IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-1530

STATE OF IOWA,
Plaintiff- Appellant,
vs.

COLBY DAVIS LAUB,
Defendant-Appellee.

ON DISCRETIONARY REVIEW FROM THE IOWA DISTRICT COURT FOR BOONE COUNTY THE HONORABLE STEPHEN A. OWEN, JUDGE.

APPELLEE'S FINAL BRIEF

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CERTIFICATE OF FILING

I, Matthew T. Lindholm, hereby certify that I filed the attached Brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on March 30, 2023, by filing it with the Court's electronic document management system.

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CERTIFICATE OF SERVICE

I, Matthew T. Lindholm, hereby certify that on March 30, 2023, I served a copy of the attached brief on all other parties to this appeal by filing it with the Court's electronic document management system.

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CERTIFICATE OF SERVICE UPON THE DEFENDANT

I, Matthew T. Lindholm, hereby certify that on March 30, 2023, I served a copy of Appellee's Proof Brief, Designation of Appendix upon the Appellee via electronic mail pursuant to his previously provided written authorization to receive documents and/or court notifications via electronic mail.

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ROUTING STATEMENT

This appeal contains issues of first impression, including whether the Equal Protection and Due Process clauses of the U.S. and Iowa Constitution prohibit the selective application of the implied consent statutes; these issues and should be retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(a) and (c). The Iowa Supreme Court should also retain this case because it is an issue of profound public importance because the State seeks to seriously implicate expected rights and protections of the motoring public. Iowa R. App. P. 6.1101(2)(d). Finally, retention by the Iowa Supreme Court is appropriate because there is a conflict between published opinions. *Compare State v. Frescoln*, 911 N.W.2d 450 (Iowa App. 2017) ("we find the State's ability to obtain chemical testing is not limited to the provisions of Chapter 321J…) *with State v. Rains*, 574 N.W.2d 904, 913 (Iowa 1998)(holding that "a person cannot be required to submit a blood, urine, or breath specimen via a warrant except in strictly circumscribed situation such as under section 321J.10") *overruled on other grounds* by *State v. Williams*, 895 N.W.2d 856 (Iowa 2017). Iowa R. App. P. 6.1101(2)(b).

STATEMENT OF THE CASE

Nature of the Case

The Defendant-Appellee accepts the State's account of the nature of the case as essentially correct.

Course of Proceedings

The Defendant-Appellee accepts the State's account of the course of proceedings as essentially correct.

Facts

The Defendant-Appellee accepts the State's account of the relevant facts as setting forth the framework for deciding the issues in this matter. Any other necessary facts will be set forth in the arguments below.

ARGUMENT

I. The Legislature Intended to Preclude Discretionary Application of Chapter 321J When Law Enforcement Seeks to Withdraw Body Specimens from Suspected Impaired Drivers to Conduct Chemical Testing.

Preservation of Error

The Defendant-Appellee agrees that error was preserved on this issue for the reasons expressed by the State-Appellant.

Standard of Review

The district court's interpretation of the application of a statute is reviewed for correction of errors at law. *State v. Romer*, 832 N.W.2d 169, 174 (Iowa 2013).

Merits

To quote Justice Waterman, "[o]urs not to reason why, ours but to read, and apply." *Anderson v. State*, 801 N.W.2d 1, 1 (Iowa 2011) (quoting *Holland*, 253 Iowa at 1011). Constitutional guarantees are but a minimum slate of protections; the Legislature remains free to provide greater protections by way of individual statutory rights. *McQuistion v. City of Clinton*, 872 N.W.2d 817, 835 (Iowa, 2015). "The arm of the court … only protects the constitutional floor of the rights of people and ensures government provides nothing less. It is up to the other branches of government to provide more." *Id.* When the Legislature so acts, the role of the court is not to question the wisdom or policy of those protections but rather to interpret those laws and ensure that they, at a minimum, conform to the minimal requirements of the constitution. *Id.* It is the court's duty to accept the law as the legislative body enacts it. *Holland v. State*, 253 Iowa 1006, 1011, 115 N.W.2d 161, 164 (1962).

Our legislature creatively and carefully enacted Iowa Code Chapter 321J in an effort to balance the goals of the State and the interests of the public. In doing so, they provided certain rights and protections to motorists above the "constitutional floor" including how and when a person can be subjected to chemical testing. The

State is now seeking to upset that balance but has not engaged in any legislative analysis. As set forth below, a thorough statutory analysis makes clears the legislature did not intend to provide the authority the State now seeks.

A. An Overview of Implied Consent.

Operating while intoxicated has been a crime in Iowa since 1911. *State v. Fischer*, 785 N.W.2d 697, 699 (Iowa 2010), (citing 1911 Iowa Acts ch. 72, § 24 (codified at Iowa Code § 1571-m23 (Supp. 1913)). "Since that time, the operating-while-intoxicated laws have evolved in a number of ways, including the adoption of the implied-consent procedure…" *Id*., (citing Rachel Hjelmaas, *Legislative Services Agency, Legislative Guide to Operating While Intoxicated (OWI) Law in Iowa 1 (2007), available at* https://www.legis.iowa.gov/DOCS/Central/Guides/OWI.pdf).

Implied consent statutes were designed to encourage cooperation with chemical testing and are supported by the "the basic principle that a driver impliedly agrees to submit to a test in return for the privilege of using the public highways." *State v. Hitchens*, 294 N.W.2d 686, 687 (Iowa 1980) (citing *State v. Jensen*, 216 N.W.2d 369, 373 (Iowa 1974)). This agreement has been classified as an "implied contract" between the state and an impaired driver. *Jensen*, 216 N.W.2d at 373. However, because there are competing interests between the State and the public the legislature carefully enacted limitations:

> "Iowa's implied consent law is the product of competing concerns. On one hand, the legislature wanted to provide an effective mechanism to identify intoxicated drivers and remove them from the highways. On the other hand, the legislature was aware of implied consent procedures invade a cherished privacy interest in the public. Therefore, chapter 321J contains limitations on the power of the State to invoke these procedures."

State v. Palmer, 554 N.W.2d 859, 862 (Iowa 1996). These statutory limitations serve three purposes: "(1) to protect the health of the person submitting to the test; (2) to guarantee the accuracy of the test; and (3) to protect citizens from indiscriminate testing or harassment." *Id.* at 861 (citing *State v. Satern*, 516 N.W.2d 839, 841 (Iowa 1994)).

One important limitation imposed by the legislature prevents the State from compelling a motorist to provide a body specimen for chemical testing by creating the right to refuse a peace officer's request to submit a body specimen for chemical testing. *See* Iowa Code § 321J.6(2) ("refusal to submit to a chemical test of urine or breath is deemed a refusal to submit…); Iowa Code § 321J.9(1)("if a person refuses to submit to the chemical testing, a test shall not be given"); *See also State v. Hitchens*, 294 N.W.2d 686 (Iowa 1980) (holding that the implied consent statutes provide a right to refuse a request for chemical testing and the State cannot compel a sample via a search warrant without infringing on that right).

This right was created by the legislature for several reasons. First, they wanted to provide an opportunity for motorists to make a voluntary decision whether to

consent or refuse chemical testing. *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981) ("in giving the arrested person a right to refuse the test, the legislature obviously sought to give the person the right to make a voluntary decision."). Second, the legislature "recogniz[ed] the potential invasiveness of collecting bodily substances" and did not want to "endow the State with the unfettered ability to invoke implied consent in order to obtain specimens for chemical testing." *Welch v. Iowa Dept. of Transp*., 801 N.W.2d 590, 595 (Iowa 2011). Finally, the legislature wanted to "avoid physical confrontations between the police and motor vehicle drivers." *Hitchens*, 294 N.W.2d at 688.

Although the legislature created a right to refuse, exercising that right comes with "serious consequences." *State v. Caldwell*, no. 19-0894, 2021 WL 592747, at *7 (Iowa Ct. App. Jan 21, 2021). For example, a refusal results in a substantially longer license revocation compared to someone who consents to the test and fails. *Compare, e.g*. Iowa Code Section 321J.9(1) (providing a one year or two-year revocation for refusal) *with* Iowa Code Section 321J.12(1) (providing for a six month or one year suspension for failing the test). The refusal is admissible against the person in a criminal trial as substantive evidence of guilt. Iowa Code § 321J.16; *See also State v. Kilby*, 961 N.W.2d 374, 381 (Iowa 2021) (recognizing that the admission of a breath test refusal is important evidence to help the state secure

convictions for the crime of operating while intoxicated). The refusal precludes the person from obtaining a deferred judgment if they are found guilty of a first offense. *See* Iowa Code Section 907.3(1)(a)(6)(d) (precluding a deferred judgment "if the defendant refused to consent to testing requested in accordance with section 321J.6"). These things make the choice between consenting and refusing "a difficult one because consenting to the breath test may reveal a blood alcohol content above the legal limit making a criminal conviction more likely, while refusing the test carries administrative and evidentiary consequences." *Kilby*, 961 N.W.2d at 377.

Nevertheless, the legislature carved out an exception for these consequences if person refused to submit a sample of their blood. See Iowa Code § 321J.6(2) ("a refusal to submit to a chemical test of blood is not deemed a refusal to submit…"); *See also State v. Overbay*, 810 N.W.2d 871, 877 (Iowa 2012) ("An accused has an 'absolute right to refuse to take a blood test provided that he is willing to submit to a secondary test or tests chosen by the officer") (citing *Rodriquez v. Fulton*, 190 N.W.2d 417, 419 (Iowa 1971)). This exception to the implied consent framework was provided by the legislature "primarily as an accommodation to those motorists whose religious beliefs or physical condition make the blood test unsuitable." *Id*.

In addition to prohibiting the State from compelling a sample for chemical testing, the legislature provided other rights and limitations attendant to the implied consent statutes. For example, there are limitations on who and what type of equipment can be used to test an individual. *See* Iowa Code §§ 321J.11 and 321J.15. There are prerequisites that must be met before a sample can be legally requested. *See* Iowa Code § 321J.6. There is a right independent testing. *See* Iowa Code § 321J.11. There are time considerations for requesting and obtaining the sample. *See* Iowa Code §§ 321J.6(2) and 321J.2(12)(a) and (b)). There are sentencing reductions for submitting to a requested sample. *See* Iowa Code § 321J.2(3)(b)(2)(a).

Thoughtfully, the legislature also recognized the need for search warrants and warrantless searches in more serious cases involving death or injuries by providing express authority and specific procedures allowing officers to obtain body specimens in those select cases. *See* Iowa Code Sections 321J.10 and 321J.10A. However, the legislature still mandated law enforcement honor an objection e even under these select cases. *See* Iowa Code Sections 321J.10 and 321J.10A. However, the legislature still mandated law enforcement honor an objection to a blood sample even under these select cases. *See* Iowa Code §§ 321J.10(4)(b)("if a person…objects to the withdrawal then a breath or urine test is required to be provided); 321J.10(5) (providing that if a person "knowingly resists or obstructs the withdrawal of a search

warrant issued under this section" it is punishable by contempt and admissible as a refusal at trial); 321J.10A(2) ("if the person from whom a specimen of blood is to be withdrawn objects to the withdrawal, a breath or urine sample may be taken").

Despite the careful drafting of these statutes in an effort to balance the interests of the State and the rights of the public, the legislature specifically declined to provide a mechanism for the State to obtain a search warrant in a standard OWI case. In fact, they expressly stated their intent by precluding that authority. *See* Iowa Code § 321J.9(1)("if a person refuses to submit to the chemical testing, a test shall not be given"). The State seeks to disrupt this balance by providing law enforcement unfettered discretion to determine to whom, when, an under what circumstances the procedures and protections of the implied consent process may be invoked despite the balance struck the legislature. The State's position is not supported by the intent of the legislature, the plain language of the statutes, or case law.

B. The legislature intended the implied consent statutes (Chapter 321J) to apply to all operating while intoxicated cases.

When enacting chapter 321J the legislature directed, "*this chapter applies to any judicial or administrative action which arises due to a violation which occurs after July 1, 1986*..." 1986 Acts, ch 1220. (emphasis added). This language articulates the legislatures intent that *all* driving while impaired cases are subject to

Chapter 321J. *See McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010) ("when the language is unambiguous, it expresses the intent of the legislature…")

The language used in the implied consent statute further demonstrates this directive. Iowa Code Section 321J.6 provides:

> *A person who operates a motor vehicle in this state* under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle in violation of section 321J.2 or 321J.2A is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, or urine and to a chemical test or tests of the specimens for the purpose of determining that alcohol concentration or presence of a controlled substant or other drugs, *subject to this section*. Emphasis Added.

The Iowa Supreme Court has recognized that this section "contains the primary conditions *limiting the circumstances under which Iowa Peace officers may require submission to chemical testing*." *Palmer*, 554 N.W.2d at 862 (emphasis added). The State's authority to collect and test a sample is therefore limited to what the implied consent statutes authorize. This section does not provide law enforcement with the discretion to bypass these procedures. *See Hitchens*, 204 N.W.2d at 688 (absence of any qualifying language such as "unless a warrant is obtained" indicates the legislatures intent to preclude obtaining a sample by warrant).

Iowa Code Section 321J.6(1) also provides that "the withdrawal of the body substances and the test or tests *shall* be administered at the written *request* of the police officer…" Iowa Code Section 321J.6(1). This singular sentence is critical for

two different reasons. First, use of the word "shall" in a statute imposes a mandatory duty. Iowa Code § 4.1(30)(a); *see also Didonato v. Iowa Department of Transportation*, 456 N.W.2d 367, 370 (Iowa 1990); *State v. Luckett*, 387 N.W.2d 298, 301 (Iowa 1986) (stating the use of the word "shall" creates a mandatory action unless the context clearly indicates otherwise). "The written request requirement is one of the procedural safeguards included in our implied consent law." *State v. Green*, 470 N.W.2d 15, 18 (Iowa 1991).

Second, the word "request" expresses the intent by the legislature that body samples cannot be compelled by a search warrant. "In the absence of a legislative definition of a term or a particular meaning in the law, we give words their ordinary meaning." *State v. White*, 563 N.W.2d 615, 617 (Iowa 1997). "The dictionary provides a ready source for ascertaining the common and ordinary meaning of a word." *Id.* The word "request" in the English language simply means "the act or an instance of *asking for something*." (Emphasis Added). "Request." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 4 Jan. 2017. Thus, law enforcement is required to ask the individual whether they will agree to the withdrawal of a body substance for chemical testing, in writing, prior to the withdrawal taking place. Compulsion through service of a search warrant is a far-cry from a "request."

Further support of the legislature's intent to limit the collection of body specimens on standard impaired driving investigations can be gleaned from the passage of Iowa Code Sections 321J.10 ("Tests Pursuant to Warrant") and 321J.10A (Blood, breath, or urine specimen withdrawal without a warrant). These sections provide authority for obtaining a body sample with or without a warrant under certain circumstances in death or serious injury cases. One must wonder why the legislature would feel compelled to enact specific statutes authorizing search warrants in death and serious injury cases but fail to do so in standard OWI cases. Moreover, why would they provide specific protections under those statutes with no parallel protections for less serious offenses? The only logical explanation is that the legislature did not intend on providing law enforcement with the authority to get search warrants on standard impaired driving cases. *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995) ("legislative intend is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned."). Any other conclusion would render the passage of those statutes superfluous. *See First State Bank v. Clark*, 635 N.W.2d 29, 32 (Iowa 2001) ("we do not interpret statutes to render any part superfluous").

Moreover, Iowa Code Section 321J.10(1), begins with the words "refusal to consent to a test under section 321J.6…" The reasonable conclusion to be drawn

from the use of this language is that the legislature intended that even drivers involved in death or serious injury cases must first be asked to submit to chemical testing pursuant to the implied consent statute before proceeding with other methods of collection. *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 231 (Iowa 2010) (we "presume the legislature intended all part of the statute for a purpose, so we will avoid reading the statute in a way that would make any portion of it redundant or irrelevant.").

Finally, there is no serious question that Chapter 321J is specific and limited to addressing instances of impaired driving. However, the State suggests that the general warrant provisions under Chapter 808 may be utilized and an effort to enforce violations of Chapter 321J. In essence, they want to jump in and out of the two Chapters as they see fit. This creates an impermissible dichotomy because there would be no directive on when, how, or to whom the provisions of Chapter 321J apply. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 2298-99, 33 L.ed. 222, 227-28 (1972) ("it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" this is because it won't provide "fair warning" and would "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc and

subjective basis, with the attendant dangers of arbitrary and discriminatory application").

For example, if a warrant is obtained under Chapter 808, does the sample have to be withdrawn in accordance with Iowa Code Section 321J.11 or 321J.15 to be admissible? Is a person entitled to an independent test? If convicted, is the person able to obtain a deferred judgment? Does submission to the warrant still trigger a license revocation under Iowa Code Section 321J.12? Will a conviction still trigger a driver's license suspension under 321J.4 even when other provisions of the Chapter were not followed? How will motorists, judges, prosecutors, law enforcement, and the Department of Transportation be able to decipher what laws apply, to whom, and when?

Not only does the State's position threaten to make Chapter 321J vague, it creates an irreconcilable conflict between Chapter 808 and 321J because the specificity in Chapter 321J is lacking in Chapter 808. One of the best examples of this conflict is that a person who is subjected to a search warrant under Chapter 808 would be precluded from receiving a deferred judgment if found guilty because he did not submit to a test "withdrawn in accordance with this chapter [321J]). *See* Iowa Code § 321J.2(3)(b)(2)(a). Because applications of both chapters create irreconcilable conflicts the general statute must yield to the specific. *See State v.*

Lutgen, 606 N.W.2d 312, 314 (Iowa 2000) (if general statutes which cannot be harmonized with a specific statute must yield to the specific statute).

As they must, the State fails to engage in any similar legislative analysis to support their position. This is likely because the legislature clearly intended to limit the authority of law enforcement officers to obtain body specimens for chemical testing. To reach a different conclusion would require this court to ignore the enactment language for Chapter 321J directing that chapter to apply to all operating while intoxicated cases, the plain language of Iowa Code Section 321J.6, and would render the enactments of 321J.10 and 321J.10A superfluous. Further, it would undermine the recognized purpose and theory supporting the implied consent statutes including the right to refuse and create conflicts and confusion regarding the applicability of Chapter 321J. Most importantly however, it would create discretionary authority to law enforcement that was not authorized by the legislature.

C. The State's reliance on current caselaw and Iowa Code Section 321J.18 is misplaced.

Instead of engaging in any legislative interpretation the State instead relies exclusively on prior caselaw and Iowa Code section 321J.18. *See* State's Proof Brief PP. 19-22 (citing *State v. Oakley*, 469 N.W.2d 681 (Iowa 1991); *State v. Frescoln*, 911 N.W.2d 450 (Iowa App. 2017); and *State v. Demaray*, 704 N.W.2d 60 (Iowa

2005)). However, as set forth the below, these authorities do not support the State's position for several different reasons.

At the outset it is imperative to note that there are fatal factual differences between the methods used to obtain the evidence in *Demaray* and *Oakley,* and those used in this case. *See Demaray*, 704 N.W.2d at 63 ("Deputy Miller used a means not included within the statute: *he asked for consent* to obtain the blood test the hospital had already withdrawn earlier for treatment purposes"); *Oakley* 469 N.W.2d at 682 (blood was withdrawn at the request of the defendant "with the intention of submitting it for independent analysis" and voluntarily left with the sheriff). These cases do not authorize the State to obtain a search warrant to *extract* a sample of a person's body substances beyond the implied consent statutes. Irrespective of this fatal factual difference, the legal analysis in each case is also flawed.

i. *State v. Oakley* is not legally sound and should be overruled.

Oakley had voluntarily requested the withdrawal of his blood for purposes of independent testing and voluntarily left the sample with law enforcement. *Id*. at 682. When he asked for the sample back, the State obtained a search warrant for the sample and had it tested. Oakley sought to suppress the results of the test on the basis that Iowa Code Section 321J.10(2) precluded the issuance of the search warrant for the sample withdrawn at *Oakley's* request. *Id*.

In dismissing *Oakley's* argument, the court held that "the legislature obviously did not intend for chapter 321J to preempt chapter 808." *Id*. at 682. However, this conclusion was based upon a misapplication of the law. In reaching this conclusion, the court analyzed Iowa Code Section 321J.10 and determined:

> The provision for a search warrant in section *321J.10 does not limit the State's authority to obtain a search warrant under the general search warrant provision of Iowa Code chapter 808*. Indeed, section 321J.10(2) *expressly provides that search warrants may be obtained either under the limited circumstances of section 321J.10(3) or in accordance with chapter 808.*

Id. at 682-83. (Emphasis added). The problem with the court's reliance upon 321J.10 in reaching this conclusion is two-fold.

First, Iowa Code section 321J.10 does in-fact limit the authority of law enforcement to obtain a search warrant contrary to the court's pronouncement. *See* Iowa Code Section 321J.10(1)(a) (requiring "a traffic accident [which] resulted in a death or personal injury reasonably likely to cause death"). Despite stating otherwise in their conclusion, the court recognized this limitation in a footnote. *Id*. n. 2 ("under Iowa Code Section 321J.10 a search warrant may be issued for a chemical testing *where a traffic accident has resulted in a probable or actual fatality*…"). The court also ignored the words "under this section," which confined the use of search warrants to only those situations authorized under the statute. *See* Iowa Code Section 321J.10(2) ("search warrants may be issued under this section in full

compliance with chapter 808 or they may be issued under subsection 3.") Thus, the court's analysis and conclusion in *Oakley* was compromised by an oversight to of what Section 321J.10 actually authorized.

More importantly, glossing over the true requirements of 321J.10, allowed the court to use 321J.10 in their analysis when it had not application to the facts of the case because an accident or serious injury was not involved. In doing so, the court broke a cardinal rule of statutory interpretation by relying upon a statute that had no application. *See State v. Guzman-Juarez*, 591 N.W.2d 1, 2 (Iowa 1999) ("the court cannot read into a statute something that the legislature did not make apparent by the language."). The misplaced application of Iowa Code Section 321J.10 in *Oakley* created a conclusion unsupported by law which must be corrected. *See Miller v. Westfiled Ins*., 606 N.W.2d 301, 306 (Iowa 2000) ("stare decisis does not prevent the court from reconsidering, repairing, correction or abandoning past judicial announcements when error is manifest, including error in the interpretation of statutory requirements").

ii. *State v. Demaray* should be limited to the facts.

Demaray differs largely from *Oakley* and the instant case because it did not involve law enforcement seeking an *consensually* withdrawn blood sample with a search warrant but instead involved the *consensual* release of medical records

containing blood alcohol test results from a sample withdrawn my medical professionals for medical treatment purposes. 704 N.W.2d at 61. "*Demaray*, argued that the blood test results were not admissible because the blood sample was not *withdrawn* in compliance with the implied consent statute." *Id*. 62. Specifically, he argued that section 321J.11 precluded admission of the medical records derived from his sample because the sample was not withdrawn by medical professionals "*acting at the request of a peace officer*." *Id*. *See* Iowa Code Section 321J.11(providing that only certain medical professional "acting at the request of a peace officer may withdraw a specimen of blood…). The state resisted "arguing that the implied consent statute is not the exclusive means by which an officer can obtain blood test results in OWI cases." *Id*.

However, like *Oakley*, the Court misidentified the true issue being presented as "whether 321J.11 is the exclusive means by which law enforcement *may obtain a blood sample from a defendant* in an OWI case." *Id*. (emphasis added). In doing so, the court conflated the voluntary release of medical records containing test results from a voluntarily withdrawn sample with the compelled extraction of a blood sample without consent. Thus, the issue the Court was actually faced with was "whether Iowa Code Section 321J.11 precludes the State from obtaining medical

records with consent of the defendant when the underlying blood sample was not withdrawn at the request of a police officer."

Framed correctly, the Court's conclusion is logical and easy to follow but certainly does not authorize law enforcement the use of the general search warrant statute to forcibly extract a body specimen. In reaching their decision, the Court acknowledged, as they must, that "Section 321J.6 contains the primary conditions limiting the circumstances under which Iowa peace officers may require *submission to* chemical testing." *Id*. at 62; *Palmer,* 554 N.W.2d at 862. (emphasis added) However, because the evidence at issue was not the compelled submission to chemical testing at the request of a peace officer but the consensual release of medical records, the Court turned to Iowa Code Section 321J.18, to resolve the issue.

Iowa Code section 321J.18 is titled "Other evidence" and provides:

> This chapter does not limit the introduction of any competent evidence bearing on the question of whether a person was under the influence of an alcoholic beverage or a controlled substance or other drug, including the results of chemical tests of specimens of blood, breath, or urine obtained more than two hours after the person was operating a motor vehicle.

Relying on this section the Court reasoned that admission of the evidence was not precluded because the defendant provided consent independent of Chapter 321J and thereby waived any arguments relating to those rights and procedures. 704 N.W.2d at 64 ("[consent may be given independent of [chapter 321J]; and the requirement

of the implied consent law may be waived" (citing *State v. Wallin*, 195 N.W.2d 95, 98 (Iowa 1972)). The Court then ultimately concluded "that the implied consent law is not the exclusive means by which the State may *obtain blood test evidence* from a defendant in an OWI proceeding." 704 N.W.2d at 64. (emphasis added).

When framed correctly, this analysis and conclusion is sound but clearly does not authorize what the State seeks. Because this case is being used as a sword to extract authority it did not clearly provide, this court should limit the holding situations where medical records are consensually released.

iii. *State v. Frescoln* should be overturned.

Only one case has evolved from the misguided rationale and factual differences exploited above which lends supports to the State. *See State v. Frescoln*, 911 N.W.2d 450 (Iowa Ct. App. 2017). In *Frescoln*, the court found that "the explicit language of chapter 321J and our supreme court's prior decisions indicate the implied consent statute is not the exclusive means by which law enforcement may obtain chemical testing" and concluded the implied consent statutes could be bypassed for a search warrant. *Id*. at 454. The "explicit language of Chapter 321J" was found exclusively in section 321J.18 and the "supreme court's prior precedent" was limited to *Demaray* and *Oakley*. *Id*. at 454-55. No other authority was discussed and no other analysis was conducted.

As discussed, *supra*, there are factual and analysis deficiencies with *Demaray* and *Oakley*, but there are other reasons why *Frescoln* was wrongly decided. First, the plain language of Iowa Code Section 321J.18 does not expressly authorize obtaining a search warrant. In fact, the statute does not use the word warrant nor does it incorporate by reference any statues that allow search warrants. The authority to issue a warrant is derived only from statutory enactments. *Meier v. Sulhoff*, 360 N.W.2d 722, 727 (Iowa 1985) ("Because there is no common-law right to issue a search warrant ... we lack the authority to expand by judicial fiat the purposes fixed by the legislature for which search warrants may lawfully issue."). By interpreting this code section as providing that authority the court read into the statute something that did not exist and "expand[ed] by judicial fiat" authority to lawfully issue a warrant that the legislature did not grant. *Id*.

Second, if the legislature wanted to give authority to issue a search warrant under that section, they knew how to do so. *See* Iowa Code Section 321J.10(2) ("search warrants may be issued under this section in full compliance with Chapter 8098 or they may be issued under subsection 3). This court cannot read into a statute something that is not apparent on the face of the statute. *See State v. Guzman-Juarez*, 591 N.W.2d 1, 2 (Iowa 1999) ("the court cannot read into a statute something that the legislature did not make apparent by the language.").

Third, the Court of Appeals in *Frescoln* did not thoroughly consider the goals or intent of the legislature by analyzing other portions of Chapter 321J. Instead, the court only considered Iowa Code Section 321J.18 in isolation, which was a dereliction of their duty. *See Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 565 (Iowa 2011) ("in determining legislative intent, we avoid placing undue importance on isolated portions of an enactment by construing all parts of the enactment together."); *Sanon v. City of Pella*, 865 N.W.2d 506, 511 (Iowa 2015) (when interpreting statutes "we look at the entire chapter when the legislature enacted the statute, so we may give the statute it's proper meaning in context"). As discussed above, other portions of 321J indicate the legislatures intent to limit the ability to obtain a search warrant in a standard OWI case.

Most importantly, the Court of Appeals concluded that, "adhering to the warrant requirement is the best means upon which to conform to the constitutional protections from unreasonable search and seizures" but in doing so ignored the holdings of other binding cases. 911 N.W.2d at 455. In *State v. Rains*, 574 N.W.2d 904 (Iowa 1998), *overruled on other grounds by State v. Williams*, 895 N.W.2d 856 (Iowa 2017), a blood sample was involuntarily obtained from the defendant following a traffic accident by hospital staff for medical purposes. *Id.* at 912. The

State sought and obtained a search warrant for the blood samples that had already been withdrawn and tested them.

Rains sought suppression and argued "that *once a specimen is produced* it cannot be obtained from the holder of that specimen, whether it be a hospital, laboratory, or the defendant himself." *Id*. at 913. The court disagreed with Rain's contention because the sample was not extracted at the government's direction. *Id*. at 914. Not surprisingly, the Court specifically condemned the exact authority the state is seeking:

> "*a person cannot be required to submit to a blood, urine, or breath specimen via a warrant except in strictly circumscribed situations such as under section 321J.10.* This interpretation of the language in question is in accord with our implied consent statute. *The warrant in question here did not request production of a specimen by Rains; rather, it requested production by the hospital of a specimen* ***already obtained*** *from Rains."* Emphasis Added.

In addition to *Rains*, other court pronouncements undermine the holding in *Frescoln*. *See State v. McGee*, 959 N.W.2d 432, 445-46 ("we doubt [a warrant] would add meaningfully to the existing protections for drivers derived from the implied consent law" and "someone who is conscious can decide whether to consent or not to consent to testing so it logical to given them the choices delineated in Iowa Code Sections 321J.6 and 321J.9."); *Palmer*, 554 N.W.2d at 862 (Iowa 1996) ("Section 321J.6 contains the primary conditions limiting the circumstances under which Iowa peace officers may require *submission to* chemical testing"); *State v.*

Owens, 418 N.W.2d 340, 345-46 (Iowa 1988) ("police must respect a driver's refusal when no fatality is involved and can only resort to revocation"); *State v. Jensen*, 216 N.W.2d 369, 374 (Iowa 1974) ("we have consistently held the [implied consent] statue must be explicitly followed and evidence flowing from it's application can be received only as expressly provided"); *State v. Baraki*, 981 N.W.2d 693, 697 (Iowa 2022) (the choice to consent or refuse under the implied consent statute "is not constitutionally required for a breath test which can be upheld anyway as a search incident to arrest but it is statutorily required").

D. Limitations of Iowa Code chapter 808.

If this Court is unconvinced that the legislature intended to place limits on the discretionary authority of law enforcement to seek search warrants through the enactment of chapter 321J, then the Court must determine if Iowa Code Chapter 808 actually provides the authority the State seeks. As previously stated, the authority to issue a warrant is solely derived by statute. *Sulhoff*, 360 N.W.2d at 727. Iowa's general search warrant statutes are contained in Chapter 808. Under this Chapter search warrants may be issued to seize "property." *See* Iowa Code Section 808.2 (delineating four ways in which "property" may be seized.) Iowa Code Section 808.3(1) applies to search warrant applications and specifically provides that "the application shall describe the person, place or thing to be searched *and the property*

to be seized…" (emphasis added). Iowa Code Section 808.4 provides that the search warrant should command that the peace officer "*search the named person, place, or thing within the state for the property specified and to bring any property seized* before the magistrate." (emphasis added).

In light of these statutory provisions, it is clear that the legislature intended to differentiate between a "search" and a "seizure" with the latter being restricted to "property." *See Horton v. California*, 496 U.S. 128, 134 (1990) ("a search comprises the individual interest in privacy; a seizure deprives the individual of dominion over his or his or her person or property"). "Property" is defined as "real and personal property." Iowa Code Section 4.1(24). "Personal Property" is defined as "money, goods, chattles, evidence of debt, and things in action." Iowa Code Section 4.1(21).

The State seeks to apply a broader definition of "property" by referencing Iowa Code Section 702.14; however, this is inconsistent. Iowa Code Section 702.1 provides that "wherever a term, word, or phrase is defined in the *criminal code*, such meaning shall be given wherever it appears in the code unless it is being specially defined for a special purpose." (emphasis added). The "Iowa Criminal Code" contains "Chapters 701 through 728." *See* Iowa Code Section 701.1 ("Chapters 701 through 728 shall be knows *and may be cited as the 'Iowa Criminal Code.'"*). (Emphasis Added). Iowa Code Chapter 808 is not part of the "Iowa Criminal Code,"

therefore the definition in Chapter 702 are not applicable to search warrants. *See* Iowa Code Section 801.1 ("Chapters 801 through 819 shall be known *and may be cited as the 'Iowa Code of Criminal Procedure*.'") (emphasis added). However, even if the definition of property contained in 702.14 applies to warrants, it does not expand the definition beyond what is contained in the definition of "real property" or "personal property."

Regardless of the definition used, there are several legal reasons why a body specimen cannot be considered property. First, a person is not property and thus any portion of that person cannot be considered property. *In re Ralph*, 1 Morris 1, 9 (Iowa 1839). Second, the legislature specifically provided authority to obtain body specimens in other statutes but neglected to do so in Chapter 808 which suggests they did not intend to include body specimens in the definition of property. *See* Iowa Code Section 321J.10(1) (providing authority for search warrant to test for drugs or alcohol in death or serious injury accident cases) and Iowa Code Section 810.1 and 810.3 (specifically allowing the collection of body specimens as non-testimonial identification through a court order only for a felony). Third, the legislature created additional limitations and safeguards when providing the authority to obtain body specimens but failed to do so under Chapter 808. *See* 321J.10(5) and 810.14 (only authorizing punishment as contempt for failure to comply with a legally authorized

request for a body specimen). Fourth, as discussed, *supra*, Chapter 321J and 808 conflict because of the limitations and safeguards contained in Chapter 321J, which are absent in Chapter 808, and therefore the general search warrant statutes must yield so the specific provisions of Chapter 321J.

Additionally, there are policy concerns to consider. First, allowing the State to bypass the implied consent statutes undermines the *quid pro quo* between motorists and the State thereby threatening the foundation and continued viability of implied consent. *Hitchens*, 294 N.W.2d at 687, (implied consent is based on "the basic principle that a driver impliedly agrees to submit to a test *in return for* the privilege of using the public highways"). (emphasis added). Second, this procedure creates an increased likelihood for physical confrontations between citizens and police officers. Third, it creates a slippery slope which allows the state to withdraw *any* bodily substance without limitation which could theoretically include semen, bile, a section of skin, a toenail, an organ, an egg, or even an embryo that has not yet reach viability. Finally, there is no statutory guidance on how those samples will be extracted, tested, stored, or admissibility determined which threatens to render Chapter 321J void for vagueness.

If a body specimen is considered "property" under chapter 808, it should not become property unless and until it is extracted by some means other than compelled

by law enforcement. Limiting the definition in this manner would validate the intent of the legislature, provide support for the premise underlying the implied consent statutes, soundly square Chapter 808 with 321J, and avoid any the policy concerns discussed above. *See State v. Distefano*, 764 A.2d 1156 (R.I. 2000) (addressing many of the issues above and concluding blood is not property).

II. Discretionary Application of Chapter 321J Violates the Constitutional Right to Equal Protection and Due Process of the Laws.

Preservation of Error

For the reasons set forth in the State's brief, the Appellee agrees that he has preserved error on the constitutional issues raised in the motion to suppress.

However, the same cannot be said for the State. The State never mentioned the words, "due process", "equal protection" or even "constitution" in their written resistance or in the record before the district court. As such, the State has waived any constitutional arguments on this issue as they failed to properly resist or raise those arguments to the district court. *See State v. Baldon*, 829 N.W.2d 785, 789 (Iowa 2013) (precluding the State from raising a constitutional argument not presented to the district court). Nevertheless, the merits of these issues will be addressed out of the abundance of caution.

Standard of Review

Because these issues involve constitutional issues the standard of review is de novo. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004).

Merits

It is a fundamental rule of statutory construction that, if possible, statutes must be interpreted *and applied* in a manner that does not render them unconstitutional. *State v. Bower*, 725 N.W.2d 435, 441 (Iowa 2006). Thus, local policies enacted by a county attorney which sidestep the application of legislative enactments violate notions of equal protection and due process. This procedure has been prohibited for almost one and a half centuries when the U.S. Supreme Court stated:

> A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that *no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition*; as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.

Ex parte Virginia, 100 U.S. 339, 346 (1880). (emphasis added.)

A. Equal Protection requires application of the implied consent statutes to suspected impaired drivers.

Both the United States and Iowa Constitutions provide that all persons shall be treated equally under the law. U.S. Const. amend. XIV, § 1 ("No State shall…deny to any person within its jurisdiction the equal protection of the laws");

Iowa Const. art. 1 § 6. ("All laws of a general nature shall have uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens").

The equal protection challenge here is unique because it involves the disparate treatment of suspected intoxicated drivers based upon a policy adopted by one county attorney. The disparate treatment deprives certain individuals of rights and privileges bestowed upon them by the legislature and in turn subjects them to compelled intrusions into their body based upon an actual or perceived exercise of their rights. Although this situation is unique, it is not unprecedented.

The United States Supreme Court has determined that when government officials preclude a citizen from exercising a statutory right, it creates an equal protection violation. *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951). In *Dowd*, prison officials prevented a prisoner from perfecting his statutory right to appeal by refusing to let him send out his appeal paperwork pursuant to a prison rule. *Id*. at 208. As a result, he was denied his right to appeal and sought habeas relief. The court concluded that the "discretionary denial of the statutory right to appeal is a violation of the Equal Protection Clause." *Id*.

Similarly, Iowa Courts have concluded, as they must, that the failure to provide a statutory right to some but not others, violates equal protection. *See*

Shortridge v. State, 478 N.W.2d 613, 615 (Iowa 1991) ("once a right of appeal is provided, it may not be extended to some and denied to others.") *superseded by statute on other grounds*. In reaching this decision, the Court determined that when a statute which "limits the appeal rights of prisoners, but not the State…denies…equal protection of the laws." *Id*. at 14.

In the event this Court decides to ignore *Dowd* and *Shortridge* and engage in a traditional equal protection analysis, the result does not change. Under the federal analysis the Court is not required to determine, as a threshold matter, if persons are "similarly situated" so long as they are treated differently. *State v. Dudley*, 766 N.W.2d 606, 616 (Iowa 2009) ("the United States Supreme Court has not employed 'similarly situated' as a threshold tested under the Federal Constitution"). However, there is no question that the policy at issue was intended to treat people who are suspected of drunk driving and who have been identified as being likely to exercise their rights differently than those who are less likely to exercise those same rights. Further, there is no question that the implied consent statutes were designed to limit the State's ability to obtain body specimens from suspected impaired drivers. *Palmer*, 554 N.W.2d at 862. Thus, if a "similarly situated" analysis is required under the Federal analysis it has clearly been met. *See Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009) (finding that homosexuals are similarly situated to heterosexuals

who wish to marry because "to truly ensure equality of the law, the equal protection guarantee requires that laws treat all of those who are similarly situated *with respect to the purpose of the law* alike.") (Emphasis Added)

Under a traditional analysis, the Court is required to determine the right affected by the questioned governmental action. The rational basis test is utilized in most instances. *Id*. at 879. However, when a fundamental right is involved the government action at issue is analyzed with strict scrutiny. *Id.* at 880. "Rights and liberties that are objectively 'deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty' qualify as fundamental." *Hensler v. City of Davenport*, 790 N.W.2d 569 (Iowa 2010) *citing Chavez v. Martinez*, 538 U.S. 760, 775 (2003). Here the right involved—subjecting a person to a forced withdrawal of a body specimen--involves a fundamental right for a number of reasons.

First, the withdrawal of body specimens for chemical testing invades the integrity of an individual's person, which is a core value of our society, and is therefore fundamental. *See Schmerber v. California*, 384 U.S. 757, 669 (1966) (indicating that a compelled blood test involves a "fundamental human interest"); *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 616-17 (1989) ("subjecting a person to a breathalyzer test…implicates similar concerns about

bodily integrity"); *Union Pacific R. Co. V. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001, 35 L.Ed. 734 (1891) ("no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, fee from all restraint or interference of others, unless by clear and unquestionable authority of law.") Thus, whether grounded in notions of bodily integrity or privacy, it is clear that the compelled governmental intrusion into the body is "deeply rooted" and is therefore fundamental.

Second, if the intrusion into the body does not involve fundament rights of bodily integrity and privacy, then it implicates fundamental property and liberty interests. Both the Due Process Clauses of the Fourteenth Amendment and Article 1, Section 9 of the Iowa Constitution protects against deprivations of life, liberty, and property. *See* also Article 1, Section 1 of the Iowa Constitution (recognizing the inalienable natural rights of citizens). If the analysis has proceeded this far, this Court has already been determined that a body specimen is "property" pursuant to Chapter 808. As such the "possession and control of [the Appellee's] own person" is "sacred." *Id*. Similarly, chemical testing of bodily specimens implicates a significant liberty interest as the person is held by law enforcement against their will while the warrant is sought and the sample withdrawn without the protections of the implied consent statutes. *See Foucha v. Louisana*, 504 U.S. 71, 80, 112 S. Ct. 1780,

1785, 118 L.Ed.2d 437, 448 (1992) (a person's interest and freedom from bodily restraint is "at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions.") A liberty interest is also involved because obtaining the chemical specimen is more likely to result in a criminal conviction. *State v. Kilby*, 961 N.W.2d 374, 377 (Iowa 2021) (recognizing that a blood test above the legal limit makes a "criminal conviction more likely."). Because a fundamental right is involved, strict scrutiny must be applied. *Varnum*, 763 N.W.2d at 880.

Under the strict scrutiny analysis, government actions are presumed to be invalid and must be narrowly tailored to serve a compelling governmental interest. *Id*. The governmental interest at issue is certainly compelling but so is the interest of the motoring public. Chapter 321J provides the necessary tools for the State to investigate and prosecute impaired drivers even if they decide to refuse the implied consent test. *Kilby*, 961 N.W.2d at 377 (concluding that the State's use of a breath test refusal was necessary to secure convictions). More recently, the Iowa Supreme Court concluded that the implied consent statutes are a well balanced means for both protecting motorists and for investigating cases of impaired driving. *McGee*, 959 N.W.2d 444-45. Thus, the need to bypass the implied consent does not pass a strict scrutiny analysis.

If this Court determines that the federal Equal Protection Clause does not provide the protections requested, then the parallel provision of the Iowa Constitution must. Although the federal and state clauses have generally been treated the same, that approach has been not always been followed. *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 4-7, 16 (Iowa 2004) (discussing the right to apply the equal protection clause differently than the federal counterpart and applying the rational basis test under the Iowa Constitution in a fashion different than the United States Supreme Court); *King v. State*, 818 N.W.2d 1, 86-87, Justice Appel dissenting (discussing approaches other states have employed differently than the Federal approach).

Article 1, Section 6 of the Iowa Constitution predates the federal Equal Protection Clause and has important textual and historical differences. *See* Edward M. Mansfield & Conner L. Wasson, *Exploring the Original Meaning of Article 1, Section 6 of the Iowa Constitution,* 66 Drake Law Review 148 (2018). This provision provides two protections-which require "uniformity of action" and "thwarts certain preferences for particular citizens or groups of citizens," both of which are being threatened in this case. *Id*. at 149.

The uniformity clause applies to "all laws" of a "general nature" and was enacted before the privileges and immunities clause. *Id*. at 162. The uniformity

clause is sought to have been developed to avoid geographic disparity amongst citizens. *Id*. 152-55. If true, then this clause would likely preclude a county attorney from imposing a policy that could subject a person in their county to a compelled bodily intrusion when that same person may not be subjected to that intrusion in another county. *Id*. at 200, n. 390 and 391 (concluding that different taxation of racetracks across counties could be a violation of Article 1, Section 6).

Similarly, the privileges and immunities clause involved after the uniformity clause and is thought to be "directed at forms of special status that are bestowed by the government to which a person would not otherwise be entitled." *Id*. at 155. Here, the legislature developed a "form of special status" which allows the person suspected of a non-injury or death OWI cases to refuse chemical testing and precludes the state from getting a search warrant in those situations. However, the State is now seeking to bypass that "form of special status" that was "bestowed by the government." To interpret Iowa Code Section 321J.18, or any other statute as providing the state that right, would therefore undermine that constitutional protection of that privilege and immunity.

As such, the historical underpinnings of the equal protection clause of the Iowa Constitution should be interpreted in a manner that is consistent with what the provisions in that clause sought to accomplish. Providing the State with the authority

they now seek would undermine those goals and would make the judiciary complacent in their duty to protect the Iowa Constitutional safeguards.

B. Due Process requires application of the implied consent statutes to suspected impaired drivers.

i. Substantive Due Process

"Due Process requires fundamental fairness in a judicial proceeding," so a trial that is fundamentally unfair violates the guarantees of due process in the United States and Iowa Constitutions. *State v. Becker*, 818 N.W.2d 135, 148 (Iowa 2012*); See also United States v. Mendoza-Lopez*, 481 U.S. 828, 839-40 (1987). "The state, acting through the legislature, has said in substance, 'if you want to exercise the privilege of operating a motor vehicle on our highways you agree to the administrative and evidentiary procedure we have outlined.'" *State v. Holt*, 261 Iowa 1089, 156 N.W.2d 884, 887 (1968). The State however is seeking to bypass the "administrative and evidentiary procedure" outlined by the legislature-one motorists have come to expect—this is "fundamentally unfair."

"Selectivity in the enforcement of laws is…subject to constitutional restraints." *United States v. Batchelder*, 442 U.S.114, 125 (1979). Although, "an individual may be punished for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *U.S. v. Goodwin*, 457 U.S. 368, 372 (1982). "For an agent of the State to pursue a course

of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, n. 20. "The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Birch*, 494 U.S. 113, 125 (1990). Similarly, due process precludes application of penal statutes that require people to speculate as to their meaning *and applicability*. *Lanzetta v. New Jersey* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939) ("no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes"); *Grayned*, 408 U.S. at 108 ("it is a basic principle of due process that an enactment is void for vagueness if it prohibitions are not clearly defined" because it "delegates basic policy matters…with the attendant dangers of arbitrary and discriminatory application").

Each of the above pronouncements would be violated if the State got their wish. It would selectively delegate basic policy matters to law enforcement to decide who the implied consent statutes apply and who they do not. It would punish people who are subjected to a search warrant by denying them the opportunity for a deferred judgment. *See* Iowa Code Section 321J.2(3)(b)(2)(a) (deferred eligibility requires a person to consent to a test "withdrawn in accordance with this chapter"). It would prevent people from making a knowing and voluntary decision whether to exercise

their statutory right to refuse to submit the sample. Finally, it would create confusion and speculation as to when and how the implied consent statutes should apply.

ii. Procedural Due Process.

"A person is entitled to procedural due process when the state action threatens to deprive the person of a protected liberty or property interest." *Bowers v. Polk County Bd. Of supervisors*, 638 N.W.2d 682, 690 (Iowa 2002). Protected interests under procedural due process "are created and their dimensions defined not by the constitution but by an independent source such as state law." *Id*. When a protected interest is involved the court balances three factors to determine what process is due which include (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedure used and the value of any additional or substitute procedural safeguards, and (3) the Government's interest. *Id*.

As more fully set forth above, the legislature carefully balanced the privacy interests of the public and the need to protect our highways when they enacted the implied consent statutes. Those statutes have procedural safeguards while at the same time providing the state with the necessary means to investigate and prosecute impaired drivers. The State is nonetheless asking to bypass these safeguards without

any significant advancement of the state's interest. This creates a procedural due process problem.

III. Application of the Exclusionary Rule would Apply to any Verbal or Non-Verbal Assertions that Related to Chemical Testing.

Preservation of Error

To the extent that the State is suggesting that any non-verbal or verbal assertions *at the scene* should not have been suppressed, the undersigned agrees as exclusion of those evidentiary items was never sought. However, the State did not adequately preserve their argument that the exclusionary rule is not applicable to the breath test results for the reasons expressed in their brief and therefore they have waived that argument on appeal. *See State v. Hicks*, 791 N.W.2d 89, 97 (Iowa 2010) (finding that failure by the State to argue the scope of the exclusionary rule and/or that some exception to the exclusionary rule at the district court level constitutes waiver of those issues on appeal) Nevertheless, should the Court disagree, those arguments will be addressed out of the abundance of caution.

Standard of Review:

To the extent that suppression under Iowa Code Section is grounded in a statutory right, the court should review for corrections of errors at law. However, to the extent that the application of the exclusionary rule contains constitutional issues, review is de novo.

Argument:

It appears that the State only has taken issue with the application of the exclusionary rule to any verbal or non-verbal statements but does not contest the applicability of the exclusionary rule to the breath test results or documents surrounding those results. The undersigned agrees that any verbal or non-verbal statements would not be subject to suppression unless they were related to chemical testing. However, any non-verbal or verbal assertions related to the exercise of the officer's discretion to forgo implied consent and seek a warrant should be suppressed. *See Jensen*, 216 N.W.2d at 373 (excluding evidence of defendant's awkwardness is submitting to chemical testing when the test has been suppressed); *See also Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)(finding that "fruits" of the prior illegality are excluding if thy were an exploitation of that prior illegality." Thus, any evidence derived as a result of the officer's decision to forgo implied consent and seek a warrant is required to be suppressed.

Conclusion

For the reasons set forth above, Appellee respectfully requests that this Court affirm the District Court's decision granting the motion to suppress evidence.

Request for Oral Argument

Request is hereby respectfully made that, upon submission of this case, counsel for Appellee to be heard in oral argument.

Certificate of Compliance with Type-Volume Limitations, Typeface Requirements, and Type-Style Requirements.

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 9,757 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 font.

Matthew T. Lindholm

March 30, 2023
Date.

Attorney's Cost Certificate

I, Matthew T. Lindholm, attorney for the Appellant, hereby certifies that the actual cost of reproducing the necessary copies of this Brief was $0.00, and that amount has been paid in full by me.

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