SC97394

IN THE SUPREME COURT OF MISSOURI

MATTHEW CARVALHO,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

From the Circuit Court of Franklin County, Missouri
The Honorable Stanley D. Williams, Associate Circuit Judge

RESPONSE BRIEF OF RESPONDENT DIRECTOR OF REVENUE

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JURISDICTIONAL STATEMENT

Appellant's Point Relied On II challenges the validity of several Missouri statutes. Thus, this appeal falls within the scope of the Court's exclusive jurisdiction. Mo. Const. Art. V, § 3.

STATEMENT OF FACTS

On May 10, 2017, Officer Eric Saavedra stopped Matthew Carvalho on suspicion of speeding. Legal File ("LF"), Doc. 52 at 14-15. During the traffic stop, Officer Saavedra observed that Carvalho exhibited "a strong odor of alcohol" and that he had "bloodshot, watery and glassy eyes." LF, Doc. 46 at 1 (Circuit Court Judgment), Respondent's Appendix ("App'x") 1. Carvalho's speech was also slurred. *Id.*

Officer Saavedra placed Carvalho under arrest and transported him to the police station. *Id.*; LF, Doc. 52 at 15. At the police station, Carvalho was asked to submit to a breath test. LF, Doc. 52 at 16. Carvalho testified that he received the following notice (the "Implied Consent Warning") regarding the breath test:

> You are under arrest. I had reasonable grounds to believe you were driving a motor vehicle while in an intoxicated or drugged condition. To determine the alcohol or drug content in your blood, I'm requesting you to submit to a chemical test of your breath. If you refuse to take the test, your driver's license will immediately be revoked for one year. Evidence of your refusal to take the test may be used against you in prosecution in a

court of law. Having been informed of the reasons for requesting the test, will you take the test.

Transcript at 11, App'x 3. Carvalho requested the opportunity to speak with an attorney. LF, Doc. 46 at 1, App'x 1; LF, Doc. 52 at 16. After speaking with an attorney, Carvalho agreed to undergo the breath test. *Id.* The breath test indicated that Carvalho's blood-alcohol content exceeded .08%. LF, Doc. 46 at 1, App'x 1; LF, Doc. 52 at 17. At that time, Carvalho's driver's license was seized, and Carvalho received a Notice of Suspension. LF, Doc. 52 at 17; *see also id.* at 2-3 (Notice of Suspension), App'x 4-5.

Carvalho requested an administrative hearing and, following the hearing, the suspension of his license was sustained. LF, Doc. 50 at 1. Carvalho then filed a petition for judicial review and trial *de novo*. *Id.* At trial, Carvalho argued that the breath-test results were inadmissible, because the Director did not introduce evidence showing that a copy of the regular maintenance report for the breath analyzer with which he was tested had been filed with the Department of Health and Senior Services. LF, Doc. 46, at 1-2, App'x 1-2. Carvalho also argued that reliance on the breath-test results violated procedural due process. *Id.*

The Circuit Court rejected Carvalho's arguments regarding the admissibility of the breath-test results and the constitutionality of the breath-test regime. *Id.* The Circuit Court found that Carvalho was not credible in his denial of having consumed alcohol prior to driving, and the Court found that the breath-test results indicated that Carvalho's blood-alcohol level exceeded the legal limit. *Id.* The Circuit Court upheld the Director's

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revocation of Carvalho's driver's license. *Id.* Carvalho appealed this case to the Court of Appeals and then sought transfer to this Court.

ARGUMENT

Standard of Review. In this court-tried license-revocation case, "the trial court's judgment [should] be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Stiers v. Director of Revenue*, 477 S.W.3d 611, 614 (Mo. banc 2016) (quotation omitted). The Court reviews the constitutionality of a statute *de novo*. *Hink v. Helfrich*, 545 S.W.3d 335, 338 (Mo. banc 2018).

I. The Circuit Court Properly Admitted the Breath-Test Results, Which Satisfied the Director's Burden of Proof by Demonstrating That Carvalho's Blood-Alcohol Content Exceeded the Legal Limit. (Responds to Point Relied On I)

In his Point Relied On I, Carvalho contends that the results of his breath test were inadmissible, because a maintenance report was not filed with the Department of Health and Senior Services ("DHSS"), as required by 19 CSR 25-30.031(3). *See* Appellant's Brief ("App. Br.") at 8-13. This argument fails for two reasons. First, the admissibility of breath-test results does not depend on whether a maintenance report has been filed with DHSS. *See* Part I.A, *infra*. Second, the record—coupled with facts susceptible to judicial notice—demonstrates that a maintenance report for the breath analyzer used to test Carvalho was, in fact, timely filed with DHSS. *See* Part I.B, *infra*. The Court should affirm the Circuit Court's Judgment.

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A. The Admissibility of Breath-Test Results Does Not Depend on Whether a Maintenance Report Has Been Filed with DHSS.

As described below, the admissibility of the results of Carvalho's breath test does not depend on whether a maintenance report was timely filed with DHSS. Missouri courts have identified three requirements for the admission of breath-test results, and none of these requirements includes the filing of a maintenance report with DHSS. *See* Part I.A.1, *infra*. Moreover, the purposes underlying the applicable statutes and regulations demonstrate that the admissibility of breath-test results does not depend on the filing of a maintenance report with DHSS. *See* Part I.A.2, *infra*. The Court should affirm the Circuit Court's Judgment.

1. Missouri courts have identified three requirements for the admission of breath-test results, and none of these elements includes the filing of a maintenance report with DHSS.

Chapter 577 sets forth the requirements for the admission of breath-test results in license-revocation proceedings. "To be considered valid, chemical analysis of the person's breath . . . shall be performed, according to methods approved by the state department of health and senior services, . . . by a person possessing a valid permit issued by the state department of health and senior services for this purpose." § 577.020.3, RSMo; *see also* § 577.037.5, RSMo. "This provision thus requires that, to lay a proper foundation for the admission of breath analyzer tests, [the] Director must demonstrate *the test was performed*: (1) by following the approved methods and techniques of the Department of Health; (2) by a person holding a valid permit; and (3) on equipment and devices approved by the Department of Health." *Potts v. State*, 22 S.W.3d 226, 230 (Mo. App. W.D. 2000)

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(emphasis in original; quotation and brackets omitted); *see also Sellenriek v. Director of Revenue*, 826 S.W.2d 338, 340-41 (Mo. banc 1992).

Carvalho does not dispute that the breath test was performed according to the procedures prescribed by DHSS, by a person holding a valid permit from DHSS, and on equipment approved by DHSS. *See* App. Br., at 8-13.[1] Instead, he argues that the Director failed to demonstrate that the regular maintenance-check report for the breath analyzer had been filed with DHSS within 15 days of the last testing. *See id.* DHHS regulations provide that "maintenance checks" must be performed "at intervals not to exceed thirty-five (35) days," and that "[t]he permittee shall retain the original report of the maintenance check and submit a copy of the report so that it shall be received by [DHSS] within fifteen (15) days from the date the maintenance check was performed." 19 CSR § 25-30.031(3).

As described in Part I.B below, the record and judicially noticeable facts show that the maintenance report for the breath analyzer used to test Carvalho was, in fact, timely filed with DHSS. Nevertheless, even if it were not, the admissibility of breath-test results does not depend on the filing of the maintenance report with DHSS. "[O]n its face [§ 577.020.3, RSMo] states only that tests shall be *performed* according to department regulations, and nothing in it suggests that a minor variation in the manner of filing a report

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[1] The record demonstrates that the test was performed according to DHSS procedures, *see* LF, Doc. 52 at 8 (describing compliance with the applicable Operational Checklist and certifying that "[t]here was no deviation from the procedure approved by the department"); that Officer Saavedra possessed a valid DHSS permit, *id.* (identifying Officer Saavedra's Operator Permit number as 363388, and certifying that "I am authorized to operate the instrument"); *id.* at 5 (identifying Officer Saavedra's "DHSS Permit Number" as 363388); and that the test was performed using an Intox EC/IR II, which DHSS has approved, *see id.* at 8; 19 CSR § 25-30.050(1).

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of that performance will render the results of the test inadmissible." *Potts*, 22 S.W.3d at 231 (emphasis in original). Similarly, § 577.037 requires that "[a] chemical analysis of a person's breath . . . shall have been *performed* as provided in" Chapter 577 and DHSS's implementing regulations. § 577.037.5, RSMo (emphasis added). Section 577.037.5 says nothing about recordkeeping requirements. *Id.*

Consistent with these statutory directives, Missouri courts have consistently rejected challenges to the admissibility of breath tests based on recordkeeping issues collateral to the performance of the breath test and the reliability of that test. Indeed, the Court of Appeals has consistently rejected precisely the argument raised by Carvalho here. For example, in *Turcotte v. Director of Revenue*, the officer had failed to file a maintenance report with DHSS within fifteen days of the last maintenance check, as required by § 25-30.031(3). 829 S.W.2d 494, 496 (Mo. App. E.D. 1992). The driver argued that the breath-test results were thus inadmissible. *Id.* The Court of Appeals rejected this argument, explaining that while compliance with the three prerequisites to admissibility—the use of approved techniques, operation by a valid permit holder, and use of approved equipment—was mandatory, the driver had "no interest in the maintenance reports being properly filed." *Id.* The Court of Appeals has consistently applied this analysis for nearly three decades. *See, e.g.*, *Hearne v. Director of Revenue*, No. ED106352, --- S.W.3d ---, 2018 WL 4320359 (Mo. App. E.D. Sept. 11, 2018); *Roam v. Director of Revenue*, No. ED106142, --- WL --- , 2018 WL 3848522 (Mo. App. E.D. Aug. 14, 2018).

Similarly, in *Potts*, the driver argued that breath-test results would have been inadmissible because the officer who administered the test had not retained the original

maintenance report as required by 19 CSR § 25-30.031(3). *Potts*, 22 S.W.3d at 230. In rejecting this argument, the court noted that the driver did not "allege that the breathalyzer test was *performed* in a way that deviated from the methods or devices required under the relevant regulations." *Id.* at 231 (emphasis in original). Nor did the driver contend that the breath analyzer "was improperly calibrated, or tested contrary to regulatory requirements, nor that the officer who performed the maintenance check was unqualified under the regulations, nor even that the breathalyzer used was not a device approved by [DHSS]." *Id.* (internal citations omitted). Instead, the driver claimed that the breath-test results were inadmissible due to a violation of § 25-30.031(3) "collateral to *the proper performance of a blood alcohol test*." *Id.* (emphasis in original). Such collateral issues simply do not affect the admissibility of breath-test results. *Id.*

Here, Carvalho's argument does not relate to the performance or reliability of the breath test, the validity of Officer Saavedra's permit, or the authorization of the breath analyzer used in the test. *See* App. Br. at 8-13. Instead, he relies entirely on a recordkeeping requirement "collateral to the proper performance of a blood alcohol test." *Potts*, 22 S.W.3d at 231. As described above, the plain text of the relevant portions of Chapter 577 and the consistent decisions of Missouri courts indicates that this issue does not affect the admissibility of the breath test. Thus, Carvalho has presented no basis for reversing the Director's revocation of his license.

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2. The purposes underlying § 25-30.031(3) and Chapter 577 confirm that the admissibility of breath-test results does not depend on the filing of a maintenance report with DHSS.

As described above, the statutory text of Chapter 577 and the cases applying that statutory scheme demonstrate that the admissibility of breath-test results does not depend on whether a maintenance report was filed with DHSS. The purposes underlying § 25-30.031(3) and Chapter 577 confirm this conclusion.

The Court has previously explained that the purpose underlying the maintenance-check requirements of § 25-30.031(3) "is to ensure the reliability of a particular test result." *Sellenriek*, 826 S.W.2d at 340. This regulatory purpose justifies strict adherence to the requirement that breath analyzers undergo regular maintenance, because that maintenance ensures that the breath analyzer will produce accurate results. But the failure to file a duplicate copy of the maintenance report with DHSS does not affect the reliability of tests conducted with that breath analyzer. *See Turcotte*, 829 S.W.2d at 496 ("[F]ailure to file timely maintenance reports does not impeach the machine's accuracy, which is the main concern here."). Thus, the purpose underlying § 25-30.031(3) does not support excluding breath-test results based on a failure to file a maintenance report with DHSS.

Excluding the breath-test results would undermine the clear legislative purposes of Chapter 577, however. The General Assembly enacted the implied-consent law "to rid the highways of drunk drivers." *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 619 (Mo. banc 2002) (quotation omitted). "To void a suspension . . . [based] on flaws in the literal procedural observances flouts the legislative purpose, to expeditiously remove the most dangerous drunk drivers from Missouri roadways." *Potts*, 22 S.W.3d at 232 (quotation

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omitted). Thus, excluding the breath-test results here would undermine the legislative purposes underlying Chapter 577. The Court should affirm the Circuit Court's Judgment.

3. *White v. Director of Revenue* has no relevance here.

Carvalho argues that the Court's decision in *White v. Director of Revenue*, 321 S.W.3d 298 (Mo. banc 2010), dictates that breath-test results should not be admitted absent evidence that a maintenance report was filed with DHSS. *See* App. Br. at 11-13. In *White*, the Court held that in license-suspension cases, the Director bears both the burden of production and the burden of persuasion. *White*, 321 S.W.3d at 304-05. Because the Director bears both burdens, "the trier of fact has the right to believe or disbelieve [the Director's] uncontradicted or uncontroverted evidence." *Id.* at 305. Applying these principles, *White* held that where a fact finder did not credit the Director's uncontradicted evidence, the fact finder could rule in favor of the driver even if the driver presented no evidence of his own. *Id.* at 304-06.

That holding does not apply here. In this case, the Director presented evidence that the breath test indicated that Carvalho's blood-alcohol content exceeded the legal limit. *See* LF, Doc. 46, at 1-2, App'x 1-2. Unlike in *White,* the Circuit Court credited the Director's evidence, finding that "[t]he results were above the legal limit." *Id.* at 1; *see also* Mo. Sup. Ct. R. 73.01(c). This evidence of Carvalho's blood-alcohol content, credited by the Circuit Court, satisfied the Director's burden of persuasion. The Court should affirm the Circuit Court's Judgment.

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B. The Record, Coupled with Matters of Which the Court Can Take Judicial Notice, Shows That a Copy of the Maintenance Report was Timely Filed with DHSS.

As described above, the admissibility of the breath-test results does not depend on whether a maintenance report was timely filed with DHSS. Moreover, the record—coupled with matters of which the Court can take judicial notice—shows that a maintenance report was, in fact, filed with DHSS within 15 days of completing the applicable check.

When reviewing a court-tried case, "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." Mo. Sup. Ct. R. 73.01(c). The Circuit Court expressly found that Carvalho's "argument [that the breath-test results were inadmissible was] contrary to the records contained in Respondent's Exhibit A." LF, Doc. 46 at 2, App'x 2.[2] Thus, the Court should construe all factual issues presented by Exhibit A in favor of the admissibility of the breath-test results. *See* Mo. Sup. Ct. R. 73.01(c). Exhibit A includes a maintenance report relating to a test conducted on April 30, 2017. LF, Doc. 52 at 10. That maintenance report includes a notation in the upper right-hand corner stating "RECEIVED By Ellen Strawsine at 9:43 am, May 01, 2017." *Id.* Carvalho acknowledges this fact, but he asserts that "there is no evidence of who that person is or what entity they [sic] represent." App. Br., at 11.

The Circuit Court and this Court may take judicial notice of the fact that Ellen Strawsine was an employee of DHSS. The State's Official Manual (commonly known as

[2] The Director's "Exhibit A" is included in the Legal File at Document 52.

the "Blue Book") identifies Ellen R. Strawsine as an "assoc pub hlth lab scientist" employed by DHSS. OFFICIAL MANUAL, STATE OF MISSOURI 2017-2018, at 1111.[3] A court may take judicial notice of a fact that "can be reliably determined by resort to a readily available, accurate and credible source." *State v. Weber*, 814 S.W.2d 298, 303 (Mo. App. E.D. 1991). Missouri courts have consistently treated the Official Manual as an accurate and credible source for determining the identity of state officials. *See Armstrong v. State*, 983 S.W.2d 643, 644 n.3 (Mo. App. S.D. 1999) (taking judicial notice of a judge's position based on the Official Manual); *In re Marriage of Gardner*, 973 S.W.2d 116, 120 n.12 (Mo. App. S.D. 1998) (same); *see also Mo. Coalition for the Environment v. Herrmann*, No. ED81790, 2003 WL 21488873, at *4 (Mo. App. E.D. June 30, 2003) (taking judicial notice of whether a state commission's staff included an executive secretary based on the Official Manual), *transfer granted and opinion issued*, 142 S.W.3d 700 (Mo. banc 2004). Moreover, Missouri courts have frequently taken judicial notice of state officials' identities and positions even without reference to the Official Manual. *See, e.g.*, *Pous v. Director of Revenue*, 998 S.W.2d 129, 132 (Mo. App. W.D. 1999) (taking judicial notice of the identity of the presiding judge of a circuit); *Mayes v. Palmer*, 103 S.W. 1140, 1142 (Mo. 1907) (taking judicial notice of the appointment of a particular individual as a judge); *State ex rel. United Bonding Co. v. Kennedy*, 364 S.W.2d 642, 643 (Mo. App. 1963) (taking judicial

[3] The Official Manual is available at https://www.sos.mo.gov/bluebook/2017-2018. The relevant page is available at https://www.sos.mo.gov/cmsimages/bluebook/2017-2018/10_Personnel.pdf.

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notice that an individual no longer held public office). Thus, the Court may take judicial notice of the fact that Ellen Strawsine was an employee of DHSS.

The record, taken together with the identity of Ms. Strawsine, provides a sufficient basis to conclude that a maintenance report was filed with DHSS on May 1, 2017. "A paper is filed when it is received by the proper officer and lodged in his office." *Johnson v. Purkett*, 217 S.W.3d 341, 343 (Mo. App. E.D. 2007). "[T]he date a document was stamped as being received is evidence of the date of receipt." *Id.* at 344. Here, the record supports the conclusion that the breath analyzer underwent a maintenance test on April 30, 2017, and that a copy of the maintenance report was received by a DHSS employee on May 1, 2017. LF, Doc. 52 at 10, App'x 6; *see also Pous*, 998 S.W.2d at 131-32 (taking judicial notice of identity of state judge and, on that basis, concluding that the Director could rely on a document marked with that judge's name). Thus, the record—together with the judicially noticeable fact that Ellen Strawsine was an employee of DHSS—supports the conclusion that a copy of the maintenance report was filed with DHSS. The Court should affirm the Circuit Court's Judgment.

II. The Implied Consent Warning Received by Carvalho and the Notice of Suspension Both Complied Fully with the Requirements of Procedural Due Process. (Responds to Point Relied On II)

Carvalho's second Point Relied On contends that he did not receive appropriate notice as required by procedural due process.[4] *See* App. Br., at 13-19. While not perfectly

[4] Carvalho does not specify whether his procedural-due-process argument arises under the Missouri Constitution, the United States Constitution, or both. *See* App. Br., at 13-19. However, "Missouri's due process provision parallels its federal counterpart, and

clear, it appears that Carvalho claims to have received constitutionally deficient notice in two ways. First, Carvalho apparently argues that the Implied Consent Warning that he received did not adequately apprise him of the potential consequences of undergoing the breath test, and thus it allegedly led him to believe that consenting to a breath test would carry no license consequences, regardless of the test result. *See* App. Br., at 15-17. Second, Carvalho apparently argues that the written Notice of Suspension did not identify every element that the Director would have to establish in the revocation proceeding. *See* App. Br., at 17-19. Neither of these arguments has merit. The Court should affirm the Circuit Court's Judgment.

A. The Implied Consent Warning Received by Carvalho Satisfied the Requirements of Procedural Due Process.

Carvalho contends that the Implied Consent Warning that he received violated procedural due process, because it did not adequately notify him of the potential consequences of undergoing the breath test. *See* App. Br., at 15-17. As described below, this argument lacks merit. First, the Implied Consent Warning complied with the standard set forth in *Teson v. Director of Revenue*, 937 S.W.2d 195 (Mo. banc 1996). *See* Part II.A.1, *infra*. Second, the Implied Consent Warning satisfied the requirements of procedural due process based on the test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* Part II.A.2, *infra*.

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in the past this Court has treated the state and federal due process clauses as equivalent." *Jamison v. Dep't of Soc. Servs.*, 218 S.W.3d 399, 405 n.7 (Mo. banc 2007).

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1. The Implied Consent Warning received by Carvalho satisfied the standard set forth in *Teson v. Director of Revenue*.

In *Teson v. Director of Revenue*, the Court considered the sufficiency of an Implied Consent Warning given to a driver suspected of drunk driving. *Teson v. Director of Revenue*, 937 S.W.2d 195 (Mo. banc 1996). The Court stated that "a warning is sufficient for purposes of due process unless the words used either (1) fail to inform the arrestee of all of the consequences of refusal or (2) mislead the arrestee into believing that the consequences of refusal are different than the law actually provides." *Id.* at 197. Importantly, both prongs of the *Teson* standard relate to the consequences of *refusing* a blood-alcohol test, and neither requires notice of the consequences of *submitting to* one. *Id.*

Carvalho raises two objections to the Implied Consent Warning, but neither objection has merit under *Teson*. First, Carvalho objects that the warning did not adequately inform him of the consequences of submitting to the breath test. *See* App. Br., at 16. However, as noted above, *Teson* provides that "a warning is sufficient for purposes of due process unless the words used either (1) fail to inform the arrestee of all of the consequences of refusal or (2) mislead the arrestee into believing that the consequences of refusal are different than the law actually provides." *Teson*, 937 S.W.2d at 197. *Teson* does not require any notice of the consequences of submitting to a breath test. *Id.*; *see also South Dakota v. Neville*, 459 U.S. 553, 565 (1983) (holding that it did not violate the Due Process Clause "to use the refusal to take [a blood-alcohol] test as evidence of guilt, even

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though [the driver] was not specifically warned that his refusal could be used against him at trial"). Thus, Carvalho's first argument fails under *Teson*.

Second, Carvalho argues that the Implied Consent Warning inaccurately "states that the revocation consequences 'will' begin 'immediately.'" App. Br., at 17. Carvalho claims that he consented to the breath test only because he believed that refusing to do so would result in the immediate revocation of his license. *See id.*; *see also* Transcript at 14. Citing § 302.574.1, Carvalho claims that "the revocation does not commence until 15 days after the refusal." *Id.* Moreover, citing § 302.574.4, Carvalho asserts that "[e]ven then, the revocation can be stayed while the driver seeks judicial review." *Id.* Carvalho's first contention misunderstands the relevant statute, and his second contention is irrelevant.

The Implied Consent Warning correctly stated that a license revocation becomes effective "immediately." The notice stated that "[i]f you refuse to take the test, your *driver's license* will immediately be revoked." Transcript at 11 (emphasis added), App'x 3. This statement accords with § 302.574, which provides that the officer conducting the traffic stop "*shall* take possession of any license to operate a vehicle issued by this state which is held by [the] person [refusing the test]." § 302.574.1, RSMo (emphasis added).

Citing the same provision, Carvalho claims that the revocation "does not commence until 15 days after the refusal." App. Br., at 17. Carvalho misreads the statute. Section 302.574.1 requires the officer to immediately take possession of the driver's *license*, but it also requires the officer to "issue a temporary permit . . . [that] is valid for fifteen days." § 302.574.1, RSMo. The issuance of this *temporary permit* does not alter the fact that the driver's *license* is immediately revoked. Indeed, by requiring the issuance of a new permit,

the statutory text makes clear that the pre-existing driver's license is no longer effect. Thus, the driver's *license* is immediately suspended, and he also receives a new—but temporary—*permit* that remains valid for fifteen days. § 302.574.1, RSMo. This situation contrasts starkly with the provisions that apply when a driver *submits to* a breath test but exceeds the legal limit. In that case, "[t]he license suspension or revocation shall become effective fifteen days after the subject person has received the notice of suspension or revocation." § 302.525.1, RSMo. The Implied Consent Warning received by Carvalho accurately described the applicable statutory scheme by stating that a refusal to submit to a breath test will result in an immediate license revocation.

The possibility of a court-issued stay of revocation also does not render the Implied Consent Warning misleading. A person whose license has been revoked for failure to submit to a breath test may petition a court for a stay of that revocation. § 302.574.4, RSMo. But the possibility that a court may *subsequently* stay a revocation has no bearing on whether the revocation begins "immediately." Under Missouri law, the revocation begins immediately, but a court may subsequently stay that revocation. § 302.574.1, .4, RSMo. The Implied Consent Warning does not contradict this. *See* Transcript at 11, App'x 3. Thus, the Implied Consent Warning satisfies *Teson* and does not violate due process. *Teson*, 937 S.W.2d at 197.

If *Teson* provides the applicable due-process standard, then the Implied Consent Warning satisfies the requirements of due process for the reasons stated in this section, and the Court should affirm the Circuit Court's Judgment. Arguably, there may be some reason to question whether *Teson* provides the applicable standard for Carvalho's procedural-due-

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process argument. First, while using the phrase "due process" in one passage, other language in *Teson* might be construed as suggesting that the case actually involved a question of statutory interpretation—that is, interpreting the requirements of § 577.041—rather than one of constitutional law. *Compare id.* (referring to "due process") *with id.* at 196 ("We hold that *section 577.041.1 requires* a law enforcement officer who arrests a person for driving while intoxicated to give the warning mandated by the statute when the arrestee refuses to take a test to determine blood alcohol content." (emphasis added)). At least one panel of the Court of Appeals may have treated *Teson* as a statutory-interpretation case rather than a due-process case. *See Staggs v. Director of Revenue*, 223 S.W.3d 866, 872 (Mo. App. W.D. 2007) ("[I]n *Teson*, the court held that section 577.041.1 mandates that the officer use the language from the statute when he informs the driver of the Implied Consent Law.").

Second, while *Teson* refers to "due process," it does not specify whether its analysis involves procedural due process or substantive due process. *See Teson*, 937 S.W.2d at 197. At least one court has relied on *Teson* in a substantive-due-process analysis of an implied consent warning. *See State v. Massengale*, 745 N.W.2d 499, 504 (Iowa 2008). In the event that the Court does not believe that *Teson* provides the appropriate standard for resolving Carvalho's procedural-due-process claim, his claim also fails under general principles of procedural due process for the reasons stated in Part II.A.2.

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2. The Implied Consent Warning received by Carvalho satisfied the requirements of procedural due process based on the test set forth in *Mathews v. Eldridge*.

The procedural-due-process protections under the United States and Missouri Constitutions "impose[] constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Jamison v. Dep't of Soc. Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). "In determining what process is due in a particular case, a court first determines whether the plaintiff has been deprived of a constitutionally protected liberty or property interest." *Id.* "If so, a court then examines whether the procedures attendant upon the deprivation of that interest were constitutionally sufficient." *Id.* When determining what procedures are required by the Constitution, courts consider:

> [1] First, the private interest that will be affected by the official action; [2] second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quoting *Mathews*, 424 U.S. at 335).

Carvalho's due-process argument invokes his interest in holding a driver's license. *See* App. Br., at 14. He does not invoke any other liberty or property interest to support his due-process claim. *Id.* Carvalho's interest in his driver's license constitutes a

cognizable interest for purposes of procedural due process. *Dabin v. Director of Revenue*, 9 S.W.3d 610, 615 (Mo. banc 2000) (citing *Dixon v. Love*, 431 U.S. 105, 112 (1977)). However, the *Mathews* factors decisively refute Carvalho's contention that procedural due process requires the State to provide Implied Consent Warning of the possible consequences of submitting to a breath test. Thus, the Court should affirm the Circuit Court's Judgment.

a. Requiring pre-test notice of the consequences of submitting to a breath test would not reduce "the risk of an erroneous deprivation" of a driver's license and may, in fact, *increase* the risk of erroneous deprivations of rights.

"[T]he second stage of the [*Mathews v.*] *Eldridge* inquiry requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used." *Mackey v. Montrym*, 443 U.S. 1, 13 (1979). Importantly, this factor looks to "the risk of an *erroneous* deprivation," not a *warranted* or *justified* deprivation. *Jamison*, 218 S.W.3d at 405 (quoting *Mathews*, 424 U.S. at 335) (emphasis added). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Thus, the Court must consider whether pre-test notice of the consequences of submitting to a breath test will reduce the risk of erroneous deprivation of a driver's license. *See id.* As described below, such a notice would not decrease the risk of an erroneous deprivation and may, in fact, *increase* the risk of erroneous deprivations of rights.

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First, Carvalho's argument appears to be premised on the assumption that such a notice might have deterred him from submitting to a breath test.[5] But chemical blood-alcohol tests like breath tests *decrease* the risk of erroneous deprivations of rights. Chemical blood-alcohol testing "provides the most reliable form of evidence of intoxication in subsequent proceedings." *Mackey*, 443 U.S. at 19. As the United States Supreme Court has noted, chemical blood-alcohol testing can exonerate those who have not violated the drunk-driving laws. *Id.* ("Indeed, in many cases, the test results could lead to prompt release of the driver with no charge being made on the 'drunken driving' issue.").

Mandating a pre-test notice that deters drivers from undergoing breath tests would increase the risk of erroneous deprivations by withholding from tribunals the most objective and reliable evidence of whether a driver was intoxicated at the time of a traffic stop. *See id.* In the absence of a chemical blood-alcohol test, tribunals must rely on less objective and less reliable evidence, such as officer observations of a driver's conduct or the smell of alcohol. Moreover, the refusal itself is admissible as evidence that the person was driving under the influence. *See* § 577.041.1, RSMo; *State v. Knifong*, 53 S.W.3d 188, 194 (Mo. App. W.D. 2001); *State v. Myers*, 940 S.W.2d 64, 65 (Mo. App. S.D. 1997). Thus, any pre-test notice that deters drivers from undergoing a breath test increases the risk of erroneous determinations and is not required by due process.

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[5] If Carvalho does not contend that a different notice would have altered his choice to submit to a breath test, then he has suffered no prejudice, and his procedural-due-process claim necessarily fails. *See* Part II.B.1, *infra*.

Second, a warning that attempts to state the consequences of submitting to a breath test is likely to be highly confusing and is unlikely to enhance a driver's ability to make a reasoned decision. Where a driver refuses a breath test, the legal consequences contemplated by the applicable statutes are straightforward and certain. The officer making the traffic stop "*shall* serve [a] notice of license revocation" on the driver, "*shall* take possession of [the driver's] license," "*shall*" prepare a report regarding the stop, and "*shall*" forwarded the report to the Director. § 302.574.1, .2, RSMo (emphases added). "Upon receipt of the officer's report, the director *shall* remove the license of the person refusing to take the test . . . ." § 302.574.3, RSMo (emphasis added). These straightforward and mandatory consequences make it relatively easy to notify motorists of the consequences of refusing a breath test.

In contrast, when a driver submits to a breath test, the consequences of that test are both complex and uncertain. If the breath test indicates that the driver's blood-alcohol content is *below* the legal limit of .08%, this result will preclude any license suspension. *See* § 577.037.2, RSMo. However, in the criminal context, a driver may still be convicted of driving while intoxicated even if the breath test indicates a blood-alcohol content below the legal limit. *See* § 577.037.2(1), (2), (3), RSMo. Moreover, the results of a breath test do not necessarily "limit[] the introduction of other competent evidence bearing upon the question of whether the person was intoxicated." § 577.037.4, RSMo. A comprehensive enumeration of the consequences of undergoing a breath test presumably would address all of these contingencies.

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A result indicating a blood-alcohol content *above* the legal limit also introduces a variety of uncertainties. Assuming that the driver is arrested, that event rather foreseeably will result in the revocation of the driver's license. *See* § 302.505.1, RSMo. But it is nearly impossible to predict what criminal consequences, if any, will follow. A test showing a blood-alcohol content in excess of the legal limit may often support criminal charges. *See, e.g.*, §§ 577.010, 577.012, RSMo. But that fact alone does not mean that the prosecuting attorney *will* bring charges. That decision will rest on the prosecutor's discretion, which may be informed by factors unknown to the officer conducting the traffic stop.

Thus, an Implied Consent Warning that accurately and meaningfully apprises drivers of all the potential consequences of undergoing a breath test is likely to be complex, confusing, and laced with uncertainty. Especially in the context of a traffic stop, drivers may be unlikely to accurately comprehend and analyze such complex information in a way that enhances their decision making abilities. *See* Ben-Shahar & Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 711-29 (2011) (identifying factors that can limit individuals' ability to utilize complex information disclosures). It is more likely that an exhaustive-but-complex warning will confuse drivers. *See id.* That confusion may be especially concerning given that, absent any warning, most drivers will understand that an adverse result in the breath test likely will have negative legal consequences for them. *See State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981) ("It strains credulity to suggest that a person arrested for [drunk driving] will not know that if he submits to a chemical test the results may be used against him at trial."). Moreover, the Implied Consent Warning received by Carvalho expressly stated that the purpose of the test was "[t]o determine the

alcohol or drug content of your blood." Transcript at 11. Thus, the pre-test warning sought by Carvalho would not decrease the risk of erroneous deprivations of rights. *Jamison*, 218 S.W.3d at 405.

Instead of a confusing and likely unhelpful warning, the relevant statutes already provide a much better mechanism for helping drivers make an informed decision about whether to undergo a breath test. Under existing law, any person requested to submit to a breath test "shall be granted twenty minutes in which to attempt to contact an attorney." § 577.041.3, RSMo. "The purpose of the statute is to give the driver the opportunity to make an informed decision as to whether to take the test." *Crabtree v. Director of Revenue*, 65 S.W.3d 557, 559 (Mo. App. W.D. 2002). Seeking legal advice from an attorney likely constitutes the mechanism most capable of helping drivers make the "right" decision as to whether to submit to a breath test. In this case, Carvalho consulted with an attorney before deciding to undergo the breath test. LF, Doc. 46 at 1, App'x 1.

For the reasons stated, a pre-test warning about the consequences of submitting to a breath test would not decrease the risk of an erroneous deprivation and may, in fact, increase the risk of erroneous deprivations of rights.

b. Important state interests weigh against requiring a pre-test warning about the possible consequences of submitting to a breath test.

The *Mathews* test also considers "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Jamison*, 218 S.W.3d at 405 (quoting *Mathews*, 424

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U.S. at 335). Important governmental interests weigh heavily against mandating the pre-test warning that Carvalho proposes.

First, the United States Supreme Court has recognized that the State has a "paramount interest . . . in preserving the safety of its public highways" by "removing drunk drivers from [the State's] highways." *Mackey*, 443 U.S. at 17. This interest includes a further "interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings." *Id.* at 18. As described above, any warning that deters drivers from undergoing a blood-alcohol test necessarily harms this interest by depriving the State—and the courts—of the most "reliable and relevant evidence" for determining whether a driver has driven under the influence of alcohol. *Id.* (rejecting procedural-due-process challenge to statute calling for revocation of license where driver refuses to undergo a blood-alcohol test). Where the State lacks the most objective and reliable evidence of a driver's intoxication, it may be less able to prosecute that driver criminally, and any resulting conviction may be less likely to be accurate. *See id.* (noting the State's interest "in promptly removing such drivers from the road").

Second, a warning that deters drivers from undergoing breath tests could also undermine the State's interest in the efficient administration of the criminal-justice system. Where a breath test objectively demonstrates that a driver has driven drunk, that driver may be unlikely to challenge criminal drunk-driving charges at trial but may instead resolve any charges via a guilty plea. But a warning that reduces the rate at which drivers undergo breath tests may, in turn, increase the rate at which criminal drunk-driving charges proceed to trial. The State has an interest in "promoting efficient administration of criminal justice

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by expediting resolution of pending criminal matters, lessening the burden upon our prosecutorial and judicial resources[,] and by furthering the economic allocation of these finite resources." *People v. Rivera*, 127 Cal. App. 3d 136, 145 (Cal. App. 1981). Imposing a warning that increases the rate at which criminal drunk-driving cases are resolved via trial—and which actually undermines the accuracy of those trials—harms this important governmental interest.

For the reasons stated, a pre-test warning about the consequences of submitting to a breath test would undermine important governmental interests without providing any countervailing benefits. The Due Process Clause does not require such a warning, and the Court should affirm the Circuit Court's Judgment.

c. The Implied Consent Warning received by Carvalho did not misstate the consequences of refusing a breath test and thus did not violate procedural due process under *Mathews*.

For the reasons stated in Part II.A.1, the Implied Consent Warning received by Carvalho did not misstate the consequences of refusing a breath test by indicating that revocation of his license would occur "immediately" if he refused the test. Thus, Implied Consent Warning did not violate procedural due process. *See United States v. Harrington*, 749 F.3d 825, 830 (9th Cir. 2014). The Court should affirm the Circuit Court's Judgment.

B. The Notice of Suspension Satisfied the Requirements of Procedural Due Process.

Carvalho also contends that the Notice of Suspension that he received after failing the breath test violated procedural due process because it "intimidates the driver into

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accepting the [license] suspension, while simultaneously obscuring the reasons for it and undermining the right to challenge it." App. Br. at 18-19. This argument lacks merit.

1. Carvalho has not sustained any prejudice from the purported deficiencies of the Notice of Suspension.

Carvalho argues that the Notice of Suspension misled him as to the legal requirements for revoking his license, and that this allegedly misleading notice prevented him from "mak[ing] an intelligent decision" whether to challenge his license revocation. App. Br., at 18. As described in Part II.B.2, the Notice of Suspension was not at all misleading, and it fully satisfied the requirements of procedural due process. Nevertheless, even assuming *arguendo* that the Notice of Suspension was misleading, Carvalho's procedural-due-process argument fails, because he sustained no prejudice.

"[A] party who claims to be aggrieved by a violation of procedural due process must show prejudice." *Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010); *see also, e.g.*, *Frye v. Levy*, 440 S.W.3d 405, 415 (Mo. banc 2014) (noting that the "lack of prejudice . . . doom[ed]" a procedural-due-process claim); *Griffin v. Ebbert*, 640 F. App'x 181, 184 (3d Cir. 2016) ("In the absence of a showing of prejudice, we cannot say that Griffin was denied the process he was due."); *Davis v. Mann*, 882 F.2d 967, 975 (5th Cir. 1989) ("To establish a denial of procedural due process, Davis must show substantial prejudice."). Thus, Carvalho can raise his due-process claim only if he has sustained prejudice from the purported violation of procedural due process.

Here, Carvalho has vigorously challenged his license revocation, contesting the revocation in both the Circuit Court and the Supreme Court. He plainly has not been

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"intimidate[d] . . . into accepting the suspension" or misled about his "right to challenge it." App. Br., at 18-19. Carvalho provides no explanation of how a more informative Notice of Suspension would have altered the outcome of this case, or how his actual litigation of this case was in any way impaired by the Notice of Suspension. "[P]rejudice for purposes of procedural due process means that the party's ability to try its case has been compromised in some manner, and that there is a reasonable probability that the outcome of the trial was affected." *C.S. v. Mo. Dep't of Soc. Servs.*, 491 S.W.3d 636, 655 (Mo. App. W.D. 2016). Carvalho has not sustained any prejudice, and thus his procedural-due-process claim necessarily fails. *See Frye*, 440 S.W.3d at 415; *Perry*, 629 F.3d at 17. The Court should affirm the Circuit Court's Judgment.

2. The Notice of Suspension satisfied the requirements of procedural due process.

Carvalho's claim also fails because the Notice of Suspension satisfied the requirements of procedural due process. Carvalho claims that the Notice of Suspension was deficient because it did not identify every element that the Director would have to establish in order to revoke Carvalho's license. *See* App. Br., at 18. Procedural due process does not require the State to provide such information. "Due process . . . require[s] notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *State v. Elliott*, 225 S.W.3d 423, 424 (Mo. banc 2007). But due process does not require the State to apprise individuals of the substantive legal principles that will govern the action. *Sneil, LLC v. Tybe Learning Ctr., Inc.*, 370 S.W.3d 562, 572 (Mo. banc 2012). "[T]he

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recipient of the notice 'must be held to a knowledge of the law.'" *Id.* (quoting *United Asset Mgmt. Trust Co. v. Clark*, 332 S.W.3d 159, 173 (Mo. App. W.D. 2010)).

The Notice of Suspension satisfied these requirements. It clearly and expressly notified Carvalho that the State had revoked his driver's license. *See* LF, Doc. 52 at 2, App'x 4. It also provided him with ample information to present his objections to the State's action. The Notice of Suspension expressly noted that he could "request a hearing to contest the basis for [the] suspension." *Id.* The Notice further stated that "[i]f you want a hearing, you must make your request within 15 days of the date of this notice." *Id.* And the Notice goes on to provide detailed instructions on how to submit a hearing request. LF, Doc. 52 at 3; App'x 5. "[T]he purpose of a notice requirement is to apprise the recipient that there is a legal action pending and to ensure that the recipient knows when and where the recipient can be heard regarding the matter[.]" *Am. Eagle Waste Indus., LLC v. St. Louis Cty.*, 379 S.W.3d 813, 834 (Mo. banc 2012). There can be no serious dispute that the Notice of Suspension clearly apprised Carvalho of the State's legal action against him and the process for objecting to that legal action at a hearing. Thus, the Notice satisfied procedural due process. Due process did not require the State to advise Carvalho of what the Director would have to prove at any subsequent hearing. *See Sneil*, 370 S.W.3d at 572. Carvalho could have "turn[ed] to public sources to learn about the remedial procedures available to him." *Id.* (quotation omitted). Thus, the Notice of Suspension satisfied the requirements of due process.

Smith v. City of St. Louis, 409 S.W.3d 404 (Mo. App. E.D. 2013), does not alter this analysis. In *Smith*, the Court of Appeals found that certain municipal ordinance violation

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notices violated Missouri Supreme Court Rules 37.33 and 38.07. *Id.* at 417. Those Rules enumerate specific information that ordinance violation notices must include. *See id.* at 416-17. The Court of Appeals found that the municipal ordinance violation notices violated these Rules by failing to "inform a ticket recipient of his or her right to plead not guilty and have a trial" and failing to provide "any information on how to obtain a court date to contest the fine." *Id.* at 417.

Smith is inapposite for at least two reasons. First, the Notice of Suspension here expressly notifies drivers that they may contest the license revocation, and it provides detailed information on how to request a hearing to contest the revocation. LF, Doc. 52 at 2; App'x 4. The Notice of Suspension here includes precisely the sorts of information that the Court of Appeals found absent in *Smith*. *Compare id.* with *Smith*, 409 S.W.3d at 417.

Second, *Smith* expressly based its holding on Rules 37.33 and 38.07, not on general constitutional principles of procedural due process. *See, e.g.*, *Smith*, 409 S.W.3d at 415 ("[W]e find the Missouri Supreme Court rules dispositive."); *id.* at 416 (considering "whether City's enforcement of the Ordinance complies with the Supreme Court rules"); *id.* at 417 ("City's enforcement of its ordinance is invalid due to its failure to comply with Rules 37.33 and 38.07."). Carvalho has not presented any argument that the Notice of Suspension violated either Supreme Court Rule. And in any event, neither Rule applies to the Notice of Suspension. Rule 37.33 applies only to proceedings for violations of municipal or county ordinances. *See* Mo. Sup. Ct. R. 37.01 (providing that Rule 37 applies only to "ordinance violations"); Mo. Sup. Ct. R. 37.06(k) (defining "ordinance" as "a law enacted by a municipality or county"). Section 302.505 was enacted by the Missouri

General Assembly, not a county or municipality. *See* § 302.505, RSMo. Similarly, Rule 38.07 does not apply to violations involving the operation of a motor vehicle under the influence of intoxicants. *See* Mo. Sup. Ct. R. 38.06(b). Thus, *Smith* provides no support for Carvalho's due-process argument.

CONCLUSION

For the reasons stated above, the Court should affirm the Circuit Court's Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy of the foregoing was served on all counsel of record via the Court's electronic filing system on October 29, 2018

I also certify that the foregoing complies with the limitations and requirements set forth in Missouri Supreme Court Rule 84.06(b) and that the foregoing brief contains 8,139 words.

/s/ Michael Martinich-Sauter

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