IN THE SUPREME COURT OF IOWA

CASE NO. 22-0536

FRANCIS LIVINGOOD, CHRISTOPHER MAURY,
AND DANIEL ROBBINS,
PLAINTIFF-APPELLANTS,
V.
THE CITY OF DES MOINES, IOWA,
DEFENDANT-APPELLEE.

Appeal from the Iowa District Court for Polk County,
the Honorable Scott Rosenberg

APPELLEE'S FINAL BRIEF

Respectfully Submitted,

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ROUTING STATEMENT

The City agrees that this is a matter of first impression and public importance. It is appropriate for the Supreme Court of the State of Iowa to retain this matter.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is a direct appeal of an order granting summary judgment to the City of Des Moines and denying summary judgment to the Appellants.

COURSE OF PROCEEDINGS AND DISPOSITION

The City largely agrees with the procedural history provided by the Appellants and offers clarification on one matter. Livingood, Maury, and Robbins mention in their recitation of procedural history that an injunction request that was denied. More specifically, they requested an injunction ordering the City to stop use of the offset program and to stop sending postcards warning of the possibility of tax offset. The district court denied this request stating, in pertinent part:

> Appellants have failed to demonstrate a likelihood of success on the merits. *MAX 100 LC v. Iowa Realty Co., Inc.*, 621 N.W.2d at 181. On the present state of the record, it appears to the Court that the City's use of the Iowa Income Offset Program is authorized by Iowa Code section 8A.504 and Iowa Admin. Code r. 11-40. The City is a public agency. ATE penalties are a liability of a person owed to a public agency. Iowa Code § 8A.504(2). The liability is a liquidated sum

> established by operation of law through an administrative or judicial proceeding after notice and an opportunity to be heard. It is a liquidated sum that is due, owing, and payable by a debtor to a public agency. Iowa Admin. Code r. 11-40.1. While it may seem heavy handed for the State to withhold an entire tax refund pending payment of a $65.00 debt owed the City through direct payment or setoff, this process is authorized and required by Iowa Code sections 8A.504(2)(e) and 8A.504(2)(f)(1). (5/30/2017 District Court Order)

STATEMENT OF THE FACTS

The City of Des Moines ("City") is a municipality organized under the laws of the State of Iowa. (3rd Am. Pet., App.1.) The Iowa General Assembly has created a program by which government entities may offset debts owed to them against individuals' tax refunds. This program was authorized by Iowa Code section 8A.504. Iowa Code § 8A.504. This program is generally referred to as the Income Offset Program and is administered by the Iowa Department of Administrative Services ("DAS") which has adopted administrative rules to implement the Income Offset Program.

In 2007, the City entered a Memorandum of Understanding with DAS under which the City would participate in the Income Offset Program. (MOU, App.374.) DAS adopted administrative rules that became effective July 2, 2008. (App.538.) Revised administrative rules became effective January 1, 2015. (App.546.) In 2015, the City entered a revised

Memorandum of Understanding with DAS under which the City would participate in the Income Offset Program. (Rev. MOU, App.375-80.)

In 2009, the City of Des Moines Police Department recommended the use of automated traffic enforcement ("ATE") to increase road safety by monitoring high risk areas for vehicles disobeying traffic laws and issuing civil citations to the registered owners of the vehicle. (Harvey Aff. App.408.) The Des Moines City Council approved the use of ATE. (Roll call 09-627 App.381-83.)

The City began using ATE cameras to monitor high risk areas at several locations in Des Moines. (Harvey Aff. App.408.) The City adopted Municipal Code 114-243 to address enforcement of citations from ATE cameras. (Roll call 09-1683 App.398-400.) When an ATE citation is issued, the owner of the vehicle committing the violation is mailed a Notice of Violation advising them of the violation and indicating that payment of a $65.00 civil penalty is owed by a specified date. (Greene Aff. 2 App.412., Council Comm. App.381.)

The $65.00 penalty is set by operation of law as part of the City's adopted schedule of fines. (Council Comm. App.398-99.) The Notice of Violation includes information on how to contest the citation if the recipient wishes to do so. (Greene Aff. App.412.) The City of Des Moines utilizes the

Nlets database, which is the premiere interstate justice and public safety network in the nation for the exchange of law enforcement, criminal justice, and public safety-related information. (NLETs App.418.)

Nlets links together and supports every state, local and federal law enforcement, justice and public safety agency for the purposes of sharing and exchanging critical information. (NLETs App.418.) Through the Nlets network, law enforcement and criminal justice agencies can access a wide range of information, from standard driver license and vehicle queries to criminal history and Interpol information. (NLETs App.419.) Nlets is a network communication center that connects over 55,000 law enforcement and judicial agencies in North America (all 50 states, Mexico and Canada). (App.502.) The connection to Nlets is a secure point to point connection. (Gatso RFP App.502.)

Vehicle owner queries are typically responded to in less than 2 seconds so information is virtually immediately available for the enforcement process. (Gatso RFP App.502.) For companies like Gatso that are not using Nlets, searching other databases is much more labor and time intensive. (Gatso RFP App.502.) Once ownership of the vehicle is determined, images and data are sent to officers at the Des Moines Police

Department who review the images and data, then determine whether a citation will issue. (Greene Aff. App.412.)

If the owner of the vehicle committing the violation does not either pay the civil penalty or notify the City of a desire to contest the citation by the date specified in the Notice of Violation, a 2nd and Final Notice is sent to that individual with much of the same information. (Greene Aff. App.412.) An independent contractor for the City, GATSO, USA, sends the first two notices. (Greene Aff. App.412.)

If a citation is outstanding for sixty days, GATSO transfers the file to the City of Des Moines. The City loads the file into a collections database. (Greene Aff. App.412.) The City's collections database is automatically checked against Iowa Department of Transportation records each weekend to identify individuals whose address information has changed. (Greene Aff. App.412-13.) After the address check has occurred, the City sends the owner of the vehicle committing the violation a reminder postcard about the citation debt. (Greene Aff. App.413.; Gatso RFP App.503.) The postcard advises the owner of the right to request an informal hearing. It also advises the owner that failure to pay may result in submission of the debt to the Income Offset Program. (Greene Aff. App.413.; Gatso RFP App.503.)

If an owner requests an informal hearing, this is conducted with employees of the City's Treasury Division. (Greene Aff. App.412.) City staff looks for information indicating that the citation was issued to the wrong person or for the wrong amount. (Greene Aff. App.412.) If an informal hearing does not result in withdrawal of the debt or no response to the postcard is received after thirty days, the status of the debt in the collections database is changed to 'offset program candidate eligible.' (Greene Aff. App.412.)

The debt will then be sent to DAS with information on other eligible debts for submission to the Income Offset Program. (Greene Aff. App.412.) The City resubmits all eligible debts each time the database is updated with DAS. (Greene Aff. App.412.) For eligible debts, the City's submission to DAS includes the individual's name, social security number, and amount owed. (Greene Aff. App.412.)

If the Income Offset Program gets a match, where DAS determines an individual who owes money to the City is owed money by the State, DAS places a hold on the whole amount owed by the State to the individual. (Greene Aff. App.412.) DAS then sends the City notice that there is a hold for the debt. (Greene Aff. App.412.) When the City receives a match notice from DAS, it sends a notice to the affected individual notifying them of the

hold, what it is for, the citation number(s) at issue, and that the individual has fourteen days to request a formal hearing. (Greene Aff. App.412-13.)

If the City receives no response after fifteen days, it notifies DAS of the lack of response. (Greene Aff. App.412.) DAS then sends the amount owed on the debt to the City and releases the remainder to the individual. (Greene Aff. App.412.) If an individual pays the City directly, the City notifies DAS and the State releases the whole amount to the individual. (Greene Aff. App.412.) If an individual requests a formal hearing, it is scheduled by the City Clerk's office which sends a formal notice including the date, time, location, and hearing procedures to the individual. (Greene Aff. App.412.)

Because a formal hearing would not take place before the initial fifteen day period has elapsed, the City notifies DAS of the amount to be held for the City and the remainder is sent to the individual. The amount held is then transferred to the City. (Greene Aff. App.412.) If the City prevails at the formal hearing, it retains the money held. If the City does not prevail, a refund is issued to the individual. (Greene Aff. App.412.)

Accordingly, the City of Des Moines adopted an ordinance governing the use of ATE devices. (Roll call 19-1636 App.545.) The ordinance

currently includes a policy statement that explains the City Council's position on ATE. It states:

> Having been presented with information and opinions concerning Automated Traffic Enforcement ("ATE"), the Des Moines City Council finds as follows:
>
> > (1) The use of ATE advances public interests of traffic safety and safety of emergency responders, as well as the interests of Des Moines taxpayers in cost effective enforcement of traffic laws;
> > (2) The use of ATE devices which capture an image of only the rear license plate strikes a desirable balance between the above stated public interests and privacy interests of the motoring public;
> > (3) The National Law Enforcement Telecommunications System ("Nlets") is a cost effective means for determining ownership of vehicles detected as traveling in violation of traffic laws within the city limits of Des Moines; and;
> > (4) The technology underlying ATE is self-calibrating and reliable, and its accuracy is readily verifiable.

(Ord. 114-243 App.404.)

The statistical number of crashes caused by traffic violations on I-235 (4700 block to 4200 block) has decreased by 13% since the implementation of the City of Des Moines' ATE camera program. (DMPD Ann. Rep. App.498.) During a period of time when a case regarding the City's use of ATE was pending before the Iowa Supreme Court, no citations were being issued from the I-235 camera pursuant to a stay; this was highly publicized locally. (DMPD Ann. Rep. App.492.). Data was still tracked during that time and average speed of travelers increased from before the stay as follows:

Average speeds 1-1-17 to 4-25-17

	1-60	61-70	71+
Lane 1	57mph	65	73
Lane 2	55	64	73
Lane 3	56	64	72
Lane 4	54	63	72

Average Speeds 4-25-17 to 1-16-18

	1-60	61-70	71+7
Lane 1	57mph	68	76
Lane 2	56	67	75
Lane 3	55	67	74
Lane 4	52	64	72

(DMPD Ann. Rep. App.492.)

FRANCIS LIVINGOOD

Francis Livingood is a resident of Postville, Allamakee County, Iowa. (Liv. Rog 7 App.115.) As of March 2014, Mr. Livingood was an owner of a Dodge made vehicle with license plate number 621RWT. (Liv. NOV App.423.) At 2:35p.m. on March 14, 2014, Mr. Livingood's vehicle with license plate number 621RWT was recorded travelling eastbound on I-235 in Des Moines at a speed of 71 mph. (Liv. NOV App.423.) At 71 mph, Mr. Livingood's vehicle with license plate number 621RWT was travelling in excess of the 60mph speed limit. (Liv. NOV App.423.)

On March 20, 2014, a Notice of Violation was generated and mailed to Mr. Livingood. (Liv. NOV App.423-24.). The Notice of Violation was designated with Citation #0180245670. (Liv. NOV App.423.) The Notice of Violation indicated that Mr. Livingood's vehicle had exceeded the speed limit on March 14, 2014 and that a $65.00 civil penalty was owed for this violation. (Liv. NOV App.423.) The Notice of Violation indicated that the penalty was due by April 19, 2014. (Liv. NOV App.423.) The March 20, 2014 Notice of Violation was mailed to Mr. Livingood's home address in Postville, Iowa. (Liv. Rog 7 App.115.; NOV App.423-24.) Mr. Livingood received the Notice of Violation. (Liv. Rog 21 App.454.)

On May 6, 2014, a 2nd and Final Notice was generated and mailed to Mr. Livingood related to citation #0180245670. (Liv. 2nd NOV App.425-26.) The 2nd and Final Notice provided the same general information about the March 14, 2014 violation as the Notice of Violation had. (Liv. 2nd NOV App.425-26.) The May 6, 2014 2nd and Final Notice was mailed to Mr. Livingood's home address in Postville, Iowa. (Liv. 2nd NOV App.425-26.) Mr. Livingood received the 2nd and Final Notice. (Liv. Rog App.454.)

On or about October 22, 2016, a postcard notice was sent to Mr. Livingood. (Greene Aff. App.415.) This postcard notice advised Mr. Livingood he had until November 21, 2016 to pay the penalty related to

citation #0180245670. (Greene Aff. App.415.) The postcard notice notified Mr. Livingood that if unpaid, the penalty could be forwarded to the State of Iowa Income Offset Program. (Greene Aff. App.415.) Mr. Livingood received the postcard notice. (Liv. Rog 21)

When it remained unpaid, the civil penalty associated with citation #0180245670 was sent to the State of Iowa for inclusion in the State of Iowa Income Offset Program. (Greene Aff. App.415.) On March 30, 2015, a Notice of Intent to Offset Amount Owing City of Des Moines Against State Income Tax Refund was prepared and mailed to Mr. Livingood. (Liv. Notice of Intent App.427.) This Notice was related to citation #0180245670. (Liv. Notice of Intent App.427.) This Notice advised Mr. Livingood that his $185.00 income tax refund was being held due to nonpayment of the $65.00 penalty. (Liv. Notice of Intent App.427.) Mr. Livingood received the Notice of Intent to Offset Amount Owing City of Des Moines Against State Income Tax Refund. (Liv Rog 21 App.454.) The City released the hold on Mr. Livingood's tax refund. (3rd Am. Pet. App.14.)

CHRISTOPHER MAURY

Christopher Maury is a resident of Manchester, Delaware County, Iowa. (Maury Rog App.473.) As of February 2016, Mr. Maury was an owner of a Toyota Sienna with license plate number AZL587. (Maury Aff. App.129; Maury NOV App.428.) At 11:23a.m. on February 28, 2016, Mr. Maury's vehicle with license plate number AZL587 was recorded travelling eastbound on I-235 in Des Moines at a speed of 71mph. (Maury NOV App.428.) At 71mph, Mr. Maury's vehicle with license plate number AZL587 was travelling in excess of the 60mph speed limit. (Maury NOV App.428.)

On March 3, 2016, a Notice of Violation was generated and mailed to Mr. Maury. (Maury NOV App.428-29.) The Notice of Violation was designated with Citation #013.0001218741. (Maury NOV App.428-29.) The Notice of Violation indicated that Mr. Maury's vehicle had exceeded the speed limit on March 3, 2016 and that a $65.00 civil penalty was owed for this violation. (Maury NOV App.428-29.) The Notice of Violation indicated that the penalty was due by April 4, 2016. (Maury NOV App.428-29.) The March 3, 2016 Notice of Violation was mailed to Mr. Maury's home address in Manchester, Iowa. (Maury NOV App.428-29.)

On April 5, 2016, a 2nd and Final Notice was generated and mailed to Mr. Maury related to citation #013.0001218741. (Maury 2nd NOV App.430.) The 2nd and Final Notice provided the same general information about the March 3, 2016 violation as the Notice of Violation had. (Maury 2nd NOV App.430-31.) The April 5, 2016 2nd and Final Notice was mailed to Mr. Maury's home address in Manchester, Iowa. (Maury 2nd NOV App.430-31.)

On or about September 23, 2016, a postcard notice was sent to Mr. Maury. (Greene Aff. App.415.) This postcard notice advised Mr. Maury he had until October 23, 2016 to pay the penalty related to citation #013.0001218741. (Greene Aff. App.415.) The postcard notice notified Mr. Maury that if unpaid, the penalty could be forwarded to the State of Iowa Income Offset Program. (Greene Aff. App.415.) When it remained unpaid, the civil penalty associated with citation #013.0001218741 was sent to the State of Iowa for inclusion in the State of Iowa Income Offset Program. (Greene Aff. App.416.)

On February 17, 2017, a Notice of Intent to Offset Amount Owing City of Des Moines Against State Income Tax Refund was prepared and mailed to Mr. Maury. (Maury Notice of Intent App.432.) This Notice was related to citation #013.0001218741. (Maury Notice of Intent App.432.) This Notice advised Mr. Maury that his $877.00 income tax refund was

being held due to nonpayment of the $65.00 penalty. (Maury Notice of Intent App.432.) The February 17, 2017 Notice of Intent to Offset Amount Owing City of Des Moines Against State Income Tax Refund was mailed to Mr. Maury's home address in Postville, Iowa. (Maury Notice of Intent App.432.) After communicating with City staff about the hold on February 17, 2017, Mr. Maury consented to the City collecting the penalty from his tax refund so that the remainder would be released. (Maury Aff. 130-31)

DANIEL ROBBINS

Daniel Robbins is a resident of Des Moines, Polk County, Iowa. (Robbins Rog 7 App.447.) As of June 2012, Mr. Robbins was an owner of a Chevrolet made vehicle with license plate number 513XYB. (Robbins NOV 433.) At 3:59p.m. on June 17, 2012, Mr. Robbins's vehicle with license plate number 513XYB was recorded travelling eastbound on I-235 in Des Moines at a speed of 71mph. (Robbins NOV 433.) At 71mph, Mr. Robbins's vehicle with license plate number 513XYB was travelling in excess of the 60mph speed limit. (Robbins NOV 433.)

On June 26, 2012, a Notice of Violation was generated and mailed to Mr. Robbins. (Robbins NOV 433.) The Notice of Violation was designated with Citation #0180152619. (Robbins NOV 433.) The Notice of Violation indicated that Mr. Robbins's vehicle had exceeded the speed limit on June

26, 2012 and that a $65.00 civil penalty was owed for this violation. (Robbins NOV 433.) The Notice of Violation indicated that the penalty was due by July 26, 2012. (Robbins NOV 433.) The June 26, 2012 Notice of Violation was mailed to Mr. Robbins's home address in Des Moines, Iowa. (Robbins NOV 433.) Mr. Robbins received the Notice of Violation. (Robbins Rog 21 App.454.)

On August 3, 2012, a 2nd and Final Notice was generated and mailed to Mr. Robbins related to citation #0180152619. (Robbins 2nd NOV App.435.) The 2nd and Final Notice provided the same general information about the June 17, 2012 violation as the Notice of Violation had. (Robbins 2nd NOV App.435.) The August 3, 2012 2nd and Final Notice was mailed to Mr. Robbins's home address in Des Moines, Iowa. (Robbins 2nd NOV App.435.) Mr. Robbins received the August 3, 2012 2nd and Final Notice. (Robbins Rog 21 App.454.)

On or about May 21, 2016, a postcard notice was sent to Mr. Robbins. (Greene Aff. App.416.) This postcard notice advised Mr. Robbins he had until June 20, 2016 to pay the penalty related to citation #0180152619. (Greene Aff. App.416.) The postcard notice notified Mr. Robbins that if unpaid, the penalty could be forwarded to the State of Iowa Income Offset Program. (Greene Aff. App.416.)

As of March 2015, Mr. Robbins was an owner of a Chevrolet made vehicle with license plate number 513XYB. (Robbins 3-31 NOV App.437.) On March 31, 2015, Mr. Robbins's vehicle with license plate number 513XYB was travelling eastbound on Grand Avenue in Des Moines. (Robbins 3-31 NOV App.437.) At 1:35p.m. on March 31, 2015, Mr. Robbins's vehicle with license plate number 513XYB was recorded travelling eastbound on Grand Avenue in Des Moines at a speed of 37mph. (Robbins 3-31 NOV App.437.) At 37mph, Mr. Robbins's vehicle with license plate number 513XYB was travelling in excess of the 25mph speed limit. (Robbins 3-31 NOV App.437.)

On April 7, 2015, a Notice of Violation was generated and mailed to Mr. Robbins. The Notice of Violation was designated with Citation #0180312406. (Robbins 3-31 NOV App.437.) The Notice of Violation indicated that Mr. Robbins's vehicle had exceeded the speed limit on March 31, 2015 and that a $65.00 civil penalty was owed for this violation. (Robbins 3-31 NOV App.437.) The Notice of Violation indicated that the penalty was due by May 7, 2015. (Robbins 3-31 NOV App.437.) The April 7, 2015 Notice of Violation was mailed to Mr. Robbins's home address in Des Moines, Iowa. (Robbins 3-31 NOV App.437.) Mr. Robbins received the Notice of Violation. (Robbins ROG 21 App.454.)

On May 15, 2015, a 2nd and Final Notice was generated and mailed to Mr. Robbins related to citation #0180312406. (Robbins 3-31 2nd NOV App.439.) The 2nd and Final Notice provided the same general information about the April 7, 2015 violation as the Notice of Violation had. (Robbins 3-31 2nd NOV App.439.) The May 15, 2015 2nd and Final Notice was mailed to Mr. Robbins's home address in Des Moines, Iowa. (Robbins 3-31 2nd NOV App.439.) Mr. Robbins received the May 15, 2015 2nd and Final Notice. (Robbins 3-31 2nd NOV App.439.)

On or about December 14, 2016, a postcard notice was sent to Mr. Robbins. (Greene Aff. App.416.) This postcard notice advised Mr. Robbins he had until January 13, 2017 to pay the penalty related to citation #0180312406. (Greene Aff. App.416.) The postcard notice notified Mr. Robbins that if unpaid, the penalty could be forwarded to the State of Iowa Income Offset Program. (Greene Aff. App.416.) Mr. Robbins received the postcard notice. (Robbins ROG 21 App.454.) When they remained unpaid, the civil penalties associated with citations #0180152619 and #0180312406 were sent to the State of Iowa for inclusion in the State of Iowa Income Offset Program. (Greene Aff. App.417.)

On April 28, 2017, a Notice of Intent to Offset Amount Owing City of Des Moines Against State Income Tax Refund was prepared and mailed to

Mr. Robbins. (Robbins Notice of Intent App.441.) This Notice was related to citations #0180152619 and #0180312406. (Robbins Notice of Intent App.441.) This Notice advised Mr. Robbins that his $205.00 income tax refund was being held due to nonpayment of the $130.00 penalty. (Robbins Notice of Intent App.441.) The April 28, 2017 Notice of Intent to Offset Amount Owing City of Des Moines Against State Income Tax Refund was mailed to Mr. Robbins's home address in Postville, Iowa. (Robbins Notice of Intent App.441.) Mr. Robbins received the Notice of Intent to Offset Amount Owing City of Des Moines Against State Income Tax Refund. (Robbins Notice of Intent App.441.) The City received payment of the $130.00 in penalties from the Income Offset Program (Robbins Notice of Intent App.441.)

ARGUMENT

The City of Des Moines has lawfully utilized the Iowa Income Offset Program, established by the Iowa Code, to collect debts owed to it. Livingood, Maury, and Robbins (hereinafter "Appellants" unless discussing them individually) object to the use of the Offset Program in relation to debts arising from Automated Traffic Enforcement (ATE) violations of the City's speed limits. It is important to note that Appellants are not arguing that they did not commit the speeding violations underlying those citations. Instead, they advance a variety of theories as to why the City should not be allowed to collect on the violations through the Offset Program.

Throughout these proceedings, the district court asked multiple times and in multiple ways, "Why isn't the State of Iowa a party to this matter? Isn't your problem with the statute and the rules?" That is the crux of this dispute. The Appellants take umbrage with two statutory paths created by the Legislature and carried out by state agencies through regulations. For the reasons discussed throughout this brief, the City's use of the Income Offset Program to collect ATE penalties is consistent with the Iowa Code, the Iowa Constitution, and the City's home rule authority.

I. The City of Des Moines' Collection of ATE Debts By Way of Iowa Code Chapter 8A Was Not Preempted.

Standard of Review: The Court reviews a district court's summary judgment ruling for the correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). "Summary judgment is appropriate when the record shows no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Petro v. Palmer Coll. of Chiropractic*, 945 N.W.2d 763, 769 (Iowa 2020) (quoting *Munger, Reinschmidt & Denne, L.L.P. v. Lienhard Plante*, 940 N.W.2d 361, 365 (Iowa 2020)).

Issue Preservation: This issue was properly preserved through summary judgment arguments and proceedings.

Discussion: Article III, Section 38A of the Iowa Constitution grants municipalities home rule power to determine local affairs and government as long as it is not inconsistent with state laws. This constitutional provision is at the core of preemption analysis. Appellants makes an implied preemption argument rather than express preemption which would require the Legislature to have specifically prohibited local action in a given area. *Goodell v. Humboldt County*, 575 N.W.2d 486, 492–93 (Iowa 1998). Implied preemption exists when "the intent of the legislature to preempt is apparent even though the legislature did not expressly preempt in

unambiguous language." *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008). Otherwise stated, "the statute on its face contains a command or mandate that by its very nature is preemptory." *Id*.

"A local ordinance is not inconsistent with a state law unless it is irreconcilable with the state law." *BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857, 859 (Iowa Ct. App. 2002). Local ordinances are granted the presumption of validity. *Iowa Grocery Indus. Ass'n v. City of Des Moines*, 712 N.W.2d 675, 680 (Iowa 2006). Whenever possible, courts should "interpret the state law in such a manner as to render it harmonious with the ordinance." *City of Des Moines v. Gruen*, 457 N.W.2d 340, 342 (Iowa 1990).

I.A. The Iowa Code authorizes rather than preempts the City's use of the Income Offset Program to recover ATE debts.

Whether framed as preemption or otherwise, many of Appellants' arguments question the City's use of the Offset Program for ATE penalties without first obtaining a court judgment through a municipal infraction proceeding. However, the Offset Program created a procedure for municipalities, including the City, to collect debts owed to them even if not reduced to judgment. Examination of section 8A.504 shows that ATE penalties can be recovered through offset without a court order. This does not result in a conflict between section 8A.504 and municipal infractions

under section 364.22 because they provide alternate methods of recovery. Additionally, a city's action of utilizing one statutory procedure cannot be preempted by the existence of an alternative procedure.

I.A.1. The Offset Program allows recovery of multiple types of debts.

Any statutory analysis must begin with the Iowa Code. In this case, section 8A.504 authorized the Department of Administrative Services to establish a debt collection system. It detailed the system and procedure called "Setoff Procedures." The authorizing provision provided[1]:

> The collection entity shall establish and maintain a procedure to set off against any claim owed to a person by a public agency **any liability of that person owed to a public agency**, a support debt being enforced by the child support recovery unit pursuant to chapter 252B, or such other qualifying debt. Iowa Code § 8A.504(2) (2017) (emphasis added).

The statute defines public agency as

> a board, commission, department, including the department of administrative services, or other administrative office or unit of the state of Iowa or any other state entity reported in the Iowa comprehensive annual financial report, or a political subdivision of the state, or an office or unit of a political subdivision. "Public agency" does include the clerk of the district court as it relates to the collection of a qualifying debt.

[1] Remarkably, Appellants' Proof Brief completely omits this section or discussion of it. Rather than addressing this section, Appellants skip to the definitions in section 8A.504(1) and provisions of the Iowa Administrative Code. This analytical leap demonstrates the fundamental flaw in Appellants' argument because they cannot explain how the City's use of the Offset Program violates Iowa law without skipping the portion that authorizes it.

> "Public agency" does not include the general assembly or the governor. Iowa Code § 8A.504(1)(*c*)(2017).

As a political subdivision, the City of Des Moines is a public agency under the statute. It is clear municipalities like the City were authorized to utilize the Offset Program to recover debts.

Important to note is that the statute authorized recovery of multiple types of debt. Child support debts are specifically recognized. Qualifying debts are also included and specifically defined as including:

> (1) Any debt, which is assigned to the department of human services, or which is owed to the department of human services for unpaid premiums under section 249A.3, subsection 2, paragraph "a", subparagraph (1), or which the child support recovery unit is otherwise attempting to collect, or which the foster care recovery unit of the department of human services is attempting to collect on behalf of a child receiving foster care provided by the department of human services.
> (2) An amount that is due because of a default on a loan under chapter 261.
> (3) Any 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(1)(*d*) (2017).

In addition to those two, the statute authorizes recovery of "any liability of that person owed to a public agency" as a separate category. This indicates that the Offset Program is not limited to child support and qualifying debts.

They are specifically identified, but not the only debts recoverable through offset.[2]

Administrative rules were also adopted to further clarify the types of debts eligible for the Offset Program.

> *"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***. Iowa Admin. Code §11-40.1(8A) (2017) (emphasis added).

This definition further emphasizes the broad range of debts that can be recovered through the Offset Program.

ATE penalties meet the definitions of debt that can be collected through the Offset Program. Both the Iowa Code and the administrative rules related to the Offset Program indicate that any debt owed to a public entity can be collected through the program. This shows Appellants' argument that ATE penalties can only be collected through the Offset Program if a court judgment resulting from a municipal infraction proceeding under Iowa Code section 364.22 is in error.

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[2] However, identification of child support and qualifying debts is not superfluous. Other provisions of the Offset Program give these debts higher priority for recovery or have extra recovery processes than run of the mill debts owed to public entities that are collected under a default process and have junior priority. Iowa Code § 8A.504(4)(2)(*k*)(2017).

I.A.2. Iowa Code section 364.22 does not preempt the Des Moines Municipal Code.

Preemption is also a question of statutory construction. *Hensler v. City of Davenport*, 790 N.W.2d 569, 578 (Iowa 2010).

> The goal of statutory construction is to determine legislative intent. We determine legislative intent from the words chosen by the legislature, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge, or otherwise change the meaning of a statute. *City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 248 (Iowa 2008), citing *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004).

One must look to the statutes and the ordinances/actions of the City. If there is no bitter pill in choosing between the two, then the Court must find there is no conflict.

Based on the plain language of 8A.504, the City of Des Moines enacted ordinances to implement a debt offset program. The statement of purpose for the City's offset ordinance asserts

> This division provides procedures to follow in the event that the city seeks to collect legally enforceable debts owed to the city by placement of such debts in the state program established and maintained by the Iowa Department of Administrative Services to offset the debts against a person's state income tax refund pursuant to Iowa Code section 8A.504 and the Iowa Administrative Rules implemented thereunder. Des Moines Municipal Ordinances "DMMO" 3-26 (2017)

The ordinance further provides for notice and a right to challenge a debt's placement in offset. *Id*.

Appellants are not arguing that the City's use of tax offset is, in general, in violation of the law. Rather, only that the City's collection of ATE debts is preempted. "The phrase 'irreconcilable' used in preemption analysis is a hard-edged term. In order to be "irreconcilable," the conflict must be unresolvable short of choosing one enactment over the other." *City of Davenport v. Seymour*, 755 N.W.2d 533, 539 (Iowa 2008).

The Court in *Seymour* looked at several Iowa Code sections and characterized the core question as "whether state law prohibits municipal authorities" from creating and using ATE in the absence of permissive statutory language. *Seymour*, 755 N.W.2 at 543. The Court focused on the express and broad grant of authority to municipalities to enact traffic ordinances and found that, no such "bitter choice" was presented in the context of Iowa Code chapter 321, and stated that for implied preemption to occur based on conflict with state law, "the conflict must be obvious, unavoidable, and not a matter of reasonable debate." *Id. at* 539. As such, the existence of ATE systems and ticketing through them is not preempted by state law.

In this case, the focus is on the method of collection by way of the state-created tax offset program. Specifically, Appellants appear to be arguing that the City's use of Iowa Code § 8A.504[3], specifically the City's reading of the Legislature's intent as to "any liability of that person owed to a public agency" (and certainly that intent that has since been clarified to clarify that this means any debt, so long as there has been notice and opportunity to be heard) and its ordinance at DMMO §§ 3.26-3.29, are in conflict with Iowa Code § 364.22. To analyze implied preemption, one must look to and compare the language of the ordinance and Iowa Code section 364.22.

Iowa Code section 364.22 is entitled "Municipal Infractions." Its introductory paragraph states, in pertinent part,

> A municipal infraction is a civil offense punishable by a civil penalty of not more than seven hundred fifty dollars for each violation or if the infraction is a repeat offense, a civil penalty not to exceed one thousand dollars for each repeat offense. Iowa Code § 364.22(1)(a).

Then Iowa Code section 364.22(6) states, "In municipal infraction proceedings: a. The matter shall be tried before a magistrate, a district associate judge, or a district judge in the same manner as a small claim…"

[3] The Appellants do not appear to argue that the City's process is in conflict with the process in Iowa Code § 8A.504 that permits offset by municipalities.

Iowa Code § 364.22(6). That section continues on to set out the prescribed procedure for municipal infraction proceedings. *Id*. As noted above, the fact that the City of Des Moines' ordinance, and the City's use of alternate resolution methods, were found to be in harmony with Iowa Code chapter 364. *Weizberg v. City of Des Moines*, 923 N.W.2d 200 (Iowa 2018). Since section 364.22 does not preempt the use of administrative procedures to establish ATE penalties, there is no reason it would preempt submission of those liabilities to the Offset Program.

I.A.3. There is no conflict between sections 8A.504 and 364.22 in the City using one process created by the Iowa Code rather than the other.

Appellants' argument largely boils down to the perceived conflict regarding two remedies offered to the City different statutes. Iowa Code section 364.22 allows the City to pursue municipal infractions that result in judgments. That is one method to get a very particular and powerful remedy. Iowa Code section 8A.504 creating the Offset Program permits the City to collect on debts owed to it by way of accessing funds passing through Iowa's Department of Administrative Services regardless of whether they have been reduced to judgment.

One remedy the State of Iowa has provided is to file a municipal infraction, which results in a judgment and all the power that provides, including but not limited to liens, interest accrual, equitable actions to

enforce, garnishment of wages or accounts, judgment-debtor exams, and a higher-priority for tax offset, than non-judgment debts. Further, unpaid judgments can result in license and registration problems for debtors, providing another incentive to pay.

The Legislature also provided a less powerful remedy of tax offset for collecting debts—and it does not exclude ATE from those debts. Offset carries less power than judgments—there are no liens, interest accrual, equitable actions to enforce, garnishment of wages or accounts, or judgment-debtor exams permitted. There are no license and registration problems associated with these types of debts. They are low on the totem pole for tax offset collection, as compared to qualifying debts. But it is another remedy the State has offered for collection of liquidated debts, meaning those whose amounts are definite, determined, and fixed by operation of law.[4] Iowa Admin. Code §11-40.1(8A) (2017).

Again, Appellants' arguments show frustration with actions and law established by the State of Iowa. As noted by the District Court after the temporary injunction hearing, in which Appellants argued the administrative rules were ultra vires (despite not naming the agency as a party):

[4] The amount for ATE tickets is fixed by operation of law through adoption of the City of Des Moines' Schedule of Fees (Council Comm. 1)

> Agency rules are ordinarily given the force and effect of law, provided they are reasonable and consistent with legislative enactments." *Wallace v. Iowa State Bd. of Educ.*, 770 N.W.2d 344, 348 (Iowa 2009). The administrative rules are reasonable and consistent with the statute. The City is entitled to rely on the statute and the administrative rules in fashioning its collection program. (District Court Order dated 5/30/2017).

When the State of Iowa creates a program for municipalities to use, the City does not violate the law by utilizing that program.

There are dozens of examples that can be found in the Iowa Code where alternate remedies are available for the same issues: the ability to pursue criminal or civil actions for the same conduct, the ability to pursue civil enforcement or administrative remedies, or the ability to pursue monetary and/or injunctive relief. The Legislature and Iowa courts have indicated that offering recourse to alternative remedies to address the same wrong is favored. *Hartford-Carlisle Sav. Bank v. Van Zee*, 569 N.W.2d 386, 389 (Iowa 1997). The tax offset program is an alternative remedy to the wrong of violating traffic laws including being recorded speeding at more than 70 miles per hour on I-235. The City could pursue a municipal infraction and get a very powerful judgment, or it can pursue tax offset for a liquidated sum owed and take a chance at recovery. These are permissible alternatives and when the City chooses the latter, it is not preempted by state

code. As such, the Court should affirm the district court's ruling that there is no preemption issue between the two Iowa Code sections.

I.B. The *Weizberg and Behm* decision do not "preempt" the City's use of the tax offset program.

It is also important to address an argument briefly asserted by Appellants in their preemption argument. They argue the City was:

> 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. (Appellants' Proof Brief, App.63.)

As an initial matter, this argument suffers from a lack of precision. Preemption principles relate to conflicting laws between superior and inferior bodies. The City can't be preempted by its own ordinances. Articulated properly, this argument is really about the concept of ultra vires.

Framed as such, Appellants argue that, as the City's ordinance was written at the relevant times to this lawsuit, the City was required to provide a municipal infraction process for every ATE violation.[5] Otherwise stated,

[5] The City has since changed its ordinance to include an administrative process as an alternative to a municipal infraction and has altered the language in the ordinance to use permissive, rather than mandatory, language related to the municipal infraction. Appellants argue that was meant to remedy a problem; the City asserts that the changes reflect clarification of the longstanding intent of the City's legislative body.

Appellants argue that mandatory prosecution is required under the City's ordinance and any other attempted resolution is ultra vires. That can't be right. The City has the right to prosecutorial discretion. Like any other prosecutor, the City can negotiate, accept plea agreements, mediate, or use an administrative process to review tickets.

Further, this "mandatory prosecution and nothing else" argument was fully addressed in *Weizberg v. City of Des Moines,* 923 N.W. 2d 200 (Iowa 2018). In that case, Appellants alleged myriad theories for how the City's ordinance and its use of an administrative process in addition to the municipal infraction process was a violation of state and constitutional law. They did not succeed. Throughout the Iowa Supreme Court's decision, there was ample discussion that a City's failure to follow its own ordinance to the letter does not, per se, amount to a legal wrong. The ultimate outcome of *Weizberg* was that the ATE ordinance and the City's processes and actions were deemed lawful. It is a nonstarter to re-assert arguments that were rejected in *Weizberg* as the jumping off point to declare the City's use of the offset program to be illegal, and more specifically, to be preempted.

Appellants rely heavily on dicta contained in both *Weizberg* and *Behm v. City of Cedar Rapids,* companion cases that challenged the ATE ordinances of the cities of Des Moines and Cedar Rapids, to attempt to

advance their position. *Behm v. City of Cedar Rapids*, 922 N.W.2d 524 (Iowa 2019). In *Behm*, as the Court was analyzing Cedar Rapids' ordinance and whether it was preempted by Iowa Code 364.22. The Court stated, "under our interpretation of the ordinance…no liability of any kind attaches to a vehicle owner without the filing of a municipal infraction" and "there are other plausible interpretations of the ordinance. But we do not find conflict preemption unless the conflict is obvious, unavoidable, and not a matter of reasonable debate." *Id*. at 564-565.

As noted by the Court, even if there are other interpretations of the ordinance, it makes no difference to the outcome of the decision regarding preemption under that analysis. This is what makes these sections of the opinion dicta. This was a "passing expression[ ] of the court, wholly unnecessary to the decision of the matters before the court". *Hemesath v. Iowa Dep't of Transp.*, 852 N.W.2d 523 (Iowa Ct. App. 2014), citing *Boyles v. Cora*, 6 N.W.2d 401, 413 (Iowa 1942). Obiter Dictum is not binding precedent. *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 391-92 (Iowa 2009). If a question fairly arises in the course of a trial and there is a distinct decision on that question, the ruling of the court in respect thereto cannot strictly be called a mere dictum. *Galvin v. Citizens' Bank of Pleasantville*,

250 N.W. 729, 730 (1933). The reverse inference then is that, if a matter was not one before the district court and part of a ruling, it is mere dictum.

If "questions are not raised in this appeal" the Court should "consequently express no view on them. This court is not a roving commission that offers instinctual legal reactions to interesting issues that have not been raised or briefed by the parties for which the record is often entirely inadequate if not completely barren." *City of Davenport v. Seymour*, 755 N.W.2d 533, 545 (Iowa 2008). Like in *Behm*, the Court opined on whether cities could use any collection methods other than voluntary payments to collect civil penalties from ATE citations even though the issue had not been briefed and the record did not address it. As a result, the Court made statements without the benefit of a full picture of the applicable facts, law, and arguments. Thus, the *Behm* dicta, and citations to it in *Weizberg*, are not binding on the analysis here.

Even if it was, it is important to address the context of what the Court was concerned about in *Weizberg*. Largely, it was the language of the decisions from the administrative process, which declared there to be a "judgment total". The Supreme Court, during oral argument, raised this language as concerning, in that, the language appeared to sound like the City could create a "court judgment" with all the power that comes with it, from

an administrative process. The City concedes that it does not have a judgment based on the nonpayment of civil fines. The City uses the offset program—an issue never presented in the context of *Weizberg* and *Behm*, so those decisions should have no impact on this analysis. Otherwise stated, the Supreme Court decision and language isn't controlling as to the issue of tax offset because it was never presented to the Court.

Close analysis of the relevant statutes demonstrates the errors of Appellants' arguments. Appellants' arguments that only debts reduced to a court judgment can be submitted to the Offset Program is contradicted by both the statute itself and its administrative rules. As a result, the perceived conflict between the offset statute and municipal infractions does not exist because the State of Iowa can create more than one process to address an issue. When it does, there is no violation of the law when an entity selects one process over the other. The Court should affirm the district court and hold that the City followed the law in utilizing the Offset Program for recovery of ATE penalties.

II. The City of Des Moines' Collection of ATE Debts By Way of the Tax Offset Program Was Not in Violation of the State's Statute of Limitations.

Standard of Review: The Court reviews a district court's summary judgment ruling for the correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). "Summary judgment is appropriate when the record shows no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Petro v. Palmer Coll. of Chiropractic*, 945 N.W.2d 763, 769 (Iowa 2020) (quoting *Munger, Reinschmidt & Denne, L.L.P. v. Lienhard Plante*, 940 N.W.2d 361, 365 (Iowa 2020)).

Issue Preservation: This issue was properly preserved through summary judgment arguments and proceedings.

Discussion: Appellants, again, fail to acknowledge the difference between a court action resulting in a judgment, as opposed to an administrative alternative to collecting a debt. It is correct that Iowa Code 614.1 indicates that an action must be brought in district court within one year of an ordinance violation in order to seek judgment to enforce. As noted above, it was the Iowa Legislature that allowed for an alternate remedy. That alternative does not come with the same power as a judgment, but it is an alternative remedy nonetheless.

As noted by the District Court in its summary judgment ruling:

> Iowa Code section 614.1 indicates that a city must bring a court action within one year of an ordinance violation in order for the court to enforce it. Iowa Code § 614.1. Appellants reiterate their argument that the City's use of the offset program is preempted. As stated above, this is not the case. Here, the legislature provide for an alternate remedy aside from action in the courts. An order from the court has a farther reach and more power to collect than the tax offset program. (District Court Order, Nov. 6, 2021).

This is an instance in which Appellants' grievance should be with the State of Iowa for offering more than one remedy to municipalities. To that end, he has argued previously that the Rules set forth by DAS are ultra vires; that argument was rejected. Certainly, for that to be a legitimate argument, Appellants should have included the state agency that created the following:

> *"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***. Iowa Admin. Code §11-40.1(8A)(2017)[emphasis added].

However, as stated by the district court in its injunction ruling, "Finally, the Court does not agree with the Appellants' assertion that the DAS rules… are ultra vires." As related to the likelihood of Appellants succeeding on the merits, the District Court also stated, "It appears to the Court that the City's use of the Iowa Income Offset program is authorized by

Iowa Code 8A.504 and Iowa Admin. Code r. 11-40… The City is entitled to rely on the statute and the administrative rules in fashioning its collection program." District Court Order, May 30, 2017. The City is not violating a statute of limitations regarding bringing court actions because it could utilize Iowa Code section 8A.504 and Iowa Admin. Code r. 11-40 without a court judgment. As such, the District Court's order of summary judgment should be affirmed as to the issue of the statute of limitations associated with Iowa Code 614.1.

III. The City of Des Moines' Collection of ATE Debts By Way of the Tax Offset Program Was Not a Violation of the Iowa Constitution's Due Process Clause.

Standard of Review: This portion of the argument involves Constitutional arguments. As such, the Court performs a de novo review. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 339 (Iowa 2015). In doing so, the Court independently evaluates the totality of the circumstances. *State v. Shanahan,* 712 N.W.2d 121, 131 (Iowa 2006).

Issue Preservation: This issue was properly preserved through summary judgment arguments and proceedings.

Discussion: The Iowa Supreme Court has already determined that the City's use of Automated Traffic Enforcement and its process offered do not offend procedural due process. *Weizberg v. City of Des Moines,* 923 N.W.2d

200 (Iowa 2018). Thus, the narrow issue before this Court is whether the use of the tax offset program offends procedural due process. The City asserts that it does not.

The Iowa Due Process Clause mandates that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. 1, § 9. Similarly, the United States Constitution's Due Process Clause states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Iowa courts deem the federal and state due process clauses to be identical in scope, import, and purpose. *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 690 (Iowa 2002).

"The requirements of procedural due process are simple and well established: (1) notice; and (2) a meaningful opportunity to be heard." *Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W.2d 255, 264 (Iowa 2001). Iowa has adopted the federal courts' balancing test in assessing what process is due. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The Court considers the following three factors to determine what process is due:

> First, the private interest that will be affected by the official action; Second, the risk of an 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 requirement[s] would entail. *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 145 (Iowa 2013), (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

"No particular procedure violates [due process] merely because another method may seem fairer or wiser." *Bowers*, 638 N.W.2d at 691(quoting from 16B Am.Jur.2d *Constitutional Law* § 909, at 500 (1998)).

The undisputed facts show notice and process were present. Mr. Livingood was sent Notices of Violation on March 20 and May 6, 2014, to his home address. (NOV 1 & 2). On or about October 22, 2016, a postcard notice was sent to Mr. Livingood, advising that he had until November 21, 2016 to pay the penalty and if unpaid, the penalty could be forwarded to the State of Iowa Income Offset Program. (Greene Aff. App.415.). On March 30, 2015, a Notice of Intent to Offset was mailed to Mr. Livingood at his home address, advising him that his $185.00 income tax refund was being held due to nonpayment of the $65.00 penalty. (Liv. Notice of Intent App.427.). Livingood received this notice. (Liv. ROG 21 App.454.) That is a total of four notices related to the debt owing due to speeding. The first notice of violation provided instructions to challenge the allegation of speeding. The Notice of Intent to Offset also provided instructions to challenge the offset. As such there were two opportunities to be heard on this matter. Mr. Maury and Mr. Robbins were sent similar notices regarding

their violations. (App.428-441.) Each had multiple opportunities to be heard regarding their ATE violations prior to submission to the Offset Program.

As for Appellants' argument that the City is not following the agency's rule as to notice found at IAC section 11-40.4(4), that is a blatant misrepresentation of the facts. The rules require that when the department notifies the public agency of a potential offset, the public agency must send a notice to the debtor. IAC §11-40.4(4) The City's ordinance provides exactly that:

> If the Iowa Department of Administrative Services notifies the city of a potential offset of a debt, the finance director or his or her designee shall **within ten days send notification by regular mail to the debtor** that shall include:
>
> (1) The city's right to the payment in question.
>
> (2) The city's right to recover the payment through the offset procedure.
>
> (3) The basis of the city's case in regard to the debt.
>
> (4) 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.
>
> (5) The debtor's right to appeal the offset and required appeal procedures set forth in this chapter.
>
> (6) The name of the city as the public agency to which the debt is owed, with a telephone number for the debtor to contact the city regarding questions about the offset.

DMMO 3-28 (2017) (emphasis added). Further, the City's response to Interrogatory 3, as noted by Appellants, actually states, "Upon

receiving the match information from DAS, the City sends a notice to the affected individual notifying them of the hold." In essence, once the state agency informs the City that there is going to be an offset, the City sends the notice to the individual. That is consistent with the regulations and the City's ordinance.

As stated above, notice and opportunity to be heard were undisputedly present. The remaining question is whether the process—meaning the notice and opportunity to be heard—met the threshold of what is due. Contextually, the point at which the analysis must begin is when the driver got the NOV. It is important to distinguish that the NOV is not the same as a municipal infraction case. A municipal infraction case occurs when the City of Des Moines files a lawsuit against the vehicle owner. Prior to that, the NOV advises vehicle owners of a debt owing, options available including, paying the penalty, attempting resolution through an administrative hearing, and having the City file the municipal infraction case with the district court.

III.A. The Vehicle Owners' Private Interests are Nominal.

Applying the first prong of the Mathews test, the City concedes the Appellants have a property interest in the $65.00 citation issued under the ATE system. *Shavitz v. City of High Point*, 270 F.Supp.2d 702, 709 (M.D.N.C. 2003) (concluding a $50 fine resulting from an ATE system constitutes a legitimate property interest for purposes of due process). However, "a civil fine between $25 and $750, although certainly a property interest protected by the Due Process Clause, is not a particularly weighty property interest." *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817, 846–47 (N.D. Iowa 2015), aff'd in part, rev'd in part sub nom. *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987 (8th Cir. 2016), citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) (applying procedural due process analysis to termination of a person's welfare benefits); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (applying procedural due process analysis to termination of a public employee following alleged misconduct); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (same); *Little v. Streater*, 452 U.S. 1 (1981) (applying procedural due process analysis to government payment to indigent defendants in paternity cases); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (applying procedural due process analysis to persons alleged to have violated the terms of their probation or parole).

Appellants argue that the temporary seizure of the entire refund amount to recover the $65 is a greater property interest. While that may be correct, albeit temporarily, that is a function of the statute and regulations. It isn't a choice exercised by any public entity using the tax offset program. In any event, the remainder is returned to the debtor and the City only keeps the amount of the fine. Again, with regards to the entire tax refund, the Appellants should direct their concerns to the State of Iowa rather than the City. Stated plainly, as to the first prong of the Mathews analysis, there is a nominal property interest at stake for the Appellants.

III.B. There is no Risk of Erroneous Deprivation.

Under the second factor, the City's use of tax offset does not risk erroneous deprivation. As for accuracy of information, the City and its vendor Gatso, use the NLETs database, which contains most current vehicle owner contact information accessible to the Iowa Department of Transportation. (NLETs App.418-421; Gatso RFP App.543.). License plates are checked through that database for current ownership.

In terms of opportunities to challenge the information or violation, the Appellants have at least two points at which they are able to contest these actions: first at the imposition of the violation itself when an individual has options of an administrative hearing and/or district court, then later at the

point of tax offset. This is a very reliable process that allows multiple points of contact and contest throughout for the very purpose of eliminating risk or erroneous deprivation. Notably, Appellants never argue that the data was incorrect or that their addresses were incorrect. None argue that they did not have access to a district court proceeding or an administrative review, if they had asked.

The United States Court of Appeals for the Sixth Circuit has provided an opinion that is helpful to the analysis here. *Silvernail v. County of Kent*, 385 F.3d 601 (2004). While not binding on this court, federal cases, foreign state cases, and other persuasive authorities can provide useful guidance. *State v. Sweet*, 879 N.W.2d 811, 832 (Iowa 2016), citing *State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014); *State v. Ochoa,* 792 N.W.2d 260, 267 (Iowa 2010). In the *Silvernail* case, a county assessed a penalty to individuals who executed bad checks. *Silvernail*, 385 F.3d at 603. In essence, it was a county infraction that came with a monetary penalty. The county contracted with a private agency to collect the fee. *Id*. It did so, not under its own ordinances, but based on local township code and state law regarding bad checks. *Id*. The process provided was a written "due process" notice demanding payment of the check, fees, and a $25 government assessment payable to the county. *Id*. There was no notice of any method for appealing the decision,

however, there was a phone number listed for "questions regarding this letter or the amount due." *Id*. at 603-604.

The court found this to be sufficient process. Specific to the second prong of the *Mathews* test, the court stated that due process was satisfied because being provided with a phone number was sufficient to provide opportunity to grieve the decision. *Id*. at 605. None of this was codified in the county ordinance. There were state proceedings, both civil and criminal that could have been pursued by the county in the Michigan district court. Nevertheless, the Sixth Circuit found this practice to satisfy due process.

Not only does this make good legal sense, that approach represents good public policy. There are hundreds of interactions between a municipality and citizens that impose requirements, actions and financial consequences. It is in the interest of citizens that not every one of these interactions forces them into the cost and consequence of district court if they choose to avail themselves of informal resolution—especially when a person isn't deprived of the statutory infraction process. The United States District Court for the Eighth Circuit upheld the system in Des Moines and in doing so articulated that the differences in the Des Moines ordinance (not outlining an administrative process) from the Cedar Rapids ordinance (outlining an administrative process), are "immaterial" because "both

ordinances offer access to the district court." *Brooks v. City of Des Moines*, 844 F.3d 978, 979 (8th Cir. 2016). That is where the rubber meets the road in this analysis; the process in Des Moines passes the second prong of the *Mathews* test by ensuring that the right to access district court is known and available to vehicle owners, as is the opportunity to contest the placement of the debt in offset.

III.C. The Government Interest Satisfies the Third Prong of Procedural Due Process Analysis.

A municipality could simply force every one of these violations to be tried in district court, resulting in costs and judgment for vehicle owners. The City of Des Moines chooses alternate remedies to avoid citizens being "further prosecuted or assessed any costs or other expenses for such violation." DMMO 1-15(e). These are alternate remedies that are codified and permitted by state statute. That is a strong governmental and public interest. As to the burdens of alternate or substitute process, the burden would be enormous. Filing municipal infractions for every individual who is recorded violating traffic laws by ATE would result in thousands of additional municipal infraction cases. This would be a burden on the City likely requiring additional staff. It would be a burden on the courts to deal with a large influx of new cases. It would also be a burden on violators who would face court costs on top of the ATE penalties. Sending all ATE

violations through a municipal infraction prior to the Offset Program would do little to reduce the already low risk of an erroneous deprivation but would burden all parties involved.

Further, providing law enforcement in a cost-effective manner is a legitimate government interest. *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 557 (Iowa 2019), *Cf. Thomas v. Fellows*, 456 N.W.2d 170, 173 (Iowa 1990). The individuals who received ATE Notices of Violation were speeding in excess of 11 miles per hour over the posted speed limit. That behavior comes with a penalty and the Legislature has given municipalities alternate remedies to engage in the enforcement part of the ticket—the imposition of a fine. One may go through the district court process and burden the already over-burdened court system in order to get a judgment, which has significant enforcement powers and additional costs. In the alternative, the City can access the tax offset program to reduce costs to the vehicle owner and still enforce legitimate safety interests in enforcing speeding laws.

It is also important to recognize that enforcement is an important part of safety. No matter how important a safety rule, people have a tendency not to follow them if they do not believe they will face a consequence for their actions. Utilizing the Offset Program to collect ATE penalties for speeding

and other traffic violations will make the public aware, perhaps slowly, that there is a real, monetary consequence for their failure to follow traffic laws. ATE violations are not simply a piece of paper in the mail that they can ignore. Generating this awareness in the public will increase compliance with traffic laws and increase safety on the roads. For all the reasons herein, the City of Des Moines's use of the tax offset program does not offend procedural due process and the summary judgment order in favor of the City should be affirmed.

IV. The City of Des Moines' Collection of ATE Debts By Way of the Tax Offset Program Was Not an Unlawful Taking in Violation of the Iowa Constitution.

Standard of Review: This portion of the argument involves Constitutional arguments. As such, the Court performs a de novo review. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 339 (Iowa 2015). In doing so, the Court independently evaluates the totality of the circumstances. *State v. Shanahan,* 712 N.W.2d 121, 131 (Iowa 2006).

Issue Preservation: This issue was properly preserved through summary judgment arguments and proceedings.

Discussion: The City has not violated the takings clause of the Iowa Constitution by utilizing the Income Offset Program. At summary judgment, Appellants pointed to two aspects of the City's use of the Offset Program as being takings: 1-the City directs the State to hold more tax refund than the amount of debt owed to the City, and 2-the City actually takes possession of the amount of the debt owed. The first is disposed of by the fact that it is *required* by statute. For the second, this is not a taking because collection of monies pursuant to the City's police power cannot be a taking. On appeal, Appellants appear to abandon the allegations related to the amount held and approaches this topic as more of a generalized takings argument that the City wasn't entitled to the money so the collection was wrong.

However, in the event the Court wishes to consider the issue of a hold being placed on the entire refund, this is required by the Iowa Code. Appellants correctly notes that when the Income Offset program results in a match between a taxpayer who owes a debt to the City and to whom the State owes money, DAS puts a hold on the whole amount rather than just the amount claimed by the City. Appellants, however, gloss over the fact that this procedure is mandated by the Iowa Code and the City has no control over that. Iowa Code § 8A.504(2)(*f*)(1)(2017).

As the District Court stated in the Injunction Order,

> While it may seem heavy handed for the State to withhold an entire tax refund pending payment of a $65.00 debt owed the City through direct payment or setoff, this process is authorized and required by Iowa Code sections 8A.504(2)(e) and 8A.504(2)(f)(1). (District Court Order, dated May 30, 2017).

Appellants' complaints should be directed to the Iowa General Assembly and the Department because the Iowa Administrative Code also contemplates that the whole amount will be held until disbursement is made to the City, though with a slightly different procedure. Iowa Admin. Code § 11-40.4(5). The City is utilizing a process established by the Iowa Code and the state agency, not engaging in an unlawful taking.

Takings analysis asks the following questions: (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 Cnty. Sheriff*, 611 N.W.2d 475, 479 (Iowa 2000).

The first prong requires precision to define what right Appellants are asserting. It is the right to receive a full state tax refund when one has a speeding citation, and after notice and opportunity to be heard, fails to pay the citation amount. According to the Iowa Code, that is not a protected

right. If Appellants take issue with that, they should challenge the validity of the statute and regulations.

Another reason Appellants' takings argument fails is that the City is engaged in the valid exercise of the police power. Iowa Courts have recognized that when the police power is exercised, it is not a taking. *See Kelley v. Story Cty. Sheriff*, 611 N.W.2d 475, 479 (Iowa 2000); *Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 425 (Iowa 1996); *City of Monroe v. Nicol*, 898 N.W.2d 899, 902 (Iowa Ct. App. 2017). This is consistent with federal law. When interpreting the takings clause of the Iowa Constitution, courts may seek guidance from federal caselaw as the federal takings clause is very similar. *Kingsway Cathedral v. Iowa Dept. of Transp.*, 711 N.W.2d 6, 9 (Iowa 2006). Appellants have not asserted any reason to apply a different analysis. Federal courts have repeatedly recognized that an exercise of the police power is not a taking. *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156-57 (1919); *Lech v. Jackson*, No. 18-1051, 2019 WL 5581699, at *5 (10th Cir. Oct. 29, 2019); *Meineke v. Finnan*, No. 1:11-cv-01624, 2014 WL 3586546, at *3 (S.D. Ind. July 21, 2014); *Grimes v. O.D.O.C. Agency*, No. 06–CV–619–AS, 2007 WL 1170636, at *3 (D. Or. Apr. 11, 2007). "[W]hen the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not

constitute a taking for purposes of the Takings Clause." *Lech*, at *5. The Takings Clause "does not apply when the government imposes penalties or forfeitures in an exercise of its police power." *Grimes*, at *3.

The City's collection of ATE penalties through the Offset Program is done pursuant to the police power to protect the health and safety of the community, so it is not a taking. The voluntariness is irrelevant. No one who is faced with a penalty for violation of traffic violations *wants* to pay the penalty. Nevertheless, it is a legitimate use of police power to assess for safety purposes. And contrary to Appellants' characterization as the City being engaged in money-grabbing, the regulations and enforcement of speeding is a legitimate and important public safety interest. As was stated by the District Court in the decision that finally dismissed the remaining claims in the *Weizberg* case on remand:

> Certainly, no rational person could question that the City of Des Moines has a legitimate interest in preventing vehicle crashes by reducing speed. Anyone who might should have to sit through a victim impact statement in a vehicular homicide case, as I have had to do on too many occasions. As an example, in State v. Lopez-Aguilar, the defendant was driving at least 12 mph over the speed limit when he blew through a stop sign and killed a 12 year old girl. See Polk County No. FECR298739; State v. Lopez-Aguilar, 924 N.W.2d 533 (Iowa App. 2018). Her grandfather, who was significantly hurt, had been driving her home after school. Alcohol was not involved in the crash. As another example, in State v. Uhe, the defendant was driving as much as 40 mph over the speed limit when he killed a young man driving to his last day of college at Grand View. See Polk

> County No. FECR315912. The time was approximately 9:54 in the morning. Alcohol was not involved in that crash either. In both cases, the impact on the families and friends was enormous. While Appellants' expert opined to a "societal cost" in the payment of civil sanctions, that cost is trivial when compared to the societal cost incurred in a single unnecessary death, let alone cases involving lower levels of personal injury or property damage. The City has an interest in taking any action it can to attempt to prevent that type of harm to the public welfare. *See* Order dated 2/13/2020; Iowa District Court Case No. CVCV050995 App.518-19.

As discussed before, utilizing the Offset Program to collect ATE penalties will further these safety interests. For all the reasons set forth above, the summary judgment order from the District Court should be affirmed as to the issue of an unlawful taking.

V. The City of Des Moines' Collection of ATE Debts By Way of the Tax Offset Program Did Not Unjustly Enrich the City.

Standard of Review: The Court reviews a district court's summary judgment ruling for the correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). "Summary judgment is appropriate when the record shows no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Petro v. Palmer Coll. of Chiropractic*, 945 N.W.2d 763, 769 (Iowa 2020) (quoting *Munger, Reinschmidt & Denne, L.L.P. v. Lienhard Plante*, 940 N.W.2d 361, 365 (Iowa 2020)).

Issue Preservation: This issue was properly preserved through summary judgment arguments and proceedings.

Discussion: Unjust enrichment is an equitable principle that "serves as a basis for restitution." *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 (Iowa 2001). The three elements a plaintiff must prove to recover under unjust enrichment are: "(1) [the] defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances." *Id*. at 154-55, cited by *Hunting Sols. Ltd. Liab. Co. v. Knight*, 902 N.W.2d 592 (Iowa App. 2017). "It is essential merely to prove that a defendant has received money which in equity and good conscience belongs to plaintiff." *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1295 (8th Cir. 1980) (citations omitted).

The City concedes that prongs 1 & 2 have been met. The question is whether it is unjust. The fine was a liquidated sum. The Appellants had ample notice and opportunity to contest. After all due process was made available, it was determined the debts were due. Iowa Code § 8A.504 and related administrative rules permit tax offset in those circumstances without a judgment. Utilizing a program created by the Iowa Code that permits the City to collect these debts is not unjust. Even if it was, the creator of that

system is the State of Iowa. Further, there are no facts in the record to support any allegation that the debts were not owed, meaning no one has argued they weren't violating speeding laws Therefore, collection of those debts is not unjust. Therefore, the summary judgment decision in the City's favor should be affirmed.

CONCLUSION

For all the foregoing reasons, the Appellee respectfully requests the Court affirm the summary judgment decision of the District Court in favor of the City of Des Moines.

STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully request that this case be submitted with oral argument.

CERTIFICATE OF COST: The undersigned certifies that the cost of printing the Appellees' brief is $0.

By: /s/ Luke DeSmet

CERTIFICATE OF FILING: I hereby certify that I have filed the foregoing Appellees' Final Brief by EDMS to the Clerk of the Iowa Supreme Court on the September _, 2022.

By: /s/ Luke DeSmet

CERTIFICATE OF COMPLIANCE:

1. This Brief complies with word length requirements and contains 12,815 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. 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 the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing Microsoft Word in 14-point font plain style.

3. This brief was also filed as a searchable PDF.

By: /s/ Luke DeSmet