No. APL-2020-00133

To be argued by:
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State of New York
Court of Appeals

In the Matter of the Application of

PEDRO ENDARA-CAICEDO,

Petitioner-Appellant,

v.

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, et al.,

Respondents-Respondents,

For a Judgment Pursuant to Article 78
of the Civil Practice Law & Rules.

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PRELIMINARY STATEMENT

The Vehicle and Traffic Law (VTL) requires the Department of Motor Vehicles (DMV) to revoke the driving privileges of a drunk-driving suspect who refuses a chemical test of the suspect's blood alcohol concentration. Petitioner Pedro Endara-Caicedo does not dispute that he was lawfully arrested for drunk driving and refused a chemical test. However, he seeks to annul the revocation of his driver's license on the grounds that he refused the test more than two hours after his arrest. Supreme Court, Bronx County (Brigantti, J.), rejected Endara-Caicedo's effort to escape the consequence of his undisputed refusal, observing that the VTL contains no exception to the revocation requirement for refusals more than two hours after arrest. The Appellate Division, First Department, unanimously affirmed. This Court also should affirm.

The VTL's license-revocation provision expressly limits the revocation determination to four requirements, none of which refers to a two-hour time period. A separate statutory provision provides that a drunk-driving suspect is deemed to have consented to a chemical test within two hours of the suspect's arrest, and that

chemical-test evidence obtained more than two hours after the arrest is not admissible at a criminal trial without the suspect's express consent. Endara-Caicedo's theory relies on reading the two-hour limitation into the license-revocation provision. But when the license-revocation provision was enacted, the two-hour limitation was not even in the same statutory section. Moreover, when the Legislature later consolidated the two provisions in the same statutory section, it gave no indication that it now intended to apply the two-hour evidentiary limitation to the separate administrative process for revoking a driver's license based on a test refusal. This legislative silence does not imply an intention to significantly alter the mandatory revocation scheme.

Indeed, it would make no sense to read a two-hour loophole into the license-revocation requirement. The two-hour evidentiary limitation was intended to ensure that the chemical-test evidence introduced in criminal trials is sufficiently probative. The two-hour rule has no application to an administrative license revocation, which is required when a driver refuses a chemical test, "whether or not" the driver is ultimately convicted of a criminal offense. In

addition, applying the two-hour limitation to the license-revocation requirement would contravene public policy by immunizing from any consequences intoxicated drivers who thwart investigation of their conduct by refusing chemical tests more than two hours after their arrest.

QUESTION PRESENTED

Whether Vehicle and Traffic Law § 1194(2)(c) requires revocation of driving privileges for chemical-test refusal, regardless of the time of refusal.

Supreme Court and the Appellate Division, First Department, unanimously answered this question in the affirmative.

STATEMENT OF THE CASE

A. Statutory Background

To address the problem of drunk driving, which "take[s] a grisly toll on the Nation's roads" and "claim[s] thousands of lives," New York—like all other States—has long imposed criminal penalties for driving under the influence. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166 (2016); *see also People v. Washington*, 23 N.Y.3d 228, 231 (2014); VTL §§ 1192 (offenses of driving while intoxicated and driving while impaired), 1193(1) (criminal penalties for VTL § 1192 violations). To facilitate enforcement of these laws, "[a]ny person who operates a motor vehicle" in New York is "deemed to have given consent to a chemical test" of the driver's breath, blood, urine, or saliva to determine blood alcohol or drug concentration, provided that the test is administered upon reasonable grounds to believe the driver has been driving under the influence and "within two hours after such person has been placed under arrest." *Id.* § 1194(2)(a)(1). This rule permits chemical testing even if the driver is unconscious or otherwise unable to affirmatively consent. *See People v. Kates*, 53 N.Y.2d 591, 595-96 (1981).

Recognizing that a conscious driver nonetheless may refuse a chemical test and thereby frustrate enforcement of the laws prohibiting driving under the influence, the Legislature separately provided that if a driver refuses a chemical test the driver's license will be administratively suspended, and after a hearing before an administrative law judge (ALJ), the license can be revoked. VTL § 1194(2)(b)-(c). This provision was intended to encourage consent to chemical tests and to promote public safety by keeping intoxicated drivers off the road. *See People v. Craft*, 28 N.Y.2d 274, 278 (1971).

The Legislature provided that license revocation may be required "whether or not" the driver is ultimately found guilty of a criminal offense. *See* VTL § 1194(2)(b)(1), (2)(c). By statute, the administrative hearing "shall be limited to the following issues": whether (1) police had reasonable grounds to believe the driver had been driving under the influence; (2) the arrest was lawful; (3) police adequately warned the driver that test refusal would result in immediate suspension and subsequent revocation of the driver's license, regardless of whether the driver is found guilty of a criminal offense; and (4) the driver nevertheless "refuse[d] to

submit to such chemical test." *Id.* § 1194(2)(c). The timing of the test refusal is not an element to be considered by the ALJ. *See id.* If the ALJ finds the four listed conditions satisfied, DMV "shall immediately revoke" the driver's license for at least one year. *Id.* § 1194(2)(c), (d)(1)(a). The driver is also subject to a $500 civil penalty. *Id.* § 1194(2)(d)(2). A driver may appeal the ALJ's findings to DMV's Administrative Appeals Board. *Id.* § 1194(2)(c).

B. Factual Background

In January 2016, in the early morning hours, the New York City Police received a report that a driver had struck a parked vehicle. (Appendix (A.) 22-24 (Refusal Hearing Transcript (Tr.) at 7:22-8:5, 9:11-15).) At the scene, Endara-Caicedo acknowledged that he was the driver who struck the parked vehicle. (A. 25 (Tr. at 10:2-6).) Police observed that Endara-Caicedo had "red bloodshot eyes," "watery, pale skin," "disarrayed clothes," and was "swaying." (A. 25 (Tr. at 10:11-14).) He had a "strong odor of alcoholic beverages on his breath." (A. 25 (Tr. at 10:14-15).)

Police arrested Endara-Caicedo at approximately 4:47 a.m. and brought him to a precinct for a chemical test of his blood alcohol

concentration. (A. 25 (Tr. at 10:22-24), 42-43 (Tr. at 27:23-28:3).) Because no officer trained to conduct the test was available, the test could not be administered until such an officer arrived at approximately 7:55 a.m. (A. 26 (Tr. at 11:6-9), 45 (Tr. at 30:12-14).)

Shortly after the testing officer arrived, Endara-Caicedo refused to take the test. (A. 26 (Tr. at 11:9-11).) Police showed Endara-Caicedo a video in Spanish (Endara-Caicedo's primary language) explaining the consequences of test refusal, but he again refused the test. (A. 26-27 (Tr. at 11:11-12:2).)

C. Procedural Background

1. The Department of Motor Vehicles (DMV) revokes Endara-Caicedo's license and the Appeals Board affirms

In July 2016, Endara-Caicedo appeared for a chemical test-refusal hearing. (A. 16.) Following the testimony, the ALJ concluded that all four criteria for revocation of Endara-Caicedo's license were satisfied: (1) the police had reasonable grounds to believe Endara-Caicedo had been driving under the influence; (2) police lawfully arrested Endara-Caicedo; (3) police adequately warned Endara-Caicedo that refusal to submit to a chemical test would result

in suspension and subsequent revocation of his license; and (4) Endara-Caicedo nonetheless refused a chemical test. (A. 53-54 (Tr. at 38:3-8, 38:16-39:5), 57-58 (Findings & Disposition).)

The ALJ rejected Endara-Caicedo's argument that DMV should not revoke his license because his refusal occurred more than two hours after his arrest. (A. 53 (Tr. at 38:8-14).) The ALJ explained that there is no requirement that a driver refuse a test within two hours in order for the refusal to result in revocation of the driver's license, as DMV had made clear in a formal opinion of counsel. (A. 53 (Tr. at 38:9-14); *see also* A. 178-179.) Accordingly, the ALJ revoked Endara-Caicedo's license and imposed a $500 civil penalty. (A. 54 (Tr. at 39:5-8), 57-58, 274.)

Endara-Caicedo appealed the ALJ's revocation determination, and, in February 2017, DMV's Administrative Appeals Board affirmed. (A. 89-90.) The Appeals Board explained that the two-hour qualification on implied consent to chemical testing on which Endara-Caicedo relies is "an evidentiary rule applicable to criminal prosecutions," and "[t]here is no authority" for engrafting that two-hour rule as "another element that must be found by the

Administrative Law Judge in a chemical test refusal hearing." (A. 90)

2. Supreme Court denies Endara-Caicedo's article 78 petition

In June 2017, Endara-Caicedo filed a petition in Supreme Court, Bronx County, pursuant to C.P.L.R. article 78, claiming that DMV's revocation of his license was improper. Endara-Caicedo did not dispute that the four statutory requirements for revocation outlined above were satisfied; he contended only that his license should not have been revoked because he refused a chemical test more than two hours after his arrest. (A. 3-9.) DMV moved to dismiss the petition. (A. 118-119.) Although Supreme Court initially denied the motion (A. 196-202), this Court shortly thereafter decided *People v. Odum*, which underscored that the two-hour qualification on implied consent to chemical testing is a rule of evidence for criminal proceedings and is inapplicable to the administrative process for revoking driver's licenses for test refusal. *See* 31 N.Y.3d 344 (2018). Accordingly, Supreme Court denied Endara-Caicedo's petition. (A. 557-565.)

Supreme Court explained, among other things, that "[t]here is no indication" in the history of the VTL that the Legislature intended to apply a two-hour limitation to license-revocation hearings. (A. 564.) The court emphasized that the concern as to the probative value of blood-alcohol evidence in a criminal trial underlying the two-hour limitation is "separate and distinct" from the issues in administrative revocation proceedings, which focus on whether a refusal has occurred, and not on the driver's blood-alcohol level. (A. 563.) The court noted that the license-revocation provision requires license revocation "whether or not" the driver is proven guilty of drunk driving. (A. 563.)

3. The Appellate Division unanimously affirms

The Appellate Division, First Department, unanimously affirmed. *See Matter of Endara-Caicedo v. New York State Dept. of Motor Vehs.*, 180 A.D.3d 499 (1st Dep't 2020). The Appellate Division agreed with Supreme Court that VTL § 1194(2) requires license revocation for a chemical-test refusal, regardless of the timing of the refusal. *See id.* at 499. The court noted that this interpretation is supported by the statute's history, "which indicates that the two-

hour time limitation in Vehicle and Traffic Law § 1194(2)(a)(1) was confined to the admissibility of the chemical test results (or the chemical test refusal) in a criminal action against the motorist and kept separate from the deemed consent and license revocation provisions until 1970, when the Legislature merely redrafted the piecemeal revisions of the Vehicle and Traffic Law" from recent years in a single statutory section. *See id.* at 499-500 (citations and quotation marks omitted). The court further explained that confining the two-hour rule to its criminal evidentiary context is supported by the recent opinions of four judges of this Court in *People v. Odum*, 31 N.Y.3d 344; the conclusions of courts in sister States with similar statutory regimes; and "the longstanding public policy of this State, and this Nation, to discourage drunk driving in the strongest possible terms." *See Matter of Endara-Caicedo*, 180 A.D.3d at 499-500.

ARGUMENT

DMV PROPERLY REVOKED ENDARA-CAICEDO'S LICENSE FOR REFUSING A CHEMICAL TEST

"It is a long-standing, well-established standard that the judicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis." *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v. State Div. of Hous. & Community Renewal*, 46 A.D.3d 425, 428 (1st Dep't 2007), *aff'd*, 11 N.Y.3d 859 (2008). "If a determination is rational it must be sustained even if the court concludes that another result would also have been rational." *Matter of Madison County Indus. Dev. Agency v. State Auths. Budget Off.*, 33 N.Y.3d 131, 135 (2019).

Though statutory interpretation is the responsibility of the court, "it is also well settled that an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference, and must be upheld if reasonable." *Matter of Partnership 92 LP*, 46 A.D.3d at 429. Particularly where "interpretation of a statute involves specialized knowledge and understanding of underlying operational practices or entails an

evaluation of factual data and inferences to be drawn therefrom, the courts should defer to the administrative agency's interpretation." *Matter of Leggio v. Devine*, 34 N.Y.3d 448, 460 (2020) (quotation marks omitted); *accord Matter of Belmonte v. Snashall*, 2 N.Y.3d 560, 565 (2004).

Here, DMV possesses specialized knowledge of the VTL, which it administers; it also possesses specialized knowledge of the problem of driving under the influence, which the VTL aims to address. In light of that knowledge, DMV has concluded that the VTL's two-hour qualification on implied consent to chemical testing is best interpreted as a rule of evidence for criminal trials that does not apply to the revocation requirement for test refusal. Applying that interpretation of the VTL, DMV determined that Endara-Caicedo's license should be revoked for undisputedly refusing a chemical test. Because DMV's determination was rational and correct, this Court should affirm the lower courts' unanimous decisions upholding that determination.

A. The Vehicle and Traffic Law (VTL) Requires License Revocation for a Chemical-Test Refusal, Regardless of the Timing of the Refusal.

1. The plain language of the VTL requires license revocation for a test refusal, regardless of the time of refusal.

New York law requires that the driving privileges of a drunk-driving suspect who refuses a chemical test of his or her blood alcohol concentration "shall be immediately suspended," and that a hearing then will be held to determine whether the license should be "revoked." VTL § 1194(2)(b). The statute provides that the revocation determination "shall be limited" to four issues: whether (1) the arrest was based on reasonable suspicion of drunk driving, (2) the arrest was lawful, (3) the driver was adequately warned that the driver's license would be suspended and subsequently revoked if the driver refused a chemical test, and (4) the driver in fact refused. *Id.* § 1194(2)(c). If the four requirements are satisfied, the license "shall" be revoked "whether or not" the driver is criminally convicted. *See* VTL § 1194(2)(b)-(c).

All four of the statutory requirements for a license revocation are undisputedly satisfied here. See *supra* at 7-8. Moreover, the

governing statutory provision does not limit revocations to refusals that occur within two hours of a drunk-driving suspect's arrest. *See id.* § 1194(2)(b)-(c).

Endara-Caicedo contends that his license should not be revoked despite his undisputed test refusal. Noting that his refusal occurred more than two hours after his arrest, he relies on a VTL provision addressing deemed consent to chemical testing—i.e., not the same VTL provision that addresses license revocations—that limits the period of deemed consent to two hours.

The deemed-consent provision states that anyone who drives in New York "shall be deemed to have given consent to a chemical test" to determine blood alcohol concentration, provided that the test is administered "within two hours after such person has been placed under arrest." *Id.* § 1194(2)(a)(1). By application of this provision, chemical-test evidence obtained within two hours of a drunk-driving suspect's arrest is admissible even if the driver was unconscious or otherwise incapable of affirmative consent, because the driver has consented to a chemical test by using the State's roads.

See Kates, 53 N.Y.2d at 595-596. The deemed-consent provision does not address test refusal or license revocation. *See* VTL § 1194(2)(a).

Based on the two-hour qualification on implied consent, Endara-Caicedo argues (*e.g.*, Br. for Pet'r-Appellant (Br.) at 4-5) that a drunk-driving suspect cannot be treated as having "refused" a chemical test when the refusal occurs more than two hours after the suspect's arrest. But the deemed-consent provision is separate from the revocation provision and the issues to which the revocation determination "shall be limited" do not include a two-hour limitation. *See* VTL § 1194(2)(c). Thus, Endara-Caicedo is mistaken in claiming that a refusal issued two hours after arrest is not in fact a refusal.

Endara-Caicedo misses the mark in asserting (Br. at 20, 21-22) that the phrase "such chemical test" in the license-revocation provision, § 1194(2)(c), incorporates the two-hour rule from the separate deemed-consent provision, § 1194(2)(a)(1). The phrase "such chemical test" in the revocation provision has always referred back only to the statute's explanation of what the driver was asked to do and refused: submit to "a chemical test of [the driver's] breath,

blood, urine, or saliva for the purpose of determining the alcoholic content of his blood." (A. 358-359 (original statutory text).) *Accord* VTL § 1194(2)(a)(1), (c).

2. The VTL's history confirms that it requires license revocation for a test refusal, regardless of the timing of the refusal.

When the VTL's license-revocation provision was enacted, the two-hour limitation did not even appear in the same statutory section, and therefore could not have been incorporated within the revocation provision's reference to "such chemical test."

The two-hour limitation had its genesis in 1941, when the Legislature first amended the drunk-driving laws to make evidence of chemical blood-alcohol test results admissible at criminal drunk-driving trials. *See* Ch. 726, 1941 N.Y. Laws 1623, 1623; *see also* Josephine Y. King & Mark Tipperman, *The Offense of Driving While Intoxicated: The Development of Statutory and Case Law in New York*, 3 Hofstra L. Rev. 541, 546 & n.18 (1975). The Legislature made admissible only results of chemical tests "taken within two hours of the time of the arrest," *id.*, in order to ensure that the test results were sufficiently probative. *See* Mem. from Assemblyman

Dutton S. Peterson [Assembly Sponsor] to Governor Herbert Lehman (Apr. 19, 1941), *in* Bill Jacket for ch. 726 (1941), at 40; *People v. Popko*, 33 Misc. 3d 277, 282 (N.Y.C. Crim. Ct. Kings County 2011).

In 1953, the Legislature separately provided, in a different statutory section, that a drunk-driving suspect's license would be automatically revoked in an administrative proceeding if the suspect refused a chemical test. (A. 358-359.) *See also* King & Tipperman, *supra*, at 549-551. The Legislature did *not* impose a two-hour limitation on the revocation requirement. (A. 358-359.) Although Endara-Caicedo asserts (Br. at 30) that the reference to "such chemical test" in the license-revocation provision "*always* meant a refusal within two hours," he cites no support for that assertion. And it makes no sense for the "such chemical test" reference in the license-revocation provision to have incorporated the two-hour evidentiary limitation from an entirely different section, when neither provision cross-referenced the other in any way. (A. 358-359.) *See also* Ch. 775, 1959 N.Y. Laws 1855, 2008-09.

In 1970, the Legislature made a number of changes to the statutory definitions of drunk-driving offenses in an effort to

"strengthen" the drunk-driving laws. (*See* A. 513-514 (Governor's Program Bill), 524-525 (DMV memorandum).) In connection with those amendments, the Legislature moved the two-hour language from the statutory section defining drunk-driving offenses (§ 1192) to the section addressing arrest and testing procedures (§ 1194), adding it to the deemed-consent provision where it remains today. *Compare* Ch. 775, 1959 N.Y. Laws at 2008 (pre-1970 statutory language), *with* Ch. 275, § 4, 1970 N.Y. Laws 1597, 1598-99 (1970 amendment) (A. 503). *See also* King & Tipperman, *supra*, at 575-77.

A party "contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). But here Endara-Caicedo has offered no evidence even hinting at a legislative intent to engraft a two-hour limitation onto the longstanding mandatory license-revocation requirement when the Legislature moved the two-hour language to the separate deemed-consent provision.

There is no indication in the VTL's legislative history that the relocation of the two-hour rule was intended to add a two-hour

limitation to the license-revocation provision in § 1194. Rather, the drafters and DMV described the adjustments to § 1194 as "conforming changes" being made to "substantially reenact" the drunk-driving laws with the new drunk-driving offense definitions. (A. 513-514, 524-525.) *See also* King & Tipperman, *supra*, at 577 (1970 amendments "redrafted" "piecemeal revisions of" the VTL from recent years).

Courts "do not rely on legislative silence to infer significant alterations of existing law." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 72 (2013); *accord Matter of Brooklyn Union Gas Co. v. Commissioner of Dept. of Fin. of City of N.Y.*, 67 N.Y.2d 1036, 1039 (1986). And a "minor, unexplained" adjustment "in connection with a general revision of a statute"—like the relocation of the two-hour rule at issue here—"should not be construed as changing a long-standing rule" like the mandatory license-revocation rule "in the absence of a clear manifestation of such intention." *See Matter of Brooklyn Union Gas Co.*, 67 N.Y.2d at 1039; *see also Cyan, Inc. v. Beaver County Empls. Retirement Fund*, 138 S. Ct. 1061, 1071 (2018) (courts will not read substantial changes into "technical and conforming amendments" (quotation marks omitted)); *Matter of*

Horchler, 37 A.D.2d 28, 29-30 (2d Dep't 1971) (similar), *aff'd*, 30 N.Y.2d 725 (1972).

A flawed premise lies at the heart of Endara-Caicedo's claim (Br. at 31) that the relocation of the two-hour rule into the deemed-consent provision must have limited use of refusals in administrative license revocation proceedings because refusals were not yet admissible in criminal drunk-driving cases at that time. Permitting the use of refusal evidence was not the original purpose of the deemed-consent provision. The original purpose was permitting the use of evidence from a chemical test when the driver was unconscious or otherwise unable to consent. See *supra* at 4, 15-16. Thus, including the two-hour qualification in the deemed-consent provision limited the period during which an incapacitated driver's chemical-test evidence would be admissible in a criminal trial.

Endara-Caicedo misunderstands the statute in arguing (Br. at 31-32) that the Legislature "could have created a different subsection" for the two-hour qualification if it did not want the two-hour qualification on implied consent to apply to revocation determinations. The Legislature *did* create different subsections for

the two-hour qualification (§ 1194(2)(a)), and the revocation requirement for test refusal (§ 1194(2)(c)), underscoring that it did not intend the two-hour qualification on implied consent to apply to the revocation requirement. *Compare* VTL § 1194(2)(a), *with id.* § 1194(2)(c).

Endara-Caicedo also errs in dismissing (Br. at 28) the definitive history of the VTL as "extrinsic matter" that this Court should not consider in determining the statute's meaning. He confuses the history of the enacted statute itself—for instance, the continuous absence of a two-hour limitation on the statute's license-revocation requirement, notwithstanding numerous amendments—with extrinsic evidence of legislative intent. The history of the statute itself is not "'extrinsic evidence,'" but "an accepted and uncontroversial tool in the interpretation of statutory texts." *Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395, 418 (2d Cir. 2019) (Calabresi, J., dissenting). It is a long-established rule that "[i]n construing any act of legislation," "regard is to be had, not only to all parts of the act itself," but also "to the history of the law as previously existing," "in the light of which the new act must be read and interpreted."

United States v. Wong Kim Ark, 169 U.S. 649, 653-54 (1898). Moreover, even extrinsic legislative history "is not to be ignored" when it aids in construction of statutory text, no matter how clear the text may appear on first examination. *See Consedine v. Portville Cent. School Dist.*, 12 N.Y.3d 286, 290 (2009).[1]

3. *People v. Odum*'s interpretation of VTL § 1194(2)(f) has no application here.

Endara-Caicedo misplaces his reliance (Br. at 24-28) on *People v. Odum* to support his reading of the license-revocation provision. The *Odum* majority opinion addressed only the statutory provision permitting the admission of test-refusal evidence at a criminal drunk-driving trial, VTL § 1194(2)(f); it expressly declined to address the license-revocation provision at issue here, *id.* § 1194(2)(c). *See* 31 N.Y.3d at 353. Noting that the *Odum* majority

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[1] *Giblin v. Nassau County Medical Center*, 61 N.Y.2d 67 (1984), on which Endara-Caicedo relies (Br. at 28), is not to the contrary. There, the Court considered a report proposing the amendment at issue as further evidence supporting the Court's understanding of the statutory language. *See* 61 N.Y.2d at 74-75. The Court may consider legislative history for the same purpose in this case.

read the "such chemical test" reference in the evidentiary provision at issue there to incorporate the two-hour qualification on implied consent to chemical testing from § 1194(2)(a)(1), Endara-Caicedo contends that the "such chemical test" reference in the separate license-revocation provision at issue here also must incorporate the two-hour rule. But the presumption of consistent usage "readily yields to context." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014) (quotation marks omitted).

Here, the use of "such chemical test" in the revocation provision did not refer to a chemical test within two hours of arrest when the revocation provision was drafted, and that meaning cannot be read into the provision after the fact. See *supra* at 18-21. By contrast, when the Legislature enacted the § 1194(2)(f) evidentiary provision in 1973, the statutory section already included the two-hour rule. *See Odum*, 31 N.Y.3d at 352. The "such chemical test" reference in the evidentiary provision therefore reasonably could be read to incorporate the two-hour rule. *See id.* at 351-52.

The *Odum* majority also emphasized that its analysis rested on an understanding that the statutory provision permitting

admission of test-refusal evidence, § 1194(2)(f), "should be strictly construed" as a "derogation of common law." *Id.* at 353. The Court noted that "the previously well-established" common-law rule was that all "evidence of a refusal was inadmissible." *See id.* The administrative license-revocation provision at issue here, however, was not a derogation of any common-law rule, so there is no basis to read a two-hour limitation into that provision. The license-revocation requirement is a purely statutory creation, not a rule of evidence with common-law roots. See also *infra* at 27-28.

Indeed, an opposing presumption applies to the license-revocation provision at issue here. In light of DMV's experience administering the VTL, DMV's interpretation of the revocation provision must be sustained so long as it is reasonable—even if Endara-Caicedo's interpretation of the provision also is reasonable. *See, e.g.*, *Matter of Madison County Indus. Dev. Agency*, 33 N.Y.3d at 135; *Matter of Partnership 92 LP*, 46 A.D.3d at 428-29.

B. The Two-Hour Limitation Is an Evidentiary Rule for Criminal Trials and Has No Application to Administrative Proceedings to Revoke a License.

It would be contrary to precedent and public policy to read the two-hour qualification on implied consent to chemical testing into the separate statutory provision requiring license revocation for a chemical-test refusal.

1. This Court and others have limited the two-hour rule to the criminal evidentiary context.

This Court has long recognized that the two-hour qualification on implied consent to chemical testing "is an evidentiary rule." *Matter of Viger v. Passidomo*, 65 N.Y.2d 705, 707 (1985). The rule exists "solely for the purpose of qualifying the results of the test for admission into evidence." *Matter of Cook v. Adducci*, 205 A.D.2d 903, 904-905 (3d Dep't 1994). It is undisputed that the rule was enacted "because scientific research showed that alcohol metabolizes quickly in the body, and it was thought at the time that a two-hour limitation, as far as possible, would ensure that the results of the blood test maintained probative value as evidence." *Popko*, 33 Misc. 3d at 282; *accord* Br. at 14.

The evidentiary concerns underlying the two-hour qualification on implied consent to chemical testing have no application to the VTL's separate provision requiring revocation of driving privileges if the driver refuses a chemical test. Because the Legislature determined that drunk drivers remained "the greatest single hazard on the highways," the license-revocation scheme was enacted to give police an additional tool "to drive the drunken driver off the road." (A. 445-446 (Interim Report of Joint Legislative Committee on Motor Vehicle Problems, Chemical Tests for Intoxication (N.Y. Legis. Doc., 1953, No. 25)).) Although chemical tests had proven effective in enforcing drunk-driving laws, their effectiveness was limited by drivers' refusal to consent. (A. 450-452.) In order to encourage drunk-driving suspects to agree to chemical tests, "[t]he taking of the test [was] made a condition of a suspect's continued use of the highways." (A. 460.) But the suspect was permitted to "refuse to take the test"—with the caveat that "if he refuses his license to drive will be revoked." (A. 453; *see also* A. 460-461.) The ability to refuse a test was "not really a right," but "merely an accommodation" to avoid forcing a chemical test on an unwilling

driver. *See People v. Paddock*, 29 N.Y.2d 504, 506 (1971) (Jasen, J., concurring). *Accord* Br. at 15 ("license revocation for a refusal was intended to procure chemical tests" and "deter drivers" from refusing tests).

As this Court has elaborated, the license-revocation statute "was designed to enable the authorities to deal promptly and effectively with the scourge of drunken drivers," *Craft*, 28 N.Y.2d at 278, by "encourag[ing] those suspected of alcohol-related driving offenses to comply with requests to submit to chemical tests," *Washington*, 23 N.Y.3d at 231, and "immediate[ly] revo[king] . . . their licenses . . . upon refusal to take the blood test," *Craft*, 28 N.Y.2d at 278. In other words, license revocation was always intended to be a mandatory result of test refusal, irrespective of the timing of the refusal.

No case Endara-Caicedo cites indicates that the VTL's two-hour qualification on implied consent limits the license-revocation requirement. Endara-Caicedo errs in relying (Br. at 22-28) on case law specific to the criminal evidentiary context. In *People v. Finnegan*, for example, this Court stated in passing that VTL § 1194(2)(a)(1)

(the deemed-consent provision) "mandates that the breathalyzer test be performed within a two-hour time period following arrest" for purposes of introducing evidence from the test against a criminal drunk-driving defendant. *See* 85 N.Y.2d 53, 59 (1995). The Court said nothing about administrative proceedings to revoke a license. *See id.* In *People v. Atkins*, this Court clarified that the two-hour limit has no application when a criminal defendant expressly and voluntarily consents to a chemical test. *See* 85 N.Y.2d 1007 (1995); *accord People v. Smith*, 18 N.Y.3d 544, 548 n.1 (2012); *see also People v. Ward*, 307 N.Y. 73, 77 (1954) (deemed-consent provision has no application where defendant consents to chemical test). But these criminal cases again said nothing about administrative proceedings to revoke a license.

Likewise, this Court's majority opinion in *Odum* addressed only the criminal evidentiary context—not the administrative license-revocation context at issue here. *See* 31 N.Y.3d 344. In *Odum*, a drunk-driving suspect refused a chemical test more than two hours after his arrest, but then agreed to the test after police warned that his test refusal would be used as evidence against him

at trial. *See id.* at 346. The *Odum* majority concluded that the chemical-test evidence and the suspect's prior test refusal were properly suppressed in his criminal trial because the Legislature deemed chemical-test evidence obtained more than two hours after an arrest insufficiently probative to be admissible without the suspect's express and voluntary consent. *See id.* at 350, 353 (citing *Atkins*, 85 N.Y.2d at 1009). And the Court concluded that the *Odum* suspect did not "voluntarily" consent to testing more than two hours after his arrest because his consent was influenced by the incorrect warning that a refusal would be used against him at trial. *See id.* at 351. That reasoning is not applicable here, in the context of an administrative license-revocation proceeding, where the driver's test refusal itself is the reason to revoke the driver's license. Whether the driver's agreement to take the test would have resulted in probative and admissible evidence at a criminal trial is immaterial; the license must be revoked "whether or not" the driver is criminally convicted. *See* VTL § 1194(2)(b)-(c).

Indeed, the *Odum* majority opinion expressly found the issue of whether the two-hour rule applies in the separate context of

administrative license revocation "irrelevant to our analysis," and declined to address it. *See* 31 N.Y.3d at 353. And Judge Wilson in his concurrence and the three dissenters—together a majority of this Court—made clear that the two-hour rule is inapplicable in the administrative revocation context. *See id.* at 353, 356-62.[2]

For these same reasons, Endara-Caicedo errs in asserting (Br. at 35-38) that *Odum* "overruled" DMV's 2012 opinion that the two-hour qualification on implied consent to chemical testing does not apply to the license-revocation provision. The *Odum* majority opinion expressly declined to consider whether the two-hour rule applies to administrative proceedings to revoke a license. *See* 31 N.Y.3d at 353. To be sure, *Odum* may have affected the criminal cases addressing admissibility of evidence cited in DMV's opinion. But it does not undermine DMV's opinion that the two-hour rule is inapplicable to the separate context of administrative license-revocation proceedings.

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[2] Judge Wilson "agree[d] with [his] dissenting colleagues" as to the lawfulness of the license-revocation warning "even after expiration of the two-hour period," and he did not say that agreement was only because of DMV policy. *See* 31 N.Y.3d at 353.

Endara-Caicedo likewise misplaces his reliance (Br. at 29) on the fact that, before 2012, DMV declined to revoke licenses of drivers who refused chemical tests after more than two hours. DMV issued a formal opinion on this subject for the first time in 2012. In that opinion, DMV concluded that no two-hour limitation applies to the VTL's license-revocation requirement for test refusal. (A. 178-179.) And since issuing that opinion, DMV consistently has revoked licenses for test refusals irrespective of whether the refusal occurred within two hours of the driver's arrest.

DMV's practice before examining the issue in 2012 explains why a number of earlier cases Endara-Caicedo cites (Br. at 15-16, 17, 24, 30-31) referred in passing to a two-hour period in which DMV would revoke the driver's license for test refusal.[3] None of

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[3] *See People v. Rosa*, 112 A.D.3d 551, 552 (1st Dep't 2013) (arrest at issue occurred before DMV's 2012 opinion); *Matter of Iovino v. Martinez*, 39 A.D.3d 311, 312 (1st Dep't 2007); *Matter of Kennedy v. Melton*, 62 A.D.2d 1152, 1153 (4th Dep't 1978); *Matter of Reed v. New York State Dept. of Motor Vehs.*, 59 A.D.2d 974, 974 (3d Dep't 1977); *Matter of Burns v. Melton*, 59 A.D.2d 975, 975 (3d Dep't 1977); *Matter of White v. Fisher,* 49 A.D.2d 450, 451 (3d Dep't 1975); *Matter of Donahue v. Tofany*, 33 A.D.2d 590, 591 (3d Dep't 1969); *Matter of Lundin v. Hults*, 29 A.D.2d 581, 582 (3d Dep't 1967).

these cases held that the VTL does not permit license revocation for a test refusal conveyed more than two hours after an arrest. The cases did not even present that issue, because the refusals generally "occurred within a two-hour period following the arrest." *E.g.*, *Matter of Lundin*, 29 A.D.2d at 582.[4]

Moreover, where these cases addressed the scope of the VTL's two-hour rule, they underscored that "[t]he two-hour limitation provided by [§ 1194(2)(1)(a)] of the Vehicle and Traffic Law is for the purpose of qualifying the results of the test for admission in evidence, and not necessarily to confer additional privileges upon the defendant, or to extend his rights in point of time." *Matter of Donahue*, 33 A.D.2d at 591; *accord Matter of White*, 49 A.D.2d at 451.[5]

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[4] *Accord Matter of Iovino*, 39 A.D.3d at 312; *Matter of Kennedy*, 62 A.D.2d at 1153; *Matter of Reed*, 59 A.D.2d at 974; *Matter of Burns*, 59 A.D.2d at 975; *Matter of White,* 49 A.D.2d at 451; *Matter of Donahue*, 33 A.D.2d at 591. The refusal in *Rosa* did not occur within two hours of the arrest, but *Rosa* also did not present the issue of whether the VTL permits revocation for a refusal more than two hours after the arrest, because it was a criminal drunk-driving case, not a revocation case. *See* 2 A.D.3d 551.

[5] Because these cases never held that a two-hour limitation applies in license-revocation proceedings, Endara-Caicedo is mistaken in contending (Br. at 16, 30-31) that the "conforming changes"

The only administrative license-revocation case Endara-Caicedo cites (Br. at 24) from after the DMV's 2012 opinion, *Matter of Lamb v. Egan*, 150 A.D.3d 854 (2d Dep't 2017), says nothing about a two-hour period. The only issue there was whether police were required to warn Lamb that his requests to consult an attorney would be construed as a test refusal. *Id.* The court answered that question in the affirmative, concluded that the police had not properly warned Lamb, and held that in light of the deficient warnings Lamb could not be considered to have refused the test. *See id.*

Limiting the two-hour qualification on implied consent to the evidentiary context is also supported by case law construing the similar statutory schemes of other States. As the Appellate Division noted in upholding Endara-Caicedo's license revocation, courts around the country have refused to apply two-hour evidentiary limitations to requirements to revoke a license for a test refusal; those courts have instead held that licenses must be revoked irrespective of the timing of the refusal. *See* 180 A.D.3d at 499-500

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referenced in the legislative history of the 1970 amendments to the VTL were aimed at conforming the statute to these cases.

(citing *Motor Veh. Admin. v. Jones*, 380 Md. 164, 174-78 (2004); *Cline v. Ohio Bur. of Motor Vehs.*, 61 Ohio St. 3d 93, 99 (1991); *Stumpf v. Colorado Dept. of Revenue, Motor Veh. Div.*, 231 P.3d 1, 3-4 (Colo. App. 2009)).

Although Endara-Caicedo asserts (Br. at 27 n.10) that other States' license-revocation statutes are "designed differently" than New York's, he offers no support for that assertion. In fact, just as in New York, these sister States use the prospect of license revocation for a test refusal as "an expedient and effective deterrent and sanction against drunk driving." *Jones*, 380 Md. at 178 (quotation marks omitted). And they treat that sanction as "separate from, independent of, and cumulative to a criminal prosecution." *Cline*, 61 Ohio St. 3d at 99. Indeed, New York's license-revocation requirement was the first in the nation—and a model for other States. *See, e.g.*, *Birchfield*, 136 S. Ct. at 2168-69.

2. Limiting the two-hour rule to its evidentiary context is supported by the strong public policy against driving under the influence.

As a policy matter, it makes no sense to apply the two-hour qualification on implied consent to chemical testing in the context of administrative license-revocation proceedings. Reading a two-hour limit into the license-revocation provision would give certain intoxicated drivers a free pass for refusing a chemical test. (*See* A. 564-565.) If an intoxicated driver managed to avoid a testing request for two hours after the driver's arrest—either by happenstance or by conscious efforts to delay—the driver would face no penalty or deterrent from driving under the influence of alcohol or drugs and then refusing the test and thereby frustrating enforcement of the laws prohibiting driving under the influence. The Legislature enacted mandatory license revocation for test refusal to avoid precisely that result. And the urgency of that legislative purpose has never been greater: there has been an "alarming rate of refusals" in recent years that will only accelerate if refusals "are without consequence." *Odum*, 31 N.Y.3d at 357 n.3 (DiFiore, C.J., dissenting) (citing Esther S. Namuswe et al., *Breath Test Refusal*

Rates in the United States—2011 Update 3 (U.S. Dept. of Transp. Mar. 2014);[6] *Birchfield*, 136 S. Ct. at 2169-70).

There is an easy answer to Endara-Caicedo's question of why the Legislature would penalize a driver for refusing a chemical test after the two-hour deemed-consent period (Br. at 33): because the Legislature wanted to deter *all* test refusals, "whether or not" the driver was ultimately criminally convicted of driving under the influence, and thus whether or not the test would produce the most probative evidence for a criminal trial. *See* VTL § 1194(2)(b)-(c).

As this Court has repeatedly recognized, the two-hour qualification on implied consent was never "intended by the Legislature to be an absolute rule of relevance, proscribing admission of the results of any chemical test administered after that period." *Atkins*, 85 N.Y.2d at 1009; *accord Odum*, 31 N.Y.3d at 349. Rather, a driver may consent to use of chemical-test evidence after two hours, because such evidence retains at least some probative value. *See Atkins*, 85 N.Y.2d at 1009. In fact, the probative value of

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[6] Available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/breath_test_refusal_rates-811881.pdf.

chemical-test evidence after two hours has increased substantially since the two-hour rule was enacted some eighty years ago. "[I]mproved breath test machines" now can detect alcohol more effectively and accurately than ever. *Birchfield*, 136 S. Ct. at 2168; *accord Odum*, 31 N.Y.3d at 357-58 (DiFiore, C.J., dissenting).

There is no merit to Endara-Caicedo's assertion (Br. at 33) that police who take more than two hours to request a chemical test must be "dallying," and thus this Court should excuse intoxicated drivers who refuse such a request. As an initial matter, inability to complete a chemical test within two hours of the suspect's arrest need not indicate improper delay. Here, for example, police were unable to test Endara-Caicedo within two hours because no officer trained to perform the test was immediately available at the station in the middle of the night. (A. 45 (Tr. at 30:9-14).) In addition, because alcohol and other drugs dissipate with time, any delay is already to the intoxicated driver's benefit. *See, e.g.*, *Washington*, 23 N.Y.3d at 231. There is no indication that the Legislature intended a further windfall for intoxicated drivers by immunizing them from the consequences of their test refusals, simply because two hours

have passed since their arrests. Any such rule would amount to a significant—and unintended—loophole in the law governing test refusals.

Contrary to Endara-Caicedo's assertions (Br. at 34-35), a two-hour rule is not needed to prevent drivers from being subject to civil penalties for a "limitless" time after their arrests. As Endara-Caicedo recognizes (Br. at 34), "[t]he police would not likely seek—and a motorist would not likely decline to take—a chemical test" more than a few hours after a drunk-driving arrest, "because alcohol would be metabolized." For the period when the police believe a test could be probative, and the driver fears the test results sufficiently to refuse the test, penalizing refusal with license revocation makes good sense—and is required by the plain language and history of VTL § 1194.

CONCLUSION

For the reasons set forth above, the Court should affirm the Appellate Division's decision and order.

Dated: New York, New York
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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Philip J. Levitz, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 7,058 words, which complies with the limitations stated in § 500.13(c)(1).

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Philip J. Levitz