CONSTITUTIONAL LAW — DUE PROCESS CLAUSE — SIXTH CIRCUIT ENDORSES STATUTORY NOTICE OF PROCEDURES TO CHALLENGE MUNICIPAL ORDINANCE VIOLATIONS. — *Shoemaker v. City of Howell*, 795 F.3d 553 (6th Cir. 2015), *reh'g en banc denied*, No. 13-2535, 2015 U.S. App. LEXIS 16363 (6th Cir. Sept. 8, 2015).

The Fourteenth Amendment's Due Process Clause constrains the government's ability to deprive any person of "life, liberty, or property"[1] without adequate procedural safeguards, essentially "some kind of hearing"[2] coupled with "reasonably calculated" notice.[3] However, what makes notice "reasonably calculated" has long puzzled lower courts. In *Mullane v. Central Hanover Bank & Trust Co.*,[4] the Supreme Court declared that, at bottom, notice must be more than "a mere gesture."[5] Instead, efforts to notify an individual of a pending action and opportunities to challenge it must be "such as one desirous of actually informing the [individual] might reasonably adopt."[6]

Last July, in *Shoemaker v. City of Howell*,[7] the Sixth Circuit held that a municipality's failure to notify a homeowner of his ability to challenge a city-ordinance violation did not violate the Due Process Clause. The court found that repeated notices to the homeowner, which cited the relevant city ordinance and gave the phone number for City Hall, provided enough information for him to investigate his procedural remedies.[8] This reasoning distanced procedural due process law from its foundations as a protection of "the deepest notions of what is fair and right and just"[9] in favor of a model that more highly prizes bureaucratic efficiency. As a result, municipalities may find themselves empowered to impose fines with one less procedural constraint.

For over fifty years, the City of Howell, Michigan (the City) has had an ordinance (the Ordinance) requiring any "owner, lessee or occupant" of land to maintain the grassy area between the sidewalk and the curb so as to prevent the "growth of weeds, grass or other rank

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[1] U.S. CONST. amend. XIV, § 1.

[2] Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974) ("[S]ome kind of hearing is required at some time before a person is finally deprived of his property interests.").

[3] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[4] 339 U.S. 306.

[5] *Id.* at 315.

[6] *Id.*

[7] 795 F.3d 553 (6th Cir. 2015), *reh'g en banc denied*, No. 13-2535, 2015 U.S. App. LEXIS 16363 (6th Cir. Sept. 8, 2015).

[8] *Id.* at 560–61.

[9] Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

vegetation to a greater height than eight inches."[10] The Ordinance authorizes the City to notify noncompliant homeowners of their violation, and then to issue fines if the violation persists.[11]

In 2009, the City initiated a road refurbishment program that expanded the width of the grassy curb strip between the City's sidewalks and residential streets.[12] Although Shoemaker had maintained the strip abutting his property as if it were his own since purchasing his home in 2003, city workers told him the curb strip was "not . . . on his property," and that "[Shoemaker] had no say in what happened" there.[13] Consequently, Shoemaker stopped mowing the area and refused to maintain the City's improvements.[14]

In August 2010, the City received a complaint about Shoemaker's grass from a neighbor concerned about the potential for the unmanaged vegetation to attract rodents.[15] After visiting the property, a city officer left a door-hanger notice informing Shoemaker that he was in violation of the Ordinance.[16] The notice listed the phone number for City Hall but did not advise that there was any right to contest the violation.[17] Shoemaker apparently mowed the curb strip shortly thereafter.[18] But the City again found Shoemaker in violation in May 2011, and once more in August 2011.[19] This time, Shoemaker took a stand: when a city official returned to inspect the property a few days after leaving the August notice, he observed that although Shoemaker's lawn was mowed, the curb strip remained uncut.[20]

Following the August 2011 violation, Shoemaker phoned the City to object to mowing the curb strip and to request to be ticketed so he could challenge the Ordinance in court.[21] The City refused. Instead, it hired a contractor to mow the area and sent Shoemaker an invoice.[22] The City enforced the Ordinance against Shoemaker three more times,

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[10] *See* HOWELL, MICH., CODE OF ORDINANCES § 622.02 (Am. Legal Publ'g Corp. 2014).

[11] The notification must be either a "citation" or a "violation notice," *id.* § 208.02, both of which are written notices that include information about the allegations, the amount of the potential fine, the consequences of failure to comply with the fine, and instructions on how to appear either in court or at the City's Municipal Ordinance Violations Bureau to contest the allegations, *see id.* §§ 202.99, 208.02–208.08.

[12] *Shoemaker*, 795 F.3d at 556; *id.* at 569 (Clay, J., dissenting).

[13] *Id.* at 569 (Clay, J., dissenting); *see also id.* at 568–69.

[14] *Id.* at 569.

[15] *Id.* at 556–57 (majority opinion).

[16] *Id.* at 557.

[17] *See* Shoemaker v. City of Howell, 982 F. Supp. 2d 745, 750 (E.D. Mich. 2013).

[18] *Shoemaker*, 795 F.3d at 557.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 557–58.

[22] *Shoemaker*, 982 F. Supp. 2d at 751. The contractor not only mowed the disputed curb strip, but also entered Shoemaker's backyard to "indiscriminately mow the entire property," which destroyed Shoemaker's garden. *Shoemaker*, 795 F.3d at 570 n.2 (Clay, J., dissenting).

each time using the same procedure.[23] When Shoemaker refused to pay the $600 in accumulated fees and charges, the City placed a tax lien for the amount on Shoemaker's home.[24] Shoemaker cleared the lien before selling his home in 2012.[25]

Shoemaker's act of protest set off a local constitutional crisis. Shoemaker sued the City in federal court, where he alleged that the City's actions violated his Fourteenth Amendment rights of procedural and substantive due process.[26] The district court awarded Shoemaker summary judgment on both counts.[27] The court first reasoned that Shoemaker had a property interest cognizable under the Fourteenth Amendment: money.[28] Next, using the *Mathews v. Eldridge*[29] three-part test to evaluate the City's procedures used to deprive Shoemaker of that interest,[30] the district court held that the City failed to provide Shoemaker with a meaningful opportunity to be heard before an unbiased adjudicator.[31] Moreover, because the door hangers described neither "the way this deprivation [would] occur [nor] the means by which the deprivation [could] be contested," the district court held that the City failed to satisfy the notice requirements of procedural due process.[32] Finally, the court held that the Ordinance violated Shoemaker's right to substantive due process.[33]

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[23] *Shoemaker*, 982 F. Supp. 2d at 751.

[24] *Shoemaker*, 795 F.3d at 571 (Clay, J., dissenting).

[25] *Shoemaker*, 982 F. Supp. 2d at 751.

[26] *Id.* Shoemaker's initial suit included the City and its contractor as codefendants, and it additionally alleged claims against both based on violations of the Equal Protection Clause and the Fourth Amendment. Shoemaker and the City stipulated to the dismissal of these two claims, and of the contractor as a party, prior to moving for summary judgment. *Shoemaker*, 795 F.3d at 558.

[27] *Shoemaker*, 982 F. Supp. 2d at 748.

[28] *Id.* at 753.

[29] 424 U.S. 319 (1976).

[30] *Mathews* asks a court to balance (1) the private interest that will be affected by the state action; (2) the risk of erroneous deprivation of that interest through the procedures used, along with the probable value of any additional safeguards; and (3) the government's interest, including the administrative and fiscal burdens of supplying more procedure. *Id.* at 335.

[31] *Shoemaker*, 982 F. Supp. 2d at 754. The City argued that Shoemaker's phone complaint constituted a "hearing" under the Fourteenth Amendment because it allowed Shoemaker to challenge the City's determination of the height of the grass. *See id.* at 753. The district court found that this procedure was "futile," *id.*, and moreover that the City's interest in keeping administrative costs down was relatively minimal, *id.* at 754. The court held that such a haphazard process posed "a great risk of improper deprivation," *id.* at 753, which the City could mitigate "at no cost by simply issuing an alleged offender of the Ordinance a ticket," *id.* at 754. The district court ruled that the phone process was also constitutionally deficient because the same city official who cited Shoemaker for the violation also adjudicated his complaints. *Id.* at 755–56.

[32] *Id.* at 755.

[33] The district court found that the Ordinance illegitimately infringed on Shoemaker's "interest to be free from mandated private maintenance of municipal property," *id.* at 758, which was "exactly the sort of right that is 'deeply rooted in this Nation's history and traditions,'" *id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

The Sixth Circuit reversed.[34] Writing for the panel, Judge Gilman[35] held that the City provided Shoemaker with ample notice and opportunity to be heard.[36] Judge Gilman noted that Shoemaker received a total of four door hangers and three letters, each of which "informed him of the nature of the alleged violation[,] . . . the relevant section of the City Code[,] . . . the phone number of City Hall[,] [and] the City's Municipal Civil Infraction Ordinance," which would have informed Shoemaker about procedures for objecting to the allegations.[37] Judge Gilman acknowledged that although "the notices in question were not perfect"[38] — indeed, they failed to comply with the City's own mandate for what information such notices must include[39] — they were "reasonably calculated to alert Shoemaker of the charges against him and any avenues available for challenging those charges."[40] Because "[a] simple investigation of the referred-to Ordinances or a call to City Hall would have answered Shoemaker's questions," the panel found that Shoemaker's ignorance of available procedural remedies was due to his own lack of diligence.[41]

The panel also disagreed with the district court's evaluation of the City's procedures under *Mathews*.[42] Judge Gilman found that Shoemaker's property interest — $600 in fines and fees over a 16-month period — was "relatively minor."[43] The risk of erroneous deprivation was low because grass height is an "objective, readily ascertainable standard."[44] The court also determined that additional process would have added little value since Michigan law allowed for a hearing and

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[34] *Shoemaker*, 795 F.3d at 556.

[35] Judge Gilman was joined by Judge Sutton.

[36] *Shoemaker*, 795 F.3d at 558. The panel also noted that Shoemaker raised additional property claims, but it refused to address them because Shoemaker neglected to fully develop those claims at trial or on appeal. *Id.* at 567–68.

[37] *Id.* at 560.

[38] *Id.*

[39] Section 208.07(e) of the Howell Code of Ordinances mandates that any violation notice include:

> [1] the time by which the alleged violator must appear at the [Howell Municipal Ordinance Violations Bureau], [2] the methods by which an appearance may be made, [3] the address and telephone number of the Bureau, [4] the hours during which the Bureau is open, [5] the amount of the fine scheduled for the alleged violation, and [6] the consequences for failure to appear and pay the required fine within the required time.

HOWELL, MICH., CODE OF ORDINANCES § 208.07(e) (Am. Legal Publ'g Corp. 2014). The notices mailed to Shoemaker included only the last two items. *Shoemaker*, 795 F.3d at 560.

[40] *Shoemaker*, 795 F.3d at 560–61.

[41] *Id.* at 560.

[42] The majority applied *Mathews* as a four-factor test, analyzing the risk of erroneous deprivation and the probable value of additional safeguards independently. *See id.* at 559.

[43] *Id.* at 561.

[44] *Id.*

for review in the state's circuit court.[45] Lastly, Judge Gilman found that the costs of additional process would exceed the City's revenue from the fines in question.[46] The panel also dismissed Shoemaker's substantive due process claim.[47]

Judge Clay dissented. Declaring that "due process is about fairness with respect to how the government exercises its authority," Judge Clay observed that "[t]here is nothing fair about . . . the City's actions in this case."[48] The dissent first argued that the City's notices were not "meaningful" because they failed to inform Shoemaker of his right to challenge the allegations and of how to initiate that challenge.[49] Judge Clay then argued that the City's "maze of City Code provisions" provided insufficient opportunity to be heard.[50]

Judge Clay next challenged the majority's application of *Mathews*, asserting that $600 "is not a 'relatively minor' expense for the average American," that the risk of erroneous deprivation was especially great where the accused "might never have an opportunity to see the bill," and that the majority's insistence that "additional process would be a financial drain on the City" was "strained and illogical."[51] Judge Clay also argued that the City owned the curb strip, and that, consequently, its application of the Ordinance violated Shoemaker's right to substantive due process.[52]

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[45] *Id.* at 561–62. Shoemaker argued that the court should ignore these procedures because the City failed to raise this argument at trial and on appeal. *Id.* at 562. However, the Michigan Municipal League and other amici curiae noted the procedures in their brief. *Id.* Although the majority noted that the court "may not consider issues or arguments raised by amici '[t]o the extent that [those issues or arguments] exceed those properly raised by the parties,'" *id.* (alterations in original) (quoting Cellnet Commc'ns, Inc. v. FCC, 149 F.3d 429, 443 (6th Cir. 1998)), it found that "the amici simply augmented the City's position that it did not violate Shoemaker's procedural due process rights," *id.* The dissent protested that such a broad characterization of the City's position was "patently untrue." *Id.* at 573 (Clay, J., dissenting).

[46] *Id.* at 562 (majority opinion).

[47] *Id.* at 567. After finding that, under Michigan law, Shoemaker "retained both his property interest in and de facto use of the land in question," the panel found that the Ordinance did not impact any "fundamental right" by requiring that he mow the curb strip. *Id.* at 566. Judge Gilman found that the Ordinance survived rational basis review because it advanced a number of interests, including traffic safety, protection of property values, and aesthetics. *Id.* at 566–67.

[48] *Id.* at 568 (Clay, J., dissenting).

[49] *Id.* at 572.

[50] *Id.* at 574. Judge Clay also argued that these provisions only afforded Shoemaker the right to challenge the tax lien, but not the underlying ordinance violation. *Id.*

[51] *Id.* at 575. Judge Clay noted that "[c]ities have not stopped issuing parking tickets (or tickets for a host of other civil infractions) simply because *some people* actually challenge those tickets." *Id.*

[52] *Id.* at 576–77. Judge Clay found that the City extinguished Shoemaker's ownership interest in the curb strip when it "uprooted his tree, made its own improvements . . . , and told him that the City was the true owner of that land." *Id.* at 576. The City then "exploited its presumed ownership interest" by demanding that Shoemaker maintain the improved property. *Id.*

In *Shoemaker*, the majority endorsed an interpretation of the Due Process Clause that burdens individuals with the responsibility to notify themselves of procedural rights conferred by municipal law. This conclusion is difficult to reconcile with the line of Supreme Court jurisprudence extending from *Mullane*, which announced that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[53] Consequently, *Shoemaker* may empower municipalities to levy fees and fines absent meaningful notice.

In *Mullane*, the Supreme Court endorsed a simple proposition: when individualized state action resulting in a deprivation is at issue, notice is required.[54] The controversy in *Mullane* arose from a New York statute that provided for accountings of common trust funds and notices of those accountings to the funds' beneficiaries.[55] The beneficiaries of a fund objected that constructive notice of an accounting via local newspapers was inadequate.[56] The statute detailed the procedures for participation in trust-fund accounting[57] — so in addition to the notice by publication at issue, the beneficiaries of the trust could have learned of their rights via a simple investigation of the New York Code. But the Court found that even "sending them a copy of the statute months and perhaps years in advance" was not enough to fulfill due process requirements.[58] In rejecting constructive notice, the Court advised that notice must be "desirous of actually informing" the affected individual of her right to be heard.[59]

The Court further endorsed a right to actual notice in *Memphis Light, Gas & Water Division v. Craft*.[60] There, a public utility failed to notify a homeowner of its procedure for challenging billed charges, despite the homeowner's good faith efforts to obtain that information.[61] Like the City's procedures in *Shoemaker* providing for indi-

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[53] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950). *But see* City of West Covina v. Perkins, 525 U.S. 234, 240 (1999) ("When the police seize property for a criminal investigation, . . . due process does not require them to provide the owner with notice of state-law remedies."). Unlike *Shoemaker*, *West Covina* confronted a seizure as part of a criminal investigation into a homicide. *Id.* at 236–37. Accordingly, *West Covina* justified its narrow holding in part because requiring far-reaching notice was in conflict with the "established practice[s]" of state and federal criminal investigations. *Id.* at 242; *see also id.* at 242–43.

[54] *See Mullane*, 339 U.S. at 313 ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing . . . .").

[55] *Id.* at 307.

[56] *Id.* at 309–11.

[57] *Id.* at 308–09.

[58] *Id.* at 318.

[59] *Id.* at 315.

[60] 436 U.S. 1 (1978).

[61] *Id.* at 13–14.

vidual challenges to ordinance violations — which the Sixth Circuit never cited and which do not seem to be described in any publicly available document[62] — the procedures in *Memphis Light* similarly lacked a "written account . . . [that] was accessible to customers who had complaints about their bills."[63] Because of that oversight, the Court held that the Due Process Clause required actual notice of "the availability of an avenue of redress . . . to contest a particular charge."[64] Numerous circuit cases underscore the point: at a minimum, due process requires affirmative notification that procedures are available to challenge state actions incidental to the deprivation of protected interests.[65]

Despite these precedents, the majority reasoned that Shoemaker "should not be able to now use [his] inaction against the [City] in claiming a violation of due process."[66] It justified its conclusion in part on two cases where individuals had no reason to rely solely on investigating statutes to learn of their procedural remedies. In *Dubuc v. Township of Green Oak*,[67] the court held that two homeowners could not claim inadequate notice when they were the ones who "initiated [an] alleged deprivation" by requesting a zoning determination regarding their property.[68] Similarly, *Santana v. City of Tulsa*[69] denied a homeowner's due process claim in part because "[the city] informed [the homeowner] of administrative appeal procedures," but he never filed an appeal.[70] Like *Shoemaker*, both cases concerned individuals who failed to take advantage of available procedures. But unlike *Shoemaker*, neither case concerned individuals who could *only* learn of those procedures via an investigation of city and state codes. For that reasoning to apply to Shoemaker's circumstances, we would have to assume that individuals are sophisticated enough to know that the existence of an opportunity to challenge a fine is a "known unknown,"[71]

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[62] The only public reference of the City's procedures for contesting responsibility for ordinance violations is a mention of their existence in the City Code, in a section detailing the required contents for ordinance-violation notices. *See* HOWELL, MICH., CODE OF ORDINANCES § 208.06 (Am. Legal Publ'g Corp. 2014).

[63] *Memphis Light*, 436 U.S. at 14 n.14.

[64] *Id.* at 13; *see also id.* at 13–14.

[65] *See, e.g.*, Grayden v. Rhodes, 345 F.3d 1225, 1244 (11th Cir. 2003); Flatford v. City of Monroe, 17 F.3d 162, 169 (6th Cir. 1994); DiCesare v. Stuart, 12 F.3d 973, 978 (10th Cir. 1993); Aacen v. San Juan Cty. Sheriff's Dep't, 944 F.2d 691, 698 (10th Cir. 1991).

[66] *Shoemaker*, 795 F.3d at 560 (alterations in original) (quoting Dubuc v. Twp. of Green Oak, 406 F. App'x 983, 989 (6th Cir. 2011)).

[67] 406 F. App'x 983.

[68] *Id.* at 987.

[69] 359 F.3d 1241 (10th Cir. 2004).

[70] *Id.* at 1244.

[71] *See* Hillary Profita, *Known Knowns, Known Unknowns and Unknown Unknowns: A Retrospective*, CBS NEWS (Nov. 9, 2006, 12:12 PM), http://www.cbsnews.com/news/known-knowns-known-unknowns-and-unknown-unknowns-a-retrospective [http://perma.cc/97PN-V3LS] (quot-

and that courts should charge them with that knowledge. This Kafkaesque result seems an unfair concession to bureaucratic efficiency.

Further, *Shoemaker* may unfairly empower municipalities to levy small fines and fees against homeowners absent one more procedural safeguard. The Sixth Circuit asserted that, because the City Code and state statutes could have informed Shoemaker of the procedures to challenge the charges against him, he was not entitled to personal notice that the charges could be challenged at all. If the City is able to fine Shoemaker and leave him to scour municipal ordinances and state laws in search of an avenue for relief, there is little to stop cities from levying similar fines without challenge from the unwary.

One alarming example of this danger realized comes from the Department of Justice's recent investigation of the City of Ferguson, Missouri. The Department found that Ferguson used code enforcement revenue to make up for tax shortfalls,[72] and that it failed to communicate the procedures for challenging code violations in part out of further financial considerations.[73] The costs of Ferguson's practice of treating residents "less as constituents to be protected than as . . . sources of revenue" included not only the exploitation of the city's most vulnerable residents, but also the erosion of the community's trust in government.[74]

Under *Shoemaker*, homeowners accused of violating municipal ordinances will similarly face the choice of finding legal representation, scouring the state code in search of a remedy, or simply paying a fine that may have been imposed in error.[75] It's likely that far more will pay the fine instead of undertaking a costly legal fight. Consequently, revenue-hungry municipalities may easily turn to imposing additional fines in a bid to maintain services without increasing local taxes. *Shoemaker* thus opens the door to the imposition of revenue-generating deprivations absent "meaningful notice." In so doing, the court denied homeowners their due.

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ing Donald Rumsfeld's observation that "[w]e also know there are known unknowns; that is to say we know there are some things we do not know").

[72] *See* CIVIL RIGHTS DIV., U.S. DEP'T. OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [http://perma.cc/T3QH-XYNG].

[73] *See id.* at 47 (finding that, in 2011, Ferguson courts decided to stop sending warrant notices in order to "save the cost of warrant cards and postage" (quoting an email from the Court Clerk to Thomas Jackson, Chief of Police)).

[74] *Id.* at 2; *see also id.* at 2–4.

[75] *Cf.* Luedeke v. Village of New Paltz, 63 F. Supp. 2d 215, 223 (N.D.N.Y. 1999) (observing that, without predeprivation hearings before attaching a lien, "municipalities would have virtually unbridled discretion to impinge upon individuals' property interests, leaving the unwary to retain counsel, search for state statutes authorizing lawsuits, or otherwise affirmatively seek out other avenues of redress to ensure their constitutional rights").