NO. 91606-3

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES DIDLAKE, ET AL.,

Petitioners,

vs.

WASHINGTON STATE, DEPARTMENT OF LICENSING,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

LEAH HARRIS,
WSBA # 40815
Assistant Attorney General
Attorneys for Respondent
OID #91020
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Phone: (206) 464-7676
Fax: (206) 389-2800
E-mail: LALSeaEF@atg.wa.gov

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I. INTRODUCTION

Under Washington's implied consent law, drivers who have been arrested for driving under the influence (DUI) must pay a statutory filing fee to obtain an administrative hearing to challenge the suspension or revocation of their driver's licenses. Indigent drivers can obtain a fee waiver, and in fact, the fee was waived in approximately 36 percent of administrative challenges in 2009–2011. The Petitioners ("drivers") are not indigent. Each paid the filing fee and had hearings where they prevailed. They claim the fee violates procedural due process. But the U.S. Supreme Court, Washington courts, and other state and federal courts have consistently determined that a filing fee for access to a hearing or court is constitutionally permissible when the interest involved is not fundamental. Even when a fundamental right is implicated, filing fees violate due process only as applied to indigent litigants.

The Court of Appeals properly held that the filing fee here does not violate procedural due process because (1) a person's interest in having a driver's license is not fundamental, and (2) the hearing fee is waived for indigent drivers. This case does not involve a significant constitutional question requiring this Court's review because the question has already consistently been resolved in the state's favor, and the only case the

drivers argue is in conflict is distinguishable. This Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUES

The issues raised in the Petition for Review are unsuitable for this Court's review under RAP 13.4(b). However, if the Court were to accept review, the issues before the Court would be:

1. Outside of fundamental rights, a filing fee for access to court or administrative hearings generally satisfies due process, even for indigent litigants. When the privilege to drive is not a fundamental right, and the Department waives the fee for indigent drivers, does the statutory fee for an implied consent hearing satisfy procedural due process?

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

3. Each of the drivers paid the DUI hearing fee and obtained a hearing. Since the petitioners were given notice and had hearings, do their as applied and facial challenges to the fee fail?

III. COUNTERSTATEMENT OF THE CASE

A. The Department of Licensing Provides Pre-Suspension Hearings for Drivers Who Timely Request a Hearing and Either Pay a Filing Fee or Show Indigency

The operative facts in this case are undisputed. Under what is known as Washington's implied consent statute, drivers in this state are deemed to have consented to a breath test if arrested for DUI. Former

RCW 46.20.308(1) (2012).[1] When the arrested driver refuses the test, or takes the test and the result indicates alcohol or drug levels above the legal limit, the arresting officer must notify the Department and submit a sworn report stating statutory grounds for a license suspension. Former RCW 46.20.308(6)(e) (2012). Upon receiving the report and confirming it satisfies basic statutory requirements, the Department suspends, revokes, or denies the driver's license as required by RCW 46.20.3101. Former RCW 46.20.308(7) (2012). The suspension does not become effective until 60 days after the arrest, allowing time for notice and a hearing if the driver requests one. Former RCW 46.20.308(8) (2012).

The arresting officer must serve the driver with written notice of the Department's intent to suspend the driver's license. Former RCW 46.20.308(6)(b) (2012). To challenge the proposed suspension and obtain a hearing, the driver must file a hearing request within 20 days of the notice and "shall pay a fee" "as part of the request." Former RCW 46.20.308(8). The Department may waive—and in fact does waive—the fee for drivers who are indigent as defined in

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

RCW 10.101.010.[2] Former RCW 46.20.308(8); CP 38 ¶ 5, 84. If the driver requests a hearing, the license suspension does not begin until a hearing officer sustains the suspension. Former RCW 46.20.308(8). Thus, all administrative hearings occur before a suspension takes effect. In this case, the drivers received notice of their hearing rights and exercised that right when they paid the DUI hearing fee and had their hearings.

B. The Legislature Adjusts Fees to Ensure Cost Recovery

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

In 2002, the Legislature enacted RCW 46.01.360, which requires the Department to submit a biennial fee study to the house and senate transportation committees. Laws of 2002, ch. 352, § 27. The fee study is to "ensure cost recovery for department of licensing services." RCW 46.01.360. "Based on this fee study, the Washington state legislature will review and adjust fees accordingly." RCW 46.01.360.[3]

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[2] The Department's website has an implied consent hearing request form and an application for an indigency fee waiver. *See* Department of Licensing, Driver Licenses, Suspended License, Hearings, How to Request a Hearing, *available at* http://www.dol.wa.gov/driverslicense/hearingsrequest.html (last visited May 4, 2015).

[3] Based on that study, the Legislature adjusted the fees for various Department services, including the challenged fee, which the Legislature raised from $100 to $200 in 2005. *See* Laws of 2005, ch. 314, § 307. In 2012, the Legislature increased the fee for the second time, to $375, effective October 1, 2012. Laws of 2012, ch. 80, § 12.

According to the 2009–2011 biennial fee study, the approximate cost to conduct each DUI hearing was $413. CP 38 ¶ 5, 84. During the biennium, the Department conducted a total of 28,405 hearings and waived the fee in 10,260 cases, about 36 percent. CP 38 ¶ 5, 84.

C. The Drivers Had Notice and a Full DUI Hearing, and Their Purported Class Includes Only Those Who Also Had a Hearing

At various times in 2010 or 2011, the drivers were all arrested for DUI and received notices of suspension. CP 2, 9. Each requested a DUI license suspension hearing, paid the $200 filing fee (none claimed indigency or requested a waiver), and had their hearings, where they prevailed.[4] CP 2-3, ¶¶ 1.1-1.3.[5]

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

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

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

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

The Department filed a motion to dismiss under CR 12(b)(6), arguing the drivers could not show any set of facts that would prove that the filing fee for non-indigent drivers violates procedural due process. CP 16-32. On the same day, the drivers filed a motion for class certification, in which they defined their proposed class as "[a]ll persons who have, within the applicable statute of limitations, paid a fee in order to receive a hearing under RCW 46.20.308." CP 254.

The superior court granted the Department's motion to dismiss and thus did not reach the motion for class certification. CP 238-44. After this Court denied direct review, the Court of Appeals affirmed, holding the filing fee for an administrative DUI suspension hearing is constitutional. *Didlake et al. v. Dep't of Licensing*, No. 71633-6-I, slip. op. at 15 (Wash. Ct. App. March 16, 2015). This Petition for Review followed.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Contrary to the drivers' assertions, this case does not involve a significant constitutional question, nor does the Court of Appeals' decision conflict with another appellate decision. RAP 13.4(b)(2), (3). Where, as here, the right involved is not fundamental and there is an indigency waiver, filing fees satisfy due process. Moreover, because all of the drivers had hearings, and the fee is waived for those who cannot pay it, the drivers

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Appellants' Opening Brief and Petition for Review (arguing only procedural due process).

cannot show the fee is unconstitutional facially or as applied to them. This Court should deny review.

A. This Case Does Not Involve a Significant Constitutional Question Requiring Review Because Courts at All Levels Have Consistently Rejected the Drivers' Procedural Due Process Argument

Prior case law amply addresses whether a filing fee to obtain an administrative hearing violates procedural due process. Under U.S. Supreme Court and Washington precedent, filing fees have repeatedly withstood procedural due process challenges. Only when a fundamental right is involved do filing fees violate due process, and even then, only if there is no indigency waiver available. The driving privilege is a substantial, but not fundamental, right, *City of Redmond v. Moore*, 151 Wn.2d 664, 671, 91 P.3d 875 (2004), and the Department waives the fee for indigent drivers. Courts have consistently concluded waiving fees for the indigent satisfies due process.

The drivers unsuccessfully attempt to distinguish their case from this mountain of precedent. Pet. for Review at 6 (arguing the drivers do not raise an "access" issue). But this case, like all other procedural due process challenges where the government seeks to deprive a person of property, is about whether the drivers were afforded notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Determining what process is due requires considering the nature of the right, the risk of erroneous deprivation, and the government interest. *Id.*

In the seminal case on filing fees, welfare recipients sought divorces without having to pay court fees. *Boddie v. Connecticut*, 401 U.S. 371, 372-73, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). The U.S. Supreme Court did not hold the fee was improper in every instance; it simply required an indigency waiver for those who could not afford the fee. The Court reasoned an access fee "may offend due process [when] it operates to foreclose a particular party's opportunity to be heard." *Id.* at 380. The Court held, "given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship," a state may not deny indigent divorce seekers the ability to adjust "a fundamental human relationship" simply by reason of their indigency. *Id.* at 373-74, 383.

The U.S. Supreme Court later clarified *Boddie* and limited its holding to situations where fundamental rights are involved. In *United States v. Kras*, the Court upheld a filing fee under due process as applied to an indigent bankruptcy petitioner who, "because of his poverty," was "wholly unable to pay or promise to pay the bankruptcy fees, even in small

installments." 409 U.S. 434, 438, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973). The Court explained that *Boddie* "obviously stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without the payment of fees." *Kras*, 409 U.S. at 450. *Boddie* involved a "fundamental" interest in one's own marital status, whereas a person's "interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the [bankruptcy act], does not rise to the same constitutional level." *Id.* at 444-45. The *Kras* Court recognized a heightened procedural due process protection for fundamental rights, requiring a cost-free opportunity to be heard for indigent litigants. *Id.* But even where a fundamental right is involved, the *Boddie* and *Kras* Courts did not hold filing fees were entirely invalid; fees are only invalid as applied to indigent litigants asserting fundamental rights.

Following *Boddie* and *Kras*, the U.S. Supreme Court upheld a statutory appellate court filing fee as applied to indigent welfare recipients who sought to appeal adverse agency decisions reducing their benefits. *Ortwein v. Schwab*, 410 U.S. 656, 658, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973). The Court held the indigent welfare recipients' interests in increased benefits, like the interest involved in *Kras*, "has far less constitutional significance than the interest of the *Boddie* appellants." *Ortwein*, 410 U.S. at 659 (citations omitted). The Court explicitly recognized that there was "no

fundamental interest" involved in the relief they sought. *Id.* Accordingly, the filing fee, even as applied to indigent welfare recipients, did not violate due process. *Id.* at 659-60.

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

The Washington Supreme Court has followed *Boddie*, *Kras*, and *Ortwein* to uphold filing fees under due process. Where no fundamental right is implicated, filing fees are permissible for all. And even where fundamental rights are involved, this Court has not invalidated filing fees in their entirety, but instead has only required indigency waivers.[7]

In *Housing Authority of King County v. Saylors*, this Court upheld an appellate filing fee for an indigent litigant defending an unlawful

[7] For access to court, the Washington Supreme Court has gone beyond what is constitutionally required and waived all mandatory fees and surcharges for indigent litigants by court rule adopted in 2010. GR 34(a); *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). This does not change the constitutional analysis.

detainer action initiated by the county housing authority. 87 Wn.2d 732, 557 P.2d 321 (1976). This Court held the fee did not violate due process because the interest involved—one's housing—was not fundamental, but rather "lies in the area of economics and social welfare." *Id.* at 739-44.

The Court of Appeals has also held that due process did not require a county to waive the fees necessary for an indigent judgment creditor to secure the execution of a sheriff's levy because the case was "one 'in the area of economics and social welfare.'" *Bowman v. Waldt*, 9 Wn. App. 562, 570, 513 P.2d 559 (1973) (quoting *Ortwein*, 410 U.S. at 660).

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

because one's interest in an occupational license is not fundamental, the filing fee did not violate due process. This was true even when the action was state-initiated, the fee was for the first opportunity to be heard, and the statute did not provide for an indigency waiver.

Even where jurisdictions have chosen to be more protective than *Boddie* and its progeny, holding filing fees for initial hearings involving non-fundamental rights can violate due process, those jurisdictions have done so only as applied to indigent litigants. *See Wiren v. Eide*, 541 F.2d 757, 763 (9th Cir. 1976) (requirement that people whose property has been seized pay a pre-hearing bond was unconstitutional only as applied to indigent claimants); *Whiteside v. Smith*, 67 P.3d 1240, 1242 (Colo. 2003) ($675 fee to obtain a mandatory independent medical examination before an injured worker can challenge the termination of his temporary disability benefits violated due process only as to indigent workers); *Varilek v. City of Houston*, 104 P.3d 849, 854 (Alaska 2004) (even though Alaska has explicitly "widened the right of access to the judicial system beyond the *Boddie* line of cases," a $200 administrative filing fee to challenge a notice of violation of zoning and land use codes denied due process only as to indigent claimants); *Boll v. Dep't of Revenue*, 528 N.W.2d 300 (Neb. 1995) (requiring prepayment of unpaid tax as a prerequisite to a hearing on appeal of tax assessments was unconstitutional only as applied to

indigent taxpayers); *Neff v. Comm'r of Dep't of Indus. Accidents*, 653 N.E.2d 556 (Mass. 1995) (statute requiring worker's compensation claimants to pay a $350 hearing fee to challenge a denial of benefits contained an implicit indigency waiver, which "obviate[d] the need . . . to address Neff's constitutional arguments"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. O'Neill*, 561 A.2d 917 (Conn. 1989) (requirement that manufacturer pay $250 filing fee to defend against consumer's complaint did not violate due process because statute provided for an economic hardship waiver).

Thus, courts nationwide have consistently held that even where a fundamental right is implicated, procedural due process does not require a court to strike down a filing fee entirely, as the drivers request. Even in the jurisdictions that have gone beyond the fundamental rights analysis in the *Boddie* line of cases, the courts have invalidated the fees only as to indigent litigants. Here, where no fundamental right is involved *and* the Department waives the fee for indigent drivers, the Court of Appeals properly followed U.S. Supreme Court and Washington precedent to find no due process violation. *Didlake*, slip op. at 9-15. Further review is unwarranted.

The drivers valiantly try to make almost the entire body of filing fee case law inapplicable (except for the one case they say supports their

position) by ignoring the question the *Mathews* due process test is designed to determine: whether the government has impermissibly burdened a person's opportunity to be heard.[8] *See* Pet. for Review at 6-9 (arguing based on the cases' facts, and not their constitutional holdings, that the cases are about "access" to the courts after a cost-free initial administrative hearing); *Mathews*, 424 U.S. at 332-34. By suggesting that government initiation of the action or the availability of an initial cost-free hearing affects the constitutional analysis, as opposed to the nature of the right at stake, the drivers essentially ignore the fundamental vs. non-fundamental distinction in the *Boddie* line of cases and discard the *Mathews* test. Like the *Boddie* filing fee cases, which examine whether the right implicated is fundamental or not, the first element of the *Mathews* test considers the nature of the underlying right. *City of Redmond v. Bagby*, 155 Wn.2d 59, 63, 117 P.3d 1126 (2005); *Mathews*, 424 U.S. at 335; *Didlake*, slip op. at 9.[9] Simply asserting that the initial opportunity to be heard must be cost-free assumes the ultimate issue. As these cases' holdings make clear, when the right implicated is a non-fundamental

[8] The drivers also argue that a party initially responding to *any* state-initiated action can never be required to pay a fee. Pet. for Review at 6. There is no support for such a categorical rule. "Due process is a flexible concept in which varying situations can demand differing levels of procedural protection." *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006) (citing *Mathews*, 424 U.S. at 334).

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

property right, a filing fee is a permissible condition on one's right to be heard.

Additionally *Morrison*, a Washington case that expressly follows the *Boddie* line of cases, is directly analogous because it involved precisely the same posture as this case: whether the state could compel an electrical contractor licensee to pay a fee to challenge state-initiated disciplinary action. *Morrison*, 168 Wn. App. at 273-75; *see* Pet. for Review at 10. The case law the Department and the Court of Appeals appropriately relied on concerns the constitutionality of requiring litigants to pay a fee to receive the process that is due. That is exactly what this case involves. The Court should reject the drivers' strained effort to distinguish the relevant filing fee case law in order to create an issue of constitutional importance. Review should be denied.

B. The Court of Appeals' Decision in This Case Does Not Conflict with Other Washington Decisions

As discussed above, the Court of Appeals' decision is consistent with this Court's decision in *Saylors* and the Court of Appeals' decisions in *Morrison* and *Bowman*. But the drivers suggest that *Downey v. Pierce County*, 165 Wn. App. 152, 267 P.3d 445 (2011), *review denied*, 174 Wn.2d 1016 (2012), conflicts with *Morrison*,[10] and now with *Didlake*. Pet.

[10] In seeking this Court's direct review of the superior court's decision in 2013, the drivers argued there was a conflict between *Morrison* and *Downey* warranting direct

for Review at 10-19. They are mistaken.

In *Downey*, the Court of Appeals struck down a mandatory $250 filing fee required for a dog owner to obtain a hearing to contest a county's dangerous animal designation. *Id.* at 166-67. However, *Downey* is distinguishable because the challenged ordinance "had no fee waiver provision, and the court did not address whether such a waiver for indigent dog owners would cure any due process violation." *Didlake*, slip op. at 14. Thus the *Downey* court's concern that the fee would "prevent many people from obtaining the review they are legally entitled to" is not present in this case because all indigent drivers can request a fee waiver, and the record contains no evidence that fee waivers have ever been improperly denied. *Downey*, 165 Wn. App. at 166. For this same reason, the drivers cannot meet the second *Mathews* factor: because a pre-deprivation hearing is afforded to all, they cannot establish a risk of erroneous deprivation without an opportunity to be heard. *Bagby*, 155 Wn.2d at 6; *Mathews*, 424 U.S. at 335.

Additionally, *Downey* addressed the unique, sentimental value of a dog as a family pet. The court stated that a dog owner's interest in her pet is "arguably more than a mere economic interest because pets are not

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review under RAP 4.2(a)(3). Statement of Grounds for Direct Review at 8-10. This Court denied direct review.

fungible." *Downey*, 165 Wn. App. at 165;[11] *see also Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 766, 63 P.3d 142 (2002) (dog owners' interest in keeping their pets "is greater than a mere economic interest, for pets are not fungible"); *Mansour v. King Cnty.*, 131 Wn. App. 255, 265, 128 P.3d 1241 (2006) ("many people consider pets part of the family"); *Rabon v. City of Seattle*, 107 Wn. App. 734, 744, 34 P.3d 821 (2001) (recognizing a potential argument "that a person's relationship with a dog deserves more protection than a person's relationship with, say, a car").[12] Although the *Downey* court stated that "due process requires access to an initial evidentiary hearing without charge," *Downey*, 165 Wn. App. at 163, nothing in the opinion suggests the court intended *Downey* to be applied beyond its unique context. Rather, *Downey* discussed the importance of family pets and described them as non-fungible in that context. *Downey*, 165 Wn. App. at 165.

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[11] The drivers are mistaken in their assertion that a driver's license is not fungible. Pet. for Review at 19-20. Drivers whose licenses are suspended for DUI may obtain ignition interlock devices and continue to drive, RCW 46.20.385, or may take alternative forms of transportation. *State v. Clifford*, 57 Wn. App. 127, 130, 797 P.2d 571 (1990). A driver's interest in his or her license is not like one's interest in a family dog.

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

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

The drivers suggest that the Court of Appeals' opinion here conflates the analysis for the two hearings in *Downey*: an initial auditor's review, which the court found insufficient, and a second, more formal, hearing examiner's review. *Downey*, 165 Wn. App. at 157-58; Pet. for Review at 16. To the contrary, the opinion merely notes the heightened concern the *Downey* court gave the unique interest involved and the inadequate procedure afforded. Slip op. at 12-14. Indeed, that is precisely what distinguishes *Downey* from *Didlake* and *Morrison*.

Just because the outcome of the weighing of the *Mathews* balancing factors was different in another case with different facts does not mean that there is a conflict with this case warranting this Court's review. *Downey* is distinguishable, as the Court of Appeals properly determined.

C. The Drivers' Due Process Challenge Fails Facially and As-Applied to Them

The Court of Appeals correctly concluded that the drivers cannot establish either a facial or an as-applied due process challenge to the hearing fee. Slip op. at 15. To prevail on a facial challenge, the drivers must prove "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond*, 151 Wn.2d at 669. Here, it is undisputed that the filing fee does not bar access

to a hearing to drivers who can pay it, and the hearing fee is routinely waived for indigent drivers. Indeed, the drivers have failed to claim a single instance where the fee has deprived a driver of a DUI hearing. Thus, there are plainly circumstances under which the filing fee does not run afoul of procedural due process.

Similarly, the drivers cannot bring an as applied challenge, in which they would need to establish that the "application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *City of Redmond*, 151 Wn.2d at 668-69. Here, the drivers cannot argue that the filing fee chilled the exercise of their right to DUI hearings. *See Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (for a due process violation, "the party must be prejudiced"); *United States v. Mendoza-Lopez*, 7 F.3d 1483, 1485 (10th Cir. 1993) ("fundamental unfairness sufficient to constitute a violation of due process" requires "prejudice from the alleged unfairness"), *cert. denied*, 511 U.S. 1036 (1994). The drivers all had administrative hearings because they were able to and did pay the fee. Accordingly, they "do[] not show that the requirement is unconstitutional as applied to [them]." Slip. op. at 15.

V. CONCLUSION

This Court should deny review because the Court of Appeals' decision is consistent with U.S. Supreme Court and Washington precedent, as well as decisions from other federal and state courts.

RESPECTFULLY SUBMITTED this 4th day of June, 2015.

ROBERT W. FERGUSON
Attorney General

LEAH HARRIS,
WSBA # 40815
Assistant Attorney General
Attorneys for Respondent

Appendix

2012

SESSION LAWS

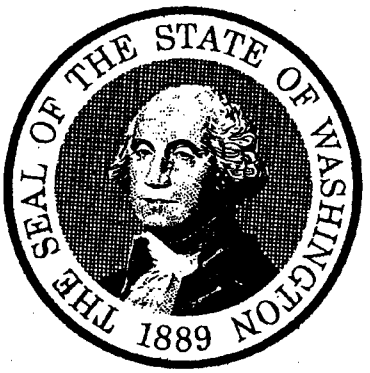
OF THE

STATE OF WASHINGTON

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROOF OF SERVICE

I, Katie Moceri, 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-titled action.

2. That on the 4th day of June 2015, I caused to be served by email a true and correct copy of **Answer to Petition for Review**, as follows to:

Via Email by agreement of the parties

Andrea Robertson (andy@robertsonlawseattle.com)
Ryan Robertson (ryan@robertsonlawseattle.com)
Robertson Law PLLC
701 Fifth Avenue, Suite 4735
Seattle, WA 98104

Kathryn Williams (Kim@williamslaw.com)
Roblin Williamson (roblin@williamslaw.com)
Williamson & Williams
2239 W Viewmont Way W
Seattle, WA 98199

Original e-filed by e-mail:

supreme@courts.wa.gov

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

DATED this 4th day of June 2015, in Seattle, Washington.

KATIE MOCERI, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Moceri, Katie (ATG)
Cc: Harris, Leah (ATG); ryan@robertsonlawseattle.com; andy@robertsonlawseattle.com; Kim@williamslaw.com; roblin@williamslaw.com
Subject: RE: James Didlake, ET AL v. DOL, No. 91606-3-Answer to Petition for Review

Rec'd 6/4/15

Supreme Court Clerk's Office

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

From: Moceri, Katie (ATG) [mailto:KatieB2@ATG.WA.GOV]
Sent: Thursday, June 04, 2015 3:46 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Harris, Leah (ATG); ryan@robertsonlawseattle.com; andy@robertsonlawseattle.com; Kim@williamslaw.com; roblin@williamslaw.com
Subject: James Didlake, ET AL v. DOL, No. 91606-3-Answer to Petition for Review

Dear Clerk and Parties,

Attached for filing is the Answer to Petition for Review in *James Didlake, ET AL v. DOL, No. 91606-3.*

Sincerely,
Katie Moceri
Legal Assistant to April Benson, Leah Harris, and Dionne Padilla-Huddleston
Attorney General's Office
Licensing & Administrative Law Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7676 Main
(206) 587-4215 Direct
(206) 389-2800 Fax