**IN THE SUPREME COURT OF IOWA**

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**NO. 17-0686**

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

**Petitioners-Appellants,**

**vs.**

**IOWA DEPARTMENT OF TRANSPORTATION and**
**IOWA TRANSPORTATION COMMISSION,**

**Respondents-Appellees.**

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

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# RESPONDENTS-APPELLEES' BRIEF

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*Enforcement Camera Systems Operational Guidelines* (NHTSA 2008)
Iowa DOT Design Manual, Section 8A-2
NCHRP Report 729 "Automated Enforcement for Speeding .. and Red Light Running"

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**Cases:**

*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)
*Ginn Iowa Oil Co. v. Iowa Dept. of Transp.*, 506 F. Supp. 967 (S.D. Iowa 1980)
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**Cases:**

*Greenwood Manor v. Dept. of Public Health*, 641 N.W.2d 823 (Iowa 2002)
*Iowa Cit./Labor Energy Coal v. Iowa St. Com.*, 335 N.W.2d 178 (Iowa 1983)
*KFC Corp. v. Iowa Dept. of Revenue*, 792 N.W.2d 308 (Iowa 2010)
*Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280 (Iowa 1991)

**Statutes and Other Authorities:**

Iowa Code §17A.4(1)
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## ROUTING STATEMENT

The Iowa Department of Transportation (DOT) agrees with the Cities of Des Moines, Muscatine and Cedar Rapids (Cities) that this is a case worthy of being retained by the Iowa Supreme Court regarding the issues of the regulation of traffic enforcement cameras on primary highways by the DOT. The case presents the first opportunity to address the validity of DOT rules that impose statewide safety standards on the use of traffic cameras by municipalities on primary roads. The Cities' argument that home rule authority places traffic cameras beyond legitimate state regulation needs to be forcefully disavowed by the Iowa Supreme Court. This appeal has been treated by the parties as the "test case" for the controversial traffic cameras. Thus, there are substantial questions of developing legal principles under Iowa R. App. P. 6.1101(2)(f) that warrant review of this case by the Iowa Supreme Court. Indeed, submission of this case with *Cedar Rapids v. Leaf*, 898 N.W.2d 204, 2017 WL 706305 (Iowa App. 2017) (Table) (further review granted) makes sense due to an overlapping issue of preemption regarding the DOT rules and the city ordinance.

## STATEMENT OF THE FACTS

### Background

The Iowa Department of Transportation (DOT) has primary jurisdiction over the primary road system throughout the State of Iowa (Iowa Code section 306.4(1)) and concurrent jurisdiction (with Iowa's municipalities) over all municipal extensions of the primary road system located in Iowa's cities with respect to "the kind and type of construction, reconstruction, repair, and maintenance" of such municipal extensions. Iowa Code §306.4(4)(a). DOT's authority and responsibility over the primary road system is addressed in numerous Iowa statutes. *See* Iowa Code chapters 307, 318; Iowa Code §§321.254, 321.348, 321.366. However, the Iowa legislature has never adopted legislation that either *authorizes* or *prohibits* the placement of Automated Traffic Enforcement (ATE) devices on municipal extensions of the primary road system located in Iowa's municipalities.

### DOT Allows ATE Units on the Primary Road System

Despite this legislative absence, DOT has long recognized that ATE units may play a role in a comprehensive traffic safety program. App. 180, 184, 188 ("When used properly, automated camera enforcement technology has the potential to be an effective tool to enhance traffic safety…"); *see*

*also* 761 IAC 144.4. Consistent with this recognition, as early as 2009 DOT allowed the Cities involved in the case at bar to place some ATE units upon municipal extensions of the primary road system located in each municipality under the terms of a standard "Agreement for Approval of a Traffic Control Device" permit. App. 105-106, 112-113, 125-126, 130-131, 133-134, 139-140, 145-146 (Cedar Rapids); 152-153 (Muscatine); 157-158, 169-170 (Des Moines). All of these permits contained the same limiting provision, which provided as follows:

> THE IOWA DEPARTMENT OF TRANSPORTATION RESERVES THE RIGHT TO: (1) require the removal of such traffic control device upon thirty days' written notice. Either lack of supervision, inadequate enforcement, unapproved operation, or intolerable congestion shall be considered sufficient reason to require removal.

App. 105-106, 112-113, 125-126, 130-131, 133-134, 139-140, 145-146 (Cedar Rapids); 152-153 (Muscatine); 157-158, 169-170 (Des Moines). With this understanding, DOT allowed the Cities to place ATE units on select municipal extensions of the primary road system located in their own city limits.

**DOT Prepares ATE Guidelines**

As ATE proliferated (App. 1267, 1275, 1286) so did the need for increased supervision and reasonable regulation of such placement on the primary road system. App. 178-179. In recognition of this need, in 2012,

DOT created the "Primary Highway System Automated Camera Enforcement Guidelines." App. 180-183. These guidelines were further revised throughout 2012 and into 2013. App. 184-191.

**DOT Prepares ATE Rules**

In March of 2013, and in recognition of the need "to provide local government agencies with a defined process for documenting a critical safety issue at a specific location and implementing the warranted traffic safety solution(s) when automated traffic enforcement is involved," DOT decided to begin the formal administrative rulemaking process to govern the implementation and placement of ATE units (both fixed and mobile) on the primary road system. App. 277. On February 12, 2014, formal administrative rules were adopted in accordance with the requirements of Iowa Code chapter 17A. App. 695-698. These administrative rules included a specific provision that addressed the minimum distance an ATE device could be placed from a reduced speed zone sign (*See* 761 IAC 144.6(1)(10), commonly referred to as "the 1,000 foot rule" at App. 697), a specific provision that arose out of public comments DOT received from a broad variety of Iowans including private citizens (App. 442), public policy advocates (App. 311-312, 564-565), a law enforcement officer (App. 686-687) and the American Civil Liberties Union (ACLU) (App. 502, 648). *See*

*also* letter of Thomas Stansberry, Legislative Counsel for Iowa Insurance Institute, dated October 31, 2013, App. 633 ("A common criticism of red light cameras is that they increase the number of rear end collisions as a result of drivers stopping quickly to avoid having their picture taken. A nationwide study by the Federal Highway Administration ("FHA") confirmed that rear end collisions increased by 15% after red light systems were installed."). These comments (and many others) were received during the notice and comment process DOT was required to conduct pursuant to Iowa Code section 17A.4(1)(b) during the entire month of October 2013, including the October 8, 2013, hearing in front of the Administrative Rules Review Committee. *See* DOT public comment documents at App. 313-656; *see also* ARRC transcripts Record 206-336, 785-872; App. 310-312, 676-691. Upon formal adoption, DOT provided the new ATE rules to all interested cities; the rules were attached to an email from DOT Traffic and Safety Director Steve Gent, the purpose of which was to emphasize the importance of the reporting requirements referenced in the new rules. App. 703-708.

## The Cities Submit Annual Reports to DOT

The new administrative rules required all cities seeking to use ATE units on the primary road system to submit an "annual evaluation" to DOT. *See* 761 IAC 144.7(1); App. 696. All the cities involved in this appeal submitted such required reports to DOT for the year 2013. App. 709-714 (Des Moines); 715-718 (Muscatine); 719-1063 (Cedar Rapids). In all instances, after receiving and reviewing these reports, DOT requested (and received) additional information from the Cities necessary in order to further clarify information referenced in the annual reports. App. 1064 (Des Moines); 1065-1072 (Muscatine); 1073-1078 (Cedar Rapids). Evaluation reports were then issued by DOT as to all three cities. App. 1097-1102 (Des Moines); 1103-1108 (Muscatine); 1109-1116 (Cedar Rapids). All were appealed to DOT Director Paul Trombino. App. 1117-1119 (Des Moines); 1120-1132 (Muscatine); 1133-1263 (Cedar Rapids).

## DOT Director Trombino Issues Final Decisions

Final agency decisions were provided to all Cities by Director Trombino on May 11, 2015. App. 1264-1292. These final agency decisions required the removal of the following ATE cameras: Des Moines (one of three locations), Muscatine (one of four locations) and Cedar Rapids (three

of seven locations – cameras at two additional locations were ordered moved to the next highway sign truss). App. 1264-1292.

***The DOT Order for Removal of the City of Des Moines I-235 Eastbound Cameras near Mile Marker 4.9***

DOT's March 17, 2015, initial evaluation report allowed the City of Des Moines to continue its red-light cameras located at the intersection of East 15th and Maple Street and also at the intersection of Martin Luther King and School Street (App. 1100), but required the City of Des Moines to remove the fixed speed cameras located on I-235 eastbound near mile marker 4.9, citing low crash rate data both before and after camera activation. App. 1100-1101.

The DOT director's May 11, 2015, decision addressed all issues raised by Des Moines in its appeal. App. 1117-1119, 1264-1269. In that decision, he analyzed the geometry of this stretch of I-235, determining that the uphill nature and horizontal curves "are moderate and not untypical for an urban interstate roadway" and do not constitute a safety concern. App. 1268. He rationally noted the inconsistency inherent in the fact that "Iowa is the only state in the nation with permanent speed cameras on the interstate" and yet "there are thousands of miles of urban interstate roadways in America and many of them are more challenging and complex than the systems we have in Iowa." App. 1269. He further analyzed the crash rate in

this section of I-235, comparing it to the entire eastbound I-235 crash rate, the entire westbound I-235 crash rate, as well as the average Iowa urban interstate crash rate – finding it well below all such averages. App. 1268. The director also included an analysis of design exceptions and conventional law enforcement methods in his decision (App. 1268), ultimately deciding that the data provided did not provide convincing evidence that this location is unsafe for motorists and law enforcement conducting routine police work. App. 1269. The director's final decision of May 11, 2015, denied the appeal of the City of Des Moines.

***The DOT Order for Removal of Muscatine's Westbound Camera on U.S. Highway 61 at the Intersection with University Drive***

The March 17, 2015, initial evaluation report allowed the City of Muscatine to continue its speed and red-light cameras at three locations: Mulberry Avenue at U.S. Highway 61, Cleveland and Park Avenue (Business U.S. Highway 61) and Washington and Park Avenue (Business U.S. Highway 61). App. 1106-1107. It required Muscatine to remove the westbound speed camera on University Drive at U.S. Highway 61, citing the fact that crashes actually *increased* since the camera was installed, a high number of speed violations were still occurring and the camera was within 1,000 feet of a lower speed zone. App. 1106. The DOT director's May 11,

2015, decision addressed all issues raised by Muscatine in its appeal. App. 1120-1132, 1270-1281. It specifically addressed Muscatine's request to have speed limit signs "grandfathered in" (*See* Cities' brief 18) and rejected that request as an unacceptable option. App. 1280.

The DOT director's May 11, 2015, decision reviewed (in detail) the crash history for this location. He reasonably rejected Muscatine's inconsistent and questionable manner of calculating before and after crash rates based on a combined number of crashes at all ATE locations as opposed to calculating before and after crash rates on a specific location basis. App. 1280. He set forth his calculations as to how the average number of crashes at the specific location (University Drive at U.S. Highway 61) actually increased after the speed camera was activated. App. 1279. He further analyzed the number of speed violations at the location and DOT's determination (which appears to be undisputed) that the speed camera is within 1,000 feet of a lower speed limit (it is 830 feet after a 55-mph to 45-mph speed limit sign) in violation of 761 IAC 144.6(1)(b)(10). App. 1280. The director's final decision of May 11, 2015, denied the appeal of the City of Muscatine.

***The DOT Order for Removal of the Cedar Rapids Traffic Cameras on: (1) U.S. Highway 151 at the Intersection with 10th Street East, (2) I-380 Northbound Near J Avenue and (3) I-380 Southbound Near 1st Avenue Ramp***

The March 17, 2015, initial evaluation report allowed the City of Cedar Rapids to continue its speed and red-light cameras at two intersections: Williams Boulevard and 16th Ave SW and 1st Avenue and L Street SW. App. 1112. The report instructed the city to *move* the speed cameras located on I-380 northbound near Diagonal Drive and I-380 southbound near J Avenue (so that both would be in compliance with the 1,000-foot rule of 761 IAC 14.6(1)(b)(10)). App. 1113-1114. It required the city to remove or disable the following speed cameras: 1st Avenue and 10th Street East (to ensure compliance with the 1,000-foot rule), I-380 northbound near J Avenue and I-380 southbound near 1st Avenue ramp. App. 1112-1115. The two cameras on I-380 were required to be removed based on crash data and the fact that they are both located *past* the "S" curve – the area of safety concern. App. 1114-1115. The DOT director's May 11, 2015, decision addressed all issues raised by Cedar Rapids in its appeal. App. 1133-1263, 1282-1292.

The DOT director's May 11, 2015, decision reviewed (in detail) the crash history for I-380 (App. 1290-1291) finding that total number of crashes stayed the same after the cameras were installed. And although the

director determined that the severity of the crashes decreased some, he further determined that it was not possible to determine whether that was due to the cameras in light of the numerous other safety countermeasures that have been added to I-380 in addition to the ATE cameras, including cable median barrier, high friction surface treatment, new or upgraded warning signs, upgraded pavement markings, installed delineation on barriers and bridge rails and replaced lighting. App. 1291. The director also addressed the decision to require removal of the "outbound" cameras on I-380, explaining the inconsistency of reliance upon an ATE camera as a warning mechanism *after* the risk posed by an "S" curve has already passed. App. 1291. Finally, the director's decision addressed the rationale for the 1,000-foot rule as well as the prior permitting system that allowed the ATE units to be placed. App. 1292. The director's final decision of May 11, 2015, denied the appeal of the City of Cedar Rapids.

**The District Court Affirms all Final Decisions**

The Cities sought judicial review of DOT's May 11, 2015, final decisions. The District Court determined that DOT did have statutory authority to promulgate its ATE administrative rules, that such rules were valid and reasonable in scope and that the final decisions based on these rules were not illogical, irrational, unreasonable, arbitrary or capricious or an

abuse of discretion. The District Court affirmed all three final decisions. App. 87-101.

## ARGUMENT

### I. THERE IS NO CONFLICT BETWEEN THE DOT RULES AND THE CITIES' ORDINANCES BECAUSE THE ORDINANCES DO NOT ADDRESS THE SAFE PLACEMENT AND THE EVALUATION OF THE EFFECTIVENESS OF THE TRAFFIC CAMERAS. IN THE EVENT OF CONFLICT, STATE LAW TRUMPS LOCAL LAW UNDER PREEMPTION ANALYSIS. HOME RULE AUTHORITY MUST YIELD TO THE STATE SAFETY REGULATIONS.

#### Preservation of Alleged Error

The DOT agrees alleged error has been preserved on the issue of home rule authority.

#### Scope of Review

The scope of review for agency action is for correction of errors at law under Iowa Code section 17A.19. *Greenwood Manor v. Dept. of Public Health*, 641 N.W.2d 823, 830 (Iowa 2002).

#### Standard of Review

The cardinal rule of administrative law is that judgment calls are the province of the agency and not that of the courts. *Mercy Health Center v. State Health Facilities Council*, 360 N.W.2d 808, 809 (Iowa 1985). In reviewing the DOT's decisions a district court does not substitute its

judgment for the agency's. *Public Employment Relations Board v. Stohr*, 279 N.W.2d 286, 290 (Iowa 1979). The district court sits to correct errors at law. *Kohorst v. Iowa State Commerce Commission*, 348 N.W.2d 619, 621 (Iowa 1984). The Iowa Supreme Court has referred to the "limited scope of judicial review under Chapter 17A. . ." *Young Plumbing and Heating Co. v. Iowa Natural Resources Council*, 276 N.W.2d 377, 381 (Iowa 1979). Review is at law, not de novo, *City of Davenport v. Public Employment Relations Board*, 264 N.W.2d 307 (Iowa 1978). "[T]he party challenging the agency action has the burden of proving the illegality of the agency action and the prejudice required." *Marovec v. PMX Industries*, 693 N.W.2d 779, 782 (Iowa 2005).

The DOT's ATE rules are presumed to be valid and Cities have the burden to show by clear and convincing evidence that a "rational agency" could not find the rules to be within the agency's delegated authority. *See Brakke v. Iowa Dept. of Natural Res.*, 897 N.W.2d 522, 533 (Iowa 2017); *Milholin v. Vorhies*, 320 N.W.2d 552, 554 (Iowa 1982). Iowa Code section 17A.19(11)(c) contemplates the court "shall give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency."

The DOT is granted a reasonable degree of "informed discretion" and is entitled to deference in its interpretation of its administrative rules. *Frank v. Iowa Dept. of Transp.*, 386 N.W.2d 86, 88 (Iowa 1986) ("We give deference to the department's interpretation of its own rules."). This means suitable respect should be shown for the experience and expertise of the DOT in regulating primary highways in this appellate review.

These rules calling for deference to the agency were intended to discourage the second-guessing of discretionary agency decisions by the courts. *See, e.g., Leonard v. Iowa State Bd. of Educ.*, 471 N.W.2d 815, 816 (Iowa 1991) ("The 'hands off' policy of the courts re-reviewing agency determinations recognizes that judicial second-guessing of agency wisdom would destroy the fabric of administrative law and render its operation largely meaningless and therefore an extravagant waste of both public and private funds.").

**District Court Ruling**

The district court properly distinguished both *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 1988), and *City of Sioux City v. Jacobsma*, 862 N.W.2d 335 (Iowa 2015), as individual challenges to traffic tickets and reasoned as follows on the home rule and preemption issues:

> . . . Here, the Cities are challenging the authority of the IDOT to regulate primary highways. Iowa Code Section

> 306.4(1) provides the IDOT with authority to regulate primary highways. Pursuant to Section 306.4(1), the IDOT implemented rules governing the minimum requirements for ATEs, their evaluation, and their subsequent removal if necessary. Iowa Admin. Code r. 761-144. Therefore, state law, through the IDOT administrative rules, controls.

App. 93.

**DOT Rules Address Safety and Engineering Concerns**

Although preemption analysis is a comparison of state law with local law, the Cities seem to ignore the text and the reasons for the DOT safety rules in their home rule argument. The fact that traffic cameras can negatively impact safety at a particular location clearly establishes the need for DOT oversight over placement on primary highways. Highway safety is a core value of the DOT. Safety benefits are expected to be gained by compliance with the DOT rules, along with orders to move or remove the subject cameras. The DOT's rules and application of the rules are entirely consistent with the engineering literature. "Automated Enforcement for Speeding and Red Light Running," National Cooperative Highway Research Program, Report 729 (Transportation Research Board 2012) is one of these studies. App. 192-276. This document reviewed and evaluated many of the ATE systems around the USA. The report provided an independent summary of best practices that should be used with any existing or new ATE systems. The study found a compelling need for the regular evaluation and

monitoring of the ATE program. For example, Report 729 stated the following:

> A formal evaluation of the impact on crashes should be conducted. It is suggested that this evaluation be conducted annually, if possible...
>
> * * *
>
> This evaluation should be conducted by the program manager, an independent organization, or consultant. If the evaluation is conducted by the program manager, an independent review of the findings, perhaps by a peer agency, will bolster confidence in the findings. (emphasis added).

App. 221. *Accord*, "Toolbox of Countermeasures to Reduce Red Light Running" (Center for Transportation Research and Education 2012). App. 955-1000. This study recognized there are disadvantages to red light cameras including "May increase rear-end crashes" and "Generally identifies only the vehicle and not the driver, so repeated offenses do not affect driving record." App. 994. Moreover, the need for regular monitoring of traffic cameras was stated. ("After installation, camera locations should be monitored to ensure that the cameras are effective in reducing crashes."). App. 995.

The "clear zone" concept of protecting occupants in errant vehicles from obstacles finds expression in the rules. *See* 761 IAC 144.6(1)(b) ("The system shall: . . . (4) Not be placed or parked on any shoulder or median of

any interstate highway. (5) Not be placed or parked within 15 feet of the outside traffic lane of any interstate highway, unless shielded by a crashworthy barrier. (6) Not be placed or parked on the outside shoulder of any other primary highway for longer than 48 hours unless shielded by a crashworthy barrier. (7) Not be placed or parked within 2 feet of the back of the curb of a municipal extension of any primary road."). App. 697. It is the 1,000-foot rule that provides motorists with additional time to adjust their speed and avoid unsafe sudden braking. *See* 761 IAC 144.6(1)(b)(10) ("The system shall: … Not be placed within the first 1,000 feet of a lower speed limit."). App. 697.

The safety basis for DOT rules finds overwhelming evidentiary support in the record. The reality is that there are recognized safety benefits and costs associated with traffic cameras. For example, red light cameras tend to cause a decrease in right-angle crashes yet increase rear-end crashes due to sudden braking and stops of motorists. Likewise, speed cameras can create unsafe speed differentials between vehicles by motorists slamming their brakes. *See* letter of Thomas Stansberry, Legislative Counsel for Iowa Insurance Institute, dated October 31, 2013, App. 633 ("A common criticism of red light cameras is that they increase the number of rear end collisions as a result of drivers stopping quickly to avoid having their picture taken. A

nationwide study by the Federal Highway Administration ("FHA") confirmed that rear end collisions increased by 15% after red light systems were installed."); Evaluating the Effectiveness of Red Light Running Camera Enforcement in Cedar Rapids and Developing Guidelines for Selection and Use of Red Light Running Countermeasures (Final Report Nov. 2011), App. 1086 ("One of the largest concerns when installing red light cameras is that the presence of the cameras causes more people to slam on their brakes resulting in more rear-end crashes. Drivers may be more likely to attempt to stop during the yellow interval to avoid an RLR violation when they would have otherwise proceeded through the intersection); letter of Ben Stone, Executive Director of ACLU of Iowa, dated October 30, 2013, App. 501 ("Additionally, data regarding the safety impact of ATEs suggest that they are not as effective as other means of improving safety, and in some cases have negative safety impact. For example, nationwide, studies show that ATEs can lead to significant increases in rear-end collisions and generally are ineffective at preventing more dangerous t-bone collisions, which are caused by drivers who are so inattentive that the presence of ATEs post no deterrent."); email of Marc Dunlap dated October 31, 2013, App. 629 ("The cameras do more bad then *(sic)* good causing a lot close calls from people slamming on their brakes so to not run the light then almost

getting rear ended."); "Automated Traffic Enforcement Systems," 26 ALR 6th 179, §2 ("The extent to which red light cameras prevent accidents has been disputed. A recent study by the Federal Highway Administration of seven jurisdictions that employ these systems found a significant decrease in right-angle crashes (a 24.6% decrease in crashes and a 15.7% decrease in definite injuries), but also a significant increase in rear-end crashes (a 14.9% increase in crashes and a 24% increase in definite injuries). The latter effect is presumably due to motorists hitting the brakes when they suddenly remember, or recognize, the camera's presence."); letter from Wallace and Pamela Taylor of Marion, Iowa, App. 442 ("Speed cameras should not be placed where there is a sudden reduction in the speed limit. It is dangerous to have a speed sign reducing speed a short distance from the camera. The locals know to reduce their speed and start slamming on breaks *(sic)*, which is not safe for traffic.").

**DOT's Lack of Financial Interest Allows for an Objective Review**

The underlying issue is whether the DOT or the Cities should make the engineering decision if and where the traffic cameras should be placed on primary highways. The DOT has been uniquely placed in a position to provide an objective review. Rule 761 IAC 144.4(2) provides:

> b. the department does not have the authority to own or operate any automated traffic enforcement system.

> c. The department shall not receive any financial payment from any automated traffic enforcement system owned or operated by a local jurisdiction.

App. 695. In contrast, cites and private vendors profit from the operation of traffic cameras. *See, e.g.*, App. 440 ("In 3 years the City of Cedar Rapids has issued 333,395 tickets which has netted the city $17.1 million dollars in fines. Cedar Rapids splits their fines with the owners of the cameras.") (footnote omitted). These rules address the concerns of the potential for loss of objectivity that naturally arise when evaluating revenue-generating traffic enforcement cameras.

**Municipal Home Rule**

The Cities attempt to immunize themselves from state regulation of traffic cameras by invoking "home rule authority." The Cities appear to be arguing in their first argument a novel "reverse preemption" whereby an ordinance enacted under home rule invalidates agency action under state law. Cities' brief 28-34. This is curious in light of traditional preemption whereby federal and state law trumps local law. Iowa home rule was never intended to serve as a sword to void state laws. The Cities appear to envision a "super" home rule that lays state regulations and agency action to waste. The theory turns traditional preemption analysis on its head to where

local ordinances would supersede state law. Such a reversal of legal hierarchy is not supported by precedent and could only create chaos.

The DOT submits its actions and rules are a measured and reasonable response to a statewide concern over the use of traffic enforcement cameras. The subject appeal involves challenges to seven remove or move orders: Des Moines (one of three locations); Muscatine (one of four locations); and Cedar Rapids (three of seven locations) (cameras at two additional locations on I-380 were ordered moved to the next truss). Home rule grants municipalities considerable discretion in managing their local affairs but city actions are not placed beyond the reach of state regulation. The DOT rules only purport to regulate the ATE devices on the primary highway system. Thus, the Cities still have complete autonomy in placement of ATEs on their local street system.

**Statutory Home Rule Provisions Allow State Law to Establish the Procedure for Exercising a Municipal Power**

Iowa Code section 364.6 states:

> A city shall substantially comply with a procedure established by a state law for exercising a city power. If a procedure is not established by state law, a city may determine its own procedure for exercising the power. (emphasis added).

Iowa Code section 364.3 provides in part:

> The following are limitations upon the powers of a city:
>
> 1. A city council shall exercise a power only by the passage of a motion, a resolution, an amendment, or an ordinance.
>
> * * *
>
> 3.*a*. A city may not set standards and requirements which are lower or less stringent that those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise. (emphasis added).

The simple answer to the Cities' argument is that Iowa Code sections 364.6 and 364.3 combine to expressly authorize state law to determine the procedure for exercising the Cities' powers and that the standards of the Cities cannot be less than those set forth in state law. The placing of ATE devices on primary highways falls neatly into the reach of sections 364.3 and 364.6. After all, the DOT administrative rules establish requirements and procedures for traffic camera authorization on the primary highway system. *See*, *e.g.*, 761 IAC 144.1 ("The purpose of this chapter is to establish requirements, procedures, and responsibilities in the use of automated traffic enforcement systems on the primary road system."). (emphasis added). Take, for example, the DOT 1,000-foot rule. The Cities would be free to enact by ordinance a 1,500-foot safety rule but not a 500-foot rule in advance of a lower speed limit for placement of traffic cameras. The district

court's ruling that the DOT rules control is correct in light of sections 364.3 and 364.6.

**Agency Rules Have Preemptive Effect**

It is well-settled that agency rules have the force and effect of statutes. *See Iowa Fed. of Labor v. Dept. of Job Serv.*, 427 N.W.2d 443, 447 (Iowa 1988), citing B. Schwartz, *Administrative Law*, §4.7 at 160 (2d ed. 1984); *Milholin v. Vorhies*, 320 N.W.2d 552, 553 (Iowa 1982). In the event of a conflict, agency rules control a local ordinance. *See Goodell v. Humboldt County*, 575 N.W.2d 486, 506 (Iowa 1998) ("We look to the substance of the ordinance, not its label, to determine whether it conflicts with a state statute or regulation."); 62 C.J.S. *Municipal Corporations* §192 ("Conflicts between regulations promulgated pursuant to properly delegated authority and ordinances are governed by the same principles governing conflicts between statutes and ordinances.").

**Preemption**

The Cities' invocation of home rule raises the issue of preemption. The Cities' heavy reliance on *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008), and *City of Sioux City v. Jacobsma*, 862 N.W.2d 335 (Iowa 2015), is entirely misplaced. Indeed, the preemption analysis of *Seymour* and *Jacobsma* can be fully reconciled with the finding of state law

through DOT agency rules controlling the operation of traffic cameras on primary highways. *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008), considered preemption in the context of the City of Davenport's ATE ordinance. No preemption was found by the Court because there was no conflict found between the ordinance allowing the use of ATE devices and certain state laws. *Accord, Rhoden v. City of Davenport*, 757 N.W.2d 239 (Iowa 2008) (procedures for collecting criminal and civil fines did not preempt Davenport traffic camera ordinance). The landscape has now changed. The DOT rules directly regulate the use of ATE systems on the primary highways to promote safety and uniformity. *Seymour*, however, recognizes the serious limitations of home rule. The *Seymour* Court declared: "Under legislative home rule, the legislature retains the unfettered power to prohibit a municipality from exercising police powers, even over matters traditionally thought to involve local affairs." 755 N.W.2d at 538. *Seymour* further reiterated "[w]hen exercised, legislative power trumps the power of local authorities." 755 N.W.2d at 538. *Accord*, *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 353 (Iowa 2015) ("Under Iowa's home rule amendment, a municipality cannot enact an ordinance that expressly or impliedly conflicts with state law."). Thus, the city ATE ordinances are invalid to the extent they conflict with state law.

**DOT is the Superior Sovereign with the Most Compelling Interest**

There is no hint in *Seymour* or *Jacobsma* that traffic cameras have been placed beyond state regulation. *Seymour* recognized the heated power struggles that can occur between state and local authorities when preemption is not clearly expressed. 755 N.W.2d at 538. No doubt, this case may be viewed by some observers as merely an ugly turf battle. The DOT, however, is merely seeking to have its regulatory authority over traffic cameras on primary highways upheld.

To resolve any conflict between state and city law, one form of analysis is that of the "superior sovereign." The superior sovereign doctrine looks at the top of the government hierarchy and subordinates municipal ordinances to state law. *See, e.g.*, *City of Bloomfield v. Davis County Community School Dist.*, 254 Iowa 900, 119 N.W.2d 909, 911 (1963) ("The law seems quite well settled that a municipal zoning ordinance is not applicable to the state or any of its agencies in the use of its property for a governmental purpose unless the legislature has clearly manifested a contrary intent.").

The use of traffic cameras is recognized by other jurisdictions as a legitimate statewide concern that can be addressed by state law. The Colorado legislature has recognized that regulation of automated traffic

enforcement cameras warrant imposing uniform and statewide standards on Cities. Colo. Rev. Stat. §42-4-110.5(1) ("The general assembly hereby finds and declares that the enforcement of traffic laws through the use of automated vehicle identification systems under this section is a matter of statewide concern and is an area in which uniform state standards are necessary.").

The current challenge to state law by home rule cities is comparable to *City of Commerce City v. State*, 40 P.3d 1273 (Colo. 2002). In *Commerce City*, the state statute regulating automated traffic enforcement was found to override the local ordinance. The Colorado Supreme Court in *Commerce City* explained the statewide significance of traffic cameras as bearing on the core expectations of motorists:

> . . .the extraterritorial impact is clear: the two cities that had already implemented automated systems ticketed a high number of non-residents. Moreover, given the practicalities of our commuter culture and our integrated highway system, Colorado drivers may regularly drive through multiple jurisdictions, increasing the impact on Colorado's citizens as a whole.

40 P.3d at 1284. Home rule must yield to valid statewide regulation of traffic cameras. *See City of Springfield v. State of Ohio*, 60 N.E.3d 649, 2016 WL 768655 (Ohio App. 2016) (appeal pending) ("Simply put, Am.Sub.S.B. No. 342 uniformly applies to all municipalities in Ohio who voluntarily choose to implement traffic cameras."); *City of Dayton v. State of*

*Ohio*, 36 N.E.3d 235, 245 (Ohio App. 2015) ("{§36} In light of the foregoing analysis, we find that Am.Sub.S.B. No. 342 provides for a uniform, comprehensive, statewide statutory scheme regulating the use and implementation of traffic law photo-monitoring devices in Ohio, and was clearly not enacted to limit municipal legislative points.").

**Home Rule Does Not Invalidate State Law**

The Iowa Court of Appeals recently held no conflict exists between the DOT administrative rules and the Cedar Rapids ordinance in the case of a motorist's challenge to a civil traffic ticket in *Cedar Rapids v. Leaf*, 898 N.W.2d 204, 2017 WL 706305 (Iowa App. 2017) (Table) (further review granted). The Court in *Leaf* recognized the DOT as the superior sovereign in framing the preemption issue as follows: "Conflict preemption involves the question of whether *a law* promulgated by an inferior body – here a municipal ordinance – is unenforceable because it is in conflict with *a law* promulgated by a superior body – here a regulation implemented by IDOT pursuant to authority delegated by the General Assembly." (emphasis in original). *Id*. at *8. The Court found no conflict between the city ordinance and the DOT rules "because the ordinance is silent regarding calibration and placement of the ATE speed cameras." *Id*. at *8.

The DOT traffic camera rules demonstrably promote safety by mandating evaluations and by creating a safe environment for the placement of ATE systems in strict conformance with engineering and safety principles. Surely, home rule does not sanction the use of ineffective traffic cameras or the unsafe placement of ATE devices along the high-speed and high-volume traffic facilities of the State's primary highway system. State law, through the DOT administrative rules, controls. The reality is there is no conflict between the DOT rules and the ordinances.[1] The ordinances do not address the safe placement and the evaluation of the effectiveness of the traffic cameras. App. 1058-1060. Only the DOT rules do. *See, e.g.*, App. 671-675.

The actions of the Cities regarding camera placement, however, remain in conflict with the DOT safety regulations. There is no legal basis for the Cities' misguided attempt to use home rule offensively to invalidate state law. Preemption does not apply in this particular context of state law being attacked by a city. *See Leaf* at *8 ("The doctrine of conflict preemption is not implicated when the question presented is whether the

[1]The Cities' argument references the city ordinances. *See* Cities' brief 33, fn. 3. However, the ordinances of Des Moines and Muscatine were not provided and made part of the record. Judicial note of an ordinance is not permissible. *Cedar Rapids v. Cach*, 299 N.W.2d 656, 658-59 (Iowa 1980); *Grimes v. Bd. of Adjustment*, 243 N.W.2d 625, 627 (Iowa 1976).

inferior government, in exercising its executive power to enforce a particular enactment (here placement of the camera), is in violation of an enactment of a superior government (here the IDOT regulation).")

The doctrine of preemption has never been a two-way street. Preemption flows down but not up. Federal law can preempt state and local law. State law can preempt local law. But under no circumstances can local law under Iowa home rule preempt state and federal law. Home rule authority must yield to legitimate statewide concerns of the DOT. The district court properly ruled that state law in the form of agency rules controls traffic camera placement on primary highways.

## II. THE DOT HAS BEEN DELEGATED FULL AUTHORITY TO REGULATE USE OF ATE DEVICES ON THE PRIMARY HIGHWAYS THROUGH ADMINISTRATIVE RULES BY THE LEGISLATURE. THE RULES DO NOT INTERFERE WITH LAW ENFORCEMENT'S ABILITY TO PATROL AND ISSUE CRIMINAL TRAFFIC CITATIONS.

### Preservation of Error

DOT agrees that Cities have preserved error on the issue of DOT authority to regulate the use of ATE devices through administrative rule.

## Scope of Review

The scope of review of agency action is for correction of errors at law under Iowa Code section 17A.19. *Greenwood Manor v. Dept. of Public Health*, 641 N.W.2d 823, 830 (Iowa 2002).

## Argument

Throughout their brief, the Cities frame the issue of DOT rulemaking authority relating to ATE devices in the extremely narrow context of municipal speed limit enforcement (Cities' brief 38, "However, nowhere in the Code is there authority for IDOT to regulate how local peace officers enforce speed limits within their own jurisdictions"). They reflexively equate ATE usage with traditional law enforcement and then attempt to attribute the safety benefits of the latter to the former. *See* Cities' brief 52, "Traditional patrol has long been presumed to enhance public safety. Logically, the same presumption applies with respect to ATE."). The Cities then proceed to analyze DOT's (often broadly empowering) statutes in this narrow context in order to come to the equally narrow conclusion that because such statutes do not reference ATEs or otherwise allow DOT "to regulate the use of technology for speed detection and enforcement in local jurisdictions" they are inapplicable. Cities' brief 41-49.

## District Court Ruling

The District Court's analysis of this very issue in its Ruling on Petition for Judicial Review could not have been more legally accurate. As demonstrated in the following passage, the District Court clearly recognized exactly what the Cities fail to understand (or refuse to acknowledge) in this case: the crucial distinction between *traffic safety* and *law enforcement* in the context of the ATE rules:

> Iowa Code section 307.2 states "[There is created] a state department of transportation which shall be responsible for the planning, development, regulation and improvement of transportation in the state as provided by law." Iowa Code §307.2. The director of the DOT is authorized to "adopt rules in accordance with Chapter 17A as the director deems necessary for the administration of the department and the exercise of the director's and department's powers and duties." Iowa Code §307.12(j).
>
> The "jurisdiction and control over the primary roads shall be vested in the [IDOT]." Id. §306.4(1). *To carry out these statutory provisions, the IDOT adopted rules regulating ATE's emphasizing safety.* *See* Iowa Admin. code r. 761-144.6(1). This is consistent with regulating obstructions in highway right-of-ways; the construction, improvement or maintenance of any highway; and limiting cities' obstruction of a street or highway which is used as an extension of a primary road. *See*, Iowa Code Chapter 318; Iowa Code §§306.4, 321.348.
>
> Furthermore, consultation between the IDOT and cities is required when both exercise concurrent jurisdiction over municipal extensions of primary roads. *Id.* § 306.4(4)(a). Therefore, the IDOT is the primary authority on matters involving the primary highway system.

> Based on state law providing the IDOT with the authority to regulate safety on primary highways, the Iowa legislature has provided DOT with the authority to regulate ATEs placed on primary highways. *The IDOT has the power to apply safety regulations to ATE use on primary highways, which does not interfere with municipal police officers' ability to enforce speed regulations.* (emphasis added).

App. 94.

**Statewide DOT Authority**

The DOT has been granted statewide authority under section 306.4(1) to locate, design and regulate primary highways that should be viewed as transcending local boundaries and interests. For example, it is well established the DOT has the exclusive jurisdiction to determine the location and design of a primary highway. *See Sierra Club Iowa v. Iowa Dept. of Transp.*, 832 N.W.2d 636, 649 (Iowa 2013); *Bernau v. Iowa Dept. of Transp.*, 580 N.W.2d 757, 760 (Iowa 1998); *Pundt Agriculture v. Iowa Dept. of Transp.*, 291 N.W.2d 340, 345 (Iowa 1980); *Curtis v. Bd. of Sup'rs of Clinton County*, 270 N.W.2d 447, 449 (Iowa 1978); *Harvey v. Iowa State Highway Comm.*, 256 Iowa 1229, 1232, 130 N.W.2d 725, 727 (1964).

The concurrent jurisdiction exception for municipal extensions of primary highways is limited to matters involving the "kind and type" of construction and maintenance under section 306.4(4). Further, the DOT is just required to "consult" with the city and the parties are to agree on a

division of the costs. ATE rules are not matters of highway construction or maintenance.

**State Departments of Transportation**

Similar to Iowa, other state transportation agencies have adopted rules to regulate the use of ATEs on state highways. The commentator in "Slave to the Traffic Light: A Road Map to Red Light Camera Legal Issues," 10 *Rutgers J.L. & Pub. Pol'y* 401, 403-404 (2013), recognizes the authority of a state department of transportation to regulate automated traffic enforcement devices on the state highways running through municipalities:

> In the absence of action by a state legislature, a state's department of transportation may nonetheless issue policies regulating the use of red light cameras in municipalities across that state.

The fact other legislatures and state departments of transportation have chosen to regulate ATEs on state highways strongly supports the DOT's efforts in promulgating administrative rules. A proper system of checks and balances simply means the Cities' ATE use on primary highways is subject to reasonable regulation. In this collision between state and city exercises of police power, the Cities should yield. After all, the Cities are adequately protected against arbitrary action by the judicial review provisions of Iowa Code chapter 17A.

The authority of the DOT regarding primary highways cannot be halted at the borders of each municipality. The Cities read section 306.4(1) as if the grant of jurisdiction was limited geographically to primary highways outside of municipalities. No such language was used by the legislature. Such an absurd statutory construction would only lead to disorder where uniformity is needed. Cities through which Interstates 80 or 35 pass could soon convert the freeways into the rough equivalent of a toll road by virtue of placing ATE devices. Sections 306.4(1) and 306.4(4)(a) should be read together and harmonized with the DOT having final authority to adopt the subject ATE rules. Cities simply do not have the veto power they desire over the ATE rules. The DOT must be considered the superior highway authority regarding the regulation of primary highways.

**DOT Authority for ATE Rules**

Iowa Code section 307.2 creates the state department of transportation and provides that it "shall be responsible for the planning, development, *regulation* and improvement of transportation in the state as provided by law." (emphasis added).

The director of the DOT is expressly authorized to:

> Adopt rules in accordance with chapter 17A as the director deems necessary for the administration of the department and the exercise of the director's and department's powers and duties.

Iowa Code §307.12(1)(j). In turn, the Iowa Transportation Commission is directed to approve the DOT administrative rules. Iowa Code §307.10(15).

The DOT has been delegated broad powers by the legislature to promulgate administrative rules that are deemed necessary. *See Elliot v. Iowa Dept. of Transp.*, 377 N.W.2d 250, 252 (Iowa App. 1985) ("The Iowa courts have consistently upheld broad delegations of rulemaking power to administrative agencies."). Thus, the DOT rules regulating the use and placement of ATE systems on primary highways for purposes of safety and effectiveness clearly fall within statutory authority.

**Assumption of Legislative Approval**

It is significant that no objections were made to the ATE rules by the Administrative Rules Review Committee (ARRC), the governor or the attorney general after their review. The ARRC plays an important role in the promulgation of agency rules. This is a bi-partisan group of legislators which functions to review the validity of administrative rules under Iowa Code section 17A.8.

Nor has the legislature acted to nullify the ATE rules through legislation. By virtue of Article III, section 40, of the Iowa Constitution, the legislature is expressly authorized to invalidate agency rules through a resolution. Article III, section 40, provides: "The general assembly may

nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of all of the members of each house of the general assembly."). This allows the fair assumption that the legislature approves of the DOT's ATE rules. For example, the Iowa Supreme Court in *State v. Miner*, 331 N.W.2d 683, 687 (Iowa 1983), made such an assumption of legislative approval regarding the DOT's rules regulating brokers of motor vehicles. The Court in *Miner* reasoned:

> The Iowa Administrative Procedure Act affords the legislature an opportunity to object to agency rules and to override them by statute. Iowa Code §§17A.4(4)(a), .8(8). These steps were not taken by the legislature; therefore, we assume that the legislature approved of the requirement that brokers be licensed as dealers and of the resulting application of the title requirements to *all* who initiate the retail sale of motor vehicles.

331 N.W.2d at 687.

The assumption of legislative approval under *Miner* is well-founded in this case. This is particularly true here where the agency rules promote safety and uniformity in traffic camera use on primary highways. The general rulemaking authority of the DOT and the numerous statutory provisions discussed herein (including Iowa Code chapter 318, Iowa Code sections 321.348 and 321.266) are more than sufficient to authorize DOT rules regulating traffic cameras on primary highways. An express grant of rulemaking authority for traffic cameras is not required. The DOT has

inherent power to apply sound safety and engineering regulations to traffic camera use on primary highways. The DOT acted as a rational agency in determining it had authority to adopt rules regulating traffic cameras. *See Meredith v. Iowa Dept. of Transp*., 648 N.W.2d 109, 117 (Iowa 2002) ("We conclude a rational agency could conclude it was empowered to enact a rule governing the reconstruction or modification of nonconforming signs."). *Meredith* makes it clear statutory gaps are properly filled in by an agency through adopting administrative rules. *Id*. at 117.

The Court in *Meredith* interpreted section 307.12 to "provide general authority to the department to adopt such rules deemed necessary to carry out its duties." *Id*. at 117. The rationale of *Meredith* fully supports the validation of the DOT rules and removal orders.

**DOT Rules Enforce the Clear Zone Under Iowa Code Chapter 318**

The DOT is vested with jurisdiction and control over the primary highways. Iowa Code §306.4(1). The DOT is the highway authority that is legally obligated to remove obstructions from the highway right-of-way of the primary highway system. Iowa Code §§318.1(1), 318.1(2), 318.1(3); 318.4. *See also* Iowa Code §318.7 (allowing the DOT to bring an injunction action to restrain right-of-way obstructions).

It is significant that municipalities are not included in the definition of "highway authority" for purposes of obstruction removal under chapter 318. Iowa Code section 318.1(2) provides: "*Highway authority*" means the county board of supervisors, in the case of secondary roads, and the department, in the case of primary roads. The mandatory duty imposed on the DOT is clear. Iowa Code section 318.4 declares: The highway authority shall cause all obstructions in a highway right-of-way under its jurisdiction to be removed.

The DOT has been recognized as the governmental entity responsible for removing obstructions from the primary highways. *See Waters v. State*, 784 N.W.2d 24, 29 (Iowa 2010); *Koehler v. State*, 263 N.W.2d 760, 764-65 (Iowa 1978). Further, a city cannot obstruct any extension of a primary road within such city, except in times of fire or for the purpose of doing construction or for other reasons with the DOT's consent. Iowa Code §321.348. In addition, the parking of vehicles on the right-of-way of controlled access facilities is prohibited by Iowa Code section 321.366(1)(f). There is a "strong public policy that highways must be free from obstructions and hazards." *Weber v. Madison*, 251 N.W.2d 523, 527 (Iowa 1977). *Accord*, *Thompson v. Kaczinski*, 774 N.W.2d 829, 835-836 (Iowa 2009). No doubt, an ATE trailer placed in the clear zone constitutes

a potential obstruction for motorists. Indeed, this record includes a photograph showing an ATE trailer that was struck by a motor vehicle. App. 1080.

The engineering basis for the 15-foot requirement set forth at 761 IAC 144.6(1)(b)(5) is based on the "clear zone" concept. The DOT design manual defines "clear zone" as follows: "A clear zone is defined as a roadside area that is free of obstacles, where an out-of-control vehicle can traverse safely." The 15-foot requirement contained in Iowa DOT's ATE rules is a reasonable distance and it is also consistent with Section 8A-2 of Iowa DOT's Design Manual which provides that "For interstate roadways the minimum clear-zone distance is 15 feet or the outside edge of the shoulder, whichever is greater." App. 1083-1084.

**No Interference with Law Enforcement**

The Cities work very hard throughout their brief to characterize the dispute in the case at bar as an infringement (by DOT) upon their legal authority to conduct law enforcement. *See* Cities' brief at 38 ("However, nowhere in the Code is there authority for the IDOT to regulate how local police officers enforce speed limits within their jurisdictions."); 40 ("…the legislature carved out authority for a municipality and its law enforcement officers to maintain control over roads and traffic within its jurisdiction,

which includes enforcement of speed limits…Moreover, the legislature has not granted IDOT authority to control how municipalities enforce its traffic regulations…"); 48 ("…there is no legislative authority granted to IDOT to regulate a City's use of ATE under its lawful delegation to enforce speeding laws in its own jurisdiction."). These sweeping assertions (to the effect that the Cities can do anything they want on the primary road system without regard to DOT jurisdiction) grossly miss the mark and are inconsistent with the legal authorities relating to DOT's primary road jurisdiction (referenced at pages 36-45 of this brief and in the above excerpt from the District Court Ruling on Petition for Judicial Review).

The Cities even go so far as to disingenuously reference a partial excerpt of an email from DOT employee Steve Gent, claiming that the excerpt constitutes an admission that DOT lacked legal authority for its ATE rules. Cities' brief 48-49. To the contrary, Steve Gent's email, when read *in its entirety* (and not piecemeal as Cities urge) aptly summarizes the safety thrust of the DOT rules:

> …The key point here is that the issue the *DOT feels we do have authority is regarding the overall responsibility for safety on the primary highway system.* Your issue is more about how enforcement is done, the fairness of that enforcement, etc. As you have seen from the proposed rules, the DOT does not tell the cities exactly how to enforce...only that if they want to enforce with cameras, then we want to ensure that they are the

> appropriate *safety* countermeasures for that location and that it is done in a *safe* manner, etc. (emphasis added).

App. 381.

The reality is the DOT rules do nothing to interfere with traditional law enforcement or the statutory law enforcement powers provided to officers in the Iowa Code. Indeed, it is widely recognized that traffic cameras can merely supplement standard law enforcement activities. Traffic cameras can never replace traditional law enforcement: *See* NCHRP Report 729 "Automated Enforcement for Speeding and Red Light Running" at p. 27 ("Automated enforcement should only be used at locations as a supplement to traditional engineering, enforcement, and education countermeasures and should never replace these measures. Officers should continue to provide traditional enforcement at locations with automated enforcement."). App. 226; *Enforcement Camera Systems Operational Guidelines* (NHTSA 2008), p. 33 ("ASE should be used to supplement, but not replace, other traffic law enforcement activities."). App. 903; 761 IAC 144.6(3)(a) ("If used, automated enforcement technology shall be used in conjunction with conventional law enforcement methods, not as a replacement for law enforcement officer contact.").

In addition, the police departments of Des Moines, West Des Moines and Windsor Heights along with the Polk County Sheriff's Office and Iowa

DOT Motor Vehicle Enforcement were interviewed regarding the I-235 corridor as part of a safety audit. The law enforcement agencies responsible for the I-235 corridor agree there is adequate enforcement along I-235. App. 1096. For example, the City of Des Moines assigns one patrol officer and vehicle to I-235 40 hours per week. App. 1095.

The factual premise of the Cities' argument is flawed. The police are not even handling the installation and daily operation of the traffic cameras. An outside private vendor, Gatso USA, has been delegated that responsibility pursuant to contract with the Cities. *See, e.g.*, App. 1120 ("3. The City worked with Gatso USA ("Gatso") (whom the City had contracted to provide automated traffic enforcement camera systems ("ATE's") and citation management solutions)…"); *See also* Cities' brief 12, 18, 22.

The DOT director's decision on appeal for the City of Des Moines directly and properly addressed the issue of traditional law enforcement and interstate highways:

> From an enforcement standpoint, this section of I-235 has many of the same enforcement issues as any other urban freeway in Iowa. There are multiple lanes in each direction, traffic volumes are high, interchanges are closely spaced, a high percentage of commuter traffic, a low percentage of trucks, etc. In these busy urban interstate roadways, there are some alternative ways to enforce, or manage, traffic speeds. Consider for a moment that there are thousands of miles of urban interstate roadways in America and many of them are more challenging and complex than the systems we have in Iowa. To

> say we cannot safely manage interstate speed limits in Iowa without automated speed cameras is not only incorrect, but it also limits our ability to solve problems as we strive to serve Iowans. Keep in mind that Iowa is the only state in the nation with permanent speed cameras on the interstate. We can, and should, learn from other cities.
>
> One way to conduct speed enforcement on an urban freeway is to place an officer on an overpass or on the outside shoulder with a radar device. That officer can then communicate with other officers downstream who personally issue tickets. During highly congested times, it is not recommended to enforce speed limits as traffic backups and second crashes may occur. In these situations, other methods to manage traffic speeds could be used such as placing enforcement vehicles at reasonable intervals in the traffic stream driving a reasonable speed. This helps calm traffic by allowing traffic to flow freely with visible enforcement.

App. 1269.

Iowa Code sections 321.485 and 321.492 set forth the peace officer's authority when stopping a vehicle and issuing a citation for a traffic violation. This face-to-face encounter between motorist and officer is the essence of traditional traffic law enforcement. DOT's rules do not interfere with these powers at all. *See City of Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002) ("The state's interests include the uniform regulation of automated vehicle identification systems-a method of traffic enforcement so fundamentally different than traditional methods of enforcement that it significantly alters Colorado citizens' basic expectations."). The conventional traffic stop and citation remains the most effective because of

the immediate opportunity for education and real legal consequences in terms of a license suspension. Not so with traffic cameras.

**Drone Ban**

The legislature recently expressed the strong preference for such conventional law enforcement by banning the use of "drones" in enforcing traffic laws in Iowa Code section 321.492B, which provides:

> Use of unmanned aerial vehicle for traffic law enforcement prohibited.
>
> The state or a political subdivision of the state shall not use an unmanned aerial vehicle for traffic law enforcement.

The general assembly has drawn a line in the sand on the use of advancing technology in traffic enforcement. There is a direct analogy between surveillance drones and traffic cameras in both having the capacity to rely on radar and imaging for license plate purposes. The big difference between the two would be the extreme mobility of an unmanned aerial vehicle. The reasonable regulation of traffic cameras through application of the DOT rules simply does not hamper conventional law enforcement.

**Traffic is a Statewide Concern**

The Iowa Supreme Court has recognized the interest of the State in regulating motor vehicle traffic and has rejected the notion the municipalities have exclusive jurisdiction over traffic enforcement. *See City*

*of Cedar Rapids v. State*, 478 N.W.2d 602, 605 (Iowa 1991) ("It does not purport to grant exclusive jurisdiction to municipalities in the enforcement of motor vehicle laws, including weight restrictions."). A leading treatise on municipal law relies on *City of Cedar Rapids* for the notion traffic regulation is a matter of statewide significance:

> Naturally, on account of the prodigious growth of interstate, interurban, and urban motor vehicle transportation and traffic in recent days and the need of uniformity of regulation, both interurban and urban transportation and traffic have become of necessity, matters of statewide importance, and courts everywhere are inclined to regard them as no longer municipal affairs. (footnote omitted).

6 *McQuillan Mun. Corp.*, §21:36 (3rd ed.).

**Failure to Report Traffic Violations**

The Cities argument that DOT's safety-based ATE rules infringe upon their statutory law enforcement powers (and that ATE usage is the safety equivalent of traditional law enforcement) is eroded even further when one merely steps back and compares the fundamental differences that exist between a civil ATE citation issued by camera and a criminal citation issued by an officer. For example, under the municipal ordinances involved in the case at bar, ATE citations are issued by mail to the owner of the speeding vehicle, regardless of whether the owner was the actual speed violator. Des Moines Municipal Code 114-243(c)(1-2); Muscatine Municipal Code 7-5-

3(A-B); Cedar Rapids Municipal Code 61.138(c)(1-2). They assess a civil penalty without criminal conviction and, as clearly indicated in each of the ordinances involved, are specifically *intended* to circumvent any reporting requirement to DOT. Des Moines Municipal Code 114-243(c)(4); Muscatine Municipal Code 7-5-3(C); Cedar Rapids Municipal Code 61.138(c)(4). And of course, as stated above, all of this is run by a private company (Cities' brief 12, 18, 22) that actually *profits* from the issuance of more ATE citations.

In contrast, as mentioned previously, law enforcement issued citations involve an immediate officer stop of the *actual offender* (thus ending his or her speed violation and the risk posed to other motorists by such violation), a criminal citation and conviction (if found guilty) and – perhaps most importantly – a report to DOT of said conviction so that DOT can take further action to sanction the driver if warranted, thus providing the public with an additional level of safety and protection.

The deprivation by ordinance of this last statutorily required public safety protection (DOT's ability to sanction an unsafe driver) is the most glaring public safety defect in the entire ATE process. Iowa Code section 321.491(2) requires every clerk of court to report speeding convictions to DOT. The report to DOT of such convictions is made through a certified

abstract of the record of the case. *See* Iowa Code §321.491(2)(a). However, all of the ordinances involved in the case at bar specifically prohibit such reporting for license suspension purposes. *See* Des Moines Municipal Code 114-243(c)(4); Muscatine Municipal Code 7-5-3(C); and Cedar Rapids Municipal Code 61.138(c)(4) at App. 1058; *See also* Muscatine Appeal to the Director ("9. All such speed and red light citations are considered civil violations, which do not get reported on an individual's driver's license, and which are significantly lower in cost than a speed or red light citation received from a police officer.") at App. 1121. This failure to report undermines driver safety because it deprives the DOT of the opportunity to take action and issue any of the following driver license sanctions:

1. Suspension for committing a "serious violation." *See*, Iowa Code section 321.210(1)(a)(6)); 761 IAC 615.17(2); 761 IAC 615.17(2)(c);

2. Suspension for being a "habitual violator." *See*, Iowa Code section 321.210(1)(a)(2)); 761 IAC 615.13(1); 761 IAC 615.13(2);

3. Bar for being a "habitual offender." *See*, Iowa Code section 321.555(2); 761 IAC 615.9(2)

4. Additional like period of suspension for speed conviction received while operating a vehicle during an OWI probationary period. *See*, Iowa Code section 321.210C(2).

Clearly, the ATE ordinances involved in the case at bar, *by design*, allow the most dangerous drivers and repeat offenders to remain on the road – a safety concern voiced in the following excerpt from the dissent in the *Seymour* case:

> The Davenport ordinance circumvents the DOT's exclusive control, and undermines the goal set forth by the legislature that repeat offenders should be kept off our roads. Why would the legislature allow a person with five violations under the Davenport ordinance to continue to drive, when its stated legislative policy is to prohibit a driver with three moving violations in any other part of the state from operating a motor vehicle? An unsafe driver in Davenport is an unsafe driver anywhere else in this state. By not applying our suspension and revocation laws uniformly, our streets and highways become a more dangerous place.

*Seymour* (dissent, J. Wiggins), 755 N.W.2d at 548. The Cities' proclamation of safety concerns rings hollow.

Both the majority and dissenting opinions in *Seymour* expressed concerns about the role big money plays in the use of ATE systems. *Seymour*, 755 N.W.2d at 544. ("In contrast, opponents may view ATE ordinances as unduly intrusive, unfair, and simply amounting to sophisticated speed traps designed to raise funds for cash-strapped municipalities by ensnaring unsuspecting car owners in a municipal bureaucracy under circumstances where most busy people find it preferable to shut up and pay rather than scream and fight."). The dissent in *Seymour*

was more pointed: "The legislature never envisioned that municipalities could raise revenue under the guise of traffic law enforcement at the expense of safer highways." 755 N.W.2d at 548.

DOT has been delegated the authority to regulate the use of ATE devices on the primary highways through administrative rules by multiple statutes. DOT's ATE rules are safety-based. They do not interfere with local law enforcement's ability to patrol and issue criminal citations. The district court properly found there was no interference with enforcing speed limits.

## III. THE DISTRICT COURT CORRECTLY DETERMINED THAT DOT'S ACITONS DID NOT VIOLATE IOWA CODE CHAPTER 17A

### Preservation of Error

DOT agrees that Cities have preserved error on the issue of alleged violations of Iowa Code sections 17A.19(10)(i), (j) and (n) except regarding waiver. To the extent Cities are claiming they have preserved error as to the remaining grounds under section 17A.19(10), DOT disagrees that such grounds were briefed and argued at the district court level and, therefore, assert such error was not properly preserved. The district court only addressed sections 17A.19(10)(i), (j) and (k). App. 95-99. In addition, the Cities' contention that DOT could have addressed the 1,000-foot issue in the

case at bar through non-enforcement or rule waiver has not been preserved for review. Cities' brief 67. This argument was not addressed by the district court and it is, therefore, waived. Moreover, the Cities failed to ask for any kind of formal rule waiver in this matter under the process set forth in Iowa Code section 17A.9A and 761 IAC 11. They cannot now assert on appeal that a waiver never formally sought constitutes an "unreasonable, arbitrary, capricious" action or "an abuse of discretion" under Iowa Code §17A.19(10)(n). The Cities failed to file a motion to enlarge the ruling. Thus, the other grounds for relief and rule waiver have not been preserved for appellate review. *See Meier v. Senecaut III*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

**Scope of Review**

The scope of review of agency action is for correction of errors at law under Iowa Code section 17A.19. *Greenwood Manor v. Dept. of Public Health*, 641 N.W.2d 823, 830 (Iowa 2002).

## Argument

### *1. DOT's actions were not "the product of reasoning that is so illogical as to render it wholly irrational" under Iowa Code §17A.19(10)(i).*

The Cities have claimed that DOT's ATE rules and the May 11, 2015, final decisions based upon them were "the product of reasoning that is so illogical as to render it wholly irrational." Iowa Code §17A.19(10)(i); Cities' brief 51-58. The basis for this argument is the flawed premise that the only means to achieving traffic safety is law enforcement and since law enforcement enhances public safety, ATE use by law enforcement always enhances public safety in the exact same way law enforcement does too. Cities' brief 52. The confusion the Cities have with respect to the scope of the separate concepts of *traffic safety* and *law enforcement* has already been discussed in Division II, above. The Cities simply fail to understand that the overall concept of "traffic safety" as it relates to the primary road system for which DOT is legally responsible involves consideration of a myriad of factors that *may include* ATE devices when appropriate, but may more properly be addressed by other available safety countermeasures. *See* App. 1268, 1291. In other words, ATE use is only one potential piece of a much larger traffic safety puzzle – and the Cities don't get that.

In disregard of this clear logic, the Cities make a number of staggering claims in their brief. First, at page 54, they claim that because their cameras are only triggered when a motorist is going 11 miles per hour over the posted speed limit, "it is illogical and irrational" to conclude that a driver should be given 1,000 feet to adjust his or her speed to the lower limit before encountering a speed camera as required under 761 IAC 144.6(1)(b)(10). Cities' brief 53-54. The basis for this rule is explained extensively at pages 72-80 of this brief. It is not something DOT simply made up; it was repeatedly emphasized during the public comment process as necessary by a wide variety of Iowans. *See* App. 442, 311-312, 564-565, 686-687, 502, 633, 648. It is entirely based upon traffic safety and the need to reduce the risk of rear-end collisions due to the recognized risk that a motorist will slam the brakes once the presence of a traffic camera is perceived. The Cities' arguments to the contrary simply make no sense. And the analogy they draw between slamming on brakes when a motorist sees a "traditional patrol car" and slamming on brakes when encountering an ATE should absolutely be rejected; there simply is no reasonable way to analogize (from a visibility standpoint) a large, multi-colored law enforcement vehicle parked on the interstate to a small camera.

**Limited Use of ATE Devices on Interstates**

The Cities claim that 761 IAC 144.4(1)(c) (providing that ATE usage should be limited on the interstate highway system because they are the safest class of any roadway and typically carry a number of non-familiar motorists) is an illegitimate regulation of law enforcement based on class of roadway. Cities' brief 54.

Rule 761 IAC 144.4(1)(c) provides:

> Automated enforcement should only be considered in extremely limited situations on interstate roads because they are the safest class of any roadway in the state and they typically carry a significant amount of non-familiar motorists.

That interstate roads are the safest high volume means of travel cannot reasonably be disputed. DOT's limitation in 761 IAC 144.4(1)(c) reasonably recognizes the safety benefits of the interstate highway system (inherent in their design) and further recognizes that factor should be given additional weight when determining whether ATE devices can be placed on that portion of the primary road system. After all, as noted by the director in the Des Moines final decision, Iowa is the only state in the nation that allows ATE devices on its interstate road system. App. 1269. Are we to believe that Iowa's urban interstates (*i.e.*, I-235 and I-380) are so much more dangerous than those in Los Angeles, Chicago or Washington D.C. that the only effective means of controlling speed and providing safe passage for

motorists in Iowa is through ATE? The answer to that question is clearly no – yet that is exactly what the Cities are claiming throughout their brief.

This rule seems entirely self-evident. It is obvious Iowa interstates carry substantial out-of-state travelers. The cities should consider looking at the rest of the nation. The City of Davenport candidly declares: "Fixed ATEs should not be allowed on interstates." App. 540. The rule stands as eminently reasonable. Otherwise, the interstate in Iowa would be at risk of being converted into a toll road system by municipalities through which the highways pass. The Iowa interstate highways are part of the national system of diverse highways. Iowa Code §306.3(4). The interstate highways are constructed in accordance with high design standards and have full access control which minimizes vehicle conflicts and accidents. The courts have recognized the superior safety of controlled access facilities as "they greatly reduce sources of danger." *See, e.g.*, *Ginn Iowa Oil Co. v. Iowa Dept. of Transp.*, 506 F. Supp. 967, 973 (S.D. Iowa 1980), quoting *Iowa State Highway Comm. v. Smith*, 248 Iowa 869, 82 N.W.2d 755, 761 (1957). Given the safety of interstate travel and the abundance of non-familiar motorists, the rule limiting traffic cameras on interstate highways makes perfect sense.

**Permit**

The Cities maintain that once DOT allowed ATE devices upon the primary road system through its permit system those decisions cannot be changed or modified. Cities' brief 56. The Cities ignore the 30-day termination clause present in each such permit. App. 105-106, 112-113, 125-126, 130-131, 133-134, 139-140, 145-146 (Cedar Rapids); 152-153 (Muscatine); 157-158, 169-170 (Des Moines). The Order on Appeal regarding Cedar Rapids explained the removal authority contained in the DOT-issued permit:

> The Iowa DOT worked with the City prior to the cameras being installed to assure the work could be accomplished in a safe manner. This process resulted in a signed "Agreement for Approval of a Traffic Control Device." The agreement has a statement on the second page that allows the DOT to require removal. Here is that statement:
>
> > THE IOWA DEPARTMENT OF TRANSPORTATION RESERVES THE RIGHT TO: (1) require the removal of such traffic control device upon thirty days' written notice. Either lack of supervision, inadequate enforcement, unapproved operation, or intolerable congestion shall be considered sufficient reason to require removal.
>
> This agreement was signed prior to the adoption of Administrative Rule 761-144.

App. 1292.

Any past DOT acquiescence or permission is of no consequence. The DOT permits for all three cities clearly authorized the removal of the traffic cameras upon 30 days' notice for unapproved operation. App. 105-106, 112-113, 125-126, 130-131, 133-134, 139-140, 145-146 (Cedar Rapids); 152-153 (Muscatine); 157-158, 169-170 (Des Moines).. The DOT's ruling on appeal for Muscatine expressly declined to "grandfather in" the subject traffic camera location. App. 1280. The DOT automated traffic enforcement rules make no provision for any exemption for already existing camera placements. The DOT has the legal right and obligation to change its course based on changing conditions and priorities. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-64, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) ("[W]e fully recognize that regulatory agencies do not establish rules of conduct to last forever and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances."). In fact, the Iowa Administrative Procedure Act

specifically authorizes agencies to create, change or even eliminate administrative rules. *See* Iowa Code §17A.4(1) ("Prior to the adoption, amendment, or repeal of any rule an agency shall...").

The Agreement for Approval of a Traffic Control Device entered into between the DOT and the Cities expressly reserved the right of the DOT to: "Require the removal of such traffic control device upon thirty days' written notice. Either lack of supervision, inadequate enforcement, unapproved operation, or intolerable congestion shall be considered sufficient reason to require removal."[2] By virtue of the DOT evaluations and the DOT director's decisions on appeal, the operation of the traffic cameras ordered removed are no longer approved. Pursuant to the agreement, removal was authorized for "unapproved operation."

It is significant the parties were treating the traffic cameras as traffic control devices in the permits. Each permit for the traffic cameras was captioned as "Agreement for Approval of a Traffic Control Device." Another seven times, the term "traffic control device" is used in the body of the permit. App. 105-106, 112-113, 125-126, 130-131, 133-134, 139-140, 145-146 (Cedar Rapids); 152-153 (Muscatine); 157-158, 169-170 (Des

[2]Although raised in the brief, the district court chose to not address the defense of the permit 30-day notice to remove provision. DOT's trial brief, Div. V. Affirmance may be based on this alternative ground. *See Matter of*

Moines). Iowa Code section 321.254 expressly requires DOT "permission" to place or maintain any traffic control device on a primary highway.

Removal of nonconforming billboards were authorized in *Meredith v. Iowa Dept. of Transp*., 648 N.W.2d 109, 116 (Iowa 2020):

> Noncompliance with the permit provisions results in the revocation of the previously issued permit and mandatory sign removal. *Id*. §306C.19; Iowa Admin. Code r. 761-117.6(5)(c); *See Iowa Dep't of Transp*., 272 N.W.2d at 13 ("[U]pon noncompliance with the permit requirements … the [ ] billboards become subject to removal"); 40 *C.J.S. Highways* §239, at 89 (sign violating permit requirements of governing statutes and applicable regulations promulgated by department is subject to removal and corresponding permit revocation).

The reasoning of *Meredith* similarly applies to the traffic cameras ordered removed by the DOT. The permit granted the DOT authority to disapprove the traffic camera operation. This power has been properly exercised by the DOT. Thus, the permit agreements provide an independent basis for affirmance of the DOT's removal decisions.

Finally, the rationale with respect to the S-curve on I-380 in Cedar Rapids is fully explained in the director's final decision. App. 1291-1292. There is nothing illogical or irrational about that explanation. Simply put, from a traffic safety standpoint, DOT has determined that ATE cameras should be placed at the very *start* of the S-curve – the place where any

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*Estate of Voss*, 553 N.W.2d 878, 879, fn. 1 (Iowa 1996).

hazard presented by the S-curve begins, and where the warning is most needed. And as the DOT director reasonably pointed out in his final decision, by the time the motorist has exited the S-curve the road safety issue (created by the S-curve) has concluded.

***2. DOT considered relevant and important matters relating to the propriety and desirability of the actions in question that a rational decision maker in similar circumstances would have considered prior to taking that action. There is no violation of Iowa Code §17A.19(10)(j) in this case.***

The Cities claim DOT ignored or failed to address important and relevant information submitted by the Cities in connection with their ATE annual reports. Cities' brief 59. That DOT did not grant every location request for ATE placement each city made does not mean that it disregarded or ignored their data.

The agency record in this matter does not support this assertion by the Cities. All of the data submitted by the Cities (contained in the agency record) was received, accepted and considered by DOT before issuing its final decisions. DOT even sought clarification from the Cities after they submitted their annual reports. App. 1064-1079. Most remarkable is the Cities' criticism that DOT "relied almost exclusively on national data, statewide crash data, and other aggregate comparisons which are of little or no value in assessing the propriety and desirability of maintaining ATE

operations at the specific locations where a few years earlier, the DOT and the Cities had made the joint decision to implement ATE." Cities' brief 59. The Cities' criticism of DOT for relying on *too wide* a variety of data is inexplicable. DOT should be commended for thoughtfully considering such a broad spectrum of information in light of the fact that "Iowa is the only state in the nation with permanent speed cameras on the interstate" (App. 1269) and it was completely rational for DOT to do so. The Cities also appear to fault DOT for considering this broad spectrum of information in light of the fact DOT previously allowed ATE usage at the locations in question under permit. Cities' brief 59. This argument has no merit and already been addressed in pages 61-65 of this brief.

Additionally, remarkable is the contention by Muscatine that DOT improperly evaluated its statistical data (Cities' brief 59-60) when the record really shows that Muscatine, in an attempt to put an inaccurate positive spin on its data, actually "combined the number of crashes at all of your intersections (with ATE cameras) rather than looking at specific intersections." App. 1280. The arguments proffered by the City of Des Moines under this division are similarly troubling, as it is apparently the position of the City of Des Moines that DOT must look at the data relating to the ATE device on I-235 in a vacuum, without regard to crash rates on I-235

or on any kind of a statewide basis. Cities' brief 60-61. The director reasonably determined that such an approach was not appropriate. Instead, he considered the crash rate at this location and compared it to "the average crash rate for the entire section of eastbound/northbound I-235" and "the crash rate for the southbound/westbound I-235" as well as "the average Iowa urban interstate crash rate" and determined the area where the ATE device was located already had "one of the lower crash rates on I-235." App. 1268. The director's consideration of this information was highly relevant and his determination (as to both Muscatine and Des Moines) was logical and rational.

**Red Light Running Study**

In addition, the Cities claim that DOT did not take into account the 2011 study titled *Evaluating the Effectiveness of Red Light Running Camera Enforcement in Cedar Rapids and Developing Guidelines*. Cities' brief 61-62. This is not accurate. The study was made part of the agency record in this matter three different times. Record 638-697, 1316-1378; App. 1005-1063, 1085-1094. It was reviewed and considered along with all other materials submitted to DOT by any of the cities. The agency record certification shows the documents appearing therein were the ones "considered by the Iowa Department of Transportation in connection with

adoption of the administrative rules or the administrative appeal decisions regarding automated traffic enforcement on primary highways in the Cities of Cedar Rapids, Muscatine and Des Moines."). Record first p. 2.

Significantly, the study did not address the use of speed cameras on the interstate. As the title suggests, the focus of the study was red light running cameras in Cedar Rapids. In addition, the article had serious limitations in terms of it not being a true "before" and "after" scientific study. ("The major limitation to use of the vendor data is that the study did not provide a true naïve before study."). App. 1031.

Nevertheless, statements in the study are consistent with the DOT rules. For example, the study noted that safety countermeasures including cameras may grow ineffective over time. ("It is not well understood if the cameras have the same impact over time. In some cases, countermeasures become less effective over time because drivers become accustomed to the treatment."). App. 1011. It recognized a crash analysis is the recommended way to evaluate the performance of traffic cameras. ("While a crash analysis is the preferred method to evaluate the effectiveness of the cameras, it cannot be completed reliably in the short term."). App. 1053. Moreover, the known risk of motorists braking in response to traffic cameras was noted. ("One of the largest concerns when installing red light cameras is that the

presence of the cameras causes more people to slam on their brakes resulting in more rear-end crashes. Drivers may be more likely to attempt to stop during the yellow interval to avoid an RLR violation when they would have otherwise proceeded through the intersection."). App. 1013. And the Cities' unsupported statement "that no rational decision maker taking that study into account would have concluded the Cities should use other countermeasures before implementing ATE" (Cities' brief 61-62) simply demonstrates the incredibly narrow and illogical focus the Cities have when it comes to traffic safety – as if only ATE devices can provide the requisite level of safety to the travelling public to the exclusion of all other traffic safety countermeasures. This runs contrary to research and literature which clearly indicates ATE devices *supplement* traditional engineering, enforcement and education countermeasures, but do not replace them. App. 226, 903.

**Local Law Enforcement**

The argument at page 62 of the Cities' brief that decisions as to ATE location on the primary road system should be made only by local law enforcement officers (and not DOT) is nothing more than a rehash of the same home rule argument raised elsewhere in their brief and to which DOT has already responded at pages 27-35 of this brief. It is, yet again, one more

example of the Cities' failure to understand or acknowledge the difference between the scope of traffic safety versus local law enforcement.

### *3. DOT's actions were not unreasonable, arbitrary, capricious and an abuse of discretion within the meaning of Iowa Code §17A.19(10)(n).*

The Cities' arguments under this division are a rehash of the same arguments they have made (and DOT has refuted) in this matter. For example, at pages 62-64 and 66 the Cities claim that DOT has no legal authority for its administrative rules (including the 1,000-foot rule) and that its decisions are based on flawed generalized analysis and data. These arguments have been addressed and refuted at pages 36-69 of this brief and in the very decisions at issue in this case. App. 1264-1292.

The "DOT previously approved permits for these ATE locations" argument arises again at page 64 of the Cities' brief (see DOT's response at pages 61-65 of this brief). And, of course, the argument made at pages 65-66 of the Cities' brief to the effect that DOT is improperly interfering in local law enforcement has been addressed in this brief at pages 46-56.

Finally, there is no legal or factual basis for waiver of the safety minimum requirements under 761 IAC 144.6(1). For safety reasons, the proposal to move the speed limit signs or "grandfather in" the camera was rejected by the DOT director. App. 1280. Reducing the 1,000-foot distance

would clearly impair the safety being afforded to motorists to the known risk of drivers slamming their brakes in response to perceiving the cameras. *See* extensive data referenced in DOT's brief, 23-25. It must be kept in mind that a vehicle will travel 1,000 feet in merely 11 seconds at 60 miles per hour. App. 1292. The safety cushion being provided should not be reduced. The statutory requirements for waiver cannot be met for giving "substantially equal protection" of safety. *See, e.g.*, §17A.9A(2)(d). The Cities simply cannot carry their "burden of persuasion" for a rule variance on the 1,000-foot rule. *See* §17A.9A(3).

## IV. AFTER EXTENSIVE NOTICE AND PUBLIC COMMENT, THE 1,000-FOOT RULE AROSE DIRECTLY AS A LOGICAL OUTGROWTH OF THE ORIGINAL NOTICE AND COMMENTS PROVIDED. THIS SHOWS THE RESPONSIVENESS OF THE DOT TO PUBLIC COMMENT. THUS, THE DOT'S RULES ARE PROCEDURALLY VALID.

### Failure to Preserve Alleged Error and Lack of Prejudice

Each of the Cities did not, as part of this brief point or challenge before the agency, specify exactly what material comments would have been made by Cities regarding the 1,000-foot rule that would be of any consequence. Issues not raised before an agency or not decided by the agency are deemed waived on a petition for judicial review. *KFC Corp. v. Iowa Dept. of Revenue*, 792 N.W.2d 308, 329 (Iowa 2010); *Office of*

*Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 283 (Iowa 1991). Moreover, a party must show itself to be "aggrieved or adversely affected" as required by Iowa Code section 17A.19(1). This failure to specify the comments and the name qualifications of the persons expected to make the comments is akin to not making an offer of proof regarding excluded evidence. Therefore, no prejudice to the Cities can be shown for the DOT not providing a second notice and comment period.

**Des Moines Failed to Make a Rulemaking Procedural Challenge**

The City of Des Moines did not make any rulemaking procedural challenge to the adoption of the DOT rules before the agency. App. 1117-1119. Thus, Des Moines has failed to preserve error for review or show the necessary prejudice. *KFC Corp. v. Iowa Dept. of Revenue*, 792 N.W.2d 308, 329 (Iowa 2010); *Office of Consumer Advocate v. Iowa State Commerce Comm'n* 465 N.W.2D 280, 283 (Iowa 1991).

**Scope of Review**

The scope of review for agency action is for correction of errors at law under Iowa Code section 17A.19. *Greenwood Manor v. Dept. of Public Health*, 641 N.W.2d 823, 830 (Iowa 2002).

## District Court Ruling

Judge Rosenberg noted the direct connection between the public comments and the 1,000-foot rule:

> The IDOT argues that comments were submitted during Administrative Rules Review Committee ("ARRC") meetings on October 8, 2013 and October 7, 2014. Further, a public hearing on the rules was held on October 30, 2013. At the meetings and during the public hearing, comments specifically citing the 1,000ft rule were submitted. Therefore, the 1,000ft rule is a direct result of public comments made and is, at the very least, a logical outgrowth of overall public comments. Since final administrative rules may differ from proposed rules, an additional notice and comment period is not required and the IDOT decisions and orders pursuant to the rule are valid.

App. 99-100.

## Procedural Challenge

The Cities make a procedural challenge to the DOT's administrative rules on Automated Traffic Enforcement (ATE) devices. DOT should prevail because: (1) Notice and comment periods were adequate because the 1,000-foot rule was a "logical outgrowth" and "in character" with the prior notice and comments during the rulemaking process and (2) Notice and comment periods were adequate to cover the 1,000-foot rule because interested parties were sufficiently apprised of the ATE subject and issues.

The Cities allege the DOT did too much to change the rules in response to public comments while often the claim is the agency did too

little to change the rules based on the public comment. This places the litigation squarely into the "darned if you do, darned if you don't" category. The rulemaking line being walked by the DOT can be challenged by two conflicting positions.

The leading Iowa case on the adequacy of rulemaking notice and comment review under the Iowa Administrative Procedures Act (IAPA) is found in *Iowa Cit./Labor Energy Coal v. Iowa St. Com.*, 335 N.W.2d 178, 181 (Iowa 1983). The petitioner in *Iowa Citizen* challenged the Commerce Commission's notice and consideration of comments regarding cold weather utility disconnections. The Court adopted the federal "logical outgrowth" test:

> An additional hearing is not required, however, merely because final rules differ from proposed rules:
>
> > The procedural rules were meant to ensure meaningful public participation in agency proceedings, not to be a straitjacket for agencies. An agency's promulgation of proposed rules is not a guarantee that those rules will be changed only in the ways the targets of the rules suggest. "The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions." [citations omitted] Even substantial changes in the original plan may be made so long as they are "in character with the original scheme" and "a logical outgrowth" of the notice and comment already given. [citation omitted]

> The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan.
>
> *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096, 100 S.Ct. 1063, 62 L.Ed.2d 784 (1980). (emphasis added).

*Iowa Citizen*, 335 N.W.2d at 181. The Court found the utility disconnect rules met the "logical outgrowth" test.

The Cities discuss *Iowa Citizen* (Cities' brief 70-72) but overlook the critical holding:

> In the present case, the rule changes that were adopted by the commission were in character with the proposals covered by the two notices, and they were a logical outgrowth of the prior notices and public hearings. The commission did not violate section 17A.4(1)(a) by failing to give an additional notice and provide a new opportunity for comment. (emphasis added).

335 N.W.2d at 181.

There was no major shift involved in the ATE rules. The 1,000-foot rule is merely one detail in the overall ATE regulations that closely tracks the public comments made. Marty Ryan of Fawkes-Lee & Ryan spoke of the need to prohibit speed cameras near to speed limit change at the Administrative Rules Review Committee (ARRC) on October 8, 2013. App. 311-312. At the ARRC meeting on February 7, 2014, Mr. Ryan acknowledged "that is one of the suggestions we had made, that it should not be set up within 1,000 feet of the reduction of a speed just for that purpose."

App. 690. Captain Melvin Williams of the Sioux City Police Department commented: "Some of the rules off the top appear to be very reasonable. The thousand-foot rule after a speed limit sign, that's entirely appropriate on an interstate highway. I'm not sure in a school zone that you want to wait a thousand feet before you slow them down. I would think that some school zone's speed limit changes are less than a thousand feet long because that's something in excess of three blocks." ARRC Meeting February 7, 2014, App. 686-687.

A letter from Marty Ryan and Stephanie Fawkes-Lee dated October 31, 2013, explained the safety advantages of a 1,000-foot rule as follows:

> Under the provisions of r. 761-144.6(1)(b), additional subparagraphs should include:
>
> a. (_) Not placed within 1,000 feet of either side of a posted speed limit sign.
>
> This provides for a more safe operation because motorists will not be applying the brakes in a hurry to prevent a citation upon seeing the mobile traffic enforcement vehicle. Slamming the brakes under such circumstances could lead to a chain reaction of rear-end collisions.

App. 564-565.

Steve Gent of the DOT noted the 1,000-foot rule was reasonable and standard practice. ARRC Hearing February 7, 2014, App. 682-685.

Ben Stone, Executive Director of the American Civil Liberties Union of Iowa, recommended a transition zone:

> **§144.6(1) Safe environment for motorists**
>
> In this section, we suggest that the Department additionally restrict ATEs' placement in locations where a higher speed zone is transitioning to a lower speed zone, or on the downward slope of a hill. In those areas, motorists are particularly likely to push the brakes too quickly in an effort to avoid a ticket or have difficulty slowing down, thus increasing the potential for rear-end collisions.

App. 502.

Mr. Stone reiterated this point in his oral presentation at the DOT public hearing:

> We also would like to see some regulations that would limit, restrict the ability of municipalities to put up signs in areas where the speed is going from a faster speed zone to a slower speed zone and also on going down a hill; because those are areas where people are more likely to slam on their brakes, and it would be more, more dangerous, we believe.

App. 648.

Finally, Wallace and Pamela Taylor of Marion, Iowa, noted the risks as follows:

> Speed cameras should not be placed where there is a sudden reduction in the speed limit. It is dangerous to have a speed sign reducing speed a short distance from the camera. The locals know to reduce their speed and start slamming on breaks *(sic)*, which is not safe for traffic.

App. 442.

The law clearly contemplates that proposed rules can and should be revised based on worthy comments. The system is working when changes to proposed rules are made by state agencies consistent with the comments made. There is no need for creating the delay and costs caused by additional notice and hearing requirements.

It is ironic the Cities challenge the very rulemaking Iowa municipalities requested of the DOT. Certain municipalities expressed dissatisfaction with the DOT ATE Guidelines because they lacked the authoritative status of administrative rules.

Representatives of municipalities addressed the ATE proposals before the Administrative Rules Review Commission on October 8, 2013, and February 7, 2014. Record 206-318, 785-872; App. 212-214, 676-691. All interested parties, including Muscatine, Cedar Rapids and Des Moines, were given full opportunity to voice their concerns on the proposed ATE rules at the public hearing held on October 30, 2013, in Ankeny. City representatives were heard. The Cities, along with the private ATE vendor, such as Gatso, have ample legal resources to keep on top of matters being discussed in public comments on proposed rules. There is no entitlement or need for multiple presentations to the DOT by representatives of cities.

Rehashing the same points is not a productive use of time. Thus, there was no denial of an opportunity to provide input on the ATE rules.

The Cities' claim rings hollow when the record reflects Captain Melvin Williams of the Sioux City Police Department commented directly on the 1,000-foot rule before the AARC hearing on February 7, 2014 ("The thousand-foot rule after a speed limit sign, that's entirely appropriate on an interstate highway."). App. 686-687. There is no violation of Iowa Code section 17A.4(1) due to the authority of *Iowa Citizen*. Moreover, Iowa Code section 17A.4(1)(b) contemplates an agency will be responsive to the oral and written comments and "shall adopt a rule pursuant to the rulemaking proceeding or shall terminate the proceeding." A new notice and comment period is not needed for changes made in response to public comments. The modest change in adding the 1,000-foot rule was "in character" with the originally proposed rules. The increment of adding the 1,000-foot rule simply does not warrant another notice and comment period. The 1,000-foot rule was clearly a natural and logical outgrowth of the public comments and should be validated along with the remainder of the DOT traffic camera rules.

## CONCLUSION

The DOT has taken the needed step of regulating the placement of ATE devices on primary highways in the interest of safety and uniformity based on substantial statutory authority. The home rule authority must yield to legitimate DOT safety regulation of traffic cameras on primary highways. To hold otherwise would mean cities are free to create unsafe conditions by parking mobile ATE trailers on the highway shoulders of the interstate. The DOT has properly taken revenue out of the equation and put safety and sound engineering practice at the forefront in the use of ATE devices on primary highways. The DOT ATE rules were properly promulgated and are fully valid. The DOT safety rules were carefully crafted and correctly applied to the Cities. The district court's ruling should be affirmed in its entirety.

## REQUEST FOR ORAL ARGUMENT

Appellees, Iowa Department of Transportation and Iowa Transportation Commission, request oral argument upon submission of this case.

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

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 15,923 words, as allowed by Court order, excluding the parts of the Brief exempted by Iowa R. App. p. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in size 14 Times New Roman.

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We, David S. Gorham and Richard E. Mull, hereby certify that on August 23, 2017, a copy of Appellee's Brief was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access and service to the brief on that same date to:

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