IN THE SUPREME COURT OF IOWA

No. 16-0435

CITY OF CEDAR RAPIDS,

Plaintiff-Appellee,

v.

MARLA MARIE LEAF,

Defendant-Appellant.

FROM DECISION OF THE COURT OF APPEALS

No. 16-0435

DATED FEBRUARY 22, 2017

APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the administrative hearing process used by the City of Cedar Rapids ("City") violated Ms. Leaf's procedural due process rights when she was forced to attend it?

2. Whether Ms. Leaf's equal protection rights were violated by the City's automated traffic enforcement ordinance, Cedar Rapids Municipal Code section 61.138 ("Ordinance"), as applied, where it distinguishes between semi-truck trailers (whose owners are not subject to prosecution) and vehicles such as Ms. Leaf's (whose owners are subject to prosecution) without any rational relationship to a legitimate purpose?

3. Whether the City's grant of jurisdiction to an administrative hearing "board" to hear municipal infractions violates Iowa Code section 602.6101, is preempted by Iowa Code section 364.22(6)(a), and Iowa Code section 364.22(4) preempts the issuance of citations by Gatso USA, Inc. ("Gatso") via regular mail?

4. Whether the implementation of the Ordinance constitutes an unlawful delegation of police powers to a private, for-profit company with a contingent interest in every discretionary decision that it makes?

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STATEMENT SUPPORTING FURTHER REVIEW

This case should be subject to further review because of the important constitutional issues decided by the Court of Appeals—largely based on a federal court decision—but which should be determined by the Iowa Supreme Court. Iowa R. App. P. 6.1103(1)(b)(2). Specifically, the Court of Appeals determined that Ms. Leaf's constitutional procedural due process and equal protection rights were not violated by the Ordinance, citing *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817, 847-48 (N.D. Iowa 2015), *affirmed in part and reversed in part* by *Hughes v. City of Cedar Rapids*, 840 F.3d 987, 996-97 (8th Cir. 2016) as persuasive authority. *See City of Cedar Rapids v. Leaf*, 2017 Iowa App. LEXIS 2016, *10-15 (Ct. App. Feb. 22, 2017). This series of federal decisions arising from a motion to dismiss should not determine these important Iowa constitutionally-grounded issues. Moreover, the Court of Appeals misinterpreted the import of *Hughes* with respect to Ms. Leaf's constitutional claims, including equal protection, which relied on the IDOT's determination as the basis for arguing that the Ordinance could not even meet the rational basis standard. The Eighth Circuit held that claims based on the State Constitution relying on the IDOT's determination were not yet ripe for review, and dismissed them without prejudice. *Hughes*, 840 F.3d at 997. The unjust cascading effect of *Hughes* on claims that were either not before it, or on Iowa-based claims, must be remedied.

In addition, the issue of unlawful delegation of police power is based on the separation of powers doctrine contained in the Iowa Constitution. IOWA CONST., art. III, § 1. This important constitutional question should be determined by the Iowa Supreme Court, and not by reliance on a determination by the federal courts. *Cf. Leaf*, 2017 Iowa App. LEXIS 2016, *23-25. This is also a question of public importance for the future of policing and the increasing use of technology powered by privately-owned companies operating under contracts with public jurisdictions. *See* Iowa R. App. P. 6.1103(1)(b)(4) ("case presents an issue of broad public importance that the supreme court should ultimately determine.").

Similarly, the Iowa Supreme Court should determine the important question of whether, under the Ordinance, an unlawful grant of jurisdiction to an administrative board, and away from the Iowa District Court, took place in violation of Iowa law, which preempts such a grant. The answer to this question is of great public importance given that the General Assembly sought to create a unified court system (Iowa Code section 602.6101) and mandated that a magistrate or other district court must have jurisdiction over municipal infractions pursuant to Iowa Code section 364.22(6)(a). Iowa R. App. P. 6.1103(1)(b)(4). The Court of Appeals again relied on *Hughes* in making this determination. *Leaf*, 2017 Iowa App. LEXIS 206, 15-23. While the Court of Appeals also cited this Court's decision in *City of Davenport v. Seymour*, 755

N.W.2d 533, 542 (Iowa 2008), it ignored the fact that the municipal process followed by Davenport in *Seymour* applied the exact same burden of proof, and therefore could be reconciled with Iowa's municipal infraction statute. *See Seymour*, 755. N.W.2d at 542-43 (finding no conflict preemption where the City applied the same burden of proof required in Iowa Code section 364.22[(6)](b), namely, "clear, satisfactory, and convincing"). In fact, Ms. Leaf believes that the Court of Appeals' decision in *Leaf* on preemption is contrary to this Court's holding in *Seymour* since the process provided in Iowa Code section 364.22(6)(a) is written as *mandatory* ("shall be tried before a magistrate, a district associate judge, or a district court judge") and, in this instance, there is no factual dispute that the City does not follow that process. Therefore, the City's administrative process is irreconcilable with Iowa law and in conflict with this Court's decision in *Seymour*. *See* Iowa R. App. P. 6.1103(1)(b)(1).

Based on these important constitutional questions, conflicts in decisions, and issues of significant public importance, this Court should exercise its discretion and review these questions, or others raised on appeal. Iowa R. App. P. 6.1103(1)(d); *see also State v. Gathercole*, 877 N.W.2d 421, 427 (Iowa 2016) (exercising the Court's discretion to limit the selected issues considered on further review).

BRIEF/ARGUMENT

I. Ms. Leaf's Procedural Due Process Rights Were Violated

A crucial fact has been repeatedly and wrongfully determined, first, by the Iowa District Court and then, second, by the Iowa Court of Appeals due to a reliance upon the *Hughes* decision, which had been rendered by the federal court, in the context of a pre-Answer motion to dismiss, and which did not have the benefit of a developed factual record before it. The key factual finding in *Hughes* that Ms. Leaf contests is that the administrative hearing process used by the City is optional, not required. *See Leaf*, 2017 Iowa App. LEXIS at *12 (citing *Hughes*, 112 F. Supp. 3d. at 847). The only testimony in the record of this case is that the administrative hearing was required for Ms. Leaf. App. 029-031, 133, 121.[1] The only option given to recipients of a Notice of Violation who want to contest it is to participate in an administrative hearing. App. 121.[2] That

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[1] In fact, Cedar Rapids police officers have admitted that the administrative hearing process is the only one provided to contest a citation:

> Lt. Jeff Hembera: When you receive a notice of violation in the mail, there are instructions for either paying the citation or appealing the citation. To appeal, you contact the company as stated on the notice, and you will be given a time to appear at the Police Station to meet with a Hearing Officer. If the Hearing Officer finds against you, you have the final option of appealing to civil court.

See Your Traffic Camera Questions Answered, THE GAZETTE, March 31, 2014, *available at* http://www.thegazette.com/2010/06/16/live-chat-on-red-light-cameras-11-a-m-tuesday.

[2] The Court of Appeals in this case, like the district court in *Hughes*, relied on the face of the Ordinance (although Ms. Leaf contends that too is ambiguous). Assuming, *arguendo*, that it provided two options on its face, that is clearly not

was the "notice" provided. The Court of Appeals recognized that this was "somewhat troubling." *Leaf*, 2017 Iowa App. LEXIS at *13-14, n.3. This was more than troublesome. It was unconstitutional. The City failed to provide Ms. Leaf with adequate notice of her rights to contest a Notice of Violation directly to the district court. First the notice was deficient, and then so too was Ms. Leaf's initial "opportunity to be heard."

Article I, section 9 of the Iowa Constitution protects against state action that "threatens to deprive [a] person of a protected liberty or property interest." *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 690-91 (Iowa 2002). Procedural due process requires "notice and opportunity to be heard in a proceeding that is 'adequate to safeguard the right for which the constitutional protection is invoked.'" *Id.*

In analyzing whether such a constitutional due process violation has occurred, the Court considers the interest protected, and then, if a protected interest is involved, it balances three competing interests:

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

Bowers, 638 N.W.2d at 691 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335

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how the Ordinance is applied. Ms. Leaf lodged both facial and as applied challenges.

(1976)). The Court has recognized a protected property interest in "not being subject to irrational monetary fines." *Jacobsma*, 862 N.W.2d at 345. Therefore, there is a private interest affected. While the amount of money implicated by a particular civil penalty (here, initially $75.00, now $195.00) may not seem significant to some, it is certainly significant to others. In addition, the loss of time (and potentially income from employment) in the wasted administrative "hearing" used by the City is substantial to everyone. There are also the interests of Vehicle Owners that are threatened by the City upon its imposition of penalties, such as "formal collection procedures" and "being reported to a credit agency." (App. 00120-00121).

Next, there is a serious risk of erroneous deprivation based on the process used by the City: Ms. Leaf received a Notice of Violation that threatened collection action for unpaid civil penalties. Before even considering whether she should exercise her due process rights for an infraction she was certain was inaccurate,[3] Ms. Leaf was dissuaded from doing so—being told by the Gatso employee who answered the listed telephone number that she should

[3] In perhaps the most unfortunate portion of this case, Ms. Leaf's certainty that she was not speeding on the day of the infraction given the inclement weather has been ignored. (App. 0026-0028). Once she finally had access to the court, the City relied on hearsay evidence to prove the main element of its case, and it has been allowed to stand. Contrary to the Court of Appeals' determination, hearsay evidence is admissible in small claims only where it is not "necessary for the resolution of the case." *Compare GE Money Bank v. Morales*, 773 N.W.2d 533, 539 (Iowa 2009) *with* Leaf, 2017 Iowa App. LEXIS at *17, n.7.

"just pay it." (App. 00133). Furthermore, the Hearing Officer who convenes and conducts the administrative hearing process lacks any authority to render any Order, and those proceedings afford no protections that are routinely provided by a court of law. For instance, Ms. Leaf's corroborating witness, Mr. Heeren, did not testify or provide evidence at the telephonic hearing. Critically, the administrative hearing process does not apply the appropriate burden of proof on the City. (App. 00120-00121). The City, using a process with fewer protections than Iowa law requires, then applies a more lenient (from the perspective of the City) and, therefore, a less protective (from the perspective of the Vehicle Owner) burden of proof at the administrative hearing.[4]

With respect to the third and final prong of the procedural due process analysis, the government interest is not significant. The Iowa Department of Transportation ("IDOT") has unequivocally determined that there is no government interest in locating the radar equipment at I-380 Southbound at J Avenue, where Ms. Leaf's vehicle had allegedly been operating in excess of posted speed limits. (App. 00095). In addition, to implement the Ordinance,

[4] The decisions of the Administrative Hearing Officers are also wildly divergent, without any footing in principles of *stare decisis*. The Hearing Officers purportedly dismiss up to 50% of cases, and state (here, mixing prosecutorial and judicial functions) that they can wield the same amount of discretion as a Police Officer stopping someone on the side of the road in determining whether to impose a civil penalty. (App. 00076-00079). While certain defenses are given in the Notice of Violation, many other defenses have been successful, apparently, including one having a baby, a "gravel truck spilling its load out," and "road rage with another vehicle." (App. 00065-00066).

the City has unlawfully delegated its government interest to a private corporation, negating any claim of true governmental importance. Moreover, the cost of using the statutory process provided (access to court) is the same cost to enforce any statute. It cannot be said to be unduly burdensome. If the administrative burdens would be too great if citizens were given direct access to a court with jurisdiction over their claims, then, perhaps, the ATE system simply cannot function within a constitutional framework.

Due process always requires a "constitutional floor of a 'fair trial in a fair tribunal.'" *Botsko v. Davenport Civ. Rights Comm'n*, 774 N.W.2d 841, 848 (Iowa 2009). As the *Botsko* Court recognized, analyzing the U.S. Supreme Court's case of *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), where pecuniary interest is involved, "experience teaches that the probability of actual bias on the part of the . . . decision maker is too high to be constitutionally tolerable." *Id.* Here, the Police Officer presenting the evidence, and then possibly overruling the Hearing Officer, has a million reasons to be biased.[5] The Police Department

[5] While it is not a mayor who makes the decision that fills a city's coffers, the police officers receive direct benefit from the tickets, and they are the ones making final decisions at the administrative hearings. S*ee Rose v. Village of Peninsula*, 875 F. Supp. 442, 448-453 (N.D. Ohio 1995) (analyzing the revenues collected in an Ohio village's mayor's court and the deprivation of due process where the mayor "occupies two practically and seriously inconsistent positions, one partisan, and the other judicial") (citing *Ward v. Monroeville*, 409 U.S. 57 (1972)). Unlike the ATE systems of some cities, the City retains all of the benefit of the fines. *See* Matthew S. Maisel, *Slave to the Traffic Light: A Road Map to Red Light Camera Legal Issues*, 10 Rutgers J. L. & Pub. Pol'y 401, 410-411

financially benefits from the millions collected from these traffic cameras. *See* Brea Love, *Traffic Cameras Along I-380 Start a Debate Over Revenue Versus Safety*, KCRG-TV9, *available at* http://www.kcrg.com/content/news/Traffic-Cameras-along-I-380-start-a-debate-over-revenue-or-safety--358435221.html (describing the $3,000,000 earned by the City all going to the police department). There can be no appearance of fairness where Police Officers are making adjudicative determinations involving the assessment of penalties. Moreover, having access to a proper tribunal at a later date does not rectify the defective due process of the original administrative hearing. *See Ward*, 409 U.S. at 61 (holding that the "State's trial court procedure [could not] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication.").[6]

The Ordinance as it is applied violates Ms. Leaf's procedural due process rights by failing to provide any notice of (or actual direct) access to the district court, and then failing to provide an initial meaningful opportunity to be heard. In finding that procedural due process was met, the Court of Appeals did not

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(2013) (describing proceeds from ATE systems in Virginia and North Carolina, among others, which go only to fund public schools).

[6] The City is also violating the minimum due process requirements of the IDOT, and has been doing so since February 2014. Such requirements include giving drivers notice of at least 1000 feet after a speed limit change before a radar unit can be placed to enforce an ATE program. Iowa Admin. Code § 761-144.6(1).

undertake a balancing of the *Mathews* factors and relied on the Ordinance offering "access to the district court before or after an optional administrative hearing." *Leaf*, 2017 Iowa App. LEXIS at *13. Again, this is not how the Ordinance is applied: the administrative hearing is required prior to accessing the district court.

In addition, Ms. Leaf was entitled to the statutory process provided by Iowa Code section 364.22(6)(a). That is the process that is "due." When analyzing contested case hearings, this Court has considered whether a "discernible statutory right" exists in determining the appropriate level of process. *See Sindlinger v. Iowa State Bd. of Regents*, 503 N.W.2d 387, 389-90 (Iowa 1993) ("In the absence of a discernible statutory right, petitioner's claim must rest on a constitutional entitlement . . . "). So too, then, should a Vehicle Owner have the exact process that is promised by statute: a hearing before "a magistrate, a district associate judge, or a district court judge." Iowa Code § 364.22(6)(a). The Court of Appeals did not decide this, although it referenced the argument made. *Leaf*, 2017 Iowa App. LEXIS at *10. This argument was also not before, or decided in, the *Hughes* decisions. The Court of Appeals' decision on procedural due process should be further reviewed and reversed.

II. Ms. Leaf's Equal Protection Rights Were Violated by the Ordinance that Makes Irrational Distinctions as Applied

The Court of Appeals rejected Ms. Leaf's equal protection arguments

relying on the Eighth Circuit's decision in *Hughes*, 840 F.3d at 996-97. *Leaf*, 2017 Iowa App. LEXIS at *15. Ms. Leaf argued that there could be no rational basis for the Ordinance on I-380, which issued her citation, based on any legitimate purpose such as safety because the IDOT had determined that each camera on I-380 should be moved or removed. *See* Appellant's Brief, pp. 53. Contrary to the Court of Appeals' holding, the Eighth Circuit did not make this determination based on Iowa constitutional law. *See Hughes*, 840 F.3d at 996-97 (citing only federal law). In fact, it expressly ruled that "[t]he drivers'[] state law claims based on IDOT standards are remanded for dismissal without prejudice." *Hughes*, 840 F.3d at 998. The State constitutional claims based on the IDOT ruling were not considered ripe: "drivers allege that the violation of IDOT rules demonstrates a claim under the Iowa Constitution. Because the City's appeal of the IDOT's ruling is still pending, this claim is not ripe." *Id.* at 997 (citation omitted). While the Eighth Circuit's opinion is not entirely clear, the fact that Plaintiffs in that case were arguing that there could be no rational basis under protections of the Iowa Constitution based on the IDOT's determination that there was no safety interest was clear in the briefing and at oral argument. Therefore, these claims were dismissed without prejudice.

Article I, section 6 of the Iowa Constitution guarantees equal protection of the laws to all citizens. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 350-51 (Iowa 2013). Iowa law requires that the *purpose* of an Ordinance be

considered when analyzing equal protection. *See Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) ("equal protection demands that laws treat alike all people who are 'similarly situated with respect to the legitimate purposes of the law.'"). The Eighth Circuit did not consider the purpose of the law and its relation to the distinctions made. *Hughes*, 840 F.3d at 996-97. Upon finding that the equal protection clause is implicated, the court then applies the appropriate level of scrutiny. *Gartner*, 830 N.W.2d at 350-51.

The ostensible[7] purpose of the Ordinance is safety. While the Ordinance does not make any enforcement distinctions among types of vehicles, the City and Gatso, in implementing it, do—they eliminate from consideration tens of thousands of vehicles for reasons wholly unrelated to safety. By a discretionary choice regarding equipment, Gatso excludes from prosecution virtually all semi-truck owners pulling trailers whose *rear* license plates are not included in the chosen database; in addition, it excludes more than 3000 government vehicles whose license plates are not in the database. (App. 00111). With respect to the legitimate *safety* purpose of the Ordinance, there is no rational distinction between any class of motor vehicle; in fact, semi-trucks operated on primary highways could be considered a *greater* danger to safety on interstate

[7] The "claimed state interest must be 'realistically conceivable'" and have a "basis in fact." *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7-8 (Iowa 2004).

highways than other vehicles. All Vehicle Owners are therefore similarly situated for safety purposes. The distinction between semi-truck trailers and other vehicles, as related to the goal of safety, is "so attenuated as to render the distinction arbitrary or irrational." *Racing Ass'n of Cent. Iowa,* 675 N.W.2d at 8. Distinguishing between semi-truck trailers and cars for safety is as arbitrary as distinguishing between racetracks and excursion boats for the purpose of taxes on gambling revenue. *See id.* at 15 (holding that such classifications for said purpose serve "no legitimate purpose . . . other than an arbitrary decision to favor excursion boats.") Exempting certain vehicles from prosecution under the Ordinance on no other basis than their license plate configuration is under inclusive and irrational.

While Ms. Leaf argued that strict scrutiny should apply based on the infringement on the right to travel, even assuming that rational basis review applied, it cannot be met here. The IDOT has determined that the location of the cameras is too distant from the S-curves, and therefore the safety interest cannot justify the camera that issued Ms. Leaf's citation. (App. 00095). Therefore, the classifications among vehicle owners cannot even survive rational basis scrutiny.

The Court of Appeals' decision, relying entirely on the *Hughes* decision, should be reviewed and reversed.

III. The Ordinance is Preempted by Iowa Code sections 364.22(4), (6) and 602.6101 and Unlawfully Grants Jurisdiction to an Administrative Board

The Court of Appeals, relying largely on the *Hughes* decision, determined that there was no unlawful grant of jurisdiction to an Administrative Board because it considered it a grant of concurrent jurisdiction. *Leaf*, 2017 Iowa App. LEXIS at *16-17 (quoting *Hughes*, 112 F. Supp. 3d at 849). This determination eviscerates the meaning of "concurrent jurisdiction."[8] Concurrent jurisdiction's definition requires "jurisdiction exercised by different *courts*." *Mallory v. Paradise*, 173 N.W.2d 264, 267 (Iowa 1969) (emphasis added). The Administrative Board cannot be considered in any sense a "court."[9] The argument must fail based on that term alone. However, the definition goes on: "…different courts, at the same time, over the same subject-matter . . . wherein litigants may . . . *resort to either court indifferently*"). *Mallory*, 173 N.W.2d at 267 (emphasis added). No one could reasonably choose the administrative hearing over a court of law

[8] It further ignores the foundational question of whether the City had the power to grant jurisdiction regarding municipal infractions to another entity at all given Iowa Code sections 602.6101 and 364.22(6)(a).

[9] In fact, Police Officer Asplund makes the distinction striking by referring to the later proceeding (after the administrative hearing) in the Iowa District Court as "court-court." (App. 00066-00068). Moreover, in response to a question as to whether a vehicle owner is threatened regarding a right to "appeal," the police officer testified that one is informed that if you lose in "court court," you will be assessed about $150 in filing fees on top of the initial $75 fine. (App. 00066-00068). So without any right to an impartial fact-finder, one is already assessed costs more than double (now $195) the amount of the citation in order to "appeal" to finally access the district court. (App. 00141).

"indifferently." Testimony and evidence, to the extent it can be offered, is not preserved (App. 00067-00068); the Hearing Officer, often a friend of a police officer, has no letters of appointment; is not a judge or attorney, and in fact, their decisions can be overridden by a police officers. App. 00072-00076.

Similarly, the Court of Appeals erred in rejecting the preemption arguments based on Iowa code sections 364.22(4), (6) and 602.6101 by relying on *Brooks v. City of Des Moines*, 844 F.3d 978, 980 (8th Cir. 2016). *Leaf*, 2017 Iowa App. LEXIS at *17. On this point, the Eighth Circuit in *Brooks* just reiterated the erroneous argument that the administrative hearing process is an exercise of "concurrent jurisdiction." *Brooks*, 844 F.3d at 980. This does not decide the issue. The test is whether the ordinance enacted by the municipality is irreconcilable with the state statute. *See Seymour*, 755 N.W.2d at 538 (holding that implied preemption "occurs when an ordinance prohibits an act permitted by statute, or permits an act prohibited by statute."). Home rule authority is granted to the extent such enactments are not "inconsistent with the laws of the general assembly." Iowa CONT., art. III, § 38A. Iowa Code section 364.22(6)(a) is irreconcilable with the Ordinance's use of an administrative hearing. Nowhere has there been any indication of how "*shall* be tried before a magistrate, a district associate judge, or a district judge" could be reconciled with trying it before someone at the police station. *Compare* 364.22(6)(a) *with* Cedar Rapids Mun. Code § 61.138(e)(1) (allowing an administrative hearing

"before an administrative appeals board (the "Board") consisting of one or more impartial[10] fact finders."). Either the case is tried before a judge, or, in violation of the statute, it is not. In fact, the City, in its brief on appeal for the first time, attempted to argue that the municipal infraction did not commence until it filed a lawsuit against Ms. Leaf in order to avoid this mandatory language. *See* Amended Final Brief of Plaintiff-Appellee, p. 1. The mandatory language does not countenance concurrent jurisdiction, even if it were involved here. These laws are irreconcilable. *See Iowa City v. Westinghouse Learning Corp.*, 264 N.W.2d 771, 773 (Iowa 1978) (quoting the definition of irreconcilable as "impossible to make consistent or harmonious").

In addition to preemption by (6)(a), section 364.22(6)(b) preempts the Ordinance where findings are made by the administrative board based on a "preponderance of the evidence." (App. 00124-00125). The lower burden of proof is irreconcilable with Iowa Code section 364.22(6)(b), which requires that the city prove a "municipal infraction occurred . . . by clear, satisfactory, and convincing evidence." The Iowa Supreme Court presaged such irreconcilability when it noted that the statutorily-required burden of proof was the only option.

[10] It is unclear how the district court determined that the administrative board was "impartial and detached." Chris Mayfield, Marla Leaf's "administrative board," was a son of a police officer, and his decisions can be overruled by a police officer. (App. 00073-00074). The police officer is therefore acting as prosecutor, key witness, judge and jury.

See Seymour, 755 N.W.2d at 538 (holding that Davenport's ATE Ordinance was not preempted by Iowa law because it applied the required standard).

Finally, under the Iowa Code, a police officer is allowed to issue a "civil citation" based on an alleged municipal infractions, and, it must be served personally, by certified mail, or by publication. Iowa Code § 364.22(4). The Notice of Violation is not issued by certified mail, however. It is mailed via regular mail from an out-of-state location by the City's vendor, Gatso. The Court of Appeals made the same factual error as the district court in writing that the Notice of Violation was sent via certified mail. *Leaf*, 2017 Iowa App. LEXIS at *7; App. 00155 (both presumably relying on the factual misstatement in *Hughes*). In addition, it is Gatso, and not a police officer, that issues[11] the civil citation (or Notice of Violation), by regular mail. *Westinghouse Learning Corporation* is significant in that the Court held that the statute had set forth a process, and the city, through an ordinance, did not follow that process, which rendered said ordinance preempted. *Id.* Similarly, Iowa Code section 364.22(4) and (6) set forth a process to be followed with municipal infractions by a city, and the City has not followed it. Such derogations are preempted. One must choose "one enactment over the other," *Seymour*, 755 N.W.2d at 541; in such a

[11] Officer Asplund described this in his testimony when referencing malfunctions in the radar system that require that Gatso would "reissue the ticket." (App. 00076-00077).

case, state law preempts. The decision of the Court of Appeals on this issue must be reviewed and reversed.

IV. The City has Unlawfully Delegated its Police Powers to a Private Company

The Court of Appeals, quoting the Eighth Circuit, noted that "[subject to later development of the law, the Iowa Supreme Court has allowed ATE systems to operate with private contractors, thus implicitly rejecting the delegation challenge." *Leaf*, 2017 Iowa App. LEXIS at 25, n. 9 (quoting *Hughes*, 840 F.3d at 997). However, the question of unlawful delegation of police power with respect to municipal ATE ordinances has never been before the Iowa Supreme Court. This statement, and its dangerous repetition, even if in *dicta*, would greatly expand a foundation of the common law, *stare decisis*, if courts were to defer to decisions on issues that were "implicitly" made. *See State v. Miller*, 841 N.W.2d 583, 586 (Iowa 2014) (describing the cardinal principle of common law as the doctrine of *stare decisis*, meaning "to stand by *things decided*") (citing Black's Law Dictionary 1537 (9th ed. 2009) (emphasis added). The issues must be decided in order to provide precedent, persuasive or otherwise. It is time for the Iowa Supreme Court to expressly address this emerging issue.

The separation of powers of state government is embodied in the Iowa Constitution: "no person charged with the exercise of powers properly belonging to one of these departments [Legislative, Executive, and Judicial]

shall exercise any function appertaining to either of the others . . ." *In the Interest of C.S.*, 516 N.W.2d 1, 5 (Iowa 1983) (quoting Iowa Const., art. III, § 1).

These claims are subject to de novo review. *Star Equip., Ltd. v. State*, 843 N.W.2d 446, 451 (Iowa 2014)). The Court of Appeals, however, recited the district court's decision heavily, including the determination that "large percentages of captured violations are not issued citations after officers use their judgment to determine if there were extenuating circumstances for the vehicle's excessive speed[]" in finding no unlawful delegation. *Leaf*, 2017 Iowa App. LEXIS at *25 (citing App. 00163). As Ms. Leaf indicated in her appellate brief, it is unclear what testimony this was in reference to, as the record indicates that the large percentage (50% figure) is what the Hearing Officer apparently rejects during the hearing process, as opposed to the City police. App. 00076-00079

"[A] fundamental principle of government" is that a "municipal corporation 'cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender,' unless authorized by statute." *Warren Cty. Bd. of Health v. Warren Cty. Bd. of Supervisors*, 654 N.W.2d 910, 913-14 (Iowa 2002). A key distinction is drawn between delegating a right to perform acts involving "little judgment or discretion" versus those involving "discretionary power conferred by law." *Id.* The latter is forbidden. *Id.*

The City has unlawfully surrendered its discretionary police powers to Gatso, a private, for-profit corporation that holds a contingency fee interest in all fines collected. It is Gatso's equipment that calculates speed, not the City's or its police officers. (App. 00051). It is Gatso's employees, and not the City's Police Department, who calibrate the radar equipment. (App. 00132; App. 00053-0054, 00060-00062). Gatso's equipment, alone, determines who is eligible for prosecution. It filters "events" (photographs, speed calculations, license plate numbers, etc.) before sending any of them to the City for review by a police officer. After a brief review, if "approved" by a Police Officer, Gatso creates Notice of Violation documents, under the City's logo, and then mails them out to Vehicle Owners. (App. 00050).

The City's police officers received their training from Gatso as to how the approval process works. (App. 00057-00059). The City's own witness testified that it is only "solely" the police officer's decision *once* the tickets "come in, and we see them." (App. 00048-00049). Gatso answers questions from Vehicle Owners over the phone on behalf of the City; Gatso employees give advice to citizens as to whether and how to pay civil fines. (App. 00133).

These delegated tasks, involving fundamental "prosecute" versus "don't prosecute" decisions, should be made by police officers only. "Screening," by its nature involves making discretionary decisions. The fact that Iowa law requires that police officers mail municipal infractions by certified mail

supports a determination by the Iowa General Assembly that this is the type of police power that should not be delegated. Iowa Code § 364.22(4).

Under a similar statute, involving an analogous relationship between a City and a for-profit corporation, a Florida court held that an unlawful delegation of police powers had occurred. *See City of Hollywood v. Arem*, 154 So. 3d 359, 364-65 (Fla. Dist. Ct. App. 2014) (holding that based on a Florida statute where only law enforcement officers can issue citations for traffic infractions, the vendor (ATS) making the initial determination of which citations a traffic enforcement officer reviewed rendered the system an unlawful outsourcing of statutory authority). The *Arem* Court described a prosecutorial process under which the vendor initially determined who was subject to prosecution and then the officer clicked "Accept," to move forward with the prosecutorial process—which is exactly how the City's prosecutorial approval process works with Gatso. *Id.* at 365; App. 00057-00058. These are not perfunctory duties; they are discretionary determinations, police, and judicial acts. They are beyond even making rules; they are enforcing the law. *See Bunger v. Iowa High Sch. Athletic Asso.*, 197 N.W.2d 555, 562-63 (Iowa 1972) (holding that a school board's delegation of its rule-making authority was invalid). The decision of the Court of Appeals on this issue should be further reviewed and reversed.

CONCLUSION

Based on one or more of these issues, or issues raised by Ms. Leaf in her appeal, Ms. Leaf respectfully requests that the Supreme Court grant her Application for Further Review of the Court of Appeals' decision.

Dated this 14th day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on March 14, 2017, I electronically filed the foregoing Application for Further Review with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Pursuant to Rule 16.317(1)(a), this constitutes service of the document on the following for purposes of the Iowa Court Rules.

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

This Application complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because: this brief contains 5,599 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)(a), which is 2/5 of that allowed by Iowa R. App. P. 6.903(1)(g)(1). This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 1997-2004 in size 14 Garamond.

Dated this 14th day of March, 2017.

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