

NO. 68133-8-I

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

KAI NIELSEN,

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF LICENSING,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Following a lawful arrest for driving under the influence of intoxicating liquor, the Department of Licensing revoked Kai Nielsen's driver's license pursuant to the implied consent statute, RCW 46.20.308.¹ After the Department issued a final order sustaining the proposed license revocation following Nielsen's administrative hearing, Nielsen applied for and received an ignition interlock driver's license (IIDL), a permit that allowed him to continue driving noncommercial vehicles equipped with an ignition interlock device despite the revocation of his driver's license.

Under the language of the IIDL statute and explained on the face of the IIDL application, a driver whose license has been suspended or revoked under the implied consent law and who receives an IIDL waives his statutory opportunity to appeal the administrative sanction. RCW 46.20.385(1)(b). Despite applying for and receiving an IIDL and knowingly waiving his right to a further appeal, Nielsen appealed the revocation to superior court.

¹ This case involves the same challenges to the ignition interlock driver's license statute as those raised in the consolidated appeals of *Russell Clarke v. Dep't of Licensing* and *Robert Bergeson v. Dep't of Licensing*, No. 67831-1 and 67862-1-1, respectively. Nielsen filed a motion to consolidate his case with Clarke and Bergeson's, which this Court denied on January 27, 2012, stating that after briefing in the present case was completed, the Court would consider whether this matter should be consolidated or linked with the other cases or should be stayed pending a decision in the other cases.

The superior court properly dismissed Nielsen's appeal because Nielsen expressly waived his right to appeal, and the IIDL statute does not violate his right to equal protection or substantive due process. The IIDL statute does not improperly create separate classes of drivers: it 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). Even if it creates separate classes, those classes are not similarly situated, and if they are, there is a rational basis for the classification.

Moreover, the IIDL statute does not deprive drivers of a constitutionally protected liberty or property interest. It therefore does not violate drivers' substantive due process rights. Accordingly, this Court should affirm the superior court's order dismissing Nielsen's appeal.

II. COUNTERSTATEMENT OF THE ISSUES

1. Under RCW 46.20.385, a person who receives an ignition interlock driver's license waives his statutory right to appeal under RCW 46.20.308. Did the superior court properly dismiss Nielsen's appeal when Nielsen applied for and received an ignition interlock driver's license before he appealed his administrative driver's license revocation, thereby knowingly waiving his 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. 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 the implied consent statute, RCW 46.20.308, may apply for an ignition interlock driver's license. RCW 46.20.385(1)(a). An IIDL is a permit issued 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). 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).

After Kai Nielsen was arrested for driving under the influence of intoxicating liquor or drugs (DUI) and refusing to submit to the evidential breath test, the Department revoked his license for one year pursuant to

RCW 46.20.308 and 46.20.3101(1)(a). CP 26. Nielsen requested an administrative hearing to challenge the revocation, and the hearing officer sustained the revocation and issued a final order. CP 135-39. Nielsen then applied for and received an IIDL. CP 38, 40. The application advised Nielsen in 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 38. Despite knowingly waiving his statutory right to further appeal the administrative revocation by applying for and receiving an IIDL, Nielsen appealed the revocation order to Snohomish County Superior Court. CP 211-12.

The Department moved the superior court to dismiss Nielsen’s appeal on the basis that Nielsen had waived his right to appeal when he applied for and received the IIDL. CP 91-94. In response, Nielsen challenged the IIDL statute on equal protection and substantive due process grounds. CP 17-36. Finding the IIDL statute violated neither equal protection nor substantive due process principles, the superior court granted the Department’s motion and dismissed the appeal. CP 4. This appeal followed.

IV. STANDARD OF REVIEW AND BURDEN OF PROOF

Nielsen challenges 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

The superior court properly dismissed Nielsen’s appeal because Nielsen knowingly waived his statutory right to appeal the administrative revocation of his driver’s license when he applied for and received an

IIDL. RCW 46.20.385(1)(b). The superior court also correctly concluded that the IIDL statute does not violate equal protection or substantive due process because the law does not create separate classes of drivers who are similarly situated yet receive disparate treatment, nor does it involve any fundamental rights that would implicate substantive due process principles.

A. The Superior Court Properly Dismissed Nielsen's Appeal Because the IIDL Statute Does Not Violate Equal Protection

The IIDL statute does not violate equal protection because it does not improperly create separate classes of drivers. Even if the law creates separate classes of drivers, those classes are not similarly situated. Even if the separate classes of drivers are similarly situated, Nielsen has not demonstrated that there is a discriminatory impact and that he is in a class receiving less favorable treatment. Finally, even assuming, *arguendo*, that Nielsen has demonstrated that the law creates separate, similarly situated classes and that he is the class receiving less favorable treatment, there is a rational basis for the classification. 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.

Nielsen concedes that the standard of review for his equal protection challenge is rational basis. Appellant's Opening Br. at 8. It is thus Nielsen's burden to show "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). Under rational basis review, "the classification is upheld unless [it] rests on grounds wholly irrelevant to the achievement of legitimate state objectives." *State v. Harner*, 153 Wn.2d 228, 235-36, 103 P.3d 738 (2004).

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, Nielsen 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, Nielsen must demonstrate that there are two classes, that the two classes are similarly situated, and that he is in the class receiving less favorable treatment. *See Harris v. Charles*, 151 Wn. App. 929, 936, 214 P.3d 962 (2009), *aff'd*, 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, Nielsen 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 Nielsen is 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, Nielsen has failed to satisfy this “heavy burden.” *Conklin*, 107 Wn.2d at 417.

1. The IIDL statute does not create a class distinction requiring equal protection analysis.

Success under any of the articulated tests requires Nielsen to first establish a challenged classification. *State v. Osman*, 126 Wn. App. 575, 583, 108 P.3d 1287 (2005). The IIDL statute does not violate equal protection because it does not improperly create separate classes of drivers requiring equal protection analysis. The IIDL statute allows any licensee convicted of a violation of RCW 46.61.502 (driving under the influence), 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 under the implied consent statute—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 thus 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.

The fact that a subset of administratively suspended drivers eligible to apply for an IIDL waives its statutory right for 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 constitute 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

² Throughout his brief, Nielsen asserts 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 15, 21. 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).

voluntary choice does not create separate class by virtue of the respective choices.

A driver who chooses to waive his statutory opportunity 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 Nielsen cites in support of his 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.* Nielsen thus has 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 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. Under Nielsen's theory, the two sub-classes the law 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 convicted criminally 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. 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). Neither law creates separate classes, just different comparable consequences as a result of an informed choice.

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, Nielsen has not demonstrated that there is a discriminatory impact and that he is a member 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.

Nielsen has 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 Nielsen wants both options. But he has 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 Nielsen wants the benefit of both options does not demonstrate discriminatory treatment by the government of persons who are similarly situated.

None of the cases Nielsen cites involves simple choice between alternative opportunities, as this case does. Unlike the cases Nielsen cites, 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.

Nielsen also relies 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 liability connected with an accident, satisfied any judgment rendered as a result 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.

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 driver’s license suspension or revocation 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*, Nielsen is not a member of a class receiving less favorable treatment than another similarly situated class.

Nielsen has failed to show the IIDL statute creates a discriminatory impact. Because there is no discriminatory impact, Nielsen has failed to establish that he is receiving less favorable treatment.

4. Even if Nielsen is a member 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. These factors, when considered together, provide a sufficient basis to distinguish between those who have chosen to obtain an IIDL and those who have not. *See Conklin*, 107 Wn.2d at 423.

"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 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, Nielsen suggests that conservation of resources may not be used to justify legislation. Appellant's Opening Br. at 23. In support of his argument, Nielsen cites *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 23. 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 Nielsen concedes, 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 *Plyer*, 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 Nielsen asserts is not "invidious," like birthplace or length of residency, or inherently suspect, and no fundamental right is implicated. And again, like in *Plyer*, 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 driving 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 appeal waiver, therefore, helps maintain the deterrent effect of the administrative sanction.

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 a 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.

Nielsen has 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.

B. The IIDL Statute Does Not Violate Substantive 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, Nielsen must establish that he was 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, Nielsen has not established that the IIDL statute deprives him of a constitutionally protected, fundamental liberty or property interest. A driver’s license is a state-created property interest that 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 Nielsen notes, neither driving nor the right of appeal is a fundamental right. Appellant’s Opening Br. at 18, 31. Due process does not guarantee a 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 prevails in an

appeal but not on consumers if the manufacturer ultimately prevails.” *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, Nielsen knowingly and intelligently waived his statutory opportunity to appeal the revocation of his driver's licenses when he applied for and received an IIDL. He made a voluntary choice to continue driving despite the revoked status of his license, instead of pursuing an appeal of the administrative revocation. The IIDL statute

offering that choice violates neither his right to equal protection nor his substantive due process rights. Because Nielsen has not established that the IIDL statute is unconstitutional beyond a reasonable doubt, the Department respectfully requests that this Court affirm the superior court's order of dismissal.

RESPECTFULLY SUBMITTED this 13th day of June, 2012.

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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 13th day of June, 2012, I caused to be served a true and correct copy of BRIEF OF RESPONDENT, via hand delivery by Dan Marvin, to:

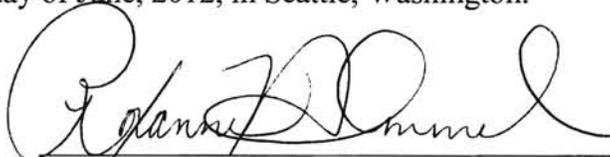
RYAN ROBERTSON
800 FIFTH AVENUE, SUITE 4000
SEATTLE, WA 98104

Original plus one copy filed by ABC Legal messenger 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 13th day of June, 2012, in Seattle, Washington.



Roxanne Immel, Legal Assistant