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IN THE SUPREME COURT OF IOWA

No. 22-0536

FRANCIS LIVINGOOD, CHRISTOPHER MAURY, AND DANIEL ROBBINS,

Plaintiffs-Appellants,

v.

CITY OF DES MOINES, IOWA,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
NO. CVCV053512
HON. SCOTT D. ROSENBERG, JUDGE

FINAL REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF THE ARGUMENT

The City of Des Moines ("City") argues in an attempt to distract that Plaintiffs did not claim that they are innocent of the speeding charges alleged by the cameras against them. However, the City ignores two crucial points. First, Plaintiffs expressly swore that they could not remember the alleged speeding incidents when they first learned of the taking of their income tax refunds because so many years had passed. They therefore could not swear one way or another. Second, and more importantly, it is not Plaintiffs' burden to prove their innocence; the City must prove by a preponderance of clear, convincing, and satisfactory evidence that Plaintiffs' violated the Automated Traffic Enforcement ("ATE") Ordinance. And therein lies the rub. The City took Plaintiffs' money without their consent without ever having proven that it was owed to it. This is directly contrary to Iowa Code section 364.22, the Iowa Supreme Court's precedent, and Plaintiffs' constitutional rights.

While Plaintiffs maintain that the district court erred on all aspects described in their opening brief, here, in reply, Plaintiffs focus on their claims for preemption, violation of the statute of limitations, and due process.

ARGUMENT

I. USE OF THE OFFSET PROGRAM TO COLLECT UNPROVEN ATE CITATIONS AND DES MOINES MUNICIPAL CODE CHAPTERS 3-26 THROUGH 3-29 ARE PREEMPTED BY IOWA CODE SECTION 364.22

While there is no dispute that the City has home rule power, 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). Iowa Code section 364.22 sets forth the process for obtaining a judgment against a citizen who does not voluntarily pay upon receiving a violation of an ordinance notice. *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 565 (Iowa 2019) ("In order to *enforce* the ordinance and impose liability on an alleged violator, Cedar Rapids must follow the process for municipal infractions outlined in Iowa Code section 364.22, which means filing an action that is consistent with Iowa Code section 602.6101.") (emphasis in original). The City does not, indeed, could not, argue that a violation of its ATE Ordinance is not a municipal infraction. Therefore, its actions (formerly without any authority and now pursuant to Des Moines Municipal Code section 3-26 through 3-29, App. 530-531) to enforce the ATE citations through the use of the Iowa Income Tax Setoff Program ("Offset Program") are preempted. *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'"). The setoff provisions of Des Moines Municipal

Code allow the City to collect ATE citations without first obtaining a judgment, directly contrary to Iowa Code section 364.22.

The City buries its discussion of *Behm* and *Weizberg v. City of Des Moines,* 923 N.W.2d 200 (Iowa 2018) and instead revisits *Davenport v. Seymour*, 755 N.W.2d 533, 539 (Iowa 2008) in support of its arguments. City's Brief, pp. 32-40. *Seymour* in no way speaks to the question currently before the Court. Rather, that decision reviewed a city's maintenance of its ATE program generally and whether it was preempted by traffic laws in Iowa Code chapter 321. *Seymour* at 755 N.W.2d at 535. Plaintiffs here are not challenging the existence of an ATE program, or even whether its purpose is safety[1]; rather, Plaintiffs are challenging the use of the Offset Program years after an alleged violation occurred where there was never a municipal infraction filed and a judgment of liability obtained. Plaintiffs argue that the City's process is in conflict with Iowa Code section 364.22 and Iowa Code section 8A.504, contrary to the City's assertion. City's Brief, p. 32 n.3. Former Iowa Code section 8A.504 in no way allowed the use of the Offset Program to collect fines resulting from alleged ATE citations that had never been reduced to judgments for liquidated sums due and payable to the district court clerk.

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[1] The City, without citations to the record, claims that speeding increased while the cameras on I-235 Eastbound were turned off. City's Brief, p. 13. However, the City does not claim that there was any increase in crashes, as related to safety, during that time period.

The City's response to the preemptive impact of Iowa Code section 364.22 is to claim that since the *Weizberg* Court allowed for the alternative administrative procedure to establish ATE penalties, "there is no reason it would preempt submission of those liabilities to the Offset Program." City's Brief, pp. 33-34. This is preposterous, as the *Behm* Court did in fact address this very issue. 922 N.W.2d at 562, 565. The City's response to *Behm's* clear import is to claim that it was merely dicta or obiter dictum. City's Brief, pp. 38-39 (citing, inter alia, *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 391-92 (Iowa 2009)). But the *Behm* references to the process required by Iowa Code section 364.22(7), (10) and Iowa Code section 602.6101 were not "passing expressions of the court, **wholly unnecessary** to the decision of the matters before the court." *Boyles v. Cora*, 6 N.W.2d 401, 413 (Iowa 1942) (emphasis added). The differentiation of voluntary and involuntary enforcement of municipal infractions was wholly *necessary* to the decision. It was crucial to saving the use of ATE enforcement by Cedar Rapids and Des Moines in those cases from preemption by Iowa Code section 364.22. The *Behm* Court mentioned Iowa Code section 364.22 and following its requirements no less than sixty (60) times in the opinion. This was not a case where Iowa Code section 364.22 was not at all relied upon in coming to the determination of the metes and bounds of acceptable ordinances and their enforcement. *Cf. Blue Grass Sav. Bank v. Cmty. Bank & Tr. Co.*, 941 N.W.2d 20, 26 (Iowa 2020) (distinguishing references in

prior case to Iowa statute where it was not applied, and finding that the statements were therefore dicta). The *Behm* Court was express: "[n]othing in the ordinance is inconsistent with the notion that the **only way** to enforce a violation of an ordinance on a person who refuses voluntary payment is to launch a municipal infraction proceeding." *Behm*, 922 N.W.2d at 565 (emphasis added). Far from being a passing reference, the *Behm* Court relied on distinguishing voluntary, pre-filing processes prior to filing a municipal infraction to that of enforcement of an ATE ordinance and imposing liability through involuntary means, which required following the "process for municipal infractions outlined in Iowa Code section 364.22[.]" *Behm*, 922 N.W.2d at 565. The *Behm* Court's analysis is directly on point, and further demonstrates that the City's use of the Offset Program to collect fines for ATE citations that were never subjected to the municipal infraction process is preempted.

The City then goes a step further and argues that even if *Behm* and *Weizberg* are binding on the question here, factual differences render it inapplicable because the *Weizberg* Court was focused on the language of a "judgment total" from the administrative hearing process by a layperson. City's Brief, p. 40. The City appears to argue that the Iowa Supreme Court would be more troubled by a reference to a "judgment total" on a document than the affirmative act of taking someone's income tax refunds based on no judgment

at all. But creating a "court judgment" for a qualifying debt that allows use of the Offset Program is a much coercive use of governmental power than just writing on a piece of paper that something is judgment total when it is not. One is an invalid document with no enforcement power; the other is an affirmative enforcement action taken by the City without any judgment. The City "concedes that it does not have a judgment based on the nonpayment of civil fines." City's Brief, p. 40. That is the beginning and the end of the analysis. Without a judgment of liability, or the proof and protections that go into obtaining the same, the City cannot seize the tax refunds of citizens for any debts, as no qualifying debts exist.

In another attempt to distract from *Behm* and *Weizberg*, the City argues that Plaintiffs ignored a key portion of another statute, Iowa Code section 8A.504.[2] City's Brief, p. 28 n.1. First, as Plaintiffs argued, that statute is perfectly harmonious with Iowa Code section 364.22, and it is the City's use of it, not its existence, that is in conflict with Iowa Code section 364.22. Second, the language cited by the City does not save it from error:

> The collection entity shall establish and maintain a procedure to set off against any claim owed to a person by a public agency any liability of that person owed to a public agency, a support debt being enforced . . . , **or such other qualifying debt**.

[2] The City completely ignores the amendment to this statute and the import of the same.

Iowa Code § 8A.504(2) (2017) (emphasis added). Plaintiffs did not cite this general language describing the process because it is not meaningful on its own. This general language was expressly limited by the specific requirements immediately following it, which the City conveniently cut off:

> The procedure shall only apply when at the discretion of the director it is feasible. The procedure shall meet the following conditions:
>
> a. **Before setoff**, a person's liability to a public agency and the person's claim on a public agency shall be in the form of a **liquidated sum due, owing, and payable**.

Iowa Code § 8A.504(2), (a) (2017) (emphasis added). This language mimics the definition of a qualifying debt, which requires a "debt which is in the form of a liquidated sum due, owing, and payable to the clerk of the district court." Iowa Code § 8A.504(1)(d)(3) (2017). Reading the statute as a whole[3] as required, therefore, it is clear, therefore, that the "liability" that can be subject to the Offset Program, "before setoff" must be a qualifying debt, or a "liquidated sum due, owing, and payable to the district court clerk." Interpretation of the statute begins with the statute's text, and where it is unambiguous, one need not search further. *Borst Bros. Constr., Inc. v. Fin. of Am. Commercial, LLC*, 975 N.W.2d 690, 699-700 (Iowa 2022).

[3] *Andover Volunteer Fire Dep't v. Grinnell Mut. Reinsurance Co.*, 787 N.W.2d 75, 82 (Iowa 2010) ("[W]e look to the statute as a whole to make sure our interpretation is harmonious with the entire legislative enactment.").

Correspondingly, this general procedure language is not necessary to review separately where "qualifying debt" is expressly and specifically defined. While the City tries to emphasize the language "any liability of that person owed to a public agency," (City's Brief, p. 28), the term "liability" is not defined in the statute,[4] and is not the material portion of the statute. That phrase on its own is of no import. Only "qualifying debt" is defined by that statute—which, the City fails to note—has been significantly amended.[5] Iowa Code § 8A.504(1)(d). The clause "or such other qualifying debt" modifies the other clauses of the statute, and is therefore defined. Plaintiffs focused on the definition, which is directly contradictory (at the time applicable to this case) to the City's use of the Offset Program for ATE citations, which do not qualify. "Such other qualifying debt" means that "liability" is narrowed by the qualifying debt language pursuant to the doctrine of *ejusdem generis*, as it is

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[4] The City conveniently ignores that "liability" is defined in the Iowa Administrative Code on which the City later attempts to rely: "'Liability' or 'debt' means a 'qualifying debt' as defined in Iowa Code section 8A.504(1)"c" or any liquidated sum due, owing, and payable by a debtor to a public agency." (App. 187-192).

[5] Indeed, if the City's reading of the statute were accurate, and any liability at all could be subject to the Offset Program, it would not have been necessary to amend Iowa Code section 8A.504 and include other debts that had not been rendered judgments payable to the district court clerk, as the regulations had previously expanded. *See* Iowa Code § 421.65(1)(d)(3); *see also* Iowa Code § 4.13(1)(a) (2021) ("The reenactment, revision, amendment, or repeal of a statute does not affect any of the following: (a) The prior operation of the statute or any prior action taken under the statute.").

defined portion of the statute. *See Young v. Iowa City Cmty. Sch. Dist.*, 934 N.W.2d 595, 605 (Iowa 2019) (applying the rule of *ejusdem generis* in holding that in reviewing "sale, lease, or other disposition" in the relevant code provision, "other disposition" must involve a transfer to another party, as limited by the "sale or lease" language). *Ejusdem generis* provides that when there is a laundry list of terms all of which relate to a larger theme, the phrases are interpreted to be of similar character to the other listed terms. *Id.*; *see also Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 376, 380 (Iowa 2000) ("Under the doctrine of *ejusdem generis*, general words which follow specific words are tied to the meaning and purpose of the specific words.").

Indeed, the Iowa Supreme Court in *Iowa Comprehensive Petroleum* cited with approval cases from other jurisdictions in which the use of "other" indicates a "limitation of the general terms otherwise there would be no need for inclusion of the specific." *Id.* (citing *People v. McCoy*, 29 Ill. App. 3d 601, 332 N.E.2d 690, 695 (Ill. Ct. App. 1975)). By any measure, therefore, the specific use of "other qualifying debt" is a limitation on the type of liability that can be subject to the Offset Program, and expressly defined in the same statute. *See also Peak v. Adams*, 799 N.W.2d 535, 547-48 (Iowa 2011) (reviewing similarity of canon of construction *noscitur a sociis*, or the "rule of both language and law that the meanings of particular words may be indicated or controlled by associated words" and that of *ejusdem generis*). There is no plausible argument that the Iowa

General Assembly meant to reference any potential "liability" owed to a public agency as being subject to the Offset Program.[6] The language is expressly limited and controlled by the surrounding phrases based on the clear intent of the General Assembly, as demonstrated through common sense as well as both *ejusdem generis* and *noscitur a sociis*.

Finally, even if there were an alleged conflict between Iowa Code sections 8A.504 and 364.22, the specific statute governs the general. *See In re Estate of Sampson*, 838 N.W.2d 633, 760 (Iowa 2013) ("To the extent there is a conflict or ambiguity between specific and general statutes, the provisions of specific statutes control."). Iowa Code section 364.22 governs the specific requirements necessary for a municipality to enforce its ordinances, and therefore even if there were a conflict with any general provisions of the former applicable statute governing the Offset Program, Iowa Code section 364.22(7), (10) would govern. *See also* Iowa Code § 4.7 ("If the conflict between the provisions is irreconcilable, the special . . . provision prevails as an exception to the general provision."). Iowa Code section 364.22(7) requires that "penalties or forfeitures collected by the court for municipal infractions shall be remitted to the city in the same manner as fines and forfeitures are remitted for

[6] It is noteworthy that the City did not attempt this argument regarding such an expansive reading of the statute at all below.

criminal violations under section 602.8106."[7] Iowa Code section 364.22(10) provides the procedure for when a judgment has been entered against a defendant, the court can then "[i]mpose a civil penalty by entry of a personal judgment against the defendant." Iowa Code § 364.22(10)(a)(1).

These are the specific requirements needed to obtain an involuntary payment, requiring adherence to a certain procedure to obtain a judgment of liability against a citizen for a municipal infraction. While voluntary payments have been upheld as an alternative route (*Rhoden v. Davenport*, 757 N.W.2d 239 (Iowa 2008)), the *Behm* Court was clear that Iowa Code section 364.22 had to be followed to obtain an involuntary payment. 922 N.W.2d at 562, 565. And former Iowa Code section 8A.504's general descriptions of procedures to be followed to use the Offset Program in no way supersedes such requirements. Indeed, as Plaintiffs argued, former Iowa Code section 8A.504 was perfectly reconcilable with Iowa Code section 364.22, and only the agency rule was *ultra vires*. *See* Plaintiffs'-Appellants' Brief, pp. 30-41. But even if there were a conflict, the specific requirements of Iowa Code section 364.22 govern any general language of former Iowa Code section 8A.504.

The City also claims that there are dozens of examples of "alternate remedies available for the same issues[.]" City's Brief, p. 36 (citing criminal or

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[7] Iowa Code section 602.8106 sets forth the procedure for the *clerk of the district court* to collect certain fees. Iowa Code § 602.8106 (emphasis added).

civil actions for the same conduct, pursuing civil enforcement of administrative remedies, etc.). This is relevant to the City's use of the administrative procedure to make a determination of civil liability at issue in *Weizberg* (923 N.W.2d at 219-220), but not relevant to the seizure of funds by the Offset Program. This is not an "alternate remedy": the remedy is receiving payment for a civil penalty arising from an ATE citation, which is a municipal infraction. The City, rather than following the minimum requirements of Iowa Code section 364.22, is seizing the vehicle owners' funds without proving that it is entitled to them. This is the same remedy but a different, unlawful means of taking it. That is the mechanism that is preempted. The City cannot use the Offset Program to seize funds that it has never demonstrated are owed to it pursuant to a judgment following a municipal infraction proceeding. This is not the same as saying that the City must provide a "municipal infraction process for every ATE violation." *Cf.* City's Brief, p. 37. This is saying, as the Iowa Supreme Court has indicated, that if vehicle owners do not voluntarily pay after receiving a Notice of Violation, or attending an administrative hearing, their funds cannot be coerced, or seized, without filing a municipal infraction process that results in a liability judgment issued by the district court. The State of Iowa did not provide one "remedy" of filing a municipal infraction (*cf.* City's Brief, p. 34): that is the only *process* they provided where a vehicle owner is accused of violating a municipal infraction and does not voluntarily pay. The City again confuses the

idea of a remedy—which is exactly the same here: obtaining the funds it seeks—and a process or procedure to encourage the "voluntary" payment of the same, which was previously litigated, and not at issue here.

The fundamental flaw[8] of the City's argument is that it attempts to re-write the statute to justify its actions, and ignores clear Iowa Supreme Court precedent. Moreover, even if *Behm* and *Weizberg* did not already dictate the result in this matter, the City cannot get around the irreconcilability of their use of the Offset Program (now through Des Moines Municipal Code sections 3-26 through 3-29, and before that, without any authority) to seize funds that were not payable to the district court clerk after a judgment, in accordance with the requirements of Iowa Code section 364.22. The district court's opinion holding otherwise should therefore be reversed.

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[8] In addition, the City, as anticipated by Plaintiffs, claims that Plaintiffs' arguments should properly be asserted against DAS, and not the City. City's Brief, pp. 25, 35, 43, 49. As Plaintiffs previously argued, it is the City's unlawful use of the lawful procedure by DAS that is at issue here. The Contract with DAS requires a lawful debt, and abiding by Iowa law. (App. 197, § 9.1). Similarly, the City is estopped from making this assertion because it argued in another forum that other citizens' claims against DAS could not move forward because of pending cases such as the instant one. *See* Plaintiffs' Proof Brief, p. 37 (arguing judicial estoppel and citing Cities' Brief in DAS).

II. THE ONLY REASONABLE INTERPRETATION OF IOWA CODE SECTION 614.1(1) IS THAT THE CITY IS VIOLATING THE STATUTE OF LIMITATIONS APPLIED TO ENFORCEMENT OF ORDINANCES

Either the statute of limitations found in Iowa Code section 614.1(1) has a meaning to control government power with respect to its enforcement of an ordinance, or it does not. "[A]bsolute power corrupts absolutely." *State v. Hauge*, 973 N.W.2d 453, 498 (Iowa 2022)[9] (quoting Lord Acton's phrase in Letter from John Emerich Edward Dalberg to Archbishop Mandell Creighton (Apr. 5, 1887), https://history.hanover.edu/courses/excerpts/165acton.html [https://perma.cc/2JX8-8K3K]). The City's contortionist argument that the statute of limitations does not apply to its taking tax refund money if it does so in a non-judicial setting—and only applies to cases with transparent proof in a court of law—is troublesome at best. A statute is interpreted to have been passed to have an effect, or meaning. *See* Iowa Code § 4.4(3) (2021) ("In enacting a statute, it is presumed that: . . . a just and reasonable result is intended."). If the City could "enforce" a violation of an ordinance by other,

[9] The *Hauge* Court amended it in the context of traffic stops to "police discretion leads to arbitrary searches and seizures and the greater the discretion, the greater the problem." 973 N.W.2d at 498. In the context of using the Offset Program for ATE citations, it might be amended to "municipal power to collect years after an alleged violation occurred based on a private company's camera leads to absolute corruption of the Offset Program."

non-judicial means years after an alleged violation, the statute of limitations would be divested of meaning.

The Court's "primary goal in interpreting a statute is to give effect to the legislature's intention." *Williams v. Thomann (In re Estate of Thomann)*, 649 N.W.2d 1, 4 (Iowa 2002); *see also Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 303 (Iowa 2000) ("We seek a reasonable interpretation which will best effectuate the purpose of the statute and redress the wrongs the legislature sought to remedy."). The Court "presume[s] the legislature intended a reasonable result, not an absurd one." *Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 67 (Iowa 2003) (citation omitted). The City's interpretation of the meaning of Iowa Code section 614.1 is absurd. It would completely strip it of meaning if the City could ignore the limitation period to enforce an ordinance years later by another, less protective, non-judicial means. *See also* Iowa Code § 4.4(4) (2021) ("In enacting a statute, it is presumed that: . . . a result feasible of execution is intended."). If the City could get an end-run around the statute of limitations by using a less protective administrative process where no proof of violation of an ordinance was required, the statute of limitations to protect citizens against stale evidence would be meaningless, and incapable of execution.

The purpose of a statute of limitations is to cut off stale claims, among others. *See Skadburg v. Gately*, 911 N.W.2d 786, 790 (Iowa 2018) ("Our law does not allow the splitting of a cause of action, and any effort to do so to avoid the

commencement of the statute of limitations would be inconsistent with the purpose of cutting off stale claims."). Prosecutions for speeding after more than four years, or five or six or more, after the date of the alleged transgression cannot be reliably proven—or defended against—in court. Therefore, they are barred by the statute of limitations. The City here is essentially trying to split the enforceability of claims into ones that have to be proven in court to obtain the remedy (i.e., money) within a year, and ones that can be seized from tax refunds after any amount of time. This is nonsensical. The City does not, and cannot, dispute that it sent a postcard to Mr. Robbins in 2016, four years after an alleged speeding violation on I-235. City's Brief, pp. 21-23. This is directly contrary to Iowa Code section 614.1(1). The word "year" means "twelve consecutive months." Iowa Code § 4.1(40). Four years is more than 48 months after the alleged violation occurred. And it gets worse, as often the City has no proof that anyone ever received a Notice of Violation, despite its claims to the contrary. *Cf.* City's Brief, p. 17 ("Mr. Livingood received the Notice of Violation."). Mr. Livingood has always sworn, and continues to swear, that he never received a Notice of Violation ("NOV"). (App. 107, ¶10-12). The City also conveniently overlooks the history of Mr. Livingood's claim where it changed its mind several times as to whether it wanted to "enforce" the Ordinance against him where his claims against the City were otherwise pending in federal court. *See* Appellants' Brief, pp. 57-58.

The City claims that Plaintiffs fail to recognize the difference between a court action resulting in a judgment, which must be brought within one year, and an administrative alternative to debt collection, which it appears to believe can be enforced at any time, without limitation. City's Brief, p. 42. But that is exactly Plaintiffs' argument: if a court action must be brought within one year, even more clearly must any other enforcement mechanism of a violation of an ordinance. And processes required to obtain a court judgment are more protective of a citizen's rights. That is because in that forum, the City must actually prove its case against a vehicle owner (Iowa Code § 364.22(6)(b)) to the satisfaction of a judicial officer, and not just send a picture to a vehicle owner. While the City claims that a judgment has more enforcement power, it obstinately ignores that enforcement through seizing an income tax refund is the most powerful "enforcement" out there. It is a guaranteed payment without any preceding judicial process. As Plaintiffs previously argued, seizing funds through the Offset Program is clearly anticipated as a means to "enforce the payment of a penalty or forfeiture under an ordinance, within one year." Iowa Code § 614.1(1).

The legislative history of Iowa Code section 614.1 also demonstrates that if the General Assembly wished to allow the City to "enforce" the violations of ordinances for all time, it could have done so. For instance, in 2007, the General Assembly amended Iowa Code section 614.1 by adding subsection 14),

providing that no "time limitation shall apply to an action brought by a county under section 445.3 to collect delinquent real property taxes levied on or after April 1, 1992." 2007 Ia. ALS 40, 2007 Ia. Ch. 40, 2007 Ia. LAWS 40, 2007 Ia. SF 450. Iowa Code section 614.1 and its various subparts have been amended dozens of times in the past several decades, but not Iowa Code section 614.1(1) to grant any municipality additional time or authority to bring or enforce violations of municipal ordinances for two, five, or ten years. The legislative history is telling. *See Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 231 (Iowa 2019) (reviewing history of amendments to the Iowa public records law and noting that the "legislative history is instructive."). When the Iowa General Assembly wants to allow a city or county to collect fines for all time, it knows how to do so. It did not do so in this instance, and expressly limited it to the shortest statute of limitations included in section 614.1: within one year.

The City also relies on the district court's order finding that the "legislature provided for an alternate remedy aside from action in the courts." City's Brief, p. 42 (citing App. 340). However, as Plaintiffs previously argued, the district court misconstrued a conflict between former Iowa Code section 8A.504 and Iowa Code section 364.22. There is no conflict. Iowa Code section 8A.504, as it existed at the time of the City's use of the Offset Program, did not allow for seizure of income tax refunds resulting from alleged ATE citations because they did not constitute "qualifying debts" as required by that statute.

Iowa Code § 8A.504(d)(1)-(3) (2017). The City's attempt to describe the use of the Offset Program as a "remedy" (City's Brief, p. 42) ignores that it requires an underlying process, or protective procedures, in order to be effectuated. *See* Iowa Code § 8A.504(e), (f), (h), (j) (2020) (setting forth various notice and opportunities to contest alleged debts in different situations, including when payable to the district court clerk).[10] The General Assembly did not provide a mechanism for proving violations of municipal infractions and then a separate mechanism for collecting them where they were not proven.

Similarly, the State of Iowa did not set forth any varying remedy for enforcing ATE citations; rather, where a qualifying debt has been proven and the debtor has had an opportunity to contest the same, the use of the Offset Program is permitted. The statutes are harmonious. Contrary to the City's assertion, it could not "utilize Iowa Code section 8A.504 and Iowa Admin. Code r. 11-40 without a court judgment." City's Brief, p. 43. Iowa Code section 8A.504(d)(3) (2017) required that the qualifying debt be "in the form of a liquidated sum due, owing, and payable to the clerk of the district court." By its

[10] The amended version also makes the requirement of a "qualifying debt" even more express: "The department shall establish and maintain a procedure to set off against each public payment any qualifying debt the obligor owes to a public agency." Iowa Code § 421.65(2) (2021). Similarly, if the department determines that a qualifying debt does not exist, it returns the funds. Iowa Code § 421.65(3)(d) (2021).

clear and express language, Iowa Code section 8A.504 requires liability for such a debt to have been rendered by a court judgment. It is not an additional "remedy" provided by the State of Iowa; it is an additional means to obtain an amount owed (the remedy) once the process has been followed to show entitlement to that amount, through a judgment. The district court's order finding otherwise must be reversed, as otherwise there will be no limit on the City's power to collect involuntary fines it has never proven are owed.

III. SEIZING TAX REFUNDS WITHOUT ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD VIOLATES PLAINTIFFS' DUE PROCESS RIGHTS

Plaintiffs agree with the City that the narrow issue before the Court is whether the use of the Offset Program violates due process. *Accord* City's Brief, p. 44. That is where the agreement ends, however. The City makes such bold claims as "[t]he undisputed facts show notice and process were present." City's Brief, p. 45. The undisputed facts show nothing of the sort. Mr. Livingood described how he had never received an NOV, and then suddenly much later received notice of the offset of his income tax refund. (App. 106-107, ¶5-10). Mr. Maury learned of the alleged violations and use of the Offset Program only when he could not figure out why he had not received his tax refund. (App. 130, ¶¶19-20). The City alleges that notices of alleged ATE citations were sent, but it cannot allege that they were undisputedly received. Indeed, it admits in discovery responses that thousands of mailed notices (more than 9000 in 2016-

2019) are returned as undeliverable and then nothing is done with them. (App. 239, 241). Plaintiffs do not need to argue that a "particular procedure . . . may seem fairer or wiser[,]" (City's Brief, p. 45 (quoting *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002)), the City does not provide any process at all to thousands, including Plaintiffs. Once Mr. Livingood learned of the use of the Offset Program, he was informed that it was too late to contest the underlying violation (or alleged municipal infraction). (App. 107, ¶10-13). This is no process at all.

The City also cites its subsequently passed Ordinance (Des Moines Municipal Code section 3-28 (2017)) to attempt to justify its compliance with Iowa Administrative Code section 11-40.4. City's Brief, pp. 46-47. The City misunderstands the import of Plaintiffs' argument, however: it was not that the City does not claim to comply with the administrative requirements, it was that it cannot do so because of the fundamental failure: it cannot prove requirements (1) through (3) of its own Ordinance. (App. 531). Specifically, the City cannot demonstrate (1) its right to the payment, (2) the right to use the offset program, or (3) the basis of the city's case, as it has failed to prove any of those things by a preponderance of clear, convincing and satisfactory evidence as required by Iowa Code section 364.22(6)(b). In trying to justify its actions, the City claims that the "analysis must begin . . . when the driver got the

NOV."[11] City's Brief, p. 48. The City then goes on to note the difference between an NOV and a municipal infraction case. *Id.* That is again entirely Plaintiffs' point. If it had been a municipal infraction process, notice would have been proven through either certified mail or personal delivery. Iowa Code § 364.22(4). The protections are in the process that is due. None of those processes, and therefore protections, occurred here.

In going over the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) factors governing due process, the City argues that the "private interests are nominal," "there is no risk of erroneous deprivation[,]" and "[t]he government interest satisfies the third prong[.]" City's Brief, pp. 48-54. With respect to the first prong, the private interest at stake, the City admits that seizure of the "entire refund . . . is a greater property interest[,]" but argues it is only temporary and required by statute. City's Brief, p. 49. None of the cases cited by the City, however, reviewed the seizure of an entire tax refund. And it is important to note that "[t]here is, however, a sliding scale of potential procedural, varying from relatively informal exchange of information to the highly structured procedural rights associated with trial." *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 778 (Iowa 2019). The balancing of the *Mathews* factors must therefore be different where an entire tax refund is seized, even temporarily, often without

[11] By that logic, the fact that Mr. Livingood never received the NOV should indicate a violation of due process, as he received no notice.

any opportunity to be heard, and then an amount never proven as owed is withheld. Where an administrative hearing might arguably suffice to meet due process requirements of a $65.00 fine that is later "voluntarily" paid, a postcard notice of the use of the Offset Program without the ability to contest the underlying violation from years prior cannot suffice.

With respect to the second factor, and the risk of erroneous deprivation (*Bowers*, 638 N.W.2d at 691), the City touts its use, along with its private for-profit vendor Gatso, of the NLETS database. City's Brief, pp. 49-50. The City also states that "[l]icense plates are checked through that database for current ownership." City's Brief, p. 50. But the City recognizes, in its recitation of the facts, as it must, that in March of 2015, Mr. Robbins "was an owner of a Chevrolet made vehicle[.]" City's Brief, p. 22. However, a postcard notice was not sent to Mr. Robbins until December of 2016, and it is not clear whether Mr. Robbins even still owned the vehicle at the time his tax refund monies were taken. City's Brief, p. 23. In addition, whatever merits of the NLETS system might exist, that does not explain why more than 9000 notices were returned over the course of several years to the City, demonstrating that they were not received. For those vehicle owners such as Mr. Livingood, they never had the initial alleged point to contest the actions. *Cf.* City's Brief, p. 50.

The City also relies on *Silvernail v. County of Kent*, 385 F.3d 601 (2004) (City's Brief, p. 50), which is distinguishable in at least three material respects.

First, the proof needed to demonstrate a violation in that case was the actual bad check, which cannot be disputed. *See Silvernail*, 385 F.3d at 605 ("[T]he proof of a bad check violation is the returned check itself."). This is not the same as a speed camera with known inaccuracies[12] and the requirement that a municipal infraction be proven by clear, convincing, and satisfactory evidence. The bad check alone is proof positive of the fact that a violation occurred in the *Silvernail* case. Second, the recipients in that instance did not actually engage in the process provided by the county in that instance (namely, calling the number provided). *Id*. at 604. They therefore did not invoke the process provided in order to be able to argue that it was deficient. Plaintiffs here attempted to invoke the process after receiving the Notice of Offset, but were told it was too late to contest the underlying infraction. (App. 107, ¶13). Third, if the individuals in the *Silvernail* case did not pay the fee, they would be criminally prosecuted, and entitled to a trial. *Id*. at 605. That is the entire point of the different sliding balance where the Offset Program is used. Plaintiffs have no such guarantee of later adequate process if they fail to pay or contest the citation in this case: their tax refunds are just involuntarily taken from them. Despite the fact that the City's Ordinance originally indicated that it will file a lawsuit against Plaintiffs if they fail to pay, this is not what the City did or does

[12] Evidence in other cases demonstrated the camera error rate of at least two percent. *Behm*, 922 N.W.2d at 553.

now. Des Moines Mun. Code § 114-243(d)(3) (2009). The *Silvernail* case therefore lacks even persuasive authority.

The City's attempt to argue that it "in the interest of citizens that not every one of these interactions [between a municipality and citizens] forces them into the cost and consequences of district court if they choose to avail themselves of informal resolution[,]" (City's Brief, pp. 51-52), is disingenuous at best. The administrative hearing process after the NOV is an informal resolution; the use of the Offset Program to seize unproven debts is a money grab. It has no relevance to safety and does not in any way benefit citizens. And contrary to the City's assertions, the U.S. District Court for the Eighth Circuit did not in any way uphold the "system in Des Moines." City's Brief, p. 52 (citing *Brooks v. City of Des Moines*, 844 F.3d 978, 979 (8th Cir. 2016)). As Plaintiffs previously argued, *Brooks* did not review the use of the Offset Program, and therefore did not speak to it at all. Appellants' Brief, p. 57. Access to the district court does not need to be *known*, it is *required* for the City to obtain its remedy. And, for Plaintiffs such as Mr. Livingood, it was never an option, as he only received the Notice of Offset, and never any NOV. (App. 107, ¶10-12).

Finally, on the third prong of balancing factors (*Mathews*, 424 U.S. at 319), the City cites its updated self-serving municipal code to demonstrate its interest, and avoid citizens being "further prosecuted or assessed any costs or

other expenses for such violation." City's Brief, p. 52. The City again is ignoring the key difference here, as earlier admitted by the City, that Plaintiffs are not here contesting the use of the ATE program. They are contesting the use of the Offset Program to seize income tax refunds to satisfy a civil penalty imposed for an unproven ATE citation. The City's discussion of ATE advancing public interest for traffic safety (City's Brief, p. 15) has no relevance to the question here. The use of the Offset Program undisputedly has nothing to do with safety, and everything to do with money.[13] The use of the Offset Program is not "law enforcement in a cost-effective manner[.]" *Cf.* City's Brief, p. 53 (citing *Behm*, 922 NW.2d at 557). *Behm* was not reviewing the use of the Offset Program, to which there is not a single reference; it was reviewing the ATE system itself. 922 N.W.2d 524. And as Plaintiffs argued, *Behm* fully supports Plaintiffs' arguments that the City cannot enforce its ATE Ordinance involuntarily without following Iowa Code section 364.22 protections. *Behm*, 922 N.W.2d at 562, 565. If the ATE program were truly about safety, only the driver would be liable and immediately so. The City would be desperate to get drivers tickets right away, so they would immediately change their behavior, not

[13] The City makes an attenuated argument that seems to be that the use of the Offset Program can also be about safety, in making the public aware, "**perhaps slowly**, that there is a real, monetary consequence for their failure to follow traffic laws." City's Brief, p. 54 (emphasis added). Taking someone's money four years after an alleged violation where they cannot even remember if they were driving on the road, let alone speeding, has nothing to do with safety.

continue it for years and then lose their tax refunds. The governmental interest in the use of the Offset Program—as opposed to the ATE program—is nonexistent, except as a revenue source. Given that the interest is finances alone, the *Bowers* balancing scale requires much more due process protections than provided. The district court's summary judgment ruling to the contrary should therefore be reversed.

CONCLUSION

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

Dated this 8th day of September, 2022.

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on September 8, 2022, 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 6,977 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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