IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-0686

POLK COUNTY NO. CVCV049988

CITY OF DES MOINES, IOWA
CITY OF MUSCATINE, IOWA
AND CITY OF CEDAR RAPIDS, IOWA

Petitioners-Appellants,

vs.

IOWA DEPARTMENT OF TRANSPORTATION and IOWA TRANSPORTATION COMMISSION,
Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY, IOWA
HONORABLE SCOTT D. ROSENBERG, DISTRICT COURT JUDGE

PETITIONERS-APPELLANTS' JOINT REPLY BRIEF

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ARGUMENT

A. THE IDOT'S HOME RULE ARGUMENTS ARE IRRELVANT TO THE ISSUES TO BE DECIDED IN THIS CASE.

At the outset of the home rule portion its brief, IDOT dedicates several pages to arguing that it should regulate ATE equipment because 1) IDOT should be in charge of ATE equipment because IDOT rules address engineering concerns and 2) IDOT does not have a monetary interest in ATE equipment. While the Cities disagree that these items militate in favor of IDOT regulating ATE equipment given a number of countervailing factors, these items have absolutely no relevance to the question of whether IDOT's rules violate the constitutional and statutory grant of home rule authority afforded to Iowa's municipalities. They are entirely superfluous to the argument at hand. *See City of Davenport v. Seymour*, 755 N.W.2d 533, 544 (Iowa 2008) (stating "the pros and cons of ATE ordinances have no bearing on the narrow legal issue that we are required to decide in this case. Our only task is to determine, under established legal principles, the issues that the parties have presented…").

After finally making its way to the legally relevant portions of its home rule argument, IDOT severely misses the mark. IDOT first argues that the Cities are making a "novel reverse preemption [argument] whereby an

ordinance enacted under home rule authority invalidates agency action under state law." IDOT Br. at 27.

IDOT is severely mistaken as to the import of the Cities' argument. To be clear, the Cities make no argument about reverse preemption and this is not an issue to be decided in this case.

Instead, the Cities argue that the legislature has not abrogated the Cities' power to enforce traffic regulations via ATE equipment – either by granting rule making authority to IDOT or by restricting the use of ATE equipment directly - and thus IDOT rules violate the Cities exercise of its home rule powers. This argument turns on traditional application of the home rule/preemption analysis and has absolutely nothing to do with reverse preemption.

Perhaps the disconnect here is attributable to IDOT's misunderstanding of its legal status in the preemption analysis. Home rule enables cities to exercise any power so long as not inconsistent with the "laws of the general assembly." *See* Iowa Code § 364.1. Although IDOT may disagree, IDOT is not the general assembly, and its rules are not tantamount to the laws of the generally assembly unless and until they are adopted pursuant to a statutory grant of rule making power and in conformance with the tenets of Iowa Code chapter 17A. *See Branderhorst v.*

Iowa State Highway Com., 202 N.W.2d 38, 41 (Iowa 1972) ("administrative agencies [do] not possess common law or inherent powers, but only the powers which are conferred by statute"); *see also, Anderson v. Iowa Dep't of Human Servs.*, 368 N.W.2d 104, 108 (Iowa 1985) (stating "***Validly*** adopted rules have the force and effect of law")(emphasis added). Thus, the fact that IDOT adopted agency rules and the Cities challenged the validity of those rules does not convert this action to one of reverse preemption, as IDOT's rules are not given the force of law simply because IDOT chose to adopt them; in all instances, they must have been authorized by the legislature.

In addition to its flawed argument about reverse preemption, IDOT again misses the mark by arguing that Iowa Code sections 364.3 and 364.6 have any relevance here. Iowa Code sections 364.3 and 364.6 state that the Cities shall substantially comply with procedures established by state law, *see* Iowa Code § 364.6, and may not set standards which are less stringent than those imposed by state law, *see* Iowa Code § 364.3. While those statutory provisions speak for themselves, they add nothing to the home rule/preemption inquiry. The Cities readily admit that where state law preempts the exercise of a city power, cities are without power to act. The IDOT seems to conflate its status to that of the legislature, and assumes that simply because it adopts an agency rule, that its agency rule is given the

force of law. As mentioned above, that is not the case. *See Branderhorst*, 202 N.W.2d at 41. Moreover, as this Court has recognized "[i]n Iowa Code § 321.236, the legislature expressly authorizes local governments to establish rules of conduct related to rules of the road. The legislature used no words of limitation in the section." *Seymour*, 755 N.W.2d at 535. Thus, the statutes cited by IDOT are irrelevant given that this Court has already determined the legislature has expressly authorized the Cities to establish rules of conduct related to rules of the road, and that such authorization extends to the deployment of ATE technology. *Id*.

With respect to IDOT's remaining arguments: that agency rules have preemptive effect, that the Cities' reliance on *Seymour* is misplaced, that IDOT is the superior sovereign with the most compelling interest, and that home rule does not invalidate state law, these arguments have been dispelled in the foregoing paragraphs or are simply without merit, as discussed below.

First, as mentioned above, agency rules only have preemptive effect if validly adopted pursuant to a grant of rule making authority and in accordance with Iowa Code chapter 17A, and not otherwise. *See Branderhorst*, 202 N.W.2d at 41. Second, as to IDOT's argument that *Seymour* is not relevant because the landscape has changed due to IDOT's adoption of the agency rules in dispute in this case, the IDOT is mistaken.

Seymour's relevance has not changed simply because IDOT has adopted agency rules. In order for the "landscape" to change, there would need to have been some change in the laws of the general assembly nullifying the Court's ruling in *Seymour*. Until then, principles of stare decisis mandate the continued application of this Court's holding. *See Gard v. Little Sioux Intercounty Drainage Dist.*, 521 N.W.2d 696, 698 (Iowa 1994) (stating that this "court has invoked the principle that issues of statutory interpretation settled by the court and not disturbed by the legislature have become tacitly accepted by the legislature."). *Bd. of Water Works Trs. of City of Des Moines v. Sac Cty. Bd. of Supervisors*, 890 N.W.2d 50, 60 (Iowa 2017) (describing doctrine of stare decisis).

Third, the superior sovereign doctrine advanced by IDOT has no relevance to this case. IDOT states that this doctrine looks "at the top of the government hierarchy and subordinates municipal ordinances to state law." DOT Br. at 31. It is unclear why IDOT relies on this doctrine at all, as Iowa's own home rule/preemption analysis does precisely that. It restricts municipal action where the legislature has preempted such action. The Cities concede as much. But to be clear, IDOT rules do not share the same advantage as laws passed by the legislature. The IDOT is itself subordinate to the legislature, and the validity of any rules that IDOT enacts depend,

necessarily, on whether the legislature has authorized the adoption of those rules. In the absence of such authorization, its rules are a nullity. *See Motor Club of Iowa v. Dep't of Transp.*, 251 N.W.2d 510, 512 (Iowa 1977) (stating that agency rules which "exceed the statutory grant and must be deemed ultra vires" and "[a]n agency's rules, if ultra vires in their entirety, are void.").

Nevertheless, IDOT then attempts to offer support for its superior sovereign analysis by pointing to other jurisdictions that have held traffic cameras are a statewide concern that can be addressed by state law. In particular, IDOT cites cases from Colorado and Ohio that purport to confirm its argument that ATE is of state-wide importance and therefore, require its regulation of ATE. These cases are irrelevant to the arguments at hand. ATE may be of state-wide importance, but the Iowa legislature has not declared it so. Both the Colorado and Ohio legislatures enacted statutes to regulate ATE and the subsequent home rule analyses made by its respective courts were premised on the home rule analysis unique to each state and an express exercise of legislative authority. *City of Springfield v. State of Ohio,* 69 N.E.3d 649 (Ohio App. 2016) (appeal pending), *City of Commerce City v. State*, 40 P. 3d 1273 (Colo. 2002). While IDOT states that, "[h]ome rule must yield to valid statewide regulation of traffic cameras," the distinction

between the circumstance in Iowa, and the Ohio and Colorado cases cited by IDOT, is that there has been no valid statewide regulation of traffic cameras in Iowa. This is the crux of the issue in this case.

B. THE IDOT LACKS AUTHORITY TO INTERPRET THE STATUTES AND ANY RULES CREATED OUT OF A PHANTOM AUTHORITY ARE ULTRA VIRES AND NOT BINDING ON THE CITIES.

Under Iowa Code section 17A.23(3), "[a]n agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency." The IDOT, in its brief, attempts to avoid dealing squarely with the questions of whether it has been granted authority to interpret statute, and if so, whether its interpretation was sound. "The legislative act is the charter of the administrative agency and administrative action beyond the authority conferred by the statute is ultra vires." § 31:2.Validity, 1A Sutherland Statutory Construction § 31:2 (7th ed.) (citing *Motor Club of Iowa*, 251 N.W.2d at 510).

Several pages of IDOT's Brief are spent looking for authority in all the wrong places. Rather than looking to "the charter" IDOT cites an article about ***red light cameras*** (not speed cameras) that merely indicates that some state DOTs-- Louisiana, New Mexico, and Missouri-- have promulgated

regulations absent legislative authority. Aside from the fact that this case is not about red light cameras, there is no analysis in the article, nor in IDOT's brief, as to whether those regulations are lawful given the legislative and agency framework present in those states. Moreover, none of the other state agency's actions have anything to do with whether the Iowa general assembly has granted authority to IDOT to regulate the placement and use of ATE within municipal boundaries, which is required by Iowa Code 17A.

Another incorrect place IDOT looks for authority is in the cases *Meredith* and *Miner*, neither of which address the question of authority presented in this case. *Meredith v. IDOT*, 648 N.W.2d 109 (Iowa 2009); *State v. Miner*, 331 N.W. 2d 683 (Iowa 1983). The *Meredith* case involves two statutes about advertising along highways, one addresses signage under 660 feet from the highway; the other addresses signage more than 660 feet from the highway. 648 N.W.2d at 117. In the shorter-distance statute, rule-making authority is explicit. In the longer-distance statute, there is silence as to rulemaking authority. Not surprisingly, the Court found that the unambiguous, plain meaning of the statute essentially amounted to an implicit directive for rulemaking on the very subject of the ordinance—signage restrictions. *Id*.

In *Miner*, Iowa Code section 322.3 is the focus, where the legislature indicated a license is required for any entity selling used motor vehicles but, similar to *Meredith*, no rulemaking authority was explicitly included. Again, not surprisingly, the Court found that the unambiguous, plain meaning of the statute amounted to an implicit directive for rulemaking on the very subject of the ordinance—license to sell used vehicles. *Miner*, 331 N.W. 2d at 686-687.

These cases are thus inapposite to the instant case because there is no statute directly on point, and such a statute or grant of rule making would be required to preempt municipal home rule. *See* Cities' Brief Section A.

IDOT further uses *Miner* to suggest that approval of the general assembly should be presumed because the Administrative Rules Review Committee, which includes a handful of legislators, failed to object to the ATE rules. Further, the agency posits that since the legislature hasn't nullified the agency's actions by passing a resolution, the legislature's stamp of approval should be imputed. These were points that bolstered the Court's decision in *Miner*, but in the very different circumstances of having an unambiguous mandate in the words of the legislature.

This case is different. Not only is there no legislative language authorizing rulemaking related to automated traffic enforcement, there is no

statute addressing automated traffic enforcement whatsoever. Rather than looking to red light regulations in Louisiana, Missouri, or New Mexico, the focus should be on the words of the statutes created by the Iowa legislature and the relevant guidance of the Iowa Supreme Court. IDOT avoids the fact that the regulations it created as to ATE, found in 761 Iowa Administrative Code 144, represent the agency's interpretation of several statutes that never mention ATE. It is up to this Court to determine if IDOT has been vested with authority to interpret statute, and, if so, whether its interpretation and actions comport with Iowa Code chapter 17A, which is discussed in more detail in the following argument sections.

Because there is no ATE statute - as to the issue of authority addressed in this section - the inquiry begins with "whether the legislature, by a provision of law, clearly vested [the agency] with the authority to interpret law." *Doe v. Iowa Dep't of Human Servs.*, 786 N.W.2d 853, 857 (Iowa 2010). The legislature has not, by provision of law, clearly vested IDOT the authority to interpret law. There are simply no words on paper to that effect and IDOT hasn't been able to point to any.

Instead, IDOT points to very general rulemaking statements found in Iowa Code Chapter 307 as giving it interpretive authority. The fact that the legislature has granted broad or sole authority for oversight is not the same

as giving it the power to interpret its statute, rules and regulations. *Eyecare v. Dep't of Human Servs.,* 770 N.W.2d 832, 836 (Iowa 2009) ((citing *State v. Pub. Employment Relations Bd.,* 744 N.W.2d 357, 360 (Iowa 2008)) (finding the power to enact, implement, and administer rules and regulations is not the same as the power to interpret them)); *Mosher v. Dep't of Inspections & Appeals,* 671 N.W.2d 501, 509 (Iowa 2003) (finding "general regulatory authority ... does not qualify as a legislative delegation of discretion" to the agency). "A general grant of rulemaking power to carry out law isn't enough… if we were to hold [that] the legislature's general grant of rulemaking authority in and of itself gives an agency interpretive powers over the statutes it administers, we would make section 17A.19(10)(c) superfluous." *Doe*, 786 N.W.2d at 858 (citing *Zimmer v. Vander Waal,* 780 N.W.2d 730, 734 (Iowa 2010)).

As such, Iowa Code Chapter 307 does little to advance the analysis in this case. Also, it appears that IDOT's position is that, based on this general grant of rulemaking authority, the legislature has handed over sovereignty to create any rules it interprets to be in the interest of benevolence and safety. That would essentially mean that the other hundreds of sections of Chapters 306 to 321 are also superfluous because IDOT has the responsibility to carry

out the will of the legislature and needs no further direction beyond that general grant.

Likewise, IDOT's reliance on Iowa Code section 306.4(1) also fails to help with the analysis about interpretive authority. The title of Chapter 306 is "Establishment, Alteration, and Vacation of Highways." As can be seen from the context of the title and the substance of the statute, this chapter deals with responsibility for the actual physical creation, changes, or removal of highways and which entity bears the costs thereof. Even if it could be considered informative for purposes of understanding jurisdictional boundaries, it only blurs matters more because it allows for concurrent jurisdiction between IDOT and the City over municipal extensions of primary highway systems, which is what is at issue in this case. In sum, Iowa Code Chapter 306 does nothing to illuminate the legislature's intent regarding authority to regulate ATE.

The analysis must go beyond Iowa Code Chapter 306 and 307. In order for this Court to determine "whether the legislature clearly vested the agency with the authority to interpret the statute, we must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended to delegate to the agency interpretive power

with the binding force of law over the elaboration of the provision in question." *Doe*, 786 N.W.2d at 857 (citing Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 63 rptr. cmt. (1998)).

From a practical standpoint, it is important to address what ATE is. ATE is one tool used by law enforcement to track speeding vehicles. National Conference of Legislatures, *Automated Enforcement Overview, http://www.ncsl.org/research/transportation/automated-enforcement-overview.aspx.* In this case, the ATE devices are photo-radar units calibrated to track speeding in excess of 11 miles per hour over posted speed limits. App. 179. It is much like police radar, except it is unmanned. It is used in places where there are concerns about driver and officer safety related to traditional law enforcement presence, due to a variety of reasons. App. 189.

It is also important to address what ATE is not. It is not an obstruction in the roadway. As noted above, ATE is not the establishment, alteration, or vacation of a highway. It is not a traffic sign, nor is it a traffic signal. It is not a drone. Despite IDOT trying to interpret language to the contrary, ATE is not any of these things that the legislature has clearly granted authority for the agency to regulate. So, IDOT's use of Iowa Code sections 306.4, 307.12,

318, and 321.348, 321.366 to claim authority to regulate—which necessarily requires statutory interpretation since none discuss ATE devices—misses the mark. This is where the analysis bleeds over into the (un)reasonableness of IDOT's interpretation. It does not have interpretive power, but if it did, interpreting ATE devices to be any of the above is wholly irrational.

The only thing IDOT's "interpretative" rules do is interfere with a tool used by law enforcement to enforce speeding laws, which directly conflicts with the legislative guarantees in §321.236 that City's may exercise police powers, including the regulation of traffic. The rules are based on interpretive authority that doesn't exist, expressly or impliedly. As such, the ATE rules of IDOT are ultra vires and lack the force and effect of law.

C. THE DISTRICT COURT ERRED IN DETERMINING THE IDOT'S ACTIONS DID NOT VIOLATE IOWA CODE CHAPTER 17A

Preservation of Error

In addressing preservation of error, IDOT mischaracterizes the Cities' arguments concerning non-enforcement and waiver. Properly stated, the Cities' position regarding non-enforcement of ATE rules as to the Cities is that under Iowa Code section 17A.19(10)(n), IDOT's actions are an abuse of discretion because IDOT directed the Cities where to locate their ATE equipment and then simply reversed itself. That reversal was arbitrary, quite

apart from any formal waiver process. IDOT's actions are in violation of the Iowa Administrative Procedure Act because, as discussed more fully in the Cities' opening briefs, IDOT had no rational basis for reversing itself. [1]

Moreover, preservation of error should be considered in light of the reviewing court's task when reviewing a district court decision pursuant to Iowa Code section 17A.20. An appellate court applies the standards of the Iowa Administrative Procedures Act, including in particular the provisions of §17A.19(10), to determine whether it reaches the same conclusions of law as the trial court reached. *Brakke v. Iowa Dep't of Natural Res.*, No. 15-0328, 2017 WL 2616928, *5 (Iowa June 16, 2017). If the results are the same as those of the District Court, then the District Court is affirmed; if the results are not the same, the District Court is reversed. *Scott v. Iowa Dep't of Transp*., 604 N.W.2d 617, 619 (Iowa 2000). Thus, on appeal from Polk

[1] IDOT apparently takes no position regarding preservation of the Cities' argument that IDOT's decision was "based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency." Iowa Code section 17A.19(10)(l). In the event IDOT later contends the Cities failed to preserve that basis as error, IDOT should not be permitted to do so. In any event, as set out above, the higher court reviewing the lower court *de novo* undertakes its own analysis of the provisions in Iowa Code section 17A.19(10). *Brakke*, 2017 WL 2616928 at 5*.

County District Court, the reviewing court should reverse if IDOT's actions violated any provision of Iowa Code section 17A.19(10).

1. ***IDOT's actions were contrary to Iowa Code §17A.19(10)(i).***

IDOT repeatedly asserts in its brief that the Cities' arguments are based on the flawed premise that law enforcement is the only means for achieving traffic safety. IDOT's characterization is false and devoid of any record support. The Cities' position has consistently been that ATE is one very effective means for enhancing traffic safety, costing taxpayers nothing while using objective criteria and significantly reducing safety risks associated with traditional patrol. In fact, while ATE is superior to traditional patrol in certain respects, the Cities readily concede that other safety measures are equally effective as ATE, and perhaps superior in certain circumstances. IDOT's arguments, on the other hand, seem to be premised on notions that ATE should be held to higher and much more subjective standards of efficacy than traditional patrol, and that ATE should satisfy public opinion while traditional patrol need not. In addition to being wholly irrational, that premise lies beyond the scope of IDOT's enabling legislation. The thrust of IDOT's "limited use" rule (761 IAC 144.4(1)(c)), at least as it was applied in IDOT's Evaluations, is to improperly require a showing that ATE is superior to any other means of enhancing traffic safety.

Ever since IDOT first attempted to implement ATE Guidelines without proper rulemaking (as discussed in the first two sections of the parties' briefs), it has taken the position that if Cities cannot satisfy IDOT that ATE simultaneously reduces crashes and the rate of citation, it should not be allowed at any given location. Such a showing has never been required of traditional patrol, and it is illogical to require it of ATE. Even worse, the rule provides no objective measures or standards according to which the Cities can satisfy IDOT. Fundamentally, the "limited use" rule expresses IDOT's irrational notion that because Iowa's interstates are safe, ATE should not be used to make them safer. IDOT emphasizes that Iowa is the only state in the nation that has fixed ATE equipment, but again, this misses the point that ATE makes safe roads still safer (and that it has other attributes). IDOT argues the Cities would have everyone believe that Iowa's interstates are so much more dangerous than the roads in Los Angeles, Chicago or Washington, DC, that ATE is the only effective means to control speed or provide safe passage. The Cities have never taken such a position, and IDOT's hyperbole lends no logic to its position. It remains a *non-sequitur* to suggest that because Iowa primary roads are safer than in other states, ATE should be limited. This ostensible reason for limiting ATE is no reason at all. Similarly, the fact that Davenport has decided not to use ATE

on its interstates does not render the Cities' position less tenable. As set out earlier in this reply, the Cities fully endorse ATE as a matter of home rule.

IDOT posits that the rule limiting ATE use is "eminently reasonable" because "[o]therwise, the interstate would be at risk of being converted into a toll road system by municipalities through which the highways pass." This rather far flung analogy fails because it disregards the undisputed fact that no ATE citations are issued in any of the Cities unless a vehicle is traveling excessively over the posted speed limit. IDOT's true concern may be with the fact that ATE serves as a force multiplier and is statistically more likely than traditional patrol to detect excessive speeding. But if the objective of IDOT's ATE rules is to lower that likelihood to the same probability as traditional patrol, then IDOT is taking a position contrary to its legislative charge. The Cities recognize ATE is unpopular among those who have received an ATE citation and those who fear they are more likely to be cited with ATE in place than without. IDOT is not vested with authority to issue regulations based upon such opinions, though.

IDOT contends the safety basis for the 1,000-foot rule in 761 IAC 144.6(1)(b)(10) is explained extensively elsewhere, citing pages 72 – 80 of its brief. That portion of IDOT's brief, however, is about public comment

on the issue.[2] When setting safety standards for local law enforcement to enforce speed limits, it is illogical to side with public opinion, particularly where the elected members of the Iowa Legislature have repeatedly declined to regulate ATE. There must be a rational basis to support IDOT's rulemaking and its administration of the rules. Public opinion does not provide that. Moreover, as IDOT itself has pointed out, the report on which they rely to say the 1,000-foot rule is a safety concern is a study of ATE use for red light running. There simply is no data to support a 1,000-foot rule for speed enforcement on the interstate. Significantly, there is no 1,000-foot grace period for speeding when it comes to traditional patrol, nor would IDOT have authority to create one because there is no "safety cushion" modifying the duty to observe speed limits. IDOT actually makes a strong case for applying the 1,000-foot rule to traditional patrol *and not to ATE*. IDOT notes, and the Cities agree, a squad car is much more visible than an overhead camera. Common sense dictates that if a motorist is still traveling 11 mph or more over the limit by the time that motorist reaches an ATE unit,

[2] The Cities recognize one set of comments cited by IDOT is from Sioux City Police Captain Williams, but it amounts to the only favorable comment from law enforcement regarding the 1,000-foot rule. His comments also reflect how arbitrary the rule is, in that IDOT would use the same distance on the interstate as it would in a school zone.

i.e., after passing street level signs warning of photo-enforcement and reduced speed, then such a motorist will be far more likely to see a "large, multi-colored law enforcement vehicle" than "a small camera" overhead. As such, a speeding motorist is more likely to suddenly slam on the brakes for traditional patrol than for ATE. IDOT cannot rationally explain the purpose, or the authority, for creating a 1,000-foot non-enforcement zone for ATE.

Regarding IDOT permits for the ATE installations at issue in this case, IDOT incorrectly characterizes the Cities' arguments, again. The Cities do not contend IDOT cannot suspend or revoke those permits, but rather that there is no proper basis for doing so. IDOT points to permit language that allows IDOT to order removal of ATE equipment upon thirty days' notice for "unapproved operation." But this merely begs the question of whether the ATE rules and their application to the Cities were proper in the first place. Given IDOT's express approval for ATE operation at those very sites, its stated reasons for revocation are so illogical as to be wholly irrational, and continued operation cannot validly be considered "unapproved." Stated otherwise, the language in a IDOT permit cannot confer legality onto an agency action that is otherwise contrary to Iowa law because quite apart from the permit, IDOT's actions remain subject to Iowa Code section 17A.19(10).

Closely related is IDOT's argument it has the "right and obligation to change its course based on changing conditions and priorities." The only such change being the adoption of ATE rules and their application to pre-existing permits, the question remains whether IDOT acted properly in adopting and applying the ATE rules as it has. IDOT's citation to *Meredith*, does not advance the argument that the permit provides an independent basis to order changes to the Cities' ATE operations. 648 N.W.2d at 109. In that case, unlike the case at bar, the agency had statutory authority to promulgate, and therefore amend, administrative rules on which basis billboard permits were revoked. *Id*. at 116 – 17.

Concerning Iowa Code section 17A.19(10)(i), IDOT summarily states "DOT has determined that ATE cameras should be placed at the very *start* of the S-curve [in Cedar Rapids] —the place where any hazard presented by the S-curve begins, and where the warning is most needed." This statement merely belies the irrational nature of IDOT's determination. As IDOT sees it, motorists are not properly responding to speed limit signs, for which they actually receive advance warning, but rather to the presence of enforcement mechanisms. If so, then those mechanisms, being patrol cars or ATE, should be placed well before hazardous areas, not where they start. IDOT's position that there is no need for ATE at the *end* of the S-curves, is also

wholly irrational. The reason IDOT and Cedar Rapids decided - together – that ATE should be placed at both ends of the S-curve for both northbound and southbound I-380, is to force motorists to *maintain* a safe speed throughout the curve. App. at 887 (recommendations by National Highway Traffic Safety Administration (NHTSA)). It is irrational to determine now, with no supporting evidence, that a single ATE device at the beginning of the curve will provide any incentive to maintain a safe speed. Once again, IDOT has reversed its own rationale for placing ATE as it did, without articulating any objectively sound, safety-based reason.

2. ***IDOT's actions were contrary to Iowa Code §17A.19(10)(j).***

The Cities maintain IDOT did not consider relevant and important information when acting on ATE because IDOT's actions run directly contrary to that information. Thus, it is not enough for IDOT to respond by simply pointing to what was submitted to the agency where it is clear that in order to conclude as it did in its rulemaking and Evaluations, IDOT must have disregarded its own data and site specific information about reduction in crash incidence and severity. Record support for ATE has already been addressed in opening briefs; the present point is the flaw in IDOT's mere reference to what it received. Nor can IDOT plausibly maintain the statistics in the record reflect that ATE operations impaired traffic safety. To the

extent IDOT insists on a showing that ATE is superior, the Cities respectfully refer to arguments in the preceding section.

IDOT calls it remarkable that the Cities would criticize IDOT's near exclusive reliance on national data, statewide crash data and other aggregate comparisons, saying IDOT should instead be commended for using a wide variety of data because Iowa is the only state with permanent ATE on its interstates. By mischaracterizing the Cities' criticism, IDOT fails to address the Cities' point, which is not that IDOT relies on too wide a variety of data, but rather data that is irrelevant to a proper analysis of the ATE locations in question. There is no logical explanation for relying on aggregate data or data from other jurisdictions and dissimilar settings to evaluate the site specific data submitted to IDOT. Originally, IDOT relied on site specific data when issuing the Cities' permits.[3] It makes no sense that such data is now insufficient. That IDOT characterizes its conduct as "completely rational" doesn't make it so.

Regarding the study "*Evaluating the Effectiveness of Red Light Running Camera Enforcement in Cedar Rapids and Developing Guidelines*

[3] Interestingly, in rejecting Muscatine's appeal to the IDOT Director, IDOT itself has indicated that data should be examined for a specific intersection rather than in the aggregate. App. 1,280.

for Selection and use of Red Light Running Countermeasures," the Cities agree with IDOT it was limited to red light running, and it recommended better scientific study over time. By extending the sudden braking concept from red light enforcement to speed enforcement on interstates, IDOT ignores the important limits which the study itself highlighted, and when IDOT relied on irrelevant and insufficient data as a basis to revoke the permits, IDOT ignored the study's recommendations about scientific study over time. Furthermore, IDOT has not addressed its failure to consider other information favorable to ATE. For example, the Federal Department of Transportation published NHTSA's *Speed-Enforcement Camera Systems Operational Guidelines*. App. 865-953. NHTSA recommends doing as Cedar Rapids did by using a "corridor" as an ATE site, rather than a single location, in order to obtain maximum deterrent effect. App. at 887.

It is not clear what IDOT means by "the difference between the scope of traffic safety versus local law enforcement." IDOT Br. at 70. If IDOT means traffic safety cannot embrace the Cities' ATE programs as originally permitted, then IDOT is wrong.

3. IDOT's actions were contrary to Iowa Code §17A.19(10)(n).

The Cities maintain that it is unreasonable, arbitrary and capricious and an abuse of discretion to apply the 1,000-foot rule retroactively.

Asserting there is no legal or factual basis for doing so, IDOT refers to pages 19 – 21 of its brief as including extensive data about reducing the 1,000 foot "safety cushion." Presumably, this is a typographical error as those pages do not contain any such data. In any event, no data even suggests a "known risk" of drivers slamming on their brakes upon detecting ATE on the interstate. The only data concerning such a risk pertains to ATE for enforcing red lights. Similarly, IDOT cites page 1748 of the record (App. 1280) as providing safety reasons for not moving speed limit signs and for applying the 1,000-foot rule retroactively, but that part of the record does not include any such reasons. This lack of record support is true of IDOT's position more generally.

The IDOT's position that the 1,000-foot rule is a safety cushion that should not be reduced is also in violation of Iowa Code section 17A.19(10)(n). IDOT simply has no discretion to create such a threshold, particularly where no citations are issued until a vehicle is detected going at least 11 mph over the limit. Not even IDOT takes the untenable position that traditional, and more visible, traffic patrol must observe a 1,000 foot "safety cushion," and it is even more unreasonable, arbitrary and capricious to require it for ATE.

D. THE CITIES PRESERVED ERROR ON THEIR ABILITY TO CHALLENGE THE 1,000 FOOT RULE AND *IOWA CITIZEN* DOES NOT SUPPORT THE VALIDATION OF THE RULES IN THIS CASE

In its brief, IDOT makes two primary arguments as it relates to this section. First, IDOT argues that the Cities failed to preserve error on this issue because we did not specify exactly what material comments would have been made by the Cities had proper notice been given. Second, IDOT argues that its adoption of the 1,000-foot rule was the logical outgrowth of notice and comments received and is valid as a result under the principles espoused in *Iowa Citizen*. *See Iowa Citizen/Labor Energy Coal., Inc. v. Iowa State Commerce*, 335 N.W.2d 178, 183 (Iowa 1983). We disagree as to both of these points for the reasons that follow.

With respect to IDOT's first argument, this argument is simply without merit. There is no requirement under Iowa Code chapter 17A or under error preservation principles that a party must "*specify the comments and the name and qualifications of the persons expected to make the comments*" in order to challenge agency rules on the ground that they were not adopted in conformity with the requirements of 17A. *See* IDOT Br. at 72. Importantly, IDOT fails to point to any authority so holding, and its failure to do so is thus akin to a failure to make the argument at all. *Watson*

v. State, 828 N.W.2d 326 (Iowa Ct. App. 2013) ("when a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived."). *Id*. (stating that a "'subject will not be considered' where a 'random discussion' is not supported by a legal argument and citation to authority") (citing *State v. Piper,* 663 N.W.2d 894, 913-14 (Iowa 2003)). *See also,* Iowa R. App. P. 6.903(2)(g)(3).

While IDOT does reference *KFC Corp* and *Office of Consumer Advocate* in this portion of its brief, neither case makes the logical leap that IDOT makes (equating requirements to preserve error in Iowa Code Chapter 17A challenges based on deficient notice to offers of proof in evidentiary hearings) and thus do not lend any support to its argument. The cases cited by IDOT simply stand for the proposition that failure to raise an argument before appeal precludes the ability of a party to raise that argument for the first time on appeal. This is indeed the rule, and the Cities have satisfied this requirement by challenging the 1,000-foot rule due to improper notice at every stage, thus preserving error as a result. App. 10-15, 1,124-1,131.

To the extent that IDOT argues the Cities cannot show prejudice because we did not present the comments or qualifications of the person who would have commented on the rule, the prejudice in this case is clear. Because of the lack of notice, the Cities were not aware the IDOT was

considering a rule which would, upon passage and without more, render unlawful the existence of certain ATE equipment in their jurisdiction. Because they were unaware of this, they did not have an opportunity to, and therefore did not, submit comments as to the propriety, scope, or effect of this rule. Thereafter, IDOT relied on this rule to order the Cities to remove such equipment. App. 1,264-1,292.

The prejudice in this case was thus the lost opportunity to submit comment and the subsequent removal order. These prejudices are well established in the Agency Record and are no less apparent, nor contingent on, the specific comments the Cities would have made, had the opportunity been afforded to them.[5]

With respect to IDOT's second argument, IDOT mischaracterizes both the Cities' argument in its brief and the import of *Iowa Citizen*. IDOT argues that the Cities overlook the holding in *Iowa Citizen* by failing to recognize that the agency rules were upheld in that case. The Cities have not overlooked this holding. The holding in *Iowa Citizen* is clear and makes good sense.

[5] One can surmise without much effort that the cities would have argued against the Rule.

There, the agency adopted rules which were the product of two notice and comment periods. *Iowa Citizen*, 335 N.W.2d at 179-80. The agency issued two notices and held two comment periods because the comments received after the first notice and comment period urged the agency to consider rules not within the scope of the first proposed set of rules. *Id*. at 180. Ultimately, the agency redrafted the proposed rules to include changes based on the first comment period, issued a second notice with the proposed rule changes, held a second comment period based on those proposed rule changes, and then thereafter adopted rules which included provisions within the scope of the first and second notice and comment period. *Id*.

Because the agency in *Iowa Citizen* republished the rule changes and ultimately adopted rules within the scope of both notice and comment periods, the opportunity to comment on the final rules adopted by the agency was thus afforded to all affected parties in *Iowa Citizen*. *See id*. That was not the case here.

Here, IDOT held a comment period, reviewed comments, and thereafter added a provision to the rules which fundamentally altered the impact these rules had on cities with existing ATE Equipment. Despite the materiality of the changes, IDOT provided no notice to affected parties and offered no opportunity to comment.

IDOT overlooks these important differences in the steps that the agency in *Iowa Citizen* took and the steps it took in the rule making process. Instead, IDOT attempts to oversimplify the holding in *Iowa Citizen* to one where, so long as the final rules are the logical outgrowth of the notice and comments, they are valid. *See id*.

This oversimplification misstates the teachings of *Iowa Citizen*. Being the logical outgrowth of the notice and comment period is a necessary but not a sufficient condition to the validity of agency rules. In all cases, "[t]he essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan." *Id*. at 181. Because the Cities had no notice that IDOT intended to adopt a rule which rendered unlawful the placement of existing ATE equipment – when the IDOT itself selected and approved of the site – the Cities could not have possibly been given an opportunity to comment on the final rules. As a result, the 1,000-foot rule is thus invalid because IDOT did not afford the commenters a fair opportunity to present their views on the final plan.

CONCLUSION

For these reasons, Petitioners-Appellants request that this Court reverse the district court's decision affirming the IDOT's March 17, 2015

order, and declare that Appellants' home rule powers permit the installation and operation of the ATE equipment until such time that Appellants' powers in this respect are abrogated by the Iowa legislature or, in the alternative, declare that the IDOT's adoption and enforcement of its agency rules against Appellants in this case violated Iowa Code chapter 17A.

Respectfully submitted,

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CERTIFICATE OF FILING

I hereby certify that I have filed the foregoing Appellant's Reply Brief by EDMS to the Clerk of the Iowa Supreme Court on the 31st day of August 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This Brief complies with the type-volume limitation of Iowa App. P. 6.903(1)(g)(1) because this brief contains 6,913 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 the 2016 edition of Microsoft Word in 14 point font plain style.

Dated: August 31, 2017.

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