**IN THE SUPREME COURT OF IOWA**

---

**NO. 18-1050**

---

**ALEX WAYNE WESTRA**
**Plaintiff-Appellant,**

**vs.**

**IOWA DEPARTMENT OF TRANSPORTATION**
**MOTOR VEHICLE DIVISION**
**Defendant-Appellee.**

---

**APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY**
**THE HONORABLE ARTHUR E. GAMBLE, JUDGE**

---

# APPELLEE'S BRIEF

---

**THOMAS J. MILLER**
**Attorney General of Iowa**

**ROBIN G. FORMAKER**
**Assistant Attorney General**
**Iowa Attorney General's Office**
**800 Lincoln Way, Ames, Iowa 50010**
**(515) 239-1465 / FAX (515) 239-1609**
**robin.formaker@iowadot.us**

**ATTORNEY FOR APPELLEE**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**

**Statutes and Other Authorities:**

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

**I. THE PUBLIC'S NEED TO COMBAT THE HOLOCAUST ON OUR ROADWAYS WHICH IS A BY-PRODUCT OF DRUNK DRIVING OUTWEIGHS ANY OTHER CONSIDERATION IN A DRIVER'S LICENSE REVOCATION MATTER HANDLED BEFORE AN ADMINISTRATIVE LAW JUDGE UNDER IOWA CODE CHAPTER 321J. THE DETERMINATION WHETHER THE REVOCATION WILL BE UPHELD IS BASED UPON ALL THE EVIDENCE OFFERED AT THE AGENCY HEARING, EVEN EVIDENCE OBTAINED THROUGH AN UNAUTHORIZED STOP.**

### A. Error preservation, scope of review and standard of review.

**Cases:**

*State v. Naujoks*, 637 N.W.2d 101 (Iowa 2001)
*State v. Stoneking*, 379 N.W.2d 352 (Iowa 1985)

**Statutes and Other Authorities:**

Iowa Code § 17A.19(10)(f)

### B. Officer Wilson's status as a DOT officer and authority to stop.

**Cases:**

*Rilea v. Iowa Dept. of Transp.*, 919 N.W.2d 380 (Iowa 2018)
*State v. Werner*, 919 N.W.2d 375 (Iowa 2018)

**Statutes and Other Authorities:**

Iowa Code ch. 321
Iowa Code § 321.477 (2017)
Iowa Code § 321.477(1) (2018)
Iowa Code ch. 321J
Iowa Code § 321J.1(8)(e)

Iowa Code § 801.4(11)(h)
Iowa Code § 804.9
2017 Iowa Acts ch. 149 §§ 1-5
2018 Iowa Acts ch. 1170, div. II, § 3

### C. The need to protect innocents on our highways from drunk drivers weighs just as heavily under Article I, section 8 of Iowa's Constitution as it does under the United States Constitution.

#### (1) *Westendorf's* rationale remains viable.

**Cases:**

*Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678 (Iowa 2013)
*Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160, 195 L.Ed.2d 560 (2016)
*Brownsberger v. Dept. of Transp.*, 460 N.W.2d 449 (Iowa 1990)
*Heidemann v. Sweitzer*, 375 N.W.2d 665 (Iowa 1985)
*Holland v. State*, 253 Iowa 1006, 115 N.W.2d 161 (1962)
*In the Matter of Property Seized from Sharon Kay Flowers*, 474 N.W.2d 546 (Iowa 1991)
*Krueger v. Iowa Dept. of Transp.*, 493 N.W.2d 844 (Iowa 1992)
*Lubka v. Iowa Dept. of Transp.*, 599 N.W.2d 466 (Iowa 1999)
*Manders v. Iowa Dept. of Transp.*, 454 N.W.2d 364 (Iowa 1990)
*McCrea v. Iowa Dept. of Transp.*, 336 N.W.2d 427 (Iowa 1983)
*One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965)
*Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998)
*Soo Line v. Iowa Dept. of Transp.*, 521 N.W.2d 685 (Iowa 1994)
*Shriver v. Iowa Dept. of Transp.*, 430 N.W.2d 921 (Iowa 1988)
*State v. Cline*, 617 N.W.2d 277 (Iowa 2000)
*State v. Funke*, 531 N.W.2d 124 (Iowa 1995)
*State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017)
*State v. Taeger*, 781 N.W.2d 560 (Iowa 2010)
*State v. Turner*, 630 N.W.2d 601 (Iowa 2001)
*State v. Werner*, 919 N.W.2d 375 (Iowa 2018)
*Swanson v. Iowa Dept. of Transp.*, 780 N.W.2d 249 (Table), 2010 WL 446994 (Iowa App. 2010)

*United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976)
*Welch v. Iowa Dept. of Transp.*, 801 N.W.2d 590 (Iowa 2011)
*Westendorf v. Iowa Dept. of Transp., Motor Vehicle Division*,
400 N.W.2d 553 (Iowa 1987)
*Wiebenga v. Iowa Dept. of Transp.*, 530 N.W.2d 732 (Iowa 1995)

**Statutes and Other Authorities:**

Iowa Code § 17A.18(3)
Iowa Code § 321.2(3)
Iowa Code ch. 321J
Iowa Code § 321J.2
Iowa Code § 321J.2A
Iowa Code § 321J.9
Iowa Code § 321J.9(1)(a)
Iowa Code § 321J.12(1)(a)
Iowa Code § 321J.13(2)
Iowa Code § 321J.13(4) (1987)
Iowa Code § 321J.13(6)
Iowa Code § 801.4(11)(h)
Iowa Constitution Article I, section 8
1986 Iowa Acts ch. 1220 § 13

**(2) Other considerations offered by Westra.**

**Cases:**

*Beller v. Rolfe*, 194 P.3d 949 (Utah 2008)
*Beylund v. Levi*, 889 N.W.2d 907 (N.D. 2017)
*Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160,
195 L.Ed.2d 560 (2016)
*Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686,
98 L.Ed. 873 (1954)
*Clark v. Board of School Directors*, 24 Iowa 266 (1868)
*Didonato v. Iowa Dept. of Transp.*, 456 N.W.2d 367 (Iowa 1990)
*Fishbein v. Kozlowski*, 252 Conn. 38, 743 A.2d 1110 (1999)
*Hartman v. Robertson*, 208 N.C. App. 692, 703 S.E.2d 811 (2010)
*Heidemann v. Sweitzer*, 375 N.W.2d 665 (Iowa 1985)
*Holte v. State v. Highway Commissioner*, 436 N.W.2d 250 (N.D. 1989)

*Lopez v. Director, N.H. Division of Motor Vehicles*, 145 N.H. 222, 761 A.2d 448 (2000)
*McCrea v. Iowa Dept. of Transp.*, 336 N.W.2d 427 (Iowa 1983)
*Motor Vehicle Admin. v. Richards*, 356 Md. 356, 739 A.2d 58 (1999)
*Nevers v. Alaska, Department of Admin., Division of Motor Vehicles*, 123 P.3d 958 (Alaska 2005)
*Park v. Valverde*, 152 Cal.App. 4th 877, 61 Cal.Rptr. 3d 805 (2007)
*Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998)
*Powell v. Secretary of State*, 614 A.2d 1303 (Maine 1992)
*Riche v. Director of Revenue*, 987 S.W.2d 331 (Mo. 1999)
*Scott v. Iowa Dept. of Transp.*, 604 N.W.2d 617 (Iowa 2000)
*Severson v. Sueppel*, 260 Iowa 1169, 152 N.W.2d 281 (1967)
*State v. Baldon*, 829 N.W.2d 785 (Iowa 2013)
*State v. Childs*, 898 N.W.2d 177 (Iowa 2017)
*State v. Garrity*, 765 N.W.2d 592 (Iowa 2009)
*State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015)
*State v. Hellstern*, 856 N.W.2d 355 (Iowa 2014)
*State v. Hicks*, 791 N.W.2d 89 (Iowa 2010)
*State v. Hitchens*, 294 N.W.2d 686 (Iowa 1980)
*State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010)
*State v. Pals*, 805 N.W.2d 767 (Iowa 2011)
*State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017)
*State v. Taeger*, 781 N.W.2d 560 (Iowa 2010)
*State v. Tubbs*, 690 N.W.2d 911 (Iowa 2005)
*State v. Vietor*, 261 N.W.2d 828 (Iowa 1978)
*State v. Walker*, 804 N.W.2d 284 (Iowa 2011)
*Tornabene v. Bonine ex rel. Arizona Highway Department*, 203 Ariz. 326, 54 P.3d 355 (Ct. App. 2002)
*United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, .82 L.Ed.2d 677 (1984)
*Westendorf v. Iowa Dept. of Transp., Motor Vehicle Division*, 400 N.W.2d 553 (Iowa 1987)
*Wiebenga v. Iowa Dept. of Transp.*, 530 N.W.2d 732 (Iowa 1995)

**Statutes and Other Authorities:**

Iowa Code ch. 321J
Iowa Code § 321J.9(1)(a)-(b)
Iowa Code § 321J.13(6)
Iowa Code § 462A.14A(4)(g)(1)

Iowa Code § 755.17 (1977)
Iowa Code § 804.20
Iowa Constitution Article I, section 8

**D. No "fundamental right" is at issue. There was no lack of substantive or procedural due process. A rational basis supports Iowa's practice and Westra had an evidentiary hearing with a stay of his revocation while he challenged the revocation before DOT.**

**Cases:**

*State v. Klawonn*, 609 N.W.2d 515 (Iowa 2000)

**Statutes and Other Authorities:**

United States Constitution, Fifth Amendment
United States Constitution, Fourteenth Amendment
Iowa Constitution, Article I, section 9

**(1) No "fundamental right" and no violation of substantive due process.**

**Cases:**

*Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)
*Gilchrist v. Bierring*, 234 Iowa 899, 14 N.W.2d 724 (1944)
*Horsfield Materials v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013)
*Scheckel v. State*, 838 N.W.2d 870 (Table), 2013 WL 4504919 (Iowa App. 2013)
*State v. Hines*, 478 N.W.2d 888 (Iowa App. 1991)
*State v. Klawonn*, 609 N.W.2d 515 (Iowa 2000)
*State v. Miner*, 331 N.W.2d 683 (Iowa 1983)
*State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017)
*State v. Vogel*, 548 N.W.2d 584 (Iowa 1996)
*Welch v. Iowa Dept. of Transp.*, 801 N.W.2d 590 (Iowa 2011)
*Westendorf v. Iowa Dept. of Transp., Motor Vehicle Division*, 400 N.W.2d 553 (Iowa 1987)
*Wright v. Iowa Dept. of Corrections*, 747 N.W.2d 213 (Iowa 2008)

**Statutes and Other Authorities:**

Iowa Code ch. 321J
Iowa Code § 321J.2
Iowa Code § 321J.2A
Iowa Code § 321J.13(2)
Iowa Code § 321J.13(6)
Iowa Code § 321J.13(6)(a)(b)(1)-(2)
Iowa Code § 321J.13(6)(b)
Iowa Code § 321J.13(6)(b)(1)-(2)
Iowa Code § 321J.13(6)(c)
Iowa Code § 321J.20
Iowa Constitution, Article I, section 9
2018 Iowa Acts ch. 1110 §§ 8-9
*Recent Decreases in the Proportion of Persons with a Driver's License across All Age Groups*, Michael Sivak and Brandon Schoettle, The University of Michigan Transportation Research Institute, January 2016

**(2) Westra had an evidentiary hearing. There was no procedural due process violation.**

**Cases:**

*Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)
*Bowers v. Polk County Board of Supervisors*, 638 N.W.2d 682 (Iowa 2002)
*Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977)
*Horsfield Materials v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013)
*Lewis v. Jaeger*, 818 N.W.2d 165 (Iowa 2012)
*Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)
*State v. Knous*, 313 N.W.2d 510 (Iowa 1981)
*State v. Owens*, 418 N.W.2d 340 (Iowa 1988)
*Westendorf v. Iowa Dept. of Transp., Motor Vehicle Division*, 400 N.W.2d 553 (Iowa 1987)

**Statutes and Other Authorities:**

Iowa Code § 321J.2
Iowa Code § 321J.6(1)(c)
Iowa Code § 321J.13(2)

Iowa Code § 321J.13(6)
Iowa Constitution, Article I, section 9

## ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals. The issue presented is not "substantial" because this case can be readily resolved through application of existing legal principles. *See* Iowa R. App. P. 6.1101(3)(a). Though Westra contends his case presents a substantial issue of first impression because of his reliance upon the Iowa Constitution, his claim, seeking the creation of a more far-reaching exclusionary rule in driver's license revocation hearings beyond what has been conferred by statute, is sufficiently like prior Iowa cases rejecting the contention based upon similar federal constitutional provisions. *See Westendorf v. Iowa Dept. of Transp., Motor Vehicle Division*, 400 N.W.2d 553 (Iowa 1987) (rejecting exclusionary rule in license revocation hearings). Indeed, in *Swanson v. Iowa Dept. of Transp.*, 780 N.W.2d 249 (Table), 2010 WL 446994, *3 (Iowa App. 2010), the Iowa Court of Appeals held:

> Swanson also argues that the initial stop was unreasonable. The DOT argues, citing *Westendorf*, that the exclusionary rule does not apply in this license revocation proceeding and that Swanson's argument regarding reasonableness of the stop is therefore irrelevant. We agree.

The district court rightly noted the dearth of Iowa authority supporting extension of an exclusionary rule into civil driver's license revocation proceedings beyond what the legislature has already conferred through Iowa

Code section 321J.13(6). Ruling, pp. 8-11; Appendix (App.) pp. 380-383. The district court correctly concluded Iowa's search-and-seizure provision did not alter the analysis in *Westendorf*.

Similarly, the district court properly applied rational basis scrutiny in rejecting Westra's substantive due process claim under the Iowa Constitution. Ruling, pp. 11-13, App. pp. 383-385. In addition, the district court justifiably applied the rationale of *Westendorf*, and its progeny, in rejecting Westra's procedural due process claims noting the analysis under Iowa's Constitution "essentially matches" what was espoused by the *Westendorf* Court. Ruling, p. 14; App. p. 386.

Westra's attempt to stay the revocation of his driving privileges was denied by order of the Supreme Court entered July 9, 2018. Though not dispositive of this appeal, the Court's action in denying Westra's stay request is consistent with the conclusion Westra's claim did not present a substantial likelihood of prevailing on the merits. *See, e.g.,* Iowa Code § 17A.19(5)(c)(1) (among criteria considered when a stay of agency action is sought is the extent "to which the applicant is likely to prevail when the court finally disposes of the matter"); *see also Teleconnect Co. v. Iowa State Commerce Commission*, 366 N.W.2d 511, 513 (Iowa 1985) (likelihood of

prevailing on the merits by the party seeking the stay a criterion in determining whether agency action will be stayed).

Therefore, this case should not be retained by the Supreme Court. It should go to the Iowa Court of Appeals. Existing case precedent affords a sufficient guidepost for its resolution.

## STATEMENT OF THE CASE

**Nature of the Case.** This appeal concerns whether Westra's driving privileges were properly revoked because of his refusal to submit to chemical testing under Iowa Code chapter 321J, Iowa's implied consent law. Agency record, pp. 67, 97; App. pp. 71, 101.[1]

[1]A certified agency record was submitted in this matter on November 8, 2017. It consisted of 98 pages which were Bates-stamped in the lower right-hand corner of the page, plus a transcript of the administrative hearing before the administrative law judge which has separate pagination. Bates-stamped page 98 is the first page of the transcript of the administrative hearing, but the transcript is then separately numbered at the upper right-hand corner of each page, beginning with page number 1 through page number 35. That transcript was prepared by Petersen Court Reporters from an audio recording. DOT, in referencing the certified agency record *other than the transcript*, will cite "Agency record" followed by the Bates-stamped page number appearing in the lower right-hand corner of those pages. DOT, in referring to the transcript of the administrative hearing, will reference the transcript by referring to "DOT Tr." followed by the page number accorded by Petersen Court Reporters in the upper right-hand corner of the page of the transcript Petersen prepared.

**Course of Proceedings and Disposition of Case in District Court.**

Westra's petition for judicial review was filed October 19, 2017. The case reached the district court following administrative proceedings conducted before the Iowa Department of Transportation (DOT) pursuant to Iowa Code chapter 17A. Administrative Law Judge (ALJ) Martin H. Francis sustained DOT's revocation of Mr. Westra's driving privileges for a period of one year because of Mr. Westra's refusal to provide a breath specimen. *See* ALJ ruling dated August 15, 2017; Agency record, pp. 72-77; App. pp. 76-81.

Mr. Westra appealed ALJ Francis's decision to DOT's reviewing officer, Mr. Mike Raab. On September 21, 2017, Mr. Raab issued DOT's final decision regarding Mr. Westra's challenge of his revocation. Mr. Raab concluded the decision of ALJ Francis was supported by the record, and he affirmed DOT's action in revoking Mr. Westra's driving privileges. *See* Raab ruling; Agency record, pp. 3-4; App. pp. 7-8.

Following submission of trial court briefs and oral argument on March 8, 2017, The Honorable Arthur E. Gamble, Chief Judge of the Fifth Judicial District, issued on May 17, 2018, a ruling affirming DOT's revocation of Westra's driving privileges. Ruling; App. pp. 373-388.

Thereafter, on June 15, 2018, Mr. Westra filed this appeal. Notice of Appeal; App. p. 389-390.

## STATEMENT OF FACTS

The motor vehicle Mr. Westra was driving was stopped by DOT peace officer, Austin Wilson, shortly after midnight on May 9, 2017. DOT Tr. 6-7; App. pp. 107-108. Officer Wilson had observed Westra's vehicle improperly stopped in the traveled portion of an interstate highway. DOT Tr. pp. 9-10; 20-21; App. pp. 110-111; 121-122. After encountering Mr. Westra at the driver's side of the vehicle, Officer Wilson observed an open alcoholic beverage container sitting behind the passenger seat but within reach of Mr. Westra. DOT Tr. p. 21. App. p. 122. In addition, Officer Wilson noticed Mr. Westra had bloodshot, watery eyes, a possible sign of intoxication. DOT Tr. p. 13. App. p. 114.

Westra refused to submit to a preliminary breath test (PBT). DOT Tr. p. 13. App. p. 114. He was completely uncooperative. He refused to hand over the alcoholic beverage container to the officer when requested to do so. DOT Tr. p. 22. App. p. 123. Officer Wilson had requested Mr. Westra show him the container, so he could verify whether it contained alcohol. Mr. Westra reported the container was empty. DOT Tr. pp. 21-22. App. pp.

122-123. Officer Wilson then asked Mr. Westra to exit the vehicle, but he refused. DOT Tr. p. 22; App. p. 123.

Officer Wilson called another officer for assistance in removing Westra from the vehicle. DOT Tr. pp. 23-24. App. pp. 124-125. After the other officer arrived, the two officers removed Mr. Westra. DOT Tr. pp. 24-25; App. pp. 125-126. The backup officer detected the odor of an alcoholic beverage coming from Mr. Westra's vehicle. DOT Tr. p. 23. App. p. 124. The officers discovered the alcoholic beverage container in Westra's vehicle was about a quarter full, notwithstanding Mr. Westra's prior claim it was empty. DOT Tr. p. 24; App. p. 125.

Mr. Westra, once removed from his vehicle, was again asked to submit to a PBT, but he again refused. DOT Tr. p. 25. App. p. 126. Westra was taken to the Jasper County jail where the DataMaster machine for testing breath specimens was located. DOT Tr. p. 15. App. p. 116. DOT Officer Wilson is a certified peace officer and certified to perform implied consent procedures. DOT Tr. p. 20. App. p. 121. The implied consent process was invoked with the requisite advisory given to Mr. Westra. DOT Tr. p. 8. App. p. 109. Westra was asked to provide a breath specimen, but he refused. DOT Tr. pp. 8-9; Agency record p. 97; App. pp. 109-110; 101. DOT, because of Mr. Westra's refusal, ordered as provided by law a one-

year license revocation of Mr. Westra's privileges to drive. Agency record, p. 67; App. p. 71.

## I.

**THE PUBLIC'S NEED TO COMBAT THE HOLOCAUST ON OUR ROADWAYS WHICH IS A BY-PRODUCT OF DRUNK DRIVING OUTWEIGHS ANY OTHER CONSIDERATION IN A DRIVER'S LICENSE REVOCATION MATTER HANDLED BEFORE AN ADMINISTRATIVE LAW JUDGE UNDER IOWA CODE CHAPTER 321J. THE DETERMINATION WHETHER THE REVOCATION WILL BE UPHELD IS BASED UPON ALL THE EVIDENCE OFFERED AT THE AGENCY HEARING, EVEN EVIDENCE OBTAINED THROUGH AN UNAUTHORIZED STOP.**

### A. Error preservation, scope of review and standard of review.

Westra offers only one basis for challenging DOT's revocation of his driving privileges: the legality of the stop of his vehicle. Otherwise, Westra effectively concedes there were reasonable grounds to invoke implied consent. Nor does he dispute the DOT peace officer's authority to administer the implied consent law by requesting a breath specimen which Westra refused to supply. This was noted by the district court as well. Ruling, p. 6; App. p. 378. DOT, upon review of the district court's ruling, believes Westra preserved error on his claim he should have been afforded the right to challenge the validity of the stop in the license revocation proceedings before ALJ Francis.

Westra's challenge raises a legal question. Questions of statutory interpretation are reviewed for errors of law. *State v. Stoneking*, 379 N.W.2d 352, 353-54 (Iowa 1985). When constitutional issues are raised, those questions are determined de novo on appeal. *See, e.g., State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001).

### B. Officer Wilson's status as a DOT officer and authority to stop.

Westra's first division of his brief is devoted to his assertion DOT Officer Wilson lacked authority to stop his vehicle because the reason for the stop was unrelated to operating authority, registration, size, weight and load. On October 19, 2018, the Iowa Supreme Court issued decisions in *Rilea v. Iowa Dept. of Transp.*, 919 N.W.2d 380 (Iowa 2018), and *State v. State v. Werner*, 919 N.W.2d 375 (Iowa 2018). Those decisions held DOT peace officers lacked authority to engage in general traffic enforcement under Iowa Code chapter 321, and further held on-duty DOT officers cannot make citizen's arrests under Iowa Code section 804.9.

*Rilea* and *Werner* applied the law in effect prior to May 11, 2017. Effective May 11, 2017, DOT's peace officers, with certain exceptions, have "the same powers conferred by law on peace officers for the enforcement of all laws of this state and the apprehension of violators." Iowa Code § 321.477(1) (2018); *see also* 2017 Iowa Acts ch. 149 §§ 1-5. The 2017

amendment contained a sunset provision which terminated its effect on July 1, 2018, but the legislature during the 2018 session extended the term of the sunset to July 1, 2019. *See* 2018 Iowa Acts ch. 1170, div. II, § 3. Westra's incident, which occurred May 9, 2017, is not controlled by the amendment to section 321.477 (2017) which did not go into effect until May 11, 2017.

Officer Wilson was a peace officer pursuant to Iowa Code section 801.4(11)(h), and he was certified to perform implied consent. Thus, his training also qualified him as a "Peace officer" within the meaning of Iowa Code section 321J.1(8)(e) ("Peace officer" defined for purposes of chapter 321J). The Court in *Rilea* held properly trained DOT officers "can enforce chapter 321J" and may "make OWI arrests." *Rilea,* 919 N.W.2d at 392. Therefore, given Officer Wilson's separate authority under Iowa Code chapter 321J, DOT invites this Court to affirm Judge Gamble on this alternative ground which was urged before the district court. *See* DOT's brief in district court, filed February 14, 2018, pp. 68-71; App. pp. 350-353.

Officer Wilson stopped Westra's vehicle based upon the officer's observation the vehicle had improperly stopped on the interstate. Judge Gamble concluded this was not an authorized stop. *See* Ruling, p. 7 ("As a

result, the Court finds that Officer Wilson did not have statutory authority to stop Westra."); App. p. 379.

But analyzing this case on that basis does not save the day for Westra. The district court noted a "primary hurdle" for Westra was his need to establish "he had a right to argue the legality of the traffic stop at all in his license revocation proceedings." Ruling, p. 7; App. p. 379. Judge Gamble properly concluded Iowa law did not allow Westra to assert the legality of the stop as a defense to the implied consent proceedings, and he correctly found this practice constitutional. He provided a detailed analysis rejecting Westra's claims in upholding DOT's revocation of Mr. Westra's driving privileges. Ruling, pp. 8-16; App. pp. 380-388. DOT seeks affirmance of Judge Gamble's decision to sustain DOT's revocation action, and DOT will proceed below to address the arguments made in Divisions II and III of Westra's brief.

### C. The need to protect innocents on our highways from drunk drivers weighs just as heavily under Article I, section 8 of Iowa's Constitution as it does under the United States Constitution.

#### (1) *Westendorf's* rationale remains viable.

The Iowa Supreme Court in *Westendorf v. Iowa Dept. of Transp., Motor Vehicle Division*, 400 N.W.2d 553, 556-67 (Iowa 1987), took up an exclusionary-rule argument in the context of an administrative hearing

involving the revocation of a driver's license. Westendorf claimed, not unlike Mr. Westra, his vehicle had been illegally stopped. 400 N.W.2d at 554. Here is what the Iowa Supreme Court said about the exclusionary rule within the context of the administrative hearing involving Westendorf's license revocation:

> We have previously emphasized the high priority our legislature has given to enforcement of laws prohibiting drunk driving. *See Veach v. Iowa Department of Transportation*, 374 N.W.2d 248, 250 (Iowa 1985) ("The State has a strong interest in obtaining the best evidence of the amount of alcohol in a driver's bloodstream at the time of arrest.").
>
> The benefit of using reliable information of intoxication in license revocation proceedings, even when that evidence is inadmissible in criminal proceedings, *outweighs the possible benefit of applying the exclusionary rule to deter unlawful conduct*. Consequently, the exclusionary rule formulated under the fourth and fourteenth amendments was inapplicable in this license revocation proceeding.

400 N.W.2d at 557 (emphasis added).

The rationale above is as valid today as it was when *Westendorf* was decided. The balancing of interests in *Westendorf* results in the same determination under the Iowa Constitution. Iowa's Constitution does not value the public welfare and safety any less than the United States Constitution. The need of licensing authorities for reliable information in civil driver's license cases to combat the scourge of drunk driving remains unchanged.

Iowa, in the absence of the legislature conferring an alternate statutory remedy, has consistently declined to invoke exclusionary rule concepts in driver's license revocation proceedings. *See, e.g., Lubka v. Iowa Dept. of Transp.*, 599 N.W.2d 466, 469 (Iowa 1999); *Wiebenga v. Iowa Dept. of Transp.*, 530 N.W.2d 732, 734-35 (Iowa 1995); *Krueger v. Iowa Dept. of Transp.*, 493 N.W.2d 844, 845-46 (Iowa 1992) (per curiam). The Iowa Court of Appeals, as noted in this brief's routing statement, referred to *Westendorf* when declaring the reasonableness of the vehicle stop to be without relevance in driver's license revocation cases. *See Swanson v. Iowa Dept. of Transp.*, 780 N.W.2d 249 (Table), 2010 WL 446994, *3 (Iowa App. 2010).

Westra, relying in large measure upon *State v. Cline*, 617 N.W.2d 277 (Iowa 2000), *overruled on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n. 2 (Iowa 2001), argues Iowa's Constitution supports a broader application of the exclusionary rule. *Cline*, however, was a criminal prosecution. The district court rightly noted:

> As Westra implicitly concedes, there is no Iowa case law directly extending the exclusionary rule beyond criminal cases and into administrative proceedings. In fact, as the IDOT points out, what case law does exist on this issue runs contrary.

Ruling, p. 9; App. 381.

There is a major difference in assessing constitutional issues in the context of criminal prosecutions versus civil proceedings. Criminal prosecutions implicate the right to be free of self-incrimination, the right to require the state prove a case beyond a reasonable doubt, the right to have counsel appointed if a possibility of incarceration exists, *etc.* Most significantly, one can go to jail for conviction of a crime. On the other hand, an Iowa driver's license revocation case is a civil matter with the burden of proof upon the licensee. Iowa Code § 17A.18(3); *see also Heidemann v. Sweitzer*, 375 N.W.2d 665, 669 (Iowa 1985); *McCrea v. Iowa Dept. of Transp.*, 336 N.W.2d 427, 429 (Iowa 1983).

The U.S. Supreme Court has also noted the different analysis implicated when reviewing implied-consent laws which are civil in nature, as opposed to provisions exacting criminal sanctions. *See Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160, 195 L.Ed.2d 560 (2016):

> Our prior opinions have referred approvingly to the general concept of implied-consent laws *that impose civil penalties and evidentiary consequences on motorists who refuse to comply*. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.

136 S. Ct. at 2185 (emphasis added) (citations omitted).

At issue in *Birchfield* was a state law making it a crime when a motorist refused testing after arrest for driving while intoxicated. *Birchfield*

held motorists cannot be deemed to have consented to providing a blood test if the refusal to do so constituted a criminal offense: "It is another matter, however, for the State not only to insist upon an intrusive blood test, *but also to impose criminal penalties on the refusal to submit to such a test.*" 136 S.Ct. at 2185 (emphasis added). In contrast, Iowa's motor vehicle implied consent law, as observed by the Court in *State v. Pettijohn*, 899 N.W.2d 1, 38 (Iowa 2017), "has chosen not to make it a criminal offense or have a mandatory monetary civil penalty when an individual refuses to take the chemical test." (Footnote omitted).

The history of Iowa's implied consent law was chronicled in *Welch v. Iowa Dept. of Transp.*, 801 N.W.2d 590, 594 (Iowa 2011):

> Enacted in 1963, Iowa's implied consent law was intended to "control alcoholic beverages and aid the enforcement of laws prohibiting operation of a motor vehicle while in an intoxicated state." 1963 Iowa Acts ch. 114, § 37 (codified at Iowa Code § 321B.1 (1966)).

(Footnote omitted).

*Welch*, which involved a revocation under Iowa Code section 321J.9 for refusal to provide a breath specimen for chemical testing, as occurred with Westra, noted: "[W]e have characterized an administrative license revocation under section 321J.9 as remedial, promoting the overarching remedial purpose of chapter 321J itself." 801 N.W.2d at 601. *See also*

*Shriver v. Iowa Dept. of Transp.*, 430 N.W.2d 921, 924 (Iowa 1988) (reaffirming the primary purpose behind chapter 321J is "to promote public safety by removing dangerous drivers from the highways").

Given these precepts, *Westendorf* remains viable. The purpose behind Iowa Code chapter 321J is better achieved if *all* evidence bearing on the question of intoxication is admitted at the license hearing. An adequate governor on police errors is obtained through application of the exclusionary rule to evidence in the criminal prosecution. Accordingly, in the realm of a civil administrative license revocation proceeding where the primary purpose is remedial in scope to achieve the objective of "removing dangerous drivers from the highways," a court-imposed exclusionary rule is out of sync.

Westra argues the exclusionary rule is needed to advance the "integrity" of the administrative process. But that argument has not been found compelling as evidenced by *Westendorf*, as well as subsequent Iowa cases applying *Westendorf's* rationale. The issues in play in an implied consent case are limited to whether the peace officer had reasonable grounds to believe the person was operating a motor vehicle while intoxicated and whether the person failed chemical testing or refused it. *See* Iowa Code § 321J.13(2) (limiting the scope of issues at the administrative hearing to the

reasonable grounds criterion and whether a test was failed or refused). It has been consistently recognized Iowa's law on implied consent is to be "liberally construed in favor of the public interest the legislature sought to protect and against the private interests of the drivers involved," *see Welch*, 801 N.W.2d at 601.

Hence, the integrity of the administrative process is surely not advanced by denying evidence pertaining to a party's failure of a chemical test, or the party's refusal to submit to chemical testing. In a civil license revocation matter where the safety of those upon the highways is the transcendent goal, it makes no sense for the Court to devise an exclusionary rule denying licensing authorities material information and resulting in the return of licenses to intoxicated drivers or those who refuse testing. Westra's position subverts the integrity of the administrative process by requiring DOT to ignore material evidence it is otherwise charged by the legislature with considering.

Further, it would frustrate the reason a longer period of revocation is imposed for refusing the test. Clearly, by providing a shorter period of revocation when a person takes the test but fails it, the legislature wanted to offer an incentive for people to take the test because the gathering of reliable evidence going toward the issue of intoxication is a critical public safety

factor in the administration of Iowa's driver's licensing process. *See* Iowa Code § 321J.9(1)(a) (one-year period of revocation for test refusal if no prior revocation on record) versus Iowa Code § 321J.12(1)(a) (180-day period of revocation for failing the test if no prior revocation on record).

Westra cites Iowa Code section 321J.13(6) as evidence *Westendorf's* concern about losing relevant evidence of failing chemical testing, or refusing to submit to chemical testing, has been eroded. Under that statute, upon presentment of the requisite petition necessitating a hearing for consideration of new evidence, DOT is to "rescind the revocation" if the district court in the Operating While Intoxicated (OWI) charge (Iowa Code sections 321J.2 or 321J.2A) arising from the same circumstance finds an absence of "reasonable grounds" or the chemical test is declared invalid or inadmissible. But in the absence of an OWI criminal case having been initiated, the legislature maintained the status quo. The legislature's exclusionary rule was strictly limited to those scenarios where there was an actual suppression of evidence in the "parallel criminal proceeding." *See, e.g.*, *State v. Taeger*, 781 N.W.2d 560, 566 (Iowa 2010); *see also Brownsberger v. Dept. of Transp.*, 460 N.W.2d 449, 451 (Iowa 1990). Westra concedes no OWI charge was filed against him. Therefore, the

provisions of Iowa Code section 321J.13(6) have no application to his circumstance.

The rescission remedy in today's Iowa Code section 321J.13(6) is not new. A version initially appeared on the books as Iowa Code section 321J.13(4) (1987). *See* 1986 Iowa Acts ch. 1220 § 13. Shortly after the provision was adopted, the Court made clear it was not going to engraft upon the administrative process an exclusionary rule of its own making to broaden what the legislature had created:

> There is no indication in the present record of any adjudication in a criminal proceeding that would trigger the reopening provision of section 321J.13(4). Nor is there any indication in that statute that the agency is to apply an exclusionary rule in deciding these cases initially. Because, on judicial review of contested case hearings under Iowa Code section 17A.19, this court may only decide whether the agency acted correctly, the rule of decision which applies to the agency also applies to the court which is reviewing the agency.

*Manders v. Iowa Dept. of Transp.*, 454 N.W.2d 364, 366-67 (Iowa 1990).

Westra does not think the legislature went far enough in the rescission remedy found in Iowa Code section 321J.13(6). He essentially asks the Court to legislate into existence an expanded exclusionary rule to cover his situation by some new constitutional entitlement. The Court should decline his invitation. If the legislature desired to create a scheme where there would be an exclusionary rule in force in all circumstances, including

Westra's, it possessed sufficient grammatical skills to do so. The legislature's statutory exclusionary rule in Iowa Code section 321J.13(6) is compelling evidence the legislature knew how to craft an exclusionary rule remedy when that was its intent. The statutory remedy the legislature afforded was "limited" and only applied in those scenarios where evidence had been "suppressed" in the parallel OWI case. *See State v. Taeger*, 781 N.W.2d 560, 564-66 (Iowa 2011). The contours of any statutory exclusionary rule are for the legislature to determine, not the Court.

Westra's plea for a court-constructed exclusionary rule to fill the gap he thinks the legislature placed him in calls to mind the wisdom of this language from *Holland v. State*, 253 Iowa 1006, 1011, 115 N.W.2d 161, 164 (1962), where in a play on Tennyson's classic poem, "The Charge of the Light Brigade," the Court observed:

> Why the change was made, why the legislature deemed it proper …, we do not know, nor is it important that we understand. Ours not to reason why, ours but to read, and apply. It is our duty to accept the law as the legislative body enacts it. We do not decide what the legislature might have said, or what it should have said in the light of the public interest to be served, but only what it did say; and this we must gather from the language actually used. When a statute is plain and its meaning clear, there is no room for interpretation; or, to put it another way, there is only one possible construction ….
>
> If we do not follow the clear language of a statute, or of the constitution, but by a fallacious theory of construction attempt to impose our own ideas of what is best, even if in so doing we

> conceive that we are promoting the public welfare and achieving a desirable result, we are indulging in judicial legislation and are invading the province of the legislative branch of the government, or of the electorate in amending the basic law. The end does not in such cases justify the means. We must accept [a statute] as the legislature wrote it, and its meaning is definite and beyond fair debate.

Westra argues section 321J.13(6) removed barriers between the criminal and administrative proceedings and provides a remedy to rectify a license revocation. It did do that, but not in a circumstance like Westra's where there has been no adjudication of admissibility rendered in an OWI proceeding. Westra argues the adoption of section 321J.13(6) must mean the legislature was not concerned about losing reliable evidence of driving while intoxicated when the evidence has been obtained "illegally." From that premise, Westra concludes *Westendorf's* viability has been drained away. But that, too, is an argument made on a house of cards that will not stand.

First, once again, had the legislature wanted to embrace Westra's scenario it would have written section 321J.13(6) the way he'd like it to be written as opposed to the manner it was written. Second, *Westendorf* has now been on the books for over three decades. Its rationale has been reaffirmed and applied in ensuing cases. The legislature is deemed to be aware of its application in the courts, and if it had a misgiving concerning

*Westendorf*'s continued viability in the scenario Westra finds himself in, it would have acted by amending section 321J.13(6). But it did not. That means the legislature is deemed to have acquiesced in the *Westendorf* rule for those situations, like Westra's, not addressed by Iowa Code section 321J.13(6). *See, e.g.*, *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013) (legislature deemed aware of cases that interpret its statutes).

Westra contends disallowance of his ability to challenge the validity of the traffic stop in the administrative proceedings is tantamount to "sanctioning a manipulation." Under Westra's argument, the State is incentivized to refrain from filing a criminal charge whenever there is an "obvious" constitutional challenge with the vehicle stop. He even tries to inflame the debate calling the present state of the law an "ambush on Iowa drivers." *See* Westra's proof brief, pp. 30-31. These assertions are preposterous.

If some form of illicit conspiratorial dragnet was underway by law enforcement with utter indifference to the constitutional rights of Iowa drivers, and incidentally nothing in this record supports such a fantastic scenario, there are already in place adequate criminal and civil remedies to address it should such a sequence of events ever arise. Second, whether a

criminal charge is filed is a matter of discretion on the part of a prosecutor. Westra immediately theorizes the discretion would be abused to the detriment of drivers like him, and that is why a criminal charge is not filed. But it is equally plausible the discretion could be skewed the other way. Perhaps a criminal charge did not get filed because the prosecutor thinks too many charges are being filed, or maybe the prosecutor has implemented a philosophy of extending "second chances" and has decided to defer the filing of the criminal charge for a period of time as a means of according the offender an informal period of self-probation – a deferred prosecution, if you will. Or, more simply, perhaps the charge was not filed because the prosecutor did not think the heavy proof burden of a criminal case could be met.

The point is prosecutorial discretion is broad. It can be applied reasonably; it can be applied unreasonably. The remedy for abuse of prosecutorial discretion is to either vote the prosecutor out of office, or have the prosecutor removed using available legal processes. Westra's assertion of a "manipulation" or an "ambush" is not a reasoned legal argument; rather, it is a rant. It is equally viable to say what Westra proposes perpetrates a "manipulation" or an "ambush" upon the public interest because it would

result in the denial of material evidence to DOT in a driver's license revocation proceeding.

Westra also suggests he should be entitled to conferral of an exclusionary rule because of Officer Wilson's status as a DOT employee. This assertion is based on the idea DOT is the agency revoking Wilson's license and, as such, there would be insufficient deterrence of police misconduct if the unauthorized stop came from an employee of the same agency revoking the license. The thought seems to be DOT, as some form of evil puppet master, controls its officers and they should be especially subject to exclusionary rule concepts, beyond what other peace officers are subjected to, since they work for the agency revoking the license. But this argument is unconvincing.

DOT is a state agency. But so is the Department of Public Safety (DPS) which employs the Iowa State Patrol. Both DPS and DOT are directed to cooperate to insure the proper and adequate enforcement of the rules of the road. *See* Iowa Code § 321.2(3). Why stop with DOT officers? Under Westra's position, why not single out state troopers employed by a sister state agency, DPS, and claim there will be insufficient deterrence since the revocation is coming from a state agency and the trooper is a state

employee under control of the same government, the State of Iowa, issuing the driver's licenses?

The underlying premise of Westra's argument is, frankly, insulting to the men and women of Iowa's law enforcement. It suggests officers will act in concert to intentionally violate constitutional rights. Never mind such an undertaking would threaten their careers, potentially subject the officers to criminal and civil liability, and cause any evidence obtained to be rendered useless in a criminal prosecution. Nonetheless, they will do this, so the argument goes, so they can "ambush" drivers to "manipulate" their driver's licenses into being revoked. There is no evidence Officer Wilson acted with this sort of mindset. He saw a vehicle improperly positioned on an interstate highway. He acted by pulling the vehicle over. At the time he did so, there was a bona-fide question whether DOT peace officers had authority to engage in general traffic enforcement. *See State v. Werner*, 919 N.W.2d 375 (Iowa 2018) (though reversed on appeal, the district court had ruled DOT officers had official authority to act upon chapter-321 offenses given their status as peace officers under Iowa Code section 801.4(11)(h) and could alternatively make valid citizens' arrests). Officer Wilson was not ambushing or manipulating anyone; he was carrying out his job in the interest of public safety.

The short answer is the application of the exclusionary rule to deny evidence in the criminal prosecution affords sufficient deterrence as *Westendorf* noted. 400 N.W.2d at 557. Moreover, the government revokes the driver's licenses, and the peace officers tasked with applying the implied consent laws are all employed by some branch of the government, be it state, county or city. Incidentally, the judges interpreting the licensing provisions, both before the agency and in the courts, are also employed by the government. Therefore, Mr. Wilson's employment by DOT should not be marked with a scarlet letter rendering his status subject to heightened scrutiny.

The bottom line from the standpoint of Iowa's constitutional search-and-seizure provision, Article I, section 8, is a driver's license revocation case is a civil proceeding vested with a remedial purpose designed to maximize the odds dangerous drivers will be removed from the roads. The *Cline* case relied upon by Westra held the good-faith exception established under federal law for the Fourth Amendment was not available under the Iowa Constitution's Article I, section 8, search-and-seizure clause. But the Court's cost-benefit discussion in *Cline* focused, understandably, upon whether the exclusionary rule's invocation adversely affected on-going

*criminal* prosecutions. The Court cited studies indicating the rule's impact was, at most, "marginal." 617 N.W.2d at 292.

*Westendorf*, on the other hand, recognized the criminal versus civil dichotomy for purposes of constitutional analysis:

> While the exclusionary rule applies in criminal prosecutions for driving while intoxicated, *State v. Aschenbrenner*, 289 N.W.2d 618, 619 (Iowa 1980), we have not previously addressed the question whether it applies in civil license revocation proceedings which though "arising from the same incident," are nevertheless "separate and distinct." *Heidemann v. Sweitzer*, 375 N.W.2d 665, 668 (Iowa 1985).

400 N.W.2d at 556. *See also Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 363 118 S.Ct. 2014, 2019, 141 L.Ed.2d 344 (1998) ("Recognizing these costs [the social costs of applying an exclusionary rule], we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials."); *United States v. Janis*, 428 U.S. 433, 447, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) (noting for purposes of federal law in the "complex and turbulent history of the rule [exclusionary rule], the Court never has applied it to exclude evidence from a civil proceeding, federal or state").

Thus, there should continue to be a material distinction between a criminal prosecution and a civil driver's license revocation proceeding in assessing any attack on the implied consent process based upon Iowa

constitutional grounds. Driver's license revocation proceedings, be they matters arising under the implied consent law or other laws implicating driver's licenses, have only a remedial purpose with one goal: public safety. *See, e.g.*, *State v. Funke*, 531 N.W.2d 124, 126 (Iowa 1995) (emphasis added):

> This court has traditionally regarded *the civil proceedings* under our habitual offender statute as remedial, not punitive, in nature. We have repeatedly observed that the license suspension of habitual offenders is designed "not to punish the offender, but to protect the public." *State v. Marvin*, 307 N.W.2d 10, 12 (Iowa 1981).

Westra cites an Iowa civil forfeiture case suggesting it affords proof the rule in Iowa has expanded. *See In the Matter of Property Seized from Sharon Kay Flowers*, 474 N.W.2d 546 (Iowa 1991). But *Flowers* should be viewed as limited to the special nature of forfeiture cases where the penalty of not gaining return of property seized may, in fact, exceed the criminal fine in any parallel criminal proceeding. The Court in *Flowers* relied upon the U.S. Supreme Court decision in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700-02, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) (adopting an exclusionary rule in forfeiture cases because of their *quasi-criminal nature* and because they can result *in punishment* greater than the underlying criminal case). Forfeiture proceedings, therefore, have a punitive component; the driver's license revocation proceedings have consistently

been deemed remedial, not punitive. *Flowers* has no bearing in the driver's license revocation context. Moreover, Iowa cases, cited earlier in this brief, *see Lubka*, *Wiebenga*, *Krueger* and *Swanson*, were decided after *Flowers* but declined to apply an exclusionary rule in the driver's license revocation context in the absence of legislative action conferring such a remedy.

The U.S. Supreme Court's *Birchfield* decision lays forth the grim statistics showing why implied consent laws, like Iowa's, have been enacted throughout the United States for the public's protection:

> Alcohol consumption is a leading cause of traffic fatalities and injuries. During the past decade, annual fatalities in drunk-driving accidents ranged from 13,582 deaths in 2005 to 9,865 deaths in 2011. NHTSA [National Highway Traffic Safety Administration], 2014 Alcohol-Impaired Driving 2. The most recent data report a total of 9,967 such fatalities in 2014 – on average, one death every 53 minutes. *Id*. at 1. Our cases have long recognized the "carnage" and "slaughter" caused by drunk drivers. *Neville*, 459 U.S., at 558, 103 S.Ct. 916; *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957).

*Birchfield*, 136 S.Ct. at 2178.

Therefore, Iowa's search-and-seizure provision, within the context of a civil administrative license hearing, is not offended by the Iowa legislature's determination to limit the remedy in Iowa Code section 321J.13(6) to those situations where an adjudication in the OWI case going toward reasonable grounds or testing validity has been made by the district court. Quite the contrary, it is perfectly rational for the legislature to have

restricted the remedy in that manner. The criminal court forum is better suited to take up issues pertaining to the stop as opposed to a less formal telephonic administrative hearing. The legislature could well have concluded ALJs rendering proposed decisions in licensing cases for DOT are not well-suited for making constitutional pronouncements since they have not been vested with any interpretive authority concerning constitutional issues. *See, e.g., Soo Line v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994) (agency has no authority to decide constitutional questions).

Because most determinations made in agency administrative proceedings never find their way to the district court for judicial review, section 321J.13(6) guarantees the admissibility questions it implicates will be addressed by a district court judge routinely tasked with calling the balls and strikes on evidentiary matters in the Iowa courts. Indeed, as noted in *Manders*, there is no indication in section 321J.13(6) suggesting the agency is to apply an exclusionary rule in deciding these cases initially. The rescission remedy in section 321J.13(6) is implicated only when there has been an adjudication in the criminal proceeding which can then trigger a reopening of a previously instituted revocation. *Manders*, 454 N.W.2d at 366-67.

There was no constitutional requirement for the legislature to enact Iowa Code section 321J.13(6) in the first place, and once the legislature acted the metes and bounds of the statute were the legislature's province. Nor has Westra cited any authority he has a constitutional right to have a criminal charge filed against him to facilitate some subsequent argument he might envision under section 321J.13(6). The Supreme Court in *State v. Taeger* referred to section 321J.13(6) as removing only "some" of the barriers between the civil license proceeding and the OWI prosecution. 781 N.W.2d at 565. *Taeger* noted the remedy under section 321J.13(6) was not complete in scope. *Id.* at 567. Plus, *Taeger* recognized: "Prosecutors in Iowa retain discretion not to proceed with the formal filing of criminal charges." *Id*. at 566, fn. 1.

What *Taeger* held is a prosecutor could not "in the furtherance of justice" dismiss an OWI charge in the face of a pending motion to suppress, depriving the defendant of an adjudication on the motion. But the prosecutor here, consistent with the discretion *Taeger* reaffirmed on the part of all Iowa prosecutors, never filed an OWI charge. Westra, consistent with the *Westendorf* rationale and Iowa's jurisprudence under Article I, section 8 of its Constitution, has no right to a court-imposed exclusionary rule as an adjunct to what the legislature devised in its enactment of Iowa Code section

321J.13(6). The woeful statistics arising from the curse which is drunk driving supply ample justification for a driver's licensing scheme which considers all the evidence arising from a stop in the absence of a legislative determination to the contrary. The *Westendorf* cost-benefit analysis remains sound and viable under Iowa's Constitution in a driver's license revocation case.

**(2) Other considerations offered by Westra.**

Under the rubric "Other considerations," Westra cites a series of cases for the proposition the Iowa Supreme Court "has not been shy in recent years about highlighting the importance of the Iowa Constitution in differing scenarios …." Westra's proof brief, p. 31. DOT believes the Iowa Supreme Court throughout its history has never been "shy" about the importance of the Iowa Constitution. The Court has been a bulwark for Iowa's Constitution, be it "in recent years" or from the time of the Court's inception in the nineteenth century. For instance, well over eighty years before the United States Supreme Court handed down its decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), Iowa's Supreme Court decided *Clark v. Board of School Directors*, 24 Iowa 266, 273-74 (1868) (applying the Iowa Constitution's requirement for the "education of all the youths of the State, through a system of Common

Schools" to bar efforts to segregate Iowa students based on race). Therefore, the Court's fidelity to the Iowa Constitution is not in issue. Instead, the issue is whether the cases cited by Westra have any bearing on the matter he presents for consideration. They do not.

Westra cites to *State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017); *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015); *State v. Baldon*, 829 N.W.2d 785 (Iowa 2013); *State v. Pals*, 805 N.W.2d 767 (Iowa 2011); and *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010). But these were criminal cases. They arrived at the Court with the proof and evidentiary hurdles the law rightfully imposes upon criminal prosecutions which can result in a person's loss of liberty. They were not administrative licensing matters cast in a non-punitive remedial mode where the licensee bears the burden "to show his compliance with the implied consent law." *McCrea v. Iowa Dept. of Transp.*, 336 N.W.2d 427, 429 (Iowa 1983); *see also Scott v. Iowa Dept. of Transp.*, 604 N.W.2d 617, 620 (Iowa 2000) ("As we have repeatedly held in our prior cases, the licensee bears the burden of proof ….").

*Ochoa* involved the criminal prosecution of a parolee and whether a warrant was required to search the parolee's motel room. The case focused upon *the expectation of privacy of parolees*. The Court under Iowa Constitution Article I, section 8 concluded a person's status as parolee did

not justify a warrantless search "by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search." 792 N.W.2d at 291. Similarly, the *Baldon* case also involved a parolee. The Court held a parole agreement with a consent-to-search clause does not itself constitute a parolee's consent to search where there was no suspicion of wrongdoing. 829 N.W.2d at 802-803. These cases dealt with questions unique to parolee status. They have no bearing here.

*Pals* considered whether voluntary consent to search had been given. The case involved a criminal prosecution for possession of a controlled substance. The decision focused upon the factual circumstances involved in determining the consent question. For example, there had been a pat-down, detainment in the police cruiser, no advisory telling Pals he was free to leave or could refuse consent without retaliation, and it was never conveyed to Pals when consent to search his truck was sought the reason that had originally precipitated the stopping of his vehicle had already been addressed. 805 N.W.2d at 782-83. Regarding this last point, the Court indicated the lack of "closure of the original purpose of the stop makes the request for consent more threatening." *Id.* at 783. The consent issue faced in *Pals* did not require balancing of highway safety issues Iowa Code

chapter 321J seeks to achieve in a civil driver's license revocation matter. *Pals* has no applicability to Westra's scenario, either.

*Gaskins* involved criminal prosecution for possession of marijuana with intent to deliver, failure to affix a drug tax stamp and knowingly transporting a revolver in a vehicle. These crimes were prosecuted, at least in part, based on a warrantless search of the contents of a locked container found in the motor vehicle. 866 N.W.2d at 3. The case focused upon the permissible scope of a warrantless search incident to arrest within a motor vehicle. *Id.* at 14. The Court held a warrant was required before searching the van and the safe. *Id*. at 16. Neither express consent, let alone implied consent, was ever in issue in *Gaskins*.

Westra references *State v. Pettijohn* as evidence the Iowa Supreme Court has not hesitated to expand the protections of the Iowa Constitution in "drunk driving cases." *Pettijohn*, however, dealt with the voluntariness of a warrantless breath test in a prosecution for "boating while intoxicated." 899 N.W.2d at 12. The Court found coercive a mandatory $500 civil penalty aimed exclusively at those who refuse chemical testing in the context of operating boats. The Court noted its decision was limited "to the statutory scheme for operating a boat while under the influence and not to the statutory scheme for operating a motor vehicle while under the influence."

*Id.* at 38. In fact, the Court observed under Iowa's law pertaining to motor vehicles, a refusal was not a criminal offense *and* there was not a "mandatory monetary civil penalty when an individual refuses to take the chemical test." *Id.* The Court noted a distinction between Iowa Code section 462A.14A(4)(g)(1), which imposed a mandatory civil penalty when the operator of a boat refused testing, and Iowa Code section 321J.9(1)(a)-(b), which contained neither a criminal penalty nor a mandatory civil penalty targeted solely at drivers of motor vehicles who refuse testing. *Pettijohn*, 899 N.W.2d at 38, fn. 17.

This is not a criminal case. It is a driver's licensing matter. Westra argues it would be a "disingenuous digression" from recent Iowa Supreme Court precedent "to ignore Mr. Westra's plea." Westra's proof brief, pp. 31-32. But Westra offers no explanation or citation to any Iowa authority calling for a different result under the Iowa Constitution than what was reached in *Westendorf's* interpretation vis-à-vis comparable federal constitutional provisions. Westra offers no Iowa constitutional analysis tailored specifically to the implied consent setting involving motor vehicles.

The U.S. Supreme Court noted, in *Birchfield*, motor vehicle implied consent laws are designed to secure cooperation with breath tests. In other words, "testing was a condition of the privilege of driving on state roads,"

and "the privilege would be rescinded if a suspected drunk driver refused to honor that condition." 136 S.Ct. at 2169. Likewise, the Iowa Supreme Court, in specific reference to Iowa's implied consent law, has observed the law is based on the premise "that a driver impliedly agrees to submit to a test in return for the privilege of using the public highways." *State v. Hitchens*, 294 N.W.2d 686, 687 (Iowa 1980).

Therefore, the consent implied when one partakes of *the privilege* of driving should be the focal point for analysis and not whether the stop of a vehicle is authorized or unauthorized. The paramount concern is *operation* of the vehicle by drivers who may be dangerously out of control because they are intoxicated. That is the menace to public safety implied consent laws seek to combat, not the particulars pertaining to the way a vehicle was stopped. It is precisely that safety interest in protecting innocent persons which is the motivating force inherent in the bargain struck between the government of Iowa and each motor vehicle licensee. It may be described as follows: nothing requires you to submit to chemical testing, meaning you may always choose whether to submit to a test pursuant to the implied consent you gave in exchange for your privilege to drive, but if you refuse testing you are revoking the consent you extended and a loss of driving

privileges results. *See Pettijohn*, 899 N.W.2d at 39-40, Chief Justice Cady concurring specially.

Therefore, within the civil license revocation context, it was determined in *Westendorf* the public safety enhancement obtained by considering evidence, even evidence obtained by an unconstitutional stop, transcends any plea to insert an exclusionary rule into the administrative proceeding. Any deterrent to police conduct is already adequately achieved by denying the evidence in criminal prosecutions, but the exclusion of such evidence from the civil licensing proceeding, especially in the face of the bargain the driver made with the state in gaining the privilege to drive, is unreasonable considering the predominant safety mission the law seeks to achieve.

Nor is disallowance of evidence obtained when Iowa Code section 804.20 is violated at odds with the continued application of the *Westendorf* rationale in Westra's scenario. Westra argues, referencing section 804.20, it is "counterintuitive" to permit a statutory exclusionary rule but not a constitutional one. Westra's effort to build a new exclusionary rule using section 804.20 as its foundation is without merit.

First, though section 804.20 applies in other contexts as well, most of the cases applying it have involved drunk driving. *See State v. Walker*, 804

N.W.2d 284, 290 (Iowa 2011). It is "read together" with the implied-consent provisions. *Id*. However, section 804.20 is not directed at issues pertaining to the stop of the vehicle. Instead, it allows an arrested individual the right to make a reasonable number of phone calls "before making the important decision to take or refuse the chemical test under implied consent procedures." *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978) (construing then Iowa Code section 755.17 (1977), statutory predecessor to present-day section 804.20). Thus, section 804.20 permits an arrestee to make an informed decision regarding chemical testing, and in that respect the statute is directly linked to the implied-consent process Iowa law has established for motor vehicle operators. *See State v. Tubbs*, 690 N.W.2d 911, 914 (Iowa 2005) ("One purpose of section 804.20, of course, is to allow an arrestee to call an attorney before deciding to submit to a chemical test.").

In addition, the Court has recognized the statutory right conferred by section 804.20 is "limited." *See Vietor*, 261 N.W.2d at 831. The provision strikes a balance between the detainee's rights and the needs of law enforcement. *See State v. Hellstern*, 856 N.W.2d 355, 362-63 (Iowa 2014). Section 804.20 does not require a peace officer to inform an arrested person about the rights it confers. *See, e.g.*, *Didonato v. Iowa Dept. of Transp.*, 456 N.W.2d 367, 371 (Iowa 1990). The case law, instead, has determined when

a request is made to make a phone call, the officer cannot stand "mute" about the provision but must advise the individual concerning the purpose for which a phone call is permitted. *Id.*; *see also State v. Garrity*, 765 N.W.2d 592, 597 (Iowa 2009).

The legislature, therefore, through its enactment of section 804.20, sought an appropriate balance between law enforcement's needs and the detainee's right to communicate with family or counsel concerning a request for chemical testing. *State v. Hellstern*, 856 N.W.2d 355, 362-63 (Iowa 2014); *see also State v. Hicks*, 791 N.W.2d 89, 95 (Iowa 2010). The legislature, too, is deemed to have acquiesced in the rule of exclusion the Court created regarding violations of section 804.20 because it never amended the statute following the Court's decisions in *Didonato*, *Garrity* or *Hicks*. *See Hellstern*, 856 N.W.2d at 363. Therefore, the rule of exclusion crafted by the Court regarding section 804.20 is in harmony with the legislative purpose of making sure when a phone call is requested the detainee is informed about the section 804.20 right before submitting to or refusing the chemical test. Section 804.20 is in furtherance of the implied consent process.

By contrast, for issues which arise concerning the validity of the vehicle stop, the legislature acquiesced in the *Westendorf* rationale rendering

those issues immaterial in the implied consent context except when specifically addressed by Iowa Code section 321J.13(6), a statute which does not apply to Westra's circumstance. Had the legislature intended to create an exclusionary rule which went beyond the confines of section 321J.13(6) to embrace Westra's situation, it could have done so, but it did not. The legislature is deemed to have accepted the judicial interpretations which have described section 321J.13(6) as conferring only a "limited" rule of exclusion which only removed "some" of the distinction between the license revocation hearing and the OWI prosecution:

> The question left open in *Manders* – whether section 321J.13(6) "operates as an exclusionary rule 'in the limited situation in which an adjudication on the admissibility of evidence relevant to the implied consent law has been made in a criminal proceeding growing out of the same facts,'" – was addressed that same year in *Brownsberger*. *Brownsberger v. Dep't of Transp.*, 460 N.W.2d 449, 451 (Iowa 1990) (quoting *Manders*, 454 N.W.2d at 366). In *Brownsberger*, this court determined that in enacting section 321J.13(6), the legislature was attempting to remove *some* of the barriers between the civil license proceeding and the criminal OWI prosecution. *Id*. To effectuate that purpose, the legislature fashioned a mandatory exclusionary rule that binds IDOT *to certain actions taken in the criminal proceeding.*

*Taeger*, 781 N.W.2d at 565-66 (emphasis added).

Thus, as noted earlier in this brief, the legislature is charged with knowledge of Iowa case law, including the decisions in *Westendorf* and its progeny. Section 321J.13(6) has been construed as providing only a *limited*

remedy which, in turn, is linked to an adjudication in a parallel OWI proceeding. The legislature chose not to grant any sort of exclusionary rule relief in a circumstance like Westra's. Therefore, the legislative purpose, it may be reasonably inferred, continues to hold to the viability of the *Westendorf* rationale in those scenarios which lack the requisite criminal case adjudication. Unlike section 804.20, where this Court recognized it was the intent of the legislature to require officers to disclose the purpose of the statute's phone call requirements whenever the issue was triggered, it would frustrate the legislature's objective to devise a court-crafted exclusionary rule to expand the limits of what the legislature did in its enactment of section 321J.13(6). The legislature never intended the creation of an all-encompassing exclusionary rule in administrative driver's license revocation proceedings. It linked its rule in section 321J.13(6) to presentation to DOT of a petition disclosing new evidence in the form of the required adjudication in the parallel OWI case to mandate rescission. No OWI case was filed on Westra.

Or, to look at it another way, implied consent proceedings have been interpreted to be distinct from any criminal cases arising from the same incident in the absence of legislative action to the contrary. *See, e.g*, *Heidemann v. Sweitzer*, 375 N.W.2d 665, 668 (Iowa 1985) ("The exception

pertaining to allocation of jurisdiction between two decision-making bodies applies because license revocation proceedings are separate and distinct from criminal charges from the same incident ….”). As noted above, the Court in *Taeger* held section 321J.13(6) removed only “some” of the barriers between the civil license proceeding and the OWI prosecution. 781 N.W.2d at 565. Precisely. And in those areas where the barrier has not been taken down, the fully distinct and separate nature of the licensing proceeding has been retained and there is no exclusionary rule to be applied.

Nor, because of the weighting of the public safety considerations, is there any constitutional requirement under Article I, section 8 of Iowa’s Constitution which would compel this Court to essentially legislate into existence an exclusionary rule the legislature chose not to confer. Nothing in the state or federal constitutions requires an exclusionary rule. Article I, section 8 says nothing about suppressing evidence obtained in violation of its command. Judicially crafted rules of exclusion are formulations which are “prudential rather than constitutionally mandated” and only applicable when courts determine an exclusionary rule is needed because “its deterrence benefits outweigh its ‘substantial social costs.’” *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 363, 118 S.Ct. 2014,

2019, 141 L.Ed.2d 344 (1998) (quoting, in part, *United States v. Leon*, 468 U.S. 897, 907, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)).

The Court in *Taeger* noted *Westendorf* employed a cost-benefit analysis causing the Court to determine "the exclusionary rule did not apply in the licensing proceeding …." 781 N.W.2d at 565. That same cost-benefit analysis holds true today for purposes of Iowa's Constitution. The statistics about drunk driving quoted earlier from *Birchfield* establish there are substantial social costs crying out for "reliable information of intoxication in license revocation proceedings, even when that evidence is inadmissible in criminal proceedings …." *Westendorf*, 400 N.W.2d at 557.

Westra points to five cases from other jurisdictions, namely, Florida, Illinois, Ohio, Oregon and Vermont, as support for his contention "many other States" allow drivers to challenge the constitutionality of "the stop in administrative driver's license suspension proceedings and apply the exclusionary rule in one form or another …." Westra's proof brief, pp. 32-33. But if Westra's five cited cases warrant a description of "many," DOT will see and raise Westra by citation to these cases from other states which declined to extend an exclusionary rule to civil administrative driver's license revocation proceedings: *Nevers v. Alaska, Department of Admin., Division of Motor Vehicles*, 123 P.3d 958, 964 (Alaska 2005); *Tornabene v.*

*Bonine ex rel. Arizona Highway Department*, 203 Ariz. 326, 54 P.3d 355, 365 (Ct. App. 2002); *Park v. Valverde*, 152 Cal.App. 4th 877, 887, 61 Cal.Rptr. 3d 895, 902 (2007); *Fishbein v. Kozlowski*, 252 Conn. 38, 743 A.2d 1110, 1117-19 (1999); *Powell v. Secretary of State*, 614 A.2d 1303, 1306-07 (Me. 1992); *Motor Vehicle Admin. v. Richards*, 356 Md. 356, 739 A.2d 58, 69-70 (1999); *Riche v. Director of Revenue*, 987 S.W.2d 331, 334-35 (Mo. 1999) (citing Iowa's *Westendorf* decision with approval); *Lopez v. Director, N.H. Division of Motor Vehicles*, 145 N.H. 222, 761 A.2d 448, 451 (2000) (citing Iowa's *Wiebenga* decision with approval); *Hartman v. Robertson*, 208 N.C. App. 692, 698 703 S.E.2d 811, 815-16 (2010); *Holte v. State v. Highway Commissioner*, 436 N.W.2d 250, 252 (N.D. 1989) (citing Iowa's *Westendorf* decision with approval); *Beller v. Rolfe*, 194 P.3d 949, 955-56 (Utah 2008).

The North Dakota Supreme Court in *Beylund v. Levi*, 889 N.W.2d 907, 915 (N.D. 2017), recently stated regarding administrative licensing hearings: "A majority of courts have considered similar provisions and concluded the exclusionary rule does not apply to civil administrative license suspension proceedings." Among these cases rejecting application of an exclusionary rule in the license proceeding, the primary justifications for their result boil down to these two reasons: (1) an exclusionary rule in

the administrative setting presents little value as a deterrent to police conduct since the evidence will already be excluded in the criminal case and (2) the societal costs of excluding the evidence outweigh any benefit of denying the evidence to the licensing authority. For instance, the Court in Maine declared:

> Because the evidence has already been excluded from the criminal proceeding, there is little additional deterrent effect on police conduct by preventing consideration of the evidence by the hearing examiner. The costs to society resulting from excluding the evidence, on the other hand, would be substantial. The purpose of administrative license suspensions is to protect the public. Because of the great danger posed by persons operating motor vehicles while intoxicated, it is very much in the public interest that such persons be removed from our highways.

*Powell*, 614 A.2d at 1306-07 (citation omitted).

*Westendorf* weighed costs and benefits in coming down on the side of allowing all evidence to be considered in the license revocation proceeding, notwithstanding questions concerning the validity of the stop. It did so vis-à-vis federal constitutional provisions. Nonetheless, in the ensuing decades there is nothing to suggest the cost-benefit analysis in *Westendorf* comes out differently when assessed against the Iowa Constitution. Public safety interests remain paramount. As the Supreme Court of Utah held:

> By keeping inebriated drivers off the roads, suspension and revocation proceedings serve the important policy function of disabling individuals who might put themselves and other

> citizens at risk. Such proceedings, which aim to protect rather than to punish, differ substantially from the objectives of the criminal law proscription against operating a motor vehicle while impaired.

*Beller*, 194 P.3d at 954.

The Iowa Supreme Court has used very strong language in describing the horrors of drunk driving. The district court, for instance, noted the Court's use of the term "holocaust." Ruling, p. 13; App. p. 385. The Court first used that term in the implied-consent context in 1967 in *Severson v. Sueppel*, 260 Iowa 1169, 1174, 152 N.W.2d 281, 284 (1967) (noting the purpose of the implied consent law "is to reduce the holocaust on our highways part of which is due to the driver who imbibes too freely of intoxicating liquor"). Fifty years later, the Court was still using that term. *See State v. Childs*, 898 N.W.2d 177, 183 (Iowa 2017) ("We noted the purpose of chapter 321J is 'to reduce the holocaust on our highways ….'") (citation omitted).

The data quoted from *Birchfield* referenced NHTSA statistics establishing a person dies in this country every 53 minutes because of drunk driving. The U.S. Supreme Court, also as noted in *Birchfield*, has used the terms "carnage" and "slaughter" in describing this problem. Pick whatever descriptor one wants, but the societal costs of drunk driving are enormous. Therefore, in the absence of any legislative undertaking to the contrary, the

district court properly concluded DOT was entitled to consider Westra's refusal in determining whether his privilege to drive should be revoked, regardless of issues pertaining to the vehicle stop. DOT's revocation of Mr. Westra's driving privileges was properly sustained by Judge Gamble.

### D. No "fundamental right" is at issue. There was no lack of substantive or procedural due process. A rational basis supports Iowa's practice and Westra had an evidentiary hearing with a stay of his revocation while he challenged the revocation before DOT.

Westra also urges application of an exclusionary rule by relying on Article I, section 9 of the Iowa Constitution. This is Iowa's Due Process Clause which in large measure mirrors the Due Process Clauses found in the U.S. Constitution. *See* United States Constitution, Fifth and Fourteenth Amendments. Westra concedes, *see* Westra's proof brief, p. 33, the analysis under Iowa's provision is the "same" as the analysis under the Fourteenth Amendment citing to *State v. Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000), for this proposition. Westra wages both substantive and procedural due process claims, neither of which have merit.

#### (1) No "fundamental right" and no violation of substantive due process.

The district court properly noted Westra's claim in this matter pertains not to any crime asserted against him, but rather the loss of driving privileges. Ruling, p. 12; App. p. 384. Thus, the district court correctly

concluded there is no "fundamental" right in play. Driving, after all, is a privilege. *See Scheckel v. State*, 838 N.W.2d 870 (Table), 2013 WL 4504919, *2 (Iowa App. 2013) ("As the district court recognized in its orders granting the defendant's motion to dismiss, there is no constitutional right to drive, but rather driving is a privilege.").

Westra suggests, in reliance upon passages found in *Gilchrist v. Bierring*, 234 Iowa 899, 14 N.W.2d 724, 732 (1944), and *Pettijohn*, 899 N.W.2d at 35, his claim should receive the stricter scrutiny applicable in "fundamental right" analysis because loss of driving privileges can impact one's ability to "earn a living." The apparent theory is there is a fundamental right to a livelihood. First, the language relied upon by Westra in *Gilchrist* and *Pettijohn* should be regarded as dicta, at least in respect to any analysis under Iowa's civil driver's license regime in Iowa Code chapter 321J. *Gilchrist*, decided in 1944, precedes the Iowa legislature's adoption of an implied consent law by nineteen years. *See Welch*, 801 N.W.2d at 594 (motor vehicle implied consent law first enacted in 1963). *Gilchrist* never construed the implied consent provisions and, as such, never engaged in any balancing of the relevant safety interests the implied consent law seeks to attain. *Pettijohn*, as previously noted, expressly disclaimed any intent for its

rationale to be applied to the statutory scheme for motor vehicle operators in chapter 321J. 899 N.W.2d at 38.

Second, the notion a "fundamental right" is involved in maintaining a driver's license is, frankly, at odds with reality. Many Americans get along very well without holding a driver's license. For example, the percentages of individuals in this nation with a driver's license for 20- to 24-year-olds in 1983, 2008, 2011 and 2014 were 91.8%, 82%, 79.7% and 76.7%, respectively. The trend is a declining fraction of the American people hold driver's licenses. *See Recent Decreases in the Proportion of Persons with a Driver's License across All Age Groups*, Michael Sivak and Brandon Schoettle, The University of Michigan Transportation Research Institute, January 2016.

Third, there is an increasing availability of temporary restricted licenses (TRL) to facilitate work-related, school and medical-related needs during the period of the license revocation. A TRL permits those with a license under revocation to continue to drive, with restrictions verified by DOT. *See also* Iowa Code § 321J.20 (pertaining to TRL issuance) as amended by H.F. 2338 this past legislative session. *See* 2018 Iowa Acts ch. 1110 §§ 8-9 (effective July 1, 2018). But the bottom line remains: when confronted with legal issues arising within the fabric of the state's driver's

licensing scheme in Iowa Code chapter 321J, driving has been rightfully regarded to be a privilege. It is not a "fundamental right." *See also State v. Vogel*, 548 N.W.2d 584 (Iowa 1996) (per curiam) (declaring within the context of chapter 321J "driving is a privilege granted by the state, not a constitutional right").

Nor is Westra's citation to *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), of support for his position. Frankly, if anything, it supports DOT, especially in respect to Westra's procedural due process claim which DOT will discuss in greater detail below. *Bell* merely held before a Georgia licensee could be suspended on the ground there was a reasonable possibility of a judgment being entered against the uninsured licensee, the licensee must be accorded the opportunity in a hearing to assert he or she was not liable for the accident. The Court held there were "alternative methods of compliance" available for Georgia to satisfy the hearing requirement. 402 U.S. at 542. It noted the "area of choice is wide" and all Georgia need do was furnish a prior hearing on liability before acting to suspend the license. *Id*. at 543.

Thus, though Westra cites *Bell* in the segment of his brief pertaining to substantive due process, the case should not be viewed as addressing an infringement of a right inherent in the concept of ordered liberty. Rather, the

case simply stands for the proposition the licensee was entitled to some form of hearing before the license was taken away. Thus, even on procedural due process grounds, the case certainly does not aid Westra. Westra was granted a hearing, unlike the licensee in *Bell*. Indeed, Westra is not really complaining he was denied a hearing; instead, he seeks to expand its scope into matters pertaining to the legality of the vehicle stop.

Because a "fundamental right" is not implicated in this matter, substantive due process requires nothing more than a "reasonable fit" between the governmental purpose and the means the legislature chose to advance it. *Klawonn*, 609 N.W.2d at 519. Westra claims no such "fit" exists, but he fails to offer any meaningful explanation for that contention. Under Iowa Code section 321J.13(6), the rescission of the license revocation is linked to an adjudication in the parallel OWI criminal proceeding. The requirement of a criminal court adjudication ensures any issues encompassed by section 321J.13(6)(b)(1)-(2) are taken up by a district court judge as noted earlier. There can be many reasons why a county attorney declines to file a criminal charge. Just because a crime is not prosecuted does not foreclose the possibility a peace officer had reasonable grounds to believe section 321J.2 was violated. *See* Iowa Code § 321J.13(2) (establishing peace officer's reasonable grounds to believe the person was operating a

motor vehicle in violation of section 321J.2 as an issue in an implied consent hearing).

The legislature could rationally conclude it makes sense to restrict the rescission remedy to those situations where, under the rights afforded the accused in our criminal justice system, a trial court judge has heard the matter first-hand and determined there was an issue concerning the legality of the stop or the admissibility of a chemical test or its refusal. Superintending these issues through the criminal court system might be deemed a more comprehensive and superior method of resolving the inquiry, as opposed to the more informal setting of an administrative hearing typically conducted telephonically before an ALJ. The legislature could rationally conclude issues implicating whether evidence was obtained unconstitutionally are better left to trained and experienced criminal court judges as opposed to ALJs who themselves have no power to make constitutional adjudications.

In fact, under section 321J.13(6), the rescission remedy, when applicable, never arises from any determination made by an ALJ. Instead, if rescission is appropriate, it occurs only when a petition for a hearing is submitted to DOT containing new information providing grounds for rescission because "in the criminal action on the charge of violation of

section 321J.2 or 321J.2A resulting from the same circumstances that resulted in the administrative revocation being challenged," the court held there were insufficient reasonable grounds to believe a violation of section 321J.2 or section 321J.2A had occurred, or the chemical test was otherwise invalid or inadmissible. *See* Iowa Code § 321J.13(6)(a)(b)(1)-(2). The holding in the criminal case is "binding" upon DOT in these circumstances and it shall rescind the revocation. Iowa Code § 321J.13(6)(c). The reopening of the case before DOT upon the petition requesting a hearing allows for the receipt of the new evidence in the form of the criminal court's adjudication and, assuming the requisite holding has been made by the criminal court judge, the person seeking reopening "shall prevail at the hearing." Iowa Code § 321J.13(6)(b) and (c).

Hence, binding DOT to the criminal case is a rational route for the legislature to have taken. The legislature, as shown by its language, was aware it was binding itself to those scenarios where the subject holdings had been made in the parallel OWI case. But where no OWI criminal charge was pursued, the legislature was content to allow the administrative process to be governed by the rule in *Westendorf*. This is a permissible, rational scheme and there is no substantive due process violation under Article I, section 9 in Iowa's Constitution.

Moreover, the State, as part of any due process requirement, is not obliged to craft Iowa Code section 321J.13(6) to meet Westra's preference. *See, e.g., State v. Miner*, 331 N.W.2d 683, 689 (Iowa 1983) ("Nor is the law rendered unconstitutional simply because the State, legislatively, could devise a separate licensing scheme for brokers."). *See also State v. Hines*, 478 N.W.2d 888, 890 (Iowa App. 1991) (rejecting due process challenge to chapter 321J provisions and recognizing the vast discretion to formulate laws designed to "promote the public health, safety, and welfare").

Iowa law enjoys a presumption of constitutionality. Westra bears the burden of overcoming that presumption. *Wright v. Iowa Dept. of Corrections*, 747 N.W.2d 213, 216 (Iowa 2008). Those asserting the statutory scheme to be devoid of reason must be prepared to negate every reasonable basis that might support differing treatment. *See, e.g., Horsfield Materials v. City of Dyersville*, 834 N.W.2d 444, 458 (Iowa 2013).

The system of motor vehicle operator implied consent in Iowa serves the legitimate governmental interest of promoting the public safety by denying driving privileges to those who violate the provisions of chapter 321J. It is directed toward stanching the "holocaust" caused by drunk driving which the Iowa Supreme Court has referenced. That the legislature restricted its "limited" remedy to those who have obtained an adjudication in

the criminal proceeding does not grant Westra a substantive due process right to have the legislation effectively amended by this Court to meet his situation.

Westra, within the context of a motor vehicle administrative license revocation hearing, cites no Iowa authority for his "substantive due process" argument. He has not met his burden. His challenge should be rejected. Iowa's licensing system does not present any constitutional infringement, be it under federal constitutional provisions or under Iowa Constitution Article I, section 9.

**(2) Westra had an evidentiary hearing. There was no procedural due process violation.**

Westra also makes a procedural due process claim relying on Iowa Constitution Article I, section 9. In doing so he cites to *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976), and its three-part test pertaining to due process dictates. The district court rightly noted, referencing the first prong of the three-part test referenced in *Eldridge*, Westra "runs into trouble" with this analysis. Ruling, p. 14; App. p. 386. This prong, relating to the "private interest" affected by the official action, was adequately protected by Westra's opportunity "to challenge the seizure in his criminal proceedings." Ruling, p. 14; App. p. 386. The district court observed: "After all, Westra does not deny that he was able to

challenge his traffic stop in criminal court." Ruling, p. 14; App. p. 386. Westra, as noted by the district court, Ruling, p. 3, App. p. 375, had been charged with an open container violation even though the county attorney did not file a trial information on the OWI charge. *See also* Westra, proof brief, p. 14.

What Westra seeks in this action has nothing to do with any private liberty interest; instead, as noted by the district court, his "real complaint" is he was unable to seek refuge under Iowa Code section 321J.13(6) because there was no adjudication in any parallel OWI proceeding. Ruling, p. 14; App. p. 386. But as the district court noted: "In this regard, the analysis essentially matches the analysis conducted by the *Westendorf* Court. Again, this Court is bound by the precedent established by *Westendorf* and its progeny." Ruling, p. 14; App. p. 386.

Under procedural due process, notice and an opportunity to be heard are required when a liberty or property interest is at stake. *Lewis v. Jaeger*, 818 N.W.2d 165, 181 (Iowa 2012); *Bowers v. Polk County Board of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002). There is considerable flexibility in how this may be implemented. *See, e.g.*, *Dixon v. Love*, 431 U.S. 105, 113, 97 S.Ct. 1723, 1728, 52 L.Ed.2d 172 (1977) (describing the process due in a driver's license suspension as "not so great" as to require

deviation from the ordinary principle that "something less than an evidentiary hearing is sufficient prior to adverse administrative action," quoting *Eldridge*, 424 U.S. at 343). *See also Bell*, 402 U.S. at 543 (the "area of choice is wide" referencing the flexibility available to states in formulating hearing-related procedures that pass due process requirements in licensing cases). Procedural due process was easily met in Mr. Westra's case as demonstrated below.

Implied consent was invoked because (1) Officer Wilson had reasonable grounds to believe Westra on May 9, 2017, had been operating a motor vehicle in violation of Iowa Code section 321J.2 and (2) Westra refused a preliminary breath test. Agency record, p. 97; App. p. 101. *See also* Iowa Code § 321J.6(1)(c). Westra, at the Jasper County jail, was formally asked to provide a breath specimen through the DataMaster machine. DOT Tr. p. 15. App. p. 116. He refused. DOT Tr. pp. 8-9; Agency record, p. 97, App. pp. 109-110; 101. Westra was notified on May 9, 2017, his driving privileges would be revoked. Agency record, p. 97; App. p. 101. The very next day, he requested a hearing. Agency record, pp. 94-96, App. pp. 98-100. His revocation was immediately stayed pending the results of the hearing. Agency record, p. 92; App. p. 96.

Originally the hearing was set for June 9, 2017. Agency record, pp. 90-91; App. pp. 94-95. Westra moved to continue the June 9 hearing, and his request for continuance was granted. Agency record, pp. 86-89; App. pp. 90-93. The hearing was reset to July 11, 2017, with the issue being whether there should be a revocation of driving privileges because of Westra's refusal to submit to testing. Agency record, pp 84-85; App. pp. 88-89. The hearing allowed for evidence in the form of witness testimony and document presentation. Agency record, p. 85; App. p. 89.

At the hearing on July 11, 2017, Mr. Westra, through counsel, waived his presence, but through his counsel had the opportunity to examine Officer Wilson and present any other evidence he chose. DOT Tr. pp. 1-35; App. pp. 102-136. ALJ Francis issued a six-page decision on August 15, 2017. Agency record, pp. 72-77; App. pp. 76-81. Westra appealed that decision to the DOT Reviewing Officer, Mr. Raab. Agency record, pp. 63-65; App. pp. 67-69. His revocation remained stayed during his appeal to Mr. Raab. Agency record, pp. 61-62; App. pp. 65-66. His request for a timetable to obtain and review a tape of the proceedings before the ALJ and file a memorandum was granted by Mr. Raab. Agency record, p. 60; App. p. 64. Documents were, in fact, offered by Mr. Westra. *See* Agency record, pp. 5-59; App. pp. 9-63. Mr. Raab issued his ruling on September 21, 2017.

Agency record, pp. 3-4; App. pp. 7-8. This action for judicial review was filed thereafter.

The events above demonstrate Westra's claim of a procedural due process violation is baseless. Mr. Westra was given the opportunity for an evidentiary hearing. The revocation was stayed while Westra exhausted his administrative remedies. *Bell* establishes procedural due process is satisfied if the licensee is accorded a hearing on the issue for which the license revocation is undertaken. 402 U.S.at 540.

In short, as noted by the district court, Westra's real objection is to the rule in *Westendorf* and the legislature's failure to construct Iowa Code section 321J.13(6) in a manner which meets Westra's desire. But this does not present a procedural due process issue. Westra's longing for section 321J.13(6) to be rewritten in a manner more to his liking is not a protected liberty or property interest. It is merely an unfulfilled desire to have the hearing process expanded to embrace the particulars of his situation. *See Horsfield Materials*, 834 N.W.2d at 459 (an "unfulfilled desire" is not a property or liberty interest which will support a claim there has been a procedural due process infringement). The granting of an evidentiary hearing on those issues to which the hearing process is limited by law, *see*

Iowa Code § 321J.13(2), plus review of the ALJ's decision through DOT's reviewing officer, accorded Mr. Westra more than sufficient process.

DOT has already noted the copious authority supporting Iowa's interest in protecting the public by removing drunk drivers from the highways through the licensing process. Moreover, due process challenges to the implied consent process pertaining to motor vehicles have generally been met with disfavor. *See, e.g., State v. Owens*, 418 N.W.2d 340, 344 (Iowa 1988) (due process challenge rejected because decision whether to submit to chemical testing was a reasonable and informed one); *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981) (holding no due process right under either the Iowa or United States Constitutions obligating officer to inform a person of their right to refuse testing).

Westra was granted ample notice and opportunity to be heard under the applicable administrative framework pertinent in an Iowa driver's license revocation proceeding. Westra's unfocused uttering of due process violations fails to sustain the burden he bears in making a claim on constitutional grounds. The process in this matter assiduously accounted for Mr. Westra's rights. There was no violation of the Iowa Constitution on any ground.

## CONCLUSION

The legislature has determined the public safety interest in having all evidence available in the license revocation hearing outweighs other considerations. *See also Morgan v. Iowa Dept. of Transp.*, 428 N.W.2d 675, 678 (Iowa App. 1988) (recognizing the need for "all the evidence" even as a result of "an unconstitutional stop"). Iowa's Constitution values the safety of those on our roads no less than the United States Constitution. The district court's decision to uphold Westra's revocation should be affirmed.

## REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ Robin G. Formaker

ROBIN G. FORMAKER AT0002574
Assistant Attorney General
Iowa Department of Transportation
General Counsel Division
800 Lincoln Way, Ames, IA 50010
(515) 239-1465 / FAX (515) 239-1609
robin.formaker@iowadot.us
ATTORNEYS FOR APPELLEE

## 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 13,516 words, 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.

THOMAS J. MILLER
Attorney General of Iowa

/s/ Robin G. Formaker
ROBIN G. FORMAKER AT0002574
Assistant Attorney General
Iowa Attorney General's Office
800 Lincoln Way, Ames, IA 50010
(515) 239-1465 / FAX (515) 239-1609
robin.formaker@iowadot.us
ATTORNEYS FOR APPELLEE

## CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

I, Robin G. Formaker, hereby certify that on December 19, 2018, a copy of Appellee'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:

Matthew Lindholm
440 Fairway, Suite 210
West Des Moines, IA 50266

THOMAS J. MILLER
Attorney General of Iowa

/s/ Robin G. Formaker

ROBIN G. FORMAKER AT0002574
Assistant Attorney General
Iowa Attorney General's Office
800 Lincoln Way, Ames, IA 50010
(515) 239-1465 / FAX (515) 239-1609
robin.formaker@iowadot.us
ATTORNEYS FOR APPELLEE