71633-6-I

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SUPREME COURT OF THE STATE OF WASHINGTON

JAMES DIDLAKE, ET AL.,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF LICENSING,

Respondent.

DEPARTMENT'S RESPONSE BRIEF

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I. INTRODUCTION

Under Washington's implied consent law, Washington drivers who have been arrested for driving under the influence (DUI) must pay a statutory filing fee to obtain an administrative hearing to prevent the suspension or revocation of their driver's licenses. Where a driver is indigent, he or she can obtain a fee waiver, and in fact, the fee is waived in approximately 36 percent of administrative challenges. Here, each of the plaintiff drivers is not indigent, and they each paid the filing fee and had hearings, where they prevailed. They argue the fee violates their procedural due process rights. But they received due process—notice, an opportunity to be heard, and a successful hearing—and thus, these plaintiffs lack standing to bring a procedural due process challenge.

Even if these plaintiffs had standing to raise a procedural due process claim, the filing fee does not violate due process. Outside of fundamental rights, a filing fee for access to court or administrative hearings generally satisfies due process, even when applied to indigent litigants, which these plaintiffs are not. Because (1) a person's interest in having a driver's license is not fundamental, and (2) the hearing fee is waived for indigent drivers, the drivers cannot establish beyond a reasonable doubt that the filing fee unconstitutionally deprives anyone of their due process rights, much less those of the purported class. A driver's

license is a privilege subject to reasonable regulations and fees. Washington's paramount interest in ensuring roadway safety by deterring drunk driving and its interest in conserving scarce fiscal and administrative resources justify the filing fee for non-indigent drivers. The Court should affirm the superior court's order of dismissal.

II. COUNTERSTATEMENT OF THE ISSUES

1. Each of the plaintiff drivers paid the DUI hearing fee, obtained a hearing, and prevailed. Where the filing fee thus did not deny the plaintiffs an opportunity to be heard, do they lack standing to assert the fee violates procedural due process, and are they prevented from bringing a successful as applied or facial challenge?

2. Outside of fundamental rights, a filing fee for access to court or administrative hearings generally satisfies due process, even for indigent litigants. Does the statutory fee for an implied consent hearing satisfy procedural due process where the right at stake is not fundamental, and the Department waives the fee for indigent drivers?

3. Where those who cannot afford the filing fee do not have to pay it, does the filing fee comply with procedural due process under *Mathews v. Eldridge* because there is virtually no risk a driver will be erroneously deprived of his license without the opportunity to be heard?

III. STATEMENT OF THE CASE

The operative facts in this case are undisputed. Since the 1990s, the Legislature has provided for a system that gives those arrested for DUI notice and an opportunity to be heard before their driver's licenses are administratively suspended. Drivers must pay a filing fee to obtain the

hearing, but the Legislature has provided for an indigency fee waiver. Here, the drivers received notice of their hearing rights and exercised their opportunity to be heard when they paid the DUI hearing fee and had their hearings.

A. The Legislature Provides for Pre-Suspension Hearings for Drivers When They Timely Request a Hearing, and Either Pay a Filing Fee or Show Indigency

Under what is known as Washington's implied consent statute, drivers in this state are deemed to have consented to a breath or blood test if arrested for DUI. Former RCW 46.20.308(1) (2012).[1] When the arrested driver refuses the test, or takes the test and the result indicates alcohol or drug levels above the legal limit, the arresting officer must immediately notify the Department and submit a sworn report stating statutory grounds for a license suspension. Former RCW 46.20.308(6)(e) (2012). Upon receiving the report and confirming it satisfies basic statutory requirements, the Department suspends, revokes, or denies the driver's license, permit, or privilege to drive as required by RCW 46.20.3101. Former RCW 46.20.308(7) (2012). The suspension does not

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[1] ESSB 5912 (2013) amended RCW 46.20.308, resulting in the renumbering of several subsections and eliminating statutory implied consent to test a driver's blood. The amendments took effect on September 28, 2013. Laws of 2013, ch. 35, §36. This brief cites to the law in effect at the time the plaintiff drivers were arrested, requested and had their administrative hearings, initiated this action in superior court, and filed their Statement of Grounds for Direct Review in the Supreme Court. A copy is attached as an appendix.

become effective until 60 days after the arrest, allowing time for notice and a hearing. Former RCW 46.20.308(8) (2012).

The arresting officer must serve the driver with a written notice of the Department's intent to suspend the driver's license. Former RCW 46.20.308(6)(b) (2012). The notice must explain the right to a DUI license suspension hearing and how to obtain one. To obtain a hearing, the driver must file a hearing request within 20 days of the notice and "shall pay a fee" (currently $375) "as part of the request." Former RCW 46.20.308(8). The Department may waive the fee for drivers who are indigent as defined in RCW 10.101.010.[2] Former RCW 46.20.308(8). It is undisputed that the Department in fact waives the fee for indigent drivers and did so for about 36 percent of the DUI hearings in the 2009–2011 biennium. CP 38 ¶ 5, 84. If the driver requests a DUI hearing, the license suspension does not begin until a hearing officer sustains the suspension. Former RCW 46.20.308(8). Thus, all administrative hearings on license suspensions occur before a suspension takes effect.

[2] The Department's website contains a request for an implied consent hearing as well as an application for an indigency fee waiver. *See* Department of Licensing, Driver Licenses, Suspended License, Hearings, How to Request a Hearing, *available at* http://www.dol.wa.gov/driverslicense/hearingsrequest.html (last visited November 25, 2013).

B. The Legislature Has Enacted a Statutory Scheme for Adjusting Fees to Ensure Cost Recovery, and Has Periodically Increased the Filing Fee for DUI License Suspension Hearings

The Legislature introduced the challenged statutory fee (then $100) in 1994. Laws of 1994, ch. 275, § 13. A few years later, the Legislature provided for a fee waiver for indigent drivers. Laws of 1999, ch. 331, § 2.

In 2002, the Legislature enacted RCW 46.01.360, which requires the Department to submit a biennial fee study to the house and senate transportation committees. Laws of 2002, ch. 352, § 27. The fee study is to "ensure cost recovery for department of licensing services." RCW 46.01.360. "Based on this fee study, the Washington state legislature will review and adjust fees accordingly." RCW 46.01.360.

The initial study found that a number of fees were insufficient to cover the Department's cost of providing goods and services. S.B. Rep. (SB 6103), 59th Leg., Reg. Sess. 3 (CP 36). Based on that study, the Legislature adjusted the fees for various Department services, including the challenged fee for a DUI hearing, which the Legislature raised from $100 to $200. *See* Laws of 2005, ch. 314, § 307.

According to the 2009–2011 biennial fee study, the approximate cost to conduct each DUI hearing is $413, based on the actual number of

hearings conducted and overall estimated expenditures for these hearings.[3] CP 38 ¶ 5, 84. During the biennium, the Department conducted 18,145 DUI hearings for drivers who paid a $200 fee. CP 38 ¶ 5, 84. During the same biennium, the Department conducted 10,260 hearings for drivers who requested and were granted an indigency fee waiver (for a total of 28,405 hearings). Thus, the Department waived the fee in about 36 percent of cases. CP 38 ¶ 5, 84. In 2012, the Legislature adjusted the fee for the second time, raising it to $375, effective October 1, 2012. Laws of 2012, ch. 80, § 12.

C. All of the Named Plaintiffs Had Notice and a Full DUI Hearing, and Their Purported Class Includes Only Those Who Also Had a Hearing

At various times in 2010 or 2011, the named plaintiffs were all arrested for DUI. CP 2, 9. The Department received arrest reports from the arresting officers, and sent each of the drivers a notice of suspension. *Id.*

Each of the plaintiff drivers requested a DUI license suspension hearing and paid the $200 filing fee. None of the plaintiff drivers claimed they were indigent and none requested a waiver or refund of the fee in the

[3] The overall expenditures are estimated because while the Department's systems track the volume of transactions and revenues by each fee type, the Department does not track effort expended (like staff time) by fee type. The hearings unit conducts both DUI and non-DUI hearings, and for purposes of the fee study, provides an estimate of the resources expended on DUI hearings alone. CP 52.

normal course of the administrative proceedings. After conducting a DUI hearing for each of the drivers, the Department rescinded the proposed suspensions.[4] CP 2-3, ¶¶ 1.1-1.3.[5]

The drivers filed a class action complaint in King County Superior Court against the Department, seeking injunctive and declaratory relief striking down the filing fee and a refund of the fees they paid. CP 1-7. The drivers allege the statutory fee for non-indigent drivers violates their procedural due process rights.[6] CP 6 ¶ 5.2.

The Department filed a motion to dismiss under CR 12(b)(6), arguing the drivers could not show any set of facts that would prove beyond a reasonable doubt that the filing fee for non-indigent drivers violates procedural due process. CP 16-32. On the same day, the drivers filed a motion for class certification, in which they defined their proposed class as "[a]ll persons who have, within the applicable statute of limitations, paid a fee in order to receive a hearing under RCW

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[4] Driver Johnson had two separate DUI arrests resulting in two separate hearings, and the Department sustained the suspension in one of his cases while rescinding the revocation in the other.

[5] While the reason these license suspensions were rescinded is not in the record, suspensions can be rescinded where the hearing officer finds, for example, that there was not probable cause for the stop or arrest, that the driver was not provided the implied consent warnings, that the officer did not comply with the breath test protocols, or when a subpoenaed officer fails to appear at a hearing.

[6] The complaint alleges both procedural and substantive due process violations. CP 4 ¶ 2.2, 6 ¶¶ 5.2, 6.3. Plaintiffs have abandoned their substantive due process argument. CP 95-118 (response to motion to dismiss, arguing only procedural due process); Appellants' Opening Brief (arguing only procedural due process).

46.20.308." CP 254.[7] Based on the purported class, the Department raised in its reply an objection to the drivers' standing to argue procedural due process. CP 228, 233-34.

The superior court granted the Department's motion to dismiss. CP 238-44. The court first questioned whether the drivers "have standing to challenge [the statutory fee] because they have paid the fee and had their hearings, and thus their procedural due process rights have been protected." CP 239. However, the court found it "wise to address the merits" and concluded the drivers "failed to carry their burden of demonstrating any procedural due process violation to anyone." CP 239-40. The court upheld the statutory filing fee. CP 240-44. The drivers filed a petition for direct review in the Supreme Court. CP 245-53.

IV. ARGUMENT

The superior court properly dismissed plaintiffs' class action complaint because neither the named plaintiffs nor their purported class includes any driver who was denied an opportunity to be heard because of the DUI hearing fee. Thus, the limitations of the plaintiffs' class, principles of standing, and the limitations of as applied challenges all preclude the plaintiffs from bringing a procedural due process challenge to the fee because they received all the process that was due. These

[7] The superior court and parties agreed the court would address the motion to dismiss first, so the court never ruled on the plaintiffs' class certification motion.

principles also prevent plaintiffs from speculating that the filing fee may prevent some hypothetical driver from obtaining a hearing.

Even if the plaintiffs have standing, they cannot establish that the filing fee is unconstitutional beyond a reasonable doubt, either facially or as applied to them. Under U.S. Supreme Court and Washington precedent, unless a fundamental right is implicated, fees for access to court or administrative hearings satisfy procedural due process, whether or not the litigant is indigent. Even when other courts have found a filing fee violates due process where a fundamental right was *not* involved, they have found the fee must be waived only for indigent litigants. Here, the plaintiffs' interest in their licenses to drive on state roadways is important, but not fundamental. Rather, a driver's license is a state-granted privilege subject to the government's reasonable regulation and control for roadway safety. And the Department waives the fee for indigent drivers. The fee satisfies due process.

Finally, even if this Court reaches the *Mathews v. Eldridge* balancing test, the substantial, but not fundamental, interest in a driver's license does not outweigh the significant state interest in maintaining highway safety and adequately protecting the taxpayer funds by charging filing fees for those who request hearings. The availability of an indigency waiver mitigates any risk of erroneous deprivation of a license

without a hearing. Thus, even under *Mathews,* the filing fee does not violate procedural due process. The plaintiffs do not argue any other basis for their claim. The Court should affirm the superior court's order of dismissal.

A. Standard of Review

Whether dismissal was appropriate under CR 12(b)(6) is a question of law that courts review de novo.[8] *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). The factual allegations contained in the complaint are accepted as true. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Dismissal is appropriate under CR 12(b)(6) when it appears "beyond doubt that the claimant can prove no set of facts, consistent with the complaint, that would justify recovery." *Id.*

Constitutional challenges are also questions of law subject to de novo review. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). Statutes are presumed to be constitutional, and the heavy burden to show unconstitutionality is on the challenger. *Id.* at 215

[8] The drivers assert that the Department's CR 12(b)(6) motion to dismiss for failure to state a claim was more properly characterized as a CR 12(c) motion for judgment on the pleadings. Appellants' Opening Br. at 17 n.45. They concede that it is a "distinction without importance for purposes of this appeal" because the appellate court reviews an order granting a CR 12(c) motion identically to an order granting a CR 12(b)(6) motion. *Id.*; *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012).

(citation omitted). Thus, the plaintiff drivers must prove a procedural due process violation beyond a reasonable doubt. *Id.*

B. The Plaintiffs Lack Standing to Raise a Procedural Due Process Challenge to the Filing Fee, and Similarly, They Cannot Show the Filing Fee is Unconstitutional Either As Applied to Them or Facially

The named plaintiffs and purported class are expressly limited to drivers who paid the filing fee and obtained hearings. None of the named plaintiffs was deprived of a hearing because of the filing fee. Their right to due process was not injured by the fee because they received all of the process that was due to them. They do not have standing to raise arguments on behalf of third-party drivers hypothetically deprived of hearings because of the filing fee, especially where indigency waivers are granted so often. Moreover, in an as applied challenge, plaintiffs are limited to showing the DUI hearing system is unconstitutional as it has been applied to them, which they cannot do. The plaintiffs similarly cannot make a facial challenge because the fee does not bar access to a hearing for those who can afford it, and it is waived for indigent drivers.

1. The purported class is limited to those who paid the fee and had a hearing, and these plaintiffs lack standing to assert the rights of hypothetical third-party drivers who would not request a hearing because of the fee.

Although the drivers deny they seek to vindicate the rights of third-party drivers not named as plaintiffs, Appellants Opening Br. at 10, they

attempt to incorporate arguments on behalf of those who would not seek a hearing because of the fee. *See* Appellants' Opening Br. at 22 ("Except for indigent drivers, access to due process is based not on the nature of the property rights at issue, but rather by the contents of the driver's bank account."), 42 (suggesting submission of the officer's report alone results in a license suspension "without any review," even though all of the named plaintiffs and members of the purported class had a pre-suspension evidentiary hearing). However, the purported class is expressly limited to those who have paid the filing fee and obtained a DUI hearing: "All persons who have, within the applicable statute of limitations, *paid a fee in order to receive a hearing* under RCW 46.20.308." CP 254 (emphasis added). Thus, the named plaintiffs and purported class explicitly exclude anyone who did not obtain a hearing because they did not or could not pay the fee. *See* CP 254; CP 2-3, ¶¶ 1.1-1.3.

"A party seeking to challenge constitutionality of a statute must demonstrate that the statute has operated to that party's prejudice." *Postema v. Snohomish Cnty.*, 83 Wn. App. 574, 579-80, 922 P.2d 176, 180 (1996) (citing *High Tide Seafoods v. State*, 106 Wn.2d 695, 701-02, 725 P.2d 411 (1986). "One cannot urge the invalidity of a statute unless harmed by the particular feature which is challenged." *State v. McCarter*, 91 Wn.2d 249, 253, 588 P.2d 745 (1978), *overruled on other grounds by*

Matter of McLauglin, 100 Wn.2d 832, 676 P.2d 444 (1984). The party's injury must be one that "'fairly can be traced to the challenged action' and is 'likely to be redressed by a favorable decision.'" *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)).[9] Here, because the plaintiffs all received notice and a hearing, they can show no injury to their own procedural due process rights.

These plaintiffs have not asserted, nor could they assert, that the filing fee operated to deprive them of their right to a hearing. *State v. Storhoff*, 133 Wn.2d 523, 527, 946 P.2d 783 (1997); *Postema v. Snohomish Cnty.*, 83 Wn. App. 574, 579-80, 922 P.2d 176 (1996). Accordingly, they lack standing to raise the filing fee as a barrier to due process because the fee was not a barrier for them; they were not "harmed by the particular feature which is challenged." *McCarter*, 91 Wn.2d at 249 (holding petitioner lacked standing to allege procedural defects existed in a statute where he had been afforded the allegedly absent rights in his own hearing); *see also, Wiren v. Eide*, 541 F.2d 757, 762 (9th Cir.

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[9] Washington's standing doctrine is drawn from federal law. *See High Tide Seafoods*, 106 Wn.2d at 702 (citing *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984), and *Craig v. Boren*, 429 U.S. 190, 193–94, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)).

1976) (plaintiff lacked standing to challenge statutory notice provision where he had received actual notice). Like the litigants in *McCarter* and *Wiren*, the drivers here were actually afforded adequate procedural due process because they all had their hearings. The filing fee did not operate to their prejudice, and they lack standing to challenge it on procedural due process grounds.

Plaintiffs rely on *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007), to establish their standing. But unlike in *Nelson*, where the vehicle dealership's violation of a statute injured the customer, there is no statutory or constitutional violation here resulting in an injury to the plaintiffs. *See id.* at 186. Whereas the dealership in *Nelson* did something a statute specifically prohibited, here, the Department did not do anything due process prohibits. *See id.* Accordingly, there was no due process injury that would allow the drivers to assert the filing fee is unconstitutional on procedural due process grounds.

Further, it is well-established that principles of standing prevent a party from making arguments to vindicate the constitutional rights of hypothetical third parties. *City of Bremerton v. Spears,* 134 Wn.2d 141, 158-59, 949 P.2d 347 (1998) (party challenging the validity of a regulation lacked standing to "raise the rights of others"); *Ludwig v. Dep't of Ret. Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006) ("Generally a litigant

does not have standing to challenge a statute in order to vindicate the constitutional rights of a third party."); *Herrada v. City of Detroit*, 275 F.3d 553, 558 (6th Cir. 2001) ("Herrada lacks standing to argue that hearings are not held despite requests by vehicle owners, because she elected to pay the fine rather than request a hearing."). Here, the drivers are not indigent. Each one of the drivers paid the fee and obtained a hearing. CP 239. Thus, to the extent the drivers allege the fee bars access to hearings for those who cannot afford it, the drivers are not appropriate plaintiffs. They lack standing to claim a due process violation for third parties. *Ludwig*, 131 Wn. App. at 385.[10]

2. The plaintiffs cannot bring an as applied challenge to the filing fee that is based on any set of facts that is not particular to them.

Similarly, the plaintiffs cannot bring an as applied challenge based on circumstances that are not their own. As an initial matter, the plaintiffs do not attempt to clarify whether they challenge the filing fee facially or as

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[10] The drivers complain that the Department did not raise the standing objection until its reply in support of the motion to dismiss. Appellants' Opening Br. at 8-10. They also complain that the superior court did not adequately rely on standing for the issue to be addressed on appeal. *Id.* But the Department did raise standing before the trial court, and the trial court addressed the issue in its ruling, so it is properly before the Court on appeal. CP 228, 233-34, 239. Even if the issue were not adequately addressed below, "a party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a). Moreover, a standing objection may be raised at any time, so long as it is adequately briefed. *Branson v. Port of Seattle*, 152 Wn.2d 862, 875 n.6, 101 P.3d 67 (2004); *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 202-03, 11 P.3d 762 (2000).

applied to them. Appellants' Opening Br. at 19 n.46. They assert that "the distinction is meaningless," because if the Court concludes that the filing fee "violates due process under either an 'as applied' or facial theory, the result is the same." *Id.* However, an as-applied challenge must establish that the "application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). If a statute is unconstitutional as applied to the plaintiffs, future application of the statute in a similar context is prohibited, but the statute is not totally invalidated. *Id* at 668-69.

Here, the plaintiff drivers cannot argue, in the context of an as-applied procedural due process challenge, that the filing fee chilled the exercise of their right to DUI hearings. *See Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (for a due process violation, "the party must be prejudiced"); *United States v. Mendoza-Lopez*, 7 F.3d 1483, 1485 (10th Cir. 1993) ("fundamental unfairness sufficient to constitute a violation of due process" requires "prejudice from the alleged unfairness"), *cert denied*, 511 U.S. 1036 (1994). By definition, none of the members of the purported class was deprived of a hearing; they all had administrative hearings because they were able to pay the fee.

While plaintiffs may attempt to assert the filing fee has deprived or will deprive other drivers of hearings, they have pointed to no instance where that has occurred in the face of frequent indigency waivers. Plaintiffs have expressly limited their purported class to those who have paid the fee and obtained a hearing, they lack standing to argue on behalf of third parties, and an as applied challenge must be limited to the plaintiffs' specific circumstances.

To the extent the plaintiff drivers seek a refund of the fees they paid, they essentially object to the Legislature's judgment to impose a fee or not to provide a refund for parties who prevail at their hearings. But absent the deprivation of a hearing, no authority suggests this legislative judgment amounts to a constitutional procedural due process violation. Plaintiffs do not raise any other basis for their objection to the filing fee.

3. The plaintiffs cannot succeed on a facial challenge because there are circumstances where the filing fee is constitutionally applied.

To prevail on a facial, rather than an as applied challenge, the plaintiffs must prove "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond*, 151 Wn.2d at 669. Here plaintiffs cannot show there is no set of circumstances under which the DUI hearing fee could be constitutional. *Id.*; *McKenzie v. City of Chicago*, 973 F. Supp. 815, 819 (N.D. Ill. 1997)

("Because there are situations in which the hearing procedure . . . might not unduly burden an individual's ability to exercise the right to that hearing, . . . we find that the above flaws in the hearing procedure do not render the Ordinance unconstitutional on its face."). It is undisputed that the filing fee does not bar access to a hearing to drivers who can afford to pay it, and the hearing fee is routinely waived for indigent drivers. Thus, there are plainly circumstances under which the filing fee does not run afoul of procedural due process. Indeed, the plaintiffs have failed to claim a single instance where it has deprived a driver of a DUI hearing. Thus, to the extent plaintiffs bring a facial challenge, it too must fail.

C. The Fee for an Implied Consent Hearing Satisfies Procedural Due Process Because It Does Not Implicate a Fundamental Right and It is Waived for Indigent Drivers

Under the Fourteenth Amendment to the United States Constitution, government may not deprive an individual of "life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. "Washington's due process clause does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution." *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

A driver's license is a substantial property interest protected by due process. *City of Redmond v. Bagby*, 155 Wn.2d 59, 62, 117 P.3d 1126

(2005). Thus, "revocation of a driver's license must comply with procedural due process." *Storhoff*, 133 Wn.2d at 527 (citation omitted). Procedural due process requires "notice and an opportunity to be heard." *Id.* Here, there is no claim of any defective notice. The only issue is whether these plaintiffs had an opportunity to be heard.

The drivers cannot establish the fee provision is unconstitutional beyond a reasonable doubt because they had both notice and a meaningful opportunity to be heard, where they prevailed. Further, under established precedent, unless a fundamental right is implicated, fees for access to court or a hearing (whether initial or appellate) satisfy procedural due process, even as applied to indigent litigants. The drivers' interest in their licenses to drive on state roadways is not fundamental but is a privilege subject to the government's reasonable regulation and control for highway safety. Moreover, the drivers are not indigent, and the filing fee is waived for those who are.

1. Under U.S. Supreme Court and Washington precedent, due process does not require cost-free hearings for *all* litigants, even where the right involved is fundamental.

Under U.S. Supreme Court and Washington precedent, filing fees have historically withstood procedural due process challenges, even without indigency waivers, where the challenger's fundamental rights are not implicated. Yet the plaintiffs assert that due process requires a cost-free DUI

hearing for all drivers, arguing the DUI hearing is an initial hearing where the state seeks to deprive the person of non-fungible property. *E.g.,* Appellant's Opening Br. at 32. They are mistaken.

In the seminal case on filing fees, the U.S. Supreme Court did not hold the fee was improper in every instance; the Court simply required an indigency waiver for those who could not afford the fee. *Boddie v. Connecticut*, 401 U.S. 371, 373-74, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). In *Boddie,* welfare recipients sought divorces without having to pay court fees. The Court reasoned an access fee "may offend due process [when] it operates to foreclose a particular party's opportunity to be heard." *Id.* at 380. The Court held, "given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship," a state may not, under due process, deny indigent divorce seekers access to court simply by reason of their indigency. *Id.* at 373-74.

The Supreme Court later clarified *Boddie* and limited its holding to situations where fundamental rights are involved. For example, in *United States v. Kras*, the Court upheld a filing fee under due process as applied to an indigent bankruptcy petitioner who, "because of his poverty," was "wholly unable to pay or promise to pay the bankruptcy fees, even in small installments." 409 U.S. 434, 438, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).

The Court explained that *Boddie* "obviously stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without the payment of fees." *Kras*, 409 U.S. at 450. *Boddie* involved a "fundamental" interest in one's own marital status, whereas a person's "interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the [bankruptcy act], does not rise to the same constitutional level." *Id.* at 444-45.[11] The *Kras* Court recognized a heightened procedural due process protection for fundamental rights, requiring a cost-free opportunity to be heard for indigent litigants. *Id.* But this analysis is limited to instances where a fundamental right is implicated. *Id.* Even where a fundamental right is involved, the *Boddie* and *Kras* Courts did not hold filing fees were entirely invalid; the government must simply provide for an indigency waiver.

Following *Boddie* and *Kras*, the U.S. Supreme Court upheld a statutory appellate court filing fee as applied to indigent welfare recipients who sought to appeal adverse agency decisions reducing their benefits. *Ortwein v. Schwab*, 410 U.S. 656, 658, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973). The Court held the indigent welfare recipients' interests in increased

[11] *Kras* involved a sympathetic bankruptcy petitioner, who lived in an apartment with his wife; two 5-year and 8-month old children, one of whom suffered from cystic fibrosis and was undergoing medical treatment in a hospital; Kras's mother; and his mother's 6-year-old daughter. *Kras*, 409 U.S. at 437. He was unemployed, his household subsisted entirely on $366 in monthly public assistance, and his rent was $102 per month. *Id.*

benefits, like the interest involved in *Kras*, "has far less constitutional significance than the interest of the *Boddie* appellants." *Ortwein*, 410 U.S. at 659 (citations omitted). The Court explicitly recognized that there was "no fundamental interest" involved in the relief they sought. *Id.* Accordingly, the filing fee, even as applied to indigent welfare recipients, did not violate due process. *Id.* at 659-60.

Consistent with this analysis distinguishing between fundamental and non-fundamental rights, the U.S. Supreme Court later held that an indigent parent cannot be required to prepay for record preparation to appeal the termination of his or her fundamental parental rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996). But even where the rights at stake involve "family life" and "the upbringing of children," and where termination of those rights "is among the most severe forms of state action," *id.* at 128, the record preparation fee is still permitted for non-indigent parents. *Id.* at 107, 116.

The Washington Supreme Court has followed *Boddie*, *Kras*, and *Ortwein* to uphold filing fees under due process. Where no fundamental right is implicated, filing fees are permissible for all. And even where

fundamental rights are involved, the Court has not invalidated filing fees in their entirety, but instead has only required indigency waivers.[12]

For example, the Court has upheld an appellate filing fee for an indigent litigant who was evicted following an unlawful detainer action initiated by the county housing authority. *Housing Authority of King Cnty. v. Saylors*, 87 Wn.2d 732, 557 P.2d 321 (1976). Before the eviction, Saylors had a conference with a management representative and a hearing before a panel of three fellow tenants. *Saylors*, 87 Wn.2d at 733. Following the conference and hearing, the county housing authority successfully filed an unlawful detainer action against Saylors. *Id.* at 734. The Court held that requiring Saylors to pay the filing fee and cost bond to appeal her eviction did not violate due process because the right involved was not fundamental. *Id.* at 739-44. The Court said the interest involved—one's housing—"lies in the area of economics and social welfare." *Id.* at 739.

The plaintiffs attempt to distinguish *Saylors* by arguing the "Housing Authority provided a preliminary hearing, at no cost." Appellants' Opening Br. at 24. But the *Saylors* court did not suggest that

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[12] For access to court, the Washington Supreme Court has waived all mandatory fees and surcharges for indigent litigants by court rule adopted in 2010. GR 34(a); *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). The Court has acknowledged that GR 34 provides more than is constitutionally required. *Jafar*, 177 Wn.2d at 530. But even GR 34 only requires a fee waiver for *indigent* litigants. The litigants in this case are not indigent, and they were not precluded from being heard because of the fee.

a prior, no-cost administrative hearing was essential to its constitutional holding, and instead distinguished between fundamental and non-fundamental interests. *Saylors*, 87 Wn.2d at 734-44. In fact, despite the plaintiffs' assertion to the contrary, the Court did not indicate whether or not Saylors was required to pay all or part of the costs of the conference and hearing. Appellants' Opening Br. at 24; *Saylors*, 87 Wn.2d at 733. Thus, the *Saylors* Court's reasoning is relevant to this case.

The Court of Appeals has also upheld filing fee requirements for all litigants to obtain an opportunity to be heard when non-fundamental rights are at stake. The Court upheld a statutory requirement that electrical licensees pay a $200 fee to obtain an initial hearing to contest the Department of Labor and Industries' citations and monetary penalties for electrical code violations. *Morrison v. Dep't of Labor & Indus.*, 168 Wn. App. 269, 273-75, 277 P.3d 675, *review denied*, 175 Wn.2d 1012 (2012). The Court upheld the fee even though the electrical statute at issue did not provide for an indigency waiver. *See* RCW 19.28.130. Nonetheless, following "the *Boddie* line of cases," the *Morrison* court held "monetary prerequisites to court access (e.g., filing fees) are permissible unless the right attempted to be vindicated is fundamental and the courts provide the only means through which vindication of such right may be obtained." *Morrison*, 168 Wn. App. at 273. In other words, because one's

interest in an occupational license is not fundamental, the statutory filing fee did not violate due process. This was true even when the action was state-initiated and the statute did not provide for a fee waiver.[13]

The Court of Appeals has also upheld court filing fees, even where the court proceeding is the first opportunity for review of government action. *Bowman v. Waldt*, 9 Wn. App. 562, 570, 513 P.2d 559 (1973). In *Bowman*, an indigent judgment creditor sought to require the director of a county department of public safety, who functioned as a sheriff, to levy a writ of execution on the judgment debtor's property. Bowman challenged the court filing fee, and even though Bowman was indigent, the Court upheld the fee. *Id.*

The plaintiffs rely heavily on *Downey v. Pierce County*, 165 Wn. App. 152, 267 P.3d 445 (2011), *review denied*, 174 Wn.2d 1016 (2012), which struck down a mandatory $250 filing fee required for a dog owner to obtain a hearing to contest a county's dangerous animal designation. The *Downey* court concluded a dog owner's interest in her pet was "arguably more than a mere economic interest because pets are not fungible." *Downey*, 165 Wn. App. at 165; *see also Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 766, 63 P.3d 142 (2002) (dog owners' interest in keeping their

[13] The *Morrison* court also affirmed the superior court's reduction of filing fees, because the court has inherent power to waive fees for "financial hardship." *Morrison*, 168 Wn. App. at 679 (citation omitted).

pets "is greater than a mere economic interest, for pets are not fungible"); *Mansour v. King Cnty.*, 131 Wn. App. 255, 265, 128 P.3d 1241 (2006) ("many people consider pets part of the family"); *Rabon v. City of Seattle*, 107 Wn. App. 734, 744, 34 P.3d 821 (2001) (recognizing a potential argument "that a person's relationship with a dog deserves more protection than a person's relationship with, say, a car").[14]

Significantly, in *Downey*, the county apparently did not provide for an indigency waiver. The court expressed concern that the procedures could prejudice someone who "does not *or cannot* pay the administrative fee" and noted that the fee "could prevent many people from obtaining the review they are legally entitled to." *Id.* at 165, 166. Such concerns are not present in this case because all indigent drivers can request a fee waiver, and the record contains no evidence that fee waivers have ever been improperly denied.

The drivers acknowledge they seek an expansion of *Downey*, claiming "*Downey* should be applied to other cases involving government

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[14] *See also State v. Langford*, 33 S.E. 370, 371 (S.C. 1899) ("Of all animals the dog is most domestic. Its intelligence, docility and devotion make it the servant, the companion and the faithful friend of man."); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005) ("dogs are more than just a personal effect," and the "emotional attachment to a family's dog is not comparable to a possessory interest in furniture").

The Court of Appeals has recognized emotional distress for malicious injury to a pet, distinguishing cases that declined to recognize claims for negligent infliction of emotional distress based on pet injuries. *Womack v. Von Rardon*, 133 Wn. App. 254, 263-64, 135 P.3d 542 (2006).

initiated action affecting non-fungible property, such as a driver's license revocation proceeding." Appellants' Opening Br. at 32. However, *Downey* addressed the unique, sentimental value of a dog as a family pet, and nothing in *Downey* suggests the Court intended it to be applied beyond its unique context. Downey did not pronounce a rule that due process always requires a cost-free, pre-deprivation hearing if the property is non-fungible. Rather, *Downey* discussed the importance of family pets and described them as non-fungible in that context. *Id.* The *Downey* court's discussion should not be expanded, especially in the face of longstanding prior precedent that consistently declined to strike down filing fees in their entirety, even where a fundamental interest was at stake. *See Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 445, 378 P.2d 684 (1963) ("[G]eneral expressions in [a judicial opinion] are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved.").

Perhaps recognizing the unique nature of the *Downey* case, the plaintiffs attempt to distinguish prior authorities upholding filing fees and simply requiring indigency waivers where a fundamental right is at stake. The plaintiffs argue that *Boddie*, *Kras*, and *Ortwein* are not relevant to this case because the plaintiffs "are not asking a court to perform an affirmative act" like the litigants in *Boddie* (terminate a marriage) or *Kras* (provide

bankruptcy protection), and they are not seeking post-suspension review as the litigants were in *Ortwein* and *Saylors*. Appellants' Opening Br. at 25-26. But these are false distinctions.

First, *Boddie* and *Kras were* about initial access rather than appellate rights. And *Boddie* involved the "state monopolization of the means for legally dissolving" the marriage relationship, *Boddie*, 401 U.S. at 374, which is a more fundamental interest than driver licensing. *See Washington v. Glucksberg*, 521 U.S. 702, 726, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (noting right to make personal decisions relating to marriage is fundamental). State-initiated or not, court access was essential. *Ortwein* and *Saylors* did involve state-initiated action to deprive persons of their property—welfare benefits in *Ortwein* and housing in *Saylors*. Notably, the Court of Appeals, post-*Downey,* expressly followed *Boddie* and *Kras* even where the government initiated a citation for a license violation. *See Morrison*, 168 Wn. App. at 274. The *Morrison* court held, "where there is no fundamental right involved but only a financial one, it is permissible to impose a monetary prerequisite to file an appeal." *Id. Morrison* thus rejects the plaintiffs' individual versus state-initiated distinction and instead applies the longstanding filing fee principle, upholding the fee for an initial hearing to contest an action where no fundamental right is involved.

As these cases show, even where a fundamental right is implicated, procedural due process does not require a court to strike down a filing fee entirely, as the plaintiffs request. Instead, courts have been primarily concerned with whether an indigency waiver exists where a fundamental right is implicated. *Downey* suggests that this principle may be extended beyond fundamental rights in some cases, but the *Downey* court did not extend as far as plaintiffs contend. The drivers point to no authority other than *Downey*, in Washington or otherwise, holding that when a non-fundamental right is implicated, due process requires fees to be waived for *all* litigants, including those with the ability to pay, whether it be for access to court or an administrative hearing, or whether the action is initiated by a private litigant or the government. It would be unprecedented for this Court to hold that a filing fee is entirely invalid because a significant, but not fundamental, right is implicated and where indigency waivers are frequently granted.

2. Other courts that have gone beyond the *Boddie* line of cases have not stricken filing fees entirely; instead, they have held filing fees must be waived only for indigent litigants.

While Washington's due process clause "does not afford broader protection than that given by the Fourteenth Amendment to the United States Constitution," *McCormick*, 166 Wn.2d at 699, some jurisdictions

have gone beyond *Boddie* and its progeny to hold filing fees for initial hearings violate due process, but only when applied to indigent litigants.

For example, the Ninth Circuit has held the federal government may not deny the opportunity for a hearing to persons whose property has been seized and is subject to forfeiture solely because of their inability to post a pre-hearing bond. *Wiren*, 542 F.2d at 763. Even though the court departed somewhat from the U.S. Supreme Court's case law in failing to distinguish between fundamental and non-fundamental interests, the court still held that the pre-hearing bond was unconstitutional only as applied to indigent claimants. *Id.* at 764.

The Colorado Supreme Court has held that a $675 fee to obtain a mandatory independent medical examination before an indigent, injured worker can challenge the termination of his temporary disability benefits violates due process. *Whiteside v. Smith*, 67 P.3d 1240, 1242 (Colo. 2003). The court found the right to worker's compensation benefits is a constitutionally protected property interest but did not find the interest was fundamental. *Id.* at 1247. Although the court expanded the due process filing fee jurisprudence to an instance where no fundamental right was implicated, it held the fee deprived only *indigent* workers of an appeal. *Id.* at 1249.

Alaska has explicitly "widened the right of access to the judicial system beyond the *Boddie* line of cases." *Varilek v. City of Houston*, 104 P.3d 849, 854 (Alaska 2004). Nevertheless, the court found that a $200 administrative filing fee to challenge a notice of violation of zoning and land use codes denied due process only to indigent claimants. *Id.* at 855. It explained: "An indigent whose business or property interests are threatened by an administrative action originally filed by a government agency need not be litigating a fundamental family matter in order to have a right of access" to an administrative process. *Id.* Thus where, as here, a person's property interests are "threatened" by government-initiated action, Alaska requires filing fees to be waived only for indigent litigants.

Other jurisdictions that have gone beyond the fundamental versus non-fundamental rights distinction have reached similar results. *See Boll v. Dep't of Revenue*, 528 N.W.2d 300 (Neb. 1995) (requiring prepayment of unpaid tax as a prerequisite to a hearing on appeal of tax assessments was unconstitutional only as applied to indigent taxpayers); *Neff v. Comm'r of Dep't of Indus. Accidents*, 653 N.E.2d 556 (Mass. 1995) (holding statute requiring worker's compensation claimants to pay a $350 hearing fee to challenge a denial of benefits contained an implicit indigency waiver, which "obviate[d] the need . . . to address Neff's constitutional arguments"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v.*

O'Neill, 561 A.2d 917 (Conn. 1989) (requirement that manufacturer pay $250 filing fee to defend against consumer's complaint did not violate due process because statute provided for economic hardship waiver).

Even in the cases that go beyond the fundamental rights limitation in the *Boddie* line of cases to find pre-deprivation fees are impermissible, the courts have invalidated the fees only as to indigent litigants. The plaintiffs have not shown, or even alleged, that the filing fee in this case forecloses anyone from administrative or judicial review of the suspension or revocation of their driver's license as a consequence of inability to pay. Because the purported class in this case includes no indigent plaintiffs, even if this Court were inclined to depart from Washington precedent adopting the *Boddie* analysis, this is not the appropriate case to address the rights of indigent nonparties. *See, supra,* Part B. The superior court properly concluded the fee satisfies due process.

D. Under the *Mathews* Test, the DUI Hearing Fee Does Not Violate Procedural Due Process

Even if this Court moves beyond the specific filing fee cases and performs the *Mathews v. Eldridge* balancing test, the filing fee here does not violate procedural due process under *Mathews*. 424 US 319, 96 S. Ct 893, 47 L. Ed. 2d 18 (1976). Determining what process is due in a given case depends on the balancing of (1) the private interest affected by the

government action, (2) the risk of erroneous deprivation of that interest under existing procedural protections, and (3) the countervailing government interest, including the function involved and the fiscal and administrative burdens additional procedures would entail. *Bagby*, 155 Wn.2d at 6; *Mathews*, 424 U.S. at 335.[15] When fundamental rights are not involved, Washington courts have held that a filing fee for access to court or a hearing satisfies due process, even as applied to indigent litigants. *See, supra,* Part C.

1. A person's interest in a driver's license is not fundamental.

The drivers' interest in their licenses, while important, is not of "fundamental importance . . . under [the] Constitution." *See Kras*, 409 U.S. at 444; *see State v. Clifford*, 57 Wn. App. 127, 130, 787 P.2d 571 (1990) (requiring a driver's license does not unconstitutionally infringe on freedom of movement). Fundamental rights or liberties are those that are "objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, 521 U.S. at 720-21 (quoting *Moore v. City of E. Cleveland,* 431 U.S. 494, 503, 97 S. Ct.

[15] Although *Boddie*, *Kras*, and *Ortwein* did not explicitly engage in a balancing of the *Mathews* factors because those cases predated *Mathews*, they did balance private and state interests consistent with *Mathews* to determine what process was due. *Boddie*, 401 U.S. at 376, 381-82; *Kras*, 409 U.S. at 445-48; *Ortwein*, 410 U.S. 659-60.

1932, 52 L. Ed. 2d 531 (1977) (plurality opinion)); *Palko v. Connecticut,* 302 U.S. 319, 325, 326, 58 S. Ct. 149, 82 L. Ed. 288 (1937), *overruled on other grounds, Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). "Fundamental liberty interests include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Andersen v. King Cnty.*, 158 Wn.2d 1, 25, 138 P.3d 963 (2006) (citing *Glucksberg,* 521 U.S. at 720).[16]

In contrast, a driver's license is a state-granted privilege, which has an expiration date and is always subject to reasonable regulations and fees. *State v. Scheffel*, 82 Wn.2d 872, 880, 514 P.2d 1052 (1973); *Nick v. Dep't of Motor Vehicles*, 12 Cal. Rptr. 2d 305, 310 (Cal. Ct. App. 1993) ("Driving is a highly regulated activity subject to numerous government-mandated fees and expenses."). Fees are required to apply for and renew a driver's license. RCW 46.20.161, .181. Every driver in this state is required to be financially responsible. RCW 46.30.020. "The driver taking the wheel does so in the knowledge that the use of the license is a privilege granted by the state, is not a right and that by accepting the license, he or she has already consented to the breathalyzer test if an

[16] A court should be reluctant to identify new fundamental rights because, in doing so, a matter is effectively placed "outside the arena of public debate and legislative action." *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 600, 192 P.3d 306, 321-22 (2008) (quoting *Glucksberg*, 521 U.S. at 720).

arresting officer has reasonable grounds to believe the driver is under the influence of intoxicating liquor." *Juckett v. Evergreen Dist. Ct.*, 32 Wn. App. 49, 55, 645 P.2d 734 (1982). Although a driver's interest in his or her driving privileges "'is a substantial one,'" *City of Redmond v. Moore*, 151 Wn.2d 664, 671, 91 P.3d 875 (2004) (quoting *Mackey v. Montrym*, 443 U.S. 1, 11, 99 S. Ct. 2616, 61 L. Ed. 2d 321 (1979)), it implicates only economic interests. The plaintiffs appear to concede the rights implicated are not fundamental. Appellants' Opening Br. at 21-22.

A driver's interest in his license is no greater than a person's interest in housing, public assistance benefits, or in maintaining a clean professional licensing record. *See Saylors*, 87 Wn.2d at 739 (interest in housing not so fundamental as to require indigency waivers for eviction appeals); *Ortwein*, 410 U.S. at 659-60 (access to public benefits); *Morrison*, 168 Wn. App. at 271 (electrical license citation). None of these interests required cost-free hearings in all circumstances.

The plaintiffs assert that their interest in a driver's license is more substantial than the interest implicated in *Morrison,* which they characterize as "solely the payment of fines." Appellants' Opening Br. at 39. However, this misses the point and mischaracterizes the *Morrison* court's holding. It was because the right involved was not fundamental that the filing fee was permissible. Regardless, an electrical code citation

may become a ground for an increased penalty for a future violation. WAC 296-46B-915. Further, electrical code citations and penalties can unquestionably impact electricians' ability to make a living—not only do cited electricians become liable for the penalties, but the citations become publicly available, implicating their business reputations.[17] Still, the *Morrison* court held the interest did not demand a cost-free process.

Additionally, the suspension or revocation of a driver's license is not permanent. "The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." *Mackey*, 443 U.S. at 12. For a first offense, the Department suspends a person's license for 90 days for refusing to submit to the breath test and revokes it for one year for blowing over the legal limit. RCW 46.20.3101(1)(a), (2)(a). Moreover, as the superior court noted, a driver whose license is suspended can seek out alternate means of transportation, such as "bicycle, taxi, or public transit." *Clifford*, 57 Wn. App. at 130; CP 242.

Moreover, a person's interest in his driver's license cannot be greater than one's interest in a commercial driver's license or right to pursue employment, which the Supreme Court has held are not

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[17] *See* L&I website, Trades & Licensing, Electrical, Violators, Electrical Violation Citations, *available at* http://www.lni.wa.gov/TradesLicensing/Electrical/Violators/Citations/default.asp (last visited Dec. 1, 2013) (listing the names of electrical licensees cited in the last six years).

fundamental. *Amunrud*, 158 Wn.2d at 220-22. Because the right to a driver's license, while substantial, is not fundamental, it does not outweigh the other *Mathews* factors in this case, and the hearing fee for non-indigent drivers satisfies due process.

2. Because the plaintiffs had administrative hearings, and the fee is waived for indigent drivers, they have raised no risk of erroneous deprivation.

Where "the private interest at issue is pecuniary and not a fundamental one," the court "need not continue the analysis of the other two *Mathews* factors." *Morrison*, 168 Wn. App. at 274-275. This is because the filing fee precedent has already balanced the private and government interests in this context to conclude that, outside of fundamental rights, risk of erroneous deprivation as a result of a filing fee is not significant enough to require a cost-free process. Yet even if this Court proceeds beyond the first *Mathews* factor, the plaintiffs cannot demonstrate any risk of erroneous deprivation because they had pre-deprivation hearings, which are afforded to all.[18]

Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Storhoff*, 133 Wn.2d 527; *City of Redmond*, 151 Wn.2d. at 670 (citation omitted). In *City of*

[18] Also, the drivers' argument on the second *Mathews* factor (risk of erroneous deprivation) is based on the fee's claimed deterrent effect as applied to others not in the putative class and, thus, raises a serious standing problem. *See* Appellants' Opening Br. at 22, 40-46; *supra,* Part B. Each plaintiff paid the fee and had a hearing.

Redmond v. Moore, the Washington Supreme Court held the Department of Licensing must provide to drivers an opportunity for administrative review before it can suspend a license after receiving notice from a court that the driver has failed to appear, pay, or comply with a traffic infraction notice. *City of Redmond*, 151 Wn.2d at 667-77. There, the risk of ministerial error was high because the statute did not provide for *any* opportunity to be heard, pre- or post-suspension, to those subject to mandatory suspensions. *Id.* at 675. The Court later held that an internal document review procedure satisfied the Court's due process concerns. *City of Bellevue v. Lee*, 166 Wn.2d 581, 210 P.3d 1011 (2009).

In contrast, the plaintiffs here *had* pre-deprivation administrative hearings—the very thing the *City of Redmond* court required in order to eliminate the risk of erroneous deprivation. Moreover, because the Department provides an indigency waiver, anyone who wants to challenge the Department's proposed suspension or revocation can do so. Indeed, during the 2009–2011 biennium, the Department waived the fee for 10,260 hearings for indigent drivers, about 36% of all hearings conducted. CP 84. The plaintiff drivers do not argue that the hearing they received somehow failed to satisfy due process.

The plaintiff drivers argue that "[e]xcept for indigent drivers, access to due process is based . . . [on] the contents of the driver's bank

account." Appellants' Opening Br. at 22. To the extent plaintiffs attempt to argue some third party drivers may be deprived of a hearing despite the indigency waiver, they lack standing to raise this argument. Moreover, while some drivers may choose not to pay the fee, this choice only reflects their conclusion that contesting the suspension or revocation "may not be worth the cost of litigation, a question litigants face in almost every lawsuit, particularly considering the American rule that attorney's fees are not ordinarily recoverable even though the suit is won." *In re South*, 689 F.2d 162, 166 (10th Cir. 1982) (rejecting argument that "because the value of its interest relative to the filing fee renders litigation economically impractical, the fee requirement denies Otasco an opportunity to be heard"); *see also Tucker v. Branker*, 142 F.3d 1294, 1298 (D.C. Cir. 1998) (Prison Litigation Reform Act's filing fee provision, "far from unduly burdening [an inmate's] access to court, merely requires him to make the same kind of economic choice that any other would-be civil plaintiff must make"). Absent indigency, the filing fee here does not unduly risk erroneous DUI suspension of a license.

Moreover, after receiving a notice of suspension or revocation under the implied consent statute, drivers may apply for an ignition interlock license, so they can continue driving. *See* RCW 46.20.385. The ignition interlock driver's license is a permit that allows a person to

operate a noncommercial vehicle equipped with an ignition interlock device while the person's regular driver's license is suspended or revoked. RCW 46.04.217. The cost of installing, removing, and leasing the device is waived for indigent applicants. RCW 46.20.385(6)(a). The availability of this license also mitigates the risk of any erroneous deprivation.[19]

Even if the fee somehow barred the drivers from obtaining pre-deprivation review, as the superior court noted, there is "significantly more objectivity to the process of suspending a license than the process of determining a dog to be dangerous."[20] CP 242. Before suspending or revoking a driver's license under the implied consent statute, DOL must

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[19] The driver's cite *Nielsen v. Dep't of Licensing*, -- Wn. App. --, 309 P.3d 1221 (Sept. 30, 2013), to demonstrate the importance of the driving privilege. Appellants' Opening Br. at 37-38. But the case also demonstrates the value of the ignition interlock driver's license. The statute at issue required drivers to waive their right to appeal their suspensions if they obtained an ignition interlock license. *Nielsen*, 309 P.3d at 1223. The Court noted that obtaining the license was "effectively the only means to lawfully operate a motor vehicle during an administrative license revocation." *Id.* at 1226. The value of the ignition interlock license, allowing drivers to drive despite the suspension or revocation of their license, thus "strongly discouraged" drivers from seeking judicial review of their suspensions. *Id.* The *Nielsen* court invalidated on *substantive* due process grounds the statute's requirement that drivers waive their right to appeal their suspensions if they obtained an ignition interlock license. *Id.* at 1229. These plaintiffs assert a procedural due process violation, so *Nielsen*'s substantive due process analysis does not apply.

[20] In comparing the *Downey* animal control officer's declaration of a dog as a dangerous animal to a police officer's sworn report stating under penalty of perjury the grounds for the driver's license suspension, the drivers may make false assumptions. Appellants' Opening Br. at 41 n.86 ("it must be assumed the Court's use of this word [i.e., declared] implies the finding was made by a declaration under penalty of perjury"). In context of the county code provision at issue, "declare" is clearly a synonym for determine. *See* Pierce County Code 6.07.010(A) ("The animal control authority may declare an animal as dangerous . . . ."), 6.07.020(A) ("The owner of the animal may contest a declaration of dangerous or potentially dangerous animal by submitting a written appeal."). There is no requirement in the code that an animal be "declared" dangerous "under penalty of perjury." *See* Chapter 6.07 Pierce County Code.

receive the arresting officer's "sworn report" stating under the penalty of perjury the grounds for the suspension or revocation. RCW 46.20.308(6)(e), (7). "The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator." *Mackey v. Montrym*, 443 U.S. 1, 14, 99 S. Ct. 2612, 2618, 61 L. Ed. 2d 321 (1979) (summary suspension of a driver's license for refusal to take a breath test without a pre-suspension hearing met due process, where the suspension was based on the arresting officer's sworn report setting forth grounds for suspension). "He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process." *Id.* As the officer is "personally subject to civil liability for an unlawful arrest and to criminal penalties for willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts," and "the risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seems insubstantial." *Id.* Due process depends on "the risk of error inherent in the truthfinding process as applied to the generality of cases," rather than the "rare exceptions." *Id.*

The plaintiff drivers assert the analysis of the reliability of the government's action is a "straw man." Appellants' Opening Br. at 41. They are mistaken. In evaluating the risk of erroneous deprivation, the

quality of the investigative process is a factor in that assessment. Indeed, this is the very analysis the U.S. Supreme Court undertook in *Mackey*. *Mackey*, 443 U.S. at 14.

While the evaluation of investigative reliability is not a "straw man," here, it may be academic, because all drivers are actually afforded administrative review of that investigation. As the Colorado Supreme Court has said, if hearing "rights were afforded to indigent claimants, this particular group would unquestionably have an opportunity to be heard at a meaningful time and in a meaningful manner and thereby due process concerns would be satisfied." *Whiteside*, 67 P.3d at 1251. Where an evidentiary hearing to challenge the reliability of the officer's investigation and compliance with the implied consent statute is provided to drivers without respect to ability to pay, the risk of erroneous deprivation is minimal at most.

3. The State's interest in roadway safety and cost recovery justifies the fee for non-indigent drivers.

As to the third *Mathews* factor, Washington has a "paramount" and "compelling interest" in roadway safety. *Mackey*, 443 U.S. at 17, 19. The implied consent statute furthers this goal by deterring drunk driving and removing the driving privileges of those who drive drunk. *See Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 47, 50 P.3d 627 (2002).

The Department also has an interest in "the efficient and cost-effective" driver's license administration. *City of Bellevue*, 166 Wn.2d at 590. This would justify the imposition of a fee for all petitioners for administrative review, but the Legislature chose to waive the fee for indigent drivers, even though doing so may not be required by due process, given that a driver's license is not a fundamental right.

In order to suspend a driver's license under the statute, the Department is constitutionally required to offer a formal hearing. *Lewis v. Dep't of Motor Vehicles*, 81 Wn.2d 664, 666, 504 P.2d 298 (1972) (citation omitted). Hearings require significant state resources. In the 2009–2011 biennium, the Department conducted 28,405 DUI hearings. CP 38 ¶ 5, 84. The approximate cost to conduct each hearing was $413. *Id.* Thus, during the biennium, it cost the Department about $11,749,238 to conduct all of the DUI hearings.

Given the cost to conduct DUI hearings, the Legislature introduced a fee for those hearings and has adjusted the fee amount to "ensure cost recovery." RCW 46.01.360. The Department has an interest "in conserving scarce fiscal and administrative resources," which "is a factor that must be weighed." *Mathews*, 424 U.S. at 348. The Department collected the $200 fee for 18,145 of the hearings and waived the fee for 10,260 hearings. CP 84. Thus, the Department was able to recover

$3,629,000 of the $11,749,238 it expended during the 2009–2011 biennium, but would not have been able to do so if it had been required to conduct all DUI hearings cost free. CP 84.

Washington's compelling interests in maintaining roadway safety and ensuring some cost recovery while providing due process hearings justify the fee for non-indigent drivers. Accordingly, the balance of the three *Mathews* factors weighs heavily in favor of the constitutionality of the hearing fee provision, especially since the private interest at stake is not fundamental, and the fee waiver for indigency mitigates any risk of erroneous deprivation. The superior court properly dismissed the drivers' complaint for failure to state a claim for which relief could be granted.

V. CONCLUSION

The named plaintiffs and the purported class of drivers all were able to pay the implied consent hearing fee and obtained an evidentiary hearing to challenge the suspension or revocation of their driver's licenses. Because the filing fee did not prejudice their opportunity to be heard, they lack standing to argue the fee violates procedural due process, or to assert the procedural due process rights of hypothetical third parties who would allegedly be deprived of a hearing.

Even so, the fee does not operate to deprive any driver of their due process hearing right based on inability to pay, because the Department

waives the fee for indigent drivers. Therefore, even if a person's interest in his driver's license were fundamental, the filing fee satisfies due process. The drivers cannot establish the fee is unconstitutional beyond a reasonable doubt. The Department respectfully asks the Court to affirm the superior court's order of dismissal.

RESPECTFULLY SUBMITTED this 23rd day of December, 2013.

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Appendix

2012

SESSION LAWS

OF THE

STATE OF WASHINGTON

REGULAR SESSION
SIXTY-SECOND LEGISLATURE
Convened January 9, 2012. Adjourned March 8, 2012.

FIRST SPECIAL SESSION
SIXTY-SECOND LEGISLATURE
Convened March 12, 2012. Adjourned April 10, 2012.

SECOND SPECIAL SESSION
SIXTY-SECOND LEGISLATURE
Convened April 11, 2012. Adjourned April 11, 2012.

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included in the sentencing order as an additional monetary obligation of the defendant and may not be substituted for any other fine or cost required or allowed by statute. The court may establish a payment schedule for the payment of the cost reimbursement, separate from any payment schedule imposed for other fines and costs.

In no event shall a person's liability under this section for the expense of an emergency response exceed ((~~one~~)) two thousand five hundred dollars for a particular incident.

If more than one public agency makes a claim for payment from an individual for an emergency response to a single incident under the provisions of this section, and the sum of the claims exceeds the amount recovered, the division of the amount recovered shall be determined by an interlocal agreement consistent with the requirements of chapter 39.34 RCW.

Sec. 7. RCW 46.20.308 and 2008 c 282 s 2 are each amended to read as follows:

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(5). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the

driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504; and

(d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of felony driving under the influence of intoxicating liquor or drugs under RCW 46.61.502(6), felony physical control of a motor vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6), vehicular homicide as provided in RCW 46.61.520, or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

(4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and the person shall be deemed to have received the warnings required under subsection (2) of this section.

(5) If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

(6) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 or more if the person is age twenty-one or over, or 0.02 or more if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (7) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (8) of this section and that the person waives the right to a hearing if he or she receives an ignition interlock driver's license;

(c) Mark the person's Washington state driver's license or permit to drive, if any, in a manner authorized by the department;

(d) Serve notice in writing that the marked license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until the suspension, revocation, or denial of the

person's license, permit, or privilege to drive is sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces; and

(e) Immediately notify the department of the arrest and transmit to the department within seventy-two hours, except as delayed as the result of a blood test, a sworn report or report under a declaration authorized by RCW 9A.72.085 that states:

(i) That the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having an alcohol concentration in violation of RCW 46.61.503;

(ii) That after receipt of the warnings required by subsection (2) of this section the person refused to submit to a test of his or her blood or breath, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person is age twenty-one or over, or was 0.02 or more if the person is under the age of twenty-one; and

(iii) Any other information that the director may require by rule.

(7) The department of licensing, upon the receipt of a sworn report or report under a declaration authorized by RCW 9A.72.085 under subsection (6)(e) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW 46.20.3101, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or when sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first.

(8) A person receiving notification under subsection (6)(b) of this section may, within twenty days after the notice has been given, request in writing a formal hearing before the department. The person shall pay a fee of two hundred dollars as part of the request. If the request is mailed, it must be postmarked within twenty days after receipt of the notification. Upon timely receipt of such a request for a formal hearing, including receipt of the required two hundred dollar fee, the department shall afford the person an opportunity for a hearing. The department may waive the required two hundred dollar fee if the person is an indigent as defined in RCW 10.101.010. Except as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW 46.20.329 and 46.20.332. The hearing shall be conducted in the county of the arrest, except that all or part of the hearing may, at the discretion of the department, be conducted by telephone or other electronic means. The hearing shall be held within sixty days following the arrest or following the date notice has been given in the event notice is given by the department following a blood test, unless otherwise agreed to by the department and the person, in which case the action by the department shall be stayed, and any valid temporary license marked under subsection (6)(c) of this section extended, if the person is otherwise eligible for licensing. For the purposes of this section, the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state

while under the influence of intoxicating liquor or any drug or had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more if the person was under the age of twenty-one, whether the person was placed under arrest, and (a) whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive, or (b) if a test or tests were administered, whether the applicable requirements of this section were satisfied before the administration of the test or tests, whether the person submitted to the test or tests, or whether a test was administered without express consent as permitted under this section, and whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person was age twenty-one or over at the time of the arrest, or 0.02 or more if the person was under the age of twenty-one at the time of the arrest. The sworn report or report under a declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more and was under the age of twenty-one and that the officer complied with the requirements of this section.

A hearing officer shall conduct the hearing, may issue subpoenas for the attendance of witnesses and the production of documents, and shall administer oaths to witnesses. The hearing officer shall not issue a subpoena for the attendance of a witness at the request of the person unless the request is accompanied by the fee required by RCW 5.56.010 for a witness in district court. The sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation. The person may be represented by counsel, may question witnesses, may present evidence, and may testify. The department shall order that the suspension, revocation, or denial either be rescinded or sustained.

(9) If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing. The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial. A petition filed under this subsection must include the petitioner's grounds for requesting review. Upon granting petitioner's request for review, the court shall review the department's final order of suspension,

revocation, or denial as expeditiously as possible. The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings. The decision of the superior court must be in writing and filed in the clerk's office with the other papers in the case. The court shall state the reasons for the decision. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant such relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant will suffer irreparable injury. If the court stays the suspension, revocation, or denial it may impose conditions on such stay.

(10)(a) If a person whose driver's license, permit, or privilege to drive has been or will be suspended, revoked, or denied under subsection (7) of this section, other than as a result of a breath or blood test refusal, and who has not committed an offense for which he or she was granted a deferred prosecution under chapter 10.05 RCW, petitions a court for a deferred prosecution on criminal charges arising out of the arrest for which action has been or will be taken under subsection (7) of this section, or notifies the department of licensing of the intent to seek such a deferred prosecution, then the license suspension or revocation shall be stayed pending entry of the deferred prosecution. The stay shall not be longer than one hundred fifty days after the date charges are filed, or two years after the date of the arrest, whichever time period is shorter. If the court stays the suspension, revocation, or denial, it may impose conditions on such stay. If the person is otherwise eligible for licensing, the department shall issue a temporary license, or extend any valid temporary license marked under subsection (6) of this section, for the period of the stay. If a deferred prosecution treatment plan is not recommended in the report made under RCW 10.05.050, or if treatment is rejected by the court, or if the person declines to accept an offered treatment plan, or if the person violates any condition imposed by the court, then the court shall immediately direct the department to cancel the stay and any temporary marked license or extension of a temporary license issued under this subsection.

(b) A suspension, revocation, or denial imposed under this section, other than as a result of a breath or blood test refusal, shall be stayed if the person is accepted for deferred prosecution as provided in chapter 10.05 RCW for the incident upon which the suspension, revocation, or denial is based. If the deferred prosecution is terminated, the stay shall be lifted and the suspension, revocation, or denial reinstated. If the deferred prosecution is completed, the stay shall be lifted and the suspension, revocation, or denial canceled.

(c) The provisions of (b) of this subsection relating to a stay of a suspension, revocation, or denial and the cancellation of any suspension, revocation, or denial do not apply to the suspension, revocation, denial, or disqualification of a person's commercial driver's license or privilege to operate a commercial motor vehicle.

(11) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has

been suspended, revoked, or denied, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he or she has a license.

Sec. 8. RCW 46.20.385 and 2011 c 293 s 1 are each amended to read as follows:

(1)(a) Beginning January 1, 2009, any person licensed under this chapter who is convicted of a violation of RCW 46.61.502 or 46.61.504 or an equivalent local or out-of-state statute or ordinance, or a violation of RCW 46.61.520(1)(a) or 46.61.522(1)(b), or who has had or will have his or her license suspended, revoked, or denied under RCW 46.20.3101, or who is otherwise permitted under subsection (8) of this section, may submit to the department an application for an ignition interlock driver's license. The department, upon receipt of the prescribed fee and upon determining that the petitioner is eligible to receive the license, may issue an ignition interlock driver's license.

(b) A person may apply for an ignition interlock driver's license anytime, including immediately after receiving the notices under RCW 46.20.308 or after his or her license is suspended, revoked, or denied. A person receiving an ignition interlock driver's license waives his or her right to a hearing or appeal under RCW 46.20.308.

(c) An applicant under this subsection shall provide proof to the satisfaction of the department that a functioning ignition interlock device has been installed on all vehicles operated by the person.

(i) The department shall require the person to maintain the device on all vehicles operated by the person and shall restrict the person to operating only vehicles equipped with the device, for the remainder of the period of suspension, revocation, or denial. The installation of an ignition interlock device is not necessary on vehicles owned, leased, or rented by a person's employer and on those vehicles whose care and/or maintenance is the temporary responsibility of the employer, and driven at the direction of a person's employer as a requirement of employment during working hours. The person must provide the department with a declaration pursuant to RCW 9A.72.085 from his or her employer stating that the person's employment requires the person to operate a vehicle owned by the employer or other persons during working hours. However, when the employer's vehicle is assigned exclusively to the restricted driver and used solely for commuting to and from employment, the employer exemption does not apply.

(ii) Subject to any periodic renewal requirements established by the department under this section and subject to any applicable compliance requirements under this chapter or other law, an ignition interlock driver's license granted upon a suspension or revocation under RCW 46.61.5055 or 46.20.3101 extends through the remaining portion of any concurrent or consecutive suspension or revocation that may be imposed as the result of administrative action and criminal conviction arising out of the same incident.

(iii) The time period during which the person is licensed under this section shall apply on a day-for-day basis toward satisfying the period of time the ignition interlock device restriction is required under RCW 46.20.720 and 46.61.5055. Beginning with incidents occurring on or after September 1, 2011, when calculating the period of time for the restriction under RCW 46.20.720(3), the department must also give the person a day-for-day credit for the time

PROOF OF SERVICE

I, Roxanne Immel, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 23rd day of December 2013, I caused to be served a copy of **Department's Response Brief** on the Appellants of record on the below stated date as follows:

Email via agreement by parties

Andrea Robertson (andy@robertsonlawseattle.com)
Ryan Robertson (ryan@robertsonlawseattle.com)
Robertson Law PLLC
701 Fifth Avenue, Suite 4735
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Seattle, WA 98199

Original e-filed by e-mail

supreme@courts.wa.gov

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 23rd day of December 2013 in Seattle, Washington.

Roxanne Immel, Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, December 23, 2013 2:38 PM
To: 'Immel, Roxanne (ATG)'
Cc: 'andy@robertsonlawseattle.com' (andy@robertsonlawseattle.com); Ryan Robertson (ryan@robertsonlawseattle.com); 'Kim@williamslaw.com' (Kim@williamslaw.com); 'roblin@williamslaw.com' (roblin@williamslaw.com); Harris, Leah (ATG); Glasgow, Rebecca (ATG)
Subject: RE: James Didlake et al. v. Washington State Department of Licensing, No. 88774-8 -- Department's Response Brief

Rec'd 12-23-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Immel, Roxanne (ATG) [mailto:RoxanneI@ATG.WA.GOV]
Sent: Monday, December 23, 2013 2:35 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'andy@robertsonlawseattle.com' (andy@robertsonlawseattle.com); Ryan Robertson (ryan@robertsonlawseattle.com); 'Kim@williamslaw.com' (Kim@williamslaw.com); 'roblin@williamslaw.com' (roblin@williamslaw.com); Harris, Leah (ATG); Glasgow, Rebecca (ATG)
Subject: James Didlake et al. v. Washington State Department of Licensing, No. 88774-8 -- Department's Response Brief

Dear Clerk,

Attached for filing is Department's Response Brief by the Department of Licensing in *James Didlake et al. v. Washington State Department of Licensing*, No. 88774-8.

The attorneys for the Appellants are receiving this email per the parties' e-service agreement.

Sincerely,
Roxanne Immel
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