IN THE SUPREME COURT OF IOWA

No. 16-1031

MYRON DENNIS BEHM, BURTON J. BROOKS,
BOBBY LEE LANGSTON, DAVID LEON BRODSKY,
JEFFREY R. OLSON and GEOFF TATE SMITH,

Plaintiffs-Appellants,

v.

CITY OF CEDAR RAPIDS, IOWA
and GATSO USA, INC.,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF LINN COUNTY
NO. CVCV083575
HON. CHRISTOPHER L. BRUNS, JUDGE

FINAL REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE ARGUMENT

The reputation of, and public perceptions about, the integrity of Defendant-Appellee City of Cedar Rapids ("City") and its policing are challenged by behavior that not only disrespects fundamental rights of citizens, but also defies the lawful Orders of the state agency empowered to protect the traveling public on Iowa's interstate highways. The arguments proffered by the City and Defendant-Appellee Gatso USA, Inc. ("Gatso") in their Joint Proof Brief ("Appellees' Brief") do nothing to assuage these concerns.[1] Rather than championing the rights of every citizen to the due process guaranteed by Iowa law, the City and Gatso now argue that they can invent and impose the dictates of a parallel legal Twilight Zone where violations of municipal ordinances lead to less protection of citizens, enabling a municipal government and its for-profit vendor to funnel people through their scheme of greed. The City's Municipal Code and Iowa law cannot be amended or abrogated in such a manner.

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[1] As they have done in every forum since the decisions were issued, the City and Gatso rely extensively on *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817 (N.D. Iowa 2015) (pending appeal), *Brooks v. City of Des Moines,* No. 15-CV-115-CRW (S.D. Iowa July 29, 2015) (pending appeal), and *City of Cedar Rapids v. Marla Marie Leaf*, No. CRCISC214393 (Iowa Dist. Ct., Feb. 9, 2016) (pending appeal). *See* Appellees' Brief, pp. 10, 11, 13, 21-25, 27, 30-33, 36, 44, 48-50. Given that these decisions are all on appeal and subject to different factual records and legal environments, relying on these decisions as irrefutable authority is surprising.

In addition, Defendants focus on the parameters of the right to interstate or intrastate travel by ignoring the irrationalities of their scheme and by using tautological reasoning to conclude that a *valid* traffic law cannot infringe on a citizen's constitutionally-protected right to travel. Cedar Rapids Municipal Code section 61.138 ("Ordinance") is not a valid traffic law, however. As analyzed below, for many of those courts that have considered the right to interstate travel, the focus is frequently fixed on the reasonableness of a contested burden placed on the right, rather than the extent of the right, itself. The irrational speed enforcement system imposed by the City's Ordinance and Gatso's implementation of the same is a violation of Plaintiffs' constitutionally-protected rights to travel, equal protection, due process, and privileges and immunities; the Ordinance, further, is preempted by Iowa law; and, finally, it is an unlawful delegation of police power to a private corporation, resulting in the unjust enrichment of Defendants.

ARGUMENT

I. AN IRRATIONAL SPEED ENFORCEMENT MECHANISM INFRINGES UPON PLAINTIFFS' FUNDAMENTAL RIGHT TO TRAVEL BY DISTINGUISHING BETWEEN VEHICLE OWNERS WITHOUT ANY BASIS RELATED TO SAFETY

"The constitutional right to travel from one State to another, *and necessarily to use the highways and other instrumentalities of interstate commerce in doing so*, occupies a position fundamental to the concept of our Federal Union." *United*

States v. Guest, 383 U.S. 745, 757 (1966) (emphasis added). According to Plaintiffs' transportation expert, Dr. Joseph Schofer, the permanent placement of automated traffic enforcement ("ATE") on interstate highways runs contrary to the purpose of the transportation system, namely, to "create a uniform and consistent quality of driving experience and expectations for operators of motor vehicles, a system that promotes the smooth and efficient flow of traffic from one part of the nation to the next." (App. 128). The Ordinance and its implementation by Defendants are infringing on Plaintiffs' right to travel, implicating a variety of constitutional rights.

The issue of what constitutes an infringement (i.e., what level of varying burden or benefit) on the right to travel or on interstate movement is difficult to harmonize from the case law. In reviewing many of the cases, it appears that how the right at issue is framed becomes paramount, as opposed to what level of burden or benefit is imposed by the challenged law. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 501 (1999) (holding that the right to interstate travel is penalized by imposing durational residency requirement for access to welfare benefits even though not a direct impairment on exercise of free travel); *Guest*, 383 U.S. at 759-60 (noting that a specific intent to interfere with a federal right to travel can constitute a conspiracy under federal law where the predominant purpose is to "impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right"); *Zobel v. Williams*, 457

U.S. 55 (1982) (deciding on equal protection grounds that State payments to Alaskan residents based on tenure of residency violated the constitution, with concurrences focusing on the right to travel); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (striking down a Virginia law that required all intrastate and interstate passenger carriers to separate the white and colored passengers based on the interference with commerce, and balancing "the exercise of local police power and the need for national uniformity in the regulations for instate travel")[2]; *Edwards v. California*, 314 U.S. 160 (1941) (finding a violation of the right to travel where a State had criminalized the transport of an indigent into that State); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (relying on the right to travel in striking down the one-year residency requirement prior to being eligible for certain welfare benefits as an unconstitutional classification), *overruled on other grounds* by *Edelman v. Jordan*, 415 U.S. 651 (1974); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (holding that the right to

[2] It is noteworthy in *Morgan* that no actual barrier to travel was imposed: travelers could still move interstate on buses, but the manner of travel was unreasonably burdened by a discriminatory law. Similarly, in a right to marry case, it was clear that something less than an actual barrier to marry infringed on that right: "[w]hen a statutory classification *significantly interferes* with the exercise of a fundamental right, it cannot be upheld unless it is supported by a sufficiently important state interest and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (emphasis added) (striking down a Wisconsin statute that required a court order to approve the marriage if one were behind in child support payments). Alternatively, however, the Court noted, "reasonable regulations … may be legitimately imposed." *Id.* at 386 (citation omitted).

travel was not burdened—and a federal conspiracy action could therefore not be maintained—by protestors being allowed around an abortion clinic, even where some had crossed state lines to seek such resources)[3]; *Idris v. City of Chi.*, 552 F.3d 564 (7th Cir. 2009) (analyzing the substantive due process issue as involving the "fundamental right to run a red light" where the right to travel was not before it); *Matsuo v. United States*, 586 F.3d 1180, 1183 (9th Cir. 2009) (categorizing the right involved as the "right to government employment" in holding that the lack of location pay in Alaska and Hawaii did not burden the right to travel); *Doe v. Miller*, 405 F.3d 700, 713-714 (8th Cir. 2005) (holding that the right to interstate travel or "right to live where you want" is not burdened by reasonable restrictions on sex offenders living near schools in Iowa); *Memorial Hosp. v. Maricopa Cty*, 415 U.S. 250, 258-59 (1974) (holding that "a classification which operates to penalize those persons . . . who have exercised their constitutional right of interstate migration must be justified by a compelling state interest") (internal quotations and citation omitted).

Perhaps even more importantly, the reasonableness (i.e., the rationality)[4] of the law itself, and the reasonableness of any classifications made, seem to

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[3] In *Bray*, any affect on the right to travel would seem too attenuated given the purely intrastate tort allegation that imposed a restriction not directed specifically at travelers. *Bray*, 506 U.S. at 276-77.

[4] This is consistent with the Court's recognition of the right "not to be subject to *irrational* monetary fines." *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 345 16 (Iowa 2015) (emphasis added). Correspondingly, Plaintiffs assert that the

play a crucial role. Some consider that "the right to travel achieves its most forceful expression in the contest of equal protection analysis." *Zobel*, 457 U.S. at 67 (Brennan, J., concurring). The unreasonableness of the Ordinance and classifications drawn by the City and Gatso post-legislation (after the City Council passed the Ordinance) therefore renders most of the cases cited by Defendants (Appellees' Brief, pp. 20-21) inapposite. *See Scheckel v. State*, 838 N.W.2d 870 (Iowa Ct. App. 2013) (unpublished table decision) (upholding reasonable traffic regulations in analyzing the right to drive as a privilege but without any distinctions made between classifications of drivers); *State v. Hartog*, 440 N.W.2d 852, 856 (Iowa 1989) (holding that the right to privacy is not violated by a mandatory seatbelt law without any classifications).[5]

The irrational classifications made by Defendants are therefore brought to the fore. Defendants note that given that the classifications made by them do not appear on the face of the Ordinance, it must first be demonstrated that such classifications exist. (Appellees' Brief, p. 29). It cannot be seriously

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right to travel encompasses the right to be free from an irrational speed enforcement system on an interstate highway.

[5] It is clear as well that treating out-of-state visitors as unwelcome is one of the keys to interstate travel, as well as the privileges and immunities clause. *Saenz,* 526 U.S. at 501-503. Appellees allege that Plaintiffs have not demonstrated that the law is disproportionately applied to those out-of-state. (Appellees' Brief, p. 19). Plaintiffs' allegation is based on good faith reliance on data published in Cedar Rapids Gazette; Plaintiffs were in the course of obtaining discovery to flesh out the same when Defendants' Motion for Summary Judgment was granted on June 5, 2016. Plaintiffs had obtained the ability to access Gatso's database after June 1, 2016, when the Protective Order was entered.

disputed that, in the enforcement of the Ordinance, classifications are made between government vehicles and non-government vehicles, and semi-truck trailers, etc. (App. 453-455, 459). These classifications demonstrate the irrationality of this system, created without any relation to a legitimate purpose. Exempting semi-truck trailers from enforcement is in no way related to safety; in fact, arguably such trailers are even more dangerous to the public who travel on interstate highways than are other types of vehicles subjected to the Ordinance's enforcement. Defendants urge that the rational reason that semi-truck trailers might be exempted is that often the owner of the semi-truck cab is not the same as the trailer. (Appellees' Brief, p. 31). But, even if arguably true, first, that rationalization has nothing to do with safety. It cannot therefore be the basis for this exercise of police power. Second, such a presumption actually proves Plaintiffs' argument as to why it is unjust to impose strict liability on vehicle owners as opposed to vehicle drivers: they are often not one in the same. Moreover, as argued previously, the legitimate purpose of safety cannot be used by the City because of the DOT's rulings that these speed cameras on I-380 are not necessary for said purpose and must be moved or removed. (App. 97-100, 115-120). While incremental problem solving may be allowed (Appellees' Brief, p. 30), the decision to exempt certain classifications of vehicle owners must still be rationally related to the ostensible purpose of the Ordinance (safety) promulgated pursuant to the City's police power.

Defendants further urge that there is no support for Plaintiffs' argument that the treatment of a post-hoc decision by a private company and City police department is not subject to the same deference as that of a legislative decision. (Appellees' Brief, p. 32). However, case law anticipates review of the governmental body's (rational)[6] decision: "legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker." *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992) (citation omitted); s*ee also Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 442-43 (8th Cir. 2007) (same); *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) (same). These post-legislative decisions by Gatso and the City have everything to do with generating money for Gatso and the City, and nothing to do with safety. Exempting some vehicle owners (particularly large, more dangerous vehicles) from a safety ordinance is irrational. An irrational system burdens the right to travel. It is forbidden under equal protection analysis: the "relationship of the classification to its goal [may] not [be] so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11; *see also Racing Ass'n*, 675 N.W.2d at 9 ("[A] citizen's guarantee of equal protection is violated if desirable legislative goals are

[6] Of course, based on the infringement on a fundamental right, Defendants would need to demonstrate a compelling state interest to which the Ordinance (and their subsequent classifications) must be narrowly tailored. Plaintiffs assume, *arguendo*, that the rational basis test applies here to demonstrate that Defendants cannot meet even that.

achieved by the state through wholly arbitrary classifications"). While Defendants recognize that police powers denote the ability to pass laws promoting "public health, safety, and welfare" (Appellees' Brief, p. 25, quoting *Gravert v. Nebergall*, 539 N.W.2d 184, 186-87 (Iowa 1995)), they have been able to provide a single public health, safety, or welfare reason to justify the classifications they made to implement this Ordinance. The ability of Gatso and the City to make as much money as possible off of this unconstitutional scheme—couched in the guise of efficiency or cost-effectiveness ("Defendants could rationally conclude that purchasing the license plate database it does is the most cost-effective way to enforce the Ordinance" – Appellees' Brief, p. 31)—is not a constitutionally-valid exercise of police power.

II. PROCEDURAL DUE PROCESS IS VIOLATED BY A PROCESS THAT VIOLATES THE CITY'S OWN CODE AND IOWA STATE LAW

In its latest iterative attempt to wriggle out of the requirements of Iowa law, the City and Gatso now argue that the City "made a specific exception to its own Ordinance through the plain language of § 61.138(e)(2)" by allowing that a recipient of a Notice of Violation *may request* a municipal infraction be issued against them. (Appellees' Brief, p. 34 (emphasis in original)). Alternatively, the City argues, it *may* allow that one may contest a Notice of

Violation by attending an administrative hearing[7] (or, in this instance, requiring such attendance). Defendants thereby attempt to flout the requirements of Iowa Code section 364.22(6)(b) for the standard of proof imposed on a municipal infraction by arguing that the City's own code defining a municipal infraction as a violation of an Ordinance (C.R. Mun. Code § 1.12) has been amended. In addition, Defendants attempt to skirt the minimal due process requirements of Iowa Code section 364.22(6)(a), which provides direct access to the district court (small claims) for municipal infractions. Such attempts are as contorted as they are unavailing. The City did not amend its ordinance *sub silentio* by providing this new process in violation of Iowa law.[8] And in fact, it could not do so.

Iowa Code section 380.2 governs the amendment of an ordinance. It requires that an "amendment to an ordinance or to a code of ordinances must specifically identify the ordinance or code, or the section, subsection, or

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[7] Defendants therefore claim that "the recipient of a Notice of Violation has the option to insist or require" that an alleged violation be prosecuted "as a municipal infraction, but until a citation for a municipal infraction has been issued, Iowa Code § 364.22 does not apply." (Appellees' Brief, p. 35). Rather than admitting its clear error in failing to abide by the express definitions set forth its own ordinances, let alone Iowa Code section 364.22, Defendants obstinately and unlawfully continue to impose a regime that violates the basic guarantees of due process.

[8] Plaintiffs dispute whether the City could do this even expressly given that Iowa Code section 364.22 provides a mechanism for what the City may do, and if the City Council chooses to do so, there are still certain guidelines the City Council must follow. Plaintiffs assume here, *arguendo*, that such an amendment might have been possible, however.

paragraph to be amended, and must set forth the ordinance, code, section, subsection, or paragraph as amended, which action is deemed to be a repeal of the previous ordinance . . .” Iowa Code § 380.2. The City Council cannot therefore amend the definition of municipal infraction (which is defined as any violation of an ordinance) unless it does so expressly, setting forth the specific provisions to be amended and repealed. Cedar Rapids Municipal Code section 1.12 still reads that the City “adopts the municipal infraction authority under Section 364.22, Iowa Code, and herewith provides that any violation of a city ordinance . . . constitutes a municipal infraction.” There is no language in either that provision or the Ordinance indicating that this has been amended so that sometimes a violation of an ordinance can be something other than a municipal infraction (with less procedural due process guarantees) if the police department and a private company so-decide. Iowa law prevents such random post-hoc claims of amendment perhaps for just this purpose. Amendments affecting important due process rights (and the applicability of statutory schemes that otherwise preempt such action) cannot be summoned out of thin air.

Plaintiffs will not reiterate their detailed arguments on the balance of the *Mathews v. Eldrige*, 424 U.S. 319 (1974) factors also weighing in their favor. Plaintiffs must respond, however, to the repeated mischaracterization of the record of this case with respect to that which Defendants wrongfully depict as

vehicle owners' direct access to the district court to contest these Notices of Violation. In every Notice of Violation issued to Plaintiffs in this case, the following language appears: "I CONTEST THIS VIOLATION. You have the right to contest this violation in person *at an administrative hearing* or *by mail* if you reside outside the state of Iowa." (App. 017, 027, 034, 036, 054) (emphasis added). Nowhere does the mailed Notice of Violation provide information to the recipient hinting, suggesting, or directing that he or she may directly access the district court. *Cf.* Appellees' Brief, p. 36 ("The most critical undisputed fact relevant to this argument is that the administrative hearing process is not mandatory.") This "fact" is absolutely disputed if Gatso continues to maintain that the administrative hearing process is not mandatory. It cannot be disputed that the Notice of Violation contains no reference to a recipient's ability to access the district court. In addition, whether one calls Gatso employees or receives a letter from the City's police department, one is informed first to go to an administrative hearing and then if unsatisfied, one can to the district court. (App. 360, 389, 464). In addition, on a motion for summary judgment, this fact had to be read in Plaintiffs' favor, and the district court erred (App. 506) in failing to do so. *Daboll v. Hoden*, 222 N.W.2d 727, 731 (Iowa 1974). Plaintiffs are obviously not requesting a hearing process at which they are guaranteed success. *Cf.* Appellees' Brief, pp. 36-37 (citing *Cochran v. Illinois State Toll Highway Auth.*, No. 15-2689, 2016 WL 3648335, at *3 (7th Cir. July 8,

2016)). Plaintiffs are requesting, instead, the process to which they are statutorily due. In addition, that process, if conducted by a court of law, would provide for the minimum protections assured by the Iowa General Assembly and would not result in arbitrary and capricious decisions based on a lower burden of proof. The fact that Plaintiff Brooks had his violation dismissed at the hearing does not render the hearing meaningful or adequate process (*cf.* Appellees' Brief, p. 37); it simply demonstrates the randomness of the system. Perhaps the administrative hearing officer and/or police officer were swayed by the fact that Mr. Brooks is a disabled veteran, or that he hadn't received a speeding ticket in 30 years, or that enough time wasn't allowed to adjust his speed as a stranger to the City. (App. 031). These reasons may be commendable (and even supported by the IDOT Order), but they are not defenses under the Ordinance—and, they are not reasons afforded to all others whose cases are reviewed by Hearing Officers. The reason provided in the "Order" dismissing Mr. Brooks' alleged Violation was that "[e]vidence shown could not prove the citizen's fault warning, please slow down." (App. 032). This is entirely arbitrary. There is no due process where some citizens receive differing enforcement treatment without any basis in the law.[9] Contrary to the

[9] For the same reason, discussed more fully below, while certainly the lucky few whose alleged Violations are dismissed are appreciative of such luck, the fact that Gatso employees reject 40% of the triggered events does not provide any comfort. *Cf.* Appellees' Brief, p. 37. Plaintiffs are not challenging a risk of non-

import of Defendants' arguments, everyone is "worse off" (Appellees' Brief, p. 38) by being forced to waste time and lose income to go through the deficient hearing process.[10]

The constitutional floor of due process, one established by the Iowa General Assembly concerning the prosecution of municipal infractions, has been violated. Even without the statutory requirement, the balance of due process protections is violated where the police officer, in the context of Defendants' invented administrative hearing, is performing both "prosecutorial and adjudicative roles." *See Botsko v. Davenport Civ. Rights Comm'n*, 774 N.W.2d 841, 849-50 (Iowa 2009) ("By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator.") (citation omitted). The general policy in favor of "disposing of invalid traffic charges outside the judicial system" cannot negate this constitutional violation. *Cf.* Appellees' Brief, p. 39 (quoting *City of Des Moines v. Iowa Dist. Court for Polk Cty.*, 431 N.W.2d 764,

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enforcement, they are challenging the ability of a private for-profit company with a contingent interest in every citation issued and paid to make the initial determination about those citations, whether the citations are dismissed or not.

[10] While Plaintiffs have not made a vagueness claim, they agree that with Defendants that "[d]ue process . . . does require that laws provide notice to the ordinary person as to what constitutes prohibited activity." Appellees' Brief, p. 39 (citing *Becker v. Lockhart*, 971 F.2d 172, 174 (8th Cir. 1992). The IDOT has determined that the ordinary person requires at least 1000 feet of notice of ATE after a reduction in speed. Iowa Admin. Code § 761-144.6(1)(b)(10). The City and Gatso's failure to comply with this regulation further denies plaintiffs and those similarly situated of pre-deprivation notice/due process.

767 (Iowa 1988)). The *City of Des Moines* case is instructive in the process used and notice provided to individuals who had received parking tickets consistent with Iowa state law: forms were provided that either explained the right to a court appearance at a specified time, or there was a "notice of fine" procedure consistent with Iowa Code section 321.236(1)(a). *City of Des Moines*, 431 N.W.2d at 765. There was also a clear explanation of either procedure included in the form. *Id.* Either direct access to the district court was provided, or the notices were consistent with governing State law: procedural due process protections were in place. The City and Gatso have failed to do or provide either in this case.

With respect to Plaintiffs' allegations that the non-rebuttable presumption is a violation of due process, Defendants claim that no Plaintiff has asserted that they were not operating the vehicle. (Appellees' Brief, p. 41). Plaintiffs Brodsky and Langston, however, own the same car (App. 033), and it is obvious that they both could not have been driving at the same time. Defendants go on to cite *Iowa City v. Nolan*, 239 N.W.2d 102, 104 (Iowa 1976), for the proposition that "[v]iolations of traffic regulations fall squarely within a proper classification of public welfare offenses." (Appellees' Brief, p. 41). This cite is noteworthy where the City and Gatso themselves are violating the IDOT's traffic regulations and Order on this interstate highway. The City and Gatso should not be able to rely on this as a public welfare offense when they

are in fact violating a traffic regulation,[11] and an Order issued by the state agency with jurisdiction over I-380, on which all Plaintiffs' vehicles were alleged to have been traveling when then were cited with violations of the Ordinance. There can be no claim therefore by Defendants that they are acting "[i]n the interest of the larger good" by putting "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation." *Id.* (citation omitted). Moreover, the issue of strict liability is less relevant for a parking violation where one main element is readily provable by a live witness at a hearing (i.e., parking illegally). Contrastingly, in these cases, the main contested element is whether the vehicle had been speeding at all, and the only live witness (i.e., not the hearsay camera evidence) cannot testify because if one is driving but is not the owner of the vehicle, one is not the person receiving the Notice of Violation and advised as to the existence of the administrative hearing. Strict liability on a speeding violation is therefore even more troublesome for constitutional purposes.[12]

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[11] In addition to continuing to maintain all four cameras in their current location in violation of the DOT's March 2015 Order, Defendants were clearly in violation of IDOT regulations by maintaining these cameras less than 1000 feet from the reduction in speed signs since February of 2014. *See* App. 426 (describing the speed limit reduction signs posted 859.9 and 896.1 feet prior to the ATE on I-380 at Diagonal Drive and J Avenue, respectively).

[12] Defendants also cite the *City of Knoxville v. Brown*, 284 S.W.3d 330, 338-39 (Tenn. Ct. App. 2008) for the proposition that the imposition of vicarious liability does not violate substantive due process. (Appellees' Brief, pp. 41-42). First, the decision in *City of Knoxville* clearly demonstrates the importance of

III. SCREENING DECISIONS AND CALIBRATION ARE SUBSTANTIVE, DISCRETIONARY DETERMINATIONS THAT CANNOT BE DELEGATED TO A PRIVATE, CONTINGENT-INTEREST COMPANY

"Rule-making by school boards involves the exercise of judgment and discretion. The legislature has delegated rule-making power to those boards . . . it cannot re-delegate matters of judgment or discretion." *Gabrilson v. Flynn*, 554 N.W.2d 267, 276 (Iowa 1996) (citation omitted). Gatso, on documents stamped with its own logo, has promulgated "Business Rules/Processing Guidelines" for the "City's Traffic Law Enforcement Program." (App. 461-465). Rather than the City exercising its own Home Rule authority, it has delegated it[13] to Gatso. Gatso both writes the Rules and enforces them. Even if the City agrees with the Rules as written, or had a part in making them,[14] the discretion to exercise such police powers, to determine the rules of the road, as it were, cannot be delegated. Iowa Code section 364.3 reads "limitations upon the powers of a city," in allowing a municipality to set stricter standards; it does not

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each State's law in reviewing these ordinances. Second, while the Tennessee Court of Appeals did note that the City Code imposed liability on the owner, there was also a provision in the City Code permitting "the responsible vehicle owner to shift the responsibility for the violation to the actual driver of the vehicle in certain circumstances." *Id.* at 438.

[13] In fact, it has attempted to delegate more authority than it has under Home Rule because, as Plaintiffs have argued, many of the acts are preempted by Iowa law.

[14] The syntax of the rules demonstrates that it was Gatso who has drafted them, in that one section is entitled "Police Approval," and includes the designation that "[n]eed to get the approvers' signatures and names for the notices." (App. 463).

read: "limitations on private companies with a contingent interest in every citation." This is a world turned upside down. The City is forced to report to Gatso the reasons for its rejections of citations. (App. 449-450). Rejections are reviewed by a Gatso supervisor. (App. 463). Gatso will provide all the documents necessary to prosecute a successful administrative hearing. (Defendants' Response to Plaintiffs' Supplemental Statement of Facts, No. 51, p. 5). After an administrative hearing, the Hearing Officer must enter the results of the hearing into *Gatso's* system within 5 business days. (App. 464).[15] Gatso is pulling the strings.

Gatso's self-serving attempt to minimize its role is insincere. Appellees' Brief, pp. 44 (App. 503-505). While Gatso's President lists three categories of Notices of Violation that are not forwarded to the City's police department, he makes no claim that this list is exhaustive. (App. 504). It would seem difficult to make such a claim, given that Gatso listed more than fifteen reasons why a Notice of Violation might be rejected in the current system:

Camera Image

[15] The Hearing Officer, interfacing with Gatso's system and providing its "Order" to Gatso, has been referred to by the City as an "administrative judge" at times, but at the same time described as not being able to rule on "legal issues." (*Compare* App. 170, 187-189 *with* App. 199, 376). This is an affront to the judiciary. The City, upon request, was unable to provide the educational background information on any of the hearing officers, and merely referenced their "availability and willingness to serve without reimbursement." (App. 432).

Erroneous Lane Trigger
Amber Light
Green Light
Emergency Vehicle
Turned Right Cautiously
Vehicle Stopped
Plate Not Readable - Blocked/Missing/Government
Plate Not Readable - Make/Model Unclear
Plate Not Readable - State Unclear
DMV - Dealer Plate
DMV - Out of Country Plate
DMV - Vehicle Mismatch
DMV - Owner/Address Info Missing
DMV - Vehicle Information Missing
DMV - Returned Invalid
Concurrent Event
Funeral/Procession Line
Police Action
Bicycle
Blinking red light
Test event
Weather
Other - free text field would be required

(App. 450). And the final option allows any text to be included as a rejection reason, making it impossible to categorize or to verify such reasons. Moreover, designations such as "Vehicle Turned Cautiously" is certainly a discretionary a determination by including the subjective language of "cautiously" in it. A judgment call is therefore required by a private company with a contingent interest in every citation. This is a forbidden delegation of police power. *See Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555, 559 (holding that

"powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment" cannot be delegated).[16]

Defendants then attempt to argue that Gatso is somehow justified in calibrating the cameras because it is a ministerial task. (Appellees' Brief, p. 46). The IDOT has determined that a local law enforcement officer "trained in the use and calibration" must calibrate the system, however, and the City is not complying. Iowa Admin. Code § 761-144.6(4). This is presumably a recognition that calibration is not merely administrative; it requires specific training. It is also clear from their own arguments that Defendants, despite protestations to the contrary, understand perfectly well the distinction between "test" and "calibrate." (Appellees' Brief, pp. 45-46) ("Cedar Rapids Police Department *tests* the *calibration* at least quarterly") (emphasis added). Calibration and accuracy of the equipment used goes to often the only disputed element in one of these cases: was the vehicle speeding. This is a substantive issue, and not just a ministerial task. "Testing" the equipment might seem ministerial, as the tests run by the CRPD demonstrate that the radar often reads 1 to 2 mph over the actual speed; calibrating, however, is a substantive act meant to fix and minimize such equipment issues. Similarly, granting access to Gatso of the

[16] Contrary to Defendants' argument, the Iowa Supreme Court did not review and impliedly approve this delegation of police power in *Jacobsma*: the issue was not at all before it. *Cf.* Appellees' Brief, p. 43 (citing *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 337 (Iowa 2015)).

Nlets—a non-profit company—database, which was created by the 50 state law enforcement agencies, is an unlawful delegation of police power. (App. 090). Employees of a private, for-profit company are benefitting from the work and efforts of a non-profit police tool created to enforce the laws, and not to make money.

Defendants also attempt to discount Plaintiffs' argument that the delegation of judicial power to a hearing officer was a violation of law. (Appellees' Brief, p. 46). Defendants cannot argue that the administrative hearing is the equivalent of concurrent jurisdiction (i.e., a court) in the same breath that they argue the hearing officer has not been delegated judicial power. They cannot have it both ways. Furthermore, Defendants attempt to minimize the power of the hearing officer by noting that they often *invalidate* the issuance of citations is nonsensical. (Appellees' Brief, p. 46) (emphasis in original). Whether a court grants a motion or denies it does not change the ability to do so, which is a judicial power. Even, *arguendo,* taking the City at its word, that hearing officers dismiss Notices of Violation in 50% of the cases (App. 417), the ability to even make this decision is the exercise of a judicial power (not in 50% of the cases, but the ability to make any decision in 100% of the cases). The district court erred in holding that an unlawful delegation of police power to Gatso had not been proven, as well as an unlawful delegation of judicial power that the City does not have to a hearing officer.

IV. PLAINTIFFS HAVE STATED A CLAIM FOR UNJUST ENRICHMENT WHERE GATSO RECEIVES $25.00 FOR EVERY SPEEDING CITATION IT ISSUES

Gatso's President[17] claims that Gatso is not paid directly out of the funds, but rather, the money is paid first to the City and then Gatso bills amounts owed. (App. 504).[18] In sworn affidavits by City employees, however, funds were indicated as "paid to Gatso." (App. 093 ("paid to Gatso 10/05/15"). In fact, however, the exact process is irrelevant: it is undisputed that for every speeding citation paid, Gatso receives $25.00 of it (so, for a $75.00 fine, Gatso has a 30% contingent interest in issuing that citation). (App. 486). Since the IDOT has ordered the removal of its ATE equipment from I-380 to January of 2016 (or eight months ago), Gatso made $1,749,143.00 on I-380 citations alone. (App. 089). Both Defendants have been enriched by this unlawful scheme, and based on the facts, Gatso cannot pretend that it is not running the system, let alone benefitting from it. The equitable doctrine of

[17] Note that it is Gatso's President, and not a City employee, who provides the foundation for evidence attached to the Motion for Summary Judgment, and asserts facts to attempt to invalidate Plaintiffs' claims. The City then apparently does not even have access to the facts necessary to resist these claims, let alone prove them against individual vehicle owners in a court of law. In fact, in Answers to Interrogatories, the City repeatedly responded that "it does not have the information necessary" to answer when being asked about what should be public records/data on the enforcement on I-380. (App. 429-431, 433-438). This further demonstrates the unlawful delegation of record maintenance to a private entity.

[18] The fact that the Ordinance provides that fines are "payable to the city of Cedar Rapids" (Appellees' Brief, p. 50), in no way affects how it works in practice.

unjust enrichment merely views whether a defendant has been enriched by a benefit at the expense of a plaintiff, and it is unjust to allow defendant to continue to retain said benefit. *State ex rel. Palmer v. Unisys. Corp.*, 617 N.W.2d 142, 254-255 (Iowa 2001). It does not consider whether a defendant can insulate itself from receiving a benefit by having it go through another party first. It is clear that a fixed amount (equivalent to a percentage) of every amount paid by Plaintiffs went to Gatso, and it is unjust under these facts to allow Gatso or the City to retain any of these amounts after March 17, 2015.

The fact that some Plaintiffs paid their citations is no defense to the unjust enrichment claim. *Cf.* Appellees' Brief, p. 50. First, it's difficult to argue that such payments were made "voluntarily" based on the facts presented, including threats of being reported to a credit agency. (App. 016, 020, 085). More importantly, however, Iowa has "never recognized the voluntary payment doctrine and decline[s] to do so now." *State ex. rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 32 (Iowa 2013). Gatso cannot escape the unlawful delegation of police power claim, nor its corrupted interest in these funds. It is unjustly enriched by this scheme, whether funds are sent first to the City, and, then to Gatso, or otherwise. It is clear who is in charge of this system. It is even clearer how much money is at stake. Defendants are unjustly retaining those millions and the district court erred in holding otherwise.

V. THE ADMINISTRATIVE HEARING IS PREEMPTED BECAUSE IT IS NOT AN EXERCISE OF CONCURRENT JURISDICTION AS IT IS NOT A COURT, AND NO ONE WOULD RESORT TO IT OVER A COURT OF LAW INDIFFERENTLY

Under the doctrine of preemption, "municipalities generally cannot act if the legislature has directed otherwise." *Mall Real Estate, L.L.C. v. City of Hamburg*, 818 N.W.2d 190, 195 (Iowa 2012) (citation omitted). As extensively argued in Plaintiffs' opening brief, Iowa law preempts the Ordinance and its implementation by Defendants.

To attempt to avoid the fact that the Ordinance is not preempted by Iowa law, Defendants are forced to argue that the administrative hearing process is an "exercise of concurrent jurisdiction." (Appellees' Brief, p. 48). As Defendants recognize, concurrent jurisdiction is "that jurisdiction exercised by different courts, at the same time . . . wherein litigants may . . . resort to either court indifferently." *Mallory v. Paradise*, 173 N.W.2d 264, 267 (Iowa 1969) (citation omitted). Defendants are therefore arguing that the administrative hearing is a court of law. This is offensive. Moreover, the idea that one could resort to either the administrative hearing process or an actual court of law "indifferently" is preposterous.

The administrative hearing is run by a friend of police department with no training in the law. (App. 416). There are no motions considered, no witnesses testify, and there is a lower burden of proof imposed on the City to

prove its case than the City would face in a municipal infraction proceeding. The police officer who can overrule the Hearing Officer has a financial stake in the outcome. (App. 417).[19] This is not a parallel exercise of jurisdiction through another court process. *Cf. State v. Stueve*, 260 Iowa 1023, 1030-31 (1967) (describing the concurrent jurisdiction of a juvenile court over younger offenders).[20] This is a sham event, dressed up as a "hearing," in order to lure those few who feel empowered to challenge their infraction into thinking that they received some sort of due process. There was none. While a Hearing Officer may issue judicial-appearing documents with captions styled, "Findings, Decisions & Order," to fully coat the sham process, they come to such determinations by a "preponderance of the evidence" and not the required "clear, satisfactory, and convincing standard" of Iowa Code section 364.22(6)(b). (App. 022, 032, 043, 044, 051, 062). These standards of proof cannot be resorted to indifferently, and a vehicle owner presenting his or her

[19] Given the financial interest of the police department, this also brings up grave due process concerns regarding the access to an "impartial" decision-maker when contesting a Notice of Violation. *See Ward v. Monroeville*, 409 U.S. 57, 59-60 (1972) (holding that a defendant was denied the impartial judicial officer guaranteed by federal due process where mayor's court fines supported municipality budget that mayor controlled).

[20] Arguably, the State of Iowa could decide to create a separate "traffic court" to address these municipal infractions, which would exercise concurrent jurisdiction. Iowa has not done so, however, and as part of its unified trial court system pursuant to Iowa Code section 602.6101, it requires that municipal infractions be treated in the same manner as a small claim action. Iowa Code § 364.22(6)(a).

evidence to a Hearing Officer is provided less protection than that person would receive in a court of law.

There is only one court to which one can and should resort, and that is the one led by a "magistrate, district associate judge, or a district judge" required by Iowa Code section 364.22(6)(a). The administrative hearing process, by contrast, permits a "process" that is prohibited by Iowa law, and is therefore preempted by it. *See Goodell v. Humboldt Cty.,* 575 N.W.2d 486, 493 (Iowa 1998) (defining implied preemption as including "[w]hen an ordinance . . . 'permits an act prohibited by statute'"). In addition, the two different standards of proof are irreconcilable, and the "Order" issued by the Hearing Officer, based on the document created by Gatso, is preempted.[21] The district court's decision was in error.

CONCLUSION

For one or more of these reasons, and those cited in Appellants' Proof Brief filed on August 10, 2016, Plaintiffs respectfully requests that the district court's decision be reversed as to all issues decided adversely to Plaintiffs.

Dated this 12th day of October, 2016.

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[21] Gatso and the City can protest as much as they like (Appellees' Brief, p. 48), but they have admitted on the record that Gatso issues the Notices of Violation (App. 448, 464), and it is undisputed that these are not by regular mail (and not certified mail or personal service), all contrary to, and preempted by, Iowa Code section 364.22(4).

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on October 12, 2016, I electronically filed the foregoing Final Reply Brief of Plaintiffs-Appellants with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Pursuant to Rule 16.317(1)(a), this constitutes service of the document on the following for purposes of the Iowa Court Rules.

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

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because: this brief contains 6,949 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 1997-2004 in size 14 Garamond.

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