

2015

**Timothy Bivens, Anthony Arias, and Michelle Reed, Individually  
and as Class Representatives, and John Does and Jane Does,  
Who Are Other Members of the Class, Similarly Situated,  
Plaintiffs/Appellants, v Salt Lake City, a Municipal Corporation,  
Defendant/Appellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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TIMOTHY BIVENS, ANTHONY ARIAS, and  
MICHELLE REED, individually and as class  
representatives, and JOHN DOES and JANE  
DOES, who are other members of the class,  
similarly situated,

*Plaintiffs / Appellants,*

-v-

SALT LAKE CITY, a municipal corporation,

*Defendant / Appellee.*

**APPELLANTS' REPLY BRIEF  
(Appeal from Dismissal)**

Appellate Case No. 20150249-CA

Third District Court № 140904155

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## ARGUMENT

The City seeks to foist upon Plaintiffs the burdens of anticipating and rebutting the City's affirmative defenses, and engaging the City's wholly invented process for challenging parking fees and penalties. The upshot of the City's argument, to paraphrase a former United States president, is that "When the [City] does it, it is legal."

The only issues that should be properly before this Court are whether the City's admittedly inadequate ordinance was legally enforceable against Plaintiffs, and whether the City's invented hearing and appeals processes meet constitutional muster.

I. A CITY ABSOLUTELY RECEIVES SOMETHING FOR NOTHING WHEN IT TAKES MONEY WITHOUT AUTHORITY OF LAW AND PROVIDES AN ARBITRARY AND CAPRICIOUS HEARING AND REVIEW PROCESS.

The City asserts its retention of parking fees and penalties cannot be inequitable, because it has long enjoyed authority under the Utah Municipal Code to regulate streets and parking. (Opp. 14-16). Notably, the case the City cites for this proposition, *Nasfell v. Ogden City*, stands for a contrary proposition. Indeed, the *Nasfell* Court held that cities' regulation and enforcement authority is limited, and Ogden *exceeded* that authority by establishing a rule of evidence governing parking violations. *See* 249 P.2d 507, 346 (Utah 1952).

Similarly, the City's authority to enforce regulations is limited insofar as it must do so through a process which is not arbitrary and capricious.<sup>1</sup> As Plaintiffs detail at

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<sup>1</sup> *See* Utah Code §§ 10-3-703.7(1)-(2) authorizing cities to establish administrative procedures to review and decide municipal violations, however, cities "shall provide due process for parties participating in the administrative proceeding"; *see also* *Hodgson v.*

length, the City invented a process, which was contrary to its own Code, misinformed Plaintiffs about that process, utilized unauthorized hearing officers, prohibited Plaintiffs' legal arguments, and skipped the proper venue of justice court for the more punitive venue of small claims court. Moreover, the City completely ignores the authorities relied upon by Plaintiffs holding that municipalities must follow their own procedural rules,<sup>2</sup> and that employing an unauthorized hearing officer is "the essence of arbitrary and capricious action."<sup>3</sup>

The City also discounts the import of *El Rancho Enterprises, Inc. v. Murray City Corp.* (Opp. 15). There, the court restated the principle that "[i]f a city obtain the money of another by mistake, or without authority of law, it is her duty to refund it" under equitable principles. 565 P.2d 778, 779-80 (1970). Although the *El Rancho* court merely restated the rule of unjust enrichment as applied to municipalities, that rule has gone unabrogated since at least 1901 with the substantive holding in *Auerbach v. Salt Lake County*.<sup>4</sup> More recently, in *American Tierra Corp. v. City of West Jordan*, the court cited *El Rancho* for the proposition that "an action to recover unlawful charges for city services is equitable in nature"). 840 P.2d 757, 759-60 (Utah 1992). By classifying such an action as equitable in nature, the court presupposed that such an action is cognizable.

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*Farmington City*, 2014 UT App 188, ¶ 7, 334 P.3d 484 (the process cannot be "arbitrary, capricious, or illegal").

<sup>2</sup> See *West Valley City v. Roberts*, 1999 Ut App 358, ¶ 15, 993 P.2d 252.

<sup>3</sup> *R.O.A. General, Inc. v. Utah Dept. of Transp.*, 966 P.2d 840, 842 (Utah 1998).

<sup>4</sup> See 23 Utah 103, 117-18, 63 P.907 (Utah 1901). The *Auerbach* court held that, whether or not a vendor had a valid or legal contract to provide furniture to Salt Lake County, which the county disputed, the county was nonetheless liable for the value of the furniture which it retained under an equitable theory.

Furthermore, the “true windfall” requirement merely requires that “the plaintiff must show the defendant received a benefit and the value of that benefit, not simply that the plaintiff suffered a loss.” *See Simons v. Park City RV Resort, LLC*, 2015 UT App 168, ¶ 15, 354 P.3d 215. Here, Plaintiffs allege the City benefitted, or received “something for nothing,” in that it charged and fined Plaintiffs for parking and parking violations “without authority of law.” Accordingly, Plaintiffs stated a claim for unjust enrichment. If the Court finds as a matter of law that the City enjoyed legal authority to enforce its admittedly inadequate ordinance, and if it finds the City’s impromptu review and appeals procedures met statutory and constitutional muster, only then would Plaintiffs’ unjust enrichment claim fail at this stage.

**A. The City’s Interpretation of the Underlying Ordinance is an Exercise in Statutory Reconstructive Surgery.**

To accept the City’s interpretation of the underlying parking meter ordinance, the Court must ignore the ordinance’s plain language and indulge the City’s tortured reading. The City is correct that when interpreting an ordinance, the “court’s primary goal is to give effect to the . . . intent in light of the purpose that the [ordinance] was meant to achieve.” (Opp. 16, citing *M&S Cox Investments, LLC v. Provo*, 2007 UT App 315, ¶ 30, 169 P.3d 789). However, the City ignores a key prerequisite to this rule, which was stated in the same case and paragraph the City cited. That is, resort to “other modes of construction” is only appropriate “if the plain language of the ordinance is ambiguous.” *See, i.e.*, 2007 UT App 315, ¶ 30. Crucially, the court in *Cox* resorted to statutory interpretation precisely because the terms at issue there – “average monthly income” and



“net income” – were not defined in city code. *Id.* at ¶ 5. Here, City Code is so clear and precise that even the City recognized in 2012 that a statutory overhaul was necessary to facilitate the switch to electronic pay stations.

The City urges the Court to reconstruct the ordinance so that it means whatever the City says it means. (*See* Opp. 17-25). Under the City’s mental gymnastics, a “parking meter” is no different than a “sign post.” (Opp. 20). “Close or near” is close enough to “immediately contiguous.” (Opp. 18). A meter in violation “shall so indicate by visible sign,” unless some other device prints out a “receipt tell[ing] the user when the time allotted for parking will expire.” (Opp. 3). A meter is in violation when “such sign is visible” or, as the City would have it, “[w]hen the time has expired.” (Opp. 19). One meter per parking space is the same as a parking station per city block. (Opp. 22, n. 6). Users “shall . . . immediately deposit[] in the parking meter contiguous to the space such lawful coin or coins . . . as are required” or, as translated by the City, the ordinance merely “allow[s] a user to ‘immediately deposit coins’ [or] use their Smart phone or credit card to pay for parking.” The City’s transportation engineer “shall” install parking meters in conformity with City Code, but it makes no difference if he actually does or does not. (Opp. 19, n. 4).

As the Utah Supreme Court has long recognized:

Statutory enactments are to be construed as to render all parts thereof relevant and meaningful. Likewise, we are compelled to give the statutory language meaning and to assume that each term in the statute was used advisedly . . . unless such a reading is unreasonably confused or inoperable. We will avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative.

*Labelle v. McKay Dee Hospital Center*, 2004 UT 15, ¶ 16, 89 P.3d 113 (citations omitted). Here, the City’s interpretation would render the parking regulation ordinance superfluous in its entirety. Words matter. They mean what they mean.

The City also attempts to rescue its admittedly inadequate ordinance with two seeming catchall provisions of City Code requiring observance of more restrictive provisions regulating parking found on City signs. (Opp. 23, citing City Code §§ 12.56.010 and 12.56.020). Unfortunately for this red herring argument, the City did not cite Plaintiffs with violating either of these provisions. The City seems intent to give the parking ordinance the same boundless construction that it gives to its invented administrative hearing and appeals process – that is, City Code means what it says unless the City says otherwise.

**B. The City Deprived Plaintiffs of a “Legal” Remedy for Challenging Citations, Thus Plaintiffs are Entitled to an Equitable Remedy.**

The City asserts Plaintiffs have not directly addressed its argument that Plaintiffs are not entitled to equitable relief, because they did not take advantage of the City’s procedures for challenging citations. (Opp. 27). Far from sidestepping, Plaintiffs allege ad nauseam that the city provided no such opportunity. (*See* Appellant’s Brief 14-18; 39-56). Consequently, the law did not require Plaintiffs to indulge the City’s futile and unauthorized hearing and review process. *See Salt Lake City Mission v. Salt Lake City*, 2008 UT 31, ¶ 11, 184 P.3d 599.

## II. THE CITY WHOLLY IGNORES THE RULE OF PLEADING THAT COMPLAINTS NEED NOT ANTICIPATE AFFIRMATIVE DEFENSES.

The City devotes a single paragraph to Plaintiffs' argument that a complaint need not include allegations anticipating and rebutting potential affirmative defenses. (Opp. 29). The City fails to cite a single authority for its proposition that Rule 9 imposed a burden on Plaintiffs to not only anticipate the City's voluntary payment and waiver affirmative defenses, but to have pled the exceptions to the defenses with particularity. Utah courts have squarely held that plaintiffs bear no such clairvoyant burden, and the City provides no contrary authority or analysis.<sup>5</sup>

Here, for the City's affirmative defenses of voluntary payment and waiver to be proper, Plaintiffs' Complaint "itself" would have to allege all of the necessary elements. *See Zoumadakis*, 2005 Ut App 325, ¶ 6. As Plaintiffs detailed in their Opening Brief, the allegations, read in the light most favorable to Plaintiffs, actually refute the City's affirmative defenses even though Plaintiffs bear no such burden at this stage.

## III. THE HEARINGS VIOLATED DUE PROCESS PROTECTIONS.

The City attempts to shield its deficient hearing officer and court proceedings behind its deficient Notice. It argues that because its Notice was successful in deterring challenges, and because the adjudications uniformly ignore arguments and facts that call

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<sup>5</sup> *See Zoumadakis v. Uintah Basin Medical Center*, 2005 UT App 325, ¶ 10, n. 6, 122 P.3d 891 (properly pled defamation claim need not anticipate and rebut affirmative defense of qualified privilege raised in motion to dismiss for failure to state a claim); citing *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶¶ 7, 11, 53 P.3d 947 (affirmative defense of statute of limitations proper in a motion to dismiss for failure to state a claim *if* the complaint explicitly states the date upon which the relevant events occurred to trigger the statute, *or* the motion is converted to one for summary judgment and those facts are developed.).

its system into question, no harm came of its Notice and hearings. The City attempts to put one over on this Court the way that it has the public.

Plaintiffs challenge both the hearings and the Notice.

**A. The Hearing Officer Reviews Were Constitutionally Deficient**

**1. The Hearing Officers Refused To Hear Arguments and Evidence.**

The hearing officer reviews violated Plaintiffs' due process rights. For example, Reed contested the marking of her space. Reed paid for parking. She entered what she thought was the correct space number. The hearing officer would not dismiss the fine based on the marking of the space. Reed's challenge was denied for the same reason that small claims challenges are denied: the City put its system beyond challenge.

At most, Reed's facts only require the reasonable inference that the City's intentional creation of a court that would not consider such facts or contentions, the City intended the same from its hearing officers. This is eminently reasonable, because that's what the hearing officer did with Reed. The City's hearing officers were instructed to adhere to the due process limitations imposed on small claims trials.<sup>6</sup>

Likewise, the hearing officer denied Bivens' challenge to applying fine ordinances to the pay stations. If an inference is needed, it is well supported. Plaintiffs allege throughout that the City denies any meaningful opportunity to make systemic challenges. It is reasonable to infer that the hearing officer, being so directed by the Notice, did exactly that to Bivens, just like the small claims court did thereafter.

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<sup>6</sup> Which they must, as they are required to be under the supervision and guidance of the court, per ordinance.

The City's hearing officer reviews violated due process.

## 2. The Hearing Officers Are Not Authorized To Conduct Hearings.

Plaintiffs were never even required to submit to reviews by hearing officers.

Where an administrative agency or officer has acted outside the scope of its defined, statutory authority, one need not exhaust administrative remedies. *See Salt Lake City Mission v. Salt Lake City*, 2008 UT 31, ¶ 11, 184 P.3d 599.

City ordinances clearly require that the judge or court administrator supervise and direct the hearing officers. First, City Code 2.84.030 provides "A judge of the justice court shall be appointed by the mayor . . . ." Second, "The hearing officer shall serve as staff for the justice court but shall be supervised as an employee, under the direction of the city justice court director or his/her designee." City Code 2.75.020. The mayor selects the judge. The judges and court director supervise the hearing officer; not the mayor, and certainly not the director of some other division or department. The mayor puts chooses who fills certain seats, but does not get to decide where those chairs go. The city council has taken that power away from the mayor. City ordinances are not in conflict; it's the City's actions that conflict with the ordinances' restrictions.

The City's pre-court reviews are conducted by employees not under control of the court. They therefore lack authority to hear and review challenges. The city might as well send the Plaintiffs to animal control, or the fire department, or some other agency. The court has the same control over those employees as it does over the parking hearing officers: none.

The Plaintiffs were not required to even pursue hearing officer reviews as they were constituted. The City's defenses related to such reviews are therefore moot, and those reviews were constitutionally deficient.

**B. The Court Hearing Was Constitutionally Deficient.**

1. The Court Refused to Hear Arguments and Evidence.

The City's hearing processes baldly deny the opportunity to present evidence and arguments. Bivens made an argument in court which the City declares is expressly impermissible: that pay station system fails to satisfy City ordinances governing issuance of parking tickets, and that such citations are without authority and therefore void.

Bivens' argument was not rejected on its merits; the judge specifically refused to entertain it, and proceeded to invalidate the citation on other grounds. That the small claims court adhered City's inexcusable Notice is evidence of a brazen, systematic denial of due process. To Plaintiffs' knowledge, this Court will not find any case holding that a court may deny the opportunity to present specific, relevant contentions. Nor will this Court find a case putting the validity of an ordinance beyond court challenge. The City demeans our legal system by suggesting that it may do so.

In reaching its decision, the district court apparently accepted the City's underlying premise that so long as there remains *some* basis to challenge citations, due process has been provided. Such a theory allows the small claims court to not merely decide what is relevant to a particular case, but allows the City to redefine "relevance"

itself. Facts and arguments are apparently only relevant because the City says so. So, as President Nixon once said, “If the [City] does it, it is legal.”<sup>7</sup>

The fact that the judge refused to hear Plaintiffs’ arguments in even single instance is a denial of the process due to that litigant. Yet this happened to Reed and Bivens with hearing officers, and to Bivens in court. Nor are these isolated events; they are the application of the City’s express policy of adjudication, which is a deliberate and effective scheme to sabotage our system of checks and balances.

The City’s much-repeated fact that the harm may “only” be \$15-55 per citation does not mitigate the constitutional insult one whit. However far our sliding scale of due process may permissibly bend, the City’s system moves due process off the constitutional grid. The City set up procedures to make the cost of due process so dear that no one opts to use it to defend or retain their property.

The Court should reverse the district court, and deny the City’s Motion as to Plaintiffs’ hearing due process claims.

#### **IV. THE NOTICE FAILS TO MEET EVEN THE CITY’S OWN RECITATION OF DUE PROCESS REQUIREMENTS AND VIOLATES THE UTAH CONSTITUTION.**

The City’s own recitations of controlling caselaw—both Utah and federal—show that its Notice violates Utah due process protections.

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<sup>7</sup> Television interview with David Frost, 1975. Moreover, the City’s position eliminates the opportunity for statutory interpretation. It would permit the City to write one thing in its ordinance, but decide decades after the fact that it can and must mean something else, and that no argument may be had about it. The district court erred by sanctioning these incredible changes to workings of a court of law.

**A. The City's Notice Fails the City's Own Stated Test of Due Process.**

Ironically, the City's primary formulation of due process drawn from the Utah Supreme Court negates its own position. "Notice typically satisfies due process when it is 'reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"

*Jordan River Restoration Network*, 2012 UT 84, ¶ 53, quoting *Mullane*, 339 U.S. at 314.

The City's Notice fails this test miserably. The Notice may be reasonably calculated to notify the class of *an* action; but it does not notify them of *the* action required by city law (let alone the sort of action required by the Constitution). The Notice apprised the Plaintiffs of an opportunity to present the objections *that are approved by the City*; the Notice never notified the Plaintiffs of an opportunity to present *the Plaintiffs' objections*.

As alleged by the Amended Complaint, the City's Notice was calculated to deny "them an opportunity to present their objections." The Notice is deficient, by the City's own measure, on its face.

**B. The City's Cited Due Process Cases Are Factually Inapposite.**

The City's due process cases address the incorrect and misleading information about penalties applied to municipal citations. Not one of those cases addressed a citation that deliberately misstated the time for seeking a hearing; the place at which to request it; the procedure by which to request it; or misdirected persons to unauthorized hearing officers; or declared that legal and factual arguments may not be presented and will not be heard. Certainly, no such case addressed all of these defects in concert.



It is one thing to present scant, but correct, information about the process. *See Horn v City of Chicago*, 860 F.2d 700, 705 (7th Cir. 1988) (holding only that the parking notices did not mislead or misinform the plaintiffs about penalties imposed for failure to pay). It is quite thing another to present misleading information, to present information meant to mislead, to direct people to persons not authorized by law for reviews, and to present information describing a futile process.

That is the lesson of *Herrada v. City of Detroit*, 275 F.3d 553. *Herrada* distinguished between “false and misleading statements pertaining to the right to request a hearing or to appeal an adverse decision, as opposed to those relating to penalties for refusing to act . . . .” *Id.*, at 559. The *Herrada* court explained that false information exaggerating penalties would encourage a person to either pay or take advantage of the hearing process. *See id.* By contrast, the *Herrada* court stated that persons misinformed about what hearings are available and subsequent appeals are entitled to more protection. *See id.*

In addition, the City’s position is contradicted by the Amended Complaint and by its own statements and admissions, relies on implausible readings of statutes, and grossly misstates cited caselaw. For example:

- The City argues that providing multiple ways to pay for a citation provides due process. Opp. At 42. Were this sufficient, it would obviate the need for courts altogether.

- The City’s brief says the citation provides the necessary facts and law. *Id.* Yet, the City’s own documents—which must be assumed to be true—say that its ordinances are useless to parking enforcement of pay stations.
- The City calls “a few” “inaccuracies” in the Notice “purported.” This is a naked attempt to rewrite the proceedings and the record. The City *admitted* notice errors in the prior proceedings. (R.573, admitting that on the Notice, the ten day time to challenge a citation and that penalties would continue to accrue, were incorrect).
- The City doubles down later in its Opposition, calling the Small Claims Information portion of the Notice merely an example of “poor crafting” by the City.

The City’s ‘purported inaccuracies’ and “poor crafting” arguments are deeply troubling. To the contrary: the City’s foreclosing of Plaintiffs’ opportunity to present their contentions was an example of excellent crafting. The City “crafted” these “inaccuracies” in order to protect their de facto system, and it worked.<sup>8</sup> The City’s Notice was designed to prevent Plaintiffs from choosing for themselves whether or not to contest citations by removing the grounds on which to do so. “This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for

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<sup>8</sup> Moreover, the City presents no plausible alternate meaning for its excellently crafted Notice, because there is no other plausible meaning for it. The City resorts to running from its Notice as fast as it can, because it was designed to mislead and coerce in clear terms, and did in fact mislead and coerce. This Court need not and should not entertain the City’s failure to present some alternative meaning for its “poor crafting” nor its backpedaling on the harm directly caused by it.

himself whether to appear or default, acquiesce or contest.” *Mullane* at 314. The City’s Notice sought to deprive Plaintiffs of their choice.

The Court should understand the City’s Notice due process violations in light of *Williams v. Redflex Traffic Systems*, 582 F.3d 617, 620-21 (6th Cir., 2009). The *Redflex* court rejected a system imposing a \$65 fee to challenge a \$50 ticket, calling that an irrevocably bad bargain that no one would choose to take, and which therefore does not satisfy due process requirements:

[A] notice that offers the ticketed the choice between paying a \$50 fine and having to pay \$67.50 to challenge it offers no choice at all. That the citation was inaccurate must be irrelevant: plaintiffs cannot be required to be clairvoyant and may, justifiably, rely on what their notice in fact says. . . . The fact that she did not pay at all does not change what the ticket offered her; it remained an irrevocably bad bargain. Imagine, for example, if the ticket was for \$50 but the fee was \$100,000— we would not say there that it was improper not to pay the fee to challenge the procedures.

*Id.* at 620-21.

Here, in order to present their contentions, citizens must get all the way to District Court for their third proceeding. They must pay at least twenty times the minimum fine in order to do so. The burdensome math of the City’s extra-legal scheme is an order of magnitude worse than the constitutionally defective process of *Redflex*. Bivens was subjected to the City’s unambiguous and knowingly-crafted abridgment of due process, as alleged in the Amended Complaint. Bivens’ hearing officer and small claims judge each followed the City’s commands and refused to entertain Bivens’ contentions.

The district court below was required to assume all of this to be true, which it clearly did not. The district court therefore erred, and its dismissal of Plaintiffs' due process Notice claims must be reversed.

**C. The City's Notice Violates the Utah Constitution Under Utah Caselaw.**

In *Nelson v. Jacobsen*, the notice at issue lacked *information* adequate to preparing a defense, not simply adequate time. 669 P.2d 1207 (Utah 1983). The problem with the two weeks notice provided in *Nelson* was that the notice also misled about the nature of the proceedings: a hearing vs a trial. The *Nelson* notice could have provided a year of notice, to no avail; if it did not also adequately provide notice of the procedure for obtaining a hearing, or the nature of the scope of the hearing's review, or any of the implications of simply describing it as a hearing rather than as a trial...it was inadequate. *See Nelson*, at 1213 ("In cases where the notice is ambiguous or misleading, courts have found a denial of due process.")

Here, the Notice expressly precludes consideration of certain arguments and evidence. Plaintiffs could not somehow escape the City's described and actual process by behaving differently. Plaintiffs did not have the option of going into justice court and saying that this whole mess does not comport with the requirements of city law, because the court they were directed to refuses to hear such arguments.

**V. PLAINTIFFS HAVE STANDING TO PURSUE THIS ACTION.**

**A. Named Plaintiffs Have Standing to Challenge the City's Notice**

First, the City raises a novel argument in its opposition, suggesting that only Reed received the small claims information, and that therefore only Reed has standing to

challenge that notice. Opp. n.12. Yet again, the City cannot or simply does not try to keep track of its many positions (or ordinances). The City's own brief states that Bivens received the Small Claims information. Opp. 4, citing R.39.

In addition, the City is simply trying to run away from its own words. The citation and small claims information are the very things that the City itself states, in black and white, about its de facto system. Together, this is the City's Notice. That is indisputable and undisputed. The consequence, which the City dearly wishes to avoid, is that whether people receive only part of the Notice or all of the Notice, the effect of the Notice is the same: almost no one challenges their ticket in court. The City's Notice is a nearly perfect deterrent, and that deterrent effect is no accident; it is by the City's design. If the City lies to some people in one way via citation, and lies to other people another way via small claims information, and lies to some people both ways, they are still lies. The Complaint alleges that the Notice and hearing are deficient because they deliberately depart from City ordinance. The City's own staff concluded the ordinance was deficient and told the City so on several occasions. But the City continued to provide its deficient Notice of its useless ordinances prior to defective hearings throughout the period of the proposed class action. It is a reasonable inference that this was deliberate.<sup>9</sup> It requires no inference to see that it violated due process.

The City provided citations to all named Plaintiffs. The City concedes that both Reed and Bivens received the full Notice. They have standing to challenge the City's

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<sup>9</sup> Not least given the matter's procedural status: the City has not even lodged an Answer to the Amended Complaint, nor has any discovery taken place.

Notice as a whole, as each suffered injury from the City's deliberate misrepresentations of ordinance, of their rights to challenge those ordinances, and the facts of enforcement.

**B. Plaintiffs Suffered Harm From the Hearing Process(es).**

Plaintiffs suffered harm from the hearing processes. First, they were fined \$15-55 for each citation. Second, Reed and Bivens acted on their rights, but their rights were violated. "...[T]he due process rights to which every citizen of this state is entitled[, ...]attach, as our constitution states, whenever a citizen is threatened with deprivation of 'life, liberty or property,' Utah Const. art. I, § 7, even when the deprivation occurs as a result of administrative action." *In re Worthen*, 926 P.2d 853, 876 (Utah 1996).

Third, harm occurs from the moment citations are issued without authority of law, as any enforcement of citations was illegitimate. That includes increased fines after 10 days, and counting citations toward booting of vehicles. The hearing officers assigned to those citations then act as gatekeepers of the court, in part by reiterating that particular arguments will not be heard and that Plaintiffs are in for an expensive, slow, damaging slog to arrive somewhere that might hear evidence and arguments.

Plaintiffs were bullied and coerced by the Notice and the hearing officers into paying the fines. Reed's request to waive the fine (through her friend) was denied by a hearing officer. Her request was based on the fact that she entered the wrong space number, but had paid for her parking, and had a receipt to prove it. The cause of her mistaken space number was the marking of the space. The hearing officer rejected her claim despite proof of payment. It is reasonable to infer that it was rejected because it was one of the grounds barred from hearing officer and small claims review.

The City's position requires that Plaintiffs exhaust remedies all the way to the district court, if not higher. This is absurd, as was recognized in *Williams v. Redflex Traffic Systems*, 582 F.3d 617, 620-21 (6th Cir., 2009). The *Redflex* court stated that persons cited had standing to challenge a system which required a fee for the right of presenting one's contentions that was larger than the original fine:

"The fact that she did not pay at all does not change what the ticket offered her; it remained an irrevocably bad bargain. Imagine, for example, if the ticket was for \$50 but the fee was \$100,000— we would not say there that it was improper not to pay the fee to challenge the procedures.... That William s received an improper processing fee over and above the price of the ticket itself gives her standing enough to get in the courthouse door."

*Id.* at 620-21.<sup>10</sup> And while the *Redflex* plaintiff's claims were dismissed as unripe, that does not apply here. Reed and Bivens each suffered the denial of a meaningful opportunity to present their contentions to a hearing officer, and Bivens suffered the same

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<sup>10</sup> The right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, at 314. Reed's challenge was denied by the hearing officer, and the small claims information told her that the next phase of review would be equally pointless. She was thereby deprived of her money because she was not accorded the process due to her. The same goes for Bivens. Even if not clearly alleged, it is reasonable to infer that Bivens challenged the legitimacy of his citation to the hearing officer; under the City's system, he could not have the privilege of being sued in small claims without doing so. It is also reasonable to infer that the hearing officer did the same thing as the small claims court: declined to consider Bivens' challenge.

in the small claims court. In the present case, each level of the hearing process was experienced and is ripe.<sup>11</sup>

In order to fully present their contentions, Plaintiffs must get all the way to District Court for a third proceeding. They must pay at least twenty times the minimum fine in order to do so. Plaintiffs have the same standing as did the plaintiffs in *Redflex*, and unlike that prior case, Plaintiffs' issues are ripe. The Court should reverse, and deny the City's Motion.

### **C. Plaintiffs Have Public Interest Standing**

In the alternative, the facts of this matter amply show why plaintiffs have public interest standing. The City's system was designed to prevent challenges, and no one else will make this challenge. It calls into question and the relationship of the courts to the legislature, executive, and our laws. This may be the most fundamental question about our legal system that can be asked, and it certainly one of interest to the public as a whole. Relief is available for the harms in this matter, by refunding fines taken without due process and without authority of law, and by ordering the City to cease its policies, which flout the basis of much of our legal system as a whole.

The Court should recognize that Plaintiffs have public interest standing in this matter.<sup>12</sup> Sanctioning the City's system will permit its replication in any and every system

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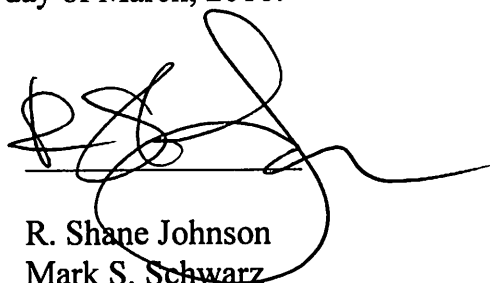
<sup>11</sup> Moreover, the City's coercive deprivation of Bivens' rights in his small claims defense caused him to abandon such challenges for subsequent citations. He had learned from experience that the City meant what it said in its Notice. Bivens did not give up his right to due process, it was taken from him altogether, as his legitimate challenge was rendered a meaningless opportunity.



of civil citation in Utah, and sister states' courts (and cities) would certainly take notice, in the worst ways possible.

If standing is denied altogether, the Court may rest assured that no one else will challenge the City's scheme, as this will be binding precedent that blesses the City's disregard for its citizens' right to due process, and creates a template for such abuses across Utah and beyond.

DATED and submitted this 14th day of March, 2016.

A handwritten signature in black ink, appearing to be "R. Shane Johnson", written over a horizontal line.

R. Shane Johnson

Mark S. Schwarz

Bruce R. Baird

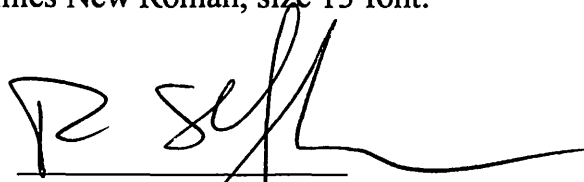
*Attorneys for Appellants/Plaintiffs*

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<sup>12</sup> It should accord public interest standing regarding the fines and the City's system of fines, even if not regarding fees charged for parking in the first place.

**CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)**

I R. Shane Johnson, on this 14<sup>th</sup> day of March, 2016, certify that this Reply Brief is submitted in compliance with rule 24(f)(1) of the Utah Rules of Appellate Procedure. The Reply Brief of Appellants contains 5,609 words pursuant to the word count of the word processing system used to prepare the brief. Also, the Reply Brief of Appellant complies with the typeface requirements of Utah Rules of Appellate Procedure 27(b) because it has been prepared using Microsoft Word, Times New Roman, size 13 font.



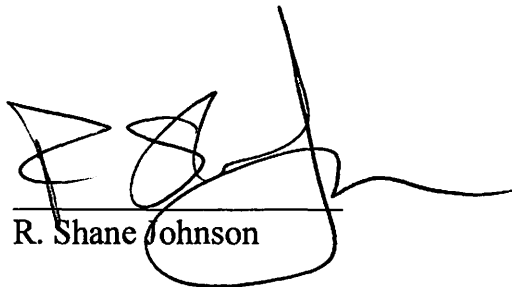
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R. Shane Johnson  
*Attorney for Appellants/Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of March, 2016, a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** was served by e-mail and U.S. Mail, and addressed to the following:

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