SC97165

IN THE SUPREME COURT OF MISSOURI

JEREME J. ROESING,

Appellant,

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

Respondent.

From the Circuit Court of Jackson County, Missouri
The Honorable Robert L. Trout, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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INTRODUCTION

This case is an appeal from the judgment of the circuit court upholding the revocation of Jereme Roesing's driving privileges due to his refusal to submit to a breath test, in violation of Missouri's implied consent law. Roesing claims that his refusal was invalid because he was not permitted to confer privately with his attorney before deciding whether to submit. After the Court of Appeals affirmed, Roesing requested a transfer to this Court.

Significantly, Roesing concedes that his constitutional rights were not violated, as Missouri courts have not recognized a constitutional guarantee to counsel in this context. Thus, the only issue before the Court is whether the limited statutory right to contact an attorney, as defined in § 577.041.1, RSMo,[1] includes an implied right to a private consultation. The plain language of that statute provides only that, upon request, a driver "shall be granted twenty minutes in which to attempt to contact an attorney," so there is no textual basis for recognizing this novel right. Moreover, an unbroken line of Missouri cases and various policy considerations—including the purpose of the implied consent law to keep drunk drivers off the road—confirms this conclusion.

[1] All statutory references are to the version of RSMo in effect in 2016 unless otherwise indicated. The Director emphasizes this point, as the sections of Chapter 577 referenced below were materially amended, effective January 1, 2017.

BACKGROUND

I. Statement of Facts

A. Roesing was arrested after he admitted to driving under the influence of at least two alcoholic beverages.

Just before midnight on April 30, 2016, Officer Jason Reddell spotted a car driving erratically on the interstate. Tr. at 6–7. He followed the vehicle and, after observing two moving violations, initiated a traffic stop. Tr. at 6–7, 14. Officer Reddell approached the driver, Roesing, and immediately detected the smell of alcohol. Tr. at 15. Roesing admitted he was coming from a local bar, Stuey McBrews, where he had consumed at least two beers. Tr. at 8–9. Accordingly, Officer Reddell called for backup to assist with a DWI investigation. Tr. at 9–10.

Officer Jordan Clapp arrived on the scene shortly thereafter. Tr. at 18–19. He too noticed signs of Roesing's intoxication, including watery eyes, slurred speech, and the odor of alcohol on his breath. Tr. at 19. Officer Clapp asked Roesing to exit the vehicle, to which he responded, "I know I'm going to jail. Can we just skip the sobriety tests?" Tr. at 29. Despite this admission, Officer Clapp administered three field sobriety tests, and all three suggested that Roesing was intoxicated. Tr. at 20–27. Further, a portable breath test registered at above .08%. Tr. at 27. Based on this evidence, Officer Clapp arrested Roesing for driving while intoxicated. Tr. at 27.

B. Officers gave Roesing more than twenty minutes to contact his attorney, and he successfully did so before refusing to submit to the breath test.

After the arrest, Officer Clapp transported Roesing to the station for detention. Tr. at 27. Once there, at 12:45 a.m., Officer Clapp advised Roesing about Missouri's implied consent law and requested that he submit to a breath test. Tr. at 28. Roesing then asked to speak with his attorney. Tr. at 28. Officer Clapp allowed him twenty minutes to contact counsel, which Roesing succeeded in doing on his personal cell phone. Tr. 28, 30–31.

About a minute into the conversation, Roesing handed the phone to Officer Clapp, and the attorney asked for privacy during the call. Tr. at 31. Officer Clapp denied the request because standard procedure for administering a breath test required him to maintain visual contact with Roesing and because Roesing had to be processed before additional phone-call privileges were allowed. Tr. at 33. Thus, for the remainder of the call, Officer Clapp stood about four feet away from Roesing and heard his end of the conversation. Tr. at 32.

After the phone call, at 1:06 a.m., Officer Clapp read Roesing the implied-consent warning for a second time. Tr. at 28. Roesing again refused to submit to the breath test. Tr. at 28. As a result, pursuant to section 577.041.1, Roesing's driver license was revoked for a period of one year. L.F. at 5–6.

II. Statutory Context: Missouri's Implied Consent Law

"The object and purpose of Missouri's implied consent law 'is to rid the highways of drunk drivers.'" *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 619 (Mo. banc 2002) (citation omitted). "The statute's central feature is that any person who drives on the public highways is deemed to have consented to a chemical test to determine the alcohol or drug content of the person's blood[, breath, saliva, or urine]." *Id.* Under the implied-consent framework, a driver retains the right to refuse a chemical test. *Id.* (interpreting § 577.041.1). However, so long as certain conditions are met, the penalty for withdrawing consent and refusing a test is a one-year revocation of the driver's license. *Id.* at 620.

A driver whose license has been revoked for refusal to submit to a chemical test may petition for review in the circuit court. § 577.041.4. At a post-revocation hearing, the court considers only: (1) whether the driver was arrested, (2) whether the arresting officer had reasonable grounds to believe the driver was driving while intoxicated, and (3) whether the driver refused to submit to a chemical test. *Hinnah*, 77 S.W.3d at 621 (interpreting § 577.041.4). The Director bears the burden of proof for all three elements. *Id.* at 620.

As to the third element, a conditional refusal or consent is generally deemed a refusal. *Spradling v. Deimeke*, 528 S.W.2d 759, 766 (Mo. 1975). The only exception is where the consent or refusal is conditioned on having an opportunity to speak with an attorney. *Riley v. Dir. of Revenue*, 378 S.W.3d

432, 438 (Mo. App. 2012). Under section 577.041.1, drivers have "twenty minutes in which to attempt to contact an attorney" before deciding whether to submit to a test. If a driver requests to speak with an attorney, "the consent *implied* by law is temporarily withdrawn for the twenty-minute abatement period to permit the driver to consult counsel for the purpose of deciding whether to *expressly* consent or refuse testing." *Riley*, 378 S.W.3d at 438. If at the end of this period the driver still does not submit, it shall be deemed a refusal. § 577.041.1.

III. Procedural History

On May 2, 2016, Roesing filed a Petition for Review and Application for Stay Order as to his license revocation in the Circuit Court of Jackson County. L.F. at 5–6. The court granted the stay pending review but ordered Roesing to install an ignition interlock device due to a prior DWI. L.F. at 1–3, 6. On March 2, 2017, after conducting a hearing, the court sustained the revocation. L.F. at 15, App.1. Specifically, the court found that Roesing was arrested upon reasonable grounds to believe that he was driving while intoxicated and that he refused to submit to the breath test. L.F. at 15, App.1. Roesing then appealed, arguing only that his refusal of the breath test was invalid because he was not allowed to confer with his attorney in private.[2] L.F. at 4.

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[2] In addition to the present matter, two other cases arose out of the drunk-driving incident. *First*, Roesing filed a petition for review of a separate, three-month license suspension for driving while intoxicated, which resulted after a blood draw revealed that his blood alcohol content was .217 four hours after the

The Court of Appeals affirmed in a divided opinion. *Roesing v. Dir. of Revenue*, No. WD80585, 2018 WL 1276969, at *1 (Mo. App. Mar. 13, 2018). The court observed that there is no *constitutional* right to counsel in deciding whether to submit to a breath test. *Id.* at *4. Instead, Missouri drivers have a *limited statutory* right under § 577.041.1, which guarantees only "a *reasonable opportunity to contact an attorney*" before making that decision. *Id.* (quoting *White v. Dir. of Revenue*, 255 S.W.3d 571, 578 (Mo. App. 2008)). Missouri courts have deemed "[t]he statutory twenty-minute requirement . . . to be the definition of 'reasonable opportunity[.]'" *Id.* (quoting *White*, 255 S.W.3d at 578). Thus, because Roesing had twenty minutes to contact counsel before he refused the breath test, the court held that "Roesing's refusal was valid." *Id.* at *5.

The Court of Appeals next considered Roesing's invitation to "broaden [the] definition of 'reasonable opportunity to contact an attorney' to include 'the right to confer privately with an attorney.'" *Id.* The court declined to do so for three reasons. *First*, the court noted that "the plain language of section 577.041.1 does not afford . . . the right to confer privately" and emphasized that it had "no authority to engraft upon the limited statutory right." *Id. Second*, the court reasoned that, because section 577.041.1 is satisfied even where a

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traffic stop. *Roesing v. Dir. of Revenue*, No. 1716-CV02290 (Jackson Cty. Cir. Ct. Aug. 21, 2017) (upholding suspension under § 302.505). *Second*, Roesing pleaded guilty to criminal DWI charges. *State v. Roesing*, No. 1616-CR02490-01 (Jackson Cty. Jun. 23, 2017). Roesing did not appeal in either case.

driver has twenty minutes but fails to contact an attorney, "it is certainly sufficient . . . to afford a person twenty minutes to successfully . . . contact an attorney, regardless whether the ensuing conversation is private." *Id.* And *third*, the court dismissed Roesing's concern that, without privacy, a driver "risks making inculpatory statements that could be used against him in [subsequent] proceeding[s]." *Id.* at *6. The court clarified that this argument conflated distinct concepts; attorney-client privilege prevents the admission of privileged materials at trial and does not bear on whether Roesing was afforded his limited statutory right under section 577.041.1. *Id.*

STANDARD OF REVIEW

Trial court judgments in driver's license suspension and revocation cases are reviewed under the same standard as any court-tried civil case. *See White v. Dir. of Revenue*, 321 S.W.3d 298, 307 (Mo. banc 2010) (citing *Guhr v. Dir. of Revenue*, 228 S.W.3d 581, 584 (Mo. banc 2007)). Thus, "the trial court's judgment will 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." *White*, 321 S.W.3d at 307 (citation omitted). Further, "[t]his Court must uphold the revocation of [a] driver's license if the revocation statute's requirements under section 577.041.4 were satisfied." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 736 (Mo. banc 2010) (citation omitted).

ARGUMENT

I. The circuit court did not err in sustaining Roesing's license revocation, as the limited statutory right "to attempt to contact an attorney" includes no guarantee of private consultation. (Responds to Roesings's Point I).

Roesing's sole point on appeal is that his refusal to submit to a breath test was invalid because Officer Clapp denied his request for a private phone call with his attorney. Roesing does not allege any constitutional violation, and indeed, he concedes that there is no constitutional right to counsel prior to deciding whether to submit to a chemical test. Appellant Sub. Br. at 8. Accordingly, he acknowledges that any purported right to private communications with an attorney must come from section 577.041.1. The limited guarantee set out in that provision simply does not bear the weight of Roesing's expansive interpretation, as demonstrated by the plain text of the statute, relevant canons of construction, and Missouri case law.

A. The plain text of section 577.041.1 is unambiguous in meaning, is limited in scope, and does not include a right to confer privately with an attorney.

Because Roesing asserts a statutory right, the Court's analysis begins with the relevant text. "'When interpreting a statute, the primary goal is to give effect to legislative intent as reflected in the plain language of the statute.'" *Stiers v. Dir. of Revenue*, 477 S.W.3d 611, 615 (Mo. banc 2016) (citations omitted). "The General Assembly is presumed to have intended what

the statute says." *Eckenrode v. Dir. of Revenue*, 994 S.W.2d 583 (Mo. App. 1999) (citation omitted). Thus, "courts must give effect to its plain meaning and refrain from applying rules of construction unless there is some ambiguity." *Ross*, 311 S.W.3d at 735. Roesing does not suggest that section 577.041.1 is ambiguous, and indeed, this provision clearly defines a limited right "to attempt to contact an attorney." Thus, the Court need proceed no further than the plain text to resolve this case.

In relevant part, section 577.041.1 provides that if a driver who is asked to submit to a chemical test "requests to speak to an attorney, the person shall be granted twenty minutes in which to attempt to contact an attorney." This language has a plain meaning: Upon request, a driver is entitled to twenty minutes to try to reach an attorney for advice. So long as officers give the driver twenty minutes to do so, the right is vindicated. Thus, the text of section 577.041.1 creates a meaningful safeguard but one circumscribed by the words the General Assembly chose to use—and not to use—in creating it.

Particularly telling here is what section 577.041.1 does *not* say. The words "privacy," "private," and "confidential" are nowhere to be found in the statute. Nor is the phrase "right to counsel" or other terminology evocative of a broader concept of the right from other contexts. As the Court of Appeals emphasized, section 577.041.1 does not even guarantee an opportunity to speak with an attorney, much less the right to a private consultation. *Roesing*,

2018 WL 1276969, at *5. This Court likewise should refrain from adding content to the statutory right that the text does not expressly provide. *See State v. Vaughan*, 366 S.W.3d 513, 518 (Mo. banc 2012) ("Courts cannot add words to a statute under the auspice of statutory construction." (citation omitted)).

In terms of what the text *does* say, section 577.041.1 contains four express qualifications that confirm the right is "limited." *See White*, 255 S.W.3d at 578. *First*, and most importantly, the statute affords only an opportunity "to attempt" to contact an attorney. Unlike the more expansive "right to counsel" from other contexts, there is no guarantee that a driver will be able to speak with an attorney.[3] *See id. Second*, the statute permits a driver to attempt "to contact" an attorney, but this verb lacks the fuller substance and connotation of privacy of a word like "confer." *Third*, as section 577.041.1 plainly states, the limited right is triggered if and only if a driver specifically "requests to speak with an attorney." *See id.* And *fourth*, a driver has only "twenty minutes" to attempt to contact an attorney before a conditional refusal is deemed a refusal. *See id.* If the right were as expansive as Roesing claims, it would make little sense to cabin it to such a short period of time, especially considering that most drunk-driving incidents occur late at night when it is difficult to contact an

[3] Roesing does not grapple with this difficulty; the word "attempt" is absent from his original appellant brief, and it appears in his substitute brief only in a quotation of the statute. *See* Appellant Sub. Br. at 11.

attorney. These four limitations, especially when read together, further militate against an expansive interpretation of this statutory right.

Likewise, even the word "attorney" signals a more limited right than the "right to counsel" guaranteed in other contexts. Interestingly, the ACLU's *amicus* brief highlights the use of "attorney" in an attempt to import meaning not expressly provided in the text. ACLU Amicus Br. at 8–13. The ACLU contends that, because attorneys generally owe clients a duty of confidentiality, the General Assembly "must be presumed" to have incorporated by extension an implied guarantee of privacy. *Id.* at 9–10. Yet this theory goes well beyond the "plain and ordinary meaning" of the word, *id.* at 8, which says nothing about privacy, *see Attorney*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. Strictly, one who is designated to transact business for another; a legal agent. 2. Someone who practices law; lawyer."). Moreover, had the General Assembly intended to provide a right to confer privately, it would have been much more natural for it to do so expressly or to have used the phrase "right to counsel," thereby implicating the full bundle of rights that terminology entails.[4] Thus, the statute's use of the word "attorney" further underscores the limited scope of this right.

[4] Indeed, section 577.041.1 is the lone Missouri statute to provide a right "to attempt to contact an attorney," and only one other statute references the "right to contact an attorney." Tellingly that provision defines a protocol for *civil* child-

Beyond the ACLU's expansive reading of the word "attorney," neither Roesing nor *amici* suggest that section 577.041.1 is ambiguous. Their arguments instead focus on statutory construction. But "courts must . . . refrain from applying rules of construction unless there is some ambiguity." *Ross*, 311 S.W.3d at 735. Because there is none here, the Court should go no further than the plain text in finding that the right "to attempt to contact an attorney" says nothing about a right to private consultation.

B. To the extent the Court finds construction necessary, it should interpret the statutory right according to its plain terms and in light of Missouri's implied consent law.

If the Court proceeds beyond the plain text of section 577.041.1, two considerations require a narrow reading of this provision.

First, given that the Court is confronted with a statutory right, its analysis is more constrained than in other contexts. The distinction between interpreting statutory versus constitutional rights is rooted primarily in separation-of-powers considerations. *See, e.g.*, *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 377 (Mo. banc 2012) (emphasizing that "each branch of government 'ought to be kept as separate from and independent from each other as the nature of free government will admit'" and, accordingly, deferring to "the legislature's power to define the

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abuse investigations, and it grants an "alleged perpetrator" only five minutes to consider such rights before an investigatory visit commences. § 210.145.6.

right that it has created." (citations omitted)). As one instructive opinion explained, "Because there is no constitutional guarantee to a statutory right, 'it is for the legislature, not the courts, to prescribe' the scope of the right." *Crown Castle USA, Inc. v. Orion Const. Group, LLC*, 811 N.W.2d 332, 337 (Wis. 2012) (citation omitted). Courts must not engage in "'[a]d hoc judicial discovery of implied statutory rights' because such an approach would impinge on the purview of the legislature." *Id.* at 338 (citation omitted).

This Court's longstanding practice confirms that statutory rights are to be interpreted according to the scope determined by the General Assembly. For example, just last year, the Court explained that "[s]tatutes allowing the taxation of costs are strictly construed," because "'costs' are a creature of statute." *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 800 (Mo. banc 2017). The Court has taken the same approach in a variety of contexts. *See, e.g.*, *Goldsby v. Lombardi*, 2018 WL 3626507 (Mo. banc 2018) ("It is the legislature that has the authority to determine the right of appeal as 'the right of appeal is purely statutory and when the statutes do not give such right, no right exists.'" (citation omitted)); *Felker v. Carpenter*, 340 S.W.2d 696, 701 (Mo. 1960) (per curiam) ("It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the [relevant] statute . . . must be strictly construed" (citation omitted)). Likewise,

the Court should decline to "engraft a judicially conceived right" onto the statute at issue here. *See Crown Castle*, 811 N.W.2d at 338.

Second, the Court of Appeals identified a separate but related justification to avoid construing section 577.041.1 beyond its plain text. The court ultimately declined Roesing's invitation to "engraft upon the limited statutory right . . . a right to private consultation." *Roesing*, 2018 WL 1276969, at *5. But it did so in recognition of the principle that courts are without authority to read legislative intent into a statute that is contrary to the intent made evident by plain language. *Id.* (citation omitted); *see also Hinnah*, 77 S.W.3d at 620 (same). The Court of Appeals simply could not reconcile Roesing's expansive interpretation with the intent conveyed by the text of the statute, which indicates that the General Assembly sought to create a more limited right.

This narrow reading of legislative intent is confirmed by the purpose and framework of the broader implied consent law. As described above, the sole aim of this law "is to rid the highways of drunk drivers." *See supra* at 10 (quoting *Hinnah*, 77 S.W.3d at 619). That objective provides an important gloss for interpreting any provision of the implied consent law. Moreover, context is key. The provision of twenty minutes "to attempt to contact an attorney" represents a limited carve-out from the implied-consent framework, in which a person agrees to submit to a chemical test as a condition of the privilege of

driving. *Id.* at 11. Beyond the abatement period, *any* "volitional failure to do what is necessary for the test to be performed" constitutes a refusal. *Spradling*, 528 S.W.2d at 766; *see also, e.g.*, *Rogers v. Dir. of Revenue*, 184 S.W.3d 137, 144–45 (Mo. App. 2006) (describing rationale for a strict application of the rule in light of statutory purpose and deeming driver's request to use the restroom a refusal); *Ruth v. Dir. of Revenue*, 143 S.W.3d 741, 746 (Mo. App. 2004) ("[A] a refusal does not have to be verbalized, and silence in response to a request to submit constitutes a refusal."); *Zimmerman v. Dir. of Revenue*, 72 S.W.3d 634, 637 (Mo. App. 2002) (finding refusal where driver said "I don't really want to, but if you want me to I will"). It makes no sense to construe refusals stringently and then read a limited exception broadly, as Roesing suggests.

Accordingly, to the extent the Court engages in statutory construction, both separation-of-powers considerations and the unique features of Missouri's implied consent law militate in favor of a narrower interpretation, consistent with the statute's plain text.

C. The Court need not address Roesing's anti-absurdity arguments given the absence of ambiguity, and if it does, the Director offers a more compelling interpretation.

Rather than engage with the plain text of section 577.041.1, Roesing skips directly to statutory construction. Effectively assuming his desired outcome, he contends that "the legislature could not have intended" any interpretation of the statute that does not confer an implied right to private

consultation because such a result would be unreasonable or even absurd. *See* Appellant Sub. Br. at 10–17. The Court should reject this outcome-driven approach because the Court does not resort to construction where the text is clear, and because the Director's interpretation makes more sense than Roesing's.

As an initial matter, the anti-absurdity doctrine is a canon of construction. Accordingly, it should not be applied in the absence of statutory ambiguity. *See Ross*, 311 S.W.3d at 735 ("[C]ourts must . . . refrain from applying rules of construction unless there is some ambiguity.").[5] The Court's analysis in *Hinnah v. Director of Revenue* is instructive on this point. 77 S.W.3d at 619–22. In that case, a driver challenged his license revocation on the grounds he was not actually the person driving the vehicle. *Id.* at 618, 622. The Court acknowledged the peculiarity of a scheme that would not allow licensees

[5] The Court has, at times, included the anti-absurdity canon in its standard for statutory interpretation, but it has repeatedly admonished that, "[w]here the language is clear and unambiguous, there is no room for construction." *See, e.g.*, *Vaughan*, 366 S.W.3d at 518 (citation omitted). To reconcile these pronouncements, the Court should first consider whether the plain text is ambiguous on its face or in the context of a broader enactment, only proceeding to construe the text to avoid absurdity where there is ambiguity to be resolved. *See Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009) (citations omitted) ("This Court's *primary rule* of statutory interpretation is to give effect to legislative intent as reflected in the *plain language of the statute* at issue. Other rules of statutory interpretation, which are diverse and sometimes conflict, are merely aids that allow this Court to ascertain the legislature's intended result." (emphasis added)).

to contest a revocation on the grounds that they were not driving. *Id.* at 621. Nonetheless, given the clarity of section 577.041, the *Hinnah* Court found that it was required to give effect to the law as written: "Absurd or not, that is what the statute says." *Id.* at 621. Here, the Court should take the same approach, particularly given that Roesing does not argue that the statute is ambiguous.

In any event, it would hardly be "absurd" for the Court to recognize that section 577.041.1 does not include an unspoken right to private communication with an attorney. "An absurdity is a result which is contrary to reason or which 'could not be attributed to a man in his right senses.'" *Tumlinson v. Norfolk & W. Ry. Co.*, 775 S.W.2d 251, 253 (Mo. App. 1989) (quoting *State v. Hayes*, 81 Mo. 574, 585 (1884)). Even beyond the considerations discussed in the preceding sections, the Director's interpretation is more compelling than Roesing's for at least three reasons.

First, it would be far more absurd to adopt a standard that affords greater protection to drivers who successfully contact an attorney than to those who are unable to do so. Yet this is the result Roesing advocates. There is no dispute that "[t]he purpose of [section 577.041.1] . . . is met when the person attempts to contact an attorney unsuccessfully and the twenty-minute statutory period expires . . . ." *White*, 255 S.W.3d at 578. Thus, as the Court of Appeals concluded, "[i]f it is sufficient . . . to afford a person twenty minutes to unsuccessfully attempt to contact an attorney, then it is certainly sufficient . . . to

afford a person twenty minutes to successfully attempt to contact an attorney, regardless whether the ensuing conversation is private." *Roesing*, 2018 WL 1276969, at *5. Given that Roesing was allotted more than twenty minutes and had a full conversation with his attorney, he fared better than the many drivers whose rights are vindicated despite not being able to reach an attorney.

Second, if the Court grants Roesing's request to expand the scope of the limited statutory right, it will jeopardize the accuracy and administration of chemical testing. Under applicable Missouri regulations, officers and other test administrators are required to observe a suspect for at least fifteen minutes before initiating a chemical test to ensure that the suspect "does not smoke, vomit, or have any oral intake" that could affect "the validity or accuracy of the test result." 19 CSR 25–30.011(2)(H); *see also, e.g.*, *Vanderpool v. Dir. Of Revenue*, 226 S.W.3d 108, 109–10 (Mo. banc 2007) (discussing the foundation required for admission of test results, which includes compliance with approved methods). If the Court grants Roesing the same attorney-client privacy rights that apply in other contexts, officers would have to leave suspects unattended, potentially undermining the accuracy and admissibility of chemical test results.

For similar reasons, Roesing's interpretation the statutory right could disrupt the delicate balance the General Assembly established as to the *timing* of chemical tests. "Section 577.041.1 represents the General Assembly's

solution to satisfy a right to seek legal counsel and the state's compelling need to obtain a timely test." *Wall v. Holman*, 902 S.W.2d 329, 331 (Mo. App. 1995). "[T]he completion in a timely fashion of a chemical test to determine the driver's blood alcohol content is imperative" because blood alcohol content dissipates over time. *Rogers v. Dir. of Revenue*, 184 S.W.3d 137, 144 (Mo. App. 2006). By requiring officers to break visual observation, reading the statute to include a right to private consultation would create an added delay. Under such a regime, every competent DWI attorney would advise their clients to request privacy and to wait until the last moment to submit to a test. The fifteen-minute delay for a new observation period following the twenty-minute abatement period, compounded by the time it takes to get to the station, would constitute a significant delay. *See Rogers*, 184 S.W.3d at 144–46 (deeming a request to use the restroom as a refusal to submit given the "unnecessary delay" it would cause in administering a chemical test). The Court should avoid disrupting the delicate structure crafted by the General Assembly by recognizing an implied right not present in the statute's text.

Third, the Director's interpretation will not lead to the parade of horribles Roesing envisions. The only upshot is that an otherwise-valid refusal to submit to a chemical test will not be undermined if law enforcement remains in a driver's presence during a call made in the twenty-minute abatement period. In speculating as to other consequences, Roesing and *amici* have

"conflate[d] distinct concepts" by focusing on constitutional rights and attorney-client concepts from other contexts instead of on section 577.041.1 itself. *See id.* *6. To be clear, the protections afforded by the Fifth and Sixth Amendments, the duty of confidentiality, and the attorney-client privilege are not implicated by this case. These important safeguards do not apply to Roesing's license revocation, and they will continue to operate undiminished in other contexts regardless of the outcome here.

This Court has long recognized, and Roesing concedes, that "that an arrested person does not have a constitutional right to consult with an attorney prior to deciding whether or not to submit to a breathalyzer test." *Spradling,* 528 S.W.2d at 764; *White*, 255 S.W.3d at 578. This is true, in part, because "license revocation proceedings are administrative and civil in nature . . . not criminal or quasi-criminal." *Hatfield v. Dir. of Revenue*, 907 S.W.2d 207, 210 (Mo. App. 1995) (citations omitted); *see also Riche v. Dir. of Revenue*, 987 S.W.2d 331, 333 (Mo. banc 1999) (same). Thus, by its own terms, the Sixth Amendment right to counsel does not apply. *See* U.S. CONST. amend VI ("In all *criminal prosecutions*, the accused shall . . . have the Assistance of Counsel for his defense." (emphasis added)); *see also* ACLU Amicus Br. at 14 (conceding that "the Sixth Amendment does not attach until prosecution has commenced"). The Fifth Amendment is likewise inapplicable. "'*Miranda*' type warnings are not required in proceedings which are civil in nature" and

because "a request to take a breath test does not involve [an] interrogation." *Sweatt v. Dir. of Revenue*, 940 S.W.2d 540, 542–43 (Mo. App. 1997) (citing *Spradling*, 528 S.W.2d at 764).

The attorney-client privilege also is not implicated by the present case. As the Missouri Rules of Professional Conduct make clear, attorney-client privilege is implicated in the context of judicial proceeding where a lawyer is "*called as a witness* or otherwise a required to *produce evidence* concerning a client." Rule 4-1.6 cmt. 3 (emphasis added). But no evidence concerning the content of Roesing's conversation with his attorney was admitted at trial here. Furthermore, if the Director or any other party were to attempt to use such evidence in other proceedings—criminal or civil—it would be inadmissible, as Roesing's speaking with his attorney in front of Officer Clapp under protest is not a voluntary waiver. *Roesing*, 2018 WL 1276969, at *6 (citation omitted). The fact that these privileged communications were not and cannot be admitted at trial should resolve the bulk of the concerns raised by Roesing and *amici*.

As for the duty of confidentiality, this is an obligation that attorneys owe to their clients. *See* Rule 4-1.6(a) ("A *lawyer* shall not reveal information relating to the representation of a client [except under limited circumstances." (emphasis added)). There is no allegation here that Roesing's attorney revealed any confidential information. Even if he had, it would be grounds for an action against the attorney, not a basis for rescinding his revocation.

In sum, the scope of section 577.041.1 should not be defined by these inapplicable—albeit fundamental—rights and protections. If anything, these safeguards confirm that a new right to private communications is unnecessary. *See Campbell v. Comm'r of Public Safety*, 494 N.W.2d, 269–70 (Minn. 1992) ("[G]iven the limited nature of the right to counsel in this context, police do not have to provide a DWI arrestee with a private telephone because the arrestee's rights will be sufficiently protected by the subsequent exclusion of any overheard statements or any fruits of those statements."). To the extent the Court has concerns about how any of these four safeguards interact with section 577.041.1—for example, if a party attempted to admit evidence from a driver's conversation with an attorney—it should wait for a case that places a judiciable question on that issue before the Court. In the meantime, section 577.041.1 will continue to provide a limited but meaningful opportunity for drivers to contact an attorney for advice even without the asserted right to private communications. *See id.* at 270 ("[W]e believe experienced attorneys will understand the situation and ask 'yes or no' questions that allow the attorneys to get the information they need to advise the arrestees properly.").

D. Applicable Missouri case law confirms that section 577.041.1 does not include a right to private consultation.

Three sets of relevant precedent reinforce the statutory analysis above, confirming there is no right to private consultation inherent in section 577.041.1.

First, the Court of Appeals addressed this precise issue in *Clardy v. Director of Revenue* and determined that a lack of privacy does not constitute a denial of the limited right "to attempt to contact an attorney." 896 S.W.2d 53, 54 (Mo. App. 1995). In that case, the driver, Clardy, reached his attorney by phone and began whispering to him. *Id.* Because the attorney was hearing impaired, however, Clardy had to speak loudly, and he asked officers to move away from him so that they would not hear his conversation. *Id.* The officers declined to do so. *Id.* Instead, they remained within arm's reach of the driver for the duration of the call. *Id.* On appeal, Clardy—like Roesing—challenged the validity of his refusal, asserting that "because the officers did not move away from him while he was on the phone to his attorney, he was effectively denied his right to a meaningful consultation with his attorney." *Id.* at 54–55.

Noting there was no Missouri precedent on point, the Court of Appeals looked to *City of Mandan v. Jewett*, an analogous case from North Dakota. *Id.* at 55. (citing 517 N.W.2d 640 (N.D. 1994)). In *Jewett*, officers were in the same room as the suspect during his phone call with an attorney, and they heard his end of the conversation. The North Dakota Supreme Court applied a balancing test that weighed the suspect's interest in private counsel with "society's strong interest" in securing evidence, and under the totality of the circumstances, it concluded that the statutory right to counsel had not been violated. *Id.* Taking a similar approach, the Court of Appeals found that the officers' mere presence

during a phone call did not deprive Clardy of the opportunity to communicate with his attorney. It also emphasized that officers "were required to keep the suspect under observation" for a fifteen-minute period to ensure "the integrity and quality of the test." *Id.* at 55–56. Accordingly, the court concluded that, at least under these circumstances, Clardy was not deprived of his right to contact an attorney. *Id.* at 56.

Roesing does not discuss *Clardy* in his substitute brief. However, in his original appellant brief, Roesing attempted to distinguish the case by highlighting that that there was no evidence that the officers in *Clardy* actually overheard the content of the conversation. Appellant Br. at 7–8. Given that "the two deputies were within arms reach of the appellant," *id.* at 54, it is speculative at best to assume they were unable to hear what Clardy said. More importantly, the Court of Appeal's passing reference to this detail was in no way central to its holding; what mattered was that Clardy was permitted to and "did confer with his attorney." *See id.* at 55. Given that these two cases are virtually identical, the Court should follow the persuasive authority of *Clardy* and deny Roesing's identical claim.

Second, other Missouri license-revocation precedent confirms that the right "to attempt to contact an attorney" does not include a guarantee of private communications. Missouri courts have described this statutory right as "limited," "qualified," and "conditional," *see, e.g.*, *Akers v. Dir. of Revenue*, 193

S.W.3d 325, 328–29 (Mo. App. 2006), and no case has recognized a right to private consultation in the nearly forty years that section 577.041.1 has been on the books. Rather, this Court has consistently held that this provision is violated only where "an officer fails to allow a driver, upon request, 20 minutes to attempt to contact an attorney." *Norris v. Dir. of Revnue*, 304 S.W.3d 724, 726 (Mo. banc 2010). Indeed, even the cases that have found a violation of section 577.041.1 are consistent with this interpretation. *See Roesing*, 2018 WL 1276969, *4 n.10 (collecting and summarizing these seven cases).

Nonetheless, Roesing attempts to broaden the scope of the statutory right by recasting it as a substantive rather than a procedural guarantee. Quoting from this Court's opinion in *Norris v. Director of Revenue*, for example, he emphasized both the right itself and the underlying rationale as if they were one in the same: "The purpose of section 577.041.1 is to provide the driver with *a reasonable opportunity to contact an attorney* [(the right)] *to make an informed decision* [(the rationale)] as to whether to submit to a chemical test." Appellant Sub. Br. at 7 (quoting 304 S.W.3d at 726–27) (emphasis added)). But "[t]he statutory twenty-minute requirement has been deemed by the courts to be the definition of '*reasonable opportunity*.'" *White*, 255 S.W.3d at 578 (emphasis added). This focus on process demonstrates that section 577.041.1 grants a procedural right "to attempt to contact an attorney," not a substantive

right "to make an informed decision."[6] Thus, *Norris* and its progeny, when read properly, also support the Director's interpretation.

Third, declining to judicially engraft a right to private consultation onto section 577.041.1 is consistent with the analogous conclusion in *In Interest of J.P.B.*, 509 S.W.3d 84 (Mo. banc 2017). In that case, the Court considered whether a statutory "right to have counsel" was denied where an incarcerated father was unable to have private conversations with his counsel during a child-protection proceeding because corrections officers were present while he communicated via videoconference. *Id.* at 97. The underlying statute, section 211.462.2, provided the more expansive "right to counsel," and accordingly, the Court recognized that the Father had "an implied right [under the statute] to effective assistance of counsel." *Id.* Nonetheless, *J.P.B.* went on to reject Father's claim because "a parent does not have to be able to communicate at all with counsel during trial, let alone confidentially, for counsel to be effective." *Id.* If a parent is not entitled to private communications during

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[6] Missouri courts have narrowly defined an "informed decision" in terms of "the consequences of *refusing* to submit" to a chemical test rather than "the multiplicity of consequences which might occur if the driver *submits* to the examination." *See Mullin v. Dir. of Revenue*, 556 S.W.3d 626, 633 (Mo. App. 2018) (citations omitted); *see also Teson v. Dir. of Revenue*, 937 S.W.2d 195, 197 (Mo. banc 1996). Additionally, this phrase generally relates to implied-consent warnings, although it occasionally applies to the right to contact an attorney. *See, e.g.*, *Staggs v. Dir. of Revenue*, 223 S.W.3d 866, 873 (Mo. App. 2007) ("The reason for contacting an attorney is to get an attorney's view of the consequences of *refusing* to take the test." (emphasis added)).

custody proceedings under the broader statutory "right to counsel," there is no reason private communications should be required to afford a driver the lesser statutory right "to attempt to contact an attorney" here.

In sum, the cases discussed above unanimously support the conclusion that the limited statutory right "to attempt to contact an attorney" extends no further than what the plain language of the text suggests.

II. Alternatively, the circuit court judgment should be affirmed because the right to private consultation was not violated here, and even if it had been, Roesing suffered no prejudice. (Responds to Roesings's Point I).

Even if the Court were to find a right to private consultation inherent in section 577.041.1, it does not necessarily follow that Roesing's license should be reinstated. For his refusal to have been invalid, the Court must also conclude that his rights were actually violated and that he was prejudiced as a result. Because neither is true here, the Court should affirm on either of these alternative grounds.

A. If the Court recognizes a new right to private consultation, it should also adopt the *Jewett* balancing test, which demonstrates that no rights were violated under these circumstances.

As described above, in *Clardy*, the Court of Appeals considered *Jewett* to be "instructive," and it borrowed from the North Dakota Supreme Court's approach in that case. *Clardy*, 896 S.W.2d at 55–56. Yet *Clardy* stopped short of adopting the *Jewett* balancing test, as it was enough to find that section

577.041.1 did not provide Clardy a right to private communications with his attorney. *Id.* at 55. If this Court reaches a different conclusion here, it should adopt the balancing test from *Jewett* as a means of effectuating the new right.

In determining whether the right to counsel is violated, North Dakota courts balance a suspect's interest in "consult[ing] privately with counsel" against "society's strong interest in obtaining important evidence." *Jewett*, 517 N.W.2d at 641–42 (quoting *Bickler v. N.D. State Hwy. Comm'r*, 423 N.W.2d 146, 147 (N.D. 1988) ("There is a right to privacy inherent in the right to consult with counsel. However, the degree of that privacy must be balanced against the need for an accurate and timely chemical test.")). *Jewett* emphasized that "[t]he accused's right to privacy is not absolute," and accordingly, whether that right is violated in a given case depends on the totality of the circumstances. *Id.*

Applying this test to the facts at issue here demonstrates that, whatever the scope of the guarantee in section 577.041.1, Roesing's rights were not violated. Significantly, this is not a case where officers engaged in egregious or wrongful conduct. *See, e.g.*, *Farrell v. Mun. of Anchorage*, 682 P.2d 1128, 1131 (Alaska Ct. App. 1984) (finding officer violated criminal defendant's right to counsel by standing next to him and taking notes during his phone call with an attorney). Officers did not physically prevent Roesing from meeting with an attorney. *See McMurray v. Dir. of Revenue*, 800 S.W.2d 820, 822 (Mo. App. 1990). Nor did they listen in on a face-to-face consultation between Roesing

and counsel. *See Jewett*, 517 N.W.2d at 643 (contrasting the privacy interests in face-to-face meetings versus telephone conversations).[7] Instead, Officer Clapp merely declined Roesing's request to leave him unmonitored for the duration of the phone call. Without more, an officer's mere presence during a phone conversation is not a sufficient burden to outweigh the state's compelling need to obtain timely tests, the purpose of the implied consent law to keep drunk drivers off the roadways, and the multitude of safety and other policy considerations related to the stationhouse-processing procedures. *See Wall*, 902 S.W.2d at 331 (interest in timely chemical tests); *Rogers*, 184 S.W.3d at 144 (purpose of implied consent law); *Clardy*, 896 S.W.2d at 56 (declining to "second guess the officer's position within the holding area"). While Officer Clapp "might have moved back from [Roesing] while he was on the phone, [his] failure to do so under all the circumstances did not effectively deprive [Roesing]" of his rights under section 577.041.1. *See Clardy*, 896 S.W.2d at 56.

B. Even if Roesing's statutory rights were violated, automatic license reinstatement is the wrong remedy.

A violation of section 577.041.1 "does not automatically entitle [a driver] to reinstatement of his license." *Kotar v. Dir. of Revenue*, 169 S.W.3d 921, 926

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[7] In drawing a sharp distinction between attorney-client privacy rights as they relate to face-to-face versus telephonic conversations, the *Jewett* Court materially distinguished *Bickler*, which is the lone out-of-state *civil* case Roesing cites. Appellant Sub. Br. at 14. Significantly, the other sister-state precedent on which he relies is criminal in nature.

(Mo. App. 2005); *see also Teson*, 937 S.W.2d at 198. "To be entitled to such relief, the appellant has to have been actually prejudiced as a result of this non-compliance." *Kotar*, 169 S.W.3d at 926. Tracing back to the decision of the Court of Appeals in *Keim v. Director of Revenue*, Missouri courts have placed the burden of proving the absence of actual prejudice on the Director. 86 S.W.3d 177, 182 (Mo. App. 2002). While that standard may make sense when it comes to *procedural* violations of section 577.041.1, the Court should reject Roesing's request to extend this remedial framework to violations of the new *substantive* right to private communications with an attorney.

The standard remedy for a violation of attorney-client privacy rights is the suppression of relevant evidence at trial. *See, e.g.*, *State ex rel. Healea v. Tucker*, 545 S.W.3d 348, 351–52 (Mo. banc 2018). Here, there was nothing to suppress because the Director did not attempt to offer any evidence concerning the content of Roesing's conversation. Moreover, any information overheard by Officer Clapp during the call could not conceivably affect this revocation case. The arrest and the determination of probable cause—both of which are undisputed here—had already occurred, and anything officers learned after the point of arrest has no bearing on those elements in any case. *See Howard v. McNeill*, 716 S.W.3d 912, 915 (Mo. App. 1986) ("'Reasonable grounds' for an arrest, like probable cause, must be determined on the basis of facts known to the arresting officer at the time of the arrest, not on the basis of facts learned

later."). The appropriate remedy is to simply suppress any evidence obtained during the call in this and any related cases.

If the Court extends the reinstatement framework to a new right to private communications with an attorney, it should reallocate the burden of proof to the driver. This would mirror the standard for claims of deficient representation in other contexts. *See, e.g.*, *Price v. State*, 422 S.W.3d 292 (Mo. banc 2014) (ineffective assistance of counsel). Moreover, it is difficult to understand how the Director could ever disprove that a lack of privacy deprived a driver of a "meaningful consultation with his attorney." Appellant Sub. Br. at 17. The driver, on the other hand, can explain how the officer's presence negatively impacted communications with counsel or at least suggest that they would have made a different decision as to the refusal to submit.

In the present case, there is no evidence in the record suggesting that Roesing's refusal was in affected by Officer Clapp's presence. Even on appeal, Roesing does not claim that he would have made a different decision had he been given the privacy he requested, and there is no reason to think he would have. Given the lack of any plausible prejudice on the part of Roesing, the Court should not grant a reinstatement, even if it finds that section 577.041.1 includes an inherent right to private communications with an attorney.

CONCLUSION

For the foregoing reasons, the Director of Revenue respectfully requests that this Court affirm the judgment of the circuit court.

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Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy of the above Respondent's Substitute Brief was served electronically by Missouri CaseNet e-filing system on December 11, 2018, to all parties of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 7,956 words.

/s/ *Zachary M. Bluestone*
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