the offset. (App. 195-196, ¶6).

D. City's Enforcement of its Ordinance

Gatso sends out Notices of Violation ("Notice" or "NOV") on behalf of the City to try to collect ATE penalties. The initial Notice sent to alleged violators contained the following language:

> NOTE: As the registered owner of the vehicle described in this Notice, you are responsible for paying this penalty or requesting a hearing by the due date. **Failure to pay the penalty or contest liability by the due date is an admission of liability and will result in this penalty being forwarded to collections and to the Iowa Income Tax Offset Program or for filing in state district court.** Failure to appear for court hearings will result in judgment being issued against you and liens registered in Polk or Warren County.

(App. 200) (emphasis added).

On the back of the NOV, a description of the ways in which a vehicle owner might contest the allegations were set forth—either via an administrative hearing or by mail. If either of those means did not resolve the issue, the NOV went on to describe the municipal infraction proceeding that could be invoked (App. 201). "If you do not [pay the fine or contest the allegation], a civil lawsuit **may be filed** against you, **which could result** in a judgment against you for filing fees and court costs in addition to the civil penalty[.]" (App. 202) (emphasis added).

According to the City, after Gatso issues the initial NOV on behalf of the City, it sends a "2nd and Final Notice" to vehicle owners to convince them to pay the fines that have been "determined." (App. 204-205). More specifically, such a Final Determination reads:

> As you have failed to pay or contest the Notice of Violation previously issued, the fine is now due. Failure to pay the civil fine **may subject you** to formal collection procedures and the Iowa Income Tax Offset Program. Failure to appear for court hearings will result in judgment being issued against you and liens in Polk or Warren County.

(App. 204) (emphasis added). The City has apparently been using the Offset Program since April of 2011 related to unpaid parking citations. (App. 204-205). It is unclear how long it has been used related to its ATE ordinance, but since at least 2015, and well prior to the passing of the 2017 Offset Ordinance. Individuals are never referred to the police department, even though it is that agency that is responsible for sending municipal infractions by certified mail to vehicle owners. (App. 226).

If vehicle owners do not pay after the Final Determination, the City takes back the files and puts the information into a collection database. (App. 227-228). The City then sends a final reminder postcard, which, in 2019, did not reference the Offset Program at all, but, rather, only described that the City might file a civil lawsuit against the vehicle owner. (App. 210). More recently, Plaintiffs understand that Gatso controls a citation for 60 days but then returns it to the City if the penalty is not paid. (App. 227-228). The City then puts the

citation into a collection database and sends a reminder postcard, threatening that the recipient's failure to pay "may result in submission of the debt to the City's collection agency or the . . . Offset Program." (*Id.*). If there is no response to the postcard demand after 30 days, the "debt" is re-characterized as "[O]ffset [P]rogram candidate eligible." (*Id.*). If the Offset Program gets a match on the "City debt," DAS puts a hold on the vehicle owner's entire income tax refund, and then sends notice to the City of that action. (*Id.*). Then:

> … [T]he City sends a notice to the affected individual notifying them of the hold, what it is for, the citation numbers at issue, and that the individual has 14 days to request a formal hearing.
>
> If the City receives no contact, after 15 days the City advises DAS of the lack of contact, DAS releases the amount of the debt owed to the City and releases the remainder to the individual. . . .
>
> If an individual requests a formal hearing, the City Clerk's office schedules a formal hearing. . . . Because the formal hearing will not take place before the initial 15 day period has elapsed, DAS is notified of the amount to hold from the individual's refund and the remainder is sent to the individual. . . . If the City prevails at the hearing, it retains the money held. If the City does not prevail at the hearing, a refund is issued to the individual.

(*Id.*). The City maintains that its use of the Offset Program is not subject to state law governing enforcement of ordinance penalties:

> The limitations statutes set forth in Iowa Code section 614.1 apply to the filing of actions in Iowa district courts. Chapter 614 is part of Title XV of the Iowa Code, Judicial Branch and Judicial Procedures, Subtitle 2, Courts. It is inherent from its location in the Iowa Code that the provisions of Chapter 614 apply to court proceedings, not to submission

> of debts to the Iowa Income Offset program . . . Submission of debts to the offset program is an administrative executive function, not a judicial one.
>
> . . .
>
> Iowa Code § 8A.504 requires a debt to exist before submission to the offset program. Filing in district court could accomplish the goal of establishing a debt exists. It is irrational to suggest that entities using the offset program would have to obtain a judgement [sic] in court and also submit the resulting debt to the offset program within the one year limitations period set out in section 614.1(1).

(App. 233) (emphasis added). Indeed, the City has never filed a municipal infraction action against an individual subject to the Offset Program, responding "None" to the interrogatory asking the same. (App. 233-234). The City considers the administrative hearing a final determination, contrary to the clear language of Iowa Supreme Court precedent:

> The ATE debts the City submits to the offset program are legally enforceable because they have been reduced to a final agency determination that is no longer subject to appeal, certiorari, or judicial review. If an individual does not respond to an ATE citation, it is a final agency determination through default of the individual. If an individual pursues the administrative hearing process, the resulting debt is a final agency determination.

(App. 234-235). The City also claims that it obtains a default judgment against vehicle owners if they do not contest the Offset: "If you fail to appear at the hearing, … a default judgement [sic] will be entered." (App. 206-207). Indeed, even if you have already paid, the burden is still on the vehicle owner to prove that they have paid within 15 days of the Notice. (App. 206-207).

The City had used the Offset against 11,591 individuals from January of 2015 through April 2018. (App. 229). Between 2015 and February of 2018, the City collected $1,343,331.55 through the Offset program. (App. 229). Those numbers presumably have grown since then.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT THE USE OF THE OFFSET PROGRAM WAS NOT PREEMPTED BY IOWA CODE SECTIONS 364.22(7), (10)

A. Standard of Review and Error Preservation

Summary judgment is reviewed for correction of errors of law. *Hollingshead v. DC Misfits, LLC*, 937 N.W.2d 616, 618 (Iowa 2020). Facts are reviewed "in the light most favorable to the nonmoving party" and "every legitimate inference in favor of the nonmoving party" is drawn. *Id.*

Plaintiffs preserved error on this issue as part of its Memorandum in Support of Summary Judgment ("Memo"), filed 1/31/2020, p. 25, and Resistance to Defendant's Motion for Summary Judgment (filed 3/5/2020), p. 7. Plaintiffs further preserved this issue in their Motion to Amend and Enlarge, p. 2.

B. Use of the Offset Program is Preempted by Iowa Code section 364.22

The district court erred in considering the need to harmonize Iowa Code section 8A.504 and Iowa Code section 364.22(7), (10) in its analysis. App. 334.

There was no conflict between these statutes; rather, the City was violating Iowa Code section 8A.504 by its characterization of the ATE citations as "debts," to justify using the Offset Program. This is preempted by Iowa Code section 364.22. These statutes are harmonious.

The City's collection of ATE penalties through the Offset Program without first obtaining a judgment following a municipal infraction prosecution is preempted by Iowa law. Municipalities have home rule authority to enact legislation that is "not inconsistent with the laws of the general assembly." *Baker v. City of Iowa City*, 750 N.W.2d 93, 99 (Iowa 2008) (quoting Iowa Const. art. III, § 38A and Iowa Code § 364.1). There are two types of preemption, and implied preemption "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 533, 538 (Iowa 2008). To prove this form of implied preemption, the "local law must be 'irreconcilable' with state law." *Id.* at 539. A city may not set standards which are lower than those imposed by state law, but may set standards which are more stringent, "unless a state law provides otherwise." Iowa Code § 364.3(3).

The language of the City's Ordinance applicable during part of the pendency of this case provided for the process consistent with the requirements of Iowa law:

(d) *Penalty and appeal.*

> . . .
> …
> (3) If a recipient of an automated traffic citation does not pay the civil penalty by the stated due date or request a trial before a judge or magistrate, a municipal infraction citation will be issued to the recipient by certified mail from the police department. Said municipal infraction citation will result in a mandatory court appearance by the recipient as well as imposition of state mandated court costs if a finding of guilty is made by the court.
> *Id.* § 114-243(d)(3).

Weizberg v. City of Des Moines, 923 N.W.2d 200, 204 (Iowa 2018) (emphasis added); *see also* App. 140-142. The issuance of a municipal infraction was not at the City's whim, it was mandatory: it "will be issued" if the vehicle owner did not pay the civil penalty. (App. 140-142). The City was therefore preempted by its own Ordinance from collecting any ATE fines against vehicle owners without, first, following the municipal infraction process (and obtaining a judgment pursuant to Iowa Code section 364.22(7) or (10)) before referring "debts" to the Offset Program. The City had amended its Ordinance (in November of 2019) to try to avoid this problem, and also added a new section on the Offset Program, but it cannot locally-legislate around the requirements of Iowa statutory law. The Iowa Supreme Court has made it clear that the requirements of Iowa Code section 364.22 had to be followed to *collect* a penalty (or involuntary payment) for the citation:

> 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. Like the ordinance, the Iowa statutory provision does not provide for any liability to arise until the City takes the affirmative step of filing an enforcement action in district court and obtains a judgment against the defendant. *Compare* Iowa Code § 64.22(4), (5)(*b*), (6)(*f*), (10)(*a*), *with* Cedar Rapids, Iowa, Mun. Code § 61.138(g). **Nothing in the ordinance is inconsistent with the notion that the only way to enforce a violation of an ordinance on a person who refuses voluntary payment is to launch a municipal infraction proceeding**.

Behm v. City of Cedar Rapids, 922 N.W.2d 524, 565 (Iowa 2019) (bold emphasis added). Similarly, the *Behm* Court held:

> 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. *See* Iowa Code § 364.22(4), (5)(*b*), (6)(*f*), (10)(*a*) (imposing a duty on the city to file the citation with the district court and the county treasurer's office).

922 N.W.2d at 562 (emphasis added). The *Weizberg* Court also made it clear that the coercive power of government could only be used if Iowa Code section 364.22 was followed:

> We noted in *Behm* that to 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**. *See Behm*, __ N.W.2d at __, 2018 Iowa Sup. LEXIS 85. A municipality is free, however, to establish an alternate, informal procedure to pursue resolution of the matter without resort to the court if the municipality does not claim or attempt to assert the power to enforce any purported citation except through the municipal infraction provisions of Iowa Code section 364.22. **Here, the Des Moines ordinance on its face does not provide that enforcement of an ordinance violation may be achieved through any means other than a municipal infraction.**

Weizberg v. City of Des Moines, 923 N.W.2d 200, 220 (Iowa 2018) (emphasis added).[3]

Enforcement is the key. Where there is no payment by a vehicle owner upon receiving the first and second Notices, there can be no enforcement (or involuntary collection of fines) without a municipal infraction prosecution and judgment of liability. The City had already been informed that if it followed its Ordinance in effect at the time, it was complying with Iowa law. It decided, however, to flout its own Ordinance and Iowa law and collect penalties without following the requirements of Iowa Code section 364.22. The City later amended its Ordinance in an attempt to cover its tracks.

It cannot do so, for at least two reasons. First, the Ordinance amendment to add the use of the Offset Program did not apply retroactively (App. 530-531), and was passed in July of 2017, years after the City began using the Offset Program for ATE. Second, adding provisions to the City Code for the use of the "Debt Income Setoff Program" does not change the analysis: those provisions are preempted. One cannot reconcile Chapter 3-26 through 3-

[3] While the *Behm* opinion cited in *Weizberg* was later withdrawn, the new *Behm* opinion, as described above, clearly stands for the same proposition: enforcement of the Ordinance requires abiding by the strictures of Iowa Code section 364.22.

29 with Iowa Code section 364.22, as the ATE fine is not a "debt" that can be enforced until a judgment is obtained in the Iowa district court.

Even more clearly than in Cedar Rapids, whose ATE ordinance had not provided for an administrative hearing at the time of *Behm*, the Court's holding in that case applies to Des Moines' ATE Ordinance, to wit: "no liability of any kind arises until Cedar Rapids files a municipal infraction." *Behm*, 922 N.W.2d at 564-65. The only way to reconcile the ATE Ordinance in Cedar Rapids with Iowa law was to find that no liability arose *unless* and *until* Cedar Rapids took affirmative steps to enforce the citation as a municipal infraction. *Behm*, 922 N.W.2d at 565 ("Further, under our interpretation of the ordinance . . . no liability of any kind attaches to a vehicle owner without the filing of a municipal infraction."). A City cannot declare that the debt is valid or final, or that a vehicle owner is subject to the Offset Program, without the City, first, proving its municipal infraction case, following the processes laid out in Iowa Code section 364.22. The City's use of the Offset Program to collect ATE citations not yet rendered as judgments is wholly inconsistent with Iowa law. *See Iowa City v. Westinghouse Learning Corp.*, 264 N.W.2d 771, 773 (Iowa 1978) (quoting the definition of irreconcilable as "impossible to make consistent or harmonious"). Such action is irreconcilable with Iowa Code sections 364.22(7), (10), because "the *only* way to enforce a violation of an ordinance on a person

who refuses voluntary payment is to launch a municipal infraction proceeding." *Behm*, 922 N.W.2d at 565 (emphasis added).

The district court only briefly mentioned *Behm*, and focused instead on *Seymour,* 755 N.W.2d 533 and *Rhoden v. City of Davenport*, 757 N.W.2d 239 (Iowa 2008). (App. 332-334). Contrary to the district court's finding, however, the *Behm* Court's analysis of *Rhoden* makes the preemption clear. The *Behm* Court described the *Rhoden* Court's consideration of the narrow question of "whether a voluntary payment made by a vehicle owner to the city of an uncontested violation could be made outside the framework established in Iowa Code section 364.22(6) (now section 364.22(7))." *Behm*, 922 N.W.2d at 565. The *Behm* Court focused on the difference between *voluntary* payments in the pre-filing process versus the *involuntary* enforcement or collection of ATE penalties, the latter of which required a municipal infraction filing. *Behm*, 922 N.W.2d at 565. While the district court referenced the fact that *Rhoden* involved "voluntary" payments, unlike *Behm* and the instant case, it erred in ignoring language that required a municipal infraction proceeding to enforce the Ordinance involuntarily. *Behm*, 922 N.W.2d at 565. By any measure, the City is enforcing its ordinance through the involuntary taking of funds it claimed were owed to it. The plain meaning of the word "enforce," as applicable here, is to constrain or compel, which is exactly what the City is doing with respect to funds

through the Offset Program. *See* Merriam-Webster (1828), Online Edition, Enforce (3), *at* https://www.merriam-webster.com/dictionary/enforce.

If no liability arises until a judgment is obtained (*Behm*, 922 N.W.2d at 562), then no enforcement can be undertaken by the City in any manner, including seizing funds from a state income tax refund without such a judgment. That is the direct import of *Behm*. The City is flaunting this clear requirement. Enforcing a citation after only sending a few notices by using the Offset Program is irreconcilable with Iowa Code section 364.22. Iowa Code section 364.22(7) provides the clear process to obtain a default judgment. Nowhere in that section does it say that if a vehicle owner does not pay a civil citation, the City can skip the entire municipal infraction process and claim that it obtained a judgment subject to the Offset Program. Only when a "judgment has been entered against a defendant," the court may "[i]mpose a civil penalty by entry of a personal judgment against a defendant." Iowa Code § 364.22(10)(a)(1). Having an administrative hearing officer review a dispute of the use of the Offset Program is irreconcilable with having a court find one liable for the underlying infraction before it can be enforced. *Cf.* Des Moines Mun. Code § 3-29, App. 531.

And indeed, it seems that the fact that this debt did not qualify under the existing version of Iowa Code section 8A.504 was recognized, as that statute was later amended. As it existed at the time, however, the debt was not a

"qualifying debt" for the Offset Program, which was defined as "[a]ny debt which is in the form of a liquidated sum due, owing, and payable to the clerk of the district court." Iowa Code § 8A.504 (emphasis added). Plaintiffs challenged the use of the Offset Program directly through DAS (and the expansion of the legislation through administrative rules), but the City, along with other municipalities, challenged the jurisdiction of DAS to hear such a case when cases—such as the instant one—were pending. (App. 168-176). Therefore, DAS made a final administrative determination not to hear the case. (App. 177-182).[4]

The district court erred in holding that Iowa Code section 8A.504 authorized use of the Offset Program by the City in this manner, and therefore tried to reconcile the two provisions. (App. 334). This is a false dichotomy. There was no conflict between Iowa Code sections 364.22 and 8A.504. The definition of "debt" included in the applicable version of 8A.504 only included amounts that were payable to the district court clerk. This is perfectly harmonious with the requirements of Iowa Code section 364.22, and also with the holding in *Behm*. A municipal infraction judgment ("payable to the clerk of

[4] Given the City's position in that litigation, it is therefore estopped from arguing in this case that DAS is somehow responsible for the challenged actions here. *See Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 196 (Iowa 2007) (defining judicial estoppel as prohibiting "a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding.")

the district court") is a condition precedent before a vehicle owner may have an ATE citation enforced against him/her.

It is noteworthy[5] that as of January 2021, the Iowa General Assembly amended Iowa Code section 421.65 (formerly 8A.504) to include a new definition of "debt," one which appears to be more consistent with the regulations. But, even as revised, the new statutory language can still be read as perfectly harmonious with Iowa Code section 364.22, based on the definition of the term "qualifying debt":

> . . .
> **(2)** Any debt which is in the form of a liquidated sum due, owing, and payable to the clerk of the district court.
> **(3)** Any liquidated sum certain, owing, and payable to a public agency, with respect to which the public agency has provided the obligor an opportunity to protest or challenge the sum in a manner in compliance with applicable law and due process, and which has been determined as owing through the challenge or protest, or for which the time period provided by the public agency to challenge or protest has expired.

Iowa Code § 421.65 (2021). The Offset Program expressly allows the collection

[5] The statutory language was amended to be more expansive and consistent with the regulations, which Plaintiffs had previously argued were *ultra vires*. *See* App. 42, 62-63. The regulations had expanded the definition of "qualifying debt" from that contained in former Iowa Code section 8A.504 to include any amount "regardless of whether there is an outstanding judgment for that sum." Iowa Admin. Code r. 11-40.1 (2021). But the amendment by the General Assembly does not save the past actions of the City here, which were taken without this new language being part of the statute.

of debts owing to a district court clerk.[6] And that is what Iowa Code section 364.22 also anticipates, with the option that when a judgment entered is against a defendant, the court may "[i]mpose a civil penalty by entry of a personal judgment against the defendant." Iowa Code § 364.22(10)(a)(1). These laws are harmonious, and there is no need to interpret them differently than their plain meaning in order to make them so. They do not "offer two different methods with which the City can obtain money owed to them." *Cf.* App. 334. These methods are one in the same, as they anticipate the exact same process of establishing liability before the Offset Program may be invoked. There is only one manner to enforce a municipal infraction: the City must bring an action in the district court, and prove its case, resulting in a judgment. 922 N.W.2d at 562.

The Offset Program itself it not preempted; rather, it is the manner in which the City is using that Program to collect taxpayer funds that are not payable to the clerk of the district court that is contrary to the law as applicable to Plaintiffs. Iowa Code § 8A.504(d). The fact that the General Assembly took subsequent remedial measures does not shield the City from liability for seizing

[6] Even if, arguably, the statutory amendment could be understood to apply retroactively, the section describing a liquidated sum certainly would not apply, as the *Behm* Court made clear that there is no sum owed, or "no liability" until a municipal infraction is filed. 922 N.W.2d at 562. That subsection further expressly requires compliance with applicable law, which would include Iowa Code section 364.22 and *Behm*.

millions of dollars in ATE citations prior to the enactment of the revised Iowa Code provision.

Moreover, even assuming *arguendo* that the "debts" met the definition required by Iowa law, the seizure of a vehicle owner's income tax refund money is still preempted where the City did not first follow the requirements of Iowa Code section 364.22 to enforce its own Ordinance. Even the City's allowing for a formal hearing to challenge placement of one's debt in the Offset program does not comply with Iowa law. Indeed, in its form, it limits the contest to three questions: (1) Whether the debt is owed; (2) Whether there is an error in the amount; and (3) Whether the debt was properly placed in the Offset program. (Notices of Violation). The question of whether the debt is owed is not a question of whether the vehicle owner is liable for it, as vehicle owners are told that the time to contest the underlying citation has passed. (App. 266-267).

Even more troubling, the City uses the fact that it is not complying with the requirements of a court process in order to further justify collecting these penalties more than one year (and often several years) later. (App. 234-235). The City rarely ever files a municipal infraction proceeding to enforce its ATE Ordinance. (App. 229). It has gone directly to the use of the Offset Program to seize private property owned by more than 11,000 individuals through 2018. (App. 229). This conduct is irreconcilable with the municipal infraction

proceeding requirements, and essentially allows what is expressly prohibited. *See James Enters. v. City of Ames*, 661 N.W.2d 150, 153 (Iowa 2003) (holding that a local ordinance that prohibited designated smoking areas conflicted with Iowa Code section 142B.2, which expressly allowed such designations, was preempted). The City's failure to even reference the municipal infraction procedure in its newly-amended Ordinance does nothing to change this analysis.

The pre-judgment enforcement of the Ordinance through the City's use of the Offset Program is preempted. The conflict with Iowa Code section 364.22 is unavoidable. *Seymour*, 755 N.W.2d at 541 (describing an irreconcilable conflict has being "unresolvable short of choosing one enactment over the other"). The Offset Program provides an end-run around the entire court process, which cannot be allowed. The district court's decision to the contrary should be reversed.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE COLLECTION OF ATE FINES THROUGH THE TAX OFFSET PROGRAM YEARS LATER DID NOT VIOLATE IOWA CODE SECTION 614.1(1)'S STATUTE OF LIMITATIONS

A. Standard of Review and Error Preservation

See Standard of Review on summary judgment rulings in Section I.A.

Plaintiffs preserved error on these issues in their Memo, p. 38, and Motion to Enlarge, p. 7.

B. Enforcing the Ordinance Years Later Violates Iowa Code Section 614.1(1)

The district court erred in its summary determination that "the City is not violating the statute of limitations because they are not bringing a court action." App. 340. The City cannot avoid the statute of limitations by first, failing to follow the law by filing a municipal infraction lawsuit within one year of an alleged Ordinance violation, and then, second, initiate an ATE collection action without having secured a judgment of liability. This double violation leads to nonsensical and unjust results, as occurred here.

"Actions may be brought within the time limited as follows, after their causes accrue, and not afterwards . . ." Iowa Code § 614.1. Section 614.1(1) then describes the requirements when the City wants to "enforce the payment of a penalty or forfeiture under an ordinance, within one year." Iowa Code § 614.1(1) (emphasis added). If an action to enforce an ordinance cannot be brought through the front door of an Iowa courthouse after one year, then it cannot be enforced through an administrative agency's backdoor of the Offset Program several years later. The type of "action" referred-to in this Code provision clearly accrues, with respect to the City's ATE Ordinance, when the Notice of Violation is issued, as the City is certainly aware of the alleged

violation of its own Ordinance.[7] *See K & W Elec., Inc. v. State*, 712 N.W.2d 107, 116-17 (Iowa 2006) (describing accrual as being tempered by discovery rule, which requires that a party must have "actual or imputed knowledge of the facts that would support a cause of action"). There was no new violation years later when the City decided to subject Plaintiffs to the Offset Program. "A statute of limitations bars, after a certain period of time, the right to prosecute an accrued cause of action." *TSB Holdings, L.L.C. v. Bd. of Adjustment for Iowa City*, 913 N.W.2d 1, 11 (Iowa 2018). Upon the expiration of the limitations period, the City cannot prosecute the cause of action in the courts; nor can it initiate the seizure of funds through administrative proceedings, thereafter.

The plain meaning of the limitations statute is that the City cannot enforce its Ordinance in any manner—through an action or unlawful seizure—more than one year after an alleged violation's accrual. *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."). The plain meaning of "enforce the payment" includes any and all means to do so, including seizing

[7] Alternatively, the obligation really only accrued when the judgment would have been obtained, which the City failed to do. *See TSB Holdings, L.L.C.,* 913 N.W.2d at 12-13 ("An obligation to pay money typically arises when the money judgment is entered."). Therefore, the City could only seek a judgment within one year, and enforce it within twenty years thereafter, but the City did neither.

the payment. As described above, "enforce" is to "constrain or compel," which is exactly what the City is doing. Indeed, the Offset Program is akin to a garnishment proceeding, which is defined as permitting a "creditor to enforce the payment of a debt or claim through property or money of the debtor held by another." *In re Marriage of Eklofe*, 586 N.W.2d 357, 359 (Iowa 1998). The City is garnishing, or seizing, citizens' tax returns and "enforcing the payment" of ATE citations unlawfully, years after the alleged infraction occurred.

The statute of limitations is a complete affirmative defense to a civil infraction prosecution, and therefore no vehicle owner could be liable after more than one year from the date of the alleged violation. *See Armstrong v. Des Moines*, 6 N.W.2d 287, 289 (Iowa 1942) ("[T]he statute of limitations is an affirmative defense and the burden of proof is upon the pleader."). It is undisputed that Plaintiffs Maury and Robbins had their entire income tax refunds withheld well after a year had lapsed since their respective alleged violations. In Mr. Livingood's instance, his citation was more than three years old when he was again informed that he would be subject to the Offset Program, and is now more than eight years old. (App. 107, ¶9). Therefore, rather than to have undertaken the required action to enforce its Ordinance, in a municipal infraction lawsuit, where it would face a statute of limitations defense, the City circumvented the courts and tried to enforce its Ordinance through the Offset Program. This cannot be countenanced. The City has to

provide at least as great, if not stronger protections to citizens than does the State. Iowa Code § 364.3. Avoiding the court system so that the City does not have to prove its case by clear, convincing and satisfactory evidence, the burden placed upon it in municipal infraction lawsuits, is wrong. That wrong is amplified when the City invokes its powers after more than a year has lapsed since the date of an alleged violation. It is a double whammy of rights' violations.

The district court further erred in holding that Iowa Code section 8A.504 provided an "alternate remedy aside from action in the courts." App. 340. This overlooks that the language first required that the amount owed be a "qualifying debt," as described above, which, at the time of Plaintiffs' alleged infractions, required such amounts to be payable to the district court clerk. The Offset Program was not an alternate remedy to collect ATE fines, as no liability had been established without a judgment. The use of the Offset Program is the coercive power of government, even more so through a seizure of funds without a citizen's access to his or her proverbial day in court. Cumulatively, with tens of thousands of ATE citations issued annually, this exercise of local governmental power is extraordinary. The Iowa General Assembly checked the unlimited use of municipal power by imposing a one-year statute of limitations upon the enforcement of ordinance violations. The City must not be allowed to evade that check in its enforcement of its ATE Ordinance.

The fact that a judgment or order from the court has "farther reach and more power to collect than the tax offset program[]" (App. 340) is not the issue, as a municipal infraction prosecution also has all the protections of a court process. Indeed, if the City had first obtained a judgment of liability in a municipal infraction prosecution, it could enforce it for up to twenty years. Iowa Code § 614.1(6). This demonstrates that if the protections of obtaining a judgment are followed, the City's powers to seize funds are broad. The Offset Program is undisputedly a quicker way to obtain funds, but it cannot be used to circumvent the protections of the statute of limitations. *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). Based on Defendant's own admission, it had seized funds in the Offset Program in 2017 that had arisen from a citation issued to Plaintiff Daniel Robbins in 2013 (ten years ago now), five years after the fact, and which had never been subject to a municipal infraction lawsuit. (App. 134, ¶4-6). The district court therefore erred in holding that the statute of limitations does not protect Plaintiffs from the seizure of their tax refunds here, and should be reversed.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE COLLECTION OF ALLEGED ATE DEBTS USING THE OFFSET PROCESS WITHOUT HAVING OBTAINED A JUDGMENT DID NOT VIOLATE DUE PROCESS

A. Standard of Review and Error Preservation

"Constitutional claims are reviewed de novo." *Clark v. Ins. Co. Pa.*, 927 N.W.2d 180, 183 (Iowa 2019) (citation omitted).

Plaintiffs preserved error in their Memo, p. 41 and Motion to Amend or Enlarge, p. 5.

B. Due Process is Violated Where There is Not Adequate Notice or a Meaningful Opportunity to be Heard

The district court referenced *Weizberg* as having addressed due process concerns regarding the City's ATE program, and therefore only focused on whether the Offset Program was violative of procedural due process. App. 337. The district court erred in ignoring, however, that *Weizberg* was premised on the language of the Ordinance at the time, which required the City to file a municipal infraction pursuant to Iowa Code section 364.22. *Weizberg*, 923 N.W.2d at 215. The City's Ordinance now allows for the Offset Program without ever following any of the protections in Iowa Code section 364.22. The "full panoply of procedural rights that clearly satisfy the *Mathews* test[,]" (923 N.W.2d at 215) are therefore not at all present. Moreover, the use of the Offset Program without filing a municipal infraction and obtaining a judgment clearly violates due process.

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.* Given the City's use of the Offset Program, both the notice and opportunity to be heard under these facts were violative of due process.

1. Inadequate Notice

In the "2nd and Final Notice" provided by the City (both currently and previously), it read that "[f]ailure to pay the civil fine may subject you to formal collection procedures and to the Iowa Income Tax Offset Program." (App. 206-207). This is exactly the type of wrongful notice that the *Weizberg* Court warned against as violative of due process:

> The ATE ordinance as applied will pass procedural due process muster if the notices the City sends to vehicle owners fairly and accurately state, as suggested in the City's brief, that the administrative hearing is optional, that it is a method of informal settlement, and **that no enforceable obligation will arise unless the City files a municipal infraction in small claims court and obtains a judgment**.

Weizberg, 923 N.W.2d at 215 n.4 (emphasis added). The City is doing the exact opposite: it is telling vehicle owners that they "have exhausted all challenge options and this is a debt due and owing to Des Moines. Failure to pay the fine

immediately will subject you to formal collection procedures and the Iowa Income Tax Offset Program." (App. 206-207) (emphasis added). This second notice also does not contain any reference to the ability to challenge the citation in any manner, but only says that the penalty is now "due." (App. 206-207). This is directly contrary to the Iowa Supreme Court's directives in *Weizberg* and *Behm*.

The City has filed less than 30 municipal infractions over the course of the ATE program's use. (App. 233-234). Yet it has applied the Offset Program to more than 11,000 individuals. (App. 229). None of the Plaintiffs were subjected to a municipal infraction proceeding prior to having their tax refund seized for an alleged violation of the ATE Ordinance. (App. 233-234). The use of the Offset Program is unlawful, and therefore the deficient notice of the same is a violation of due process.

The City has described in detail the parameters of its unlawful process and notice. (App. 233). It starts by referring the matter to a collections database, and then a postcard is sent to the owner of a vehicle alleged to have been operating in excess of the speed limit. (*Id.*). If there is no response to the postcard after 30 days, the "debt" then becomes eligible for the Offset Program. (*Id.*). No matter the amount owed, there is a hold placed on the entire tax refund, and the City sends out a notice to the vehicle owner providing 14 days to request a hearing. (*Id.*). If no response is received after 15 days, DAS

then turns over to the City the funds claimed by it, releasing the remainder, if any, to the taxpayer. (App. 233).

The district court referenced *War Eagle Vill. Apartments v. Plummer,* 775 N.W.2d 714, 720 (Iowa 2009), in holding that sending the notices via US Mail was sufficient, whether or not Mr. Livingood received one. (App. 336). The *War Eagle Village Apartments* Court, however, had held that "[d]ropping a letter in the mailbox is not notice, yet is deemed sufficient notice. It is mere lip service to meaningful notice." *Id.* at 720-21. While the property interest is of course not the same, Plaintiffs are not, in this instance, challenging post-judgment collections where the proper notice of obtaining such a judgment had already been followed. *Cf. Wells Fargo Equip. Fin., Inc. v. Retterath*, 928 N.W.2d 1, 10 (Iowa 2019) (comparing the post-judgment collection procedure at issue in that case—enforcement of a foreign judgment—to the forcible entry at issue in *War Eagle* and finding less need for protection). If Plaintiffs had already gone through the process of a municipal infraction proceeding—as anticipated in *Weizberg*[8]—the notices sent here would likely have sufficed. But that is not this

[8] The *Weizberg* Court also noted that misleading notices in ATE citations had been disapproved of in a Missouri case. *Weizberg*, 923 N.W.2d at 215 n. 5 (citing *City of Moline Acres v. Brennan*, 470 S.W.3d 367, 381 (Mo. 2015) (en banc). Similar to the Iowa Supreme Court, the Missouri Supreme Court noted two of "the law's most basic principles," which included that "the power to inflict the penalty imposed by the ordinance cannot be exercised until there has been a judicial determination of the fact that the ordinance has been violated." *Id.* at 380.

case.

The City is using regular mail, with no evidence or proof that any notice (App. 200-201, 202-203, 204-205, 206-207, 209, 210, 211) has ever been delivered to, or received by, an addressee. Iowa Code section 364.22(4) requires notice by certified mail or personal service in order to proceed with a municipal infraction. The City is avoiding the entire municipal infraction process in collecting penalties through Offset, but also avoiding the bare minimum notice requirements. Mr. Livingood does not recall having ever received the Notices of Violation. (App. 107, ¶10). This is readily distinguishable from *City of Cedar Rapids v. Leaf*, 923 N.W.2d 184, 198 (Iowa 2018), where Ms. Leaf had received notice. Mr. Livingood only learned of the ATE citations once he received the Offset Notice. (App. 106-107, ¶5-9). Mr. Maury did not originally recall receiving it, but then only recalled receiving the initial Notice of Violation. (App. 130, ¶14). Mr. Maury learned of the alleged violations and use of the Offset Program only when he could not figure out why he had not received his income tax refund. (App. 130. ¶19-20). This after-the-seizure indirect-notice is not the type of notice envisioned by the Iowa General Assembly when it fashioned a statute requiring the use of certified mail or personal service by a law enforcement officer. While this conduct may not constitute a *per se* violation of due process by failing to follow the process set forth in the statute (*Weizberg*, 923 N.W.2d at 214-215), use of the Offset Program in this manner

cannot satisfy the *Matthews v. Eldridge*, 424 U.S. 319 (1976) test.

Indeed, the City has had more than 9000 notices returned between 2016 and 2019. (App. 241). The City does not do anything with those notices other than keep them in boxes in the Treasury Office. (App. 239, 241).[9] The City is therefore on notice that vehicle owners are not receiving the notices, but does not make any concession to remove those names from transfer to the Offset Program. (Answer to Interrogatory No.28). This is beyond failing to provide the necessary information; the City cannot even prove that it provided any notice at all of the violations issued to vehicle owners whose funds are later seized. *See Linn Farms & Timber Ltd. P'ship v. Union Pac. R.R.*, 661 F.3d 354, 358-59 (8th Cir. 2011) (describing the notice requirements when mail is returned as undelivered, and noting the need to take reasonable additional steps where available).

Disturbingly, the City has changed its practices to provide less notice of the Offset Program as time goes on: originally, its postcard notice read:

> If you wish to request an informal hearing, pursuant to Municipal Code Section 3-27, regarding placement of this debt in the State of Iowa Income Offset Program, you must submit a written request to the City of Des Moines Finance Director before 3/30/2018. A request form can be obtained by emailing treasury@dmgov.org or calling 515-283-4093.

[9] Even when using certified mail, the U.S. Supreme Court has held that "when a notice is returned unclaimed, the government is required to take additional reasonable steps to attempt to provide notice before a tax sale." *Jones v. Flowers*, 547 U.S. 220, 225 (2006).

(App. 209). Perhaps the City was receiving too many calls, but it now provides no such notice of the Offset Program or the ability to request a hearing:

> . . . The last day to pay will be 7/22/2019. This will be the final notice sent to you. If you do not pay, a civil lawsuit may be filed against you, which could result in a judgment against you and an assessment of filing fees and court costs against you, in addition to the civil penalty listed below. This may not reflect all tickets outstanding on this plate.

(App. 210).

In addition, the Iowa Administrative Code provides certain minimum notice requirements before implementing the Offset Program that are also not being met by the City:

> **40.4(4)** *Notification to debtor.* Each public agency shall send notification to the debtor within 10 calendar days from the date the agency was notified by the department of a potential offset. This notification shall include:
>
> a. *The public agency's right to the payment in question.*
> b. *The public agency's right to recover the payment through the offset procedure.*
> c. *The basis of the public agency's case in regard to the debt.*
> d. *The right of the debtor to request the split of the payment between parties when the payment in question is jointly owned or otherwise owned by two or more persons.*
> e. *The debtor's right to appeal the offset and the required appeal procedure.*
> f. *The name of the public agency to which the debt is owed, with a telephone number for the debtor to contact the public agency regarding questions about the offset.*

Iowa Admin. Code § 11-40.4(4), App. 187-192. The City's described process in no way meets these minimum requirements. (App. 227-228). The City cannot

describe what right it has to the payment in question (subparagraph a), as it does not have any right. The City further claims that the vehicle owner has "exhausted your legal remedies regarding the validity of this debt[,]" but it has no idea whether the vehicle owners were actually ever informed of any such legal remedies. Moreover, as described above, vehicle owners cannot have exhausted their legal remedies because the City has the burden to prove liability in a municipal infraction lawsuit before these penalties can be enforced. The notices provided to vehicle owners (if, in fact, they are ever received) are so deficient as to render them a violation of due process.

2. Opportunity to be Heard

The City is additionally violating Plaintiffs' due process under the second prong of due process, or the opportunity to be heard. *Behm*, 922 N.W.2d at 566 n.7 (citing *Lewis v. Jaeger*, 818 N.W.2d 165, 181 (Iowa 2012)). In evaluating this aspect of procedural due process, three competing interests are balanced:

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

Bowers, 638 N.W.2d at 691 (quoting *Mathews*, 424 U.S. at 335). First, for the private interest affected, Iowa has recognized a protected property interest in

"not being subject to irrational monetary fines." *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 345 (Iowa 2015). All Plaintiffs were assessed fines without benefit of a municipal infraction trial; then, Mr. Maury and Mr. Robbins had the amounts of their fines withheld from their respective income tax refunds. (App. 131, ¶28; App. 135, ¶10). Therefore, there is a private interest affected in the property right. In addition, there is a property interest in the timely return of one's income tax refund, which is held hostage by the City's wrongful use of the Offset Program. While the City argues that the property interest is not very weighty when most fines fall the range of $65.00, the cumulative burden on thousands of taxpayers undeniably constitutes a heavy, unchecked power. Moreover, for certain individuals, such as Mr. Maury, the unlawfully-withheld funds (of hundreds of dollars of an entire tax refund) are needed to pay bills and other obligations and, as such, are burdens significant. (App. 131, ¶30).

The district court erred in finding the temporary nature of the hold a reason to consider it less weighty. (App. 338). It is only temporary if a vehicle owner agrees to pay. In 2017, Mr. Maury had to check with the IDR to see where his tax refund was, as it did not arrive in the normal amount of time. (App. 130, ¶19). Only then did Mr. Maury learn that his $877 tax refund was being held hostage by the City's attempt unlawfully to enforce a citation's penalty concerning which he had had no recollection. (App. 130, ¶20).

With respect to the second prong, or the risk of erroneous deprivation,

the interest is substantial. Three main factors demonstrate the risk here. First, as described above, vehicle owners often do not even receive any NOV, and the City has no proof that it has actually sent them, or that either Notice has ever been received. Second, there is no opportunity to challenge the underlying "debt" once it has been placed in Offset, and therefore no protections for the vehicle owner. Third, and relatedly, the City does not go through the municipal infraction process, which is required to use the coercive power of government to prove an alleged debt is actually owed. *Cf. Leaf*, 923 N.W.2d at 198 (finding that the small claims judicial process ultimately invoked by Ms. Leaf satisfied due process). Here, the "ordinary judicial process" that is "due process" according to Cedar Rapids is avoided entirely by Des Moines. *Leaf*, 923 N.W.2d at 198.

The district court erred in relying on *Brooks*, 844 F.3d at 979-80, and *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817, 846-47 (N.D. Iowa 2015), neither of which involved use of the Offset Program. Ruling, p. 12.[10] Indeed, when Mr. Livingood received notice of the Offset Program, and challenged it, the City had originally indicated that it would not allow him to challenge the underlying citation. (App. 107, ¶11). When counsel became involved, Mr.

[10] Moreover, both of those cases were dismissed on motions to dismiss and did not have any of the detailed facts of how the City engages in this process as produced here.

Livingood was told he could challenge the citation. (App. 107, ¶15). However, the City then changed course and indicated that it would not try to enforce the penalty against Mr. Livingood at that time. (App. 107-108, ¶16). Notwithstanding the same, the City then changed course yet again, *years* later, when it decided to institute Offset Program against Mr. Livingood without ever allowing him to contest the citation. (App. 108, ¶18). This is no process at all. It is chaos. The district court also erred in holding that one could contest a Notice all the way up to the Iowa Supreme Court (App. 338), as that is not true for the Notice of Offset. There are different defective notices at issue. The Notice of the Offset Program is expressly limited to only contesting the use of Offset, but not the underlying citation. (App. 202-203).

With respect to the third *Mathews* prong, the nature of the government's interest, it is only about money, and therefore, cannot be characterized as a strong interest. This case is not about traffic safety, as there is no deterrent effect by taking money from a vehicle owner (who may or may not have been driving) years after an alleged infraction had occurred. The use of the Offset Program is not the same as the ATE Ordinance generally: the challenge, here, is to the City's unlawful taking of money from vehicle owners. The interest is therefore purely financial for the City, and the City cannot complain that it is required to spend money to obtain money to properly file and prosecute a municipal infraction. The district court erred in finding that "[p]ublic safety and

enforcing traffic laws" were at issue with the use of the Offset Program. (App. 339). Those arguments may be made to defend the ATE Ordinance itself, but not the use of the Offset Program, which, when implemented without a preceding judgment, is merely a money grab. Sending out the ATE citation notifications and trying to stop speeding have nothing to do with seizing the money years later without requisite judgments of liability.

Any burdens imposed on the City are merely the costs of due process: following the minimum processes set by Iowa statutes. The City has to prove liability in a municipal infraction proceeding before an Iowa district court judge or obtain a default judgment after original notice and service of process have been effectuated. The City knows how to do these things when it so chooses. (App. 242-260). When bringing the heavy hand of government to enforce ATE citations, the law requires an affirmative step by City government. That is not overly burdensome. It is the bare minimum. The district court erred in ignoring the use of the Offset Program (and corresponding deficient notices and opportunities to be heard) and conflating it with the ATE program generally, and should be reversed.

IV. THE DISTRICT COURT ERRED IN NOT FINDING THAT THE CITY'S USE OF THE OFFSET PROGRAM CONSTITUTES AN UNLAWFUL TAKING

A. Standard of Review and Error Preservation

"Constitutional claims are reviewed de novo." *Clark*, 927 N.W.2d at 183.

Plaintiffs preserved error in their Memo, pp. 42-45.[11]

B. Obtaining Funds Unlawfully to Which One has no Demonstrated Right is a Taking

The district court erred in determining first that the City was the wrong governmental agency against whom to bring this claim, and second, that the City's police power insulated this from being a taking.

Article I, section 18 of the Iowa Constitution prohibits the taking of private property for "public use without just compensation first being made, or secured to be made to the owner thereof[.]" *See also Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998) (describing proscription on "taking of private property for public use in violation of article 1, section 18 of the Iowa Constitution"). A "taking" is defined as the "act of seizing an article, with or without removing it, but with an implicit transfer of possession or control." BLACK'S LAW DICTIONARY, Bryan A. Garner, 2nd Pocket Edition, (2001). The City, through its use of the Offset Program, has taken Plaintiffs' property: first, by directing DAS to hold entire refund hostage; and second, when taking funds allegedly owed to the City. Plaintiffs believe that this constitutes an unlawful taking.

[11] Plaintiffs have withdrawn their appeal of the issue of whether the ATE penalty constitutes an unlawful tax.

Three steps are followed to determine whether a taking has occurred: (1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been taken by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner?" *Kelley v. Story Cty. Sheriff*, 611 N.W.2d 475, 479-81 (Iowa 2000). Under the first prong, imposing a sanction is a protected property interest. *Weizberg*, 923 N.W.2d at 212. The second and third prongs are readily demonstrated: these funds are then taken and put in the public coffers (Answer to Interrogatory No.3), and no compensation is thereafter paid. The district court held that this should be considered an exercise of police power and not a taking (Ruling, p.13), but ignored the "point at which police power becomes so oppressive that it results in a taking[,]" which must be determined case by case, using a standard of reasonableness. *Kelley*, 611 N.W.2d at 480-81. The district court summarily stated that traffic enforcement is the police power under which the City is collecting these penalties (Ruling, p.14), but ignored that there is no need to seize tax refunds in order to enforce traffic laws without having obtained a judgment of liability against the owner.

The balancing test "asks whether the collective benefits of the regulatory action outweigh the restraint imposed upon the property owner[.]" *Id.* Factors to consider include the "economic impact of the regulation on the claimant's property" and the "character of the governmental action." *Id.* Plaintiff Chris

Maury described the significant impact on his property, which was to hold his family's *entire* tax refund, on which they were relying to pay bills to secure the City's alleged entitlement to a much smaller sum. (App. 129, ¶8). The character of the government's action is even more critical here, where it seizes alleged amounts owed prior to ever proving its case against vehicle owners. The City does not allow vehicle owners to contest the liability for the underlying citation once it is placed in the Offset Program. (App. 233). The unlawful character of these actions is clear. This seizure is confiscatory, because it has nothing to do with the public purpose of traffic safety. *See Home Builders Ass'n*, 644 N.W.2d at 351 (citing *Quarty v. United States,* 170 F.3d 961, 969 (9th Cir. 1999) (noting courts reviewing taking challenges to a taxing measure where they were confiscatory, or "not reasonably related to a substantial public purpose.").

Traffic safety is not improved by seizing unproven penalties years after an alleged violation occurred. Even assuming, *arguendo*, the ATE Ordinance could be considered for the purpose of traffic safety, its amendment to include use of the Offset Program is strictly to raise revenue. It has no public safety benefit on its face. There is no allegation that the roads are made safer by clearing out obstructions, or other relevant argument to safety. *Cf. Goodenow v. City Council of Maquoketa*, 574 N.W.2d 18, 24-25 (Iowa 1998) (reviewing ordinance requiring cutting of weeds and grasses along city streets as a valid

exercise of police power where ensured adequate view of the road). Using the Offset Program in no way makes the roads safer. It just fills the City's pockets.

The involuntary nature of the payments further renders them a taking. *Cf. McCarthy v. City of Cleveland*, 626 F.3d 280, 287 (6th Cir. 2010) (McKeague, J., concurring) (describing that the payment of ATE citations were not a taking because they did not demonstrate that they were involuntary) (citing Y*ee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992)). It is a different story, however, were the City to "garnish, attach, seize or otherwise 'take' the fine monies from accounts or funds belonging to plaintiffs." *McCarthy*, 626 F.3d at 288 (McKeague, concurring). Seizing funds owned by Plaintiffs, their tax refunds, is exactly what happened here. And these are certainly not voluntary seizures. Indeed, Plaintiffs' situations demonstrate how involuntary the City's seizures have been. For example, Mr. Maury, needing his income tax refund of $877, paid the City's claim for a fraction of the amount owed under compulsion so that he could have access to the remainder. (App. 131, ¶30). Compulsion is not a voluntary payment. The City took Plaintiffs' property without just compensation, and must refund it.

The district court also held that since Iowa Code section 8A.504(2)(f)(1) provided that the entire tax refund was to be held, the City was not the right entity to challenge for such seizure. (App. 339). But the district court ignored that the City has no right to even send the alleged "debt" to DAS in the first

place, and it is therefore not DAS who is responsible for such an illegal taking. The requirements of DAS for sending the debt were not met in the first place, as described above, and that falls on the City, including based on its own contract with DAS, in which it promises to comply with the law. (App. 197, §9.1). The district court erred in failing to recognize the City's liability in this seizure, as it is not DAS that decided on its own to seize these funds, but rather, did so under the direction (and contractual promises) of the City. The district court's determination on this issue should therefore be reversed.

VI. THE DISTRICT COURT ERRED IN FINDING THE CITY WAS NOT UNJUSTLY ENRICHED BY THE ORDINANCE

A. Standard of Review and Preservation of Error

See standard in Section I.A. Plaintiffs preserved error in their Memo, p. 47.

B. The City is Unjustly Enriched by the Offset Program Seizures

The district court held that since it found the City's actions were not unlawful, it was not unjustly enriched by the same. (App. 341). As described above, this was error because the actions were clearly preempted and violated the statute of limitations. Therefore, since the City already conceded the first two elements of unjust enrichment (App. 340-341), Plaintiffs have demonstrated that the City has been unjustly enriched by its use of the Offset Program.

Specifically, Plaintiffs have demonstrated that: (1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiffs; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances. *State ex rel. Palmer v. Unisys. Corp.*, 637 N.W.2d 142, 154-55 (Iowa 2001). In other words, Plaintiffs have proven "the defendant received a benefit that in equity belongs to the plaintiff." *Slade v. M.L.E. Inv. Co.*, 566 N.W.2d 503, 506 (Iowa 1997).

Under the first prong, the City has been enriched by the benefit of a collection of fines from Plaintiffs and the class members whom they seek to represent. Indeed, from 2015 to February of 2018, the City had already collected $1,343,331.55. (App. 230-231). Second, this enrichment was at the expense of Plaintiffs, who had had their tax refunds held hostage until they had paid the penalties for the ATE citations without any right to contest the underlying alleged "debt." The City has been enriched at the expense of more than 11,500 individuals through 2018, and the number has only grown. (App. 229).

Third, and finally, based on the violation of the statute of limitations, as well as failing to make this a collectible or enforceable judgment, and in violation of Plaintiffs' constitutional due process rights, it is unjust to allow the City to retain these amounts. Every Plaintiff who had to pay the unlawful citation fine through the Offset Program is entitled to restitution of that

payment. The amounts wrongfully paid are liquidated. The district court erred in failing to find that the City's use of the Offset Program was unlawful, and therefore erred in failing to find the City had been unjustly enriched. The decision must therefore be reversed.

CONCLUSION

Plaintiffs respectfully request that the district court's denial of Plaintiffs' motion for summary judgment—and corresponding granting of the City's motion for summary judgment—be reversed.

Dated this 8th day of September, 2022.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument.

CERTIFICATE OF COST

Plaintiff-Appellant/Cross-Appellee will not submit a Certificate of Cost given the electronic filing of the final Briefs and Appendix.

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on September 8, 2022, I electronically filed the foregoing Proof 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 13,997 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 1997-2004 in size 14 Garamond.

Dated this 8th day of September, 2022.

Respectfully submitted,

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