SUMMARY
July 7, 2022

**2022COA77**

**No. 21CA0318, *Nakauchi v. Cowart* — Constitutional Law — Fourteenth Amendment — Due Process; Family Law — Child Support — Income Withholding Orders — Income Assignments for Child Support or Maintenance**

A division of the Colorado Court of Appeals concludes that, under the Fourteenth Amendment's Due Process Clause, child support obligors in direct pay cases must be afforded notice and an opportunity to be heard before a forward-looking income withholding order is issued. In doing so, the division departs from *Ortiz v. Valdez*, 971 P.2d 1076, 1078-79 (Colo. App. 1998), and concludes that a post-judgment obligor may be due additional process after the judgment is executed.

COLORADO COURT OF APPEALS **2022COA77**

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Court of Appeals No. 21CA0318
Jefferson County District Court No. 16CV30654
Honorable Diego G. Hunt, Judge

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Laurie Nakauchi,

Plaintiff-Appellant and Cross-Appellee,

v.

Wanda Cowart, in her official capacity as Director of the Community Assistance Division for Jefferson County, Colorado; Yvette Gallegos, in her official capacity as a child support specialist for Child Support Services; Larry Desbien, in his official capacity as Director of Colorado Child Support Services; Michelle Barnes, in her official capacity as Executive Director of the Colorado Department of Human Services,

Defendants-Appellees and Cross-Appellants.

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JUDGMENT AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE FOX
Freyre and Gomez, JJ., concur

Announced July 14, 2022

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Dynamic Policy Law, LLC, Matthew J. Morrissey, Arvada, Colorado, for Plaintiff-Appellant and Cross-Appellee

Kimberly Sorrells, County Attorney, Eric T. Butler, Deputy County Attorney, Golden, Colorado, for Defendants-Appellees and Cross-Appellants Wanda Cowart and Yvette Gallegos

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¶ 1 Plaintiff, Laurie Nakauchi, appeals the trial court's judgment resolving her civil rights claims against defendants — Wanda Cowart and Yvette Gallegos, employees of Jefferson County Child Support Services (the County), and Larry Desbien and Michelle Barnes, employees of the Colorado Department of Human Services (the State) — for violation of her constitutional right to due process of law.

¶ 2 The trial court agreed with Nakauchi that the County violated her constitutional rights by issuing, without notice, an Income Withholding Order (IWO) to satisfy her future child support obligations. But Nakauchi contends that the court's state-wide injunction, which requires only concurrent notice in such situations, is inadequate. Because due process requires advance notice and an opportunity to be heard, she asserts, the court did not actually remedy the constitutional infirmities of the challenged no notice policy.

¶ 3 Defendants cross-appeal, arguing that the no notice policy was constitutionally sound. Accordingly, they contend, the court's injunction is wholly unwarranted.

¶ 4 We agree with Nakauchi. Thus, we reverse the portion of the court's judgment finding that due process requires only concurrent notice under the circumstances presented, and we remand for the court to modify its injunction to mandate advanced notice and an opportunity to challenge the IWO. However, we affirm the court's judgment that the County cannot be held liable for Nakauchi's due process violation under 42 U.S.C. § 1983 (Section 1983).

## I. Background

### A. Underlying Facts and Claims

¶ 5 Nakauchi and her former husband, J.H., have one child together and divorced in 2011. A 2011 child support order established an "alternative agreement" between Nakauchi and J.H., which required Nakauchi to pay monthly child support directly to J.H. instead of through the Family Support Registry (FSR), as authorized by section 14-14-111.5(3)(a)(II)(B), C.R.S. 2021.

¶ 6 In December 2015, J.H. inaccurately told the County that Nakauchi had not made her monthly payment. In February 2016, pursuant to section 14-14-111.5, the County issued an IWO to Nakauchi's employer that (1) informed the employer that Nakauchi had missed a child support payment, and (2) directed the employer

to withhold her child support obligation from her wages each month and remit the funds to the FSR to be paid to J.H. The County did not first notify Nakauchi that it was issuing the IWO; she only became aware of it when her employer apprised her of the IWO a week later. Her employer withheld $169 from her February 2016 paycheck per the County's directive.

¶ 7 Nakauchi contacted the County and provided documents proving that she had not missed a payment. She also made a payment to the FSR for twelve months' worth of child support. The County rescinded the IWO shortly thereafter.

¶ 8 In June 2016, Nakauchi sued, under Section 1983, two County employees and two State employees — in their official capacities — involved in administering child support services. She alleged that they violated her due process rights under color of state law by failing to give her advance notice of the IWO and an opportunity to be heard. She also claimed that section 14-14-111.5 is unconstitutional on its face because it does not require notice before an income assignment is issued. She sought declaratory and injunctive relief but not damages.

¶ 9 Defendants moved to dismiss under C.R.C.P. 12(b)(5), arguing that Nakauchi's claims were moot and that she lacked standing. In June 2017, the trial court granted the motion — but not on mootness or standing grounds. Instead, relying on *Agg v. Flanagan*, 855 F.2d 336 (6th Cir. 1988), it concluded that due process was not violated because Nakauchi received notice and an opportunity to be heard before the original child support order issued in 2011. The court did not address whether section 14-14-111.5 was unconstitutional.

¶ 10 A division of this court reversed. *See Nakauchi v. Tafoya*, (Colo. App. No. 17CA1089, Apr. 12, 2018) (not published pursuant to C.A.R. 35(e)). It found that the court had erred by relying exclusively on *Agg*, since it was neither binding authority nor factually analogous. It concluded that Nakauchi's due process claim was plausible (and therefore should not be dismissed) and remanded to determine whether Nakauchi's due process rights under *Mathews v. Eldridge*, 424 U.S. 319 (1976), had been violated.

¶ 11 The court presided over a three-day trial in July 2019. The court issued a judgment ruling for Nakauchi in part and against her

in part. We pause here to discuss the relevant legal framework to provide context for the court's judgment.

### B. Legal Framework

¶ 12 Colorado's child support enforcement law establishes procedures to enforce child support orders. The statute authorizes "income assignment[s]," which are a form of garnishment used to satisfy a child support order. § 14-14-111.5(1); *see also* Dep't of Hum. Servs. Reg. 6.002, 9 Code Colo. Regs. 2504-1 ("'Income Assignment' — the process whereby a noncustodial parent's child support payments are taken directly from his/her income and forwarded to the [FSR] through a notice to the employer, trustee, or other payor of funds.").

¶ 13 Income assignments are relevant in FSR cases and direct pay cases. In an FSR case, the court activates an income assignment requiring the noncustodial parent (the obligor) to pay child support to the custodial parent (the obligee) through a third-party governmental entity known as the FSR. § 14-14-111.5(2)(a). Once the court enters this order, the obligor's employer, trustee, or other

payor of funds is notified that it must directly pay the FSR the specified amount. § 14-14-111.5(3)(a)(I)(A).[1]

¶ 14 In a direct pay case, by contrast, the court determines that the parents can independently manage child support obligations. Under this scheme, the court does not activate an income assignment because the parents have entered into an "alternative agreement" in which the obligor pays the obligee directly — i.e., without going through the FSR. *See* § 14-14-111.5(3)(a)(II)(B). So, unlike with an FSR case, in a direct pay case, the obligor's employer is not notified of the ongoing child support obligation since an income assignment has yet to be established. *Compare* § 14-14-111.5(3)(a)(I)(A), (4)(a), *with* § 14-14-111.5(3)(a)(II)(B).[2]

¶ 15 An income assignment is activated when an IWO is issued. There are two types of IWOs: forward-looking and arrears.

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[1] For conciseness, we will refer to an income assignment notice as being directed solely at the obligor's employer — as occurred here.

[2] In its due process analysis, the trial court analyzed the ways in which section 14-14-111.5, C.R.S. 2021, comports with federal authority establishing standards for state child enforcement agencies. *See generally* 42 U.S.C. §§ 654(20), 666(b)(3)(A), (b)(4)(A); 45 C.F.R. § 303.100(d) (2020). But since we conclude that this federal authority does not determine whether the defendants violated Nakauchi's due process rights, we do not examine it further.

Forward-looking IWOs seek to preemptively secure a child support payment from the obligor's employer, the goal being to avoid future missed payments. In contrast, arrears IWOs seek to recover child support payment(s) that the obligor has failed to make. This distinction matters in the context of direct pay cases because the State and the County provide different processes for obligors based on the type of IWO.

¶ 16 With respect to forward-looking IWOs, the State, in 2016, had an unofficial policy (which the County replicated) to not provide notice or an opportunity to be heard before activating the income assignment. So, if the child enforcement agency had notice that an obligor in a direct pay case had missed a payment, it would automatically issue an IWO to the obligor's employer to withhold wages so as to avoid future missed payments. As for arrears IWOs, the County (but not the State) had a policy of providing the obligor with fourteen days' notice and an opportunity to be heard before activating an IWO to collect back payments.

¶ 17 Two changes in policy later occurred in response to Nakauchi's case. In 2017, the County instituted an unofficial policy to afford direct pay obligors the same advance notice for forward-looking

IWOs as it had been providing for arrears IWOs. And in 2019, the State promulgated a regulation, Dep't of Hum. Servs. Reg. 6.902.14, 9 Code Colo. Regs. 2504-1, requiring fourteen days' notice and an opportunity to be heard before the issuance of an arrears IWO.[3]

C. Trial Court Judgment

¶ 18 At trial, Nakauchi sought (1) declaratory and injunctive relief vis-a-vis Section 1983 on the theory that defendants violated her due process rights by issuing a forward-looking IWO without providing notice or an opportunity to be heard; and (2) a declaratory judgment that section 14-14-111.5 is unconstitutional. The court concluded that section 14-14-111.5 is constitutional, and because Nakauchi does not contest that conclusion on appeal, we do not address it.

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[3] This appeal concerns only the process afforded obligors subject to forward-looking IWOs in direct pay cases. Despite Nakauchi's continual efforts to expand this case to address due process requirements for arrears IWOs, this case concerns, and has only ever concerned, forward-looking IWOs — the only type of IWO to which Nakauchi was subjected. Indeed, Nakauchi does not object to the trial court's finding that the IWO at issue did not direct her employer to withhold any child support arrears. Thus, as the trial court observed, "this litigation applies to a narrow set of circumstances" and "does not involve child support services units' efforts to collect past-due child support or arrears . . . . Instead, the claims apply to the use of forward-looking [IWOs]."

¶ 19 Regarding Nakauchi's due process claim, the court determined that the State and the County's practice of automatically issuing forward-looking IWOs for direct pay cases violates due process under the *Mathews* factors. Integral to the court's reasoning was its comparative analysis of the federal authority establishing standards for state child enforcement agencies. *See generally* 42 U.S.C. §§ 654(20), 666(b)(3)(A), (b)(4)(A); 45 C.F.R. § 303.100(d) (2020). More precisely, it assumed that those authorities require *concurrent* notice for the obligor in this situation and, therefore, that the failure to provide any notice was probative of whether due process was violated.

¶ 20 But the court found that due process does not require the State or the County to provide *pre-deprivation* notice to such an obligor before issuing the IWO. Instead, it concluded that because section 14-14-111.5 does not require any notice, and because it assumed federal authority only requires concurrent notice to such an obligor, pre-deprivation notice is "not necessarily required." Consistent with this conclusion, the court issued a statewide injunction requiring that, in a direct pay case, child enforcement

agencies must provide notice to the obligor when they activate a forward-looking IWO — but not before.

¶ 21 Although the court determined that the County deprived Nakauchi of due process, it concluded that the deprivation was not actionable under Section 1983. The court began its analysis by noting that neither state law (section 14-14-111.5) nor state regulation defines the notice requirements for this specific situation — and that the County's failure to provide any notice violates due process. Nevertheless, it reasoned that

> [the County's] practice for issuing IWOs in direct pay cases in 2016 was not a locally-instituted practice. There was no [County] policy, practice or custom that was the moving force behind the deprivation. Instead, the County Defendants were complying with the stated policies and practices of the State [to not provide notice]. Thus, the County Defendants cannot be held liable . . . under section 1983.

¶ 22 In the wake of the trial court's judgment, the State issued an "Operation Memo" notifying all local child support offices to begin providing noncustodial parents in direct pay cases with concurrent notice when issuing a forward-looking IWO.

## II. Mootness

¶ 23 As noted, in March 2017, the County began affording direct pay obligors the fourteen-day notice that Nakauchi sought in her complaint for forward-looking IWOs. Thus, in a joint motion for summary judgment, defendants argued that Nakauchi's claims had become moot while the litigation was pending. The trial court disagreed, citing the County's ability to freely retract its change in policy. On appeal, defendants contend that (1) the trial court erred in its mootness analysis and (2) the case remains moot on appeal. We disagree.

¶ 24 "Courts must confine their exercise of jurisdiction to cases that present a live case or controversy." *Davidson v. Comm. for Gail Schoettler, Inc.*, 24 P.3d 621, 623 (Colo. 2001). Hence, a court generally will not reach the merits of a case that has become moot. *See Diehl v. Weiser*, 2019 CO 70, ¶ 10; *Fullerton v. Cnty. Ct.*, 124 P.3d 866, 867 (Colo. App. 2005). "A case is moot when a judgment would have no practical legal effect on the existing controversy." *Diehl*, ¶ 10; *see also State Bd. of Chiropractic Exam'rs v. Stjernholm*, 935 P.2d 959, 970 (Colo. 1997) ("A section 1983 injunctive claim is

moot when prospective relief is unnecessary to remedy an existing controversy or prevent its recurrence.").

¶ 25 But Colorado's mootness doctrine is not without exception. As relevant here, "a defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice." *United Air Lines, Inc. v. City & Cnty. of Denver*, 973 P.2d 647, 652 (Colo. App. 1998). "This is so because there is no certainty that the defendant will not resume the challenged practice once the action is dismissed, thereby effectively defeating the court's intervention in the dispute." *Id.*

¶ 26 Defendants do not dispute that the County's March 2017 change in policy was a voluntary response to Nakauchi's due process claims. Nor do they dispute the trial court's finding that the County remains "free to change the [policy] as it deems necessary." Thus, although the County effectively granted Nakauchi the relief she sought, it came only by means of voluntary cessation. Accordingly, it would appear that, as the trial court concluded, the circumstances of this case fit squarely into the voluntary cessation exception.

¶ 27 Defendants attempt to circumvent the exception, however, by directing us to *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325-26 (5th Cir. 2009), which they claim carved out an exception to the exception for government entities. We are not persuaded that *Sossaman* negates the exception's application.

¶ 28 Like in Colorado, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). In the federal context, the party asserting mootness has the "heavy burden" of persuading the court "that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (citations omitted). In *Sossamon*, however, the Fifth Circuit announced a "lighter burden" for government entities:

> [C]ourts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity . . . government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties. Without evidence to the contrary, we assume that formally announced

> changes to official governmental policy are not mere litigation posturing. . . . We will not require some physical or logical impossibility that the challenged policy will be reenacted absent evidence that the voluntary cessation is a sham for continuing possibly unlawful conduct.

*Sossamon*, 560 F.3d at 325.

¶ 29 In our view, defendants overstate *Sossamon*'s rather narrow holding. While the Fifth Circuit encouraged "some solicitude," *id.*, by any measure, "some solicitude" is not the same as absolute deference to a government entity's profession of good faith. Indeed, even *Sossamon*'s "lighter burden" requires the government entity "to make 'absolutely clear' that the [illegal condition] cannot 'reasonably be expected to recur.'" *Id.* The defendants fail to explain how they met that burden.

¶ 30 Moreover, the court in *Sossamon* cautioned that any "presumption of good faith" applies only where a government entity has "formally announced" a change in policy. *Id.* Here, though, the trial court found — with record support — that the County's change in policy was merely "documented in email communications and meeting minutes"; it was "never set out in any formal policy document." Nor, the court observed, had the practice been "put . . .

into written policy form" at the time of trial. Thus, in our view, the County's change in policy lacked the formality that would warrant the presumption contemplated in *Sossamon*.

¶ 31 Despite claiming that the reasoning of *Sossamon* has been pervasively followed, defendants direct us to only one other case, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010), in support of their position. But the court in *Rio Grande* did not apply *Sossamon*. Instead, the court simply assessed whether, under *Laidlaw*'s traditional "heavy burden," there was a reasonable expectation that the Bureau of Reclamation (Reclamation) would revert to a challenged policy. *Id.* at 1118. Because Reclamation took "the concrete step . . . of issuing a[n] . . . opinion" that "established a new regulatory context" superseding its previous policy, the court was satisfied that Reclamation met its burden under *Laidlaw*. *Id.* As noted, similar formalities were not observed here. If anything, the County's change in policy was akin to a "mere informal promise or assurance" that the *Rio Grande* court cautioned would not meet the *Laidlaw* standard. *Id.*

¶ 32 In any event, the *Sossamon* "exception" to voluntary cessation may have persuasive authority, but it is not binding on Colorado

state courts. The mootness doctrine of *Laidlaw* and its progeny concerns the jurisdiction of federal courts to hear a case under Article III of the United States Constitution and federal statute. It is not necessarily relevant to the jurisdictional scope of Colorado's state courts. Nor has any Colorado case recognized the applicability of *Sossamon* in our own mootness jurisprudence. And we do not have occasion to do so today, having concluded that the County's change of policy does not meet the *Sossamon* exception.

¶ 33 Accordingly, we disagree with defendants that *Sossamon* compelled the trial court — and now compels us — to conclude that Nakauchi's claims are moot. In fact, the County later substantiated the trial court's doubts that it should be treated with any "solicitude." Despite arguing that they should have been afforded a presumption of good faith, defendants admit in their opening-answer brief that, after the trial court's judgment, the County reneged on its policy change. Per their admission, the County has since dispensed with the advance notice Nakauchi sought and implemented a policy of providing only concurrent notice for direct pay obligors in forward-looking IWO cases. Though defendants suggest in their reply brief that we cannot consider the

County's latest policy change because it is not a part of the record, their acknowledgement constitutes a binding judicial admission that permits us to do so. *See Kempter v. Hurd*, 713 P.2d 1274, 1279 (Colo. 1986) ("A judicial admission is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding . . . ."); *Salazar v. Am. Sterilizer Co.*, 5 P.3d 357, 365 (Colo. App. 2000) (Assuming they are unequivocal, "[j]udicial admissions are binding on the party who makes them."); *see also Purgess v. Sharrock*, 33 F.3d 134, 143-44 (2d Cir. 1994) (statement by defense counsel in a footnote in a memorandum of law was a judicial admission); *Postscript Enters. v. City of Bridgeton*, 905 F.2d 223, 227–28 (8th Cir. 1990) (statements made by party in its brief and at oral argument constituted judicial admissions).

¶ 34 Thus, in sum, the trial court correctly concluded that Nakauchi's claims were not moot at the time of trial. *See Colo. Mining Ass'n v. Urbina*, 2013 COA 155, ¶ 23 ("We review de novo the legal question of whether a case is moot."). And because the County has rescinded the very policy upon which defendants base their mootness defense, we cannot conclude that Nakauchi's case is

moot on appeal. Accordingly, we turn to the merits of the parties' appeals.

## III. Due Process

¶ 35 The question at the heart of this litigation is straightforward enough: What process, if any, is due a direct pay obligor before a forward-looking IWO is issued? The answer, unsurprisingly, is less clear. Ultimately, we agree with the trial court that defendants' no notice policy did not comport with the requirements of the Due Process Clause. However, we are persuaded by Nakauchi that the court's order of injunctive relief — requiring only concurrent notice — did not sufficiently remedy the IWO's procedural infirmities. We remand for the court to modify the injunction to require pre-deprivation notice and an opportunity to contest the IWO.

¶ 36 The Due Process Clause of the Fourteenth Amendment prohibits governmental actions that deprive "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To determine whether a person has been denied procedural due process, we employ a two-part inquiry. First, we ask whether the person was deprived of a protected interest in property or liberty. *Bd. of Regents of State Colls. v. Roth*, 408 U.S.

564, 569-70 (1972); *M.S. v. People*, 2013 CO 35, ¶¶ 9-13. If so, we then consider whether the procedural safeguards afforded the person comported with due process. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 US. 40, 59 (1999). We address each prong in turn, reviewing de novo the trial court's conclusions. *See Black v. Black*, 2020 COA 64M, ¶ 103 ("Whether a party's due process rights were violated . . . presents a question of law that we review de novo.").

A. Protected Interest

¶ 37 Defendants maintain that, contrary to the trial court's determination, Nakauchi did not have a "protected interest" in her withheld wages. Thus, they argue, the issuance of the IWO did not implicate her due process rights. We disagree.

¶ 38 Property interests are not created by the Constitution; they "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577. To have a property interest protected by the Due Process Clause, the claimant "must have more than a unilateral expectation of it. [She] must, instead, have a legitimate claim of entitlement." *Id.*

¶ 39 In *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340, 342 (1969), the Supreme Court recognized that wages are "a specialized type of property presenting distinct problems in our economic system" and concluded that a challenged "prejudgment garnishment procedure [of employee wages] violates the fundamental principles of due process." Though *Sniadach* was not explicit on the point, it has since been widely accepted that "[i]ndividuals . . . have constitutionally-protected property interests in their wages." *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 900 (6th Cir. 2019); *see also, e.g.*, *Toney v. Burris*, 829 F.2d 622, 625 (7th Cir. 1987) (upholding district court's finding "that the plaintiff had a property interest in his wages"); *Follette v. Vitanza*, 658 F. Supp. 492, 503 (N.D.N.Y. 1987) ("Plaintiffs clearly have a protectable property interest in their wages."), *order vacated in part on different grounds*, 671 F. Supp. 1362 (N.D.N.Y. 1987); *Sellers v. Iowa Power & Light Co.*, 372 F. Supp. 1169, 1174 (S.D. Iowa 1974) ("Wages are property and are protected by the due process clauses."); *Laubinger v. Laubinger*, 5 S.W.3d 166, 174 (Mo. Ct. App. 1999) ("[A]ppellant has a constitutionally protected interest in her financial assets, including wages earned."); *Hampton Nat'l Bank v. Desjardins*, 314

A.2d 654, 656 (N.H. 1974) (recognizing that wages are "protected by the [F]ourteenth [A]mendment").

¶ 40 Defendants posit, however, that where a person is subject to a court-ordered child support obligation, her wages are divested of due process protection. In other words, viewed through the lens of the post-judgment obligation, defendants assert that the obligor cannot be said to have a "legitimate claim of entitlement" to her wages, especially where wages are withheld only to satisfy future court-ordered payment obligations. But defendants cite little authority to support their position.[4] And in fact, a number of courts have suggested that the contrary is true. *See People ex rel. Sheppard v. Money*, 529 N.E.2d 542, 546-47 (Ill. 1988) (due process analysis presupposing that a child support obligor had a protected interest in his wages); *Wagner v. Duffy*, 700 F. Supp. 935, 942 (N.D. Ill. 1988) ("There can be little doubt that a citizen" — there, a child

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[4] Defendants' reliance on *Ortiz v. Valdez*, 971 P.2d 1076, 1078-79 (Colo. App. 1998), is misplaced. The court there did not consider whether a post-judgment obligor still has a "protected interest" in her wages; if anything, it appears to have presupposed that the obligor does. And while *Ortiz*, as we discuss later, indicated that due process applies differently to post-judgment obligors, it did not hold that those so situated have *no* due process protection, just *less* protection.

support obligor — "has a property interest in his or her tax refund, which is in reality withheld wages."); *Marcello v. Regan*, 574 F. Supp. 586, 598 (D.R.I. 1983) (due process required that child support obligors be afforded an opportunity to be heard before their tax refunds were seized); *Nelson v. Regan*, 560 F. Supp. 1101, 1111 (D. Conn. 1983) (same); *see also Toney v. Burris*, 650 F. Supp. 1227, 1238 (N.D. Ill. 1986) ("The modern view is that due process does apply to post-judgment remedies."), *rev'd on other grounds*, 829 F.2d 622 (7th Cir. 1987). Moreover, as here, where the obligor had already made the child support payment that was withheld from her paycheck, there is a possibility that, although there is a recurring monthly obligation, the obligation may have already been satisfied.

¶ 41 Accordingly, we conclude that Nakauchi's deprivation of her wages, brief as it was, implicated her due process rights. *See N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) (due process protection applies not only to final, permanent deprivations of property, but also temporary ones). While we reject defendants' contention, they have not entirely missed the mark. Nakauchi's status as a post-judgment obligor may not have deprived her of due

process protection, but, as discussed further below, it informs our analysis of the procedural safeguards to which she was entitled under the Fourteenth Amendment.

B. Procedural Process Required

¶ 42 The trial court likewise found that Nakauchi had a protected interest in her wages. It then turned to the more difficult question: Did defendants' no notice policy comport with due process requirements? The court determined that it did not, citing the policy's inconsistency with federal regulations. We agree, albeit for different reasons.

¶ 43 Curiously, though, while the trial court appeared to suggest that Nakauchi was entitled to an opportunity to contest the IWO before her wages were withheld, it also ruled that "pre-deprivation notice is not necessarily required," all but depriving similarly situated obligors of the opportunity to object. Instead, the court found that all the Due Process Clause requires of defendants is that they provide direct pay obligors the notice mandated by controlling federal regulations — regulations that it construed as requiring only concurrent notice. The injunctive relief granted was limited accordingly. This, we believe, was error.

### 1. Reliance on Federal Regulations

¶ 44 What process is required by federal regulation and what is required by the Fourteenth Amendment are two separate questions. And the answer to the former does not necessarily dictate the answer to the latter; the process due under the Fourteenth Amendment is determined, obviously, by the text of the Constitution, not by federal agencies exercising their regulatory authority. The trial court apparently conflated these analyses. So, the fact 45 C.F.R. § 303.100 — cited by the trial court — may not require pre-deprivation notice does not dictate what the Due Process Clause requires.[5]

### 2. Process Owed to Post-Judgment Obligors

¶ 45 The Supreme Court has held that the hallmark of due process is that a deprivation of a property interest must be "preceded by notice and opportunity for hearing appropriate to the nature of the

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[5] Because of the trial court's conclusion, defendants go to great lengths to explain why the County's "technical noncompliance with the [relevant] federal regulation" did not constitute a due process violation. As explained above, that is not the pertinent inquiry. Moreover, we express no opinion as to whether the trial court properly construed 45 C.F.R. § 303.100 as requiring only concurrent notice.

case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)). Indeed, "'the root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" *Id.* (citation omitted). This axiom is superimposed on the balancing test announced in *Mathews*, 424 U.S. at 335, the application of which determines whether an individual received sufficient process.

¶ 46 At one time, however, the Supreme Court seemed to suggest that post-judgment obligors — such as, defendants assert, Nakauchi[6] — were not entitled to any further process before execution of the judgment. *See Endicott-Johnson Corp. v.*

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[6] We assume without deciding that Nakauchi is a post-judgment obligor for purposes of our due process analysis. *See Jahn v. Regan*, 584 F. Supp. 399, 413 (E.D. Mich. 1984) ("[The plaintiff] is a post[-]judgment debtor, since a valid judgment that he owes child support has been entered against him."); *People ex. rel. Sheppard v. Money*, 529 N.E.2d 542, 549 (Ill. 1988) ("After the duty for support was established, defendant's status changed from a prejudgment debtor to a post-judgment debtor, since a valid judgment that he owed child support was entered against him."); *McNeece v. McNeece*, 39 Colo. App. 160, 162, 562 P.2d 767, 769 (1977) (finding that "a final judgment was entered, ordering defendant to pay $35 per month child support"); *see also* C.R.C.P. 58(a) ("The term 'judgment' includes an appealable decree or order.").

*Encyclopedia Press*, 266 U.S. 285, 288 (1924). A division of this court followed suit in *Ortiz v. Valdez*, 971 P.2d 1076, 1078-79 (Colo. App. 1998), concluding that, per *Endicott-Johnson*, "once judgment has been entered against a defendant, . . . no additional notice or hearing is constitutionally necessary to execute or levy upon, or garnish the judgment debtor's property."

¶ 47 Defendants argue that *Ortiz* and, by extension, *Endicott-Johnson* compel us to hold that Nakauchi was not owed any post-judgment process. But *Endicott-Johnson*'s vitality as precedent has been questioned. Even the Colorado Supreme Court has acknowledged that, notwithstanding *Endicott-Johnson*, "[i]t is not entirely clear what precisely due process requires by way of procedures for post-judgment filings." *Gedeon v. Gedeon*, 630 P.2d 579, 583 (Colo. 1981).

¶ 48 *Griffin v. Griffin*, 327 U.S. 220, 232 (1946), appears to have narrowed *Endicott-Johnson*'s holding. There, a wife was awarded alimony. Ten years later, without notice to the husband, she obtained a judgment that alimony payments were in arrears and a writ authorizing execution of that judgment. The Court held that

the failure to give notice of the later proceedings violated due process, and, therefore, that the judgment could not be enforced:

> While it is undoubtedly true that the 1926 decree, taken with the New York practice on the subject, gave petitioner notice at the time of its entry that further proceedings might be taken to docket in judgment form the obligation to pay installments accruing under the decree, we find in this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not.

*Id.* at 229. Notably, though, *Griffin* distinguished between judgments entered with adequate prior notice and hearing (as was the case in *Endicott-Johnson*) and those entered without those pre-judgment procedures (which could not be enforced). *Id.* at 233-34.

¶ 49 Despite *Griffin* not explicitly referencing *Endicott-Johnson*, many courts have since recognized that, "[v]iewed in light of *Griffin*[,] . . . *Endicott*[-*Johnson*] does not entirely foreclose consideration of whether the Due Process Clause requires post-judgment notice or other procedures." *Morrell v. Mock*, 270 F.3d 1090, 1097 (7th Cir. 2001); *see also, e.g.*, *McCahey v. L.P.*

*Invs.*, 774 F.2d 543, 547-49 (2d Cir. 1985); *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1364-65 (5th Cir. 1976). "These cases interpret *Griffin* as holding that, at least as to issues and rights that were not litigated in the underlying judgment, such as defenses to execution on particular assets" — e.g., as invoked here, mistake of fact — "*Endicott*[-*Johnson*] does not supply the answer." *Morrell*, 270 F.3d at 1097.

¶ 50 Moreover, "[a]lthough *Endicott-Johnson* has not been overruled, it was decided before the [Supreme] Court significantly revised its approach to due process rights, and since then courts have been reluctant to give *Endicott-Johnson* controlling weight." *Adkins v. Rumsfeld*, 464 F.3d 456, 471 (4th Cir. 2006); *see also, e.g.*, *Aacen v. San Juan Cnty. Sheriff's Dep't*, 944 F.2d 691, 695 (10th Cir. 1991) ("The circuit courts reviewing the constitutional sufficiency of notification and hearing procedures in post-judgment garnishment proceedings have universally employed the balancing test summarized in *Mathews*."); *Finberg v. Sullivan*, 634 F.2d 50, 56-57 (3d Cir. 1980); *Hutchinson v. Cox*, 784 F. Supp. 1339, 1343 (S.D. Ohio 1992) ("Even if *Endicott-Johnson* has not been explicitly overruled, its premises have been radically undercut by the

Supreme Court's analysis in *Mathews*."). Some courts have even suggested that the "expansive language [from *Endicott-Johnson*] is no longer the law given the more recent Supreme Court precedent in the area of property sequestrations and due process." *Dionne v. Bouley*, 757 F.2d 1344, 1351 (1st Cir. 1985); *see also Toney*, 650 F. Supp. at 1238 ("The modern view is that due process does apply to post-judgment remedies."); *Warren v. Delaney*, 469 N.Y.S.2d 975, 977 (App. Div. 1983) ("[T]he [*Endicott-Johnson*] decision appears 'to be irreconcilable with evolving concepts of due process.'") (citation omitted).

¶ 51 Accordingly, we are not persuaded that *Endicott-Johnson* or *Ortiz* compel us to conclude that direct pay obligors are not entitled to *any* process before a forward-looking IWO is issued. *See Chavez v. Chavez*, 2020 COA 70, ¶ 13 (one division is not bound by the holding of another division).

¶ 52 That is not to say, however, that a post-judgment obligor is due the same process as a pre-judgment obligor. The *Mathews* test often dictates that post-judgment obligors are entitled to fewer protections before execution than are pre-judgment debtors. *See, e.g.*, *McCahey*, 774 F.2d at 549-50 (post-judgment debtors have no

right to a pre-seizure hearing, only right to notice of seizure and prompt post-seizure hearing to assert exemptions); *Finberg*, 634 F.2d at 59-62 (post-judgment seizure must be followed by prompt notice of possible exemptions and hearing, but there is no right to pre-seizure hearing); *Jahn v. Regan*, 584 F. Supp. 399, 415-16 (E.D. Mich. 1984) (post-judgment debtor entitled to procedural safeguards after a refund interception, not before; however, a debtor against whom a judgment has not yet been entered is entitled to greater safeguards prior to the refund interception). The rationale is that

> [t]he reduction in procedural safeguards for post-judgment debtors is often appropriate because there are generally fewer defenses to the execution of a judgment than there are to the existence of an underlying debt. Thus, for post-judgment debtors, there is less likelihood that seizure would be erroneous and there is a greater risk that eligible property will be wrongfully concealed. Consequently, it is understandable that courts are often reluctant to afford post-judgment debtors with pre-seizure hearings.

*Toney*, 650 F. Supp. at 1239.

¶ 53 Nonetheless, courts have consistently held that child support obligors are entitled to *some* pre-deprivation notice and opportunity

to be heard before their financial assets are seized, at least in the context of intercepted tax refunds. *McClelland v. Massinga*, 786 F.2d 1205, 1213 (4th Cir. 1986); *Nelson*, 560 F. Supp. at 1107 ("A clear and detailed pre-deprivation notification, specifying the possible defenses and the procedures for asserting those defenses, is necessary to afford due process protection to these individuals."); *Marcello*, 574 F. Supp. at 598 (due process required a notice informing obligors of their right to an administrative hearing and judicial review and, further, advising them of the general nature of potential defenses).

¶ 54 Applying the *Mathews* test here, we hold that forward-looking IWOs must be preceded by notice and an opportunity to contest the IWO on a limited basis — for instance, that there is an error in the obligor's identity or in the amount of support due (if it is otherwise consistent with the support order).

3. *Mathews* Factors

¶ 55 The *Mathews* test requires that we weigh three factors: (1) the private interest affected by the state action; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or substitute

procedural safeguards; and (3) the government's interest, taking into account the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335. We address each factor in turn.

¶ 56 First, as to the interest at stake, wages, of course, are a vitally important and expected source of property. They "constitute a private interest of historic and continuing importance . . . since wages for most people are required for their daily needs." *Nakauchi,* No. 17CA1089, slip. op. at ¶ 42 (citation omitted). At the very least, wages are as important as tax refunds, the deprivation of which without advance notice has been found to run afoul of due process. *See McClelland*, 786 F.2d at 1213; *Nelson*, 560 F. Supp. at 1107; *Marcello*, 574 F. Supp. at 598. We are cognizant, also, that an erroneous garnishment exposes obligors to embarrassment and potential harm to their reputations when their employers are told that they failed to pay a child support obligation.

¶ 57 Second, issuing an IWO without advance notice creates an obvious risk of erroneous withholding. There is a substantial risk that a vengeful obligee who seeks to trouble an obligor spouse can activate an IWO even when payment has already been made. The

same could be true where a careless obligee merely loses track of the support payment.

¶ 58 By contrast, the probable value of pre-deprivation notice is relatively high. If, as in this case, the cause of the IWO is a mistake of fact, notice to the obligor can easily result in correction. And even where nonpayment is the actual trigger for the IWO, advance notice can have the salutary effect of incentivizing the obligor to pay the support to avoid the inconvenience or embarrassment of a wage assignment.

¶ 59 Third, we recognize, of course, that requiring pre-deprivation notice and some opportunity to be heard would impose an administrative and fiscal burden on defendants, especially where they do not currently offer any such procedures for forward-looking IWOs. Indeed, as defendants point out, the trial testimony disclosed that the imposition of additional procedures would be onerous, time-consuming, and reduce efficiency — as the trial court acknowledged in its order: "[P]roviding advance notice and an opportunity to be heard in direct pay cases where there are allegations of nonpayment creates an administrative burden on child support staff." Nonetheless, as the trial court found, "it

cannot be said that requiring defendants to provide obligors notice of initiated income assignments in direct pay cases imposes an undue burden on the defendants when such notice and procedures are required by federal laws and regulations." Nor do we believe *advance* notice would so heavily burden defendants as to outweigh obligors' significant interest in their wages and avoiding embarrassment. Defendants' recent practices are perhaps the best evidence of this: despite their objections, they have willingly provided direct pay obligors such notice for years.

¶ 60 Since 2012, the County has provided not just advance notice to obligors before issuing arrears IWOs, but fourteen days' notice and an opportunity to be heard. From 2017-2020, it freely afforded direct pay obligors the same in the context of forward-looking IWOs, only retracting its policy after the trial court's order.

¶ 61 The State, too, has more recently provided pre-deprivation notice. In response to the underlying action, the State promulgated Department of Human Services Regulation 6.902.14, 9 Code Colo. Regs. 2504-1, officially requiring fourteen days' notice for arrears IWOs. Significantly, in their notice of proposed rulemaking (NPR), the State averred that "[t]here are no expected county fiscal impacts

associated with this rule change. There will be more streamlined processes and improved parent/county partnerships that are expected to aid in long term reduction of workload and costs." Implementation of H.B. 18-1363, H.B. 18-1339, 42 Colo. Reg. 4 (Feb. 25, 2019). It also noted that the State would similarly not suffer any additional burden. In other words, the State acknowledged that providing notice before issuing IWOs, at least in the arrears context, creates no undue administrative or fiscal burden on State or county child support agencies.

¶ 62 Ultimately, the trial court rejected the notion that advance notice is necessary not because of any additional burden on defendants, but because of their substantial "interest in assuring prompt and efficient support payments." Undoubtedly, children and custodial parents have a significant interest in collecting child support payments. But even the State acknowledged, in passing Department of Human Services Regulation 6.902.14, 9 Code Colo. Regs. 2504-1, that providing advance notice to obligors outweighed any concerns about possible delays in child support, at least in the context of arrears IWOs. At trial, Elise Topliss, who authored the NPR for the regulation on behalf of the State, conceded that "taking

into account . . . the concerns of obligees . . . [the State nonetheless] came to the conclusion that notice should still be given." And, in the NPR itself, the State averred that "*[a]ll* . . . revisions will benefit the noncustodial and custodial parent." 42 Colo. Reg. at 3 (emphasis added).

¶ 63 As Nakauchi points out, this leads to the following question: What is more of a burden on child support obligees — waiting through procedural processes to receive *past* payments already overdue or *future* payments not yet due? Child support obligees would presumably take greater issue with the former. Yet the State, when issuing Department of Human Services Regulation 6.902.14, 9 Code Colo. Regs. 2504-1, concluded that a fourteen-day notice process was an acceptable burden on obligees waiting months for payment of arrears. It follows that advance notice for forward-looking IWOs, imposing less of a burden on obligees, is equally acceptable.

¶ 64 In sum, we are not persuaded that defendants' interest here forecloses the possibility of pre-deprivation notice. Rather, balancing the *Mathews* factors, we conclude that due process requires direct pay obligors to be afforded advance notice and an

opportunity to be heard *before* a forward-looking IWO is issued.[7] *See Wagner*, 700 F. Supp. at 945 ("At a minimum, a judgment debtor" — there, a child support obligor — "must have some pre-deprivation[] opportunity to respond to the threatened government action."); *Toney*, 650 F. Supp. at 1243 (same).

4. Conclusion and Remand Instructions

¶ 65 The parties have asked us to resolve two specific questions as it pertains to Nakauchi's due process claim. First, posed by defendants: Did the trial court err by concluding that the County's no notice policy did not comport with due process? In light of our above analysis, we conclude that it did not. Second, posed by

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[7] "[P]re-deprivation notice and hearing represent the norm and the state must forward important reasons to justify a departure therefrom." *Miller v. City of Chicago*, 774 F.2d 188, 191 (7th Cir. 1985). These "extraordinary situations" usually fall into one of the following categories: an immediate public danger exists, *e.g.*, *N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1980); an economic emergency, *e.g.*, *Bowles v. Willingham*, 321 U.S. 503 (1944); and where scheduling a deprivation hearing is impractical because of the random or unauthorized actions of state actors, *e.g.*, *Hudson v. Palmer*, 468 U.S. 517 (1984). To the extent defendants suggest that the need to withhold future income to satisfy a child support obligation also qualifies as such an "extraordinary situation," we disagree. Affording advance notice before withholding direct pay child support payments, due at some point in the future, does not come with a similar risk of imminent harm or irretrievable disappearance.

Nakauchi: Did the trial court's order of injunctive relief remedy defendants' constitutionally infirm procedures? Because we conclude that *some* type of pre-deprivation notice and opportunity to be heard is required, we conclude that the court's injunction was an insufficient remedy.

¶ 66 Nakauchi, however, requests that we go further. Rather than merely reviewing the trial court's judgment for legal error, Nakauchi asks for a "statewide injunction" requiring defendants to provide all direct pay child support obligors "notice and 14 days to respond" before issuing an IWO, regardless of whether the IWO is for arrears or for prospective child support payments. In support of her request, she relies primarily on Department of Human Services Regulation 6.902.14, 9 Code Colo. Regs. 2504-1, affording such process for arrears IWOs.

¶ 67 We agree, as explained above, that direct pay obligors are entitled to advance notice and a meaningful opportunity to contest limited aspects of the IWO — such as mistakes of fact — but we decline to dictate the precise timeline for that process. Several factors guide our decision:

- The pertinent state and federal regulations, which are not a model of clarity, left room for the parties' differing interpretations.
- This decision has now provided guidance on the key disputes.
- There are limited objections available to the obligor in direct pay cases.
- The state and county child support enforcement agencies that send the IWO notices, address objections thereto, and promulgate regulations implementing federal and state statutes are best situated to decide the fact-laden question of whether fourteen days — or ten, twenty, or some other number of days — is sufficient to protect the obligor's due process interests. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990) (requiring that the state provide "a fair opportunity to challenge the accuracy and legal validity" of the obligation and a "clean and certain remedy" for an erroneous or unlawful collection so that the opportunity to contest the tax obligation is "meaningful") (citation

omitted); *Deary v. Guardian Loan Co.*, 534 F. Supp. 1178, 1187 (S.D.N.Y. 1982) (assuming, but not deciding, that some prompt post-enforcement procedure would satisfy constitutional requirements but noting that the opportunity to challenge the enforcement action must not be unnecessarily delayed).

- Relatedly, the agency, not the court, is best positioned to assess its available human and other resources and allocate those to provide the process that is due to obligors.
- There is no indication here that the agencies are unwilling to afford the process that is due.

¶ 68 Thus, we will not specify a precise number of days for an obligor to object on the limited grounds allowed. Nor do we believe it is necessary to order, as Nakauchi requests, the trial court to engage in a year of compliance monitoring. Instead, we remand the case to the trial court with instructions to modify the injunction to

require pre-deprivation notice and an opportunity to contest the forward-looking IWO before one is issued in a direct pay case.[8]

## IV. Section 1983 Liability

¶ 69 Next, Nakauchi contends that the trial court erred by finding that the County defendants cannot be held liable for its due process violation under Section 1983. We disagree.

¶ 70 A political subdivision of a state may be liable under Section 1983 for any "policy or custom" that causes a "deprivation of rights protected by the Constitution." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978); *see also Brandon v. Holt*, 469 U.S. 464, 470-71 (1985) (treating official capacity suits as a suit against the government entity, not the individual defendant). Courts have diverged, however, as to the appropriate legal standard for evaluating the existence of a "policy" for purposes of a *Monell* claim. The prevailing view, and the one advanced by Nakauchi, is articulated in *Vives v. City of New York*, 524 F.3d 346, 353-54 (2d Cir. 2008).

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[8] As the defendants explained during trial, direct pay cases are the exception rather than the rule. This opinion does not affect, and is not intended to affect, FSR cases.

¶ 71 In *Vives*, the Second Circuit established a two-part test: courts are to consider whether (1) the municipal government had a "meaningful choice" in whether and how to enforce the relevant state law and (2) if so, whether the entity "adopted a discrete policy to enforce" the relevant law "that represented a conscious choice by a municipal policymaker." *Id.* at 353. Whether Nakauchi established a *Monell* claim presents a mixed question of law and fact. *See Juzumas v. Nassau Cnty.*, 33 F.4th 681, 686 n.6 (2d Cir. 2022) (applying *Vives* and reviewing the district court's legal conclusions de novo); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 145 (1988) (Brennan, J., concurring in the judgment) (observing that "the realities of municipal decisionmaking" require any inquiry into municipal liability to consider the municipality's actual practices). We review the trial court's legal conclusions de novo, *BKP, Inc. v. Killmer, Lane & Newman, LLP*, 2021 COA 144, ¶ 65, and its factual findings for clear error, *Lawry v. Palm*, 192 P.3d 550, 558 (Colo. App. 2008).

¶ 72 As to the question of "meaningful choice," we are aware of no state statute that obligated the County defendants not to provide direct pay obligors any notice when issuing a forward-looking IWO.

Indeed, the trial court found that the relevant statute here, section 14-14-111.5, did not so require — a finding that is not challenged by either party on appeal. Nor did the governing child support enforcement regulations dictate that counties must not provide notice. *See* Dep't of Hum. Servs. Reg. 6, 9 Code Colo. Regs. 2504-1. If anything, it would appear that the County defendants had some discretion in determining whether, and what, notice to provide, as evidenced by the changes to its notice requirements that departed from State policy. Thus, it seems the County defendants at least had the capacity to make a "meaningful choice" here. *See Vives*, 524 F.3d at 355 ("[T]he central question" in a meaningful choice analysis is whether the state "mandated" the entity to act.).

¶ 73 Still, that the County defendants were not acting pursuant to any specific mandate is not dispositive to our inquiry. *See id.* at 353 ("[I]f a municipality decides to enforce a statute that it is authorized, but not required, to enforce, it *may* have created a municipal policy pending other considerations.") (emphasis added).[9]

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[9] Nakauchi directs us to this same quotation from *Vives v. City of New York*, 524 F.3d 346, 353 (2d Cir. 2008), emphasizing the court's use of the word "authorized." She suggests that the

Where we cannot agree with Nakauchi is on the question of "conscious choice." Problematic to her claim is that the record is unclear as to the origins of how or why, or at whose direction, the County's no notice policy came to be implemented. We know that the State had adopted the same no notice policy, but did the County defendants make a specific decision, choosing between various alternatives, to enact the no notice policy? Or did they implement a general policy of following state direction? The former would be indicative of a "conscious choice," but the latter would likely be insufficient to establish a *Monell* claim. *See Vives*, 524 F.3d at 350 ("[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives." (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985)); *Vaher v. Town of Orangetown*, 133 F. Supp. 3d 574, 606 (S.D.N.Y. 2015) ("For

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threshold question of the *Vives* test is thus whether a municipality has been authorized to act. She again points out that section 14-14-111.5 did not authorize the County to implement its no notice policy. But just because the County was not statutorily required to do so does not mean it was not authorized to. The County has some discretion to locally implement policies to enforce child support obligations. *See* Dep't of Hum. Servs. Reg. 6.101.21, 9 Code Colo. Regs. 2504-1. Thus, contrary to Nakauchi's contention, simply because the statute did not specifically require a no notice policy does not alone render the County liable under Section 1983.

*Vives* to apply as a limit on a municipality's liability under *Monell*, the threshold question is, does the municipality merely carry out a state law?") (citation omitted).

¶ 74 The trial court's factual findings add another wrinkle to our analysis. The court found that "[the County defendants'] practice for issuing IWOs in direct pay cases in 2016 was not a locally-instituted practice," that the County defendants were "not the moving force behind the deprivation," and that they were just "complying with the state policies and practices of the State." In other words, the court found that the County defendants were merely carrying out state policy. While the record is far from clear as to the origins of the County's policy, it is not entirely inconsistent with the court's findings. The record supports — and Nakauchi concedes — that it was the State's policy not to provide notice to direct pay obligors in 2016. The record also confirms that the County defendants abided by the same policy, and that doing so formed the basis of the underlying action. Moreover, several witnesses at trial indicated that, while counties may have the discretion to include additional procedural safeguards for direct pay obligors, the baseline to which they adhere is the State's policy.

And the fact that County decisionmakers *can* implement a policy does not mean that they had done so at the time of Nakauchi's IWO.

¶ 75 Thus, although conflicting evidence was presented on the matter, we must accept the trial court's findings. *See Lawry*, 192 P.3d at 558 ("We defer to the court's credibility determinations and will disturb its findings of fact only if they are clearly erroneous and not supported by the record. When the evidence is conflicting, a reviewing court may not substitute its conclusions for those of the trial court merely because there may be credible evidence supporting a different result.") (citation omitted).

¶ 76 Accordingly, and in light of the gaps in of the record before us, we will not overturn the trial court's ruling that the County defendants cannot be held liable under Section 1983. *See Vives*, 524 F.3d at 353 (a "mere municipal directive" to enforce state policy does not amount to a "conscious choice" for *Monell* purposes); *Vaher*, 133 F. Supp. 3d at 606 ("For *Vives* to apply as a limit on a municipality's liability under *Monell*, the threshold question is, does the municipality merely carry out a state law?") (citation omitted); *see also Whitesel v. Sengenberger*, 222 F.3d 861, 872 (10th Cir.

2000) ("emphasiz[ing] that the [municipal entity] cannot be liable for merely implementing a policy created by the state [entity]").

## V. Attorney's Fees

¶ 77 Following trial, Nakauchi moved for attorney fees and costs, invoking 42 U.S.C. § 1988. The court stayed the motion pending this appeal. In her opening brief, she appears to renew her request, but she fails to specify whether her request is limited to appellate fees. Defendants contend that, accordingly, and in light of the motion pending before the trial court, we should deny her request, as it is not properly before us. We agree and remand the issue of attorney fees and costs — incurred both at trial and on appeal — for the trial court's consideration. *See* C.A.R. 39.1 ("In its discretion, the appellate court may determine entitlement to and the amount of an award of attorney fees for the appeal, or may remand those determinations to the lower court or tribunal.").

## VI. Conclusion

¶ 78 The judgment is affirmed in part and reversed in part. We affirm the trial court's ruling that Nakauchi's due process rights were violated. We also affirm its ruling that the County defendants cannot be held liable under Section 1983. However, we reverse the

portion of the judgment determining that due process requires affording direct pay obligors only concurrent notice.

¶ 79 The case is remanded for the trial court to (1) modify its injunction to mandate pre-deprivation notice and an opportunity to contest the IWO, albeit on narrow grounds and consistent with this opinion; and (2) rule on Nakauchi's request for attorney fees and costs.

JUDGE FREYRE and JUDGE GOMEZ concur.