

NO. 67831-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

RUSSELL CLARKE,

Appellant,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Respondent.

DEPARTMENT'S RESPONSE BRIEF

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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I. INTRODUCTION

Following lawful arrests for driving under the influence of intoxicating liquor (DUI), the Department of Licensing revoked Russell Clarke's and Robert Bergeson's driver's licenses pursuant to the implied consent statute, RCW 46.20.308.

Clarke and Bergeson chose to retain their ability to drive under the Ignition Interlock Drivers License (IIDL) statute, RCW 46.20.385. Pursuant to the language in the IIDL statute, when drivers choose to avail themselves of the benefit of driving with an IIDL following a license suspension or revocation, they give up their right to appeal that license suspension or revocation. Despite choosing to obtain IIDLs over the right to appeal, and thereby retaining their right to drive, Clarke and Bergeson appealed their license revocations to superior court.

The superior courts properly dismissed Clarke's and Bergeson's appeals because Clarke and Bergeson had expressly waived their right to appeal. The IIDL statute did not violate Clarke and Bergeson's right to equal protection under the law because the statute does not improperly create separate classes of drivers. The IIDL statute applies equally to all drivers who have been convicted of DUI, physical control under the influence, vehicular homicide, or vehicular assault, and those whose licenses have been suspended or revoked under the implied consent

statute. *See* RCW 46.20.385(1)(a). Thus, the IIDL statute provides equal protection to all drivers that it applies to. Moreover, the IIDL statute does not deprive drivers of a constitutionally protected liberty or property interest. Thus, the IIDL statute does not violate drivers' substantive due process protections. This Court should, therefore, affirm the superior court orders dismissing Clarke's and Bergeson's appeals.

II. COUNTERSTATEMENT OF THE ISSUES

1. Under RCW 46.20.385, a person receiving an ignition interlock driver's license waives his statutory right to appeal under RCW 46.20.308. Did the superior courts properly dismiss Clarke's and Bergeson's appeals because Clarke and Bergeson applied for and received ignition interlock driver's licenses before they appealed their administrative driver's license revocations, thereby knowingly waiving their right to appeal?
2. Where the IIDL statute allows all drivers whose licenses have been suspended or revoked under the implied consent statute a choice between different comparable consequences, does the statute violate equal protection?
3. May Clarke and Bergeson raise a substantive due process argument before this Court when it was not raised below, and the superior court did not commit a manifest error affecting a constitutional right?
4. Where the IIDL statute does not implicate any fundamental, constitutionally protected liberty or property interests, does the statute violate substantive due process?

III. COUNTERSTATEMENT OF THE CASE

Beginning January 1, 2009, any person licensed under chapter 46.20 RCW who has had or will have his license revoked under

RCW 46.20.308 may apply for an ignition interlock driver's license (IIDL). RCW 46.20.385(1)(a). An IIDL is a permit issued to a person by the Department that allows the person to drive all noncommercial motor vehicles equipped with an ignition interlock device while the person's regular driver's license is suspended or revoked. RCW 46.04.217; RCW 46.20.385(1)(c)(i).

A person may apply for an IIDL anytime, including immediately after receiving the notices under RCW 46.20.308(6)(a) and (b) or after his license is suspended or revoked pursuant to RCW 46.20.3101. RCW 46.20.385(1)(b). The Department, upon receipt of the IIDL application and prescribed fee, and upon determining that the person is eligible to receive the license (see RCW 46.20.385(2)), may issue the person an IIDL. RCW 46.20.385(1)(a).

A person who chooses to avail himself of the IIDL and actually receives an IIDL "waives his or her right to a hearing or appeal under RCW 46.20.308." RCW 46.20.385(1)(b).

Here, the Department revoked the driver's licenses of both Clarke and Bergeson pursuant to RCW 46.20.308. Both Clarke and Bergeson applied for and obtained IIDLs pursuant to RCW 46.20.385, knowingly waiving their statutory right to appeal the revocations. Then, Clarke and Bergeson appealed the Department's revocation orders to superior court,

seeking to have the court rule on the merits of their cases. In response to the Department's motions to dismiss because the drivers had waived their statutory right to appeal upon receiving IIDLs, Clark and Bergeson challenged the constitutionality of the IIDL statute, RCW 46.20.385. The specific facts of each case follow:

A. Russell Clarke

Bellingham Police Department Officer Christopher Brown arrested Clarke for DUI on December 6, 2010. CP RC 157.¹ As a result of Clarke's refusal to take the breath test, on December 9, 2010, the Department issued an order revoking Clarke's driver's license for one year for a first refusal. CP RC 147; RCW 46.20.3101(1)(a). Clarke requested and was granted an implied consent hearing to challenge the revocation. CP RC 145-46.

The hearing officer sustained the December 9, 2010, revocation order. CP RC 140. On March 2, 2011, the Department issued a final revocation order that went into effect on March 16, 2011. CP RC 130.

On March 15, 2011, Clarke applied for an Ignition Interlock Driver's License (IIDL). CP RC 91. The application advised Clarke in

¹ Because this case involves the consolidated appeals of *Russell Clarke v. Dep't of Licensing* and *Robert Bergeson v. Dep't of Licensing*, No. 67831-1-I and No. 67831-1-I, respectively (consolidated under the former), there are two sets of Clerk's Papers. Those for Russell Clarke are indicated in this brief as "CP RC," and those for Robert Bergeson are indicated as "CP RB."

bold print, “**You waive your right to a hearing or appeal when you receive an Ignition Interlock Driver License,**” citing RCW 46.20.385. CP RC 91. On March 15, 2011, the Department issued Clarke an IIDL. CP RC 92. On March 24, 2011, despite having agreed to waive his right to appeal in exchange for the IIDL, Clarke appealed the Department’s final revocation order to the Whatcom County Superior Court. CP RC 179.

B. Robert Bergeson

Washington State Patrol Trooper Betts arrested Bergeson for DUI on September 11, 2010. CP RB 236. As a result of Bergeson’s blood alcohol concentration being over the legal limit, on December 5, 2010, the Department issued Bergeson an order revoking his personal driver’s license for two years for a second incident within seven years. CP RB 207, 210, 227, 238; RCW 46.20.3101(1)(b). Bergeson requested and was granted an implied consent hearing to challenge the two-year revocation. CP RB 221, 224.

On March 22, 2011, the Department’s hearing officer sustained the December 5, 2010, revocation order. CP RB 211. The following day, the Department issued Bergeson a final revocation order, which went into effect on April 6, 2011. CP RB 200.

Bergeson chose to apply for an Ignition Interlock Driver’s License (IIDL), and on April 6, 2011, the Department issued Bergeson an IIDL.

CP RB 245-46. On the application, Clarke received the same notice as Bergeson that he waived his statutory right to a hearing or appeal if he received an IIDL. CP RB 91. On April 12, 2011, Bergeson appealed the Department's final revocation order to the Skagit County Superior Court.

IV. STANDARD OF REVIEW AND BURDEN OF PROOF

By virtue of their decisions to apply for and receive IIDLs, Bergeson and Clarke waived their statutory right to appeal their driver's license revocations to superior court. The superior courts did not have jurisdiction to hear their appeals. Whether a court has jurisdiction is a question of law subject to de novo review. *Crosby v. Spokane Cy.*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

Bergeson and Clarke nevertheless challenge the IIDL statute's waiver provision on constitutional grounds. A challenge to the constitutionality of a statute is a question of law that a court reviews de novo. *City of Bothell v. Barnhart*, 172 Wn.2d 223, 229, 257 P.3d 648 (2011).

Statutes are presumed constitutional. *School Districts' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). "[A] party challenging a statute's constitutionality must prove it unconstitutional 'beyond a reasonable doubt.'" *Id.* Under this standard, one challenging a statute must, by argument and research,

convince the court that there is no reasonable doubt that the statute violates the constitution. *Id.* This standard is high in order to respect the “legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution.” *Id.* (quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)). A court must assume the legislature considered the constitutionality of its enactments and afford great deference to its judgment. *Id.* Moreover, the legislature speaks for the people, and courts must be hesitant to strike a duly enacted statute unless fully convinced that the statute violates the constitution. *Id.* at 606.

V. ARGUMENT

Clarke and Bergeson chose to avail themselves of the continued benefit of driving despite the revocation of their driver’s licenses when they applied for and received IIDLs. In making this choice, Clarke and Bergeson waived their statutory right to appeal their license revocations. As such, the superior courts lacked jurisdiction to hear their appeals and properly dismissed their cases.

The IIDL statute provides equal protection to drivers because it applies equally to the class of drivers who have been convicted of DUI, physical control under the influence, vehicular homicide while DUI, or vehicular assault while DUI, and to the class whose licenses have been

suspended or revoked administratively under the implied consent statute. RCW 46.20.385(1)(a). The IIDL statute also does not implicate substantive due process rights because it does not deprive drivers of a constitutionally protected liberty or property interest.

A. The Superior Courts Properly Dismissed Clarke's and Bergeson's Appeals Because the Court Lacked Authority to Consider the Merits of the Appeals

A superior court reviewing an agency order acts “in its limited appellate capacity,” and all statutory and procedural requirements must be met before the court’s appellate authority is properly invoked. *City of Seattle v. Public Emp’t Relations Comm’n (PERC)*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991). Thus, before a superior court may exercise its appellate authority, the statutory procedural requirements must be satisfied. *Id.*; see *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990).

The implied consent statute contains several requirements that must be met before a superior court can entertain the merits of an appeal: there must be a final order from which to appeal; a notice of appeal must be filed within 30 days after the date of the final order, RCW 46.20.308(9); and a person must not have waived their right to appeal by receiving an ignition interlock driver’s license, RCW 46.20.385(1)(b).

Clarke and Bergeson received IIDLs. CP RC 92; CP RB 246. The IIDL application that they signed and submitted to the Department explicitly stated, in boldface type, **“You waive your right to a hearing or appeal when you receive an Ignition Interlock Driver License.”** CP RC 91; CP RB 245. The bottom of the application form also cited to the relevant statute, RCW 46.20.385. Clarke and Bergeson knew they waived their right to appeal once they received the IIDLs, yet they chose to apply for the IIDL anyway.

In fact, Clarke and Bergeson do not dispute that in applying for and receiving the IIDL, they knowingly waived their right to appeal. Rather, Clarke and Bergeson assert that this requirement of the IIDL statute is unconstitutional. However, the IIDL statute is presumed constitutional, and, as articulated below, Clarke and Bergeson have failed to bear the heavy burden of demonstrating otherwise. *School Districts' Alliance*, 170 Wn.2d at 605.

Therefore, applying the properly enacted IIDL statute, the superior court lacked authority to hear Clarke's and Bergeson's appeals because they failed to comply with all the statutory requirements necessary to invoke the courts' appellate authority. Accordingly, the superior courts properly dismissed the appeals.

B. The IIDL Statute Does Not Violate Equal Protection

Clarke and Bergeson concede that the standard of review for their equal protection challenge is rational basis review. Appellant's Opening Br. at 9. As such, Clarke and Bergeson have the "burden of showing that the law is irrelevant to maintaining a state objective or that it creates an arbitrary classification." *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). Rational basis review is a deferential standard of review. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998). When minimum scrutiny applies, the party challenging the statute has "the heavy burden of overcoming the presumption of constitutionality." *Conklin v. Shinpoch*, 107 Wn.2d 410, 417, 730 P.2d 643 (1986).

Equal protection requires that similarly situated individuals receive similar treatment under the law. *Harris v. Charles*, 171 Wn.2d 455, 462, 256 P.3d 328 (2011); see U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 12. However, while equal protection requires equal application of law, it does not require complete equality among individuals or classes of individuals. *Harris*, 171 Wn.2d at 462.

To show a violation of the equal protection clause under the Fourteenth Amendment and article I, section 12, Clarke and Bergeson first must establish that the challenged law treats two similarly situated classes

of people differently. *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 635, 911 P.2d 1319 (1996). To do so, Clarke and Bergeson must demonstrate that there are two classes, that the two classes are similarly situated, and that they are in the class that is discriminated against. *See Harris v. Charles*, 151 Wn. App. 929, 936, 214 P.3d 962 (2009), affirmed, 171 Wn.2d 455, 256 P.3d 328 (2011); *State v. Handley*, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990). Mere classification of persons into different groups is not an equal protection violation. *Norlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992) (“Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respect alike.”).

Accordingly, to prove an equal protection violation, Clarke and Bergeson must show (1) that there are two classes of persons under the IIDL statute; (2) that the two classes of persons are similarly situated; (3) that there is a discriminatory impact, and Clarke and Bergeson are part of the class receiving less favorable treatment; and (4) that there is no rational basis for the law to treat the two classes differently. For the reasons discussed below, Clarke and Bergeson have failed to satisfy this “heavy burden.” *Conklin*, 107 Wn.2d at 417.

1. Clarke and Bergeson have not demonstrated that the IIDL statute improperly creates separate classes of drivers.

The IIDL statute does not violate equal protection because it does not improperly create separate classes of drivers. The IIDL statute allows any licensee convicted of a violation of RCW 46.61.502 (DUI), 46.61.504 (physical control while under the influence), 46.61.520(1)(a) (vehicular homicide while under the influence), or 46.61.522(1)(b) (vehicular assault while under the influence), or who has had or will have his license suspended, revoked, or denied pursuant to the implied consent statute, RCW 46.20.308, to apply for an IIDL. RCW 46.20.385(1)(a). Among these drivers, the IIDL statute states that a person suspended or revoked under the implied consent statute waives his or her right to an implied consent hearing or appeal under RCW 46.20.308. RCW 46.20.385(1)(b). The same waiver does not apply to those criminally convicted who receive an IIDL. So if the IIDL statute creates two separate classes of drivers, they are those who have been convicted of any of the four enumerated criminal statutes and those who have been or will be suspended or revoked administratively under the implied consent statute. However, within each of these separate classes, the drivers are treated alike. Only the second class—those who have been administratively sanctioned—is at issue here.

In *Crossman v. Dep't of Licensing*, 42 Wn. App. 325, 711 P.2d 1053 (1985), the driver argued that the former implied consent statute unfairly prescribed greater punishment for resident licensed drivers than for resident unlicensed drivers because while licensed drivers' licenses were suspended, unlicensed drivers only lost the right to apply for a license. In concluding the implied consent statute did not violate equal protection, the court noted that the statute "applies equally within each class it creates." *Id.* at 329. Similarly here, those who have been convicted of any of the four criminal statutes enumerated in the IIDL law do not waive their right to appeal their convictions if they choose to obtain an IIDL, while those who have been or will be suspended or revoked administratively under the implied consent law do.

The IIDL statute allows all drivers within the class subject to suspension under the implied consent statute, without discrimination, to choose whether or not to obtain an IIDL. Every driver in the class has the same choice, and it is a voluntary choice.² Therefore, all members of the class of drivers are treated alike. Thus, like in *Crossman*, within each of these classes, the IIDL statute applies equally.

² Throughout their brief, Clarke and Bergeson assert that all drivers subject to suspension or revocation are required to apply for an IIDL and install an ignition interlock device. Appellant's Opening Br. at 16, 21-22. This is not the case. "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." RCW 46.20.385(1)(b) (emphasis added).

The fact that a subset of administratively suspended drivers eligible to apply for an IIDL waives its right to an implied consent hearing or appeal if they choose to obtain the IIDL does not mean that this then creates *sub*-classes of drivers. Simply because different groups can be identified within a class of individuals does not mean that the groups create additional classes for purposes of equal protection. *See Keffeler v. State*, 151 Wn.2d 331, 88 P.3d 949 (2004) (finding that under equal protection analysis, only one class existed as identity of representative payee did not create a separate class because all representative payees must use the benefits according to the laws and regulations). Like the implied consent statute itself, at the time the law applies—in other words, at the time the driver first comes within the scope of the law—the law creates one class and applies equally to that class by offering the same choice to all members of that class. The allowance of a voluntary choice does not create a separate class.

A driver who chooses to waive his statutory right to appeal in order to take advantage of an IIDL is also similar to a defendant taking advantage of a plea bargain. All defendants charged by the State with a crime make the choice whether or not to plead guilty. If a defendant pleads guilty, he waives his right to a trial and he waives the right to appeal most issues. *State v. Phelps*, 113 Wn. App. 347, 352, 57 P.3d 624

(2002). If a defendant does not plead guilty, he retains his right to a trial and retains his right to appeal. The fact that criminal defendants may choose whether or not to plead guilty does not create separate classes of persons by operation of that choice.

In none of the cases that Clarke and Bergeson cite in support of their class formation argument was a class created following a choice. *See Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 202 P.3d 334 (2009) (class membership determined by the location of property); *State v. Berrier*, 110 Wn. App. 639, 41 P.3d 1198 (2002) (class membership determined by the type of firearm that a criminal defendant possessed *at the time the crime was committed*); *State v. Marintorres*, 93 Wn. App 442, 969 P.2d 501 (1999) (class membership determined by the type of translation services, treating non-English speaking defendants differently than hearing-impaired defendants). Separate classes were already established at the time the law applied to them, and the laws treated the classes differently because of their pre-established distinctions. *Id.* Clarke and Bergeson thus have failed to establish that the IIDL statute impermissibly creates two separate sub-classes of drivers by virtue of a choice.

2. **Even if there are separate sub-classes of drivers, once they make their choice to obtain an IIDL or proceed with their appeal, the classes are no longer similarly situated.**

Even if the IIDL statute creates two separate sub-classes of drivers, those classes are not similarly situated for purposes of equal protection analysis. The two sub-classes the law arguably creates are: (1) those who have received an IIDL, and (2) those who have not. However, once one class has chosen to obtain an IIDL and the other has not, they are no longer similarly situated by virtue of that choice. One group has chosen to exercise a statutorily-granted opportunity to drive with an IIDL while their personal licenses are suspended or revoked, and the other group has chosen not to pursue that opportunity. By making that choice, one group has maintained the status quo and retained a statutory opportunity to have an administrative hearing or appeal (the group that did not obtain an IIDL), and the other group has waived that opportunity (the group that obtained the IIDL).

Statutes only violate equal protection of the laws when they disparately impact similarly situated persons. *Harris*, 151 Wn. App. at 936; *Handley*, 115 Wn.2d at 289-90. Because the drivers who obtain an IIDL are not similarly situated to those who do not, the IIDL statute does

not violate equal protection because the separate classes are not similarly situated.

Moreover, like the class distinction between drivers who have been criminally convicted and drivers who have been or will be administratively suspended under the implied consent statute, the drivers within each sub-class are treated alike. The operation of the IIDL statute is no different than the implied consent statute itself (RCW 46.20.308) or a criminal defendant facing trial. Both the IIDL statute and the implied consent statute allow drivers to make a choice: the IIDL statute allows drivers to choose whether to obtain an IIDL, and the implied consent statute allows drivers to choose whether to submit to the breath test. Under the IIDL statute, each driver may choose either to retain his right to appeal or to receive an IIDL, thereby retaining his driving privilege. RCW 46.20.385(1)(b). Similarly, the implied consent statute provides for different consequences for drivers arrested for DUI based on the driver's choice of whether or not to submit to the breath test. If a driver arrested for a first incident of DUI provides a breath sample above the legal limit, his license will be suspended for 90 days. RCW 46.20.308(2); RCW 46.20.3101(2)(a). If a driver arrested for a first incident of DUI refuses the breath test, his license will be revoked for one year. RCW 46.20.3101(1)(a). But because the law applies equally *within* each class it

creates, it does not violate equal protection. *Crossman*, 42 Wn. App. at 329.

3. **Even if the separate classes of drivers are similarly situated, Clarke and Bergeson have not demonstrated that there is a discriminatory impact and that they are part of the class receiving less favorable treatment.**

Assuming *arguendo* that the IIDL statute creates separate classes of drivers who are similarly situated, the IIDL statute does not treat the two classes differently to the detriment of one of the classes.

The IIDL statute allows each driver to choose from the following options: (1) appeal the license revocation, (2) apply for an IIDL, or (3) do neither. RCW 46.20.385. Choices one and two are at issue here. The first option, appealing the license sanction, maintains the status quo: the driver's license remains suspended or revoked pending an appeal (unless a stay is granted), and the driver may not drive. In the second option, the legislature affords the driver the opportunity to continue driving in spite of the suspension or revocation of his license. All drivers have the opportunity to appeal the sanction once their license is suspended or revoked; they simply cannot also obtain an IIDL.

Clarke and Bergeson have cited to no case that suggests that legislature may not condition the grant of an IIDL on the voluntary waiver of another statutorily granted opportunity. Each choice provides one

benefit to the driver but not another. Neither benefit is necessarily better than the other—they are different. Neither is constitutionally compelled, and neither confers or withholds a fundamental right. The statute offers alternative options, but Clarke and Bergeson want both options. But they have failed to establish that one of the groups is treated differently *to the detriment* of the other group. A driver's choice does not produce a discriminatory outcome, only different comparable consequences. The fact that Clarke and Bergeson want the benefit of both options does not demonstrate discriminatory treatment by the government of persons who are similarly situated.

None of the cases Clarke and Bergeson cite involve a simple choice between alternative opportunities, as this case does. Unlike the cases Clarke and Bergeson cite, drivers are not punished under RCW 46.20.385 if they choose to avail themselves of their statutory right to appeal the suspension or revocation. They simply maintain the status quo of their suspension or revocation.

In *Knowles v. Iowa Dep't of Transp.*, 394 N.W.2d 342 (1986), drivers convicted of DUI who acquiesced to the administrative revocation or who appealed but did not prevail at an administrative hearing received only a 120-day license revocation. *Knowles*, 394 N.W.2d at 344. However, a convicted driver who prevailed in an administrative revocation

proceeding based on the same occurrence incurred a one-year license revocation. *Id.* In other words, the punishment was different based on the result of the challenge. Here, the IIDL statute is not a punishment statute; it has nothing to do with the severity of the sanction imposed. The length of the license revocation remains the same irrespective of whether a driver obtains an IIDL.

In *Voyles v. Thorneycroft*, 398 F. Supp. 706 (Ariz. 1975), the federal district court found an Arizona statute, which rescinded a DUI suspension for failure to submit to a breath test if the driver pled guilty, impermissibly burdened a defendant's Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a jury trial. The court then summarily concluded, without any explanation or analysis, that the statute also violated the Equal Protection clause of the Fourteenth Amendment. *Id.* at 707. The *Voyles* court did not even explain what level of scrutiny it applied.³ Accordingly, *Voyles* is not instructive here.

Clarke and Bergeson also rely on *Beazley v. Armour*, 420 F. Supp 503 (Tenn. 1976). There, drivers challenged the requirement that drivers involved in automobile accidents file and maintain proof of financial responsibility for three years if they obtained a judgment relieving them of

³ Presumably the court applied a heightened level of scrutiny, since it found that the statute impermissibly burdened substantive constitutional rights. The conclusion, therefore, does not apply to the present case where no fundamental right or suspect class is at issue and only rational basis scrutiny applies.

liability connected with an accident, satisfied any judgment rendered as a result of the accident, or if they obtained releases from all other parties to the accident. *Id.* at 508. No such requirement was imposed on drivers if after a period of one year, there was no court action brought arising from the accident. *Id.* The plaintiffs argued that it discouraged drivers subject to the financial responsibility laws from bringing potentially meritorious claims to avoid the financial responsibility requirement. *Id.* The difference between the Tennessee law and the IIDL statute here is that drivers who sought to vindicate their rights in Tennessee suffered an additional penalty—having to file proof of financial responsibility for three years. In contrast here, those who choose to appeal their appeal their administrative sanction and not apply for an IIDL simply maintain the status quo. They do not receive any additional penalty; they simply do not receive the additional privilege of being able to drive despite the suspended status of their driver’s licenses. Unlike *Beazley*, Clarke and Bergeson are not members of a class receiving less favorable treatment than another similarly situated class.

Clarke and Bergeson have failed to show the IIDL statute creates a discriminatory impact. Because there is no discriminatory impact, Clarke and Bergeson have failed to establish that they are receiving less favorable treatment.

4. Even if Clarke and Bergeson are members of a class receiving disparate, less favorable treatment, there is a rational basis for the classification.

Even if separate classes and disparate treatment exist, the legislative distinction is rational. The IIDL statute furthers the state's interest in conserving resources, maintaining the deterrent effect the implied consent statute has on drunk driving, and in obtaining finality in the administrative appeal process in exchange for allowing drivers to continue driving despite their license suspensions.

"In reviewing the statute, the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification." *American Legion Post #149 v. Dep't of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008). "The classification need not be made with 'mathematical nicety,' and its application may 'result[] in some inequality.'" *Id.* (internal quotations omitted). Moreover, the State has no obligation to produce evidence to support the rationality of a classification. *State v. Wallace*, 86 Wn. App. 546, 937 P.2d 200 (1997). "A legislative choice may be based on rational speculation." *Id.* at 554.

The State has a legitimate interest in protecting the public from alcohol-impaired drivers. As such, the State suspends or revokes the licenses of drivers who are DUI or who refuse a breath test. However, the State understands that many of these individuals will drive with suspended

or revoked licenses to get to work or for other reasons. The IIDL statute allows these drivers the opportunity to continue driving in a legally authorized way, while still protecting the public from alcohol-impaired drivers. H.B. Rep. on Engrossed Second Substitute H.B. 3254, at 4, 60th Leg., Reg. Sess. (Wash. 2008). (public testimony in support of bill). In choosing to confer the benefit of continuing to drive to these drivers, the state is allowing them to evade the consequences of the license revocation. In exchange for that benefit, the statute requires that the driver waive his statutory right to appeal.

Under the IIDL statute, the State confers a substantial benefit on the driver—namely, the ability to continue driving despite the suspension or revocation of his license—and the driver, in exchange, confers a substantial benefit on the State—namely, the conservation of state resources. Just as it is not unconstitutional for the State to extend a benefit to a criminal defendant who, in turn, extends a benefit to the State by pleading guilty, it is not unconstitutional for the Department to extend a benefit to a driver who agrees to waive a hearing or appeal. *Brady v. U.S.*, 397 U.S. 742, 752-53, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970).

The Court in *Brady* indicated that conservation of state and judicial resources may be a valid consideration. *Id.* In analyzing the benefits conferred on each party by a criminal defendant's choice to plead guilty,

the Court acknowledged that “[f]or the State, there are also advantages . . . with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.” *Id.* at 752. The Court further stated: “we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who, in turn, extends a substantial benefit to the State.” *Id.* at 753. The Court recognized the “mutuality of advantage” that a guilty plea provides to each party to it, evidenced by “the fact that, at present, well over three-fourths of the criminal convictions in this country rest on pleas of guilty.” *Id.* at 752.

Notwithstanding the U.S. Supreme Court’s acknowledgment that the conservation of state resources can be considered, Clarke and Bergeson suggest that conservation of resources may not be used to justify legislation. Appellant’s Opening Br. at 24. In support of their argument, Clarke and Bergeson cite to *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982), and *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971). Appellant’s Opening Br. at 24. Both cases are distinguishable.

Plyler involved Texas’s practice of denying undocumented school-age children the free public education it provided to children who were

citizens or legally admitted immigrants. *Plyler* is distinguishable for multiple reasons. First, enumerating the “costs to the Nation and to the innocent children who are [the] victims” of the challenged statute, the Court applied a heightened level of scrutiny and required the state to demonstrate the disparate treatment furthered a “substantial goal of the State.” *Plyler*, 457 U.S. at 223-24. Second, the legislation itself in *Plyler* concerned the allocation of state resources: paying for children’s education. The Court said that “a concern for the preservation of resources, standing alone, can hardly justify the classification used in allocating those resources.” *Id.* at 227 (citing *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971)). “The State must do more than justify its classification with a concise expression of an intention to discriminate.” *Id.* (citing *Examining Bd. V. Flores de Otero*, 426 U.S. 572, 605 (1976)).

As Clarke and Bergeson concede, the present case does not involve a suspect class, nor does it impose “a lifetime of hardship on a discrete class of children not accountable for their disabling status.” *Id.* at 223. Therefore, the State must only demonstrate that the legislation is rationally related to a legitimate purpose. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). And, unlike the Texas law, the IIDL statute does not allocate state resources to one class of persons and deny those same resources to another. Therefore, unlike in *Plyler*, the preservation of state

resources is not circularly offered as justification for a law dealing primarily with the allocation of resources; the IIDL law concerns the safety of Washington's roadways.

Graham is also distinguishable. *Graham* involved an Arizona law that denied public assistance to those who were not U.S. citizens or who had not resided in the United States for 15 years. *Graham*, 403 U.S. at 366-67. The Court said that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.” *Id.* at 372. The Court applied strict scrutiny and held that preservation of resources was not sufficiently compelling to justify the discrimination. *Id.* at 375-76. Quoting *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), the Court said that a “State has a valid interest in preserving the fiscal integrity of its programs. . . . [But] [t]he saving of welfare costs cannot justify an otherwise invidious classification.” *Id.* at 375. Here, the classification Clarke and Bergeson assert is not so “invidious” as birthplace or length of residency and is not inherently suspect, and no fundamental right is implicated. And again, like in *Plyer* and unlike the IIDL statute, the relevant statutes in *Graham* dealt explicitly with the allocation of state resources—welfare benefits.

In contrast to those cases, the IIDL statute is not an economic statute that explicitly allocates state resources; it is a public safety statute.

Maintaining a deterrent against alcohol-impaired is an important public safety goal. But if the statutory scheme were to allow a driver to completely evade the consequences of driving under the influence by obtaining an IIDL and the ability to continue driving while also being allowed to proceed with a challenge to the suspension, it would undermine the deterrent effect of the suspension. If a person chooses to obtain an IIDL, the license suspension or revocation remains on his or her record, and a harsher sanction will result for a subsequent incident of DUI. RCW 46.20.3101(1)(b), (2)(b). But if the person is also allowed to seek reversal of the administrative sanction while also being allowed to continue driving, it undermines the intended deterrence of the implied consent sanctioning scheme. Requiring the trade-off, therefore, maintains the deterrent effect of the administrative suspension process.

The IIDL statutory scheme parallels the advantages of a plea bargain, where by entering into a plea bargain the defendant knowingly and voluntarily waives certain fundamental and constitutional rights to have a trial by jury of one's peers and to appeal a conviction. In exchange for that plea and waiver, the defendant may receive a conviction based on a reduced charge, a recommendation for a more favorable sentence, or the inclusion or exclusion of certain conditions. Similarly here, a driver knowingly and voluntarily waives the statutory right to appeal the

administrative suspension or revocation in order to obtain the substantial benefit of the continued ability to drive despite the suspended or revoked status of his or her driver's license.

The statute is also rationally related to the State's objective in obtaining finality of the administrative proceedings. If the State is going to allow a driver whose license has been suspended or revoked for DUI to continue driving, then it is reasonable for it to expect that, in exchange, the driver will end the administrative appeal process and accept the suspension or revocation.

Finally, in *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 800 P.2d 367 (1990), Ford Motor Co. challenged the portion of Washington's "lemon law" that imposes on the manufacturer continuing damages of \$25/day and payment of attorney fees if the consumer ultimately prevails in an appeal. *Ford Motor Co.*, 115 Wn.2d at 561. The statute imposes no such penalty on consumers if the manufacturer ultimately prevails. *Id.* Ford asserted the provision violated equal protection guarantees by singling out a class of litigants for onerous penalties for seeking redress in the courts. *Id.* The Washington Supreme Court disagreed. Applying the rational basis test and stating that "[e]qual protection does not require that legislative efforts be perfect," the Court found that the statutory scheme allows manufacturers to determine their choice whether to seek review in

the courts upon the relative merits of each case. *Id.* at 567. Similarly, here, while it may not be a perfect scheme, the IIDL statute allows a driver suspended under the implied consent statute to determine his choice whether to continue to pursue an appeal of the suspension or to waive that right and, in exchange, be allowed to continue driving despite the suspension.

Clarke and Bergeson have failed to prove beyond a reasonable doubt that the IIDL statute violates equal protection. The IIDL statute is relevant to maintaining a legitimate state objective, and it does not create any arbitrary classifications.

C. The IIDL Statute Does Not Violate Substantive Due Process

1. Clarke and Bergeson should not be permitted to raise their due process claim for the first time on appeal.

This court should decline to consider Clarke and Bergeson's due process argument because it is raised for the first time on appeal, and Clarke and Bergeson fail to show the superior court committed a "manifest error affecting a constitutional right." *See* RAP 2.5(a)(3); *State v. Pulfrey*, 154 Wn.2d 517, 529, 111 P.3d 1162 (2005) ("[W]e do not consider the constitutional argument because it was not raised below.").

For the Court to consider an argument raised for the first time on appeal, Clarke and Bergeson must show both that "(1) the error implicates

a specifically identified constitutional right, and (2) the error is ‘manifest’ in that it had ‘practical and identifiable consequences’ in the trial below.” *State v. Bertrand*, 165 Wn. App. 393, 400, 267 P.3d 511 (2011) (defendant could not challenge the trial court’s special verdict jury unanimity instruction on appeal because the alleged error was neither constitutional nor manifest). Under RAP 2.5(a)(3), a manifest error requires a party to show actual prejudice. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Clarke and Bergeson fail to address either requirement of the two prong test, and they fail to fulfill either requirement of the test. First, the privilege to drive is not a “specifically identified constitutional right.” Clarke and Bergeson therefore fail to show that any alleged error is of constitutional magnitude. Moreover, Clarke and Bergeson do not argue and cannot show actual prejudice.

Clarke and Bergeson had ample opportunity to raise the argument below and did not do so. Their new due process argument should not be considered.

2. Even if this Court considers the substantive due process argument, the IIDL statute complies with due process.

The IIDL statute does not unconstitutionally deny access to the courts. Substantive due process generally asks whether the government

abused its power by arbitrarily depriving a person of a protected interest, or by basing the decision on an improper motive. *Nieshe v. Concrete School Dist.*, 129 Wn. App. 632, 640-41, 127 P.3d 713 (2005). Thus, as a threshold issue, Clarke and Bergeson must establish that they were deprived of a constitutionally protected liberty or property interest. *Id.* at 641. While property rights created under state law warrant certain procedural due process protections, “[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.” *Albright v. Oliver*, 510 U.S. 266, 272, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). “These fields likely represent the outer bounds of substantive due process protection.” *Nieshe*, 129 Wn. App. at 642 (quoting *Nunez v. City of L.A.*, 147 F.3d 867, 871 n.4 (9th Cir. 1998)). Substantive rights can only be created by fundamental interests derived from the Constitution. *Id.* at 642.

Here, Clarke and Bergeson have not established that the IIDL statute deprives them of a constitutionally protected, fundamental liberty or property interest. A driver’s license is a state-created property interest than cannot be deprived without due process of law. *State v. Nelson*, 158 Wn.2d 699, 702, 147 P.3d 553 (2006). But the fact that the state guarantees driver’s license holders certain due process procedures does

not create substantive liberty interests warranting *substantive* due process protections.

As Clarke and Bergeson note, neither driving nor the right of appeal is a fundamental right. Appellant's Opening Br. at 33. Due process does not guarantee the right to appeal. *Ford Motor Co.*, 115 Wn.2d at 569. Where the State has provided a statutory right of appeal, a person may not be deprived of that right unless the balance of state and private interests favors the government scheme. *Id.* In *Ford Motor Co.*, a "lemon law" provision imposed "continuing damages of \$25/day and payment of attorney fees on manufacturers if the consumer ultimately prevail[ed] in an appeal but not on consumers if the manufacturer ultimately prevail[ed]." *Id.* at 561. Ford argued that the provision was a penalty that discouraged meritorious appeals by manufacturers and effectively required manufacturers to provide a remedy prior to appeal. *Id.* at 566, 570. The Washington Supreme Court held that Ford had not established that the statutory scheme violated substantive due process by restricting the right to appeal. *Id.* at 570.

The consequence for drivers pursuing an appeal here is significantly less onerous than for manufacturers in *Ford Motor Co.* Drivers simply maintain the status quo if they choose to appeal rather than obtain an IIDL. There is no penalty imposed on drivers who appeal.

Accordingly, under *Ford Motor Co.*, Nielsen has not demonstrated a substantive due process violation here.

In *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), Amunrud challenged an order suspending his commercial driver's license for failing to pay child support, alleging he had a fundamental economic right to pursue an occupation as a taxi driver. The court acknowledged that professional and motor vehicle licenses create interests requiring due process protection. *Id.* at 219. It further acknowledged that the pursuit of an occupation or profession is a liberty interest protected by due process. *Id.* However, determining that rational basis was the appropriate standard of review, the court found the State's interest in creating a strong incentive for those owing child support to make timely payments was rationally related to the suspension of a professional license. *Id.* at 224.

The IIDL waiver provision implicitly indicates that the legislature balanced competing objectives and determined it would not provide drivers whose licenses were suspended for DUI the right to have their cake and eat it too: that is, the legislature reasonably determined not to provide drivers the continued privilege to drive with an IIDL despite the suspended or revoked status of their driver's license and simultaneously still be able to continue to challenge the suspension or revocation.

Maintaining a deterrent against DUI is an important public safety purpose. The public is entitled to drive safely on the roadways, and when a statutory scheme allows a driver to completely evade punishment, there is no deterrent. Requiring drivers to choose between an appeal while serving their license suspension, and obtaining an IIDL and evading the consequences of their license suspension, keeps drivers accountable, which keeps roads safer.

VI. CONCLUSION

By operation of law, Clarke and Bergeson knowingly and intelligently waived their statutory right to appeal the revocation of their driver's licenses when they applied for and received IIDLs. They made a voluntary choice to continue driving despite the revoked status of their licenses instead of pursuing an appeal of the administrative sanction. The IIDL statute offering that choice violates neither their right to equal protection nor their substantive due process rights. Because Clarke and Bergeson have not established that the IIDL statute is unconstitutional beyond a reasonable doubt, the Department respectfully requests that this Court affirm the superior courts' orders of dismissal.

RESPECTFULLY SUBMITTED this 8 day of June, 2012.

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Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, ROXANNE IMMEL, hereby state and 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 8th day of June, 2012, I caused to be served a true and correct copy of DEPARTMENT'S RESPONSE BRIEF, by U.S.

Mail, postage prepaid to:

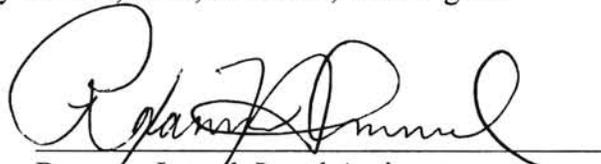
RYAN ROBERTSON
800 FIFTH AVENUE, SUITE 4000
SEATTLE, WA 98104

Original plus one copy filed with:

RICHARD D. JOHNSON, CLERK
COURT OF APPEALS, DIVISION I
ONE UNION SQUARE
600 UNIVERSITY STREET
SEATTLE, WA 98101-1176

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

DATED this 8th day of June, 2012, in Seattle, Washington.


Roxanne Immel, Legal Assistant