APL-2020-00133

To be argued by
V. MARIKA MEIS
Time Requested: 15 minutes

Court of Appeals

State of New York

In the Matter of the Application of PEDRO ENDARA-CAICEDO,

Petitioner-Appellant,

-against-

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES et al.,

Respondents-Respondents

For an Order and Judgment Pursuant to Article 78 of the
New York Civil Practice Law and Rules

Bronx Co. Index No. 250444/2017

REPLY BRIEF FOR PETITIONER-APPELLANT

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V. MARIKA MEIS, *Of Counsel*
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PRELIMINARY STATEMENT

Pedro Endara-Caicedo submits this reply to Respondent's January 2021 brief ("Resp.") and in further support of his December 2020 main brief ("Br.")

ARGUMENT

REPLY POINT I

DMV IS NOT ENTITLED TO DEFERENCE AND THE STANDARD OF REVIEW IS *DE NOVO*.

In his opening brief, Endara-Caicedo argued that because this case involves pure statutory interpretation and not any issue within DMV's specialized or technical expertise, *de novo* review applies. *See* Br. at 13. Respondent nevertheless seeks to limit this Court's power to interpret the V.T.L., insisting that this Court must defer to its latest interpretation of the statute (DMV reversed its position on this statutory matter

in 2012). Contrary to Respondent's view, this Court does not defer to an agency's construction of a New York State law.[1] Statutory construction is this Court's job. *In re Walsh v. New York State Comptroller*, 34 N.Y.3d 520, 523-24 (2019). Respondent's own cited authority demonstrates this. *E.g. Matter of Belmonte v. Snashall*, 2 N.Y.3d 560, 566 (2004) (this Court declined to accord the agency's interpretation of a statute any deference and itself conducted pure statutory analysis looking at the plain language reading of the statute and the Legislature's use of the same term in other statutes).[2]

Respondent also contends that its interpretation of the V.T.L. is entitled to deference, because the DMV "has specialized knowledge of the V.T.L." and "the problem of driving under the influence" *See* Resp. 13. But, again, statutory interpretation is within the province of this Court. Nor does the "problem of driving

[1] Respondent also claims that administrative determinations are reviewed only for whether they are arbitrary and capricious or without rational basis. *See* Resp. at 12 (citing *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v. State Div. of Hous. & Community Renewal*, 46 A.D.3d 425 (1st Dept. 2007), aff'd, 11 N.Y.3d 859 (2008) and *Matter of Madison County Indus. Dev. Agency v. State Auths. Budget Off.*, 33 N.Y.3d 131 (2019)). Respondent asserts that this limited standard of review applies here. However, this deferential standard of review applies to an agency's discretionary determinations, not to matters of statutory interpretation as are involved here. Respondent's own authority demonstrates this. *E.g. Matter of Partnership 92* (agency determined, based on testimony elicited at a hearing, that tenancy was illusory and that rent stabilization law applied); *Matter of Madison County Indus. Dev. Agency* (refusal of agency to allow an entity to file consolidated reports was not "an abuse of the agency's discretionary authority"); *see generally Matter of Haug v. State University of N.Y. at Potsdam*, 32 N.Y.3d 1044 (2018)(factual determinations of an administrative agency must be accorded deference on review).

[2] Nor is this a case where deference is appropriate because the agency is interpreting a regulation it has promulgated. *See, e.g., Matter of Blue Spruce Farms v. State Tax Commn.*, 99 A.D.2d 867 (3d Dept. 1984). The question before this Court is the interpretation of a statute passed by the Legislature, not a regulation enacted by an agency.

under the influence" require any "expertise" to understand. That is even more so the case here where the dispute turns on the meaning of the phrase "such chemical test"—words that can be interpreted without any specialized knowledge of the "problem of drunk driving."[3]

REPLY POINT II

THE TWO-HOUR LIMIT APPLIES TO ADMINISTRATIVE LICENSE REVOCATIONS.

Everyone agrees that the question before this Court is what antecedent the phrase "such chemical test" (VTL § 1194(2)(b)-(c)) incorporates. Endara-Caicedo contends that this phrase incorporates the statutory requirement that the "chemical test" be conducted "within two hours" of the arrest (§ 1194(2)(a)); Respondent insists that the provision merely refers back to the generalized requirement that the test be limited to one for "breath, blood, urine, or saliva" (§ 1194(2)(a)). Thus, Respondent contends, time is irrelevant to the refusal sanction—a refusal that happens *at any time* after the arrest triggers the hefty sanction of license revocation.

Although this Court has already interpreted the phrase "such chemical test" in V.T.L. § 1194 subdivision (2) to mean a test conducted "within two hours" of the arrest, *People v. Odum*, 31 N.Y.3d 344, 351-52 (2108) (interpreting the phrase "such chemical

[3] Notably, Respondent appears to agree that Endara-Caicedo's interpretation of §1194(2)(c) is reasonable, but argues the DMV's interpretation should prevail since it is afforded deference (Resp. 25). As, for the reasons stated above, deference does not apply, this Court is the ultimate arbiter of whether Endara-Caicedo's interpretation should become law.

test" in § 1194(2)(f)), Respondent envisions a statute that defines that same phrase differently in different subparagraphs. In proposing this confusing patchwork statute, Respondent takes no issue with basic legal realities: the Legislature enacted a temporal limit on the police's power to perform a chemical test; provided a "right" to refuse that test after two hours following arrest; and rendered the refusal inadmissible if exacted after the two-hour period expired. *See Odum*, 31 N.Y.3d at 349 ("[N]othing prevents the Legislature from granting accused motorists a statutory right to decline the test or from placing limits on the authority of the police to administer the test absent voluntary consent – and that is precisely what the legislature has done.")(emphasis added). Nevertheless, Respondent claims that the Legislature also intended to affirmatively punish those who exercise the very post-two-hour-refusal right that this Court held in *Odum* was guaranteed by the Legislature. This theory ignores this Court's recent decision in *Odum* as well as the plain meaning and structure of the statute, and produces unreasonable results.

A. The Plain Language of VTL §1194(2), the Statute's Purpose and the Statute's History Mandate Applying the Two-Hour Limit to License-Revocation Proceedings.

Respondent first insists that since V.T.L. § 1194(2)(c) does not expressly include a two-hour requirement, the matter should end there (Resp. at 16-17). As even Respondent realizes, the matter cannot be resolved so simplistically because §§ 1194(2)(b) & (c) relate back to § 1194(2)(a) through (2)(b) & (c)'s use of the phrase "such chemical test" (Resp. 16-17). Indeed, this Court confronted the same scenario

in *People v. Odum*, 31 N.Y.3d 344 (2018), where, although the two-hour limit was equally absent from the subparagraph under review (V.T.L. § 1194(2)(f)), this Court nevertheless held that the phrase "such chemical test" referred back to the two-hour rule in subsection (a). *Odum*'s statutory analysis applies here too with equal force.

Respondent nonetheless argues that, *Odum* notwithstanding, the phrase "such chemical test" in 1194(2)(c) does not encompass the two-hour limit and only refers to the unparticularized antecedent in 1194(2)(a): "a chemical test of [the driver's] breath, blood, urine, or saliva for the purpose of determining the alcohol contents of his blood." Resp. 17. In other words, although conceding, as it must, that § 1194(2)(a) is the proper antecedent reference for interpreting "such chemical test," Respondent maintains that "such chemical test" in (2)(c) does not refer back to the particularized antecedent requiring that the test be administered "within two hours after . . . arrest." Respondent's reasons for distinguishing *Odum* and for this Court to adopt a separate definition of "such chemical test" are unconvincing.

There is no textual basis for drawing this distinction. The phrases "such chemical test" are identical in subsections 1194(2)(b) & (c) (at issue here) and (2)(f) (at issue in *Odum*). And *Odum* held that, "[a]lthough there is no time limit expressly set forth in section 1194(2)(f) . . . the use of the word 'such' in section 1194(2)(f) ties that provision back to subdivision (2)(a)—a different subparagraph within the same subdivision—so that the two must be read together." *Odum*, 31 NY.3d at 351. Section 1194(2)(a) provides that a motorist is "deemed to have given consent to a chemical [breath] test,"

so long as the test is performed "within two hours after such person has been placed under arrest for" driving while intoxicated. *Id.* "Such chemical test" in (2)(f) thus means "the one to which a defendant is deemed to have consented in subdivision (2)(a)." *Id.* That same logic governs the interpretation of the phrase "such chemical test" in the refusal/license revocation subsections (V.T.L. § 1194(2)(b) & (c)).

Post-*Odum* case law confirms that "such chemical test" incorporates the two-hour limit of subsection (a). In *People ex rel. Negron v Superintendent, Woodbourne Correct. Facility*, 36 N.Y.3d 32 (2020), this Court was faced with a similar interpretative dispute, and needed to decide whether "such person" in Executive Law 259-c (14) referred only to the generalized antecedent, "a person serving a sentence," or to the particularized antecedent, "a person serving a sentence for [an enumerated offense]." This Court determined that the phrase "such person" referenced the "particularized antecedent," favorably citing the principle that "'[n]ormal usage in the English language would read the word 'such' as it applied to the entire antecedent phrase.'" *Negron*, 36 N.Y.3d at 37 (citing *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 37 (2020)).

Respondent, in fact, does not dispute that the "presumption of consistent usage" ordinarily requires reading identical terms to mean the same thing (Resp. 24), but claims that *Odum* applied the two-hour limit to (2)(f) only because that case involved refusal evidence at a criminal trial (Resp. 24). Respondent is again wrong. Once a statute is construed by the highest court in a judicial system, it must be interpreted uniformly in accordance with that construction, whether in a criminal or civil context. *See United*

States v. Nippon Paper Industries Co. Ltd., 109 F.3d 1, 4-5 (1st Cir. 1997). That is, after all, the rule of harmony—a rule that assumes that the Legislature does not define the same exact language *differently* without coming out and expressly saying so. *See* McKinney's Cons. Laws of N.Y., Statutes § 97. Therefore, although the majority opinion in *Odum* declined to address the license-revocation provision in §1194(2)(c), its interpretation of "such chemical test" cannot be discarded.

Respondent draws a false distinction between criminal and civil proceedings. In this regard, *Smith* and *Matter of Lamb* are instructive. *Smith* issued a definitive interpretation of the words "refuses to submit to a chemical test" as used in V.T.L. § 1194. *People v. Smith*, 18 N.Y.3d 544 (2012). This Court held that the two consequences of a refusal – (1) license revocation by the DMV and (2) use at a criminal proceeding – have the same statutory basis, and "flow" from and are identically dependent upon proving the single act of "refusal." *Id.* at 548-49. In *Matter of Lamb*, the issue on appeal was whether this Court's binding interpretation from *Smith* applied to the DMV administrative proceedings. *In Re Lamb v. Egan*, 150 A.D.3d 854 (2d Dept.)., *mot. for lv. to appeal denied*, 29 N.Y.3d 918 (2017). The Second Department agreed with petitioner's argument, on identical facts, that the same definition from *Smith* applied in the license revocation context. *Smith* and *Lamb* support that a statute should be interpreted the same whether criminal or civil. As the interpretation of "refusal" applies equally in the administrative context, there is no reason not to do the same with respect to "such chemical test."

Respondent erroneously analyzes the amendments to the statute as a basis for cabining *Odum*. In fact, the manner in which the statute was amended supports application of the two-hour limit to revocation proceedings. For example, Respondent argues that because former V.T.L. § 71-a, which deemed drivers to consent to a breath test and sanctioned refusal with license revocation, did not contain a two-hour limit (*see* L. 1953, ch. 854, § 1), the two-hour limit was never meant to apply to revocation proceedings. This is so, the argument goes, even though the two-hour limit was moved in 1970 to the deemed consent provision of V.T.L. § 1194, the same statute addressing license revocation.

Respondent's theory ignores that the deemed-consent and license revocation provisions were always understood by courts to work together, as well as together with the two-hour rule, even when they were in separate statutes. Contrary to Respondent's claim (Resp. at 18, 28-29, 32, n.3), Endara-Caicedo cited ample support for this assertion (Br. at 15-17 (citing *Matter of Lundin v. Hultz*, 29 A.D.2d 581, 582 (3d Dept. 1967); *In re Donahue v. Tofany*, 33 A.D.2d 590, 591 (3d Dept. 1969); *Matter of Kennedy v. Melton*, 62 A.D.2d 1152 (3d Dept. 1978); *Matter of Reed v. New York State DM*V, 59 A.D.2d 974 (3d Dept. 1977); *Matter of White v. Fisher*, 49 A.D.2d 450 (3d Dept. 1975)). These cases read the two-hour limit into the elements necessary for revoking a motorist's license for a refusal. While they refer to the two-hour limit as an evidentiary rule, that does not change the fact that these cases applied the two-hour limit to refusal hearings. Had the Legislature intended to reject these decisions and to define the same

phrase differently in the same statutory subsection (subsection 2 of V.TL. § 1194), it would have said so. It would not, as Respondent envisions, have created a confusing patchwork of inconsistent language, hoping that courts would guess correctly as to their meaning.

Indeed, even before the two-hour limit was moved to § 1194 in 1970, the DMV itself had a practice of applying the two-hour limit to license revocation proceedings. *See* 2012 Memo. This history further demonstrates that the two-hour rule was understood to apply to license revocation, even when those provisions were in separate sections. Accordingly, it is Respondent, not Endara-Caicedo, who is urging that legislative action changed settled law, and thus Respondent who has the burden to show the Legislature intended a change that exempts the license revocation sections from the two-hour limit (Resp. at 19) (citing *Green v. Bock Launrdy Mach. Co*., 490 U.S. 504, 521 (1989)).

There is no question – and Respondent does not dispute – that in 1970, the Legislature moved the two-hour rule to the deemed-consent provision, expressly limiting the deemed-consent period to two hours. If the two-hour limit was not previously understood to apply to the deemed consent law, then this change could hardly be deemed a mere conforming change as described in the supporting memorandum on which Respondent so heavily relies. It follows that the move was characterized as a mere conforming change because the two-hour limit and the deemed consent provision were historically understood together, even when separate.

Respondent also does not dispute that when the two-hour rule was relocated in 1970, refusals were not yet admissible in criminal drunk-driving trials and were only admissible at administrative proceedings (Resp. 21). Yet, Respondent takes issue with Endara-Caicedo's argument that this state of affairs supports that the two-hour rule was meant to limit the use of refusals at license-revocation proceedings – the only refusals then admissible – claiming that the "original purpose" in moving the two-hour rule had nothing to do with refusals at all but was to "permit[] the use of evidence from a chemical test when the driver was unconscious or otherwise unable to consent." (Resp. 21).

Here, again, Respondent is wrong. Not only does this argument make little practical sense because police cannot obtain a breath test from an incapacitated driver, but it was made in *Odum*. *See* Appellant's (The People's) Brief at 25-28 (making this exact argument); https://www.nycourts.gov/ctapps/courtpass/Public_search.aspx (search "Odum"). This Court in *Odum* flatly rejected that the deemed consent provision applies only to incapacitated drivers, explaining that the statute was "designed to encourage" compliance with requests to submit to chemical tests to "obviate the need for securing court orders," or "the need for the use of force . . . if an individual should refuse to submit." *See Odum*, 31 N.Y.3d at 348-49; *see also People v. Kates*, 52 N.Y.2d 591-596, fn. 1 (1981) ("the applicability of the deemed consent provision in [VTL] § 1194(2)(a)(1) is not limited to those who are 'incapable of consenting"). As getting evidence from an incapacitated driver was not the sole purpose of incorporating the

two-hour limit into the deemed consent provision, there is no basis for limiting the application the two-hour limit.

Respondent's claim that the two-hour limit was based on evidentiary reliability concerns not at issue in revocation proceedings (Resp. at 17-18) is also misguided. The DMV itself acknowledges that the purpose of license revocation was to encourage chemical tests for use in criminal proceedings, meaning those obtained within two hours (Resp. at 27). And as license revocation for a refusal applies regardless of criminal conviction, it is a particularly effective method for securing chemical-test compliance. From inception, license revocation was a tool that worked in tandem with criminal proceedings to secure admissible evidence. Thus, concerns of reliability must equally inform any interpretation of § 1194(2)(c).[4]

Ultimately, had the Legislature wanted "such chemical test" in § 1194(2)(c) to mean something other than its full definition in (2)(a), the Legislature could have used a different section entirely, with a different definition. Or the Legislature could have given a textual indication, such as "notwithstanding (2)(a), such chemical test for subsection (b) and (c) means a chemical test requested at any time." It did not. Certainly, it makes little sense to ascribe different meanings to identical phrases within

[4] License revocation is a harsh penalty. Although VTL § 1192(2)(b) and (c) are civil provisions, the statute imposes a penalty of license revocation for a minimum of a year. A statute which prescribes a civil penalty, without a remedial component, is considered penal in nature and must be strictly construed. *See* McKinney's Cons. Laws of N.Y., Statutes, §§ 273, 275. This renders meritless Respondent's argument that § 1194(2)(a) must be strictly construed but that § 1194(2)(c), being a purely statutory creation, need not (Resp. 24-25).

an integrated statute, especially when the Legislature specifically sought to unify that statute in 1970. Thus, the overall legislative goal of creating a comprehensive statute governing drunk-driving proceedings and the use of refusals also counsels in favor of Endara-Caicedo's interpretation.[5]

As the statute's plain language, the context surrounding the disputed language, this Court's precedent, the purpose of the statute, the manner in which the statue was amended, and even the legislative history, all support finding that the meaning of "such chemical test" must include the two-hour limit, this Court should reverse the lower court's determination.[6]

B. Respondent's Policy Arguments Do Not Support Permitting License Revocation for a "Refusal" at Any Time.

Respondent argues that revoking licenses regardless of the timing of the refusal supports the strong public policy of getting drunk drivers off the road and discourages refusals (Resp. at 27-28).[7] This is not how statutory construction works. A court cannot

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[5] Respondent claims Endara-Caicedo dismissed the legislative history as extrinsic (Resp. at 22), but Endara-Caicedo clearly relied on the amendments and history of the statute in his opening brief (Br. at 14-17). What Endara-Caicedo opposed was resort to extrinsic material such as sponsor's memoranda, etc. in light of the statute's clear plain language and the rules of statutory construction. In any event, such materials further support Endara-Caicedo's position, see *ante* at 7-8 (discussing sponsor's memo)

[6] Respondent predictably attempts to cobble together a controlling opinion from Judge Wilson's concurrence and the *Odum* dissent (Resp. 31). As discussed in Endara-Caicedo's opening brief, there is no basis for doing so. Judge Wilson considered only whether Mr. Odum's consent to take a breathalzer tgest after two hours was voluntary when he was issued the two refusal warnings. *See* Br. At 26 n.9; 37-38. In agreeing that the warning of license revocation was lawful in light of the 2012 Memo, Judge Wilson did not undertake a statutory analysis of whether the 2012 Memo properly interpreted V.T.L. § 1194(2)(b) and (c).

[7] The anecdotal evidence from a 2014 national report on refusals (Resp. at 36-37) does little to support Respondent's argument that refusals after two hours are a public danger. The DMV

simply isolate the broad goal of a statute and then invariably interpret the statute to pursue that goal at all costs. Instead, the *exceptions* in the statute—here the two-hour rule—are also policy goals that must be honored by the judiciary. As the Supreme Court has held, "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates, rather than effectuates, legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States,* 480 U.S. 522, 525-26 (1987); *see also Holloway v. United States*, 526 U.S. 1, 18 (1999) (Scalia, J., dissenting) ("[E]very statute intends not only to achieve certain policy objectives, but to achieve them by the means specified. Limitations upon the means employed to achieve the policy goal are no less a 'purpose' of the statute than the policy goal itself. Under [a contrary] analysis, any interpretation of the statute that would broaden its reach would further the purpose the Court has found. Such reasoning is limitless and illogical.") (citing *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995)).

Indeed, the same argument Respondent makes here could have been adopted in *Odum*: that is, courts should ignore the two-hour rule in the admissibility context

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presumably has access to actual data on the numbers of refusal hearings in New York state annually, and how many of those are refusals after two hours.

because it could impede the primary goal of prosecuting drunk drivers. But *Odum* rejected that broad approach because the V.T.L. does not pursue that goal at all costs; it *also* has specific limitations on police power that protect individual liberty and ensure reliable evidence. Those textual limitations cannot be ignored by a court because enforcing them will impede broader policy objectives. That is nothing more than legislation by "judicial fiat"—the exact approach that *Odum* rejected. 31 N.Y.3d at 353.[8]

Respondent also incorrectly suggests a motorist could game the system and benefit from a "loophole" by strategically attempting to delay the test until after the two-hour period has elapsed. Resp. Br. 36. Beyond the fact that this position assumes drunk drivers are well-versed in the VTL's intricacies and also sober enough to strategically engage in a timing ploy, this argument fails on its own terms. Such strategic conduct is already a sanctionable refusal under settled law when it occurs within two hours of arrest. *See, e.g.*, *People v. Massong*, 105 A.D.2d 1154, 1115 (4th Dept. 1984) (pretending to be unconscious is a refusal); *People v. Niedzwiecki*, 127 Misc. 2d 919, 920 (Crim. Ct., Queens Cty. 1985) ("mere silence" can be deemed a refusal if motorist is given a warning that such silence would constitute a refusal). A refusal to submit may be evidenced by words or conduct (*Matter of Dykeman v. Foschio*, 90 A.D.2d 892 (3d Dept. 1982) (driver refused by smoking a cigarette after he had been informed that

[8] Respondent drastically overstates its policy position. The *only* drivers at issue here are those who refuse a test more than two hours after arrest. For all other motorists suspected of drunk driving, a refusal results in both admissible evidence and license revocation. Of all the breath tests conducted in New York, the number at issue here is an exceedingly-small segment of the population.

doing so was the same as refusing to submit to the test); *Matter of Van Sickle v. Melton*, 64 A.D.2d 846 (4th Dept. 1978) (motorist blowing into mouthpiece and officer hearing air come out of corner of motorist's mouth supported DMV's determination that motorist's conduct amounted to a refusal).

Further, it is the police who control when a chemical test is offered and when refusals warnings are given, and offering the test outside of the two-hour window is the exception, not the norm. *See* Br. at 33 (citing *People v. Morris,* 8 Misc.3d 360 (Crim. Ct., Richmond Cty. 2005)). Even if there is no "dallying" as in this case, the delay was still at the hands of police.[9] To punish Endara-Caicedo with a severe one-year license revocation is unfair. As well, delay in a test is not necessarily to the motorist's benefit, and is only arguably so if the motorist is in fact intoxicated.[10]

Nor can Respondent draw strength from its claim that declining to apply the two-hour rule to revocation proceedings will encourage drunk driving. Resp. Br. 35. It is unimaginable that a motorist will conclude that, although drunk driving results in criminal punishment and a refusal within two hours of arrest triggers license revocation, the motorist can drive drunk, banking on the possibility that the police will arrest him

[9] Respondent notes that in this case, Endara-Caicedo was not offered a chemical test until after two hours because there was nobody trained to administer the test available earlier (Resp. at 38).

[10] Even if a motorist were intoxicated, in delayed testing cases, courts have frequently permitted reverse or retrograde extrapolation testimony to argue a driver had a higher BAC at the time of driving, even over reliability and accuracy challenges to this "science." *See, e.g., People v. O'Connor*, 290 A.D.2d 519 (2d Dept. 2002) (upholding evidence from expert of retrograde extrapolation over objection); *People v. Cross*, 273 A.D.2d 702 (3d Dept. 2000) (same).

and delay a test more than two hours after arrest. This strange person, "like the unicorn," does not exist. *See generally Henderson v. United States,* 588 U.S. 266, 276 (2013). Unsurprisingly, Respondent cites nothing indicating that the Legislature was concerned with this fictional character when it enacted the two-hour rule.

Nor could the Legislature have possibly intended to punish those who exercise their "right" to decline a breath test after the two-hour period with the hefty sanction of license revocation. *Odum*, 31 N.Y.3d at 349 ("[N]othing prevents the Legislature from granting accused motorists a statutory right to decline the test or from placing limits on the authority of the police to administer the test absent voluntary consent – and that is precisely what the legislature has done.") (emphasis added). The Legislature should not be presumed to have been so draconian and unreasonable. *People v. Garson,* 6 N.Y.3d 604, 614 (2006) (courts "must interpret a statute so as to avoid an unreasonable or absurd application of the law") (internal quotations omitted).

Respondent also appears to ignore that those who exercise their statutory right to refuse a test after two hours are not only doing so because they have broken the law, as the DMV contends. Sober motorists have many legitimate reasons to refuse a test, especially one conducted many hours after arrest. For example, a motorist might distrust police, might believe that a notoriously problematic test is unreliable and could produce false results, might object to being forced to breathe into a machine by the government, might be unable to clearly understand the officer's instructions, or may have a medical issue that might affect the administering or reliability of the chemical

test. *See, e.g.*, *Matter of Prince v. DMV*, 36 Misc. 3d 314 (Sup. Ct., N.Y. Cty. 2010)(reversing license revocation where petitioner was experiencing an asthma attack when asked to submit to the chemical test); *Matter of Beaver v. Appeals Bd. Of Administrative Adjudication Bureau, State Dept. of Motor Vehicles*, 68 N.Y.2d 935 (1986) (upholding license revocation where petitioner suffered from ailments, including emphysema as testified to by a doctor, but doctor but did not establish that petitioner's lung capacity was insufficient for the purposes of the breathalyzer test).

Yet, under the DMV's reading of the statute, a person who is not intoxicated but who is offered a chemical test well after the expiration of the two-hour period that triggered their automatic consent, would suffer the harsh penalty of one-year license revocation if they refuse. Clearly though, the Legislature did not pursue the goal of detecting and prosecuting drunk driving at any and all costs—it limited its pursuit of that goal and balanced it against the important right/privilege of drivers. This careful balancing was reflected in the numerous due process challenges that resulted in amendments that added statutory protections after the deemed consent provision was enacted. *See* King and Tipperman, *The Offense of Driving While Intoxicated: The Development of Statutory and Case Law in New York*, 3 Hofstra L. Rev. 541, 572, 577, 580 (1975). It makes sense for the Legislature to have imposed the harsh penalty of mandatory one-year revocation only on motorists who refused to take a chemical test they were presumed to have consented to. That period is undeniably two hours.

Notably, if applying the two-hour limit to administrative proceedings was so dangerous to the public and contrary to the policy of keeping the roads safe from drunk drivers, as Respondent argues, then for many years (and until the 2012 Memo and changed practice of the DMV), the DMV itself created a loophole and put the public at danger by only suspending licenses for refusals made within two hours. Of course, that is not what happened. Instead, the DMV previously recognized that the text of the statute, and the spirit of the two-hour-deemed-consent provision, precluded the theory that a person could lose their means of transportation and livelihood because they refuse to submit to a breath test *after* the deemed-consent period has expired. *See* 2012 Memo.

Finally, recognizing the startling breadth of its position, DMV proposes an artificial limitation on its position: the time period for license revocations for refusals should not extend indefinitely, but only to the unspecified period after two hours when a relevant and probative chemical test could still be obtained (Resp. at 38-39). While probative evidence might be obtained in this murky time period, the Legislature already settled on a compromise of two-hours in drafting this statute and provided a bright line rule for law enforcement and citizens to follow. If the probative value of chemical test evidence after two hours has increased since the statute was passed roughly eighty years ago (Resp. at 37-38), it is for the Legislature alone to expand that time period.

Respondent's effort to inject this artificial limitation on its position only demonstrates its discomfort with interpreting the statute to absurdly allow for license

revocation based on a refusal many hours or even days after an arrest. To be clear, the question before this Court is binary: either there is a two-hour limitation or there is not. There is no middle ground, as much as inventing one may be convenient to Respondent's position on this appeal.

CONCLUSION

FOR THE FOREGOING REASONS, THIS COURT SHOULD REVERSE.

Respectfully submitted,

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