IN THE SUPREME COURT OF IOWA
Supreme Court No. 23–1448
Dubuque County No. OWCR148265

STATE OF IOWA,
Plaintiff-Appellant,

vs.

JEFFREY FLYNN,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HON. ROBERT J. RICHTER, DISTRICT ASSOCIATE JUDGE

APPELLANT'S BRIEF

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I. Flynn was arrested for OWI. He voluntarily consented to a chemical breath test and provided a sample. The district court ruled that Flynn's consent was voluntary. But it still granted Flynn's motion to suppress because it held that implied consent was *required*, and that the deputy violated sections 321J.6(1) and 321J.8 by asking for consent to a test without invoking implied consent.

Did the district court err?

Authorities

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ROUTING STATEMENT

The district court believed that it was ruling on an issue of first impression. *See* MTS Ruling (7/3/23), D0029, at 3. It was wrong. It is well-established that "the State's ability to obtain chemical testing is not limited to the provisions of chapter 321J so long as the procedure utilized conforms to constitutional requirements." *See State v. Frescoln*, 911 N.W.2d 450, 455 (Iowa Ct. App. 2017); *accord State v. Demaray*, 704 N.W.2d 60, 61 & 66 (Iowa 2005). That is why "consent may be given apart from the Implied Consent Law." *See State v. Wallin*, 195 N.W.2d 95, 98 (Iowa 1972); *State v. Ransom*, 309 N.W.2d 156, 159 (Iowa 1981); *State v. Boner*, 186 N.W.2d 161, 164 (Iowa 1971). This is not the only recent instance of confusion on this settled point of law, among Iowa district courts. Retention would provide an opportunity to put that confusion to rest. *See* Iowa R. App. P. 6.1101(2)(d) & (f).

The Iowa Supreme Court recently heard oral argument in *State v. Laub*, No. 22–1530 (argued Oct. 11, 2023). In that case, the officer chose not to invoke implied consent, and instead sought a warrant to withdraw a blood sample through chapter 808. This appeal presents a variation on the issue presented in *Laub*. Deciding both cases together will provide important guidance to the bench and bar (among others).

STATEMENT OF THE CASE

Nature of the Case

This is the State's appeal from a ruling that granted a motion to suppress a breath test result. The State charged Jeffrey Flynn with operating while intoxicated (first offense), a serious misdemeanor, in violation of Iowa Code section 321J.2 (2022). The evidence against him included a chemical breath test result (.110). The deputy did not invoke implied consent. Instead, he simply asked Flynn if he would consent to a breath test. He did not read an advisory, nor did he tell Flynn that there would be any consequences for refusal (or for a particular result). Flynn consented and gave a breath sample. The district court found that "the consent was voluntarily given and not coerced." *See* MTS Ruling (7/3/23), D0029, at 2. But it still suppressed the test result, because it ruled that "[w]hen reasonable grounds exist, a request for consent to a chemical test must comply with [sections] 321J.6 and 321J.8." *Id.* at 4.

The district court was incorrect. When reasonable grounds exist, an officer *may* invoke implied consent. But officers may instead choose to investigate in other ways. One option is to ask for *actual* consent to a chemical test, without any penalty for refusal (unlike implied consent). That is not unconstitutional, nor is it prohibited by chapter 321J.

Statement of Facts

On November 24, 2022, a deputy saw Flynn driving at 68 mph in a 55-mph zone. The deputy initiated a traffic stop. Upon making contact with Flynn, the deputy noticed "the odor of alcohol coming from [him]." *See* MTS Tr. 13:6–18. Flynn admitted to drinking, earlier that evening. The deputy conducted field sobriety tests. Flynn showed some indicia of intoxication. The deputy requested a preliminary breath test (PBT).

> Results were over the .08. From there he asked what his test result was. I advised him that at this time he's not entitled to that information. And then when he asked how he performed on the test, I advised him that there were some indicators that I observed that led me to believe that he was impaired. . . . I did advise that he was over the legal limit, but did not tell him his exact test result.

See MTS Tr. 13:18–15:8. Flynn was "placed under arrest" and taken to the Dubuque Law Enforcement Center. *See* MTS Tr. 15:9–16. And then:

> I did ask the subject, Mr. Flynn, if he would be willing to provide a sample of his breath for chemical testing on the DataMaster, the State certified machine. At that time Mr. Flynn made a comment about doing a test roadside. I again informed him that the PBT was not used in court and asked him if he would be willing to do it on the DataMaster, at which time he did provide a sample.

MTS Tr. 15:22–16:12. The deputy never mentioned implied consent, nor any consequence for refusal (or for any particular test result). *See* MTS Tr. 16:19–17:1; MTS Tr. 20:25–21:8. The breath test showed that Flynn's BAC was .110. *See* MTS Tr. 16:13–18.

Flynn was charged with OWI (first offense). Flynn moved to suppress any evidence of the breath test result. *See* MTS (3/8/23), D0014. He argued that the deputy violated section 321J.6(1) by failing to make a written request for a chemical test sample, and also violated section 321J.8 by failing to read the implied consent advisory. *See id.* At a hearing on that motion, the State argued that *Frescoln* had established that officers could choose to seek a search warrant instead of invoking implied consent, and "voluntary consent to a specimen is an exception to the search warrant requirement that was in play here." *See* MTS Tr. 25:21–27:25 (citing *Frescoln*, 911 N.W.2d 450).

Flynn conceded that the deputy could have chosen to apply for a search warrant under chapter 808. *See* MTS Tr. 35:11–21. So the court pointed out that voluntary consent to a search ordinarily relieves the officer of any need to obtain a search warrant. Flynn agreed with that. But he argued that the rule did not apply here because section 321J.6 states that every motorist is already "deemed to have given consent" to a chemical test. *See* MTS Tr. 35:22–36:23. And he also argued:

> [W]hat would be the point of the implied consent statute? . . . [U]nder that scenario, the officer could first ask, before I read implied consent, hey, will you give me a voluntary sample of your breath or will you give me a sample of breath on this machine? If the Defendant says no, then the officer can invoke implied consent to the extent you have to invoke

> it, and then go through that. And then if the Defendant refuses, then the State can get a warrant.
>
> I don't think the Legislature intended that that would be the process, and that's why we have the implied consent statute. . . . [W]hy would we create this procedure if the officers can just bypass it by first asking, hey, do you want to take this test?

MTS Tr. 36:24–38:3. With that, the district court ended the hearing.

The district court subsequently granted the motion to suppress. It believed that it was deciding an issue of first impression. *See* MTS Ruling (7/3/23), D0029, at 3. It quoted *Frescoln*—but then ruled that implied consent under section 321J.6 and an implied-consent advisory under section 321J.8 are statutorily required for *any* chemical testing:

> The Court of Appeals in *Frescoln* stated "we find the State's ability to obtain chemical testing is not limited to the provisions of chapter 321J so long as the procedure utilized conforms to constitutional requirements." *State v. Frescoln*, 911 N.W.2d 450, 455 (Iowa Ct. App. 2017). One could argue that this language suggests voluntary and uncoerced consent obtained outside the procedures of 321J should not be suppressed. However, the *Frescoln* court also stated "nothing in the statute expressly" states that the implied consent procedures are the exclusive way to obtain a test. *Id.* at 454. But the implied consent statutes do expressly state that the suspect shall be advised of the warnings under 321J.8 and the test shall be administered at the written request of the officer.
>
> Ultimately, the Court is convinced by the Defendant's interpretation of the implied consent statutes. The legislature used the word shall and this Court is not inclined to engage in some sort of strained mental gymnastics to interpret the word in a different way. The Court finds the statute unambiguous. It would be odd for the legislature to

> spell out a very detailed scheme for obtaining consent if there was no requirement that officers follow it. When reasonable grounds exist, a request for consent to a chemical test must comply with the requirements of 321J.6 and 321J.8. This was not done by the deputy here.
>
> [Footnote: Officers would likely make the same decision in the future if permitted to obtain consent without following implied consent. Iowa caselaw is full of examples of Defendants seeking to suppress the test results due to alleged non-compliance with the nuances of the implied consent statute. The easiest way, if allowed, to avoid those technicalities would be to simply never invoke the statute. Additionally, the suspect would suffer a license revocation if eventually convicted and it would virtually guarantee a test result in every case. If the suspect does not consent then seek a search warrant. The choice to bypass the implied consent statute would result in a win-win-win for the State. The State's reading of the statute would "effectively eviscerate the implied consent statute." *State v. Morgan*, 289 Ga. App. 706, 708, 658 S.E.2d 237, 240 (2008).]

MTS Ruling (7/3/23), D0029, at 3–4.

The State filed a motion to reconsider. *See* Motion to Reconsider (7/13/23), D0031 (citing *Demaray*, 704 N.W.2d 62–66, and *State v. Kelly*, 430 N.W.2d 427, 431 (Iowa 1988)). The district court ruled:

> The cases cited by the State were factually different from the facts presented here. [*Demaray* and *Frescoln*] dealt with a test that was conducted by medical personnel for treatment purposes and a test that was conducted pursuant to a warrant. The test in this case was conducted pursuant to a request for consent by a peace officer. The Court finds that the statute does not grant the officer with that discretion when reasonable grounds exist to believe the person was operating while intoxicated.

Order (8/16/23), D0033. And so it denied the motion to reconsider.

ARGUMENT

I. The district court erred in granting Flynn's motion to suppress his chemical breath test result.

Preservation of Error

Error was preserved. The State argued that implied consent was not mandatory at the hearing on the motion to suppress, and again in its motion to reconsider. *See* MTS Tr. 25:21–28:2; *id.* at 29:10–30:10; Motion to Reconsider (7/13/23), D0031. The district court's rulings that rejected those arguments preserved error. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

This is a ruling on an issue of statutory construction. Review is for errors at law. *State v. McGee*, 959 N.W.2d 432, 436 (Iowa 2021). A ruling on a constitutional issue would be reviewed de novo. *See id.*

Merits

Flynn was arrested for OWI. *See* MTS Tr. 15:9–16. A motorist arrested for OWI "has no constitutional right to refuse a breath test as a search incident to [their] arrest." *See State v. Kilby*, 961 N.W.2d 374, 383 (Iowa 2021). Actual consent is a separate, freestanding basis for a warrantless search. Flynn voluntarily consented to the breath test. *See* MTS Ruling (7/3/23), D0029, at 2. Nothing unconstitutional here.

The district court's ruling purported to find a different problem: it determined that the deputy was *required* to make a request in writing and read an implied consent advisory, since he had reasonable grounds to believe Flynn was intoxicated and had arrested Flynn for OWI. *See* MTS Ruling (7/3/23), D0029, at 3–4. This ignores binding precedent on chemical tests, and it misreads the relevant statutory language.

A. Under *Wallin* and *Demaray*, implied consent is neither mandatory nor exclusive. Consent to a chemical test may be obtained by other means.

Iowa precedent is clear: if the officer presents the arrestee with a choice as to whether to withdraw their implied consent (with any of the consequences associated with that choice under section 321J.8–9) then the officer must substantially comply with every provision of law that applies to implied consent. However, the officer has the option of seeking actual, voluntary consent—apart from implied consent.

> Consent may be given independent of this chapter; and the requirements of the Implied Consent Law may be waived. This is what we held in *State v. Hraha*, [193 N.W.2d 484 (Iowa 1972)]. It is also implicit in our conclusion in *State v. Charlson*, [154 N.W.2d 829, 835 (Iowa 1967)]. Language in *State v. Johnson*, [135 N.W.2d 518, 525 (Iowa 1965)], also recognizes consent may be given apart from the Implied Consent Law.
>
> However, such consent or waiver must be clearly proven by the party relying on it to have been made voluntarily, freely and intelligently with a full realization and comprehension of its meaning. *State v. Hraha*, *supra*.

State v. Wallin, 195 N.W.2d 95, 97 (Iowa 1972). In *Wallin*, the request was for a chemical test under implied consent, because the officer had "explained the consequences of refusal" and presented a consent form that explained implied consent. So when the suspect gave consent to a chemical test under threat of implied-consent consequences, that was "consent under the Implied Consent Law and nothing more." *See id.* Of course, if implied consent was the mandatory and exclusive route for *any* chemical test after an arrest for OWI, then it would not matter what the officer did—*Wallin* would not need to analyze the request or the scope of consent given to determine if this was implied consent.

State v. Ransom contains some dicta that suggests the opposite: that "the procedures of chapter 321B are mandatory" in any situation where a driver has been placed "under arrest for OMVUI," along with "those situations enumerated in section 321B.5 [now section 321J.6(1)] wherein the arrest requirement is obviated." *See State v. Ransom*, 309 N.W.2d 156, 158 (Iowa 1981). But in *Wallin*, the suspect was arrested *and* had been involved in a motor vehicle collision where someone had "died instantly as a result of the collision." *Wallin*, 195 N.W.2d at 96. Again, if implied consent was mandatory and exclusive in situations where it *could* have been invoked, that would have ended the analysis.

Other language in *Ransom* reinforces the notion that Iowa law permits voluntary consent to chemical tests, outside implied consent. In those cases, "the proper question is whether defendant validly gave consent to have a blood sample withdrawn outside the scope of 321B." *See Ransom*, 309 N.W.2d at 159. "This requires an examination of the totality of the circumstances to determine whether the [test choice was] the product of an essentially free and unconstrained choice made by the defendant at a time when his will was not overborn nor his capacity for self-determination critically impaired." *See id.* For those purposes, the fact that a defendant "was never threatened that his license would be taken if he refused to give the test" helps *foster* voluntary consent. *See id.*; *accord State v. Pettijohn*, 899 N.W.2d 1, 33–36 (Iowa 2017), *overruled by Kilby*, 961 N.W.2d at 374 (airing concerns that mentioning revocation consequences of a refusal would "weigh against finding his consent [to a chemical test] was voluntary and uncoerced").

More recently, the Iowa Supreme Court "read *Wallin* to stand for the proposition that the statutory implied consent procedure must be followed, but only when the implied consent procedures are invoked." *See State v. Demaray*, 704 N.W.2d 60, 64 (Iowa 2005). And it noted that section 321J.18 "expresses our legislature's intent that the chapter

'not . . . be construed as limiting the introduction of competent evidence bearing on whether an accused was intoxicated.'" *Id.* at 63–64 (quoting *Charlson*, 154 N.W.2d at 833); Iowa Code § 321J.18. Thus, in *Demaray*, suppression was not required when the officer obtained evidence by asking the suspect "to give his consent for the hospital to release his medical records, which included results of a blood test the hospital performed for treatment purposes." *See Demaray*, 704 N.W.2d at 61. Note that the officer still *could have* chosen to invoke implied consent; he could have arrested Demaray or requested a PBT, either of which would have given him two hours to get a test sample or refusal. *See id.* (citing Iowa Code § 321J.6(2)). But implied consent was not mandatory or exclusive—so the officer could pursue other chemical test evidence.

> [I]nstead of invoking implied consent procedures to obtain a blood sample, Deputy Miller used a means not included within the statute: he asked for consent to obtain the blood test the hospital had taken earlier for treatment purposes. . . . Therefore, the first issue we face is whether section 321J.11 is the exclusive means by which law enforcement may obtain a blood sample from a defendant in an OWI case.
>
> [. . .]
>
> [W]e specifically stated in *Wallin* that "[c]onsent may be given independent of [chapter 321J]; and the requirement of the implied consent law may be waived." [*Wallin*, 195 N.W.2d at 98].
>
> We now reiterate 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. *See* Iowa Code § 321J.18 ("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...."). In this case, the officer did not invoke the implied consent procedures, and consequently, we do not judge the admissibility of the blood test under the standards applicable to the implied consent standards. Instead, the blood test was obtained by means of a release of medical records. Thus, we turn to the standard described in section 321J.18, which requires evidence obtained outside the implied consent law to be "competent," as well as the general standards governing waiver and release under state law.

Demaray, 704 N.W.2d at 63–64. In other words, the fact that "the State *could have* invoked implied consent procedures" is not a basis for excluding an otherwise admissible chemical test result. *See id.* at 66. And "[c]onsent may be obtained independently of the statute." *See id.*

The district court stated that *Demaray* was distinguishable because it "dealt with a test that was conducted by medical personnel for treatment purposes." *See* Order (8/16/23), D0031. But the point is that the officer in *Demaray* could have invoked implied consent, and chose to ask for consent to release of that chemical test result instead. *See Demaray*, 704 N.W.2d at 63–64. The underlying rule is the same: implied consent is neither mandatory nor exclusive. *Demaray* was clear on that, like *Wallin* before it. The district court erred by disregarding that clear holding from *Demaray*, which should have controlled here.

B. The procedural requirements of section 321J.6 and section 321J.8 only apply to chemical testing under implied consent, where motorists *submit to* a test request or face consequences for refusal.

Section 321J.6(1) states:

> 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 . . . , subject to this section. The withdrawal of the body substances and the test or tests shall be administered at the written request of a peace officer having reasonable grounds to believe that the person was operating a motor vehicle in violation of section 321J.2 or 321J.2A, and if any of [six subsequently enumerated] conditions exist: . . .

Iowa Code § 321J.6(1). The first sentence defines the scope: this is about implied consent to withdrawal/testing of a chemical sample—"subject to this section." All motorists who meet specified conditions gave implied consent to chemical testing as set out in these provisions. That comes with a statutory right to rescind that implied consent. *See* Iowa Code § 321J.9(1). And it comes with a statutory right to receive a specified advisory about the potential consequences. *See id.* § 321J.8.

Throughout the rest of section 321J.6 and closely related sections, the Code makes it clear that it is not discussing *any* chemical test, nor *all* requests for chemical testing. Those sections apply to *the* requests

and *the* chemical tests that are within the scope of the first sentence of section 321J.6(1)—the requests and testing to which the motorist has already given implied consent. *See, e.g.*, Iowa Code § 321J.7 (explaining that a dead or unconscious motorist "is deemed not to have withdrawn the consent provided by section 321J.6, and the test may be given" upon certification by a medical professional); *id.* § 321J.10(1) (stating "[r]efusal to consent to a test under section 321J.6" must be honored).

Other provisions about chemical tests are not limited in that way. Section 321J.11(1) limits *who* may take "a specimen" of various types for chemical testing. *See* Iowa Code § 321J.11(1); *accord Hraha*, 193 N.W.2d at 488 ("We find that the legislative intent in adopting such standards was to insure . . . accuracy of the . . . tests. . . . It cannot be doubted accuracy is vital to the reliability of evidence relating to such tests whether . . . offered in an administrative hearing or in independent civil or criminal proceedings."). And section 321J.15 provides that chemical test results are admissible at trial, *without* any reference to section 321J.6 or to any request under implied consent:

> Upon the trial of a civil or criminal action . . . arising out of acts alleged to have been committed by a person while operating a motor vehicle in violation of section 321J.2 or 321J.2A, evidence of the alcohol concentration . . . at the time of the act alleged as shown by a chemical analysis of the person's blood, breath, or urine is admissible.

Iowa Code § 321J.15; *accord id.* at § 321J.2(12). And as *Demaray* noted, a freestanding section makes it clear that chapter 321J "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 . . . 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." *See id.* at § 321J.18; *Demaray*, 704 N.W.2d at 63–64. Provisions in this latter category apply to *all* chemical tests—not just testing by implied consent (which is neither mandatory nor exclusive).

Section 321J.8 belongs in the former category, not the latter. It only applies to chemical testing under implied consent. It specifically describes consequences of refusal, which do not apply to any refusals outside of implied consent. *See* Iowa Code § 321J.8(1)(a). It would not make sense to advise a suspect on consequences that are inapplicable—that could only *undermine* the voluntariness of any test decision. It also repeatedly makes references to "the test"—just like the prior provisions that are referring back to "the test" under implied consent, as specified in the first sentence of section 321J.6(1). *See* Iowa Code §§ 321J.6(1) & 321J.7. Moreover, section 321J.8 is only applicable to persons who are "requested to submit to a chemical test." *See* Iowa Code § 321J.8(1).

The "request to submit" is unique to implied consent. It is not a request for *consent*—as section 321J.6(1) explains, consent has already been given or imputed. Rather, it is a request to *submit* in accordance with that consent already given/imputed. *See* Iowa Code § 321J.6(1). Likewise, turning down a request for consent to a chemical test *outside* of implied consent is not a "refusal to submit." Iowa Code § 321J.6(2).[1] And when testing occurs without acquiescence to a "request to submit," that sidesteps consequences that would apply if the person "submitted to chemical testing"—even when the other conditions that would trigger those consequences are present. *See* Iowa Code §§ 321J.12(1) & (6). The officer must choose whether to invoke implied consent and make that "request to submit"—or, alternatively, to seek consent to a chemical test *outside* of implied consent, without otherwise applicable consequences and without the advisory to explain those now-inapplicable outcomes.

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[1] Any refusal to submit within the context of implied consent is analogous to "resisting or obstructing the withdrawal of a specimen pursuant to a search warrant"—to the point where such obstruction triggers the same consequences. *See* Iowa Code § 321J.10(5). Because declining a request *outside* of implied consent isn't "refusal to submit" as used in chapter 321J, that kind of refusal doesn't preclude officers from getting a search warrant—as long as they never made any request that invoked implied consent and its accompanying consequences. *See* Iowa Code § 321J.9(1); *cf. State v. Frescoln*, 911 N.W.2d 450 (Iowa Ct. App. 2017); *State v. Dewbre*, 987 N.W.2d 861 (Iowa Ct. App. 2022). But that is not what happened here, so that is not before this Court.

"Normally, when the same term is used repeatedly in the same statute, we give the term the same meaning each time." *State v. Sewell*, 960 N.W.2d 640, 643 (Iowa 2021) (citing *State v. Paye*, 865 N.W.2d 1, 7 (Iowa 2015)). One such term in section 321J.8 limits its applicability: it can only apply to "[a] person who has been requested to submit to a chemical test." *See* Iowa Code § 321J.8(1). This makes sense, because it lays out an advisory that covers the consequences that only apply to a "request to submit to" the chemical test under implied consent.

This is the only reading that is compatible with opinions holding that "the implied consent statute is not the exclusive means by which law enforcement may obtain chemical testing." *Frescoln*, 911 N.W.2d at 454; *Demaray*, 704 N.W.2d at 64. Under the district court's reading, officers would have to read the advisory under section 321J.8(1) even in situations where they seek consent to chemical testing for reasons that are unrelated to OWI, where those consequences clearly do not apply. *See, e.g.*, *State v. Thompson*, 836 N.W.2d 470, 475 (Iowa 2013) (noting that defendant who murdered his girlfriend in their home had taken a breath test after post-arrest interview with police—and his BAC result was probative evidence in his trial for murder); *State v. Weldon*, No. 11–1370, 2012 WL 3196086, at *3 (Iowa Ct. App. Aug. 8, 2012) (noting

defense presented evidence from a blood test to establish defendant's level of intoxication during a killing that did not involve OWI). The far better approach is to recognize that the language of the statute limits its applicability to situations where its advisory would be useful (and not misleading in a way that would potentially preclude any consent): it only applies to requests to submit to testing under implied consent.

C. This is not a loophole. Implied consent is a tool that officers can reach for whenever it is useful, or leave in the toolbox if it is not needed.

The district court included a footnote that identified the concern that animated its ruling: it worried that "[o]fficers would likely make the same decision in the future if permitted to obtain consent without following implied consent." MTS Ruling (7/3/23), D0029, at 4 n.1. Maybe so. The same is true of voluntary consent to *any* search—when it is simpler than invoking a power to make that consent unnecessary, officers will seek voluntary consent in cases where it is practical to do so. That is neither bad nor new. Moreover, in this context, it is specifically authorized and permitted by section 321J.18. *See* Iowa Code § 321J.18; *Demaray*, 704 N.W.2d at 63–64. The whole point of implied consent is to give officers *additional* options for how to investigate suspected OWI, as opposed to requiring them to use a mandatory/exclusive protocol.

The district court observed (quite correctly) that implied consent often leads to challenges from "defendants seeking to suppress the test results due to alleged non-compliance with the nuances of the implied consent statute." *See* MTS Ruling (7/3/23), D0029, at 4 n.1. When implied consent functions as intended, it can trigger a near-automatic revocation of an intoxicated driver's license. But implied consent may be vulnerable to hyper-technical challenges, and situations may arise where officers cannot be confident that a district court (months later) will reject those challenges. *See, e.g.*, *State v. Jones*, No. 17–0006, 2018 WL 348094 (Iowa Ct. App. Jan. 10, 2018) (arguing that refusal was not actually a refusal); *State v. Carey*, No. 11–1098, 2012 WL 2411202, at *3 (Iowa Ct. App. June 27, 2012) (challenging alleged technical defects in the implied consent advisory); *State v. Casper*, 951 N.W.2d 435, 438 (Iowa 2020) (arguing that officer violated statute on independent test when he "agreed to provide the defendant exactly what he wanted"). Often, this is not a cut-and-dry question about what the law requires—Iowa precedent on implied consent is full of requirements that officers take "reasonable" steps when facing unforeseen challenges. *See State v. Wootten*, 577 N.W.2d 654, 656 (Iowa 1998) (requiring officers to grant a request for an independent test if it is "made within a reasonable time

under the circumstances"); *State v. Baraki*, 981 N.W.2d 693, 699–700 (Iowa 2022) (reversing district court ruling that officer did not fulfill duty to make "reasonable efforts to have the implied consent advisory interpreted into a language in which the motorist is fluent"); *State v. Stephens*, No. 13–1858, 2015 WL 1815969, at *3–4 (Iowa Ct. App. Apr. 22, 2015) (panel split on appeal on question of whether the officer "provided a reasonable opportunity for Stephens to contact his mother" after reading the implied consent advisory, notwithstanding officer's "affirmative . . . effort to revive Stephens's cell phone"). Officers may prefer to steer clear of such uncertain and shifting terrain, especially if an OWI suspect appears likely to give actual consent to a chemical test even without the promise of consequences for refusal.

After all, the whole point of implied consent is to impose costs and evidentiary/administrative consequences on OWI suspects who *refuse* to provide a chemical sample, and thereby create incentives for OWI suspects to *submit* to chemical tests to avoid those consequences (which also has the effect of enhancing the probative value of a refusal, by making it more costly). That is extremely useful in situations where an OWI suspect has not already made up their mind about whether to take the chemical test. But if they are clearly willing to offer a sample

without the need for the implied consent advisory, there is no need to complicate the matter and muddy the waters—that actual consent is constitutionally valid (perhaps even constitutionally preferable), and the chemical test result is admissible under section 321J.18. Officers may calibrate their approach to each OWI suspect on the basis of each individual's statements, behaviors, and apparent level of intoxication.

Officers may also calibrate their approach based on the timing of their interaction with the OWI suspect. All implied consent testing must be *offered* within two hours of a suspect's PBT decision or arrest for OWI. *See* Iowa Code § 321J.6(2). But an implied consent decision requires a reasonable opportunity for a consultation with an attorney. *See, e.g.*, *State v. Dunphy*, No. 17–1693, 2018 WL 5292096, at *3–6 (Iowa Ct. App. Oct. 24, 2018). An officer who knows that a significant portion of time has already elapsed may decide not to risk reading an implied consent advisory, if the clock may run out on the applicability of consequences that it mentions (which would render it misleading). *See State v. Kjos*, 524 N.W.2d 195, 197 (Iowa 1994). That officer may instead rely on section 321J.18 and its safe harbor for "the results of chemical tests of specimens . . . obtained more than two hours after the person was operating a motor vehicle." *See* Iowa Code § 321J.18.

The district court relied upon *State v. Morgan*, 658 S.E.2d 237 (Ga. Ct. App. 2008). It noted that *Morgan* was subsequently abrogated by amendment to Georgia's implied consent statute—but it missed the point of that abrogation. *Morgan* held that Georgia officers *must* read their implied consent advisory "even though a suspect may otherwise consent to testing." *See Morgan*, 658 S.E.2d at 239. But that was not what Georgia's legislature intended in passing its implied consent law (which was substantially similar to Iowa's in language and operation). And that is why it amended the statute to clarify that "[n]othing in this Code section shall be deemed to preclude the acquisition or admission of evidence . . . if obtained by voluntary consent or a search warrant." *See* OCGA § 40–5–67.1(d.1) (2006); *cf. McMullen v. State*, 730 S.E.2d 151, 159 n.42 (Ga. Ct. App. 2012) (noting that it was not clear from the opinion in *Morgan* whether the crime and/or the district court ruling had preceded that 2006 amendment, to explain why *Morgan* did not mention that provision). *Morgan* read a similar statutory framework and held that the Georgia legislature intended to make implied consent mandatory and exclusive—but it could not have been more wrong. The policy consequences that *Morgan* said were unacceptable were, in fact, just what legislatures that passed these laws had intended all along.

The district court worried that this would "virtually guarantee a test result in every case." *See* MTS Ruling (7/3/23), D0029, at 4 n.1. But how? An OWI arrestee should be more likely to *refuse* to consent, in the absence of an advisory stating that the consequences for a refusal will be twice as harsh as the consequence for taking the test and failing. *See* Iowa Code §§ 321J.8(1)(a)–(b), 321J.9(1), 321J.12(1). Flynn has not even alleged that his test decision might have changed, if the deputy gave him a written request and read him an implied consent advisory. Nor could he plausibly make such an allegation, given that the advisory would have promised more severe consequences for refusing the test than for taking it and failing it. The upshot in this particular case is that *even if* Flynn were right that this violated section 321J.8, it would not be a violation that would warrant suppression of this test result. *See, e.g.*, *State v. Hutton*, 796 N.W.2d 898, 905–07 (Iowa 2011) (holding information in advisory was incorrect, but also that suppression was not required because "the circumstances do not support an argument that the excess verbiage in the advisory induced Hutton to consent to the test"); *accord State v. Overbay*, 810 N.W.2d 871, 879 (Iowa 2012) (stating suppression is not required if "the defendant would have made the same choice to undergo . . . chemical testing" without the error).

More broadly, this illustrates why the district court's concerns are largely unfounded: if officers choose not to invoke implied consent, that does not make a suspect *more* likely to consent to a chemical test. There are reasons why officers may choose to forego implied consent (including time pressure, or scenario-specific uncertainty about what a reviewing court might say about the "nuances" of implied consent as applied to those specific factual circumstances). But convincing more OWI suspects to provide chemical samples is not one of them. Officers who want to maximize their rate of obtaining chemical test results will use implied consent when it is practicable, and steer clear otherwise—just as the legislature intended. After all, section 321J.18 states that this chapter "does not limit the introduction of any competent evidence" on the question of a driver's intoxication. *See* Iowa Code § 321J.18; *accord id.* at §§ 321J.2(12) & 321J.15. Officers are free to use any lawful means to investigate OWI. They may invoke implied consent when applicable, or select another (lawful) investigative method—and if that produces evidence that satisfies the foundational requirements for admissibility of chemical test results, so much the better. No provision of law requires officers to brandish implied consent in situations where simply asking for actual consent—a much lighter touch—might be equally effective.

Put simply: "the implied consent law is not the exclusive means by which the State may obtain . . . test evidence from a defendant in an OWI proceeding." *See Demaray*, 704 N.W.2d at 64; *accord Wallin*, 195 N.W.2d at 98. Implied consent is neither mandatory nor exclusive, so asking for actual consent (instead of invoking implied consent) did not violate any provision of chapter 321J (nor was it otherwise unfair). The district court erred in holding otherwise, and it erred in suppressing evidence of the results of this chemical breath test after finding that the sample was "voluntarily given and not coerced." *See* MTS Ruling (7/3/23), D0029, at 2. Therefore, this Court should reverse.

CONCLUSION

The State respectfully requests that this Court vacate the district court's ruling that granted Flynn's motion to suppress, and remand for further proceedings consistent with that order.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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