IN THE SUPREME COURT OF IOWA

NO. 17-1803

RICKIE RILEA
TIMOTHY RILEY

Petitioners-Appellees,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent-Appellant.

Appeal from the Iowa District Court for Polk County
The Honorable Eliza Ovrom, Judge

RESPONDENT-APPELLANT'S BRIEF

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court for disposition because the issue presented is of broad public importance requiring its ultimate determination. Issues of public safety are implicated by the district court's ruling. *See* Iowa R. App. P. 6.1101(2)(d).

The district court's rejection of the citizen's arrest doctrine, as applied by peace officers employed by the Iowa Department of Transportation (DOT), also conflicts with principles pertaining to citizen's arrest in *State v. Lloyd*, 513 N.W.2d 742 (Iowa 1994). *See also* Iowa R. App. P. 6.1101(2)(b).

Lloyd holds a citizen's arrest may be made under Iowa Code section 804.9(1) by a peace officer for any public offense attempted or committed in the officer's presence, including simple misdemeanor traffic offenses. Pursuant to *Lloyd*, a peace officer in making a citizen's arrest may use the "indicia" of his or her office to stop an individual's vehicle, meaning the officer may use the means and equipment available to police officers to make traffic stops such as activating the flashing lights of a patrol car. In addition, it is immaterial to perfecting the citizen's arrest whether the officer purports to act officially or as a private person. Under *Lloyd*, the officer may charge the individual by citation in lieu of taking the person into formal

custody for appearance before a magistrate. *See Lloyd*, 513 N.W.2d 743-745; *see also* Restatement (Second) of Torts § 121, comment d. The salutary holding of *Lloyd* should not be undermined.

STATEMENT OF THE CASE

Nature of the Case. This matter arises from petitions for judicial review brought in the district court by petitioners, Rickie Rilea and Timothy Riley. Appendix (App.) pp. 184-193. The petitioners sought judicial review of declaratory orders DOT issued pursuant to Iowa Code section 17A.9 on April 26, 2017. App. pp. 76-183. Petitioners Rilea and Riley submitted their petitions for declaratory orders to DOT on March 30, 2017. App. pp. 40-75.

DOT held its peace officers, in addition to the arrest authority conferred upon them by Iowa Code section 321.477 (2017) applicable as of March 30, 2017, also possessed legal authority to stop vehicles, issue citations and, if need be, make arrests, for the following:

> 1. The offense of Operating While Intoxicated (OWI) in Iowa Code chapter 321J if the DOT officer had the requisite training called for by Iowa Code section 321J.1(8)(e).
>
> 2 Offenses pertaining to school bus safety under the "*Keep Aware Driving – Youth Need School Safety Act*." *See* Iowa Code § 321.372; *see also* Iowa Code § 321.380 (making it the duty of "*all peace officers* and of the state patrol to enforce the provisions of Iowa Code sections 321.372 to 321.379") (emphasis added).

> 3. For any public offense "observed" by a DOT officer in the officer's presence, including traffic offenses, pursuant to the arrest authority conferred by Iowa Code section 804.9(1) (the citizen's arrest doctrine), consistent with the interpretation of the Iowa Supreme Court in *State v. Lloyd*, 513 N.W.2d 742 (Iowa 1994).

DOT Declaratory Orders; App. pp. 118, 172.[1]

Course of Proceedings in District Court. Rilea's petition for judicial review was filed in Polk County No. CVCV054155 on May 23, 2017; Riley's petition for judicial review was filed in Polk County No. CVCV054156, also on May 23, 2017. On June 23, 2017, Judge Ovrom ordered the two actions consolidated into CVCV054155. Judge Ovrom on October 24, 2017, reversed DOT's determination, declaring:

> Before the May 2017 amendment to Section 321.477, the legislature had not conferred authority on IDOT MVE officers to issue citations for matters other than operating authority, registration, size, weight, and load, and the other limited exceptions discussed in note 3 above. Under the statute in effect at the relevant times, IDOT officers were not authorized to issue speeding citations; such authority lies with other designated peace officers.

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[1]The DOT's declaratory orders applied the law as it existed on March 30, 2017. App. pp. 77, 131. Iowa Code section 321.477 (2017) was subsequently amended effective May 11, 2017. *See* 2017 Iowa Acts ch. 149, § 3 (H.F. 463). Throughout this brief, DOT will cite "section 321.477 (2017)" to refer to the statute interpreted by DOT in its declaratory orders prior to the enactment's amendment. By contrast, DOT will cite "section 321.477 (as amended)" when referring to the statute as amended by H.F. 463.

App. p. 264.[2]

On November 7, 2017, DOT filed its notice of appeal. App. pp. 267-269.

Statement of the Facts. Petitioners sought a ruling from DOT declaring the agency's peace officers had no authority to stop motor vehicles for the enforcement of laws "beyond those laws relating to operating authority, registration, size, weight, and load." App. pp. 40, 58. Petitioners asserted:

> For approximately the past two or more years, the IDOT has maintained an internal policy whereby MVE patrol officers are directed to stop and detain any motorist *observed* violating Iowa law and issue citations to those motorists.

App. pp. 41, 59 (emphasis added).

Petitioners specified a DOT peace officer had "observed" each violation of law. Under those circumstances, meaning the witnessing of the commission of a public offense by a DOT officer, DOT ruled its officers had legal authority to stop a vehicle, issue a citation and, if need be, make an arrest for the public offense committed in an officer's presence. *See generally*, App. pp. 117-123, 171-177.

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[2]Judge Ovrom's "limited exceptions" preserved the right to make arrests for OWI violations under Iowa Code chapter 321J, as well as allowing DOT peace officers to assist other non-DOT peace officers in making arrests in accordance with Iowa Code section 804.17. App. p. 257.

ARGUMENT

THE DISTRICT COURT ERRED IN DECLARING NO LEGISLATIVE AUTHORITY EXISTED THAT WOULD JUSTIFY A DOT PEACE OFFICER'S EXERCISE OF ARREST AUTHORITY FOR AN OFFENSE UNRELATED TO OPERATING AUTHORITY, SIZE, WEIGHT, LOAD, AND OPERATING WHILE INTOXICATED, EVEN WHEN THE OFFENSE WAS OBSERVED IN THE OFFICER'S PRESENCE.

Error Preservation, Scope and Standard of Review. Error was preserved by DOT. DOT urged the affirmance of DOT's declaratory orders before Judge Ovrom on October 6, 2017. *See* transcript (Tr.) of hearing, pp. 41-76. In addition, DOT on August 31, 2017, filed an eighty-five-page brief in the district court extensively outlining its position. All this followed DOT's issuance of two forty-eight page declaratory orders by DOT's director. App. pp. 76-183.

The scope of review for an agency determination is for correction of errors at law. *See, e.g., Midwest Automotive III, LLC v. Iowa Dept. of Transp.*, 646 N.W.2d 417, 422 (Iowa 2002). It is a fundamental principle of administrative law that "administrative decisions are to be made by the agencies and not the courts." *Id.*, quoting *Leonard v. Iowa State Board of Education*, 471 N.W.2d 815, 815 (Iowa 1991).

Additionally, the petitioners' requests for declaratory orders implicated traffic offenses encompassed in Iowa Code chapter 321. The legislature has vested wide authority in DOT's director regarding matters in Iowa Code chapter 321, including the enforcement of its provisions. For instance, Iowa Code section 321.3 provides: "The director [DOT director] is hereby *vested with the power and is charged with the duty* of observing, administering, *and enforcing the provisions of this chapter*" (emphasis added).

Accordingly, though the final interpretation of the law rests with this Court, given the vesting of the power and duty to enforce the provisions of Iowa Code chapter 321 in DOT's director, the declaratory orders issued by Mr. Lowe should be given appropriate deference unless this Court finds his determinations "irrational, illogical, or wholly unjustifiable." *See* Iowa Code §§ 17A.19(10)(l) and 17A.19(11)(c).

A. Iowa Code section 804.9(1).

The district court declared DOT peace officers may not issue citations for offenses beyond operating authority, registration, size, weight, load or operating while intoxicated because of Iowa Code section 321.477 (2017). The court declared "100 uniformed officers" were relying upon citizen's arrest powers "to exercise authority not given to them by the legislature, and

to issue thousands of citations outside their designated statutory authority." App. p. 261. This conclusion necessarily meant Judge Ovrom found *nothing* in the Iowa Code that could ever possibly justify the DOT officers' actions, even in the context of the facts posited by the petitioners which assumed violations of law were being "observed" in the officers' presence.

Iowa law understandably aspires to achieve results that are reasonable and in accordance with public interest. This aspiration finds codification in various formulations throughout Iowa's statute books. As just one example, Iowa Code section 4.4(3) declares it "presumed" the legislature intends a "just and reasonable result." It is further presumed the legislature's statutes are calculated so the "[p]ublic interest is favored over any private interest." Iowa Code § 4.4(5).

The Iowa Supreme Court has long aligned itself with these same concepts. On any number of occasions, the Court has declared it will refrain from statutory interpretation "in a manner that leads to absurd results." *Iowa Ins. v. Core Group, Iowa Justice Ass'n*, 867 N.W.2d 58, 75 (Iowa 2015). The Court wisely observed it necessary to "consider fact patterns other than the one before the court to determine if a particular statutory interpretation would have *untoward* consequences." *Id.* (emphasis added). The pondering of the effects of rulings "is part of the judicial function – to consider

alternative statutory interpretations and see where those alternatives logically lead." *Id.* at 76. The above authorities demonstrate the Iowa Supreme Court has long aligned itself on the side of "common sense."

Iowa Code section 804.9(1) provides:

> A private person may make an arrest:
>
> 1. For a public offense committed or attempted in the person's presence.

At first blush, one might argue a peace officer is not a private person. DOT officers are peace officers. *See, e.g.*, §§ 801.4(11)(h) and 321J.1(8)(e). But Iowa's appellate courts have declared a peace officer, who for some reason is otherwise lacking in general arrest authority, may nonetheless act to effectuate a citizen's arrest if the offense has been "observed" by the officer, *i.e.*, if the crime has been attempted or committed in the officer's presence. *See State v. Lloyd*, 513 N.W.2d 742 (Iowa 1994); s*ee also Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 769 (Iowa 2002) ("in the person's presence" requirement is liberally construed and is satisfied by simple sensory detection through sight, sound or smell). Though peace officers might not for whatever reason possess "official" arrest authority they do not "cease to be persons." *State v. O'Kelly*, 211 N.W.2d 589, 595 (Iowa 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974).

Thus, the Iowa Supreme Court in *Lloyd* held a South Dakota peace officer could rely upon the citizen's arrest statute in Iowa Code section 804.9(1) to make a traffic stop in Iowa because the arrest was "valid as a citizen's arrest under section 804.9(1) if made for a public offense committed in the officers' presence." 513 N.W.2d at 744. The officer had "observed" the violations. *Id.* at 742, 745. The Court held citizen's arrest could even be used to charge a defendant with low-level traffic offenses such as "failure to have lighted taillights" and "expired registration." *Id.* at 744. *See also Long v. Lauffer*, 797 N.W.2d 621 (Table), 2011 WL 222530, *6-8 (Iowa App. 2011) (approving *State v. Lloyd's* analysis concerning Iowa Code section 804.9 to uphold a citizen's arrest made by an off-duty Polk County deputy sheriff).

In addition, the legislature, well before *Lloyd*, embraced citizen's arrest for use by peace officers. The state patrol, under Iowa Code section 80.22, has powers reserved to it by 1939 Iowa Acts, ch. 120. Interestingly, in 1939 Iowa Acts, ch. 120, section 8, state patrol officers were precluded from exercising "their general powers" inside the limits of "any city or town," subject to certain exceptions. However, the legislature provided its "limitations shall in no way be construed as a limitation as to their power as officers *when a public offense is being committed in their presence*."

(emphasis added). In other words, the state patrol is permitted to make citizen's arrests. *See also* Iowa Code § 80.9A(7). The 1939 legislation, of course, predates the inclusion of DOT's officers as "Peace officers" under Iowa Code section 801.4(11)(h). But there should be no logical reason to think state patrol peace officers have citizen's arrest powers but DOT peace officers do not. Of course, DOT peace officers have the same citizen's arrest authority as anyone else.

The above is consistent with the long-standing principle a police officer who otherwise lacks official authority nonetheless has all the powers of arrest of a private person. 6A C.J.S. *Arrest* § 12, at 21 (1975). This, in turn, jives with Iowa precedent declaring no difference in the authority granted citizens to arrest under Iowa Code section 804.9(1) with the authority granted peace officers under Iowa Code section 804.7(1). In both instances, the law permits persons to make arrests when the offense is committed in their presence. *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 770 (Iowa 2002).

But the *Lloyd* case is particularly significant because it held a peace officer need not act as a private person in making a citizen's arrest. Instead, the officer may apply "indicia" of office to complete an arrest. 513 N.W.2d at 745. The officer does not have to shed the police uniform; switch from a

government-owned squad car to a private vehicle; or refrain from effectuating a traffic stop without using the squad car's flashing lights.

In summary, if a peace officer otherwise has general arrest authority, he or she may arrest for any offense committed in the officer's presence under Iowa Code section 804.7(1). But if in some situations that officer lacks arrest authority, officers still retain their private capacity and may arrest under the citizen's arrest authority conferred in Iowa Code section 804.9(1) for infractions attempted or committed in the officer's presence. The law has not left a gap.

Therefore, in view of Iowa Code section 804.9(1), the law's expressed intent to interpret statutes with the objective of achieving a just and reasonable result in the public interest, the existence of case authority such as *State v. Lloyd*, and the Iowa Supreme Court's expressed desire to avoid absurdity, consider the implications of the district court's ruling under the following fact patterns:

A. What if a DOT officer on patrol in an interstate highway construction zone, where workers are present and where a family of four was recently killed because of a motorist traveling at an excessive rate of speed, observes a motorist traveling through the work zone going 89 miles per hour in the 55 mile-per-hour zone?

B. What if a DOT officer observes a driver traveling eastbound in the westbound lanes of Interstate 80 at an excessive rate of speed?

C. What if a DOT officer while entering a rest area along Interstate 35 observes a child being molested by an assailant?

D. What if a DOT officer on patrol observes a fugitive from justice wanted on charges involving violent crimes?

E. What if a DOT officer, upon exiting the courthouse after testifying in a case involving an overweight load infraction, observes a person in the courthouse parking lot punch one of the lawyers to the proceedings in the nose and overhears that same person making threats about what he intends to do to the judge?

F. What if a DOT officer while traveling through a highway construction zone at night observes a semi being driven without any headlights or taillights activated?

G. What if a DOT officer on duty at a weigh station observes a vehicle passing through the facility with a bountiful supply of illicit drugs in the vehicle?

H. What if a DOT officer on routine patrol observes a shooting and witnesses the shooter fleeing the crime scene?

I. What if a DOT officer observes a vehicle dangerously tailgating another vehicle on the highway in what appears to be a fit of road rage?

J. What if a DOT officer observes a driver illegally pass a school bus stopped with the bus's stop arm and warning lights activated to let children exit the bus, and the errant driver hits a seven-year-old girl crossing the street and the motorist proceeds to leave the scene?

None of these scenarios involve matters relating to operating authority, registration, size, weight, load or operating while intoxicated.

DOT's officers are highly trained peace officers. Mr. Lowe's recitation of their extensive training is set out in his declaratory orders at pages 45-46 (original pagination). App. pp. 120-121, 174-175. It is absurd to think a highly trained peace officer could witness the occurrences above, but that same officer has absolutely no legal authority to stop a vehicle or make an arrest based upon the violations of law the officer observed. Yet, that is "the law" if the officers are restrained from acting upon violations of law they have "observed" which are unrelated to operating authority, registration, size, weight, load or operating while intoxicated.

The scenarios above are hypothetical. But that's the nature of an action for declaratory relief. The declaratory order provisions of Iowa Code section 17A.9 contemplate rulings based upon "purely hypothetical facts." *Iowa Ins. v. Core Group, Iowa Justice Ass'n*, 867 N.W.2d 58, 68 (Iowa 2015). But the scenarios above are not remote from reality. In *State v. Hedlund*, 662 N.W.2d 372 (Table), 2003 WL 190768 (Iowa App. 2003), the Iowa Court of Appeals held DOT officers had reasonable suspicion to support the continued detention of the driver of a tractor-trailer at a Dallas County weigh station because the officers' observations of the subject were consistent with Hedlund's reactions to alcohol, narcotics or medication. Hedlund refused the DOT officers' request to search the vehicle's cab.

Hedlund was ultimately charged with possession of marijuana when the officers later discovered marijuana in a compartment behind the driver's seat after a West Des Moines K-9 unit was called to the scene. 2003 WL 190768, *1-2.

Under the district court's ruling, the DOT officers in *Hedlund* acted improperly, though their actions were upheld on appeal. Possession of marijuana would be an offense unrelated to operating authority, registration, size, weight, load or operating while intoxicated. Hedlund had shown anxiety and was hesitant in answering the DOT officers' questions. His eyes were bloodshot, and one eye was jerking to the side. A passenger in the vehicle had provided a false name. Nevertheless, under the district court's rationale DOT officers may have been wrong to request a search and, once the request was refused, should have apparently permitted Hedlund to travel down the road though marijuana was later found in the vehicle within the driver's reach. Nor under the district court's declaration could DOT officers legally restrain Hedlund while awaiting the arrival of other officers. Such a restraint would arguably be an arrest which the district court held they were powerless to perform due to Iowa Code section 321.477 (2017). *See also* Iowa Code § 804.5 (arrest defined to include the "restraint" of a person). Once again, it is absurd to think the DOT officers lacked the authority to

stop and arrest a person who was exhibiting signs of narcotics use and who had been operating a semi on this state's highways.

It is also interesting to consider another "what if." If it is "the law" DOT officers have no authority to invoke citizen's arrest, does it mean Mr. Hedlund would have been within his rights to simply disregard the officers and drive out of the weigh station once their investigation implicated potential narcotics possession? If there was no lawful basis that could justify the stop and arrest for marijuana possession, it appears Mr. Hedlund could have done so. Yet that would have been an absurd result that is clearly *not* in the public interest.

And do DOT officers get involved in scenarios where shootings have occurred? The record in this case reveals they do. The petitioners' exhibit 3, filed July 31, 2017, at page 6 (memorandum of Mark Lowe), contains the following passage:

> One of the key things that will pull us from our core enforcement duties is the request for assistance by another agency, a need that was recently and ably demonstrated by the recent shootings of two Des Moines and Urbandale officers – we immediately provided officers to assist in patrol activities to search for the shooter and our officers were the next two officers on scene to back up the Iowa DNR officer that apprehended the shooter.

App. p. 225.

Two points are significant from the above. First, it was a DNR officer that apprehended the shooter, not a city police officer, sheriff's deputy or state patrol officer. Iowa's peace officers, *all of them*, provide extremely important public safety functions, and very often are called upon to do so at considerable risk to themselves. They absolutely have every legal right to act *in the interest of public safety* upon what they have "observed." Second, though a naysayer might respond the DOT officers needed no additional authority to the extent they could be deemed to be acting at the request of other law enforcement, *see* Iowa Code § 804.17, what about the scenario where a DOT officer observes a shooting firsthand before any request for assistance is made by another agency? Is it reasonable to think a DOT officer has absolutely no authority to act in that circumstance? Of course not. That officer can and should act upon the observation of the offense, entirely consistent with Iowa Code section 804.9(1).

The harsh effects for public safety arising from the district court's rulings cannot be mitigated by resort to alternative legal doctrines. The petitioners assumed a set of facts where criminal violations of law had been "observed," and DOT officers stopped vehicles and issued citations for the lawbreaking. Thus, the "community caretaking" exception to the warrant requirement would be of no aid in justifying the actions of the DOT officers.

That doctrine exists only in respect to activities "totally divorced" from matters pertaining to the "violation of a criminal statute." *See State v. Pettijohn*, 899 N.W.2d 1, 15 (Iowa 2017) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed.2d 706 (1973)).

Nor under the district court's ruling would an "investigatory stop" be authorized, except in relation to the limited criminal offenses the district court's ruling permitted the DOT officers to pursue. The legal underpinning permitting investigatory stops requires an officer to have reasonable suspicion a criminal act has, is or will be taking place. *Id*. But if DOT's officers have no authority over criminal offenses beyond the specified few granted to DOT for enforcement by the district court, it begs the question why they would be authorized to make any investigatory stop for matters pertaining to the non-permitted offenses.

Therefore, DOT's declaratory orders, premised as they were upon DOT officers having "observed" a public offense in their presence, should have been upheld as correct by the district court. Regardless of any limitations in Iowa Code section 321.477 (2017), DOT's officers had the right to act regarding offenses attempted or committed in their presence pursuant to Iowa Code section 804.9(1).

B. The Iowa Attorney General's Opinion.

The district court referenced an opinion of the Iowa Attorney General in the ruling. App. pp. 259-260. DOT sought an opinion of the Iowa Attorney General in 1990 concerning the authority of its peace officers. *See* 1990 Iowa Op. Atty. Gen. 100 (Iowa A.G.), Opinion No. 90-12-8, 1990 WL 484921. An opinion of the attorney general is not binding upon the courts, but it is entitled to appropriate consideration as the courts go about their determination regarding the interpretation to be "placed upon the statute." *City of Clinton v. Sheridan*, 530 N.W.2d 690, 695 (Iowa 1995).

Under the attorney general's rationale, Iowa Code section 321.477 (2017) limits the arrest authority of DOT peace officers to "arrests for violations of the motor vehicle laws relating to the operating authority, registration, size, weight, and load of motor vehicles and trailers and registration of a motor carrier's interstate transportation service with the department." 1990 WL 484921 *2. DOT accepted the attorney general's opinion and has acted in conformity with it. App. pp. 78, 132. But the DOT's acceptance of the attorney general's advice concerning the limitations upon its general arrest authority does not resolve the issue raised by petitioners.

The attorney general, in addition to the issue concerning "general" arrest authority, was also asked about the authority DOT's officers have in relation to OWI enforcement. The attorney general opined the relevant statutory provisions in then Iowa Code chapter 321J (1989) specifically included DOT peace officers within the meaning of "law enforcement officer" in section 321J.1(7)(e) (1989). Consequently, if they were properly qualified under section 321J.1(7)(e) (1989) [today the statute is codified as Iowa Code section 321J.1(8)(e) (2017)], requiring satisfactory completion of an approved training regimen relating to drunk driving enforcement, the attorney general concluded DOT's peace officers "have authority to enforce OWI violations under Iowa Code chapter 321J." *See* 1990 WL 484921 *3.

DOT's peace officers do have the requisite training referenced in Iowa Code section 321J.1(8)(e) (2017). App. pp. 83, 120, 137, 174. Consequently, consistent with the attorney general's advice, DOT officers meet the definition of "Peace officer" under chapter 321J to enforce the OWI laws, even though such matters may be unrelated to operating authority, registration, size, weight, and load.

The petitioners originally contested this point. Their petitions to DOT for declaratory orders sought a declaration DOT officers had no authority "to stop drivers for violations unrelated to operating authority, registration, size,

weight, and load or issue citations for such violation." App. pp. 57, 75. No exception was made by petitioners for OWI. Later, perhaps for tactical reasons, petitioners conceded DOT peace officers may make arrests for operating while intoxicated and the district court noted: "It is also undisputed by both sides that IDOT officers have OWI arrest authority under Iowa Code chapter 321J …." *See* ruling, p. 6 fn. 3; App. p. 257. *See also* Tr. pp. 10, 45-46.

The petitioners' concession DOT has OWI enforcement powers presents an interesting point for discussion. This is because the attorney general also advised DOT its officers could make citizen's arrests for OWI. The entirety of the attorney general's advice pertinent to OWI enforcement provided:

> We opine that DOT peace officers fit the definition of "law enforcement officer" under section 321J.1(7)(e) [1989 Code of Iowa now section 321J.1(8)(e) in the 2017 Code of Iowa] and, if properly trained and qualified pursuant to that section, have authority to enforce OWI violations under Iowa Code chapter 321J.
>
> Notwithstanding the arrest limitation of section 321.477, the propriety of the implied consent procedures under chapter 321J do not necessarily depend on the law enforcement officer's authority to arrest an individual. *State v. Wagner*, 359 N.W.2d 487, 489 (Iowa 1984); Iowa Code § 321J.6 (1989). When a law enforcement officer initiates the implied consent procedures under chapter 321J, they act as a statutory agent of the DOT for purposes of administering the laws of this state pertaining to revocation of a driver's license. *Id.* at 490.

> *Moreover, DOT peace officers may make arrests for OWI if, in the performance of their regular duties, the offense is committed or attempted in the officer's presence, pursuant to the citizen arrest powers of Iowa Code section 804.9 (1989).*

1990 WL 484921 *3 (emphasis added).

Thus, the attorney general opined the citizen's arrest doctrine was available to DOT officers. There can be no other reasonable interpretation. Note, too, the attorney general's use of "Moreover" in the italicized portion of the quote above. "Moreover" means: "In addition to what has been said." Merriam Webster Collegiate Dictionary (Tenth Edition) (1995) at 757. Therefore, *in addition* to having authority to enforce the provisions of chapter 321J if officers meet the 321J-training criteria, DOT officers, in the attorney general's view, have authority to make arrests for OWI *during their regular duties* whenever the "offense is committed or attempted" in their presence.

Citizen's arrest represents a legitimate, separate legal basis authorizing an arrest. After all, if the only basis permitting a DOT officer to enforce the OWI provisions in chapter 321J was in those circumstances where the officer had the 321J-training, there would have been no reason for the attorney general to even mention the citizen's arrest authority in the opinion.

The petitioners, as noted, altered their initial position and decided they would concede the attorney general was correct in holding DOT officers may enforce the OWI laws, at least if they have the statutory training mentioned in chapter 321J. But what about enforcement of OWI by means of citizen's arrest as discussed in the opinion? And if citizen's arrest is available to enforce OWI, why isn't it available regarding any other public offense a DOT officer observes? The district court's resolution of these obvious questions was to hold the opinion's discussion of "citizen's arrest authority is limited to OWI enforcement under Chapter 321J." App. p. 260. According to the district court, the attorney general's endorsement of the citizen's arrest authority in Iowa Code section 804.9 applied to one crime only: OWI. This is erroneous.

Yes, citizen's arrest was discussed in that portion of the opinion where it was asked "whether DOT peace officers have authority to enforce the Operating While Intoxicated (OWI) laws found in Iowa Code chapter 321J (1989)." 1990 WL 484921 *2. That was the specific crime DOT asked about. But the attorney general's answer was two-part: First, DOT was told the officers "have authority to enforce OWI violations under Iowa Code chapter 321J" if they have the training specified in chapter 321J and, second, they may make arrests for OWI if officers observe the offense attempted or

committed in their presence under the citizen's arrest doctrine. 1990 WL 484921 *3.

But is the attorney general's rationale limited only to OWI? Of course not. Nor could it be. Iowa Code section 804.9 is not limited to one offense. Iowa Code section 804.9(1) applies to any "public offense." The term "public offense" includes "that which is prohibited by statute and is punishable by fine or imprisonment." *See* Iowa Code § 701.2. *See also State v. Lloyd*, 513 N.W.2d at 745 ("Thus, the status of an offense as a felony or misdemeanor has no bearing on the grant of authority in section 804.9."). That the attorney general said a citizen's arrest can be made for OWI does not mean a citizen's arrest cannot be made for any other public offense.

The district court also concluded the attorney general must have meant citizen's arrests can only be made for OWI by DOT officers because if they were permitted to make citizen's arrests for other public offenses it "would negate the entire first portion of the opinion, and is contrary to the *Merchant* (*sic*) *Motor Freight* decision relied on in the attorney general's opinion." App. p. 260. The district court is incorrect. The "first portion" of the attorney general's opinion dealt with this question:

> First you ask whether DOT peace officers are empowered by the general arrest provisions of Iowa Code section 804.7 or

> limited by the arrest powers enumerated under Iowa Code section 321.477.

1990 WL 484921 *1.

The first question, therefore, pertained to "general arrest authority." General arrest authority is what is delineated in Iowa Code section 804.7. *See Hildenbrand v. Cox*, 369 N.W.2d 411, 416 (Iowa 1985) ("Iowa Code section 804.7 *more generally* prescribes the conditions under which peace officers may make warrantless arrests ...") (emphasis added). Iowa Code section 804.9, on the other hand, is a statute of greater particularity. In the case of misdemeanors, section 804.9 permits an arrest *only* if the public offense has occurred or been attempted in the presence of the person making the arrest.

Declaring an individual, or class of individuals in the case of DOT officers, to be without general authority under Iowa Code section 804.7 does not mean no arrest authority exists pursuant to Iowa Code section 804.9. The district court's position would "negate" the use of citizen's arrest authority whenever "general" arrest authority is lacking. But if a private citizen who is not a peace officer lacks general arrest authority under section 804.7, which is obviously the case, does that mean that person must be without authority to make a citizen's arrest pursuant to Iowa Code section 804.9? Or, put differently, if that same person has citizen's arrest authority

under section 804.9, does that "negate" the conclusion the private citizen lacks "general" arrest authority pursuant to Iowa Code section 804.7? Certainly not. Similarly, if DOT officers lack general arrest authority pursuant to Iowa Code section 804.7, it does not mean they are without the authority to make a citizen's arrest under section 804.9. These two provisions of the Iowa Code were not enacted to cancel each other out.

Nor is the application of citizen arrest authority to public offenses beyond OWI in conflict with the attorney general's reliance upon *Merchants Motor Freight*. DOT will discuss *Merchants Motor Freight v. Iowa State Highway Commission*, 239 Iowa 888, 32 N.W.2d 773 (1948), in greater detail in subsection d of this argument. However, it is sufficient for purposes here to simply note *Merchants Motor Freight*, under the view of the law in 1948, concluded the citizen's arrest doctrine was "not a question presented here for determination." 239 Iowa at 893, 32 N.W.2d at 776.

The *Merchants Motor Freight* Court reached this conclusion on the notion no citizen's arrest could be achieved if highway commission officers were acting "officially" and if "summonses" were being issued to Merchants Motor Freight's employees. *Id*. The issuance of a summons was thought to be a procedure that was not an arrest under Iowa Code section 755.5 (1946) (Iowa's citizen's arrest statute at the time of *Merchants Motor Freight*). 239

Iowa 893, 32 N.W.2d at 776. In addition, a summons could not be issued by a private citizen.

The attorney general, on the other hand, rendered an opinion that allowed for citizen's arrests for OWI *during* an officer's "regular duties." 1990 WL 484921 *3. Therefore, it was immaterial to the attorney general's analysis whether the officer purported to act "officially" for purposes of citizen's arrest. Four years later in *State v. Lloyd*, the propriety of the attorney general's advice found confirmation when the Court concluded it did not matter for purposes of perfecting a citizen's arrest whether the officer purported to act in the officer's official capacity or as a private citizen. *See also* Restatement (Second) of Torts § 121, comment d, cited in *Lloyd* at 513 N.W.2d at 745. In fact, *Lloyd* expressly held a peace officer may use the "indicia" of his or her office in making a citizen's arrest. 513 N.W.2d at 745.

Merchants Motor Freight's reference to the use of summonses has no relevance to a citizen's arrest in the modern era. *Lloyd* made it very clear a peace officer may make a citizen's arrest through a citation. 513 N.W.2d at 743-744. The Court in *Lloyd* carefully noted the process set forth in Iowa Code chapter 805 for citation issuance and rejected Lloyd's assertion "that

no valid citizen's arrest could have occurred because Officer Sandage only issued him a citation and a warning." 513 N.W.2d at 743.

Accordingly, DOT's conclusion the attorney general's opinion ratified its use of the citizen's arrest doctrine to make arrests for *any* public offense does not "negate" any advice the attorney general imparted to DOT. Nor is DOT's conclusion at odds with the attorney general's reference to *Merchants Motor Freight* in respect to the conclusion concerning "general" arrest authority vis-à-vis Iowa Code section 321.477 (2017). As explained earlier, one may lack "general" arrest authority but that does not eliminate the separate right to make a citizen's arrest.

The attorney general's additional advice pertaining to an OWI citizen's arrest had the practical effect of informing DOT that even if the 321J-training was lacking, officers always retained the separate right to make a citizen's arrest when the offense was attempted or committed within their presence. It happened the specific question posed related to OWI, but any other public offense would be embraced by the attorney general's rationale as well. The attorney general was not foreclosing citizen's arrests by DOT officers for public offenses other than OWI.

C. *State v. Lloyd* and Thousands of Tickets.

The district court at pages 9-10 of the ruling distinguished *State v. Lloyd* on the grounds the decision (1) did not deal with an Iowa agency whose officers are "state actors" and (2) did not address a scenario where "100 uniformed officers rely on citizen's arrest powers to exercise authority not given to them by the legislature, and to issue thousands of citations outside their designated statutory authority." App. pp. 260-261.

First, it is true the officer in *Lloyd* was not employed by an "Iowa agency." But that is not a significant distinction. Officer Sandage in *Lloyd* was employed by the police department of North Sioux City, South Dakota. 513 N.W.2d at 742. Nevertheless, he was a "state actor" because he was employed by a governmental unit. *See, e.g.*, *Salazar v. Luty*, 761 F. Supp. 45, 47 (S.D. Tex. 1991), where in relation to an off-duty police officer working as a school security guard it was said:

> Kelly was a state actor against whom all the constitutional restrictions on the use of governmental power apply. Although he was working a second job as a school security officer, he was hired because of his ability to use his governmental association as an additional weapon against the troubles he found at school. As a security agent of the public school, he would be a state actor in any event, even if he had come from Brinks.

Lloyd held Officer Sandage retained the power to use the "indicia of his office" in making the citizen's arrest. 513 N.W.2d at 745. Therefore, the

district court's effort to distinguish *Lloyd* based on the DOT officers being "state actors," while Officer Sandage was not, will not fly. Officer Sandage was a "state actor"; the DOT officers are "state actors." The notion an out-of-state officer has authority to make a citizen's arrest in Iowa, while an Iowa DOT officer does not, underscores the erroneous determination the district court made.

The district court noted *Lloyd* dealt with a single officer "from another state who was in pursuit of a speeding vehicle." App. p. 260. However, there was no "speeding vehicle" pursuit in *Lloyd*. Instead, the South Dakota police officer had observed Lloyd's vehicle "lacked lighted taillights." 513 N.W.2d at 742. Nevertheless, the idea *Lloyd's* principles can be isolated to a circumstance where an officer pursues a vehicle outside the officer's territorial limits is incorrect. When an officer is outside the officer's territorial jurisdiction, the officer ceases to be a peace officer. The officer is instead "treated as a private person." *See State v. O'Kelly*, 211 N.W.2d 589, 595 (Iowa 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974). The officer, like any other private person, is imbued with the authority to make any arrest a "private person" could make. *Id*. *See also* petitioner's exhibit 13, audio of *State v. Atzen*, Polk County STA0733477,

39 minutes: 04 seconds – 39 minutes: 42 seconds, where counsel for petitioners agreed with the attorney general's opinion, stating

> You are limited to only those duties codified in 321.477 unless, for example, you see an OWI, then you have the same authority a normal citizen would have on effectuating a citizen's arrest.

DOT never disputed its officers lacked general arrest authority. Therefore, for those offenses for which they did not have general arrest powers, the DOT officers, like Officer Sandage in *Lloyd*, were confined to the arrest powers private persons possess under Iowa law. In *Lloyd*, the officer was outside his territory and therefore without jurisdiction to act as a peace officer, while the DOT officers were similarly without jurisdiction as peace officers for those offenses over which they lacked authority. There is really no difference in the analysis. In both cases there remains the right to arrest any private person possesses.

The district court has incorrectly placed DOT officers in a position with less arrest authority than a private person. Consider what that means in the real world. Assume a person drove the wrong way upon a highway and collided with another vehicle; nobody was injured, though the property damage was substantial. Say the errant driver also indicated he was going to leave the accident scene. The innocent driver would have the right under Iowa law as a private citizen to detain the errant driver using the citizen's

arrest powers conferred in Iowa Code section 804.9(1). But if a DOT officer also witnessed the occurrence, under the district court's ruling, that officer would have no authority to arrest the errant driver. The DOT officer would have to look to the private citizen to perfect any arrest if events at the accident scene made that necessary.

To take the analysis one step further. It would be alright under the district court's reading of *Lloyd* if a DOT officer pursued a speeding vehicle going 100 miles per hour in Iowa across the state line into Missouri, stopped the vehicle in Missouri and issued the driver a ticket for the violation occurring in Iowa. *See also State v. Dentler*, 742 N.W.2d 84 (Iowa 2007) (district court's granting of a motion to suppress reversed where peace officer observed vehicle driving recklessly in Iowa, pursued subject into Missouri, charged him with various infractions of Iowa law and brought him back from Missouri to Wayne County, Iowa, for disposition). However, should that scenario be reversed, with the driver going 100 miles per hour as the vehicle comes into Iowa from Missouri, the DOT officer would be without authority to do anything about it under the district court's ruling.

The district court's conclusion citizen's arrest is not available to DOT's officers because the doctrine is being relied upon to exercise authority the legislature did not grant, and because it has resulted in

"thousands" of tickets requires further exploration as well. First, if a valid citizen's arrest is made, that means the arrest was lawful and in accordance with authority granted by the legislature. Citizen's arrest is permitted by the explicit statutory authority conferred under Iowa Code section 804.9. What the district court is really saying is DOT officers can never make citizen's arrests. But nothing in Iowa Code section 804.9 takes the citizen's arrest power from the hands of DOT officers, and certainly *State v. Lloyd* stands for the proposition a police officer otherwise lacking in general arrest authority may invoke citizen's arrest using "indicia" of office to complete the arrest.

What about the "thousands" of tickets the district court references? There is no numerical limit in Iowa Code section 804.9 restricting the number of citizen's arrests to be made. The legislature, if it chose, could have denied the use of the doctrine to DOT officers. But it did not.

The position of the DOT peace officers must be viewed in proper context. First, they are peace officers for purposes of what is called "The Iowa Code of Criminal Procedure." *See* Iowa Code §§ 801.1 and 801.4(11)(h). DOT, their employer, is the agency charged with the responsibility of "planning, development, *regulation* and improvement of transportation in the state as provided by law." Iowa Code § 307.2

(emphasis added). DOT's director is vested with the "power" and the "duty" of "observing, administering, and *enforcing*" the provisions of Iowa Code chapter 321. Iowa Code § 321.3 (emphasis added). DOT's peace officers, simply by the nature of their regular duties are upon Iowa's highways all hours. Mr. Lowe observed:

> DOT MVE peace officers routinely patrol Iowa's highways in relation to their statutory duties involving commercial vehicles. They also regularly staff weigh stations and conduct permitted inspections. As a result, DOT MVE peace officer staff are in an enhanced position, just by nature of going about their lawful duties, to observe hundreds of thousands of motorists throughout the course of a year. It should be reasonably anticipated they will observe many, many violations, including offenses unrelated to operating authority, registration, size, weight, and load.

App. pp. 99, 153. *See*, *e.g.*, petitioner's exhibit 13, audio of *State v. Atzen*, Polk County STA0733477, 20 minutes: 03 seconds – 20 minutes: 53 seconds (Officer Wittkowski testified on an average day he concentrated on commercial vehicles, including inspection and paperwork, but if he had probable cause to stop a non-commercial vehicle based upon what he had witnessed, he would.).

Mr. Lowe noted Iowa law has recognized a "public safety function" regarding peace officers beyond their roles as enforcers of the law. App. pp. 121-122, 175-176. A case cited in DOT's declaratory orders, *State v. Moore,* 609 N.W.2d 502, 504 (Iowa 2000), illustrates this very well. In

relation to the authority of a park ranger to stop a vehicle for speeding, which in turn resulted in a charge and conviction for OWI, it was held:

> In the present case, the park ranger's authority to stop defendant's vehicle was derived from two sources. First, it is specified in Iowa Code section 321.285 that
>
> [a]ny person driving a motor vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other conditions then existing.
>
> The ways of travel in state parks are public highways if open to the general public. Iowa Code §§ 321.1(78), 461A.8. Although a violation of Iowa Code section 321.285 may be a misdemeanor, *see* Iowa Code section 321.482, *we believe the statute confers a public safety function on Iowa peace officers as well as a law enforcement function*. The second source of the park ranger's authority is found in Iowa Code section 461A.3, which grants to the Department of Natural Resources and its employees regulatory authority in regard to "proper public access" within the state park system. *Either or both of these statutes* support the park ranger's action in stopping defendant's vehicle.

State v. Moore, 609 N.W.2d 502, 504 (Iowa 2000) (emphasis added).

DOT is vested with responsibility for the regulation of transportation in this state and its director has the power and the duty to see the provisions of Iowa Code chapter 321 are enforced. Iowa Code §§ 307.2 and 321.3. DOT has responsibility for maintenance of all primary roads. Iowa Code § 313.36. Both petitioners were speeding while traveling in road work zones. App. pp. 99-100, 125, 153-154, 179. DOT is "expressly charged" with the

"duty" to supervise, direct and inspect "the work of construction of primary roads." Iowa Code § 313.12. Mr. Lowe noted the following in relation to road work zone concerns:

> DOT takes work zone safety very, very seriously. From March through November in Iowa, DOT may have up to 500 road construction work zones, and DOT's maintenance garages may establish one or more short-term work zones per day. These zones require extra caution on the part of drivers. During the ten-year period from 2004-2013, an average of five lives per year were lost in work zone accidents, and 115 injury crashes occurred per year in Iowa work zones. While most of the fatalities involved motorists, ten percent of the fatalities during this ten-year period involved DOT or contractor workers.
>
> Therefore, DOT gives high priority to work zone safety. DOT MVE peace officers, as a result of fatal and personal injury accidents occurring within interstate highway construction zones in 2016 (which include accidents involving both commercial and noncommercial motor vehicles), were instructed to give extra enforcement attention to DOT road work zones. If drivers are speeding, operating while under the influence or otherwise driving recklessly through a work zone and if the conduct is observed by a DOT MVE peace officer, Iowa Code section 804.9(1) and *State v. Lloyd* authorize that officer to act by stopping the vehicle, issuing a citation or formally arresting individuals when warranted. DOT should be encouraged to continue such an undertaking, not condemned for it.

App. pp. 100, 154.

Therefore, when DOT officers observe motorists speeding in a road work zone, just as one example, they have the authority to stop the vehicle under Iowa Code section 804.9(1) and *State v. Lloyd*, and such an

undertaking is entirely consistent with DOT's public safety mission. The Court in *Moore* held Iowa Code section 321.285, Iowa's speeding law, confers a "public safety function on Iowa peace officers." *See* 609 N.W.2d at 504. To deny DOT peace officers authority to make a citizen's arrest for a speeding offense committed in their presence is to eviscerate their public safety function. It would be entirely at odds with the rationale in *Moore*. *See also* petitioner's exhibit 13, audio of *State v. Atzen*, Polk County STA0733477, 24 minutes: 35 seconds – 24 minutes: 58 seconds (Officer Wittkowski testified he saw an approaching vehicle traveling at a high rate of speed causing him to check his radar which confirmed the vehicle was doing 84 miles per hour in a 55 mile-per-hour zone.).

Speeding is especially significant in relation to DOT's core functions relating to commercial motor vehicle oversight. Maximum gross weight, assuming appropriate number of axles, can be 80,000 pounds (40 tons) before need of permit on Iowa's primary highways. *See* Iowa Code § 321.463. Big vehicles require special considerations regarding load displacement. *Id*. Iowa's speeding law, as noted in *Moore*, in addition to specifying numerical speed limits, also requires vehicles to be driven "at a careful and prudent speed not greater than nor less than is reasonable and

proper" having appropriate regard for the traffic, roadway and other conditions. *See* Iowa Code § 321.285(1).

Large trucks account for nearly a quarter of all work zone deaths. Large trucks with fully loaded trailers are ten times more likely to roll, and loaded trailers typically require 20 to 40 percent more braking distance than passenger vehicles to come to a stop. Loaded trailers have a higher center of gravity, and a sudden speed adjustment can cause a load to shift resulting in skidding or rollover. *See* FMCSA (Federal Motor Carrier Safety Administration) *CMV Driving Tips – Too Fast For Conditions*, https://www.fmcsa.dot.gov/safety/driver-safety/cmv-driving-tips-too-fast-conditions.

The Federal Motor Carrier Safety Act is premised, in part, upon the notion state governments should provide assistance in assuring safe commercial vehicle operations. *See, e.g., Radio Ass'n v. U.S. Dept. of Trans. Fed. HW. Admin.*, 47 F.3d 794, 797 (6th Cir. 1995). Particularly troublesome is the speed of large commercial vehicles (CMVs): "Moreover, because CMVs are much larger and heavier than other vehicles, the damage they cause when they are involved in accidents at excessive speeds is much greater." *Id*. at 809.

Consequently, a direct relationship exists between vehicle speed and vehicle size, weight and load regarding what may be a careful, prudent and reasonable speed as contemplated in Iowa Code section 321.285(1). This is one reason DOT officers have radar units in their squad cars:

> Radar is a helpful tool in being able to address concerns with vehicle speeds. DOT can be called upon by other law enforcement agencies to assist in areas where excessive speed is occurring. *See, e.g.*, Iowa Code § 321.2(3) (DOT and state patrol are to cooperate to insure "proper and adequate enforcement" of the provisions of chapter 321). DOT can be contacted by highway contractors working upon DOT highway projects in regard to speed issues as well. *The speeds of commercial vehicles transporting loads upon the highways also implicate issues relevant to the core responsibility of DOT MVE peace officers.* Accordingly, having the ability to monitor ongoing highway speeds is entirely consistent with DOT's mission in achieving a safe roadway environment.

App. pp. 101, 155 (emphasis added).

The above illustrates the problem with isolating the activities of DOT's peace officers. For example, it is undisputed the officers have enforcement authority under section 321.477 (2017) in relation to vehicle "size, weight, and load." But issues relating to vehicle "size, weight, and load" are intertwined with vehicle "speed." DOT, as an example, is empowered to make safety investigations to determine whether vehicles as configured may be "safely operated" in compliance with Iowa Code chapter 321, including determinations about whether the "motive power" of a

vehicle is adequate "to propel *at a reasonable speed* such vehicle *and any load thereon*." *See* Iowa Code § 321.464 (emphasis added).

Therefore, DOT's core safety mission makes it entirely reasonable for its officers to (1) possess radar units and (2) use those units to monitor vehicle speed. If a vehicle is being observed to be violating Iowa's speed laws, it frankly defies common sense to think a DOT officer is powerless in the face of Iowa Code section 804.9(1) to stop the vehicle traveling at an excessive rate. The acting of a DOT officer upon such an observation is consistent with the authority to issue citations and make arrests for offenses occurring in the officer's presence. It meshes as well with the public safety function the officers are called upon to fulfill.

The petitioners' declaratory order requests were premised entirely upon the notion motorists were "violating" the law, and were "observed" doing so. App. pp. 41, 59. Therefore, as Director Lowe noted, petitioners were not contending DOT officers were acting upon mere hunches, or acting other than upon their good-faith observations. No constitutional infractions were alleged, and it was never claimed DOT's officers were acting without reasonable belief a crime had been committed in their presence. App. pp. 121, 175. It is unreasonable and contrary to the public interest to maintain there is nothing a DOT peace officer can do, except ironically call for other

police with the hope they arrive in time whenever any public offense, beyond those limited exceptions allowed by the district court, is taking place in the very presence of a DOT peace officer. Iowa Code section 804.9(1) and cases such as *State v. Lloyd* and *State v. Moore* are the law's manifestations of "common sense" regarding the authority available, not only to achieve obedience with the law but to promote public safety.

Further, if this case is to be determined based on "numbers" of citations issued, Iowans might understandably ask what is the right number? Is it really zero as the district court declared? Is it alright if "occasionally" an officer is permitted to act upon what has been observed? Or is there a precise number which serves public safety, and beyond which the officers are not permitted to go? Or perhaps a range the number of citations must fall within?

Petitioners claim there is a "policy" afoot, suggesting something nefarious has been unleashed. But the "policy" is in Iowa Code section 804.9(1), and it has been utilized consistent with *State v. Lloyd* and the opinion of the Iowa Attorney General to achieve the public safety purpose the Iowa Supreme Court extolled as a virtue in *State v. Moore.* Suffice to say, if a motorist was to speed by a DOT officer in a road work zone, and if that officer stood down because it was declared the officer had no authority

to do anything about it, the citizen's arrest doctrine would likely look cogent if that same motorist later collided with another vehicle resulting in death and injury. That is why there can be no precise numerical limit imposed on the number of tickets issued under Iowa Code section 804.9. To do so is at odds with the interests of public safety.

The "thousands of citations" formulation of the district court is not consistent with Iowa law. If officers have authority to act upon violations of law they observe in their presence, they have that authority once and for all, regardless of the number of tickets issued. If the public believes too many citations are being issued, that may present a public policy matter which can be taken to the governor, agency heads or legislators to address, but it is not an issue for the courts.

The 1994 decision in *Lloyd* was chastised by petitioners at paragraph 70 of their petitions for declaratory orders as "result-oriented and short on statutory analysis; a classic example of strange facts making bad law." App. pp. 56, 74. The petitioners argued *Lloyd* did not apply because (1) it did not involve a scenario where an officer was "effectuating an illegal policy," (2) *Lloyd* did not deal with Iowa Code section 80.22 barring other agencies "from exercising general police powers" and (3) "*Lloyd* does not govern

because *Merchants Motor* does." Rilea and Riley petitions to DOT, paragraphs 69-71; App. pp. 55-56, 73-74.

First, there is nothing "illegal" if a valid citizen's arrest is made. An arrest which comports with Iowa Code section 804.9 is lawful. That it may have been done as part of "official" policy is immaterial as both *Lloyd* and the Restatement (Second) of Torts instruct. *See Lloyd*, 513 N.W.2d at 745, citing Restatement (Second) of Torts § 121, comment d.

Second, Iowa Code section 80.22 with its reservation of general police powers to the department of public safety pursuant to "1939 Iowa Acts, ch. 120" is immaterial to the *Lloyd* analysis. The decision in *Lloyd* dealt with the citizen's arrest doctrine under Iowa Code section 804.9(1). The citizen arrest power is independent of any general arrest powers conferred by the legislature upon the department of public safety or any other government entity. Moreover, section 80.22 speaks in terms of powers "specifically reserved" by 1939 Iowa Acts, ch. 120. Query whether the "specific reservation" language has applicability in the modern era given the legislature's subsequent mandate to DOT and the department of public safety to cooperate to insure enforcement of Iowa Code chapter 321 pursuant to Iowa Code section 321.2(3), as well as the vesting of power in DOT's director for enforcement of chapter 321 under Iowa Code section 321.3.

Third, regarding *Merchants Motor Freight*, as discussed in greater depth below, the rationale of that decision which deemed citizen's arrest "not a question presented here for determination," *see* 239 Iowa at 893, 32 N.W.2d at 776, is no longer correct. *Merchants Motor Freight* cannot apply today because (1) it is immaterial in the modern era whether peace officers purport to act in their official capacities in making a citizen's arrest, (2) the use of a citation (summons) to make a citizen's arrest is permissible in light of *Lloyd* and renders inapplicable any need to take a subject before a magistrate pursuant to Iowa Code section 804.24 and (3) *Merchants Motor Freight* premised its analysis on the notion the highway commission employees were not even peace officers, which, of course, does not apply to the DOT officers who today hold the status of "Peace officers." *See, e.g.*, Iowa Code § 801.4(11)(h).

Accordingly, to affirm the district court, the conclusion must be reached that DOT officers can never make a citizen's arrest for offenses the officers have "observed." That would be an unreasonable result contrary to common sense and public safety, let alone the fact it runs contrary to Iowa Code section 804.9(1) as interpreted by pertinent case law. DOT's officers have authority available under the citizen's arrest doctrine, and it matters not

whether one or thousands of citations have been issued so long as they involved violations of law occurring in the officer's presence.

D. *Merchants Motor Freight*.

The district court declared: "The Iowa Supreme Court *decided the issue presented in this case* in 1948 in the *Merchants Motor Freight* decision." App. p. 257 (emphasis added). DOT disagrees. The issue presented in this case is whether as of March 30, 2017, not 1948, any legal authority existed for DOT peace officers to act upon violations of law they "observed" beyond those related to operating authority, registration, size, weight, load and OWI.

The following portion of the *Merchants Motor Freight* decision was what the district court hinged its conclusions upon:

> Appellants state that even though no statutory authorization exists for enforcing the motor vehicle laws, as to license and registration, a violation thereof constitutes a misdemeanor, Section 321.17. That when committed in his presence any person may arrest, and the fact that the defendants are clothed with the authority of peace officers, does not prevent them from acting as individuals. This is no doubt true, but is not a question presented here for determination. The record clearly shows that defendants acted, and in the future will act, officially and under orders from the Highway Commission. Furthermore, the appellants do not threaten arrests and have not arrested. They have issued summonses which are not authorized by Section 755.5. There is not merit in this contention.

239 Iowa at 893, 32 N.W.2d at 776. *See* ruling, p. 7; App. p. 258.

First, as alluded to earlier, there are substantial differences in the law since *Merchants Motor Freight* was decided. *Merchants Motor Freight* premised its decision upon then Iowa Code section 321.2 (1946) which stated the department of public safety "shall constitute the motor vehicle department for the administration and enforcement of this chapter [321]." 239 Iowa at 891, 32 N.W.2d at 775. Since the time of the *Merchants Motor Freight* decision in 1948, however, the highway commission was supplanted with the creation of DOT. *See* Iowa Code § 307.2; *see also* 1974 Iowa Acts ch. 1180, §§ 2 and 200. Under today's statutory regime, the department of public safety does not operate in a vacuum or exist as the sole agency with responsibility over the rules of the road. *Both* DOT and the department of public safety are obliged to insure the "proper and adequate" enforcement of chapter 321, and DOT's director is specifically vested by statute with the "power" and the "duty" of "enforcing" the provisions of chapter 321. *See* Iowa Code §§ 321.2(3) and 321.3.

In *Merchants Motor Freight*, the dispute was tied to the interpretation of the word "control" in then Iowa Code section 321.477 (1946). 239 Iowa at 891, 32 N.W.2d at 775. At the time of *Merchants Motor Freight*, Iowa Code section 321.477 (1946) did not contain the words "operating authority" or "registration"; instead, the statute specified enforcement only in relation

to "size, weight, and load of motor vehicles." *Id.* The highway commission's position was: "[B]y using the word 'control' in section 321.477, the legislature granted to them [highway commission] authority over registration and licenses." 239 Iowa at 892, 32 N.W.2d at 775. The Supreme Court affirmed the district court's determination the "authority" of the highway commission was "limited to size, weight, and load" pursuant to section 321.477 (1946). 239 Iowa at 893, 32 N.W.2d at 776.

By contrast, DOT's declaratory orders are not premised upon an errant interpretation of Iowa Code chapter 321 which would otherwise inflate the arrest authority of its peace officers. In fact, DOT accepted the attorney general's 1990 advice regarding the limitations upon its officers' "general" arrest authority. But the attorney general in 1990, in relation to DOT's specific question concerning OWI enforcement, also opined DOT's officers had authority to make citizen's arrests under Iowa Code section 804.9 whenever they observe an offense committed in their presence during their regular duties. Moreover, as discussed earlier, there is no reason in applying the attorney general's rationale why DOT's officers would not have citizen's arrest authority for other public offenses committed in their presence as well.

Consequently, given DOT's responsibility by law to promote a safe and reliable transportation system, including the "power" vested in DOT for "enforcing" the rules of the road in Iowa Code chapter 321, *see* Iowa Code § 321.3, it has been DOT policy its officers may stop vehicles and issue citations for violations of law they have "observed." *See also* petitioners' Exhibit 3, filed July 31, 2017, at p. 3 (memorandum of Mark Lowe); App. p. 222.

Ironically, the decision in *Merchants Motor Freight* endorses the citizen's arrest doctrine. The Court observed:

> That when committed in his presence any person may arrest, and the fact that the defendants are clothed with the authority of peace officers, does not prevent them from acting as individuals.

239 Iowa at 893, 32 N.W.2d at 776. The Court in 1948, however, found the citizen's arrest argument not to be "a question presented here for determination." *Id*. But the reason for that conclusion is no longer legally tenable because of the law's evolution since 1948. This is especially so given the decision in *State v. Lloyd*, 513 N.W.2d 742 (Iowa 1994), as explained in detail below.

Citizen's arrest authority was not deemed to be a matter presented for determination in *Merchants Motor Freight* because the Court concluded highway commission officers had "acted" in the past and would act in the

future "officially." The Court deemed the highway commission employees to be acting like officers, or officials of the government, rather than private citizens or "individuals." If they acted as officers from the highway commission, in the eyes of the 1948 Court, they could not make a citizen's arrest. The Court adopted a rationale consistent with the appellate brief filed by Merchants Motor Freight with the clerk of the Iowa Supreme Court on March 25, 1948, where it was argued at page 26:

> The defendants have not been acting as private citizens, but have been acting in their official capacity only and at the expense of the State. The defendants have issued summonses for improper registration. But a private person has no authority to issue a summons. See Section 321.485, Code of Iowa, 1946 which authorizes issuance of a summons by a peace officer.

(citations to the record omitted).

The quoted selection from the brief filed by Merchants Motor Freight in 1948 explains why the Court concluded citizen's arrest was not applicable, and it also highlights a second reason why the *Merchants Motor Freight* Court deemed citizen's arrest to be a matter not "presented here for determination." That second reason related to the use of summonses to charge for alleged registration violations. The highway commission officers, according to the Court, "do not threaten arrests and have not arrested." 239 Iowa at 893, 32 N.W.2d at 776. Instead, they "issued summonses which are

not authorized by Section 755.5 [Iowa's citizen's arrest statute at the time of *Merchants Motor Freight*]." *Id.*

The decision in *Lloyd* establishes why the *Merchants Motor Freight* Court's rationale is no longer valid today. First, in terms of a citizen's arrest made by an officer acting "officially," *Lloyd* refutes the notion the officer loses the "indicia" of office when acting under Iowa Code section 804.9. The Court noted Lloyd had argued: "When the officer takes police action as a private citizen, the argument goes, he must act like a private citizen." 513 N.W.2d at 745. The *Lloyd* Court rejected this argument completely:

> We believe that officer Sandage's use of the indicia of his office was proper and that this conclusion is consistent with the limitations on ordinary private citizens in making citizen's arrests.

Id. Indeed, the Court noted the "symmetry" of Lloyd's argument was "undermined by its unwise policy." *Id*.

The Court in *Lloyd* also approvingly cited to Restatement (Second) of Torts § 121, comment d. *Id.* This is significant, too. Comment d provides:

> *The peace officer has all the privileges of arrest which*, by the rules stated in §§ 119 and 120, *are conferred upon one not a peace officer*. In such a case, his privilege to arrest is not dependent upon his being a peace officer; and *it is immaterial whether he purports to act in his capacity as peace officer or as a private person or whether he is or is not acting within* the territorial or *other limits of his designation*.

(emphasis added). Accordingly, the *Merchants Motor Freight* notion an officer acting "officially" may not make a citizen's arrest is not a pertinent factor in assessing citizen's arrest authority under today's Iowa law.

Second, regarding the *Merchants Motor Freight's* rationale the use of summonses rendered citizen's arrest not "a question presented here for determination," the Court in *Lloyd* directly addressed that issue as well: "We first consider defendant's contention that no valid citizen's arrest could have occurred because Officer Sandage only issued him a citation and a warning." 513 N.W.2d at 743. The *Lloyd* Court concluded even if Officer Sandage's conduct amounted to "something less than a technical arrest," it was "no less valid than a formal citizen's arrest." *Id.* at 744. Petitioners even admitted at paragraph 68 of their petitions for declaratory orders in *Lloyd* the "Iowa Supreme Court held that the South Dakota officer's restraint of the defendant was valid as a citizen's arrest even though the officer did not ultimately arrest the defendant." App. pp. 55, 73.

Hence, the authority under Iowa Code chapter 805 to employ the less stringent uniform citation and complaint procedure, in lieu of formally arresting a defendant with need for appearance before a magistrate prior to release, is subsumed within the overall arrest authority in Iowa Code section 804.9. A peace officer today may, in accordance with Iowa Code section

804.9, lawfully issue a citation in lieu of making an actual, formal arrest. In short, if the officer can make a full-blown arrest using the citizen's arrest doctrine, the officer can also charge the person through means of a citation. *See Lloyd*, 513 N.W.2d at 744. ("Officer Sandage could have made a valid citizen's arrest for Lloyd's failure to have lighted taillights and for his expired registration."). There is no need, if the citation procedure is used, to hold the defendant for appearance before a magistrate pursuant to Iowa Code section 804.24.

Merchants Motor Freight also concluded the highway commission employees were not even "peace officers." 239 Iowa at 892-93; 32 N.W.2d at 776. They had merely been "conferred the authority of a peace officer" under section 321.477 (1946). This, too, has changed since the time of *Merchants Motor Freight*. There is no doubt today concerning the status of the DOT officers. They are "Peace officers" by express legislative enactment. *See, e.g.,* Iowa Code §§ 801.4(11)(h) and 321J.1(8)(e). *See also* Iowa Code § 321.1(50) (which defines "Peace officer" to mean every officer authorized to direct traffic or to make arrests for violations of traffic regulations *in addition to* its meaning in section 801.4).

Furthermore, a DOT officer is a voting member of the Iowa law enforcement academy council. *See* Iowa Code § 80B.6(1)(k). DOT,

pursuant to Iowa Code section 80B.11B(2)(a), is also assessed costs by the Iowa law enforcement academy for its officers to receive the basic training course designed to meet the minimum basic training requirements for a law enforcement officer. *See also* Iowa Code § 80B.11 (setting forth rules and minimum basic training requirements for law enforcement officers).

The modern-day designation of DOT's officers as "peace officers" demonstrates another flaw inherent with the district court's unqualified acceptance of the *Merchants Motor Freight* rationale from 1948. As explained, the 1948 Court did not deem the highway commission officers to be "peace officers." By applying the 1948 analysis, the district court has failed to account for changes in Iowa's law. Today, for instance, Iowa has enacted statutes designed to afford school children with broad protection while entering and exiting school buses. This legislation is referred to as the "*Keep Aware Driving – Youth Need School Safety Act*." *See* Iowa Code § 321.372.

The legislature in Iowa Code section 321.380 made it the duty "*of all peace officers* and of the state patrol to enforce the provisions of sections 321.372 to 321.379" (emphasis added). "All" peace officers should include DOT officers, and section 321.380 should itself be deemed statutory enforcement authority involving school buses, independent of the separate

right of officers under Iowa Code section 804.9(1) to address offenses committed in their presence. Yet, the district court's rigid application of *Merchants Motor Freight* wrongly results in Iowa's school children being deprived the enforcement protection of DOT's officers as students enter and exit their school buses. DOT's officers under the district court's ruling are precluded from performing the "duty" mandated by Iowa Code section 321.380, regardless of whether the offense is committed in their presence.

Additionally, it is worth noting the citizen's arrest authority has evolved into a robust doctrine under Iowa law. The Iowa Supreme Court in *Lloyd* deemed Iowa Code section 804.9(1) as representing an expansion of the common law rule which allowed for citizen's arrests in relation to felonies or "breaches of the peace." 513 N.W.2d at 744. Iowa today recognizes a very broad right of citizen's arrest which is itself at odds with the narrower view of the doctrine articulated by the *Merchants Motor Freight* Court.

Therefore, much has changed since 1948. The *Merchants Motor Freight* rationale which held citizen's arrest was not even a matter implicated for consideration is outmoded. This is especially so considering the development of the citizen's arrest doctrine as evidenced in cases such as *Lloyd*. Also, it cannot be credibly argued citizen's arrest is not a matter ripe

for determination under this record. The petitioners raised the issue of citizen's arrest at paragraphs 62 through 71 of their petitions for declaratory orders. App. pp. 53-56, 71-74.

The district court noted *Lloyd* never mentioned or overturned the *Merchants Motor Freight* decision. App. p. 261. That is not a material distinction. A DOT officer was not involved in *Lloyd*. However, where DOT officers are involved, there is no logical reason the rationale in *Lloyd* should be deemed applicable to a South Dakota peace officer but inapplicable to other peace officers like the DOT officers. Such a limitation places an unreasonable gloss on Iowa Code section 804.9. Also, as explained before, if DOT officers are deprived the use of the citizen's arrest doctrine, the "public safety function" the Iowa Supreme Court held Iowa peace officers possess in *Moore* is seriously undermined.

E. Iowa Code section 321.477 as Amended.

The legislature amended Iowa Code section 321.477 (2017), effective May 11, 2017. *See* 2017 Iowa Acts ch. 149, § 3 (H.F. 463). The legislative change, subject to a sunset provision set for July 1, 2018, extended general arrest powers to DOT MVE peace officers, with certain exceptions, "to enforce all laws of the state." Iowa Code § 321.477(1) (as amended). The

district court set out in full in its ruling the amended version of the statute. App. pp. 261-262. Judge Ovrom, at page 12 of her ruling, then concluded:

> This amendment demonstrates that IDOT did not have general enforcement authority under the previous version of the statute. There would be no reason to amend the statute if IDOT officers already had the authority to make arrests for matters other than operating authority, registration, size, weight, and load.

App. p. 263.

DOT never asserted it had "general enforcement authority under the previous version of the statute." Mr. Lowe's declaratory orders made clear DOT had accepted the 1990 Iowa Attorney General's opinion which offered the view DOT's officers did not have general arrest authority under Iowa Code section 804.7. DOT noted:

> DOT accepts the above-referenced opinion of the Iowa Attorney General, and DOT acts in conformity with its terms. DOT peace officers do not have general arrest authority within the meaning of that phrase as used by the Attorney General. But that proposition does not fully answer the matter as framed in the petition for declaratory order posed by petitioner. The subject of petitioner's inquiry does not pose a question of general arrest authority in the abstract; instead, petitioner has specifically posited the scenario where traffic stop and citation issuance by DOT's Motor Vehicle Enforcement (MVE) peace officers has occurred as a result of violations of law "observed" by the DOT MVE peace officer. *See* petition, numbered paragraph 8. When a peace officer has "observed" a violation of law, a different analysis is applicable as the Iowa Attorney General noted as well in the 1990 opinion.

App. pp. 78-79, 132-133.

The term "general enforcement authority" used by Judge Ovrom would be applicable to the various general arrest powers itemized at Iowa Code section 804.7(1)-(6). "General" arrest power gives an officer much more authority than simply making an arrest in the situation where an officer witnesses an offense. When an officer has "general" enforcement authority, just as one example, the officer may make an arrest when the officer "has reasonable ground for believing that the person arrested has committed it." Iowa Code § 804.7(2). Many, if not most, public offenses take place outside the presence of any peace officer. If the arrest power was limited solely to situations where the offense took place in an officer's presence, law enforcement's utility would be greatly limited with a negative consequence to the public security as well.

An officer with "general" arrest authority may make an investigation of a crime. Witnesses can be interviewed, forensic evidence gathered, search warrants issued, etc. Once sufficient evidence has been obtained, an officer having "general" arrest power may arrest based upon a reasonable belief the arrested person committed the offense. DOT took the position its officers had no such authority under the law as it existed prior to the amendment to Iowa Code section 321.477 (2017). That was a very substantial limitation on their authority.

Or, to put it within the context of DOT officers, if in June 2017, subsequent to the effective date of the amendment to section 321.477 (2017), three highly credible eyewitnesses reported to a DOT peace officer a person had driven a car upon Interstate 80 outside any city's limits going the wrong way on the highway and almost causing a serious pileup, that officer under section 321.477 (as amended) had the authority to take enforcement action against the errant driver once the officer had reasonable grounds to believe the driver committed the offense. Because of the amendment DOT is not precluded from taking enforcement action simply because an officer did not actually observe the offense.

On the other hand, prior to the amendment to section 321.477 (2017) that same DOT officer having received those identical three credible eyewitness accounts would be precluded from taking any enforcement action because the officer had not observed the vehicle going the wrong way, *i.e.*, the offense did not take place in the officer's presence. Therefore, contrary to the district court's holding, there was, in fact, very good reason for the legislature's amendment because it gave DOT officers "general" arrest authority which is much broader than anything they previously possessed, even when acting under citizen's arrest authority.

Significantly, though the district court disagreed, *see* ruling, p. 12, App. p. 263, Iowa Code section 321.477 (as amended) serves to confirm the correctness of DOT's position concerning Iowa Code section 804.9(1). The district court at page 11 of its ruling noted the amended version of section 321.477 "gives explicit authority to IDOT peace officers to enforce 'all laws of the state,' with limitations inside city limits." App. p. 262. That is true, but the new law took care to note any restrictions on DOT officers:

> [S]hall in no way be construed as a limitation on the power of employees designated as peace officers pursuant to this section *when a public offense is being committed in their presence*.

Iowa Code § 321.477(4) (as amended) (emphasis added). Therefore, the legislature carefully preserved the DOT officers' existing authority under Iowa Code section 804.9. It did not want its language to be construed as interfering with that independent source of arrest authority.

Nor does this interpretation render the legislature's amendment superfluous. Under the law prior to the amendment, DOT officers, for offenses beyond those enumerated in section 321.477 (2017), OWI and the school bus infractions under Iowa's "*Keep Aware Driving – Youth Need School Safety Act*," had enforcement authority *only* under the citizen's arrest provisions of Iowa Code section 804.9. Following the amendment, DOT officers now have general enforcement authority subject to certain

limitations discussed above. Thus, the amendment materially changed the law by giving DOT officers much greater authority than before, but that does not mean the officers were without citizen's arrest authority prior to the statutory amendment.

Or put another way, the amendment to section 321.477 (2017) did not amend Iowa Code section 804.9. Iowa Code section 804.9, the citizen's arrest doctrine, a concept which has been in the Iowa statute books going back to 1851, *see Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 769 (Iowa 2002), does not detract from the substantial expansion of DOT peace officer arrest power achieved by Iowa Code section 321.477 (as amended). DOT's interpretation of its authority prior to the amendment was entirely consistent with Iowa Code section 804.9 and the relevant case law of the *Lloyd* era.

CONCLUSION

DOT requests the district court's decision be reversed and the declaratory orders issued by DOT on April 26, 2017, affirmed. The district court's ruling precludes DOT officers from ever using the statutory citizen's arrest authority. This poses a very real threat to public safety. Other than for the "limited exceptions" Judge Ovrom preserved for DOT peace officer enforcement, *see* ruling pp. 6, 13, App. pp. 257, 264, DOT officers would be precluded from making arrests for offenses other than operating authority,

registration, size, weight, and load of motor vehicles, even if the violation of law was taking place in the very presence of an officer.

Iowa law should not allow lawbreakers to commit public offenses with impunity in the very presence of peace officers. DOT peace officers had citizen's arrest authority under Iowa law to stop motorists, issue citations and make arrests for offenses committed or attempted in their presence. This is entirely consistent with *State v. Lloyd* and the public safety function as interpreted in *State v. Moore*.

REQUEST FOR ORAL ARGUMENT

DOT requests to be heard in oral argument upon submission of this case.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 13,612 words, as allowed by Court order, excluding the parts of the Brief exempted by Iowa R. App. p. 6.903(1)(g)(1).

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 Microsoft Word 2010 in size 14 Times New Roman.

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

We, David S. Gorham, Robin G. Formaker and Richard E. Mull, hereby certify that on April 5, 2018, a copy of Appellant's Brief was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access and service to the brief on that same date to:

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