No. __-____

IN THE

# Supreme Court of the United States

MARK GIBSON,

*Petitioner,*

*v.*

COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES and NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

*Respondents.*

*On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

In the State of New York, the Commissioner of the Department of Motor Vehicles, and the Department of Motor Vehicles (collectively the DMV), is legislatively assigned the task of both revoking a driver license when appropriate and restoring that same driver's license. The legislation establishing this regime is found in the New York State Vehicle and Traffic Law (the VTL), and in the regulation promulgated by the DMV, which is found in Title 15 of the New York Compendium of Rules and Regulation (the NYCRR). Based upon both statute and regulation the DMV is granted unlimited discretion to either restore a person's driver license, or not. The DMV regime provides for several layers of review, but all determinations and review are conducted by either employees or appointees of the DMV. Only after exhausting the multiple steps of the administrative process can an applicant for restoration of a driver license petition a court for additional review. The reviewing court, however, must defer to the findings and conclusions of the DMV so long as they meet the low threshold of having any rational basis. The issues raised by this procedure are:

A. Does the driver license restoration regime established in New York violate Petitioner's right to due process of law because DMV, although given legislative permission, writes the rules, administers the rules, and adjudicates

the application of those rules? All of these steps are conducted by either employees or appointees of the DMV and the only hearing is conducted on the papers submitted by the applicant. Furthermore, judicial review is conducted after the administrative proceedings and is circumscribed by the deference the court must give to the administrative agency, thereby denying Petitioner review by an independent magistrate.

B. Does the driver license restoration regime deny Petitioner equal protection of the law because there is no method to determine if Petitioner is treated differently than other similarly situated applicants for driver license restoration?

C. Does the license restoration regime violate the separation of powers so as to deny Petitioner access to an independent judiciary?

D. Does the license restoration regime constitute the unconstitutional taking of property either because it is an additional penalty for prior criminal acts or is punishment disproportionate to the underlying civil action.

## LIST OF PARTIES

The parties to the proceeding below were:

Mark Gibson,
Petitioner.

Commissioner of the New York State Department of Motor Vehicles, and the New York State Department of Motor Vehicle,
Respondents.

Prior Proceedings:

1. *Gibson v. Commissioner et al*, Index No. 611294/2021, New York State Supreme Court, Suffolk County, Judgment entered January 10, 2022 (13a-15a).

2. *Gibson v. Commissioner et al,* Index No. 611294/2021, New York State Supreme Court, Suffolk County, Judgment entered August 25, 2022 (denying re-argument).

3. *Gibson v. Commissioner et al,* Docket No. 2022-00654, Appellate Division of the New York State Supreme Court, Second Department, Judgment entered January 10, 2024 (223 AD3d 667, 203 NYS3d 627 [2d Dept. 2024]). (2a-5a).

4. *Gibson v. Commissioner et al,* Motion No. 2024-139, Court of Appeals of the State of New York, Judgment entered June 20, 2024 (41 NY3d 910, 236 NE3d1280, 213 NYS3d 264 (2024)(table). (1a).

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## JURISDICTION

The decision by the Court of Appeals of the State of New York denying Petitioner's motion for leave to appeal was entered on June 20, 2024.

This Court's jurisdiction is recited in 28 USC § 1257(a).

## CONSTITUTIONAL SECTIONS

### FOURTEENTH AMENDMENT

#### SECTION ONE

"No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

### EIGHTH AMENDMENT

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

## STATEMENT OF THE CASE

The DMV is vested, through the New York State Vehicle and Traffic Law (the VTL), with the authority and power to create the rules and regulations used to determine if a motorist, whose driv-

er's license has been revoked because of alcohol related offenses, can restore their driver's license. Within this sphere of influence the DMV creates the rules, administers the rules, and adjudicates whether a request for license restoration was correctly denied. In other words, for this tranche of the Vehicle and traffic Law and regulations, the DMV undertakes all three traditional roles of government; it establishes, enforces, and adjudicates the rules germane to license restoration. All three components of the DMV regime are staffed by either employees of the DMV or persons appointed by the Commissioner. Judicial review, which is available after an applicant for license restoration has exhausted the administrative process, is available through New York Civil Practice Law and Rules (the CPLR) Article 78. The trial court's independence to consider a petition filed under Article 78 is restricted by the deference afforded administrative decisions, thereby denying any applicant whose request for license restoration has been denied, review by an independent magistrate.

### 1. A Brief Description of the License Revocation and Restoration Regime in New York State.

The Vehicle and Traffic Law authorizes the DMV, by the commissioner, to "[s]ubject to and in conformity with the provisions of the vehicle and traffic law . . . enact, amend and repeal rules and regulations which shall regulate and control the exercise of the powers of the [DMV] and the per-

formance of the duties of officers, agents and other employees thereof." VTL § 215(a). The commissioner is given the power to appoint agents to act on DMV's behalf, and the commissioner may establish the internal procedures to be followed by DMV's agents. VTL § 508(1). Any application filed with the DMV shall be in the manner and on a form proscribed by DMV. VTL § 508 (2). Title 5, Article 20 of the Vehicle and Traffic Law outlines the commissioner's authority to suspend, revoke, and reissue drivers' licenses. The decision to restore a driver license, even after the expiration of a minimum period of revocation, is at the discretion of the commissioner. VTL § 510(5). This grant of power allows DMV to regulate the administration of licensing procedures. VTL § 508(4).

The Vehicle and Traffic law also provides that a conviction for certain alcohol-related driving offenses results in both criminal penalties, generally both fines and the possibility of incarceration (VTL § 1193[1]), and license sanctions such as the revocation of the miscreant's driver license. VTL §§ 1193(2)(b), 1194(2)(c)(4 and (2)(d)). The revocation periods established in the Vehicle and Traffic Law are minimums, but the Vehicle and Traffic Law does not mandate permanent license revocation. It is only the DMV regulations that require permanent forfeiture and license restoration applications seeking waiver of the permanent punishment are decided solely at the discretion of the DMV. VTL § 1193(2)(b) and (c). The DMV's restoration power is unfettered, except that a revocation is vacated

when a conviction that resulted in a license suspension or revocation is reversed on appeal. VTL § 510(5) and (6).

Moreover "[t]he commissioner may promulgate regulations with respect to the administration of this article." VTL § 508(4). The DMV enacted regulations in an attempt to standardize the exercise of the unlimited discretion given to it. 15 NYCRR part 136. Therein DMV created the regulations that were used to determine Petitioner's application for reissuance of his driver's license. The regulations provide for a review of the applicant's lifetime driving record. 15 NYCRR § 136.5(b). The commissioner shall deny the application if the applicant has three or more alcohol or drug related convictions in the 25 years prior to the latest revocation, and also has a serious driving offense. 15 NYCRR § 136.5(b)(2). The refusal to take a test to determine blood alcohol content is considered an alcohol related offense, even if the person who refused the test is later acquitted of all alcohol related driving offenses. 15 NYCRR § 136.5(a)(1)(iv). A serious driving offense includes accumulating 20 or more points assessed against the driver's license, and such points are assessed for convictions of various driving infractions, within a specified time period. 15 NYCRR § 136.5(a)(2). The commissioner may, however, deviate from the general policy and permit re-licensing based on a showing of unusual, extenuating, and compelling circumstances, albeit these terms are not defined. 15 NYCRR § 136.5(d).

In *Matter of Acevedo v. N. Y. S. Dept. of Motor Vehicles,* 29 NY3d 202, 77 NE3d 331, 54 NYS3d 614 (2017), the New York State Court of Appeals upheld the validity of the regulations. The Court held that the regulations were not in conflict with the Vehicle and Traffic law, were not violative of the separation of powers doctrine as it is defined by state decisional authority, were not irrational, and were not ex post facto legislation which could, therefore, be applied retroactively under the circumstances of the cases before the Court.

In practice, to request license restoration the applicant must first apply to the DMV to have their driver's license restored. If, as is the case here, the request is denied, the applicant then makes a request to the Driver Improvement Bureau (the DIB), of the DMV and asks that the decision to deny the re-licensing request be reversed. The DIB can either grant the request, grant the request with conditions, or reject the request. If the request is rejected the applicant can then appeal to the Administrative Appeals Board (the AAB) of the DMV (17a-23a). The AAB, based on the arguments submitted to it on paper, then decides if the DIB was or was not correct in its determination (25a-34a). At the agency level the DMV has the flexibility to bypass the regulations when the circumstances presented make application of the general policy inappropriate. *Gurnsey v. Sampson*, 151 AD3d 1928, 1930, 57 NYS.3d 855 (4th Dept. 2017). The regulations are meant to be nonpunitive and their application cannot exceed the nonpunitive intent

and become punitive. *Mckevitt v. Fiala,*129 AD3d 730, 731, 10 NYS3d 554 (2d Dept. 2015).

The members of the DIB and AAB are all either employees of the DMV or, in the case of the AAB, they are appointed to the position by the commissioner of the Department of Motor Vehicles. See, VTL §§ 228, 260; 15 NYCRR § 155.

### 2. Petitioner's Arguments in the State Courts Showing Where and How the Constitutional Issues Were Raised.

Petitioner, whose driver's license was revoked for alcohol related offenses and points on his license, followed the proscribed procedure and, after his request for license restoration was denied, he asked the DIB to reinstate his driver's license. This request was denied on January 7, 2021, in a decision signed by Amy D.; the person making the decision is not further identified. Petitioner then appealed the denial to the AAB, and his appeal was denied on February 23, 2021; this time the decision is attributed to the Appeals Board (25a-34a). This exhausted Petitioner's administrative remedies, and he then sought relief in the trial court via an Article 78 Petition.

Petitioner, in his Article 78 petition. did not contest the validity of the DMV's decision to revoke his driver's license (107a-108a). He did, however, argue that the AAB's decision not to allow license restoration was based on spurious facts and specious reasoning. He did maintain that the DMV mis-

counted the points accumulated against his license, that his driving record when correctly analyzed showed that he was not a problem driver, that he had undertaken and completed the remedial acts that DMV required of him to show that he was not a habitual drunk driver, and, since the focus of the DMV's regime was both to protect the public and remediate the behavior of the particular driving applicant, he had fulfilled all of the goals set by the DMV for him to obtain his driver's license (108a-109a, 112a-124a). In other words, he maintained that the DMV's decision was irrational and an abuse of discretion (*Id*.).

Petitioner also argued that DMV violated both Due Process and Equal Protection of the Law. He said that the DMV regime ran afoul of due process requirements because the standards used by the agency are undefined; there is no definition to be found for unusual, extraordinary, and compelling circumstances (121a-123a). In turn, because there is no standard, and because there is no index or other method to categorize DMV's administrative decisions there is no way to tell if different applicants to DMV are treated differently (*Id*.). Furthermore, if DMV were treating all applicants the same, meaning that all such applications were denied, then DMV would not give each applicant the particularized review required under its own regulations. Petitioner also argued that the extended revocation was an additional punishment that was excessive in the light of his conduct (123a).

In December 2021, the trial court wrote its decision explaining why the Article 78 Petition was denied, and in January 2022 a judgment was entered memorializing the decision (7a-12a, 13a-15a). In its decision the court iterated the uniform standards used to assess claims that an agency had not properly operated according to its mandate and whether it had reached an arbitrary and capricious decision (9a-10a). Although the court was not unsympathetic to Petitioner it felt that it was constrained to deny the petition even if it independently would have reached a different result (10a). The court did, however, find that the DMV had considered Petitioner's arguments regarding unusual, extraordinary, and compelling circumstances (11a-12a). Thus, the constitutional arguments were denied (12a.).

The trial court's judgment was then appealed to the State's intermediate appellate court, the Appellate Division of the Supreme Court. In his appeal the Petitioner argued that in order not to violate the separation of powers doctrine the DMV had to possess the power to override a lifetime driver's license revocation (76a-78a). The procedures used to make such a determination are incompatible with due process of law because there is no definition of the criteria used to assess any claim seeking restorative action (78a-85a) Additionally, since the DMV must make a case-by-case assessment of the claims a hearing would be required because the determination is not mandated (84a). Without a hearing the agency would not need to prove its case,

and there would be no method to determine if people similarly situated are treated consistently (85a). and Petitioner again maintained that the regulatory decision exceeded the bounds of administrative regulation and veered into excessive punishment (85a-87a). The Appellate Division issued its Decision and Order on January 10, 2024, and found that Petitioner's constitutional arguments were without merit (2a-5a).

Petitioner next moved for leave to appeal to the New York State Court of Appeals (35a-56a). He began by reminding the Court that in its *Acevedo* decision it held that the separation of powers doctrine was not violated because the longer period of revocation allowed in the regulations did not contravene the lesser statutory revocation time period because there exists a mechanism to obtain restoration of a driver's license; namely, the discretion of the DMV (47a). Nevertheless, because the DMV is given such wide discretion the Petitioner argued that the DMV was required to give notice of the basis for the decision it intends to make (47a-50a). How else could an applicant prepare an application for license restoration? A lack of adequate notice is itself a due process violation. Additionally, the Petitioner argued that since the DMV made a case-by-case decision regarding license restoration, it could not rely on its point or incident assessment system to justify its decision (*Id*.). Too, if there is no obligation to define the criteria used to make the administrative decision then there is no method

to determine if all similarly situated people are treated equally (51a, 53a).

Petitioner continued that the license restoration system in New York also prohibited Petitioner from obtaining review by a neutral magistrate. The DMV does not provide a neutral magistrate when it makes its decisions about whether a person's driver license should be restored; employees or appointees of the DMV make all those decisions. Yet, by the time a petitioner gets before a neutral magistrate via an Article 78 proceeding, that magistrate's independence is limited because, unless there is a seismic error, that magistrate is required by statute to rule for the agency (51a-52a). CPLR § 7803. And Petitioner argued that the revocation imposed in this case was excessive and violative of the Eight Amendment (53a),

On June 20, 2024, the Court of Appeals denied the motion for leave to appeal (1a).

### 3. The License Restoration Procedure Established in New York Violates Due Process and Equal Protection of the Law, and Results in the Unconstitutional imposition of Punishment for an Administrative Offense.

The New York license restoration regime denied Petitioner, and others similarly situated, due process of law and the equal protection of the law. The result of the procedure used also caused Petitioner to be punished for an administrative finding,

thereby either imposing an excessive punishment or twice sentencing him for his conduct. The crux of the disagreement between Petitioner and the DMV is that DMV says that its license restoration procedure provides due process and equal protection of the law and Petitioner says otherwise. More specifically, this case deals with that tranche of the law and regulations that address the return of a driver license after certain alcohol related offenses. Constitutional mandates are not met.

Petitioner argued in the state courts and continues to advocate that this Court's decision in *Dixon v. Love* (431 U. S. 105, 97 S. Ct. 1723, 52 L.Ed2d 172 [1977]), not only does not preclude his argument, but it also enhances the argument. In *Dixon,* this Court considered the Illinois plan to revoke or suspend driver's licenses. That plan, as in this case, relied on a point system to determine the extent of suspension or revocation of a person's driver license. The state's action was defined by the points assessed and no pre-suspension hearing was required both because a person could contest the validity of a traffic infraction or crime in court before points were assessed against the driver's license, and because the following decision to suspend or revoke the license is based on a mechanical arithmetic procedure and result. The Court in *Dixon,* therefore, held that the holding of a hearing to consider ameliorating conditions did not have to precede revocation or suspension. *Dixon,* 431 U. S. at 115. Furthermore, the petitioner in *Dixon* did not question the adequacy of the administrative hear-

ing; he only questioned the timing of such hearing. *Dixon* 431 U. S. at112. Indeed, when an agency's actions are not based on individual grounds but reflect a general policy, no hearing is constitutionally required *(Yassini v. Crosland,* 618 F2d 1356, 1363 [9th Cir. 1980] [with regard to INS procedures]). The New York State Court of Appeals in *Acevedo* likewise approved the point system to guide the DMV's 's procedures *(Acevedo* 20 NY3d at 220).

The New York procedure to revoke a driver license is essentially indistinguishable from the Illinois procedure approved in *Dixon*. The *Dixon* Court, however, also noted that, "[w]hen a governmental official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decision making may not be the best way to assure fairness." *Dixon*, 431 U.S. at 115. Yet case by case decision making is required by the New York regime, and when such a procedure is utilized, more is required than a recitation of the reasons for the revocation combined with the statement that the petitioner did not meet the undefined requirement of unusual, extraordinary, and compelling circumstances. There exists no scale that indicates how DMV weighs the assessment of a driving record against substantiated rehabilitative actions and results. In other words, if total discretion is given to the agency, then the agency must define how it will grant relief, not just how it will deny relief.

### A. Petitioner Was Denied Due Process of Law.

> "To succeed on a procedural due process claim, 'a plaintiff must first identify a property right, second show that the state has deprived him [or her] of that right, and third show that the deprivation was effected without due process.'" *Progressive Credit Union v. City of New York,* 889 F3d 40, 51 (2d Cir. 2018), quoting *Local 342, Long Island Public Service Employees v. Town Board of Huntington,* 31 F3d 1191, 1194 (2d Cir. 1994), quoting *Mehta v. Suries*, 905 F3d 595,598 (2d Cir. 1990).

The minimum requirements of a procedural due process claim are notice, an opportunity to be heard, and a decision made by a neutral decision maker *Goldberg v. Kelly,* 397 U. S. 254, 267, 90 S. Ct. 1011, 25 L.Ed2d 287 (1970); see also *Some Kind of Hearing* by Henry J. Friendly, University of Pennsylvania Law Review, Vol 125, p1267. The Second Circuit Court of Appeals has observed that, "the Fourteenth Amendment guarantee of due process is fully applicable to adjudicative proceedings conducted by state and local government administrative agencies." *New York State National Org. for Women v. Pataki*, 261 F3d 156, 163 (2d Cir. 2001). Petitioner addresses each of the factors delineated in *Progressive Credit Union* and *Goldberg*.

"It is well established that a driver's license is a substantial property interest that may not be deprived without due process of law." *Pringle v. Wolfe*, 88 NY2d 426, 431, 668 NE2d 1376, 646 NYS2d 82 (1996), citing *Bell v. Burson*, 402 U. S. 535, 539, 91 S. Ct. 1586, 29 L.Ed2d 90 (1971). Once issued, a driver license is not to be taken away without the procedural due process that is required by the Fourteenth Amendment. *Bell*, 402 U. S. at 539. The procedure used to obtain a driver's license must also comply with due process of law. *Towanda v. Towanda Theater*, 29 AD2d 217, 221, 287 NYS2d 273 (4th Dept. 1968), In the proceedings below the DMV never asserted that the Petitioner did not have a property right that required application of due process principles. Indeed, the DMV refers to a license restoration program rather than a license application program, thereby indicating a person's continued possession of a property right that remains after revocation. Too, the right to apply for a driver license is a liberty interest that is protected by due process considerations. See, *Bolling v. Sharpe,* 347 U. S. 497, 499-500, 74 S. Ct. 693, 98 L. Ed 884 (1958) (in case rejecting segregation in D, C, public schools the Court noted that liberty extends to the full range of conduct that a person if free to pursue which can only be restricted for a proper government purpose). The Fourteenth Amendment is, therefore, applicable to the DMV procedures used in this case, and by incorporation the protections of the Fifth and Eight Amendments are also applicable. Petitioner established that he

possesses a property (or liberty) interest to which due process criteria apply.

With regard to the tripart factors used to determine the existence of a due process violation the Petitioner notes the following.

First, in the administrative forum an agency must give notice of the charges that are reasonable under the circumstances, so that the defendant can prepare an adequate defense. *Matter of Block v. Ambach,* 73 NY2d 323, 332, 537 NE2d 181, 540 NYS2d 6 (1989) (reasonably specific notice of the charges); *Matter of Fitzgerald v. Libous,* 44 NY2d 660, 661, 376 NE2d 192, 405 NYS2d 32 (1978) (notice sufficient to prepare a defense). The notice given must relate to the statutory requirements that establish the charge. *Matter of Maclean v. Procaccino,* 53 AD2d 965, 386 NYS2d 111 (3d Dept. 1976). Here there are no DMV standards associated with the weighing of a claim of hardship (or compelling reason or extraordinary circumstance), against an agency belief that the applicant owns a bad driving record. Likewise, there is no standard that weighs a person's proof of rehabilitation against that person's driving record. The agency has absolute discretion to determine if a driver's license will be restored. In those circumstances where the grounds for approval or denial of an application rest within the discretion of the agency, it is the agency not the applicant that must initially provide the calculus used to weight the conflicting arguments that are used in making the

agency's determination. There is no other way for the applicant to either address the agency's actual concerns or defend against the vagaries of the agency's practices.

On the one hand under the DMV regulations a person, such as Petitioner, is permanently prohibited from obtaining a driver license, even though there is no such provision in the Vehicle and Traffic Law and the permanent revocation relies solely on the rules made by the DMV. The DMV can override the permanent revocation based on a showing of unusual, extenuating, and compelling circumstances (15 NYCRR § 136.5[d]), but those terms are not further defined. However, based on the AAB's decision in this case the agency focuses on its interpretation of the driver's driving record (25a-34a). With this decision the DMV indicates that the driving record is paramount.

On the other hand, the DMV's own regulations and publications highlight that its mandate is to both protect the public from bad drivers and to rehabilitate those drivers so that their suspended or revoked license can be restored to them. Part 136 of the Regulations is codified under Subchapter J of Chapter1 of Title 15; subchapter J is titled Driver Rehabilitation Programs. The regulations state that it is the intent of and purpose of the commissioner to utilize driver improvement programs to rehabilitate problem drivers. 15 NYCRR § 136.1(a). The DMV' monograph, Request Restoration After a Driver License Revocation, instructs that if a li-

cense is revoked for an alcohol related reason, then the driver must undertake and complete a driver rehabilitation program. (*dmv.ny.gov/points-and-penalties/request-restoration-after-a-driver-license-revocation*.). The article also directs the reader to the DMV's article Substance Abus Assessment and Treatment (*dmv.ny.gov/points-and-penalties/substance-abuse-assessment-and-treatment*.).

So, when an application is made for restoration of a driver license a person would know the reason for the revocation, have his or her own interpretation of the underlying facts, and know that the regulations and DMV's articles focus on rehabilitation. There is, however, no notice as to what, if any, information will be considered by the DMV in its analysis, or what weight will be given competing factors such as driving record and rehabilitation. A lack of adequate notice is itself a due process violation. *Matter of Sonders v. N Y. State Dept. of Motor Vehicles Traffic Violations Bureau,* 187 AD3d 1, 129 NYS3d 411(1st Dept. 2021) (failure to send notice of conviction and revocation). There is, therefore, no notice.

Second and Third factors. The opportunity to be heard before the DMV is limited to a paper submission, which deprives the applicant of any opportunity to answer any concerns DMV might have about the person's rehabilitation, especially since—as noted above—there is no notice as to the agency's decision-making calculus.

Traditionally, administrative agencies have argued that review via an Article 78 petition, which is litigated before a Justice of the State Supreme Court, fulfils the need for independent judicial review. *Solnick v. Whalen*, 49 NY2d 224,231, 401 NE2d 190, 425 NYS2d 68 (1980) (Article 78 customary method to challenge administrative actions including due process claim). This is likewise incorrect. An Article 78 court is constrained to affirm the administrative agency if there is any rational basis for its determination. CPLR § 7803(3). The court cannot assess whether the petitioner has established that they are rehabilitated, it cannot question the agency's reliance on its interpretation of the applicant's driving record, and it cannot independently determine if there exist unusual, extraordinary, and compelling reasons to return a driver's license. The issue, of course, is not whether the determination is correct but rather whether an applicant has the opportunity to have the competing arguments reviewed by an independent jurist.

For example, the DMV in this case relied, in part, upon Petitioner's failure to take a breath test, rather than the finding that he was not guilty of the alcohol related offense, as one of its reasons to deny re-licensing (28a, 31a).Thus, because the administrative agency only considered Petitioner's decision not to take the breath test, the trial court was prohibited from considering that Petitioner was acquitted of the underlying criminal offense. The elimination of the basis for the test was not given any weight by the courts. This determination

is neither rational nor does it address the need for safety on the roadways. See *Kisor v. Wilkie,* 588 U.S. 558, 139 S. Ct. 2400, 204 L.Ed2d 841(2019) (deference to administrative agency interpretation of ambiguous regulations should be cabined in scope). Losing a vested property right (or liberty interest), without a sound basis in reason and without regard to the facts is arbitrary. *Matter of Pell v. Board of Education,* 34 NY2d 222, 231, 313 NE2d 321, 356 NYS2d 833 (1974). Likewise, that failure to restore that property right without a sound basis in reason establishes a due process violation.

The facts of this case illustrate the problem with the DMV procedure and lack of notice. Here, DMV denied license restoration because, in its estimation, Petitioner has a fraught driving record with multiple alcohol offenses. The DMV, therefore, considered Petitioner a potential hazard on the road and denied his request. Petitioner, on the other hand, maintained that his bad driving record was mostly historic because it occurred in the last century. He additionally noted that he actually had only two criminal DWI offenses within the 25-year look-back period created by the DMV; one in 1988-1989, and the other in 2006 (impaired driving; an infraction and not a crime). Petitioner also noted that the other traffic tickets he received this century, except for one event, were all related to the 2006 driving while impaired incident. Additionally, Petitioner submitted proof that he had completed an alcohol rehabilitation program, was continually

attending AA, and that his counselor recommended that his driver's license be reinstated.

Petitioner, after the administrative proceedings, knows only that his version of his history was rejected by DMV, but DMV is not an unbiased or independent arbitrator. Petitioner knows that his arguments were rejected, but he is no wiser as to the facts or circumstances that would change DMV's opinion or decision not to return his driver license. Petitioner knows that he could apply again for mercy, but he is not informed about the meaning of unusual, extraordinary, and compelling circumstances so he could answer any questions DMV might have about his fitness to drive. Petitioner knows that his arguments were rejected, but he has no knowledge if the decision in his case is consistent with DMV's decision for other similarly situated drivers.

After completing the administrative process, The Petitioner went to court but was denied a neutral magistrate to consider the competing claims. When a court is able to intervene via an Article 78 proceeding a petitioner is denied review by an independent magistrate because the courts are constrained to affirm the administrative decision without the ability to consider the arguments advanced by the petitioner.

According to DMV the purpose of the revocation and licensing regime is to keep bad drivers off the road and to urge people to rehabilitate themselves to overcome the urge to drink and drive; the regime

is meant to be rehabilitative and punitive. Here, DMV concentrated on the punishment aspect of its charter (keep the driver off the road) rather than the rehabilitation aspect of the application (the applicant no longer posed any threat to re-offend), while Petitioner established that the purpose of the revocation had been met. Due to the structure of New York law Petitioner never had his arguments considered by an independent magistrate.

### B. Petitioner Was Denied the Equal Protection of the Law.

The DMV system also offends Equal Protection dictates because there is no method to determine if the DMV is consistent in its determinations. There is no method to determine if DMV is exercising its unlimited discretion consistently for similarly situated applicants for license restoration. Not all rejections of re-licensing applications are subject to an Article 78 proceeding, so there is no record of the basis for the DMV's decision and actions. There is simply no way to tell if the Agency is acting in good faith.

### C. The Regulations Approved by the New York Courts Creates a Separation of Powers Issue that Creates a Due Process Violation.

There is also a due process of law problem created by the Court of Appeals' holding in *Acevedo*. By holding that the DMV regime does not violate the

State's separation of powers doctrine the Court of Appeals created an overlap between the agency rulemaking and legislative power that resulted in the Petitioner being denied due process of law. In *Acevedo* the Court affirmed the Agency's mandate to create rules to implement the legislative intent, and that this regime did not violate the separation of powers doctrine, in part because the DMV can reinstate any driver's license at will thereby not offending the legislation which suggests that a license will be returned after a period of revocation. 29 NY3d at 219-226. The resulting regime, however, impinges on due process and separation of power doctrines because an executive agency (the DMV), is legislating by making rules and is then essentially the sole arbiter of the application of its own rules. In general, the DMV is allowed to make the rules, enforce the rules, and adjudicate disputes arising from the enforcement of those rules. All three branches of government are collected within the DMV. Regardless of the State Legislature's entitlement to divest itself of its legislative function, the result of its divestiture is to deny Petitioner due process of Law. Petitioner does not contend that New York cannot delegate its legislative authority, even if such delegation is at least adjacent to a separation of powers violation; it is questionable if this is a federal constitutional error. Petitioner does, however, contend that the result of the delegation is the deprivation of Petitioner's constitutional rights.

Furthermore, because the court, when given the opportunity to review the DMV's actions, must defer to the administrative agency, there is no independent judicial review of the cause argued by a petitioner. The deferential standard of review reduces the courts to mere spectators of the agency's power. The legislature has both improperly delegates judicial power to the executive branch and also negated the court's neutrality since it is directed to adhere to any rational agency determination. And the standard requiring a rational basis has been reduced to simply supplying a reason. In other words, adherence to the separation of powers doctrine as interpreted in this case prevented the Petitioner from getting at least one review of his claims by an independent judiciary.

### D. The Decision by the DMV not to Grant Petitioner's Request Constitutes Additional Punishment Based on an Administrative Determination.

If the forfeiture of a property right is disproportionate to the underlying civil action (for example when a person is acquitted of any alcohol driving offense but is still liable for civil sanctions), then the Eighth Amendment excessive fines clause comes into play. *United States v. Bajakajian,* 524 U.S. 321, 329, 118 S. Ct. 2028, 141 L. Ed2d 314 (1998); *Austin v. United States,* 509 U.S. 602, 113 S. Ct. 2801, 2805, 125 L.Ed2d 488 (1993]). The excessive fines clause of the Eighth Amendment is made applicable to the states through the Four-

teenth Amendment. *Timbs v. Indiana*, 586 U. S. 146, 139 S. Ct. 682, 203 L. Ed2d 11 (2019).

In this case the Petitioner has established that the state is depriving him of his property, his driver license. The DMV is certainly tasked with keeping inherently bad drivers off the roads. To accomplish this the DMV has allowed itself to examine the lifetime record of an applicant for relicensing. 15 NYCRR § 1565(b). DMV also advises that if the revocation is based on alcohol related offenses, then the applicant needs to show that they have participated in approved remediation programs and no longer pose a threat of recidivist drunk driving. VTL § 1193(2)(b)(12)(b)(i). The regulations and DMV publications inform an applicant that a license restoration decision looks to both a person's driving record and that person's rehabilitation. Again, however, there is no information about how these factors are assessed or weighed against each other Petitioner has through his actions fulfilled the mandate that he rehabilitate himself so that he will no longer be a dangerous driver. Yet, DMV declines to consider his efforts and without an apparent reason has determined that his actions are inadequate. Since there is no reason not to accept Petitioner's proof of rehabilitation, the decision to not grant the request for license restoration is actually punishment for his prior behavior, rather than an attempt to promote road safety. Similarly, if the retention of the Petitioner's property is an administrative sanction or fine it is disproportionate to both the underlying

facts and the Petitioner's rehabilitation. This is then an additional punishment for his prior actions and is excessive.

### 4. Why The Petition for Certiorari Should Be Granted.

Certiorari should be granted in this case. Petitioner has established that he was denied due process of law, the equal protection of the law, and he has been burdened with an extra or excessive punishment appended to either prior crimes or an administrative determination. The burgeoning state sanctioned administrative procedures have a dramatic effect on everyday citizens. This case highlights how a person can follow the administrative agency's pronouncements, provide proof in conformity with the administrative agency's regulations and be denied relief without any meaningful recourse available to them. Any person in the same position as the Petitioner in this case has only one path forward; to continually seek mercy from the administrative agency. The small question here is whether due process requires more than the procedure highlighted here. The big question is whether an administrative agency can establish rules and regulations that place a person in a spiral with no exit, even though the law provides that license restoration is available after a minimum period of revocation.

The constitutional errors in this case are germane to all motorists in New York, and nationwide. Driving a car is the major method of transportation

for virtually everyone in this Country, and the administration of driver licensing regimes will have an effect on everyone. Furthermore, a ruling in this case would have implications for state administrative law beyond the confines of the regulation of motor vehicles.

Most interesting is the question whether a state legislature can divest so much of its rulemaking authority to create a due process violation for citizen of the respective state. Assuming that the delegation by a state legislature is a matter only for state judicial review can a state legislature divest its authority and make rules be so extreme that that it denies a person of due process of law?

Certiorari should also be granted because the system created in New York is either additional punishment for past crimes, or it is a civil forfeiture that is disproportionate to the underlying civil action.

These questions can be addressed narrowly, so as to have only particular precedential value, or more broadly to define the limits of state administrative rulemaking. Because this case can be cabined to narrow issues or broadened to more major concerns it is available to address the due process and equal protection implications of burgeoning state administrative rule making.

## CONCLUSION

Petitioner has been denied due process of law, the equal protection of the laws and the agency action is so disproportionate to the Petitioner's conduct during this century it is constitutionally excessive.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael J. Miller
*Counsel of Record*
Philip J. Branigan
HEILIG BRANIGAN LLP
*Attorneys for Petitioner*
4250 Veterans Memorial highway
Suite 111E
Holbrook, New York 11741
631-750-6888
m.miller@hbmclaw.com
philip@heiligbranigan.com

September 18, 2024

# APPENDIX

**State of New York**
**Court of Appeals**

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***Decided and Entered on the twentieth day of June, 2024***

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**Present**,

Hon. Rowan D. Wilson, *Chief Judge*, ***presiding***.

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Mo. No. 2024-139

In the Matter of Mark B. Gibson,

Appellant,

v.

Commissioner of the New York State Department of Motor Vehicles et al.,

Respondents.

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Appellant having moved for leave to appeal to the Court of Appeals in the above;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/ LISA LECOURS
Lisa LeCours
Clerk of the Court

**Supreme Court of the State of New York**
**Appellate Division:**
**Second Judicial Department**

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D73768 Y/id

___ AD3d ___ Argued – October 20, 2023

FRANCESCA E. CONNOLLY, J.P.
LARA J. GENOVESI
BARRY E. WARHIT
LILLIAN WAN, JJ.

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2022-00654

In the Matter of Mark B. Gibson, appellant, v Commissioner of the New York State Department of Motor Vehicles, et al., respondents.

(Index No. 611294/21)

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**DECISION & ORDER**

Heilig Branigan LLP, Holbrook, NY (Michael J. Miller of counsel), for appellant.

Letitia James, Attorney, General, New York, NY (Judith N. Vale and Sarah Coco of counsel), for respondents.

In a proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Motor Vehicles Administrative Appeals Board dated February 23, 2021, which affirmed the denial of the petitioner's application

for relicensure, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (David T. Reilly, J.), dated January 10, 2022. The judgment denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed, with costs.

In November 2013, the petitioner refused to submit to a chemical test, resulting in the revocation of his driver license. Thereafter, the petitioner filed an application with the New York State Department of Motor Vehicles (hereinafter the DMV) for relicensure, which was denied by the DMV Driver Improvement Bureau on December 8, 2020. After the denial was affirmed by the DMV Administrative Appeals Board, the petitioner commenced this proceeding pursuant to CPLR article 78 to review the determination. In a judgment dated January 10, 2022, the Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals.

"The applicable standard of review in this matter is whether the challenged determination 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion'" (*Matter of Gorecki v New York State Dept. of Motor Vehs.*, 201 AD3d 802, 803, quoting *Matter of Gerber v New York State Dept. of Motor Vehs.*, 129 AD3d 959, 960; *see* CPLR 7803 [3]). "In applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis" (*Matter of*

*Halperin v City of New Rochelle*, 24 AD3d 768, 770 [internal quotation marks omitted]; *see Matter of Manning v New York State-Unified Ct. Sys.*, 153 AD3d 623, 624). "Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith'" (*Matter of Halperin v City of New Rochelle*, 24 AD3d at 770, quoting *Matter of Cowan v Kern*, 41 NY2d 591, 599; *see Matter of Manning v New York State-Unified Ct. Sys.*, 153 AD3d at 624). "A determination is rational where it has 'some objective factual basis, as opposed to resting entirely on subjective considerations'" (*Matter of Gorecki v New York State Dept. of Motor Vehs.*, 201 AD3d at 803, quoting *Matter of JSB Enters., LLC v Wright*, 81 AD3d 955, 956).

Here, the DMV's determination to deny the petitioner's application for relicensure was rational and not arbitrary and capricious (*see Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 229; *Matter of Argudo v New York State Dept. of Motor Vehs.*, 149 AD3d 830, 832). The petitioner's driving record supported the denial of his application. The petitioner had three alcohol-related driving offenses and a serious driving offense within the 25-year look back period (*see* 15 NYCRR 136.5[b][2]). Furthermore, the petitioner failed to demonstrate an exemption from the regulations since he failed to present any "unusual, extenuating[,] and compelling circumstances" that may form the basis to deviate from the general policy (*id.* § 136.5[d]; *see Matter of Argudo v New York*

*State Dept. of Motor Vehs.*, 149 AD3d at 830-831). Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding.

The petitioner's remaining contentions are without merit.

CONNOLLY, J.P., GENOVESI, WARHIT and WAN, JJ., concur.

ENTER:

/s/ DARRELL M. JOSEPH
Darrell M. Joseph
Acting Clerk of the Court

**M E M O R A N D U M**

SUPREME COURT,
SUFFOLK COUNTY

I.A.S. PART 30

By: David T. Reilly, J.S.C.
Dated: December 17, 2021

Index No. 611294/2021
Mot. Seq. #001 MD; CDISPSUBJ

Return Date: July 7, 2021
Adjourned:

In the Matter of the Application of

MARK B. GIBSON,

Petitioner,

For a Judgment under Article 78 of
the Civil Practice Law and Rules

– against –

COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES and NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

Respondents.

HEILIG BRANIGAN, LLP
Attorney for Petitioner
4250 Veterans Memorial Highway
Suite 111 East
Holbrook, New York 11741

LETITIA JAMES, ESQ.
Attorney General of
the State of New York
By: Antonella Papaleo, Esq.
300 Motor Parkway, Suite 230
Hauppauge, New York 11788

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In this CPLR Article 78 proceeding, the petitioner challenges a February 23, 2021 decision by the New York State Department of Motor Vehicles, Administrative Appeals Board ("Appeals Board") affirming the denial of his request for relicensure.

On December 12, 2013, the petitioner's driver's license was revoked following his third alcohol-related driving offense in the previous 25 years. In November of 2020, he applied to the Commissioner of Motor Vehicles for relicensure.[1] When his application was denied based on his record of alcohol-related driving convictions and incidents, he

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[1] A driver's license is not generally viewed as a vested right, but merely a personal privilege subject to reasonable regulations and restrictions, including revocation (*e.g.* ***Matter of Scism v Fiala***, 122 AD3d 1197, 997 NYS2d 798 [2014]), and, once revoked, it may be restored only at the direction of the commissioner (Vehicle and Traffic Law § 510 [5]).

submitted a request for reconsideration, asking that the Commissioner exercise the discretionary authority granted under Vehicle and Traffic Law §§ 510 and 1193 to deviate from general policy denying relicensure to applicants with the petitioner's driving record (*see* 15 NYCRR 136.5 [b] [2]) and to approve his application upon consideration of "unusual, extenuating and compelling circumstances" (15 NYCRR 136.5 [d]).[2] Among the "circumstances" highlighted in the application were the petitioner's participation in an addiction counseling program, his completion of an accident preventer course, and his commitment to sobriety.

In a letter dated January 7, 2021, the New York State Department of Motor Vehicles, Driver Improvement Bureau ("DIB") denied the petitioner's application. Based on its review of the petitioner's driving record, and observing that the

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[2] 15 NYCRR 136.5 (b) (2) provides that upon receipt of a person's application for relicensure, the commissioner shall conduct a lifetime review of such person's driving record, and if the record review shows that "the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period and, in addition, has one or more serious driving offenses within the 25 year look back period, then the Commissioner *shall* deny the application" [emphasis added]. Pursuant to 15 NYCRR 136.5 (d), however, the commissioner "shall not be foreclosed from consideration of unusual, extenuating and compelling circumstances that may be presented for review and which may form a valid basis to deviate from the general policy * * *. If an approval is granted based upon unusual, extenuating and compelling circumstances, the applicant may be issued a license or permit" with appropriate restrictions.

petitioner had received a violation for operating a motor vehicle while his license was revoked, the DIB found that "[o]peration of a motor vehicle while revoked is a serious matter," "demonstrates a fundamental unwillingness to abide by the law," and "is considered very negatively when assessing a motorist's claim that he or she ought to have a license privilege restored due to 'unusual, extenuating and compelling' circumstances." The DIB concluded, therefore, that the petitioner had failed to demonstrate the requisite circumstances to justify that an exception be made to restore his driving privilege.

The petitioner timely appealed to the Appeals Board. In a decision dated February 23, 2021, the Appeals Board affirmed the determination of the DIB. Upon its review of the petitioner's driving record, the Commissioner's statutory and regulatory authority to issue and reissue driver's licenses, and the arguments raised on appeal, the Appeals Board concluded that the petitioner's request for relicensure had properly been denied pursuant to 15 NYCRR 136.5 (b) (2). In considering whether unusual, extenuating, and compelling circumstances had been presented, the Appeals Board effectively adopted the DIB's findings and concluded, in view of "the Department's responsibility to promote highway safety and protect the public welfare," that the DIB's determination was reasonable and had a rational basis. This proceeding followed.

In reviewing an administrative determination, the role of the Court is not to decide whether the agency's action was correct or to substitute its

judgment for that of the agency (***Matter of Chemical Specialties Mfrs. Assn. v Jorling***, 85 NY2d 382, 626 NYS2d 1 [1995]), but simply to consider whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (CPLR 7803 [3]; ***Matter of Curry v Commissioner of N.Y. State Dept. of Motor Vehs.***, 172 AD3d 1588, 99 NYS3d 498 [2019]). An action is arbitrary and capricious if it is taken without sound basis in reason or regard to the facts (***Matter of Peckham v Calogero***, 12 NY3d 424, 883 NYS2d 751 [2009]). If a rational basis is shown, a court must sustain the determination even if it would have reached a different result (*id.*).

While the Court is not unsympathetic to the petitioner, it is nevertheless constrained to deny the petition. In support of his application, the petitioner alleged that he has participated in an alcohol rehabilitative treatment counseling program, that he has established and maintained sobriety with the assistance of a sober support network, and that the symptoms of his alcohol use disorder have been in remission for more than six years; he also alleged that, having had only one alcohol-related conviction in the past 25 years, he does not represent a danger to the driving public. Even assuming the sufficiency of the record to establish those circumstances, it cannot be said that the denial of his application was arbitrary, irrational or abuse of discretion, given—as cited by the reviewing agencies—his violation and subsequent conviction for operating a motor vehicle after his license was

revoked (*see* ***Matter of Nortz v New York State Dept. of Motor Vehs. Appeals Bd.***, 186 AD3d 977, 129 NYS3d 556, *lv denied* 36 NY3d 902, 135 NYS3d 350 [2020]; ***Matter of Nicholson v Appeals Bd. of Admin. Adjudication Bur.***, 135 AD3d 1124, 23 NYS3d 709 [2016]).

> [T]he Legislature has reasonably vested the Commissioner with broad discretionary authority to approve or deny relicensing applications (*see* Vehicle and Traffic Law § 510 [5], [6]), particularly when such applications are submitted by persons whose licenses were revoked after multiple alcohol- or drug-related driving offenses (*see* Vehicle and Traffic Law §§ 1193 [2] [c] [1]; 1194 [2] [d] [1]). Further, the Legislature has explicitly permitted the Commissioner to refuse to restore a license to a repeat offender when it is "in the interest of the public safety and welfare" (Vehicle and Traffic Law § 1193 [2] [b] [12] [b], [e]).

(***Matter of Carney v New York State Dept. of Motor Vehs.***, 133 AD3d 1150, 1151-1152, 20 NYS3d 467, 469 [2015], *affd sub nom.* ***Matter of Acevedo v New York State Dept. of Motor Vehs.***, 29 NY3d 202, 54 NYS3d 614 [2017]). To the extent that the petitioner argued before the agencies that his work as a contractor is impacted by his struggles to arrange transportation to various worksites, it appears that the petitioner has chosen not to press that argument in this proceeding—there is no reference to it in the petition, memorandum of law, or reply—and the Court, therefore, deems it

abandoned; the Court notes, in any event, the lack of proof in the record to document the location of the worksites or to establish that he could not use some combination of private and public transportation to suit his needs. And as to the petitioner's argument that the subject law and regulations were "unconstitutionally applied" in this case because the agencies did not address the substance of his claim regarding the existence of unusual, extenuating and compelling circumstances, it suffices to note that this argument is based on a flawed premise. It is evident, rather, that the agencies did review the substance of his claim, but concluded that the fact of his conviction for operating a motor vehicle after his license was revoked demonstrated an ongoing disregard for public and highway safety that outweighed any consideration of his claimed sobriety and warranted the denial of his application.

Accordingly, the proceeding is dismissed.

Submit judgment.

Dated: December 16, 2021

[SEAL]

/s/ DAVID T. REILLY
David T. Reilly, J.S.C.

At an I.A.S. Part 30 of the Supreme Court of the State of New York held In and for the County of Suffolk, at The Courthouse located at One Court Street, Riverhead, New York on the 10th day of January 10th, 2021.

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PRESENT:

Honorable David T. Reilly
Supreme Court Justice

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SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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Index No: 611294/2021

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In the Matter of the Application of

MARK B. GIBSON,

For A Judgment under Article 78 of
the Civil Practice Law and Rules,

Petitioner,

– against –

COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES and NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

Respondents.

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## JUDGMENT

Petitioner, having commenced a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules under Index No. 611294/2021, seeking to set aside the determination of the New York State Department of Motor Vehicles ("DMV");

NOW, upon the reading and filing of the following papers in this matter: (1) Notice of Petition dated June 16th, 2021, Petition verified by Petitioner Mark B. Gibson on June 9th, 2021, with Exhibits 1-9 attached thereto, and Memorandum of Law in Support of Petitioner's Petition dated June 14th, 2021; (2) Answer and Objections in Points of Law with Exhibit 1 attached thereto, submitted by Respondents the Commissioner of the New York State DMV and New York State DMV, verified by Assistant Attorney General Antonella Papaleo, Esq. on June 30, 2021 and Memorandum of Law submitted by the Commissioner of the New York State DMV and New York State DMV; (3) Administrative Return with Exhibit A attached thereto, submitted by Respondents the Commissioner of the New York State DMV and New York State DMV, on June 30, 2021; (4) Reply in Support of Petitioner's article 78 Petition dated July 7, 2021, submitted by Petitioner; and

THIS matter having come on to be heard by the Honorable David T. Reilly, and after due deliberation, a Decision and Order dated December 16, 2021 having been rendered, which is attached here as EXHIBIT A; it is

ORDERED, ADJUDGED, AND DECREED, that:

1. TheNew York State DMV Appeals Board ("Appeals Board") affirmed the New York State DMV Driver Improvement Bureau's ("DIB") denial of Petitioner's request for relicensure pursuant to 15 NYCRR 136.5 (b) (2);

2. The New York State DMV Appeals Board and DIB fully reviewed the substance of Petitioner's claim regarding the existence of unusual, compelling, and extenuating circumstances;

3. The finding of the DMV DIB and Appeals Board that Petitioner did not demonstrate unusual, compelling, and extenuating circumstances, justifying relicensure, was not arbitrary, capricious, or an abuse of discretion;

ORDERED, ADJUDGED, AND DECREED, that the relief sought in the Petition is DENIED in its entirety, and that this proceeding is DISMISSED in its entirety.

DATED: Riverhead, New York
January 10, 2022

[SEAL]

/s/ David T. Reilly
David T. Reilly, J.S.C.

**Exhibit 4**

DMV Appeals Board
Ten Dollars
Mark Gibson
Appeals Processing fe

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[LETTERHEARD OF HEILIG, B [ILLEGIBLE]]

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Department of Motor Vehicles
Appeals Processing Unit
PO Box 2935
Albany, New York 12220-0935

Re: Re: Mark Gibson

Dear Sir/Madam:

Enclosed please find NYS DMV form AA-33A, my my firm's check in the amount of Ten Dollars ($10.00) appeal processing fee, Appeals Arguments with Exhibits 1-5.

Thank you.

Very Truly Yours,

/s/ MICHAEL J. MILLER
Michael J. Miller, Esq.

MJM/slc
Encl.
Cc: Mark Gibson

NEW YORK STATE | Department of Motor Vehicles

# ADMINISTRATIVE APPEAL FORM (AA-33A)

VEHICLE AND TRAFFIC LAW ARTICLES 3-A and 12-A

(THIS FORM IS NOT TO BE USED TO APPEAL TRAFFIC VIOLATION BUREAU TICKETS)

DMV USE ONLY

## WHAT IS REQUIRED TO FILE AN APPEAL

You must send this **COMPLETED, SIGNED APPEAL FORM** (2 pages) and a **$10 APPEAL FEE** to the DMV Appeals Board. Read this entire form carefully. Type or print all information clearly. You must state your reason for the appeal on page 2 of this form. You must pay a non-refundable **$10 appeal fee for each CASE NUMBER you appeal.** DO NOT SEND CASH. Appeal fees must be paid by check or money order, payable to the "Commissioner of Motor Vehicles." Print your case number(s) on your check or money order. A $35 penalty is charged for dishonored checks.

## DEADLINE TO FILE AN APPEAL

You must send this **APPEAL FORM and the APPEAL FEE(S)** to the DMV Appeals Board **WITHIN SIXTY (60) DAYS OF THE DATE OF THE DEPARTMENT'S ORDER OF SUSPENSION/REVOCATION, DECISION LETTER, OR NOTICE.** If you file by mail, the USPS postmark will be used to determine if your appeal is timely. If the postmark is illegible, the date your appeal is received by the Board will determine timeliness. You should keep copies of your completed appeal form, appeal fee, and proof of mailing.

## WHERE TO SEND AN APPEAL

**Mail the appeal form and appeal fee(s) to:**

DMV APPEALS BOARD
P.O. BOX 2935
ALBANY, NY 12220-0935

## WHAT IS THE SUBJECT OF YOUR APPEAL (Check the appropriate box.)

- ☐ CHEMICAL TEST REFUSAL– DMV HEARING HELD
- ☒ DENIAL OF APPLICATION FOR DRIVER LICENSE, CERTIFICATE OR PRIVILEGE – NO DMV HEARING HELD
- ☐ FACILITY LICENSE OR CERTIFICATE, including INSPECTION STATION, INSPECTOR, DEALER, REPAIR SHOP – DMV HEARING HELD
- ☐ FATAL ACCIDENT, PERSISTENT VIOLATOR, FALSE STATEMENT– DMV HEARING HELD
- ☐ ALL OTHERS – including OTHER DETERMINATIONS MADE WITHOUT A DMV HEARING

## HEARING TRANSCRIPTS

If a hearing was held, the Appeals Board may review hearing testimony only if you order and pay for a transcript in a proper and timely manner. The Appeals Board will acknowledge receipt of your appeal form and fee with a letter that will direct you to send a transcript deposit to the designated Transcription company within 30 days of the date of the letter. The Appeals Board does not accept transcript payments. If you do not receive an acknowledgment letter, contact the Appeals Board at (518) 474-1052 or at the address above. The Appeals Board will not review hearing testimony unless all transcript payments are timely and complete.

**IF A HEARING WAS HELD, check the appropriate box below:**

- ☐ **I WANT THE HEARING TESTIMONY REVIEWED BY THE BOARD. I UNDERSTAND THAT I AM REQUIRED TO PAY A TRANSCRIPT DEPOSIT TO THE TRANSCRIPTION COMPANY WITHIN 30 DAYS OF THE DATE OF THE LETTER ACKNOWLEDGING RECEIPT OF THIS APPEAL.**
- ☐ **I DO NOT WANT A TRANSCRIPT OF THE HEARING TO BE PRODUCED. I UNDERSTAND THAT THE BOARD WILL NOT REVIEW HEARING TESTIMONY.**

## REQUESTING A STAY

☐ **I REQUEST THAT THE FINE, SUSPENSION OR REVOCATION BE STAYED (STOPPED) PENDING THE OUTCOME OF THE APPEAL.**

Stays pending appeals are granted in the discretion of the Board (except for most Article 12-A appeals). The Appeals Board will not grant a stay unless the appeal fee is paid and valid reasons for the appeal and for needing the stay are provided on page 2 of this form. You will be notified whether your request for a stay has been granted or denied.

## REQUIRED APPEAL INFORMATION

All correspondence for this appeal will be sent to the address(es) supplied on this appeal form. You must notify the Appeals Board in writing immediately of any change of address that occurs after this appeal is filed.

| | |
|---|---|
| Last Name: GIBSON; First Name: MARK; M.I. | Type of Appeal (Chemical Test Refusal, License Denial, Inspection, Dealer, Repair Shop, etc.) |
| Date of Birth: MM [redacted] DD [redacted] YYYY 1954; Sex: ☑ Male ☐ Female | NYS Driver License Client ID Number: [redacted]5696 |
| Corporate Name or DBA | Facility/Certificate Number |
| Appeal Mailing Address (Street): 194 LYNN AVENUE | Case Number(s): D06-39297 |
| City: HAMPTON BAYS; State: NY; Zip Code: 11946 | Date of Each Hearing |
| ATTORNEY FOR THIS APPEAL (if any): MICHAEL J. MILLER | Date of Decision/Order |
| Attorney Mailing Address (Street): 4250 VETERANS MEMORIAL HIGHWAY, 111 EAST | Hearing Location(s) |
| City: HOLBROOK; State: NY; Zip Code: 11741 | Administrative Law Judge |

**DMV USE ONLY** ☐ $10 APPEAL FEE(S) RECEIVED ☐ NO FEE RECEIVED ☐ CHECK ☐ MONEY ORDER ☐ AMOUNT: $ _____ DATE: MM / DD / YYYY STAY: _____

NEW YORK STATE | Department of Motor Vehicles

**ADMINISTRATIVE APPEAL FORM (AA-33A)**
VEHICLE AND TRAFFIC LAW ARTICLES 3-A and 12-A
(THIS FORM IS NOT TO BE USED TO APPEAL TRAFFIC VIOLATION BUREAU TICKETS)

DMV USE ONLY

**WHAT RECORDS ARE REVIEWED:**

Any exhibits submitted at the hearing will become part of the appeal record. The Appeals Board reviews the entire record created at the hearing. The Board will review a transcript of the hearing only if you order it and pay for it in a timely manner.
To receive copies of hearing exhibits for personal use, submit a **FREEDOM OF INFORMATION LAW (FOIL) request** to: DMV FOIL OFFICE, 6 Empire State Plaza, Albany, NY 12228. Information for obtaining DMV records and FOIL forms is available online at: **www.dmv.ny.gov**.

**APPEAL ARGUMENTS:**

**IN THE SPACE BELOW YOU MUST STATE IN DETAIL THE REASON(S) FOR THIS APPEAL and for needing a stay (if requested). PLEASE TYPE OR PRINT CLEARLY.** Attach additional pages, if necessary, and write your name on every page. **Personal appearances and oral agruments are not permitted on appeal.** If a transcript is ordered, you will have 30 days to submit additional arguments from the date of the transcript invoice. After the 30-day period, your appeal will be reviewed and decided. You will receive written notification of the outcome of the appeal.

Please See The ATTACHED APPEAL ARGUMENTS

**SIGN AND DATE YOUR APPEAL:**

I affirm under penalty of perjury that all of the information on this form and all supporting documents submitted with this appeal are true, and that no prior appeal has been filed in this matter.

Sign Here X _____ Date 1-23-21

**BE SURE THAT YOU:**

- ☐ Pay the non-refundable appeal fee of $10 **for EACH case** appealed. Enclose a check or money order payable to "Commissioner of Motor Vehicles".
- ☐ Submit your appeal form and appeal fee(s) to the Appeals Board **within 60 days of the date of your order or notice.**
- ☐ Provide **reasons for your appeal** on page two. If requesting a stay, provide **reasons for a stay request** on page two.
- ☐ **Sign and date** your appeal form on page two.

Appeals Argument

There are several reasons to grant this appeal.

First, the Driver Improvement Bureau, in 2019, denied re-licensing based on the assessment of alchohol related offenses and "points". **Exhibit 1** is a copy of the 2019 Decision. In 2020 the Driver Improvement cited the same reasons as the basis to decline the re-licensing request. **Exhibit 2** is a copy of the 2020 Decision. The 2020 Decision was administratively appealed, and that appeal was denied based on the same justifications as were cited in the Driver Improvement Review. **Exhibit 3** is the Decision of the Administrative Appeals Board.

In November 2020, Mr. Gibson applied again to the Driver Improvement Bureau. This time he pointed out that he had one (1) conviction for an alochol-related offense in the past 25 years; a conviction for driving while impaired. He has undergone OASES counseling and has been alcohol free since 2014. Additionally, the points properly assessed against Mr. Gibson do not exceed the statutory limits.

On January 7, 2021 the Driver Improvement Bureau denied the re-licensing request. This time, however, the Bureau abandoned its reliance on alcohol and "points", and presented a new justification for its decision. The Bureau now states that Mr. Gibson cannot be relieved because he received violations while his driving privileges were revoked. **Exhibit 4** is a copy of the Decision from January 7, 2021.

These decisions show that the Driver Improvement Bureau is "moving the goal line". When their reasons are shown to be deficient, they create another justification for their actions. A justification for the action taken is not a rationale basis for that action. It is noteworthy that Mr. Gibson's only alcohol related offense in the past 25 years is a driving while impaired violation. His license was revoked in 2013 for failure to take a breath test, but it is germane that Mr. Gibson was acquitted of the underlying charge. His only traffic incidents go back to 2013, albeit the termination of those charges occurred several years later.

The rational conclusion from these facts is that Mr. Gibson does not have a horrendous driving record, he has not accumulated new "points", he is not a hazardous driver, and he does not have a drinking/driving problem. And we note that any accusation, cannot be equated with a disposition of the charge. It is the disposition by the New York State Courts that is relevant; there are no recent moving traffic violations. In other words, DMV cannot rely on an accusation when a New York Court of competent jurisdiction has determined that the ticket must be dismissed.

Please note that DMV's records do not, apparently, reflect the dismissal of accusations made in 2020. **Exhibit 5** is a copy of the court record and the results of a urine test conducted last fall was submitted to the DMV.

Second, the Regulations found in 22 NYCRR 136 were established to promote safety and are not meant to be punitive (See, Matter of Acevedo v.

N.Y.S. Dept. of Motor Vehicles, 132 AD 3d 112 [3d Dept. 2015]). The regulations are meant to both promote safety and reduce the instances of drunk driving (id.). In this case the actions of the Driver Improvement Bureau in declining to grant Mr. Gibson's request for his license is punitive and not remedial. In his application Mr. Gibson established he has been sober since 2014 and that he possesses no threat to the safety of either himself or others. It has been six years since he had a drink and the vast majority of his driving offenses occurred over 20 years ago. The decision of the Driver Improvement Bureau punishes Mr. Gibson for past conduct and fails to properly consider that mandate to promote safe, sober driving. If the legislature mandate is followed, Mr. Gibson's driving privileges should be reinstated.

Third, Section 136.5(b)(2) provides that an application for re-licensing will be denied if an applicant has 3 or 4 alcohol related offenses and "in addition" has one or more serious driving offenses. Here, Mr. Gibson has one (1) alcohol related conviction in the last 25 years (driving while impaired) and does no have additional serious offenses.

The Driver Improvement Bureau is searching for a justification for its determination. But a justification is not a rational basis; rather it is an excuse to support a preconceived decision. Hence, that decision is not based on fact.

Respectfully submitted,

By: Michael J. Miller, Esq.
Heilig, Branigan & Miller, LLP
4250 Veterans Memorial Highway
Suite 111 East
Holbrook, New York 11741
(631) 750-6888

**Exhibit 5**

[LETTERHEAD NYS DEPARTMENT OF
MOTOR VEHICLES ADMINISTRATIVE APPEALS BOARD
DECISION OF APPEAL]

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GIBSON, MARK, B
194 LYNN AVE
HAMPTON BAYS, NY 11946
CID: 714195696
DRIVER LICENSE DENIAL –
CASE NO.: DO639297B

DOCKET NO.: 45622
DECIDED BY BOARD: FEBRUARY 23, 2021

This is an appeal from a denial of an application for re-licensure after appellant's license had been revoked. The application was denied pursuant to Vehicle and Traffic Law (VTL) §§ 510, 1193, 1194 and Part 136 of the Commissioner's Regulations (15 NYCRR 136). The denial was issued after evaluation of the appellant's driving record.

**APPEAL ARGUMENTS**

- The appellant completed OASES counseling and hass not consumed alcohol since 2014.
- The appellant has only one alcohol conviction during the last 25 years. Although he was found to have refused to submit to a chemical test on November 28, 2013, he was not convicted of the underlying criminal charge.
- The "points" assessed against the appellant do not exceed the statutory limits.

- In the decision letter dated January 7, 2021, the Driver Improvement Bureau abandoned its initial basis (alcohol-related driving incidents and points) for denying appellant's application for re-licensure and presented a new justification, that the appellant drove while revoked. This clearly demonstrates that the bureau is "moving the goal line."
- The appellant's only traffic incidents go back to 2013. He has no recent moving violations.
- The denial is punitive and not remedial, contrary to the intention of the regulations which serve as the basis for the denial.

**ANALYSIS AND DISCUSSION**

The Commissioner has been granted broad, explicit, and exclusive administrative authority to issue and reissue driver licenses and to adopt and amend rules and regulations to carry out the Department's responsibilities and functions. (Vehicle and Traffic Law § 215). Once an offender's license has been revoked, reissuance of a new license is subject to the discretion of the Commissioner [Vehicle and Traffic Law § 510 (5) and (6)(a)]. Vehicle and Traffic Law §§ 1193(2)(c)(1) and 1194(2)(d)(1) provide that where a license is revoked as the result of a mandatory revocation arising out of an alcohol or drug-related offense or a chemical test refusal, no new license shall be issued except in the discretion of the Commissioner. Vehicle and Traffic Law § 1193(2)(b)(12)(b)(ii) provides authority to the

Commissioner to refuse to restore a license that has been permanently revoked "in the interest of public safety and welfare."

Part 136 of the Commissioner's Regulations was promulgated to assist the Commissioner in exercising the broad discretion afforded by law and to help fulfill the responsibility of promoting highway safety by identifying problem drivers. Section 136.5 of the Commissioner's Regulations addresses the inherent danger of relicensing drivers convicted of multiple alcohol and drug-related driving offenses in order to protect all those who share the public highways of this State. The Regulation provides objective review criteria which the Department must consider in determining whether the license of someone with multiple alcohol or drug-related driving convictions or incidents will be restored after revocation. The Regulations are within the discretion authorized by law, reasonable, and bring about the purposes for which they were adopted. The Court of Appeals has unanimously upheld the Commissioner's Regulations and application of those regulations to relicensing applications. *Matter of Acevedo v. New York State Dept. of Motor Vehicles*, 29 NY3d 202, 229 (2017).

After being revoked for Refusal to Submit to a Chemical Test, appellant applied for reissuance of a driver's license to the Department's Driver Improvement Bureau. In a letter dated December 8, 2020, the Driver Improvement Bureau denied appellant's application pursuant to Commissioner's Regulations § 136.5(b)(2), which requires the

Department to deny an application for re-licensure if a lifetime review of the applicant's driving record shows that the applicant has three or four alcohol or drug-related driving convictions or incidents and one or more serious driving offenses within the 25-year look back period.

An "alcohol or drug-related driving conviction or incident" is defined as: (i) a conviction of a violation of VTL § 1192 or an out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs; (ii) a finding of a violation of VTL § 1192-a or a finding of refusal to submit to a chemical test under VTL § 1194-a; (iii) a conviction of a Penal Law offense for which a violation of VTL § 1192 is an essential element; or (iv) a finding of refusal to submit to a chemical test under VTL § 1194, where such finding does not arise out of an incident that resulted in a conviction of a violation of VTL § 1192 [15 NYCRR 136.5(a)(1)].

"Serious driving offense" is defined as: (i) a fatal accident; (ii) a driving-related Penal Law conviction; (iii) conviction of two or more violations for which five or more points are assessed on a violator's driving record pursuant to 15 NYCRR 131.3; or (iv) 20 or more points from any violations [15 NYCRR 136.5(a)(2)].

The "25-year look back period" is defined as the period commencing upon the date that is 25 years before the date of the "revocable offense" and ending on and including the date of the "revocable offense" [15 NYCRR 136.5(a)(3)].

"Revocable offense" means the violation, incident or accident that results in the revocation of the person's driver's license and which is the basis of the application for re-licensure. Upon reviewing an application for re-licensure, the Commissioner shall review the applicant's entire driving record and evaluate any offense committed between the date of the revocable offense and the date of the application as if it had been committed immediately prior to the date of the revocable offense. The "date of the revocable offense" means the date of the earliest revocable offense that resulted in a license revocation for which the revocation has not been terminated by the Commissioner's subsequent approval of an application for re-licensure [15 NYCRR 136.5(a)(4)].

The date of violation of appellant's earliest open revocable offense was November 28, 2013. Thus, the 25-year look back period would commence 25 years before that date and would include offenses dating back to November 28, 1988.

The Department's review of appellant's driving record showed that appellant had the following three alcohol or drug-related driving convictions or incidents within the 25 year look back period:

| Description | Violation Date | Finding/ Conviction Date |
|---|---|---|
| Chemical Test Refusal | November 28, 2013 | December 12, 2013 |
| Driving While Impaired | February 1, 2006 | August 7, 2006 |
| Driving with .10% Alcohol | December 23, 1989 | July 24, 1990 |

In addition, appellant's driving record showed one or more "serious driving offenses" as defined by 15 NYCRR 136.5(a)(2) within the 25-year period, consisting of a total of 29 points. Therefore, appellant's application was properly denied pursuant to § 136.5(b)(2) of the Commissioner's Regulations, as appellant's driving record showed three alcohol-related driving convictions and one or more serious driving offenses within the 25-year look back period.

Given appellant's driving record, the denial of appellant's application for reissuance of a driver's license had a rational basis, was authorized by Vehicle and Traffic Law and Commissioner's Regulations, and did not constitute an abuse of discretion. The Regulations are consistent with the Commissioner's statutory responsibilities and were properly and fairly applied. Notwithstanding the appellant's argument on appeal, the basis for the license denial has been consistent and made pursuant to law. The appellant's conviction for Facilitating Aggravated Unlicensed Operation on March

3, 2016 did not form the basis for the denial of appellant's application for re-licensure.

A chemical test refusal hearing and the prosecution of an alcohol or drug-related driving charge are two distinct proceedings, independent of each other. The refusal hearing is a civil, administrative hearing, whereas alcohol or drug-related driving offenses [such as Driving While Intoxicated (DWI) and Driving While Ability Impaired (DWAI)] are prosecuted in a court of law. The burdens of proof, issues, rules of evidence, and potential outcomes are different in each matter, and one cannot determine the other (*People v Kearney*, 196 Misc.2d 335; *People v Riola*, 137 Misc. 2d 616; *Combes v Kelly*, 2 Misc. 2d 491). Different outcomes are not unusual. Nor does an acquittal in court of any alcohol-related driving charges result in the cancellation or "dismissal" of the administrative chemical test refusal hearing.

Section 136.5(d) of the Commissioner's Regulations provides that, in the exercise of discretionary authority granted under VTL §§ 510 and 1193, the Commissioner may consider unusual, extenuating and compelling circumstances presented for review, which may form a valid basis to deviate from the general policy of denying re-licensure for those applicants with multiple alcohol or drug-related driving convictions or incidents, as set forth in Section 136.5. After issuance of the December 8, 2020 denial letter, appellant submitted claims of unusual, extenuating and compelling circumstances to the Driver Improvement Bureau for

review. The Driver Improvement Bureau considered appellant's information and notified appellant in a letter dated January 7, 2021 that the circumstances claimed by appellant were not sufficient to justify deviating from the general policy of denying re-licensure to applicants with multiple alcohol or drug-related convictions or incidents, as set forth in Section 136.5. The Driver Improvement Bureau also indicated that appellant had not sufficiently demonstrated that unusual, extenuating and compelling circumstances existed to warrant re-licensure and that granting appellant's application for re-licensure would be inconsistent with the Department's mission of promoting highway safety.

In addition to having multiple alcohol (or drug-related) driving convictions or incidents, appellant's driving record also showed a serious driving offense and a conviction for Facilitating Aggravated Unlicensed Operation while revoked. Therefore, taking into consideration the Department's statutory responsibility to promote highway safety and protect the public welfare, the January 7, 2021 determination was reasonable and had a rational basis.

DECISION BY THE BOARD: The determination is affirmed. The original decision remains.

**Exhibit 6**

[LETTERHEAD OF NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD]

March 02, 2021

MARK B GIBSON
194 LYNN AVE
HAMPTON BAYS, NY 11946

Re: NOTICE OF APPEAL DECISION
APPEAL DOCKET NO.: 45622
CASE NO.: DO639297B

Dear Appellant:

The Appeals Board decided the above-referenced Administrative Appeal on the date indicated on the enclosed Decision of Appeal, pursuant to Article 3-A of the Vehicle and Traffic Law.

This is a final, administrative determination of the Department. Any further appeal of an adverse decision should be made to the New York State Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules.

APPEALS BOARD PROCESSING UNIT

Enclosure:

MICHAEL MILLER, ESQ
4250 VETERANS MEM HWY, 111 E
HOLBROOK, NY 11741

COURT OF APPEALS
STATE OF NEW YORK

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Suffolk County Clerk Index No.: 611294/2021

Appellate Division Second Department
Docket No.: 2022-00654

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In the Matter of the Application of
MARK B. GIBSON,

*Petitioner-Appellant*,

For a Judgment under Article 78 of
the Civil Practice Law and Rules

Against

COMMISSIONER OF THE NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES and NEW YORK
STATE DEPARTMENT OF MOTOR VEHICLES,

Respondents-Respondents.

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NOTICE OF MOTION FOR LEAVE TO
APPEAL TO THE COURT OF APPEALS

**PLEASE TAKE NOTICE**, that upon the annexed statement, made according to the Rules 500.21 and 500.22 of the Court ofAppeals Rules of Practice, signed on the 7th day of February, 2024, and the papers attached thereto, Michael J. Miller will move this court, at the Court of Appeals Hall,

Albany, New York on the 26th day of February, 2024, for an order granting leave to appeal to this Court from the Decision & Order of the Appellate Division, Second Judicial Department, dated January 10, 2024.

Answering papers, if any, must be served and filed in the Court ofAppeals with proof of service on or before the return date of this motion.

Dated: Suffolk County New York
February 7, 2024

Yours,

/s/ MICHAEL J. MILLER
Michael J. Miller
*of counsel to*
Heilig Branigan LLP
4250 Veterans Mem. Hgwy.
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Holbrook, N. Y. 11741
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To: Clerk of the Court of Appeals
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COURT OF APPEALS
STATE OF NEW YORK

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Suffolk County Clerk Index No.: 611294/2021

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In the Matter of the Application of
MARK B. GIBSON,

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For a Judgment under Article 78 of
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Against

COMMISSIONER OF THE NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES and NEW YORK
STATE DEPARTMENT OF MOTOR VEHICLES,

Respondents-Respondents

---

NOTICE OF MOTION FOR LEAVE TO
APPEAL TO THE COURT OF APPEALS

STATEMENT IN SUPPORT OF MOTION
FOR LEAVE TO APPEAL

Appellant Mark B. Gibson (hereinafter either Mr. Gibson or Appellant) seeks permission to appeal to the Court ofAppeals from a Decision &

Order ofthe Appellate Division, Second Judicial Department that was issued and entered on January 10, 2024. In that document the Appellate Division held that the decision of the Department of Motir Vehicles and the Commissioner of that Agency (collectively hereinafter the DMV or Agency), correctly denied Mr. Gibson's request to reinstate his driving privileges in the State of New York. Specifically, the Appellate Division held that there was a rational basis for the DMV's determination.

Appellant, however, had also argued, both in his initial Article 78 Petition and in the Appellate Division, that not only was the DMV's decision irrational but also that the procedure used by DMV to reach its determination denied Mr. Gibson due process of law under the Fourteenth Amendment to the United Staes Constitution. The Appellate Division only addressed Appellant's due process argument by noting that all other issues raised by Appellant were without merit.

Here, Mr. Gibson asks for leave to appeal to the Court of Appeals because he has been denied the protections afforded to him under the Fourteenth Amendment to the United States Constitution. Before addressing why leave to appeal should be granted, Appellant will first address procedural issues of timeliness and finality.

## PROCEDURAL ISSUES

First, Mr. Gibson has not moved for leave to appeal to this Court in the Appellate Division and

this is his only application to this court (see 22 NYCRR § 500.22[b][2]).

Second, this motion is timely made. The Appellate Division's Decision and Order was issued and entered on January 10, 2024. Notice was emailed to counsel for Appellant on January 11, 2024 (see CPLR § 2103[b][7]; 22 NYCRR § 1245.5). This motion is made within 30 days of my receipt of the court-initiated notice.

Third, the decision of the Appellate Division is final. The Appellate Division affirmed the Supreme Court's determination to deny Mr. Gibson's Article 78 Petition in which he argued not only that the DMV's decision was irrational but also that he was denied Due Process of law under the federal Constitution. Unless leave to appeal to this Court is granted there is nothing more that can be done in this case. This Court has jurisdiction in this case because the decision from the lower court is final and-as is discussed below-there is a question of law that warrants review by this Court.

## BACKGROUND LITIGATION

### A. THE PROCEEDINGS BEFORE DMV AND THE LOWER COURTS

In 2013 Mr. Gibson's driver's license was revoked because of his failure to submit to a breath test to determine the alcohol content of his blood (R. 10, 115-119).[1] In November 2020, Mr. Gibson applied to

[1] Parenthetic numbers preceded by an R refer to the pages of the record in the court below.

the Department of Motor Vehicles (DMV). to have his driving privileges restored (R. 10 ¶22, 118 ¶22). This application was denied and, in a letter, dated December 8, 2020, the DMY iterated that the denial was based on three prior alcohol offenses and more that 20 points on Mr. Gibson's driving record during the 25-year look-back period (R. 57-59, 119 ¶25). Thereafter, Mr. Gibson applied to the Driver Improvement Bureau (DIB) – a sub-unit of the DMV- to negate the refusal to issue him a new driver's license (R. 10 ¶24-25, 22-23, 119-121 ¶26-30).

The DIB, on January 7, 2021, denied the request for re-licensure (R. 10 ¶24-25, 46, 120-121 ¶29-30). The DIB declined to reinstate Mr. Gibson's driving privileges because he operated a motor vehicle while his license was revoked and because operating a vehicle while revoked established that he did not demonstrate unusual, compelling, or extenuating circumstances. At no time did DIB analyze the information supplied by Mr. Gibson; rather, they simply stated the ipse dixit that driving while revoked showed that he did not meet the unusual. compelling, and extenuating mantra.

Mr. Gibson appealed the DIB's denial of re-licensing to the Administrative Appeals Board (AAB) of the DMV (R. 11 ¶26-28, 47-51, 126 ¶47-48). In the administrative appeal Mr. Gibson argued that the DIB changed the reasons it gave for denying re-licensing in Mr. Gibson's serial applications (R. 50-51). The DMV's inconsistency showed that the agency was searching for a justification for its actions rather than a rational basis

for its decisions (R. 50). Mr. Gibson also argued that the DIB's decision was punitive because it neither promoted safety nor remediation (R. 51). And Mr. Gibson noted that if a person counted back from the date of the application for re-licensing, he had one driving while impaired conviction and no serious driving offenses (R. 51).

The AAB denied Mr. Gibson's appeal (R. 66-68). The AAB reasoned that the DIB correctly determined not to reinstate Mr. Gibson's driving rights because Mr. Gibson had three alcohol-related offenses and 29 points on his driver's license within the 25-year look back period (R.68). The AAB went on to explain the difference between the refusal to take a breath test and the acquittal of the underlying criminal case, and then continued and explained its interpretation of the action taken by DIB (*Id*.). Finally, the AAB noted that Mr. Gibson was convicted of a species of unlicensed operation, albeit they recognized that this was not part of the DIB's rationale (*Id*.).

Mr. Gibson next petitioned for a judgement pursuant to Article 78 of the Civil Practice Law and Rules (R. 6-19, 89-103). In general Mr. Gibson maintained that the decision not to reinstate the driver's license was arbitrary and capricious, that because the DMV abused its discretion, the regulations were unconstitutionally applied in this case, and because the DMV acted arbitrarily and capriciously and abused its discretion the continued revocation functioned as an unconstitutional punishment (R. 14-15).

More specifically Mr. Gibson said that the DVM never actually addressed his contention that his remediation efforts and lack of recent driving violations established facts that countered the lifetime ban imposed upon him (R. 91-101). The AAB decision was irrational, arbitrary, and capricious because they could not show that the decision to allow or deny relicensing was cabined by any criteria; the Commissioner's discretion was unlimited (R. 93-101). The AAB decision was not based on any articulable standard because there are no criteria defining compelling, unusual, or extraordinary (R. 97-98). Furthermore, because the agency's discretion is unfettered reliance on its discretion in this case- where the applicant had presented compelling reasons to override the lifetime ban- denied Mr. Gibson due process of law and equal protection of the law because there is no way to determine if the agency acted in accordance with any standard regarding reinstatement of driving rights (R. 101-102). Finally, Mr. Gibson noted that in this case the punishment imposed is disproportionate to his historical conduct (R. 102).

The State responded to the Petition and wrote that the agency was legally justified in both revoking and not reinstating Mr. Gibson's driver's license (R. 117-127). The State maintained that the DMV's decision was not arbitrary or capricious and that its determination was fully supported by the record (R. 155-163). The State also said that the exercise of the Commissioner's discretion in denying an application for reinstatement was not a penalty and that due process of law was provided

by the underlying criminal proceedings and the chemical test refusal (R. 163-164).

Mr. Gibson replied to the State's submission. Therein, he noted that the State misinterpreted the 25-year lookback period by extending it until the time an application is made to reinstate the driving privileges; this is contrary to the relevant regulations (R. 274-275). The regulations are also enforceable because the life-time ban is ameliorated by the Commissioner's right to override the ban, and without the override the regulatory scheme would be unenforceable because the regulations would exceed the penalty imposed through the Vehicle and Traffic Law (R. 275).

Next, he noted that he did not dispute that the refusal to submit to a chemical was a ground for revocation, but that an acquittal of the underlying charge was germane to the calculus regarding reinstatement of driving privileges (R. 275). Although Mr. Gibson may have violated the requirement that he take a breath test, his acquittal of the underlying charge negated any claim that he was operating a vehicle under the influence of alcohol (R. 275). Mr. Gibson also addressed the Agency's changing explanations for its actions in order to illustrate that a reason is different from a rational basis for the Agency's decisions (R. 276). And Mr. Gibson further explained the due process and equal protection violations engendered by the Agency's implementation of its rules and regulations (R. 277).

## B. THE TRIAL COURT'S DECISION

On December 16, 2021, the Supreme Court published a Memorandum decision on this matter. Therein the Court found that the Agency had appropriately considered all of Mr. Gibson's arguments and that the Agency had acted according to its rules and regulations. Additionally, the Court found that there were no constitutional violations because the Agency had in fact considered Mr. Gibson's arguments before rejecting them. Thereafter, and on January 10, 2022, the Court issued its Judgment that: The AAB affirmed the DIB's denial of re-licensure pursuant to 15 NYCRR 136.5(b)(2); The DIB and AAB fully reviewed the substance of Mr. Gibson's claim regarding the existence of unusual, compelling, and extenuating circumstances, and; The DIB and AAB finding that there were no unusual, compelling, and extenuating circumstances, was not arbitrary, capriccios or an abuse of discretion (R. 5). This is an appeal from the Judgment of the Supreme Court, Suffolk County.

## C. THE APPEAL IN THE COURT BELOW

In the appellate Division Mr. Gibson argued that the trail court erred because the decision of the DMV is arbitrary capricious and irrational, that the failure to allow for a hearing denied him due process of law, and that the refusal to re-license Mr. Gibson resulted in an unconstitutional punishment imposed in a civil proceeding without due process of law. On January 10, 2024, the Appellate

Division specifically reject the argument that the DMV's decision lacked a rational basis and found the other argument without merit.

## HOW MR. GIBSON WAS DENIED DUE PROCESS OF LAW

Leave to appeal to this Court should be granted because the procedures used to deny Mr. Gibson's application to reinstate his driving privileges in New York fail to fulfill Due Process requirements of the Fifth and Eight Amendments, which are made applicable to the State through the Fourteenth Amendment. To begin, there is no question that, at least for Federal due process analysis, a driver's license is a property interest. "It is well established that a driver's license is a substantial property interest that may not be deprived without due process of law" (*Pringle v. Wolfe*, 88 NY2d 426,431 [1996], citing *Bell v. Burson*, 402 U.S. 535,539 [1971]). The Supreme Court in *Bell* wrote that," [o]nce licenses are issued, . . . , their continued possession may become essential to the pursuit of livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment (citations omitted" (*Bell*, at 539). In the context of suspending driving privileges an evidentiary hearing is not required (*Dixon v. Love*, 431 U.S. 105 [1977]). But due process is flexible that calls for the procedural protections that the situa-

tion demands (*Morrissey v. Brewer*, 408 U.S. 471, 481 [1972]).

In this case Appellant did not question the correctness of DMV's decision to revoke his driving privileges. He did, and does maintain, however, that the regime established that allows relicensing runs afoul of federally protected rights. Whether Appellant has never lost his right to drive subject to the relicensing procedure, or whether he must meet distinct and personal criteria different from all other applicants for a driver's license Mr. Gibson is subject to unregulated discretion of the DMV.

And Mr. Gibson is well aware that in *Acevedo v. N.Y.S. Dept. Of Motor Vehicles*, this Court upheld specific provisions of the DMV regulations, upheld the agency's authority to promulgate the regulations, and upheld the agency's right to enforce the regulations. The Court endorsed the agency's penalties that are stricter than those found within the VTL because the VTL granted the agency wide ranging power to regulate drivers and motor vehicles (29 NY3d at 219-221), and because the regulations as promulgated did not violate the separation of powers doctrine (29 NY3d at 221-226). Separation of power was not violated because the regulations fit within the dictates of the statute; the longer period of revocation in the regulations did not contravene the lesser statutory period because there exists a means to obtain reinstatement- the discretion of the Commissioner.

Nevertheless, the unbridled discretion given to the Agency regarding the restoration of driving

privileges runs afoul of constitutional protections because of that very absolute discretion given to the Agency. In the administrative forum the agency must give notice of the charges that is reasonable under the circumstances, so that the defendant can prepare an adequate defense (*Matter of Block v. Ambach*, 73 NY2d 323, 332 {1989] [reasonably specific notice of the charges]; Matter of *Fitzgerald v. Libous*, 44 NY2d 660, 661 [1978] [notice sufficient to prepare a defense]). The notice given must relate to the statutory requirements that establish the charge (*Matter of MacLean*, *v. Procaccino*, 53 AD2d 965 [3d Dept. 1976]). Here there are no DMV standards associated with the weighing of a claim of hardship (or compelling reason or extraordinary circumstance), against an agency belief that the applicant owns a bad driving record. The agency has absolute discretion, and in those circumstances, it is the agency not the applicant that must initially provide the reason for its determination. After all, there is no other way for the applicant to defend against the vagaries of the agency's practices.

Consider the following. A person is required to take a test to obtain a driver's license, but when they take the test, they are told that they have failed but they are not told why or what they need to do to pass the test. Rather, they are told to continue to apply (to take the test) until such time as the agency feels that they have established a basis to pass the test. Or consider that a person is sentenced to a determinative five-years of incarceration, but at the end of the five years they are told

that their release is discretionary and to continue to ask for release until such time as the agency thinks it is warranted. The issue in these hypotheticals, and the issue in Mr. Gibson's case, is that the relevant agency has no obligation to define the criteria used in advance of deciding., and there is thereafter no ability to determine if all similarly situated persons are treated the same. See, for example the State Administrative Procedures Act (generally requiring notice, allegations of matters article asserted, discovery and a hearing before an administrative law judge), Sex Offenders registration Act (Article 6-C of the Corrections law, requiring notice allegations and a hearing), and the Sex offender Requiring Civil Commitment or Supervision ( Article 10 of the Mental Hygiene Law, generally requiring a petition and trail).

In *Dixon*, the Court considered the Illinois plan to revoke or suspend driver's licenses. That plan, as in this case, relied on a point system to determine the extent of suspension or revocation of a person's driver's license. The State's action was defined by the points assessed and no pre-suspension hearing was required because of the mechanical arithmetic procedure and result. The Court in *Dixon*, therefore, held that the holding of a hearing to consider ameliorating conditions did not have to precede revocation or suspension (*Dixon v. Love*, 431 U. S. at 115). Indeed, when an agency's actions are not based on individual grounds but reflect a general policy, no hearing is constitutionally required (*Yassini v. Crosland*, 618 F2d 1356, 1363 [9th Cir. 1980] [with regard to INS procedures]).

The Court of Appeals in *Acevedo* likewise approved the point system to guide the Agency's procedures (*Acevedo* 20 N.Y.3d at 220).

The New York procedure to revoke a driver's license is in-distinguishable from the Illinois procedure approved in *Dixon*. The *Dixon* Court, however, also noted that, "[w]hen a governmental official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decision making may not be the best way to assure fairness." (*Id*). Yet case by case decision making is required by the New York regime, and when such a procedure is utilized, more is required than a recitation of the reasons for the revocation combined with the statement that the petitioner did not meet the undefined requirement of unusual, compelling, and extraordinary circumstances. In other words, if total discretion is given to the agency the agency must define how it will grant relief, not just how it will deny relief.

Here, leave to appeal should be granted because the procedures used to determine if driving privileges should be restored do not comport with due process of law mandates. The total discretion given to the Agency provides no notice to Appellant, or any other applicant, about the standards utilized by the Agency to analyze the information offered by the applicant in favor of relicensing as against the applicant's driving record. A lack of adequate notice is itself a due process violation (*Souders v. N. Y. State Dept. of Motor Vehicles Traffic Violations Bureau*, 187 AD3d 1 [1st Dept. 2020] [failure to send notice of conviction and revocation]). The

total discretion afforded the Agency provides no guidance as to the criteria used and provides no ability to determine if the discretion is being uniformly applied. Indicating that an applicant has to establish compelling, unusual, or extraordinary factors does not provide any guidance because those terms are undefined and there again is no method to determine that those criteria are uniformly applied.
There are additional considerations.

First, the extent to which a court needs to defer to an administrative agency is under review. See *Loper Bright Enterprise v. Raimondo*, *and Relentless*, *Inc. v. Dept. of Commerce*, both argued before the Supreme Court on January 17, 2024. Each of these cases address the scope of the *Chevron* deference doctrine (*Chevron v. Natural resources Defense Council*, 467 U. S. 837 [1984]). Although these cases question the viability of the *Chevron* doctrine regarding the reasonable interpretation of an ambiguous statute, during oral argument counsel for one group of petitioners noted that Chevron undermines a court's ability say what the law is. Counsel noted that if all nine Justices agreed that the petitioner's interpretation of the law was better than the agency's interpretation of Justices would still have to adhere to the agency's interpretation if it were reasonable (Amy Howe, *Supreme Court likely to discard Chevron*, SCOTUSblog (Jan. 17, 2024, 6:58 PM), https://www.scotusblog.Com/2024/01/supreme-court-likely-to-discard-chevron/) (last visited February 2024).

Here Appellant argued that there was in fact no rational basis for the Agency's decision. For example, the Agency relied upon a failure to take a breath test rather than the finding that Appellant was not guilty of the alcohol related offense. Thus, although there was a decision not to take the breath test, the elimination of the basis for the test was not given any weight by the courts. This determination is neither rational nor does it address the need for safety on the roadways (see *Kisor v. Wilkie*, __ *U.S.* __, 139 S. Ct. 2400 [2019] [deference to administrative agency should be cabined in scope]). . Losing a vested property right without a sound basis in reason and without regard to the facts is arbitrary (*Matter of Pell v. Board of Education*, 34 NY2d 222, 231 [1974]). Appellant likewise states that failure to restore that property right without a sound basis in reason is arbitrary.

Second in *Acevedo v. N.Y.S. Dept. Of Motor Vehicles*, this Court affirmed the Agency's mandate to create rules to implement the legislative intent, and that this regime did not violate the separation of powers doctrine (29 NY3d at 219-226). The current regime, however, impinges on due process and separation of power doctrines because an executive agency is legislating by making rules and is then essentially the sole arbiter of the application of its own rules. The deference standard reduces the courts to mere spectators of the agency's power. This likewise improperly delegates judicial power to the executive branch and may also violate the court's neutrality since it is directed to adhere to any rational agency determination. And the stan-

dard requiring a rational basis has been reduced to simply supplying a reason.

Third, as we noted below, because there is no method to determine if the Agency is consistent in its determinations there may additionally be equal protection or inconsistent application of the Agency rulings. There is simply no way to tell if the Agency is acting in good faith.

Fourth, if the forfeiture of a property right is disproportionate to the underlying action (for example when a person is acquitted of any alcohol driving offense as occurred here), then the Eight amendment excessive fines clause comes into play (see, *Tyler v. Hennepin County* __ U. S. __, 143 S. Ct. 1369 [2023]; *United States v. Bajakajian*, 524 U. S. 321, 329 [1998]; *Austin v. United States*, 113 SCt. 2801, 2805 [1993]).

## WHY LEAVE TO APPEAL SHOULD BE GRANTED

Leave to appeal to the Court of Appeals should be granted in this case. The procedures utilized by the Agency that caused the Agency to deny Mr. Gibson's application to restore his driving privileges denied him federally protected due process of law. The agency's procedure has no standards to determine if a showing of necessity or extraordinary circumstances has been met, and there is no calculus suppled that shows how a claim of need or entitlement is weighed against a driving an individual's driving record. There is no method to determine if the Agency is consistent in its applica-

tion of its guidelines, and -because the decision is completely discretionary- the Agency should have to initially justify its actions rather than have the applicant make repeated request to the agency with no guidance as to the factors that are considered in determining if the application will be successful. Too, if no applications are granted-or perhaps even very few applications are granted-then the part of *Acevedo* that led this Court to hold that the regulations do not violate the separation of powers doctrine is negated. If no applications are granted the DMV has clearly exceed the grant of authority found in the statue. The DMV regime reduces the powers of the courts and perhaps undermines the court's neutrality.

These concerns are potentially applicable to all drivers in New York State and have wide ranging implications for all drivers. Furthermore, the correct interface between citizens and administrative agencies should be examined because of the due process implications of DMV's procedures. An essential principle of due process [is] that deprivation of life, liberty, or property be preceded by notice and, opportunity for hearing appropriate to the nature of the case.'" (*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 [1985] [quoting *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 313 [1950]). Here the procedure employed is inadequate because it has no discernable standards in its application to any particular individual, it provides no method to determine if the Agency is consistent in its application of its regulations, it diminishes the importance and powers of

the courts, and -if the Agency is simply denying all similar applications-then it violates the separation of powers doctrine.

## EXHIBITS

Attached as Exhibits are:

1. The Decision of the Appellate Division.
2. The decision and order of the trial court.

## CONCLUSION

Leave to appeal should be granted because the decision in the lower court incorrectly determined the due process issues presented, this is a matter of importance because it is germane both to all New York State drivers and to all New York State administrative proceedings.

Dated: February 7, 2024

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ISSUES PRESENTED

1. Petitioner presented unusual, compelling, and extraordinary reasons why his driving privileges should be reinstated, but the Department of Motor Vehicles ("DMV" or "Agency") declined to override his license revocation. The lower court then held that the Agency acted within its mandate. Should this Court reverse the lower court when unusual, compelling, and extraordinary reasons for reinstatement have been presented and the actions of the Agency are an abuse of discretion.

Answer: YES.

2. The Agency acts within its authority when it utilizes a point system to determine its actions, such as revoking a driver's license. However, the Agency acts solely on its discretion when it declines to reinstate a driver's license; the point system is no longer in effect. The Agency does not explain the reasons for its actions because it does not define the criteria it utilizes. The lower court held that the Agency's unbounded discretion did not violate Due Process of Law. Should this Court reverse the

lower court and hold that the unfettered use of discretion violates Due Process of Law.

Answer: YES.

3. An Agency's enforcement of its rules can be so disproportionate to the violation incurred that it acts as an unauthorized punishment. Should this Court determine that the decision of the Agency based on the facts and circumstances of this case functioned as an unauthorized punishment.

Answer: YES.

## STATEMENT OF FACTS

### A. The Proceedings Before the Department of Motor Vehicles

There is no dispute that in 2013 Mr. Gibson's ("Appellant" or "Petitioner") driver's license was revoked because of his failure to submit to a breath test to determine the alcohol content of his blood (R. 10, 115-119). In November 2020, Appellant applied to the Department of Motor Vehicles ("DMV"). to have his driving privileges restored (R. 10 ¶ 22, 118 ¶ 22). This application was denied and, in a letter dated December 8, 2020, the DMV iterated that the denial was based on three prior alcohol offenses and more than 20 points on Appellant's driving record during the 25 year look-back period (R. 57-59, 119 ¶ 25). Thereafter, Appellant applied to the Driver Improvement Bureau ("DIB")—a subunit of the DMV- to negate the refusal to issue him

a new driver's license (R. 10 ¶¶ 24-25, 22-23, 119-121 ¶¶ 26-30).

The DIB, on January 7, 2021, denied the request for re-licensure (R. 10 ¶¶ 24-25, 46, 120-121 ¶¶ 29-30). The DIB declined to reinstate Mr. Gibson's driving privileges because he operated a motor vehicle while his license was revoked and because operating a vehicle while revoked established that he did not demonstrate unusual, compelling, or extenuating circumstances:

> The circumstances of operating a vehicle while revoked demonstrates a fundamental unwillingness to abide by the law and a disregard for public and/or highway safety, not unlike repeated instances of unlawful operation while impaired. Accordingly, we find that you have not demonstrated unusual, extenuating, and compelling circumstances that warrant that an exception be made to restore your driving privileges. (R. 46).

At no time did DIB analyze the information supplied by Appellant; rather, they simply stated the *ipse dixit* that driving while revoked showed that he did not meet the unusual, compelling, and extenuating mantra.

Appellant appealed the DIB's denial of re-licensing to the Administrative Appeals Board ("AAB") of the DMV (R. 11 ¶¶ 26-28, 47-51, 126 ¶¶ 47-48). In the administrative appeal Appellant argued that the DIB changed the reasons it gave for denying re-licensing in Appellant's serial applications (R. 50-51). The DMV's inconsistency showed that

the agency was searching for a justification for its actions, rather than a rational basis for its decisions (R. 50). Appellant also argued that the DIB's decision was punitive because it neither promoted safety nor remediation (R. 51). And Appellant noted that if a person counted back from the date of the application for re-licensing, he had one driving while impaired conviction and no serious driving offenses (R. 51).

The AAB denied Appellant's appeal (R. 66-68). The AAB reasoned that the DIB correctly determined not to reinstate Appellant's driving rights because Appellant had three alcohol related offenses and 29 points on his driver's license within the 25 year look back period (R.68). The AAB went on to explain the difference between the refusal to take a breath test and the acquittal of the underlying criminal case, and then continued and explained its interpretation of the action taken by DIB (*Id*.). Finally, the AAB noted that Appellant was convicted of a species of unlicensed operation, albeit they recognized that this was not part of the DIB's rationale (*Id*.).

B. The Article 78 Petition and Response by the State

Appellant next petitioned for a judgement pursuant to Article 78 of the Civil Practice Law and Rules (R. 6-19, 89-103). In general, Appellant maintained that the decision not to reinstate the driver's license was arbitrary and capricious, that because the DMV abused its discretion, the regula-

tions were unconstitutionally applied in this case, and because the DMV acted arbitrarily and capriciously and abused its discretion the continued revocation functioned as an unconstitutional punishment (R. 14-15).

More specifically Appellant said that the DMV never actually addressed his contention that his remediation efforts and lack of recent driving violations established facts that countered the lifetime ban imposed upon him (R. 91-101). The AAB decision was irrational, arbitrary and capricious because they could not show that the decision to allow or deny relicensing was cabined by any criteria; the Commissioner's discretion was unlimited (R. 93-101). The AAB decision was not based on any articulable standard because there are no criteria defining compelling, unusual, or extraordinary (R. 97-98). Furthermore, because the Agency's discretion is an unfettered reliance on its discretion in this case-where the applicant had presented compelling reasons to override the lifetime bandenied Appellant due process of law and equal protection of the law; there is no way to determine if the Agency acted in accordance with any standard regarding the reinstatement of Appellant's driving rights (R. 101-102). Finally, Appellant noted that in this case the punishment imposed is disproportionate to his historical conduct (R. 102).

The State responded to the Petition and wrote that the Agency was legally justified in both revoking and not reinstating Appellant's driver's license (R. 117-127). The State maintained that the DMV's decision was not arbitrary or capricious and that

its determination was fully supported by the record (R. 155-163). The State also said that the exercise of the Commissioner's discretion in denying an application for reinstatement was not a penalty and that due process of law was provided by the underlying criminal proceedings and the chemical test refusal (R. 163-164).

Appellant replied to the State's submission. Therein, he noted that the State misinterpreted the 25 year look back period by extending it until the time an application is made to reinstate the driving privileges; this is contrary to the relevant regulations (R. 274-275). The regulations are also enforceable because the life-time ban is ameliorated by the Commissioner's right to override the ban. Without the Commissioner's override the regulatory scheme would be unenforceable because the regulations would exceed the penalty imposed through the Vehicle and Traffic Law ("VTL") (R. 275).

Next, he noted that he did not dispute that the refusal to submit to a chemical test was a ground for revocation, but that an acquittal of the underlying charge was germane to the calculus regarding reinstatement of driving privileges (R. 275). Although Appellant may have violated the requirement that he take a breath test, his acquittal of the underlying charge negated any claim that he was operating a vehicle under the influence of alcohol (R. 275). Appellant also addressed the Agency's changing explanations for its actions in order to illustrate that a reason is different from a rational basis for the Agency's decisions (R. 276). And Appellant further explained the due process and

equal protection violations engendered by the Agency's implementation of its rules and regulations (R. 277).

C. The Decision and Judgment of the Supreme Court

On December 16, 2021, the Supreme Court published a Memorandum decision on this matter. Therein the Court found that the Agency had appropriately considered all of Appellant's arguments and that the Agency had acted according to its rules and regulations. Additionally, the Court found that there were no constitutional violations because the Agency had in fact considered Appellant's arguments before rejecting them. Thereafter, and on January 10, 2022, the Court issued its Judgment that: The AAB affirmed the DIB's denial of re-licensure pursuant to 15 NYCRR 136.5(b)(2); The DIB and AAB fully reviewed the substance of Appellant's claim regarding the existence of unusual, compelling, and extenuating circumstances; and, The DIB and AAB finding that there were no unusual, compelling, and extenuating circumstances, was not arbitrary, capriccios or an abuse of discretion (R. 5). This is an appeal from the Judgment of the Supreme Court, Suffolk County.

## POINT I

## PETITIONER ESTABLISHED UNUSUAL, COMPELLING AND EXTRAORDINARY REASONS FOR AN OVERRIDE OF HIS REVOCATION

Petitioner, before the DIB and AAB, and in his Article 78 proceeding, established that the Agency erred when it failed to reinstate his driving privileges because he had established unusual, extraordinary, and compelling reasons to override his lifetime suspension. The DMV regulations are supposed to ameliorate the problems caused by drunk or impaired drivers and, in this case, Petitioner showed that he had no alcohol related offenses since the last century and that he was not a threat to anyone if he operated a motor vehicle on a public highway. Despite proving that he did not fall within the category of drivers that the regulations sought to restrict, the Agency still declined to issue a driver's license to him. Since Petitioner showed that he was not a threat to the health and safety of the public the Agency's refusal to admit that he was not within the class of people sought to be constrained by the regulations is an abuse of discretion. The decision in the Court below should, therefore, be reversed.

Petitioner lost his driving privileges because he had three alcohol related offenses, and sufficient points on his driver's license, within the 25 year look-back period to establish grounds for revoking his driver's license (R. 115-19). More specifically,

Petitioner was convicted in 1990 of driving while intoxicated and in 2006 of driving while impaired (R. 118). In 2013 he was revoked for failing to take a breath test (*Id.*). With regard to this, Petitioner noted in the lower court, and reiterates here, that he was acquitted of the driving offense that led to the refusal (R. 91). So, in actuality, Petitioner has two alcohol related driving convictions separated by 16 years. This hardly speaks to Petitioner being a threat on the roads.

Similarly, Respondent points to Petitioner having 29 points on his driver's license, which constitutes a serious driving offense (R. 118-119). Again, however, only 6 of those points occurred this century. And those 6 points relate to the same incident that led to Petitioner's refusal to takes a breath test. (R.117-118).

Judicial review of administrative determinations is limited to the review of the grounds raised and determined before the agency (*Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758, N.E. 2d 562, 570 N.Y.S.2d 474 [1991]). At the agency level the Commissioner has the flexibility to bypass the regulations when the circumstances presented make application of the general policy inappropriate (G*urnsey v. Sampson*, 151 A.D.3d 1928,1930, 57 N.Y.S.3d 855 [4th Dept. 2017]). The regulations are meant to be nonpunitive and their application cannot exceed the nonpunitive intent and become punitive (*Mckevitt v. Fiala*, 129 A.D.3d 730, 731, 10 N.Y.S.3d 554 [2d Dept. 2015]).

In (*Acevedo v. N. Y. S. Dept. of Motor Vehicles* 29 N.Y.3d 202, 223, 54 N.Y.S.3d 614, 77 N.E.3d 331[2017]) the Court highlighted that, "the ultimate aim of the Regulations-the legislative policy goal-is both well established and widely shared: protecting the public from the dangers of recidivist drunk driving." The scope of the Agency's rule making authority is circumscribed by its mandate to fulfill the legislative goal (*Id*. at 221). The Agency's determination regarding revocation or suspension of a driver's license is, therefore, assessed against the aim or goal of the Agency. In these terms Petitioner established that an override is not only appropriate but is compelled by his proof of sobriety. Since 1990 he has one conviction for driving while impaired; he attends AA, and his counselor stated that as of October 12, 2020 (the application to DIB was made on November 6, 2020), Petitioner was in the low-risk category for recidivism (R. 22, 41). Petitioner established that he fulfilled the rehabilitative goals set by the Agency, and the Agency's refusal to follow its mandate is an abuse of discretion.

Furthermore, as Petitioner argued below (R. 96-97), without any explanation as to the meaning of unusual, extraordinary, and compelling circumstances the public is not apprised of any standards for the Agency action. The Agency's argument is that it has pointed to a reason (subsequent operation without a license), but that reason could be an excuse, and there is no way to determine if the Agency is being consistent among applications for reinstatement. This is the very reason that Appel-

lant pointed out that the Agency decisions within this case are inconsistent (R. 50-51);[1] the inconsistency is convincing evidence that the Agency is searching for a rationale, which is different from a reason or a rational basis. In other words, without better information there is no way to properly determine if the Agency is acting within the parameters of its mandate. There can be no rational basis for decision devoid of meaningful content.

Next, the Agency provided its only explanation for its refusal to exercise its discretion in its response to the Article 78 Petition (R. 121-125 ¶¶ 30-46, 157-162). And the Agency will rely on its arguments in response to the Article 78 Proceeding to now justify its actions (*see Harding v. Melton*, 67 A.D.2d 242, aff'd 49 N.Y.2d 739 [3rd Dept.1979] [Article 78 review sufficient for due process in case with lack of pre-suspension review]). The argument that both the administrative review and the Article 78 proceeding itself provide all the review needed is disingenuous. In the response to the Article 78 Petition, for example, the Agency highlighted traffic tickets for which Petitioner was not convicted, but they nevertheless argued this showed a propensity for injurious behavior (R. 122-123). The Agency, however, can only rely on convictions not accusations (R. 275) (*see*, 15 NYCRR § 136.10(b)(4) [if a ticket is pending agency must wait for court to

[1] The Agency, in a footnote (R. 118), remarked that the prior applications for relicensing were beyond review. Petitioner, of course, never asked that they be reviewed, just that they be considered as evidence of the Agency's inability to find a rationale for its decision.

determine if ticket results in a conviction]). More importantly, however, the Agency cannot justify its actions after the fact; the applicant should know the ground rules at the start of the process and be given the results within the process, and not need to rely on the post-Agency proceeding to find out what the Agency relied upon; especially when the reasons justifying the Agency's actions change as they did here.

A non-alcohol traffic infraction or misdemeanor, without any additional driving error, is insufficient to establish criminal negligence or recklessness (*People v. McGranthan*, 12 N.Y.3d 892, 913 N.E.2d 936, 885 N.Y.S.2d 244 [2009] [U-turn across three lanes of traffic unwise but not criminally negligent]; *People v. Cabrera*, 10 N.Y.3d 370, 377, 887 N.E.2d 1132, 858 N.Y.S.2d 74 [2008] [speed alone does not support finding of criminal negligence or recklessness]). A conviction for a traffic offense is inadmissible at the trial to prove civil liability (*Montalvo v. Morales*, 239 N.Y.S.2d 72,18 A.D.2d 20 [2d Dept. 1963]). Decisional authority establishes that public safety is something more than counting traffic infractions. And the VTL agrees with this assessment; the Commissioner is allowed to extend revocations beyond the statutory period only in the interest of public safety (see, VTL §§ 1193, 1194 and 1196]. Here, albeit DMV cited to the public safety rationale in its decisions, it never explained how a regulatory offense-that has no relationship to a person's skill at driving (being unlicensed)-has any effect on public safety.

Petitioner also notes that the AAB 's defense of using the refusal to take a breath test in its calculus to revoke Appellant's license is both irrelevant and misleading (R. 68). It is irrelevant to the extent that Appellant does not contest the basis for his revocation. It is misleading because, together with his acquittal of the underlying offense, it does not demonstrate that Appellant is either a danger to himself or the public. Rather, this is merely a defense of the bureaucratic process. While the Agency may argue that penalizing those who do not take the test protects the public by binding a cost to the act, thereby promoting either sober driving or adherence to the regulator regime, that result is abrogated by the acquittal of the underlying offense. Thus, in this case, although the revocation based on the refusal enforces the regulatory system, it protects neither the public nor Appellant. It is then merely punitive.

Petitioner adds that the Agency participates in a bait-and-switch scheme that is worthy of a used car dealer. According to VTL § 1196 the DMV can establish a program of remediation for persons convicted of alcohol related driving offenses. Part 134 of the regulations (15 NYCRR part 134) establishes the parameters of the re-education program. To promote this voluntary program the Agency published a monograph "How to request restoration after a driver's license revocation" (R. 79-87. At page 5 of this monograph the Agency states that if a person has more than two alcohol related offenses, then that person must complete an OASAS course before applying to DMV to end the

revocation. An approved OASAS counselor found that Petitioner was an insignificant risk for recidivism (R. 41). At page 6 of the same document the agency notes that the applicants entire driving record will be examined before relicensing is approved. No additional information is provided, and the clear implication of the document is that a person will be relicensed if these steps are taken. The applicant expends money, time, and effort to comply with these instructions, but there is no warning that the steps taken will be futile.

Here, the lower court erred when it determined that the DMV properly considered Petitioner's application for re-licensure: unusual circumstances existed (his acquittal, among others); there was a compelling reason to grant his application (he is sober, attended AA, and, after meeting him and performing a clinical evaluation of Petitioner's circumstances, a respected counselor found that Petitioner was an insignificant risk for recidivism); and those extenuating circumstances existed (his bad driving record was historical). Based on the foregoing the judgment should be reversed because the decision of DMV is arbitrary, capricious and an abuse of discretion.

## POINT II

## IN ORDER NOT TO VIOLATE THE SEPARATION OF POWERS DOCTRINE THE COMMISSIONER MUST HAVE THE AUTHORITY TO OVERIDE A LIFETIME REVOCATION

Petitioner maintains that because of the A*cevedo* decision (29 NY3d 202), the Agency's regulations do not violate the separation of power doctrine only because the Commissioner can override the lifetime ban on obtaining a driver's license. Too, it should be the Agency's burden to explain why the information submitted to it is not sufficiently unusual, compelling, and extenuating to invoke the Commissioner's discretion. And the explanation should not be provided by independent counsel after the fact in an Article 78 Proceeding.

In *Acevedo,* the Court of Appeals upheld specific provisions of the DMV regulations, upheld the Agency's authority to promulgate the regulations, and upheld the Agency's right to enforce the regulations. The Court endorsed the Agency's penalties that are stricter than those found within the VTL because the VTL granted the Agency wide ranging power to regulate drivers and motor vehicles (*Acevedo* at 219-221), and because the regulations as promulgated did not violate the separation of powers doctrine (*Id*. at 221-226). Separation of power was not violated because the regulations fit within the dictates of the statute; the longer period of revocation in the regulations did not contravene

the lesser statutory period because there exists a means to obtain reinstatement- the discretion of the Commissioner. Petitioner maintains that without the ability to override the lifetime ban separation of powers is violated because the intent of the legislature-as expressed through the VTL - is that license revocations are not eternal.

The petitioners in *Acevedo* argued that the regulations conflicted with the VTL because the regulations allowed a longer period of revocation than the statutory authority. The Court found that there was no conflict in part because the Commissioner did not abrogate her authority by formalizing it (*Acevedo* at 220). "By formulating rules to govern relicensing the Commissioner ensures that her discretion is exercised consistently and uniformly such that similarly-situated applicants are treated equally" (*Id.*). If the regulations lead to a result that is inappropriate considering unusual, extenuating, and compelling circumstances the Commissioner may deviate from the general policy (*Id.* at 220-221). If the petitioner has the initial burden of showing that the Agency has failed to follow its precedent (see *Argudo v. New York State Dept. of Motor Vehicles*, 149 A.D.2d 830, 51 N.Y.S.3d 589 [2d Dept. 2017][petitioner failed to show that DMV did not follow own precedent]), then the Agency should either have to show the criteria it uses to assess whether unusual, compelling or extenuating circumstances exist or explain what benchmark has not been reached. Simply put, if the Agency intends to extend the statutory period of revoca-

tion, it should have the burden to explain its reasoning.

The DMV has no set standards defining unusual, extenuating, and compelling circumstances and -in this case- the AAB has not elucidated the standard in its decision in this case. In other words, it is impossible to determine if DMV followed any set criteria or considered any of Petitioner's arguments in reaching its decision. Instead, the Agency reiterates the basis for revocation, never considers the arguments why the record does not support its conclusion, and then cites to a regulatory offense that has little relationship to real world ability to drive safely as the reason for its decision. This is hardly persuasive and is irrational considering the evidence presented.

## POINT III

## THE PROCEDURES ADOPTED BY THE AGENCY DO NOT PROVIDE DUE PROCESS OF LAW

Petitioner, in the court below, argued that he was denied both due process and equal protection of the law (R. 14-15 ¶¶ 65-72, 101-102). Respondent answered that Petitioner's due process rights were protected by the criminal proceedings underlying his convictions and by the chemical test refusal hearing (R. 163). The lower Court determined that Petitioner's premise was flawed because the Agency did review the substance of his claims (R. 5.1-5.4), and the Judgment recites that DMV

reviewed the substance of Petitioner's claims regarding compelling, unusual, and extenuating circumstances (R. 5 ¶2). Respondent's arguments and the lower Court's decision and Judgment are incorrect because they do not address the specific issue raised by Petitioner.

In the court below Petitioner did not argue that the Agency erred in revoking his driving privileges; indeed, he specifically said that he was not contesting the initial revocation of his driving privileges (R. 90). On the other hand, Petitioner did argue that the procedures used by DMV were deficient because the Commissioner's decision whether to override the revocation is completely discretionary (R. 101-102). The Agency can, as it did in this case through the AAB, recite the grounds for revocation, note its belief that the applicant has not established any compelling, unusual, and extenuating circumstances, but never explain what would fulfill the Agency's criteria for such circumstances:

> Section 136.5(d) of the Commissioner's Regulations provides that, in the exercise of discretionary authority granted under VTL §§ 510 and 1193, the Commissioner may consider unusual, extenuating and compelling circumstances presented for review, which may form a valid basis to deviate from the general policy of denying re-licensure for those applicants with multiple alcohol or drug-related driving convictions or incidents, as set forth in Section 136.5. After issuance of the December 8, 2020 denial letter, appellant submitted claims

> of unusual, extenuating and compelling circumstances to the Driver Improvement Bureau for review. The Driver Improvement Bureau considered appellant's information and notified appellant in a letter dated January 7, 2021 that the circumstances claimed by appellant were not sufficient to justify deviating from the general policy denying re-licensure to applicants with multiple alcohol or drug-related convictions or incidents, as set forth in Section 136.5. The Driver Improvement Bureau also indicated that appellant had not sufficiently demonstrated that unusual, extenuating and compelling circumstances existed to warrant re-licensure and that granting appellant's application for re-licensure would be inconsistent with the Department's mission of promoting highway safety. (R.68).

A person reading this decision is no wiser as to what circumstances would warrant deviation from the general policy. A person could, as did Petitioner here, apply for re-licensure multiple times, but the applicant is no wiser as to what the Commissioner will consider grounds for an override. In other words, this is a Kafkaesque bureaucratic nightmare.

But beyond the possibility of a literary dystopian nightmare the lack of any accountability renders the total discretion exercised by the Agency a due process/equal protection error. To begin, there is no question that, at least for due process analysis, a

driver's license is a property interest. "It is well established that a driver's license is a substantial property interest that may not be deprived without due process of law" (*Pringle v. Wolfe*, 88 N.Y.2d 426, 431, 668 N.E.2d 1376, 646 N.Y.S.2d 82 [1996], citing *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 {1971]. The Supreme Court in Bell wrote that," [o]nce licenses are issued, . . . , their continued possession may become essential to the pursuit of livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment (citations omitted" (*Bell*, at 539). In the context of suspending driving privileges an evidentiary hearing is not required (*Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L. Ed.2d 172 [1977]). But due process is flexible and calls for the procedural protections that the situation demands (*Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 [1972]).

In *Dixon*, the Court considered the Illinois plan to revoke or suspend driver's licenses. That plan, as in this case, relied on a point system to determine the extent of suspension or revocation of a person's driver's license. The State's action was defined by the points assessed and no pre-suspension hearing was required because of the mechanical arithmetic procedure and result. The Court in *Dixon*, therefore, held that the holding of a hearing to consider ameliorating conditions did not have to precede revocation or suspension (*Dixon* at 115).

Indeed, when an agency's actions are not based on individual grounds but reflect a general policy, no hearing is constitutionally required (*Yassini v. Crosland*, 618 F2d 1356, 1363 [9th Cir. 1980] [with regard to INS procedures]). The Court of Appeals in *Acevedo* likewise approved of the point system to guide the Agency's procedures (*Acevedo* at 220).

The New York procedure to revoke a driver's license is largely in-distinguishable from the Illinois procedure approved in *Dixon*. The *Dixon* Court, however, also noted that, "[w]hen a governmental official is given the power to make discretionary decisions under a broad statutory standard, case-by-case decision making may not be the best way to assure fairness." (*Id*). Yet case by case decision making is required by the New York regime, and when such a procedure is utilized, more is required than a recitation of the reasons for the revocation combined with the statement that the petitioner did not meet the undefined requirement of unusual, compelling, and extraordinary circumstances.

This is the issue raised by Petitioner in this case in the lower court. Because the Agency's decision-making process has no standards it cannot provide any assurance that proper consideration (due process) is given to the applicant. Here, Petitioner knows that the DMV believes that he should not have his license returned to him, and that they think that his reasons for asking for his license back are inadequate, but there is no standard available to measure the Agency's actions.

According to both Respondent and the lower court the Agency fulfilled its mandate by reiterating Petitioner's driving record, noting the reasons he submitted for an override, and then saying that the information submitted did not establish an unusual, extraordinary, and compelling reason to deviate from the sanction imposed (R. 5 ¶2, 119-126). However, there is no way to ascertain if the Agency's discretion has been correctly, or indeed uniformly, applied. Since the application of the Agency's discretion to override is not fixed, reliance on a comparison to similar situations is the only method to determine if the Agency has acted appropriately (*Matter of Bomysoad v. N.Y.S. Liquor Auth*., 26 Misc2d 704. 706, 204 N.Y.S.2d 325 [Sup Ct. 1960] with regard to suspension of liquor license]). (*rev'd See*: *Matter of Bomysoad v. N.Y.S. Liquor Auth*., 13 A.D.2d 873 [Appellate Court did not find error in method of analysis used by lower court, but disagreed with the result]. If the penalty imposed on an applicant is more severe than the penalty imposed on a second person under similar circumstance, then the penalty is both discriminatory and arbitrary *(Id*.). Here the comparison cannot be made without a hearing to put the Agency to its proof; without additional information the Agency could be acting inconsistently in its override determinations (*see, Franza v. Carey*, 102 A.D.2d 780, 781, 478 N.Y.S.2d 873 [1st Dept. 1984] [seizure of property without a hearing violates due process]). "The touchstone of due process is protection of the individual against arbitrary action of

government" (*Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963,41 L.Ed.2d 935 [1974]).

The decision in *Acevedo*, does not alter this analysis. In *Acevedo* the Court addressed whether the regulations promulgated by the DMV conflicted with the Vehicle and Traffic Law (*Id*., starting at 219), whether promulgating the regulations violated the separation of powers doctrine (*Id*., starting at 221), whether the regulations were rational (*Id*., starting at 226), and whether the regulations were retroactively effective and/or violated the prohibition against *ex post facto* legislation (*Id*., starting at 229). The specific issue raised by Petitioner here was not addressed in *Acevedo*. Since *Acevedo*, however, multiple decisions have concluded that the DMV regulations conform with due process requirements, and that the regulations are not void for vagueness (*see for example, Matter of Gurnsey v. Sampson*, 151 A.D.3d 1928, 1929 [4th Dept. 2017]; *Roderick v. N.Y.S. Dept. of Motor Vehicles*, 63 Misc.3d 486, 97 N.Y.S.3d 402 [Sup. Ct 2019]). Despite this decisional authority Petitioner maintains that the procedures employed by the DMV fail to comport with the strictures of due process of law. Specifically, when discretionary authority is employed by an administrative agency to completely deprive a person of a property interest a hearing should be required. The greater the deprivation imposed, the greater the procedure required (*see, Mackey v. Montrym*, 443 U. S. 1, 12, 99 S. Ct. 2612, 61 L.Ed.2d 321 [1979] [suggesting that the greater the deprivation of interest the greater need for protection]).

Due Process requires that the Agency be transparent when it exceeds the mere counting of points, and this means that there should be a set criteria for the exercise of discretion. Since there are no set standards here there is no way for any applicant to properly assess whether or not to apply for re-licensure. This is amplified by the State's literature that at least suggests that the path to getting a license re-issued is through proving that there is no alcohol problem (R. 79-87). There is no question that the Agency can add up points to revoke a driver's license, but the VTL has only a five-year revocation period, and the additional lifetime revocation imposed through the regulations does not run afoul of the separation of powers doctrine because of the discretionary override. But that override is not based on the point system, and it is therefore incumbent on the Agency to have standards so that it can be established that the applicant is getting fair treatment both as to Due Process and Equal Protection of the law.

## POINT IV

## IN THIS CASE THE REVOCATION IS PUNITIVE AND EXCESSIVE

In this case the lifetime revocation without an override is so excessive with relation to Petitioner's conduct that it is a punishment imposed in violation of the prohibition against double jeopardy. In this case Petitioner has one driving while intoxicated conviction and one driving while impaired con-

viction within the prescribed time frame. Although he did not take a breath test in 2013, he was acquitted of the underlying offense. Points assessed against his license mostly date to before 2000. He has taken the mandated rehabilitative courses and submitted proof that he is not likely to be a recidivist drunk driver. Despite this, and without explanation of the standard to be met, Petitioner was refused re-licensure by the DMV. A comparison between the civil penalty imposed by DMV and Petitioner's driving record establishes that the penalty acts as a punishment. The Agency did not, in its decisions, provide any explanation why it would not provide an override.

"An administrative penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law" (*In re Kreisler v. N.Y. City Transit Auth.*, 2 NY3d 775,776, 812 N.E.2d 1250, 780 N.Y.S.2d 302 [2004], citing *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833 [1974]). "The test on review is whether the discipline imposed is 'so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness'" (*Matter of Bovino v. Scott*, 22 N.Y.2d 214, 239 N.E.2d 345, 292 N.Y.S.2d 408 [1968], *citing Matter of McDermott v. Murphy*, 15 A.D.2d 479, 222 N.Y.S.2d 111 [2nd Dept. 1961], aff'd 12 N.Y.2d 780 [1962] [dissenting opinion]). Multiple punishments for the same offense violate double

jeopardy (*Kuriansky v. Professional*, 147 Misc.2d 782, 555 N.Y.S.2d 1 [Sup. Ct. 1990} *citing U. S. v. Halper*, 490 U. S. 435, 447-448, 109 S.Ct. 1892, 104 L.Ed.2d 487, [1989]). In this case, for the reasons cited above, the penalty of continued revocation is disproportionate to Appellant's driving record and imposes an additional punishment in violation of the prohibition against being twice put in jeopardy for the same offenses.

## CONCLUSION

The Judgement-that the DMV did not abuse its discretion-should be reversed and the Agency should be ordered to reinstate Petitioner's driving privileges.

Alternatively, the Agency's procedures should be held to violate Due Process of Law and Equal Protection of the Law, and a hearing requiring the Agency to establish both the meaning of unusual, compelling, and extraordinary; and that its decision not to override the revocation is not arbitrary and capricious in this case should be ordered.

Alternatively, this Court should hold that the sanction in this case is so disproportionate as to constitute the second punishment for the same offenses in violation of the prohibition of twice being put in jeopardy for the same offense.

Dated: Holbrook, New York
June 21, 2022

/s/ MICHAEL J. MILLER
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**PART 130 CERTIFICATION**

**Certified:** Pursuant to 22 NYSCRR Section 130-1.1-a: the undersigned, an attorney admitted to practice in the courts of the State of New York, certifies that, upon information and belief and reasonable inquiry, (1) the presentation of the annexed document and contentions contained therein are not frivolous as defined in section 22 NYSCRR § 130-1.1(c), and that (2) if the annexed document is in initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYSCRR §1200 41-a.

Dated: Holbrook, New York
June 21, 2022

/s/ MICHAEL J. MILLER
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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYSCRR §1250.8(j) that the foregoing brief was prepared on a computer.

*Type:* A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman
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Line spacing: Double

*Word Count*: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc. is 5,944

I declare under penalty of perjury that the foregoing is true and correct.

Dated: this 21st day of June, 2022

/s/ MICHAEL J. MILLER
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**STATEMENT PURSUANT TO CPLR 5531**

**New York Supreme Court**
APPELLATE DIVISION — SECOND DEPARTMENT

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Docket No. 2022-00654

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In the Matter of the Application of

MARK B. GIBSON,

*Petitioner-Appellant*,

For a Judgment under Article 78 of the
Civil Practice Law and Rules

*against*

COMMISSIONER OF THE NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES AND
NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

*Respondents-Respondents*.

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1. The index number of the case in the Court below is 611294/2021.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court, Suffolk County.
4. This action was commenced on or about June 8, 2021, by the filing of a Notice of Petition and Verified Petition. Issue was joined by service of a Verified Answer on or about June 29, 2021.
5. The nature and object of the action: special proceeding pursuant to Article 78 of the Civil Practice Law and Rules, seeking to set aside the determination of the New York State Department of Motor Vehicles.
6. The appeal is from the Judgment of the Supreme Court of the State of New York, County of Suffolk, entered January 10, 2022.
7. This appeal is being perfected with the use of a fully reproduced Record on Appeal.

SUPREME COURT OF
THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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Index No.:

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In the Matter of the Application of

MARK B. GIBSON,

Petitioner,

For a Judgment under Article 78 of
the Civil Practice Law and Rules

– against –

COMMISSIONER OF THE NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES, and NEW YORK
STATE DEPARTMENT OF MOTOR VEHICLES,

Respondents.

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**VERIFIED ARTICLE 78 PETITION**

Petitioner, Mark B. Gibson, ("Petitioner" and/or "Applicant") by and through his attorneys Heilig Branigan LLP, as and for his Petition in the above-captioned proceeding respectfully alleges as to his own conduct, and upon information and belief as to the conduct of others and matters of public record as follows:

1. Mark B. Gibson petitions this court for a judgement in his favor pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR").

## PARTIES

2. Mark B. Gibson resides in Hampton Bays, Suffolk County, New York 11946.

3. Respondents are the Commissioner of the Department of Motor Vehicles and the Department of Motor Vehicles (hereinafter collectively "DMV").

4. Respondent Commissioner of the Department Vehicles address is: *Mark J. F. Schroeder, Commissioner, Department of Motor Vehicles, 6 Empire State Plaza, Albany, New York 12228.*

5. Respondent Department of Motor Vehicles address is: *Department of Motor Vehicles, 6 Empire State Plaza, Albany, New York 12228.*

6. This petition is about DMV's decision to deny Petitioner's request to reinstate his New York State driver's license and his privilege to drive in New York State.

## PROCEDURAL REQUIREMENTS

7. After the statutory waiting period, a driver whose license is revoked may apply for a new driver's license.

8. If the application is denied the Applicant can then request review by the Driver Improvement Bureau (hereinafter "DIB") of DMV.

9. If the DIB declines to reinstate the Applicant's driving privilege, there is an appeal available to the Administrative Appeals Board (hereinafter "AAB") of DMV.

10. The appeal to the AAB is at the discretion of the Applicant.

11. If the appeal is taken and denied the Applicant can then seek judicial review of the administrative determination.

12. But the administrative appeal is a prerequisite to a petition made pursuant to Article 78 of the Civil Practice Law and Rules.

13. Petitioner has followed the designated path preliminary to seeking this relief.

14. Venue in this matter is proper pursuant to §§7801-7806 of the Civil Practice Law and Rules.

15. This Court has Jurisdiction in this matter because Petitioner resides in Suffolk County, New York.

## PROCEDURAL BACKGROUND

16. Petitioner's driving privileges were revoked in 2013.

17. Petitioner's most recent revocable offense occurred on November 28, 2013, when he declined to submit to a chemical test.

18. Petitioner, however, was acquitted of the driving while intoxicated charges underlying the breath test refusal (he was found guilty of two traffic violations not based on alcohol consumption). **Exhibit 1** is a certificate of disposition for the charges.

19. In 2019 Petitioner applied for reinstatement of his driver's license, but this application was denied.

20. In 2020 Petitioner again applied for his driver's license and again he was denied.

21. Petitioner appealed the 2020 denial, and his administrative appeal was likewise denied.

22. In November 2020 Petitioner again applied for a new driver's license and this request was similarly denied.

23. Petitioner then applied to the DIB because his request for a new license had been rejected. **EXHIBIT 2** is the application to DIB.

24. DIB rejected his request on January 7. 2021. **EXHIBIT 3** is the letter denying the application.

25. The DIB denied Petitioner's re-licensing request because he operated a motor vehicle while revoked and, therefore, the information he provided was insufficient to deviate from the DMV's general policy.

26. On January 22, 2021, Petitioner appealed the denial to the AAB. **EXHIBIT 4** is the application to the AAB.

27. On February 23, 2021, the AAB denied his appeal. **EXHIBIT 5** is the decision of the AAB.

28. On March 2, 2021, the AAB sent notice of its rejection of the appeal, together with its decision (Exhibit 4), to counsel for Mr. Gibson, and the notice and decision were received on March 5, 2021. **EXHIBIT 6** is the Notice of Appeal rejection.

29. It is from the decision of February 23, 2021 that Petitioner seeks relief from this Court.

30. Petitioner therefore maintains that this petition is timely made.

## ARGUMENTS MADE IN THE ADMINISTRATIVE APPEAL

31. Petitioner argued that the DIB failed to correctly consider the specific facts and circumstances of his background, which established that there existed unusual, compelling, and extenuating circumstances in his case.

32. Petitioner presented competent evidence that he had attended Oases counselling and was alcohol free since 2014.

33. Petitioner had only one alcohol driving offense conviction in the last 25 years.

34. Although Petitioner refused to submit to a chemical test in 2013, he was thereafter acquitted on the underlying charges.

35. Violation points assessed against him do not exceed the statutory limits.

36. The DIB gave different reasons for its current decision than it gave in its prior decisions.

37. By searching for a rationale for its decisions the DIB revealed that there was no rational basis for them.

38. Petitioner has had no moving violations since 2013, but he operated without a license in 2016.

39. The denial was punitive, not remedial, and was contrary to the intent of the regulations.

**THE DECISION ON APPEAL**

40. The decision on appeal reiterated the authority of the DMV to promulgate and enforce regulations.

41. The AAB agreed that Petitioner's most recent revocable offense was the 2013 refusal to submit to a chemical test.

42. The AAB then iterated that within the 25 years prior to the 2013 revocation Petitioner had two other alcohol related offenses; a driving while impaired in 2006 and a driving with greater that .10% blood alcohol in 1990.

43. Additionally, the AAB found that Petitioner had accrued 29 points during the same look-back period.

44. The AAB then stated that because of the alcohol offenses and the points the DIB correctly

denied Petitioner's request and that its decision had a rational basis.

45. The AAB specifically noted that Petitioner's 2016 conviction for Facilitating Aggravated Unlicensed Operation was not a basis for denying relicensing (see, Exhibit 4, p.3, ¶ 1).

46. Next the AAB noted that a refusal to take a chemical test acted independently of the underlying acquittal of the driving offense and could serve as a basis for revocation.

47. The AAB continued and stated that the DIB considered Petitioner's claims and, consistent with its statutory and regulatory authority, denied relicensing.

48. For the reasons stated by the DIB, and because of the 2016 Facilitating Aggravated Unlicensed Operation conviction, the AAB concluded that the determination of the DIB had a rational basis.

49. Petitioner was, therefore, not allowed to obtain his driver's license.

## ADDITIONAL INFORMATION

50. A New York State DMV COMPASS printout of Mr. Gibson's full driving record from June 12, 2015 reports that Mr. Gibson acquired a total of 23 points on his driver's license up until that point in time. **EXHIBIT** 7 is the driving Compass.

51. The total points are more than asserted by Mr. Gibson is his appeal; but it is also less than the 29 points assessed in the AAB decision.

52. An Abstract of Mr. Gibson's driving record produced on May 14, 2021, shows that Mr. Gibson's license was revoked in 2013 because of his refusal to take a chemical test and that he received a citation in 2016 for Facilitating Aggravated Unlicensed Operation. **EXHIBIT 8** is the 2021 driving abstract.

53. Exhibit 8 also reports that Mr. Gibson was convicted of the unlicensed operation charge in July of 2019, not 2016 as recited by the AAB in its decision.

54. The DMV's publication "How to request restoration after a driver license revocation'revocation' is attached as **EXHIBIT 9**.

55. In Exhibit 9 the DMV instructs that a person with two or more alcohol related offenses must successfully complete an Oases program before applying for renewed driving privileges.

56. The only caveat to the Oases requirement mentioned in the publication is that a person's entire driving record will be reviewed.

## AS FOR A FIRST CAUSE OF ACTION

57. Petitioner repeats the factual allegations in paragraphs 1 through 56.

58. According to the provisions of CPLR § 7803(3) the determination of the DMV is arbitrary, capricious, an abuse of discretion and is irrational.

59. The DIB cited the reasons Petitioner's driver's license was revoked, but never explained how or why the circumstances presented are not unusual, compelling, or extraordinary.

60. The AAB repeated this error by again citing why the license was revoked and ratifying the decision of the DIB without addressing how or why the application was insufficient.

61. Citing the reasons for the revocation without explaining how the application for relicensing is inadequate provides no basis for the agency's decision.

62. With no discernable reason for rejecting Petitioner's claims there is no basis to hold that the decision is rational.

63. Without any rational basis the decision is arbitrary and capricious.

64. The decision of DMV is, therefore, untenable.

## AS FOR A SECOND CAUSE OF ACTION

65. Petitioner repeats paragraphs 1 through 64.

66. According to the provisions of CPLR §7803(3) the determination of DMV is an abuse of discretion.

67. The decision is an abuse of discretion because the Vehicle and Traffic Law and the Regulations were unconstitutionally applied in this case.

68. Petitioner has a qualified property interest in his driver's license.

69. The qualified property right can be revoked provided that procedural due process is provided.

70. Where, as here, the agency fails to fulfill its procedural obligation by not addressing the substance of the unusual, compelling and/or extraordinary circumstances, it has not provided due process of law.

71. Furthermore, because there is no way to tell if the agency's decision in this case is similar to the decisions reached in any similar case there is no way to prevent the agency from continually violating the doctrine of equal protection under the law.

72. The law and regulations are, therefore, unconstitutionally applied in this case, case, and the DMV's decision is an abuse of discretion.

## AS FOR A THIRD CAUSE OF ACTION

73. Petitioner repeats paragraphs 1 through 72.

74. In this case the decision of DMV is arbitrary, capricious, and an abuse of discretion because the punishment imposed does not fit the conduct of Petitioner.

**WHEREFORE**, Petitioner asks that this Court grant his petition, find that DMV has abused its discretion, has acted arbitrarily, capriciously, and irrationally in not granting his application for re-licensing, and

**ORDER**, that the DMV reinstate Petitioner's driver's license.

Dated: June 8, 2021
Holbrook, New York

HEILIG BRANIGAN, LLP
Attorneys for Petitioner
/s/ PHILIP J. BRANIGAN
Philip J. Branigan, Esq.,
4250 Veterans Memorial Highway
Suite 111 East
Holbrook, New York 11741
(631) 750-6888

**VERIFICATION**

State of New York )
) ss:
County of Suffolk )

I am the Petitioner in the within action. I have read the foregoing **Verified Petition** and I know the contents thereof. The contents are true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

/s/ MARK B. GIBSON
MARK B. GIBSON

Sworn to before me this
9th day of June, 2021.

/s/ ELLEN M. FRIEDMAN
Notary Public

ELLEN M. FRIEDMAN
Notary Public, State of New York
No. 01FR5045129
Qualified in Suffolk County
Commission Expires August 14, 2023

## CERTIFICATE OF WORD COUNT

Case No.:

Case Name: Mark B., Gibson v. Commissioner of the NYS Department of Motor Vehicles and NYS Department of Motor Vehicles

Document Title: Verified Article 78 Petition.

Pursuant to Rule 202.8-b of the Rules of this Court, I certify that the accompanying Verified Article 78 Petition which was prepared using Times New Roman 12 point typeface, contains 2031 words, excluding the parts of this document that are exempted. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated this __day of June, 2021.

/s/ PHILIP J. BRANIGAN
Philip J. Branigan, Esq.
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(631) 750-6888

## PART 130 CERTIFICATION

**Certified**: Pursuant to 22 NYCRR Section 130-1.1-a: the undersigned, an attorney admitted to practice in the courts of the State of New York, certifies that, upon information and belief and reasonable inquiry, (1) the presentation of the annexed document and contentions contained therein are not frivolous as defined in section 22 NYCRR 130-1.1(c), and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing any fee earned therefrom and that (ii)if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200 41-a.

Dated: Holbrook, New York
June 10, 2021

/s/ PHILIP J. BRANIGAN
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## MEMORANDUM OF LAW

This Memorandum of Law accompanies Mark Gibson's petition for a judgment according to the provisions of CPLR § 7803(3). Mr. Gibson's New York State driver's license was revoked due to a confluence of alcohol related driving offenses and points assessed for driving infractions. Despite the outwardly serious nature of these charges/convictions they should not result in the outcome reached by DMV. Simply put, the outwardly serious nature of Mr. Gibson's driving record is belied by a careful analysis of that record viz-a-viz the applicable regulations. Mr. Gibson has undertaken the remedial measures required by DMV (see Exhibit 9) and has led a sober and productive life; yet DMV insists that ancient incidents are more germane than recent events. Not only does DMV make this questionable value judgment, but it also fails in its obligation to explain why it has reached its decision. There is no factual basis to conclude that the DMV acted rationally; its decision is arbitrary and capricious. Additionally, because the DMV decision is amorphous, it violates both due process and equal protection mandates. Lastly, because the decision gives undue weight to ancient events, the punishment imposed -continued revocation- is constitutionally disproportionate.

Rather than address Mr. Gibson's remediation, and the historical nature of most of Mr. Gibson's driving infractions, the DMV insists that it had the right to revoke Mr. Gibson's driving privileges, which is not contested. Having revoked Mr. Gib-

son's driving privilege, they decline to address why his remediation efforts are lacking. Rather, they insist that since they properly revoked Mr. Gibson's driving privileges (which occurred in 2013 and is not at issue here) it is proper not to reinstate those same privileges because of a single instance of driving without a license (see Exhibit 3). The AAB stated that the DIB did not rely on the conviction for Facilitating Unlicensed Operation of a Motor Vehicle as the basis for its decision, and then later relies on the same conviction to support its affirmance of DIB's decision (see Exhibit 5).

Mr. Gibson's petition is properly before this Court. He has fulfilled the prerequisite imposed by VTL § 263 by exhausting his administrative remedies (see, *Matter of Bainton v. New York Dept. of Motor Vehicles*, 179 A.D.3d 1211 (2020), 116 N.Y.S.3d 428, 2020 NY Slip Op 00027). And the petition is timely, having been filed within four months of the agency decision (CPLR § 217[1]).

1. *What Mr. Gibson does not contest*

To be clear, Mr. Gibson is not contesting the statement that, according to the VTL, the DMV had the authority to revoke his driver's license, although there is no provision in the VTL for lifetime revocation (see, VTL §§ 1193, 1194). According to VTL § 215 the Commissioner of the Department of Motor Vehicles is given broad authority to issue or reissue driver licenses, and to adopt rules and regulations necessary to fulfill its statutory functions. Once a person's license has been revoked

reissuance is at the discretion of the Commissioner (VTL § 510 [5] and [6][a]). Vehicle and Traffic Law Sections 1193(2)(c)(1) and 1194(2)(d)(1) likewise allow for the reissuance of driving privileges after revocation for alcohol related offenses, at the Commissioner's discretion. Part 136 of the Commissioner's regulations sets out the agency's criteria for both the revocation and reinstatement of a person's driving privilege or license. Indeed, the DMV regulations, or at least specific parts of those regulations, were upheld by the Court of Appeals in *Matter of Acevedo v. New York State Dept. of Motor Vehicles* (29 NY3d 202 [2017]). And the *Acevedo* decision upheld the promulgation of the regulations and their compliance with both statutory and decisional authority. Applying the statutory and regulatory rules Mr. Gibson's driver's license was revoked in 2013; this, however, does not answer the question of whether his license should be reinstated.

2. *What Mr. Gibson Does Contest*

Mr. Gibson maintains that the Commissioner never addressed his contention that, based on unusual, compelling, or extenuating circumstances, his driver's license should be reinstated. Mr. Gibson presented several reasons to the Driver Improvement Bureau why his revocation should be lifted (see Exhibit 2). He argued that since 1990 he had one driving while intoxicated conviction, one driving while impaired conviction, and one revocation for declining to take a breath test. He was

acquitted of the charge underlying the chemical test refusal. Although these offenses occurred within a 25 year time-period, if time were counted backwards from today there is only one alcohol driving conviction within the last 25 years. Thus, there is compelling evidence that Mr. Gibson is not a "drunk driver."

In addition, Mr. Gibson presented extensive evidence that he leads a sober and responsible life. He submitted competent proof that he completed Oases counseling, attends AA, and updated his sobriety with a respected Oases counselor. Indeed, the counselor opined to the Driver Improvement Bureau that Mr. Gibson presented no risk to the community if he were allowed to drive (*id.*).

Mr. Gibson pointed out that if his driving record was considered retrospectively from today, points assessed against his license did not exceed statutory redlines. Here, as with the misdemeanor underlying the refusal notation, many alleged infractions were dismissed by courts when the facts were made known. That Mr. Gibson may have been often overcharged is not an unbelievable understanding of enforcement excesses; it is a recognition that sometimes a person is known to the local police and that person receives special attention.

Without addressing any of these concerns the DIB rejected the application because Mr. Gibson had a driving offense/s after his license was revoked (see Exhibits 3 and 5). Mr. Gibson, therefore, submits that the AAB failed to consider the unusual, compelling, and extenuating nature of his history, that without such explanation by AAB

there is no basis to find that its decision has a rational basis, that the AAB decision is not supported by the record and is arbitrary and capricious, that because the AAB did not address the arguments made by Mr. Gibson, it did not fulfill its regulatory mandate and, because the correct procedure was not followed, the decision violates both equal protection and due process mandates. Put in other terms, the continued revocation of Mr. Gibson's driving privileges is excessive; the punishment exceeds the error of the underlying conduct.

3. *The Appeal to the Administrative Appeals Board*

Mr. Gibson has appealed to the AAB (see Exhibit 4) He began by noting that the last 3 refusals by the DIB to return his license gave different reasons for its determinations. In the first two decisions the DIB declined to issue a new driver's license because of points and alcohol related offenses. In the most recent sequence DIB declined to issue a license because Mr. Gibson had a driving violation or violations after his license was revoked. We pointed out that by changing reasons DIB was providing a justification for its actions, rather than establishing a reason for its decision.

Next, Mr. Gibson reminded AAB that he had only one alcohol related offense in the past 25 years. He agreed that in 2013 he lost his license because he did not take a breath test but offered as mitigation the irrefutable fact that he was acquitted of the underlying DWI charge (see Exhibit 1). Mr. Gibson

then noted that the regulations found in 22 NYCRR §136 were promulgated to promote public safety, but they are also meant to be rehabilitative and not punitive (see, *Mtr. of Acevedo v. N.YS. Dept. of Motor Vehicles*, 132 AD3d 112 [3d Dept. 2015]). The regulations are meant to both promote safety and reduce the instances of drunk driving (*id.*). In this case DIB exceeded its mandate and acted punitively because Mr. Gibson established both that he was sober and that he was not a threat to public safety. Lastly Mr. Gibson asserted that he did not have a serious driving offense in addition to his alcohol related infractions. Mr. Gibson does not have a horrendous driving record, he has not accumulated new points, he does not have a drinking/driving problem, and, therefore, he is not a hazardous driver.

In response to Mr. Gibson's arguments -that unusual circumstances existed (his acquittal, among others), that there was a compelling reason to grant his application (he was sober, attended Oases and was vouched for by a respected counselor), and that extenuating circumstances existed (his bad driving record was historical)- the AAB reiterated the legal frame work for its authority, reiterated that Mr. Gibson's license was properly revoked, and concluded that DIB had a rational basis to deny Mr. Gibson's request. The AAB never addressed whether unusual, compelling, or extenuating circumstances existed, or if Mr. Gibson's claims show that his case is within the remedial, non-punitive, category of cases. Indeed, a motorist is given no guidance of what constitutes an unusu-

al, compelling, or extenuating circumstance, and has no way to determine if DMV's decisions are consistent and non-punitive.

4. *The Decision of the AAB is Irrational, Arbitrary and Capricious*

It is axiomatic that a decision or ruling made by an administrative agency will be sustained by a court if it is both made in conformity with the agency's established rules and has factual support. "Pursuant to CPLR § 7803(3), the standard of review in this CPLR article 78 proceeding is whether the determination under review was made in violation of lawful procedure, was afflicted by an error in law, or was arbitrary and capricious or an abuse of discretion. An action is arbitrary and capricious when it is taken without sound bases in reason or regard to the facts" (*Matter of Resto v. Dept of Motor Vehicles*, 135 AD3d 772, 773 [2d Dept 2016] [internal quotations and citations omitted]). A decision, therefore, cannot be upheld if it is irrational, arbitrary, and capricious.

Here, Mr. Gibson presented a cumulation of arguments to the DIB and then AAB. The crux of his argument is that despite the outward appearance of his driving record it does not actually support the continued revocation of his driver's license. Since 1990 he had only two alcohol related convictions (one driving with greater than 0.1% BAC and one driving while impaired) (see, Exhibits 7 and 8). He did refuse to take a breath test, but his decision is mitigated by his acquittal of the under-

lying offense (see, Exhibit 1). And his DMV Compass report (printed in 2015; see Exhibit 7) shows that he received 13 points against his license in the 1980s and 8 points against his license in the 1990s. However, it reports no points in the 2000s to mid-2015, and any points accessed for his conviction in 2019 do not diminish the argument that his driving record is historic and not current. Mr. Gibson also presented credible proof from both an Oases counselor and his peers at Alcoholics Anonymous that he is not a drunk driver. In other words, he presents no danger to the driving public.

In response to Mr. Gibson's information the DIB simply stated that the information he provided was insufficient to deviate from the general policy and they noted that he had operated a vehicle while revoked (see, Exhibit 3). Operating a vehicle while revoked eliminated any consideration of reinstatement because it was inconsistent with public safety (*id*). Mr. Gibson, however, showed that he was not a danger to himself or others, and we know that operating without a license does not prove any type of dangerous driving; it is simply a regulatory offense.

A non-alcohol traffic infraction or misdemeanor, without any additional driving error, is insufficient to establish criminal negligence or recklessness (*People v. McGranthan*, 12 NY3d 892 [2009]. [U-turn across three lanes of traffic unwise but not criminally negligent]; *People v. Cabrera*, 10 NY3d 370 [2008] [speed alone does not support finding of criminal negligence or recklessness]). A conviction for a traffic offense is generally inadmissible at

trial to prove civil liability (*Montalno v. Morales*, 18 AD2d 20 [2d Dept. 1963]). Decisional authority establishes that public safety is something more than counting traffic infractions. The VTL agrees with this assessment; the Commissioner is allowed to extend revocations beyond the statutory period only in the interest of public safety (see, VTL §§ 1193, 1194 and 1196]. Here, albeit DMV cited to the public safety rationale in its decisions, it never explained how a regulatory offense -that has no relationship to a person's skill at driving (being unlicensed)- has any effect on public safety.

The AAB focused on the correctness of the 2013 decision to revoke Mr. Gibson's license, and iterated that operating a vehicle without a license after revocation was the reason that Mr. Gibson could not obtain his driver's license (see, Exhibit 5). The agency, however, did not elucidate its understanding of the arguments raised by Mr. Gibson, or what standard is used to make its determination. Additionally, within the same decision, the AAB both notes that the DIB did not rely on the unlicensed operation charge to reach its decision, and then cites to that charge to support its determination.

Judicial review of administrative determinations is limited to the review of the grounds raised and determined before the agency (*Matter of Betsy v. Scherbyn*, 77 NY2d 753, 758 [1991]). At the agency level the Commissioner has the flexibility to bypass the regulations when the circumstances presented make application of the general policy inappropriate (*Matter of Gurnsey v. Samson*, 151 AD3d 1028,1930 [4th Dept. 2017]). The regulations are

meant to be nonpunitive and their application cannot exceed the nonpunitive intent and become punitive (*Matter of Mckevitt v. Fiala*, 129 AD3d 730, 731 [2d Dept. 2015]). It is, therefore, incumbent on the petitioner to show that the agency did not follow its own precedent or treated similarly situated individuals differently (*Argudo*, 149 AD3d at 832-833).

Without any explanation for the meaning of unusual, extraordinary, and compelling circumstances the public is not apprised of any standards for the agency action. The agency's argument is that it has pointed to a reason (subsequent operation without a license), but that reason could be an excuse, and there is no way to determine if the agency is being consistent among applications for reinstatement. This is the very reason that Mr. Gibson pointed out that the agency decisions within this case are inconsistent; the inconsistency is strong evidence that the agency is searching for a rational, which is not the same as a reason or a rational basis. In other words, without better information there is no way to properly determine if the agency is acting within the parameters of its mandate. There can be no rational basis for decision devoid of meaningful content.

Furthermore, Petitioner maintains that because of the *Acevedo* decision (29 NY3d 202), the agency is required to explain why the information submitted to it is not sufficiently unusual, compelling, and extenuating to invoke the Commissioner's discretion. In *Acevedo*, the Court of Appeals upheld specific provisions of the DMV regulations, upheld the

agency's authority to promulgate the regulations, and upheld the agency's right to enforce the regulations. The Court endorsed the agency's penalties that are stricter than those found within the VTL because the VTL granted the agency wide ranging power to regulate drivers and motor vehicles (29 NY3d at 219-221), and because the regulations as promulgated did not violate the separation of powers doctrine (29 NY3d at 221-226). Separation of power was not violated because the regulations fit within the dictates of the statute; the longer period of revocation in the regulations did not contravene the statutory lesser period because there exists a means to obtain reinstatement- the discretion of the Commissioner.

The petitioners in *Acevedo* argued that the regulations conflicted with the VTL because the regulations allowed a longer period of revocation than the statutory authority. The Court found that there was no conflict, in part because the Commissioner did not abrogate her authority by formalizing it (29 NY3d at 220). "By formulating rules to govern relicensing the Commissioner ensures that her discretion is exercised consistently and uniformly such that similarly-situated applicants are treated equally" equally" (*id.*). If the regulations lead to a result that is inappropriate considering unusual, extenuating, and compelling circumstances the Commissioner may deviate from the general policy (*id.* at 220-221). If the petitioner has the initial burden of showing that the agency has failed to follow its precedent (see *Matter of Argudo v. New York State Dept. of Motor Vehicles*, 149 AD2d 830

[2d Dept. 2017] [petitioner failed to show that DMV did not follow own precedent]), then the agency should either have to show the criteria it uses to assess whether unusual, compelling or extenuating circumstances exist or explain why that benchmark has not been reached. Simply put, if the agency intends to extend the statutory period of revocation, it should have the burden to explain its reasoning.

DMV has no set standards defining unusual, extenuating, and compelling circumstances, and -in this case- the AAB has not elucidated the standard in its decision in this case. In other words, it is impossible to determine if DMV followed any set criteria or considered any of Petitioner's arguments in reaching its decision. Instead, the agency reiterates the basis for revocation, never considers the arguments why the record does not support its conclusion, and then cites to a regulatory offense that has little relationship to real world ability to drive safely as the reason for its decision. This is hardly persuasive and is irrational considering the evidence presented.

There seems to be no question that drivers with similar driving records are treated similarly on the front end (revocation), but there is no assurance that they are treated similarly on the back end (reinstatement) because the grant of authority is open ended and, therefore, without bounds and meaning. Petitioner here maintains that the regulations do not conflict with the VTL only because the potential of lifetime revocation, which is not required in the VTL, is ameliorated by the

Commissioner's discretionary authority (*Acevedo*, 29 NY3d at 219-221). Case by case consideration is given to each relicensing application, but the decision on the reissuance application must be consistent so that similarly situated individuals are treated the same (*Argudo*, 149 AD3d at 832-833).

Here, there was and is no dispute that Mr. Gibson's license was properly revoked in 2013; indeed no one contended otherwise at that time. Now 9 years later, Mr. Gibson submits that his efforts to correct his mistakes are the exact type of remediation that leads to the ineluctable conclusion that he should be allowed to drive. DMV disagrees, but there is no method to determine if DMV's decision here is consistent with applications for reinstatement made by other similarly situated drivers: his driving record is not bad because his errors are mostly over 20 years old; he has addressed any alcohol problem, and since 1990 he has one misdemeanor and one violation for driving after drinking; and he completed the accident prevention class (albeit his record indicates only one accident in 1994) (see Exhibit 7).

Petitioner also notes that the AAB's defense of using the refusal to take a breath test in its calculus to revoke Mr. Gibson's license is both irrelevant and misleading (see Exhibit 5, p.3, ¶ 2). It is irrelevant to the extent that Mr. Gibson does not contest the basis for his revocation. It is misleading because, together with his acquittal of the underlying offense, it does not demonstrate that Mr. Gibson is either a danger to himself or the public. Rather, this is merely a defense of the bureaucratic

process. While the agency may argue that penalizing those who do not take the test protects the public by binding a cost to the act, thereby promoting either sober driving or adherence to the regulator regime, that result is abrogated by the acquittal of the underlying offense. Thus, in this case, although the revocation based on the refusal enforces the regulatory system, it protects neither the public not Mr. Gibson. It is then merely punitive.

According to VTL §§ 1193 and 1194 the objective of the regulatory scheme is to promote public safety. The regulations are meant to be remedial and not punitive. Yet in this case there is no way to ascertain if the agency followed its own precedent or if the result in this case is consistent with other similarly situated individuals. Petitioner, therefore, argues that there is no reason to affirm the agency's determination because there is no basis to conclude that it is a rational decision. Rather, license restoration should be based on the real-world facts (not the artificial counting of points and a remote look-back period), and events. Petitioner here has shown that he has two alcohol driving offenses in the past 30 years, that his refusal to take a breath test is mitigated by his acquittal on the underlying charge, that his driving infractions date back to the last century, and he has demonstrated that he is sober and not a threat to safety on the roads. A decision cannot be rational, and is arbitrary and capricious, if it does not promote or achieve the agency's stated goals. Put in other terms, an agency's conclusion that it has correctly

enforced and applied its own rules and regulations is untenable.

Petitioner adds that the agency is involved in a bait-and-switch scheme that is worthy of a used car dealer. According to VTL § 1196 the DMV can establish a program of remediation for persons convicted of alcohol related driving offenses. Part 134 of the regulations (15 NYCRR part 134) establishes the parameters of the re-education program. To promote this voluntary program the agency published a monograph "How to request restoration after a driver's license revocation (see, Exhibit 9). In Exhibit 9, at page 5, the agency states that if a person has more than two alcohol related offenses than that person must complete an Oases course before applying to DMV to end the revocation. At page 6 of the same document the agency notes that the applicants entire driving record will be examined before relicensing is approved. No additional information is provided, and the clear implication of the document is that a person will be relicensed if these steps are taken. Money, time, and effort is expended by the applicant to comply with these instructions, but there is no warning that the steps taken will be futile.

Additionally, if the agency's default mode is to reject all applicants with three or more alcohol related driving offenses, then the regulations providing for exceptions to the general rule are a farce. If this is correct (and Petitioner maintains that it is the only interpretation of the facts in this case that makes sense) then the regulations are not in

conformity with the legislative directive and cannot be sustained.

Here there are many reasons why the decision by DMV to deny Petitioner a drivers license is wrong. The application of its regulations is contrary to the empowering legislation expressed in the Vehicle and Traffic Law. Additionally, because Petitioner has no way of knowing what is required to impress the commissioner with the merit of the application, there is no way to determine if the commissioner correctly assessed whether there are unusual, compelling, and extenuating circumstances. Simply repeating the basis for revocation and then claiming no unusual circumstance exists does not establish a rational basis for the decision. Under DMV's regime, once a license is revoked there is never a requirement for the agency to explain why the information provided by the applicant is not sufficiently unusual, compelling and/or extenuating. Under these circumstances a court is never presented with a rational basis for the agency determination; rather the court is given a rationale in hopes that it will justify the agency's actions. Petitioner askes this Court to reject the agency's determination and hold that Petitioner has established that he is not a threat to public safety and that his driver's license should be restored.

5. *Petitioner was denied due process of law and equal protection of the laws*

"It is well established that a driver's license is a substantial property interest that may not be

deprived without due process of law" (*Pringle v. Wolfe*, 88 NY2d 426,431 [1996], citing *Bell v. Burson*, 402 U.S. 535, 539 [1971]). The Supreme Court in *Bell* wrote that, "[o]nce licenses are issued, . . . , their continued possession may become essential to the pursuit of livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment (citations omitted)" (*Bell*, at 539). In the context of suspending driving privileges an evidentiary hearing is not required (*Dixon v. Love*, 431 U.S. 105 [1977]). But due process is flexible that calls for the procedural protections that the situation demands (*Morrissey v. Brewer*, 408 U.S. 471, 481 [1972]).

In this case the DMV followed its tried-and-true procedure that has been ratified in abundant decisional authority. Yet, in this case the procedure employed is deficient because it does not fulfill the mandate that the applicant can both determine if standard rules are followed and if the applicant is being treated equally as to those people similarly situated. The administrative procedure as applied in this case denied Petitioner both due process of law and equal protection under the law.

If, however, respondent maintains that all applicants for drivers licenses similarly situated as petitioner are denied then the agency is following its own regulations, the applications of those regulations does not conform to the mandates of decisional authority (see *Acevedo*), and the regulations

would then run afoul of the doctrine of separation of powers (*id.*).

6. *The penalty in this case is disproportionate to the Petitioner's driving record*

"An administrative penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law" (*Kreisler v. N.Y. City Transit Auth.*, 2 NY3d 775,776 [2004] [internal quotations and citations omitted]). In this case, for the reasons cited above, the penalty of continued revocation is disproportionate to Mr. Gibson's driving record. He was convicted of driving while intoxicated in 1990, and of driving while impaired in 2006. His traffic infractions mostly date back to the last century. He has attended the recommended remedial programs and a certified and respected Oases counselor has vouched for Mr. Gibson's suitability for restoration of his driving privileges. Continued revocation is disproportionate in this case.

## CONCLUSION

For these reasons, this Court should find that the agency has acted irrationally, and order that Mr. Gibson's driver's license be reinstated.

This Court should find that the agency violated due process of law and/or equal protection under the law, and order that Mr. Gibson's driver's license be reinstated.

This Court should find that the penalty imposed by the agency is disproportionate to Mr. Gibson's driving record, and order that Mr. Gibson's driver's license be reinstated.

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## CERTIFICATE OF WORD COUNT

Case No.:

Case Name: Mark B., Gibson v. Commissioner of the NYS Department of Motor Vehicles and NYS Department of Motor Vehicles

Document Title: Memorandum of Law

Pursuant to Rule 202.8-b of the Rules of this Court, I certify that the accompanying Memorandum of Law which was prepared using Times New Roman 12 point typeface, contains 4670 words, excluding the parts of this document that are exempted. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: June 10, 2021

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## U.S. Const. amend. XIV

Section Amendment XIV –
Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## U.S. Const. amend. VIII

Section Amendment VIII –
Further Guarantees in Criminal Cases

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.