

No. SC94085

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IN THE  
MISSOURI SUPREME COURT

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CITY OF MOLINE ACRES, MISSOURI,

Appellant,

v.

CHARLES BRENNAN

Respondent.

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Appeal from the Circuit Court of St. Louis County, Missouri

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Brief of American Civil Liberties Union of Missouri  
in Support of Respondent as *Amicus Curiae*

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### **Authority to File**

Amicus files this brief with the consent of the parties and pursuant to Missouri Rule of Civil Procedure 84.05(f)(2).

### **Jurisdictional Statement**

Amicus adopts the jurisdictional statement as set forth in Respondent's brief filed with the Court in this case.

### **Statement of Facts**

Amicus adopts the statement of facts as set forth in Respondent's brief filed with the Court in this case.

## Interests of Amicus Curiae

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Missouri is the ACLU's affiliate in the State of Missouri, which has more than 4,500 members.

The ACLU of Missouri has a long history of protecting and promoting civil liberties in Missouri's courts, both through direct representation and participation as amicus curiae. The ACLU of Missouri has most recently filed amicus briefs with this Court in *Vowell v. Kander*, SC94285; *State v. Nathan*, 404 S.W.3d 253 (Mo. banc 2013); *E. Mo. Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755 (Mo. banc 2012); *Gurley v. Mo. Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012); *State v. McNeely*, 358 S.W.3d 65 (Mo. banc 2012), *aff'd*, 133 S. Ct. 1552 (2013); *In re Adoption of C.M.B.R.*, 332 S.W.3d 793 (Mo. banc 2011); *Smith v. Pace*, 313 S.W.3d 124 (Mo. banc 2010); *F.R. v. St. Charles Cnty. Sheriff's Dep't*, 301 S.W.3d 56 (Mo. banc 2010); *Saint Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721 (Mo. banc 2007); and *In re C.W.*, 211 S.W.3d 93 (Mo. banc 2007).

## Argument

### **I. This Court has specified the minimum procedural safeguards that are required when an individual is accused of an ordinance violation.**

Both the City of Moline Acres and the Missouri Municipal League, in support of Moline Acres, invite this Court to conduct an analysis utilizing the seven-factor test adopted by the Supreme Court of the United States in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *See* App. Br., at 54-55 (citing *City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252 (Mo. App. E.D. 2011) (in turn citing *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168)); Amicus Br. Mun. League, at 8 (same). From this analysis, they suggest that this Court conjure a conclusion as to whether Brennan was charged with a criminal or civil offense.

One of the foundational and fundamental principles of our nation is that citizens are not deprived of liberty or property by the government without notice and the opportunity to be heard, i.e., without due process. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). This case raises the question of what process is due and, thus, affords this Court an opportunity to provide municipalities guidance regarding the minimum procedural safeguards required when citizens are accused of ordinance violations. However, this Court need not undertake a full

*Mendoza-Martinez* analysis to find that the process provided by Moline Acres is inadequate.<sup>1</sup>

To begin with, this Court has already categorized ordinance violations as “quasi-criminal in nature.” *See, e.g., Strode v. Dir. of Revenue*, 724 S.W.2d 245, 247 (Mo. banc 1987). Although, where exactly on the civil-criminal continuum a particular ordinance falls may be determinative of what *federal* due process protections are required, such analysis is unnecessary here.<sup>2</sup> This is because, while

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<sup>1</sup> This Court has never before undertaken a *Mendoza-Martinez* analysis. This Court has cited to *Mendoza-Martinez* twice only in passing. *See Younge v. State Bd. of Registration for Healing Arts*, 451 S.W.2d 346, 348 (Mo. 1969) (finding *Mendoza-Martinez* not “applicable” in a case where a physician who was facing disciplinary sanctions by the State Board of Registration for the Healing Arts for performing an illegal abortion after he was criminally tried and acquitted); *In re Van Orden*, 271 S.W.3d 579, 589 (Mo. banc 2008) (noting that “[i]n the cases presently before the Court, the appellants fail to address the legislative history of the SVP act or other factors necessary to evaluate the civil or criminal nature of the statutes”).

<sup>2</sup> *Mendoza-Martinez* examined whether a federal statute was “penal or regulatory in character” to ascertain if “procedural safeguards guaranteed by the Fifth and Sixth Amendments” of the United States Constitution were required. 372

minimal due process requirements are mandated by the United States Constitution, as well as by the Missouri Constitution, Missouri also provides procedural safeguards through statutes and the rules adopted by this Court pursuant to its constitutional authority. Thus, there is no requirement that Missouri provide only the minimal due process required in a given situation, and, in many instances, the protection provided by Missouri, as well as other states, is more robust than what might be necessary not to run afoul of the Fourteenth Amendment.

This Court has promulgated just such a rule that articulates the minimum procedural safeguards required when an individual is charged with an ordinance violation. Rule 37 was promulgated pursuant to “article V, section 5 of the Missouri Constitution and supersedes all statutes, ordinances and court rules inconsistent therewith.” Rule 37.02.<sup>3</sup> Rule 37 is directly applicable to this case regardless of what a *Mendoza-Martinez* analysis might conclude. That is, even if Rule 37 provides Charles Brennan with more due process than he would be entitled

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U.S. at 166-68 (holding that a federal statute that included a sanction of stripping an individual of her citizenship for the leaving or remaining outside the country to evade military service was penal in nature and required all constitutional protections).

<sup>3</sup> All rule references are to the Missouri Supreme Court Rules (2014), unless otherwise noted.

to under the federal constitution, he is nonetheless entitled to the additional protection. Due process analysis requires that, once this Court has established the rule governing what process is due, Moline Acres must provide that process, even if the Fourteenth Amendment would not have required it in the first instance.

Pertinent to this case, Rule 37.33 requires that any citation for an ordinance violation be in writing and:

- (1) State the name and address of the court;
- (2) State the name of the prosecuting county or municipality;
- (3) State the name of the accused or, if not known, designate the accused by any name or description by which the accused can be identified with reasonable certainty;
- (4) State the date and place of the ordinance violation as definitely as can be done;
- (5) State the facts that support a finding of probable cause to believe the ordinance violation was committed and that the accused committed it;
- (6) State that the facts contained therein are true;
- (7) Be signed and on a form bearing notice that false statements made therein are punishable by law;

- (8) Cite the chapter and section of the ordinance alleged to have been violated and the chapter and section that fixes the penalty or punishment; and
- (9) State other legal penalties prescribed by law may be imposed for failure to appear and dispose of violation.

Rule 37.33(a)(1)-(9). Further, the citation (i.e., notice of violation) must “be substantially in the form of the Uniform Citation set out in Form 37.A[.]” Rule 37.33(c).<sup>4</sup>

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<sup>4</sup> In addition, if the violation was within the authority of a violation bureau—as defined by Rule 37.49—the citation must also provide the following:

- (1) The specified fine and costs for violation; and
- (2) That a person must respond to the violation notice by:
  - (A) Paying the specified fine and court costs; or
  - (B) Pleading not guilty and appearing at trial.

Rule 37.33(b). The record in this case is unclear as to whether the violation was within the authority of a violation bureau. It would be an odd result, however, were Moline Acres able to deprive Brennan of the additional protections offered to those cited for offenses within the authority of a violation bureau simply by designating what appears to be a traffic violation as not subject to the authority of a violation bureau. Moreover, Moline Acres’ website claims that “[t]he Moline Acres

This case can be decided without determining the minimum protections required by federal due process because Moline Acres has not provided the procedural safeguards that this Court has mandated under Rule 37. That is not to say, however, that, without Rule 37, no due process is required. To the contrary, “[s]imilar to [a court’s] analysis of the notice requirement established under the Missouri Supreme Court Rules, both the federal and Missouri constitutions impose the fundamental requirement of due process” applicable to ordinance violations. *Unverferth v. City of Florissant*, 419 S.W.3d 76, 103, n.8 (Mo. App. E.D. 2013). Such due process requirements “include[] providing notice reasonably calculated to apprise the parties of the pendency of the action and afford[ing] them an opportunity to present their objections ‘at a meaningful time and in a meaningful manner.’” *Id.* (quoting *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 82 (Mo. banc 2008)).

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Municipal Court and Violations Bureau was established in compliance with the rules and regulations of the Missouri Supreme Court and is a Division of the 21st Judicial Circuit Court of St. Louis County.”

<http://www.molineacres.org/Courts.aspx> (last visited July 29, 2014).

**II. The first notice in Moline Acres’ two-notice scheme does not comply with the minimum procedural safeguards set forth in Rule 37, and the second notice is not before this Court and cannot be used to cure the fatal deficiencies of the first notice.**

**A. The notice of the ordinance violation did not comply with the due process requirements of Rule 37.33.**

The notice sent to Brennan on or about August 10, 2012, was the first of two notices referred to in CITY OF MOLINE ACRES, MO., CODE § 1804.<sup>5</sup> The terms of section 1804 require a police officer to “complete a [first] Notice” within fourteen days of an alleged violation and mail notice to the vehicle’s owner. LF 23. The first notice is on a form that is “approved by the Chief of Police.” *Id.*

Moline Acres’ first notice does not comport with Rule 37. LF 19-20. Specifically, the first notice sent to Brennan fails to include at least three of Rule 37.33’s requirements. It does not include the address of the court, but instead just a post office box. Rule 37.33(a)(1). It also does not include a statement that “the facts contained therein are true;” nor is it signed and on a form bearing notice that false statements made therein [by the officer completing the form and claiming

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<sup>5</sup> A virtually identical first notice was also sent to Brennan on the same date, the only difference with this notice being a different “Payment Due” date. LF 56. This does not appear to be the second notice contemplated by the ordinance.

probable cause] are punishable by law[.]” Rule 37.33(a)(6)-(7). In contrast, Form 37.A states explicitly, before reciting the facts of the violation and signing the citation: “I, KNOWING THAT FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY LAW, STATE THAT I HAVE PROBABLE CAUSE TO BELIEVE THAT.” Moreover, assuming that, as Moline Acres advises on its website, the administration of alleged ordinance violations is under the authority of a violation bureau, the notice must also “specif[y for the recipient] court costs” or advise the accused of the right to plead not guilty and have a trial. Rule 37.33(b)(2)(B). Brennan’s first notice does neither.

Thus, the first notice of an ordinance violation issued by Moline Acres fails to provide the minimum procedural safeguards required by Rule 37 to insure due process is provided to the accused.

**B. The notice’s deficiencies are not mere administrative flaws;  
rather, they comport with the language of the ordinance.**

The deficiencies of the first notice are consistent with the terms of Moline Acres’ ordinance. The ordinance itself provides for a second notice only if the owner “fail[s] to respond to [the first] Notice ... by timely payment of [the] fine or by timely and sufficient [sworn] statement [of justification why they should be excused for exceeding the speed limit].” LF 25. That second notice, captioned a “Notice of Hearing,” includes a “court date” and, presumably, a court location. *Id.*

The ordinance, however, does not require that the second notice include the other missing elements of the procedural safeguards required by Rule 37.33, including: that statements are made under oath and false statements are punishable by law, the amount of the specified court costs, and that the accused has the option of pleading not guilty. Despite the failure to provide the required procedural safeguards, the second notice states: “If the person fails to appear as ordered, the person will be sent a summons to appear in court.” LF 25. Finally, the second notice provides that “[i]f the person fails to appear the person will be subject to prosecution for the offense of Failure to Appear.” *Id.*

That the ordinance calls for two distinct notices reveals the purpose and nature of the first notice. It is an attempt to get recipients to pay money to Moline Acres without exercising their rights, or even learning that there are procedural safeguards in place to insure that due process is provided.

The consequences of deficient notices have not been lost upon other courts. For example, in *Unverferth*, the court noted that “the omission of a court date on the Notice of Violation is critical because . . . the lack of a court date could erroneously lead the recipient to believe that he or she has no other option but to pay the fine.” 419 S.W.3d at 102; *see also, Smith v. City of St. Louis*, 409 S.W.3d 404, 418 (Mo. App. E.D. 2013). The first notice Brennan received provided no court date, nor did it provide clear instructions on how to obtain a court date. LF

19-20. A reasonable person receiving Moline Acres' notice could conclude that there is no option other than to pay.

In addition to providing a post office box rather than the address of the court, in violation of Rule 37.33's requirements, there was no contact information for the prosecutor. *Id.* A court where one might be heard, or a prosecutor to whom one could plead her innocence or seek an exercise of discretion, are fundamental elements of due process because, without them, there is no "opportunity to be heard." Indeed, from the first notice, the accused would never know that he or she has a right to be heard, much less that it is the government's burden to prove guilt. Instead of including the requirements necessary to satisfy the procedural safeguards set forth by this Court in Rule 37, a website and toll-free phone number where a payment can be made are each listed four times on the notice. *Id.*

Certainly, the first notice arguably suggests the accused may be *heard* by someone if he or she calls the payment toll-free number or logs onto the payment website, but as far as defending him or herself, that requires the accused to first pay court costs. Moreover, the only suggestion in the first notice that the accused might receive any due process, including the opportunity to be heard, is couched in terms of having to pay for it. Under a section captioned "COURT PROCEEDING" the first notice states:

If you do not wish to resolve this matter outside the municipal court system and you do not remit payment as herein requested, a summons will be issued for you to appear in Municipal Court. Please be advised that once the matter has been filed in the Municipal Court, court costs will be assessed in addition to the fine set forth herein.

LF 20; *see also Smith*, 409 S.W.3d at 418. The message to the recipient of this first notice is unambiguous: you might get some due process later, but you will have to pay for it.

Yet, even if the recipient of the first notice were able to ascertain the court's address or the prosecutor's contact information, it is not clear what good that would do him or her. Specifically, the first notice does not state whether there is even an option to plead not guilty. Although it does state that "payment is an admission of a violation of Ordinance No. 1084," LF 20, nowhere on the first notice is the phrase "not guilty" or any equivalent used. LF 19-20. Just as the notice of red-light ordinance violation in *Smith*, the failure of Moline Acres to inform the recipient "that they must respond to the violation notice by *either* paying the fine *or* pleading not guilty and appearing at trial" should be fatal. 409 S.W.3d at 417.

Perhaps the most significant deficiency in the first notice here was that Officer Phillip Quinn completed the form that was sent to Brennan without a sworn statement acknowledging that false statements are punishable by law and “the facts contained therein are true.” Rule 37.33(a)(6)-(7). Sworn statements are frequently required before there is any governmental interference with a person’s liberty, such as for a warrant application or to begin criminal proceedings. “The important feature, regardless of the form of oath, is its quickening of the conscience of the witness and the liability it creates for the penalty of perjury.” *State v. Ward*, 242 S.W.3d 698, 703 (Mo. banc 2008). Moline Acres cannot simply ignore these requirements when accusing an individual of an ordinance violation.

In contrast to the lack of oath the ordinance requires from the officer, the notice invites those with a “justification” for speeding to submit an “affidavit by mail” setting forth their “justification.” LF 20. Making a false affidavit is a crime. § 575.050, RSMo. (2000), as updated. So, too, most likely, is transmitting such a false statement by mail. *See* 18 U.S.C. § 1341 (2014). While the notice does not say so, the ordinance states that any such affidavits “shall be examined by the City Prosecuting Attorney” to determine if the statement is “insufficient.” LF 24. If the justification is deemed insufficient, another “first” notice (apparently identical to the first) is sent to the vehicle owner. Because the owner’s affidavit is made with respect to their prosecution, the government should, within the notice, inform the

accused that any given statements may be used against him or her. Mo. Const. art. 1, § 19 (“[n]o person shall be compelled to testify against himself for a criminal cause[.]”). To pass constitutional muster, the ordinance should prohibit the use of “unwarned” statements against the accused.

While the notice in *Smith* was far less deficient than the first notice at issue here, the analysis of the court of appeals is on point:

The Ordinance as currently enforced is designed to intimidate vehicle owners into paying the fine without challenging their violation, while simultaneously obscuring and undermining their right to do so. City’s Notice of Violation is deficient under Rule 37.33...  
Allowing City to continue this practice would render meaningless the purpose behind the Supreme Court rules.

409 S.W.3d at 418. The court in *Unverferth* echoed *Smith*, noting that “‘it is not lost on this Court that the notices mailed by City to vehicle owners produce the exact results desired by [the] City, i.e., payment of fines by vehicle owners without resort to legal proceedings or challenge.’” 419 S.W.3d at 102 (quoting *Smith*, 409 S.W.3d at 418). Those decisions are correct and on point. Moline Acres cannot sidestep the requirements of Rule 37 in order to trick vehicle owners into paying

money into the City's coffers without ever making those accused aware of the procedural rights they are due.

**C. This Court should reject the notion that the citation here is merely a courtesy notice that need not comport with the requirements of Rule 37.33.**

Courts have long rejected the notion that a citation can be framed as a courtesy notice that need not comply with due process. For instance, in *City of Elvins v. De Priest*, the court found that a ticket issued to the defendant by the city marshal with the notation that “[t]his notice is given to you in lieu of immediate issuance and service of warrant for arrest and *for your convenience*” nonetheless had to satisfy due process. 398 S.W.2d 22, 23, 24 (Mo. App. E.D. 1965) (emphasis added). Despite the issuance of a citation, rather than obtaining a warrant for arrest, allegedly being of some benefit to the vehicle owner, compliance with Rule 37's procedural safeguards is not excused. *Id.* at 24. Since the citation did not comply with Rule 37, further prosecution was disallowed. *Id.* The result should be the same here; even if the first notice was issued for Brennan's convenience, Moline Acres was nonetheless required to provide the procedural safeguards required by Rule 37.33.

Additionally, because the effect of the first notice—regardless of how Moline Acres frames it—is to charge the recipient with an ordinance violation, due

process as specified by this Court in Rule 37 is required. In Missouri, when an officer signs and issues a citation, the recipient has been “charged” with an ordinance violation. In *State ex rel. Westfall v. Clifford*, the court of appeals addressed “the sole issue” of whether the issuance of a citation in the form of a Uniform Citation constituted “valid charges.” 617 S.W.2d 102, 103 (Mo. App. E.D. 1981). There, an officer issued the defendant a Uniform Citation for committing two unspecified misdemeanors. *Id.* The court held that the issuance of the ticket was a charge, finding that, “[i]n the case before us, defendant was charged by use of the Uniform Traffic Ticket with two misdemeanors.” *Id.*

In *Kansas City v. May*, a police officer was using a radar unit to check traffic speeds on Interstate 435. 760 S.W.2d 534, 535 (Mo. App. W.D. 1988). The officer issued the defendant a citation for driving “69 miles per hour in a 55 miles per hour zone in violation of Kansas City, Mo., Code of General Ordinances § 34.90” in the form of a “uniform traffic ticket.” *Id.* at 535. The court expressly found that the issuance of the uniform traffic ticket by the officer “charged” the defendant with speeding. *Id.*

Like *Clifford* and *May*, Moline Acres charged Brennan with an ordinance violation when Officer Quinn signed the first notice and issued it to Brennan. It makes no difference that the citation was mailed to Brennan rather than issued in person. The result is the same: an ordinance violation charge.

It is also inconsequential to the question of whether Brennan was charged that the notice failed to comply with Rule 37.33. *See Stubbs v. Mullholland*, 67 S.W. 650, 663 (Mo. 1902) (“Nor is it material that the plaintiff was prosecuted by an insufficient process . . . for a bad indictment may serve all the purposes of malice as well as a good one, and the injury to the party is not on that account less than if the process had been regular . . . .” (quoting 2 Greenl. Ev. (14th Ed.) § 449)). Likewise, here, the “effect” on, or potential “injury” to, Brennan occurred upon receipt of the first notice and cannot be escaped by arguing that some later notice rectifies any due process deficiencies.

Additionally, the first notice completed and signed by Officer Quinn in this case appears to be a Uniform Citation, albeit a deficient one. The Uniform Citation and the document sent to Brennan are practically identical in appearance, font, and format. *See* LF 19; *cf.* Form 37.A. Furthermore, they also contain much of the same information, including the date, time, location, and nature of the offense; the name and address of the accused; the year, make, model, and license plate number of the vehicle; the details of the offense charged; and the information of the issuing officer. *See* LF 19-20; *cf.* Form 37.A. And, although the Uniform Citation contains additional information (such as the date and time for a court appearance, employer information, and car color and weight) the basic information and purpose of both

the Uniform Citation and the notice are substantially the same. *See* LF 19-20; *cf.* Form 37.A.

The recognition of a substantial similarity between the notice and a Uniform Citation is another reason to consider the first notice a charge. *See State v. Austin*, 861 S.W.2d 334, 335 (Mo. App. S.D. 1993) (stating that the court would treat a form completed by the officer as a Uniform Citation because it was “substantially similar in form and content to Supreme Court Form 37.A”).

In addition to their aesthetic similarities, the notice signed by the police officer here has the same effects as a Uniform Citation. The first notice, when signed, initiated a process by which Brennan could be found guilty of violating an ordinance and could have a penalty imposed upon him. The notice is unambiguous on this point: “[p]ayment” of the fine “is an admission of a violation of Ordinance No. 1084.” LF 20. Moreover, the notice also creates the opportunity for Brennan to be subject to other legal consequences such as perjury or failure to appear. *Id.*

Because the information contained in the notice Brennan received is essentially a Uniform Citation and a charge that he violated the ordinance, the minimum due process under Rule 37.33 was required.

**D. The failure of the first notice to advise the accused of the procedural safeguards available to protect his rights is not cured by a subsequent notice.**

In *Smith*, the court of appeals held that a red-light enforcement system violated due process because its *original* notice failed to provide proper notice and subsequent remedial notice is inadequate. As the court noted:

[T]he purpose behind a Notice of Violation is to inform the accused of the essential facts constituting the offense charged while keeping in mind the traditional rights of the accused and the orderly administration of justice. City's Notice of Violation is analogous to a petition in that both institute proceedings against a party. City is without authority to supplement its Notice of Violation with additional information provided in a subsequent Final Notice, but rather is required to provide all of the information contemplated by Rule 37.33 at the outset of the proceeding.

409 S.W.3d at 418 (internal citation omitted).

Similarly, in *Unverferth*, the court of appeals looked only at the original notice to determine whether the government violated the accused's due process

rights. 419 S.W.3d at 101. The City of Florissant established a red-light enforcement system similar to the one in *Smith* in order to prevent violations of public safety. *Id.* at 84. Like the first notice in this case, Florissant’s original citation did not provide a court date. *Id.* at 102. “If the recipient of the Notice of Violation fail[ed] to pay the fine by the due date listed on the notice, Florissant police sen[t] the alleged violator a Notice to Appear.” *Id.* at 85. This subsequent notice informed the vehicle owner of a new due date for payment and that failure to pay would require the owner to appear in court at a specified date and time. *Id.* The *Unverferth* court held that Rule 37.33(c) requires the notice to be in “substantial” compliance with the provided Uniform Citation, which contains a court date. *Id.* at 102. And a “lack of a court date could erroneously lead the recipient to believe that he or she has no other option but to pay the fine.” *Id.* Since the original citation failed to provide a court date, those charged could show that the government violated their due process rights. *Id.* at 103. The court determined this without even considering the subsequent Notice to Appear, which contained a specific court date and time. *Id.*

Here, the court of appeals correctly examined the first notice. It is upon receipt of the first notice that the individual accused of violating Moline Acres’ ordinance needs to know what due process is available to him or her. Moline Acres

should not be permitted to urge vehicle owners to give the City money and, only if the owner declines, advise the accused of procedural rights under Missouri law.

## **Conclusion**

Based on the foregoing, Amicus Curiae urge this Court to affirm the judgment of the circuit court.

Respectfully submitted,

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### **Certificate of Service and Compliance**

The undersigned hereby certifies that on July 29, 2014, the foregoing amicus brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 5,108 words (excluding the cover, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word 2007. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert