IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–1353

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUAN DANIEL SALCEDO,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HON. PATRICK R. GRADY, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

JANET M. LYNESS
Johnson County Attorney

ELIZABETH BEGLIN
Assistant Johnson County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

Other Authorities

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Did the Trial Court Err in Denying Salcedo's Motion to Suppress Evidence?

Authorities

Arizona v. Johnson, 555 U.S. 323 (2009)
Muehler v. Mena, 544 U.S. 93 (2005)
Rodriguez v. United States, 135 S.Ct. 1609 (2015)
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)
United States v. Arvizu, 534 U.S. 266 (2002)
United States v. Bloomfield, 40 F.3d 910 (8th Cir. 1994)
United States v. Brigham, 382 F.3d 500 (5th Cir. 2004)
United States v. Childs, 277 F.3d 947 (7th Cir. 2002)
United States v. Drayton, 536 U.S. 194 (2002)
United States v. Givan, 320 F.3d 452 (3rd Cir. 2003)
United States v. Golinveaux, 611 F.3d 956 (8th Cir. 2010)
United States v. Holland, 510 F.2d 453 (9th Cir. 1975)
United States v. Holt, 264 F.3d 1215 (10th Cir. 2001)
United States v. Iturbe-Gonzales, 100 F.Supp.3d 1030 (D. Mont. 2015)
United States v. Jones, 254 F.3d 692 (8th Cir. 2001)
United States v. Murillo-Salgado, 854 F.3d 407 (8th Cir. 2017)
United States v. Powell, 423 U.S. 87 (1975)
United States v. Rivera, 570 F.3d 1009 (8th Cir. 2009)
United States v. Sanchez, 417 F.3d 971 (8th Cir. 2005)
United States v. Ward, 484 F.3d 1059 (8th Cir. 2007)
Baker v. State, 50 S.W.3d 143 (Tex. Ct. App. 2001)
Brown v. State, 182 P.3d 624 (Alaska Ct. App. 2008)
City of Cedar Falls v. Flett, 330 N.W.2d 251 (Iowa 1983)
Cmty. Lutheran Sch. v. Iowa Dep't of Job Serv., 326 N.W.2d 286 (Iowa 1982)
Commonwealth v. Cleckley, 738 A.2d 427 (Pa. 1999)
Commonwealth v. Klick, 65 A.2d 440 (Pa. Super. Ct. 1949)
DeVoss v. State, 648 N.W.2d 56 (Iowa 2002)
Fisher v. State, 481 S.W.3d 403 (Tex. Ct. App. 2015)
Graves v. State, 708 So.2d 858 (Miss. 1997)
In re Pardee, 872 N.W.2d 384 (Iowa 2015)

Jones v. Mississippi Dept. of Public Safety, 607 So.2d 23 (Miss. 1991)
Jones v. State, No. CR 08–1417, 2010 WL 4922348 (Ark. Dec. 2, 2010)
Knight v. Iowa District Court, 269 N.W.2d 430 (Iowa 1978)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Penick v. State, 440 So.2d 547 (Miss. 1983)
People v. Gonzalez, 789 N.E.2d 260 (Ill. 2003)
People v. Harris, 886 N.E.2d 947 (Ill. 2008)
People v. James, 561 P.2d 1135 (Cal. 1977)
State v. Aderholdt, 545 N.W.2d 559 (Iowa 1996)
State v. Amaya, 29 P.3d 1177 (Or. Ct. App. 2001)
State v. Amaya, 89 P.3d 1163 (Or. 2004)
State v. Askerooth, 681 N.W.2d 353 (Minn. 2004)
State v. Barros, 48 P.3d 584 (Haw. 2002)
State v. Benders, 146 P.3d 751 (Mont. 2006)
State v. Blackstone, 410 P.3d 354 (Or. Ct. App. 2017)
State v. Bledsell-Moore, 91 A.3d 619 (N.H. 2014)
State v. Brown, 156 S.W.3d 722 (Ark. 2004)
State v. Brown, 890 N.W.2d 315 (Iowa 2017)
State v. Bullock, 805 S.E.2d 671 (N.C. 2017)
State v. Campbell, No. 15–1772, 2017 WL 706208 (Feb. 22, 2017)
State v. Carty, 790 A.2d 903 (N.J. 2002)
State v. Coffman, 914 N.W.2d 240 (Iowa 2018)
State v. Coleman, 890 N.W.2d 284 (Iowa 2017)
State v. Cooley, 229 N.W.2d 755 (Iowa 1975)
State v. Coppes, 78 N.W.2d 10 (Iowa 1956)
State v. Cox, 171 S.W.3d 174 (Tenn. 2005)
State v. Dalton, 674 N.W.2d 111 (Iowa 2004)
State v. Domicz, 907 A.2d 395 (N.J. 2006)
State v. English, No. 17–0836, 2018 WL 3060261 (Iowa Ct. App. June 20, 2018)
State v. Estabillio, 218 P.3d 749 (Haw. 2009)
State v. Ferrier, 960 P.2d 927 (Wash. 1998)
State v. Flores, 185 P.3d 1067 (N.M. Ct. App. 2008)
State v. Gomes, 236 P.3d 841 (Or. Ct. App. 2010)
State v. Holling, 78 N.W.2d 25 (Iowa 1956)
State v. Hoskins, 711 N.W.2d 720 (Iowa 2006)
State v. Jenkins, 3 A.3d 806 (Conn. 2010)

State v. Jimenez, 353 P.2d 1227 (Or. 2015)
State v. Johnson, 346 A.2d 66 (N.J. 1975)
State v. Kearns, 867 P.2d 903 (Haw. 1994)
State v. King, 867 N.W.2d 106 (Iowa 2015)
State v. Kinkead, 570 N.W.2d 97 (Iowa 1997)
State v. Kreps, 650 N.W.2d 636 (Iowa 2002)
State v. Lane, 726 N.W.2d 371 (Iowa 2007)
State v. Lowe, 812 N.W.2d 544 (Iowa 2012)
State v. McIver, 858 N.W.2d 699 (Iowa 2015)
State v. McKinnon-Andrews, 846 A.2d 1198 (N.H. 2014)
State v. Melohn, 516 N.W.2d 24 (Iowa 1994)
State v. Miller, 422 P.3d 240 (Or. 2018)
State v. Morlock, 218 P.3d 801 (Kan. 2009)
State v. Pals, 805 N.W.2d 767 (Iowa 2011)
State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017)
State v. Possemato, No. 115,087, 2018 WL 297378 (Kan. Ct. App. Jan. 5, 2018)
State v. Reinders, 690 N.W.2d 78 (Iowa 2004)
State v. Richardson, 501 N.W.2d 495 (Iowa 1993)
State v. Rodgers, 227 P.3d 695 (Or. 2010)
State v. Short, 851 N.W.2d 474 (Iowa 2014)
State v. Smith, 814 N.W.2d 346 (Minn. 2012)
State v. Snell, 99 P.3d 191 (Mont. 2004)
State v. Storm, 898 N.W.2d 140 (Iowa 2017)
State v. Tague, 676 N.W.2d 197 (Iowa 2004)
State v. Targas, 90 P.3d 1088 (Wash. Ct. App. 2004)
State v. Tyler, 830 N.W.2d 288 (Iowa 2013)
State v. Wiegland, 645 N.W.2d 125 (Minn. 2002)
State v. Williams, 695 N.W.2d 23 (Iowa 2005)
State v. Wiseman, 614 N.W.2d 66 (Iowa 2000)
State v. Witherrite, 339 P.3d 992 (Wash. Ct. App. 2014)
State v. Young, 863 N.W.2d 249 (Iowa 2015)
State v. Young, 867 P.3d 593 (Wash. 1994)
Welch v. State, 219 S.W.3d 156 (Ark. 2005)
Washington Const. Art. I, § 7
Iowa Const. Art. I, § 8
Minnesota Const. Art. I, § 10
Iowa Code § 321.297(2)
Iowa Code § 4.4(2)
Iowa Code § 321.285(1)

Iowa Code § 321.294
Iowa Code § 321.285
Matthew Phillips, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185 (2008)
Illya Lichtenberg*, Miranda in Ohio: The Effects of Robinette on "Voluntary" Waiver of Fourth Amend*ment RIGHTS, 44 How. L.J. 349 (2001)

ROUTING STATEMENT

Salcedo seeks retention. *See* Def's Br. at 16–17. He challenges the scope/duration of the stop, but that claim is controlled by *State v. Coleman*, 890 N.W.2d 284 (Iowa 2017). He challenges section 321.297 as unconstitutionally vague, but he does not argue for redefinition of Iowa's approach to vagueness challenges, so that claim can be resolved by applying established legal principles. *See, e.g.*, *State v. Showens*, 845 N.W.2d 436, 441–49 (Iowa 2014); *State v. Nail*, 743 N.W.2d 541, 544 (Iowa 2007); *accord* Iowa R. App. P. 6.1101(3)(a).

Finally, Salcedo challenges *Schneckloth* as the framework for analyzing the voluntariness of consent under Article I, Section 8 of the Iowa Constitution. *See* Def's Br. at 16, 45–52. The applicability of that framework under the Iowa Constitution is still an established legal principle. *See, e.g.*, *State v. Reinders*, 690 N.W.2d 78, 81–84 (Iowa 2004) (noting that "[t]he validity of consent does not depend on a particular defendant's knowledge that he had a right to refuse permission for the search" and remarking that "we have found no basis to distinguish the protections afforded by the Iowa Constitution from those afforded by the federal constitution under the facts of this case"); *State v. Reiner*, 628 N.W.2d 460, 464–65 (Iowa 2001) (noting that

Article I, Section 8 protects the "same fundamental right of privacy" as the Fourth Amendment and that an inquiry into voluntariness "becomes a question of fact based upon the totality of the relevant circumstances" under *Schneckloth*). The Iowa Supreme Court has been teetering on *Schneckloth* under Article I, Section 8 since 2011—but it has still applied *Schneckloth* and found no difficulty in doing so. *See, e.g.*, *State v. Pettijohn*, 899 N.W.2d 1, 29–37 (Iowa 2017); *State v. Lowe*, 812 N.W.2d 544, 572–75 (Iowa 2012); *State v. Pals*, 805 N.W.2d 767, 779–83 (Iowa 2011). Justice Waterman aptly noted:

> . . . As in *Pals*, the problem here is not that the existing Fourth Amendment search and seizure precedents are unclear. The problem is that members of this court believe those precedents lead to an unjust result and therefore want to chart a different path under the Iowa Constitution.

Lowe, 812 N.W.2d at 582 (Waterman, J., concurring specially). And the Iowa Supreme Court has continued to route similar challenges to the Court of Appeals, which indicates that nothing has really changed. *See, e.g.*, *State v. Lepon*, No. 16–0117, 2017 WL 4049829, at *5 (Iowa Ct. App. Sept. 13, 2017); *State v. Barth*, No. 14–1929, 2016 WL 740302, at *3 (Iowa Ct. App. Feb. 24, 2016). Thus, this appeal can be resolved by applying the same established legal principles, and transfer to the Iowa Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Juan Daniel Salcedo and Jairo Rodriguez were charged with possessing 82 pounds of marijuana that were found in the trunk of a rental vehicle. That marijuana was found when Salcedo, the driver, consented to a search of the vehicle during a traffic stop that had been initiated because of failure to drive in the right-hand-lane and failure to yield right-of-way to a faster vehicle to pass on the left. Salcedo and Rodriguez were jointly charged with possession of marijuana with intent to deliver in violation of Iowa Code section 124.401(1)(d), and possessing a taxable substance without affixing a drug tax stamp, in violation of Iowa Code sections 453B.1, 453B.3, and 453B.12 (2017).

They moved to suppress all evidence recovered from the search. That motion to suppress was denied. MTS Order (7/11/18); App. 32. Salcedo and Rodriguez filed applications for discretionary review of that ruling on their motion to suppress. Both were granted.

In this ensuing appeal, Salcedo argues his motion to suppress should have been granted because: **(1)** the scope/duration of the stop and the request for consent to search exceeded the justification for the initial stop and violated *State v. Coleman* and Article I, Section 8;

(2) his consent to the search was involuntary under a new framework for voluntariness that he proposes under Article I, Section 8; **(3)** the initial stop was invalid because he did not violate section 321.297(2); and **(4)** section 321.297(2) is unconstitutionally vague.

All of those claims fail. During the traffic stop, Deputy O'Hare made additional observations that gave rise to reasonable suspicion of drug trafficking, and he could expand the scope/duration of the stop to investigate accordingly. Salcedo's consent was voluntarily given, and there is no reason to reject *Schneckloth* under Article I, Section 8. Finally, section 321.297(2) is not unconstitutionally vague—and when Salcedo failed to yield right-of-way and stayed in the left-hand lane as Deputy O'Hare's vehicle approached from behind at a greater speed, that violation of section 321.297(2) created probable cause for a stop.

Course of Proceedings

The State generally accepts Salcedo's description of the relevant proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 17–19.

Facts

At about 9:00 p.m., on November 2, 2017, Johnson County Sheriff's Deputy Cody O'Hare was driving west on I-80, on his way to respond to another report. He was driving about 75 miles per hour.

Deputy O'Hare came up on Salcedo's vehicle "extremely fast because they were going fairly slow for the speed limit that is in that area"—the speed limit was 70 miles per hour, and Salcedo's vehicle was traveling at "right around 60." *See* MTS Tr. 7:2–9:17. Deputy O'Hare noted that Salcedo was driving in the left lane and did not move to the right lane to give the right-of-way to Deputy O'Hare, who was moving faster in the same direction—which was a clear violation of Iowa Code section 321.297(2). *See* MTS Tr. 9:18–11:2. Deputy O'Hare noted that there was no other traffic, no adverse weather, and no other condition that would have made it unsafe for Salcedo to yield the right-of-way by moving to the right-hand lane as Deputy O'Hare approached. *See* MTS Tr. 10:4–11:7. Salcedo's vehicle remained in the left-hand lane, blocking Deputy O'Hare from passing, as both vehicles traveled about three miles. *See* MTS Tr. 11:8–18; State's Ex. 1, at 21:04:10–21:05:30.

Deputy O'Hare initiated a traffic stop. Salcedo pulled over. *See* MTS Tr. 11:19–23. Salcedo was driving, and Rodriguez was the only passenger in the vehicle. *See* MTS Tr. 11:24–12:14. Deputy O'Hare asked Salcedo for his driver's license and the rental car contract, and Salcedo provided them. *See* MTS Tr. 12:15–24. Deputy O'Hare asked Salcedo to accompany him to his patrol vehicle, which was routine:

> Part of the reason is with the traffic on 80, it's extremely loud, it's hard to hear with me standing outside or both of us standing outside. I make it common practice to have them come back and speak to me so I can separate the parties and get their individual stories also so I can compare them.
>
> Plus it was extremely — I shouldn't say extremely cold. It was cold that night and so it's just more comfortable to sit in my car where it's easily heard conversation.

See MTS Tr. 12:25–13:14.

Deputy O'Hare had suspicions that criminal activity was afoot—specifically, drug trafficking. The vehicle was rented to a third party, who was not present. *See* MTS Tr. 14:16–15:5. That was a red flag. Deputy O'Hare knew that "[i]t is common practice for drug traffickers" to use rental vehicles in efforts to avoid detection, and to rent vehicles in someone else's name. *See* MTS Tr. 15:6–11; MTS Tr. 6:12–19.

Those suspicions only deepened when Deputy O'Hare spoke with Salcedo, who said they had traveled to New York to Florida and then to California by plane, and were driving back to New York. *See* MTS Tr. 15:12–16:13. Deputy O'Hare observed that "most people, when they fly to somewhere, they don't drive back in a rental car. They fly back also." *See* MTS Tr. 16:14–21. Deputy O'Hare also had a specific awareness that California was a common point of entry for illegal drugs into the United States. *See* MTS Tr. 53:22–54:4; MTS Tr.

6:7–15. He also knew that New York was a common destination point for drug traffickers who transport illegal drugs across the country. *See* MTS Tr. 6:20–7:1. One week before this traffic stop, Deputy O'Hare completed a three-day training course on highway drug interdiction—so he knew that his information was up to date. *See* MTS Tr. 5:15–6:6.

Deputy O'Hare went back to the vehicle to speak with Rodriguez, and he verified some observations that he initially made earlier:

> I noticed that there was three phones in the vehicle with just two people. That is also a red flag for drug trafficking, so they have a — what they call a burner phone to make contacts or anything with the people that they are working for.

See MTS Tr. 18:10–20. Deputy O'Hare also noticed "a lot of luggage in the back seat of their rental vehicle," which was "unusual when the vehicle has a trunk." *See* MTS Tr. 18:10–24. Placing some luggage in the backseat would make sense if the trunk was full—but Rodriguez told Deputy O'Hare that all of their belongings were in the back seat and that there was nothing in the trunk. *See* MTS Tr. 18:25–19:12.

Deputy O'Hare went back to his patrol vehicle and spoke with Salcedo again. Deputy O'Hare asked Salcedo "if he was transporting any weapons of mass destruction, rocket launchers or grenades." *See* MTS Tr. 19:13–20:1. Salcedo said: "[N]o, you can do what you've got

to do"—which Deputy O'Hare took to mean that Salcedo "was going to allow [him] to search the vehicle." *See* MTS Tr. 20:2–6. Deputy O'Hare asked Salcedo "if he was transporting marijuana" or any other drugs, and Salcedo repeated the same general reply. *See* MTS Tr. 20:7–16. Deputy O'Hare followed up and asked Salcedo: "[S]o you're saying I can search the vehicle?" *See* MTS Tr. 20:17–21. Salcedo replied: "Yeah, you can do what you gotta do." *See* State's Ex. 1, at 21:19:45–21:20:25. This conversation was short, and it did not involve any raised voices, threats, promises, or inducements. *See* MTS Tr. 19:19–21:14. The audio was recorded—Salcedo even laughed while denying that he was carrying heroin. *See* State's Ex. 1, at 21:19:45–21:20:25.

Deputy O'Hare went back to Salcedo's vehicle and informed Rodriguez that he was going to search the car. He gave Rodriguez a choice between sitting in his patrol vehicle or standing outside. *See* MTS Tr. 21:21–23:12. Deputy O'Hare discovered a large quantity of marijuana in the vehicle's trunk. It turned out to be 82 pounds. *See* MTS Tr. 23:13–21.

Additional facts will be discussed when relevant.

ARGUMENT

I. The Trial Court Did Not Err in Denying Salcedo's Motion to Suppress Evidence.

Preservation of Error

Salcedo's challenges were mostly raised and ruled upon. *See* MTS Order (7/11/18); App. 32; *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). The single exception will be identified below.

Standard of Review

Constitutional issues are reviewed de novo. *See State v. Young*, 863 N.W.2d 249, 252 (Iowa 2015). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of the witnesses, but we are not bound by those findings." *See State v. Storm*, 898 N.W.2d 140, 144 (Iowa 2017) (quoting *State v. Brown*, 890 N.W.2d 315, 321 (Iowa 2017)).

Competing interpretations of the Iowa Constitution are evaluated through "exercise of our best, independent judgment of the proper parameters of state constitutional commands." *State v. Short*, 851 N.W.2d 474, 490 (Iowa 2014). As the Iowa Supreme Court has rejected a criteria-based approach, the ultimate touchstone for resolving conflicts between two proposed interpretations of the Iowa Constitution is persuasiveness. *See id.*; *Young*, 863 N.W.2d at 257.

Merits

Salcedo challenges the existence of any legitimate basis to initiate a traffic stop, the extension of the scope and duration of the stop to investigate Deputy O'Hare's suspicion of drug trafficking, and the voluntariness of his consent to the search of his vehicle.

A. Section 321.297(2) is not void for vagueness.

Iowa Code 321.297(2) states:

> Any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic upon all roadways, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection, an alley, private road or driveway.

Iowa Code § 321.297(2). Salcedo argues this statute is an invalid basis for a traffic stop because it is void for vagueness, because "it fails to give individuals fair notice of when their conduct is prohibited and it leads to arbitrary or discriminatory enforcement." Def's Br. at 52–59.

His argument would be better if not for the posted speed limit, which puts slower drivers on notice that the "normal speed of traffic" may be higher than their preferred speed, and if not for the presence of faster highway traffic approaching that slower driver from behind—which, in this case, happened to be Deputy O'Hare. *See* MTS Tr. 7:2–

11:18. At that point, a reasonable driver would know that his/her speed was significantly below the posted speed limit and was also lower than the approaching vehicle's speed. Section 321.297(2) puts that driver on notice that, absent some other valid reason for using the left lane, he/she must move to the right-hand lane and yield right-of-way to the faster vehicle to pass on the left. *See* Iowa Code § 321.297(2).

Salcedo argues that section is still vague because the duty to use the right-hand lane only applies when a vehicle is "proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing." *See* Iowa Code § 321.297(2). In his view, "[a] person of ordinary intelligence might find it prudent to drive at a speed lower than the speed limit in the dark of night, at 9:05 p.m., on a rural interstate highway." *See* Def's Br. at 55. But if such a driver found the stretch of highway approaching Iowa City and Coralville to be so rural and dangerous, they could drive at their preferred speed *in the right-hand lane*, without slowing the flow of all other traffic on the interstate highway traveling at the posted speed limit (or near it).

Salcedo also contends that section 321.297(2) is vague "when there is little to no other traffic surrounding that person's vehicle" to set a baseline for a "normal speed of traffic." *See* Def's Br. at 54–55.

This is not persuasive when there are no adverse weather conditions, construction zones, or other abnormalities that would give a driver reason to believe that the speed limit would not generally correlate with the "normal speed" of traffic in the area. Any confusion on that point could only last until faster vehicles approached from behind—at that point, it would become obvious that the "normal speed of traffic" was somewhat higher, necessitating a move to the right-hand lane.

Indeed, section 321.294 states "[a] person shall not drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law." *See* Iowa Code § 321.294. Even if the hypothetical driver had identified some safety concern (either relating to his driving capabilities, his vehicle, or specific driving conditions), the only way to comply with section 321.294 and section 321.297(2) is to move to the right-hand lane.

Finally, Salcedo is concerned that section 321.297(2) "leads to arbitrary or discriminatory behavior by law enforcement." *See* Def's Br. at 56–58. But its terms are clear and susceptible to reasonable knowledge of its scope: a violation of section 321.297(2) only occurs when a vehicle in the left lane is moving slower than normal traffic,

for reasons other than passing another vehicle or preparing to turn left. *See* Iowa Code § 321.297(2). Vehicles in the right-hand lane cannot be subjected to arbitrary/discriminatory enforcement, nor can vehicles using the left-hand lane at normal speeds or for permissible purposes. The fact that Deputy O'Hare harbored other unrelated investigative intentions does not undermine section 321.297(2)'s validity or render it unconstitutionally vague, either generally or as applied to Salcedo.

Salcedo offers section 321.285 as an example of another duty that drivers have: they must operate "at a careful and prudent speed not greater than or less than is reasonable and proper" and specifically "having due regard to the traffic" on the highway. *See* Def's Br. at 55 (quoting Iowa Code § 321.285(1)). If section 321.297(2) is vague for predicating a duty on awareness of the "normal speed of traffic," then section 321.285 would be similarly vague for requiring Iowa drivers to calibrate their speed with "due regard" for traffic conditions (among other conditions). And yet, section 321.285 and other driving-related criminal prohibitions have repeatedly survived vagueness challenges, even when their operative provisions are defined with flexible terms, because drivers are expected to conform to various rules of the road while adapting to unforeseen circumstances that defy enumeration:

> There are a great variety of sharp turns, and curves of different degrees of curvature. Many descents with different degrees of steepness. It would be impossible to specify a mile-per-hour speed that would be proper or practical for these differing highway conditions. The best that a legislative body can do is to inform the motorist in pertinent general language.
>
> . . . "To define specifically permissible rates of speed under every conceivable condition would be manifestly impossible; hence the general language . . . is no valid objection to it on constitutional grounds."

State v. Holling, 78 N.W.2d 25, 26 (Iowa 1956) (quoting *Commonwealth v. Klick*, 65 A.2d 440, 442 (Pa. Super. Ct. 1949)); *accord State v. Coppes*, 78 N.W.2d 10, 22–24 (Iowa 1956) ("This statute is directed primarily to the operators of motor vehicles on public highways. . . . They know or should know what speed is proper and reasonable under different traffic conditions."). The "normal speed of traffic" is context-dependent, but that does not void the duty to determine it and drive accordingly.

Other courts considering statutes resembling section 321.297(2) have generally declined to find them void for vagueness. *See, e.g.*, *State v. Possemato*, No. 115,087, 2018 WL 297378, at *3–5 (Kan. Ct. App. Jan. 5, 2018) (upholding similar Kansas law against vagueness challenge because "it effectively communicates that a driver should drive in the right lane except when he or she is in the process of overtaking and passing another vehicle"); *State v. Benders*, 146 P.3d

751, 755 (Mont. 2006) (upholding similar Montana statute against vagueness challenge because it "does not require a determination as to the minimum speed allowable, but rather prohibits driving at a speed slow enough to impede the normal movement of traffic"); *Baker v. State*, 50 S.W.3d 143, 146 (Tex. Ct. App. 2001) (upholding similar Texas statute against vagueness challenge because "a person of ordinary intelligence would know when the person is no longer passing a vehicle and must move from the left lane."). Nothing about section 321.279(2) compels a different result in this particular case.

Ultimately, section 321.297(2) is not void for vagueness because its meaning is "fairly ascertainable by reliance on generally accepted and common meaning of words used." *See State v. Dalton*, 674 N.W.2d 111, 121 (Iowa 2004) (quoting *Knight v. Iowa District Court*, 269 N.W.2d 430, 432 (Iowa 1978)). "Due process requires no more than a reasonably ascertainable standard of conduct." *See City of Cedar Falls v. Flett*, 330 N.W.2d 251, 256 (Iowa 1983) (citing *United States v. Powell*, 423 U.S. 87, 93–94 (1975)). Salcedo's duty under section 321.297(2) was reasonably ascertainable: if he was traveling slower than most other traffic, he should move to the right-hand lane. This law is not unconstitutionally vague, and Salcedo's challenge fails.

B. Deputy O'Hare had probable cause to initiate the traffic stop when Salcedo's vehicle remained in the left lane and refused to yield right-of-way as Deputy O'Hare approached at a higher speed.

Salcedo argues he did not violate section 321.297(2) because "there was no 'normal speed of traffic' at the time, because there was no one else on the road except for Salcedo and the deputy," which means Deputy O'Hare inadvertently set the "normal speed of traffic" to equal Salcedo's actual speed by matching his pace in the right lane. *See* Def's Br. at 59–60. Of course, if a vehicle blocks passing traffic in the left lane while matching speed with traffic in the remaining lane(s), no other vehicle can possibly exceed that speed. Thus, equating the "normal speed of traffic" to the lower speed of already-impeded traffic would effectively reduce section 321.297(2) to mere surplusage, which is a disfavored result. *See, e.g.*, *State v. Wiseman*, 614 N.W.2d 66, 67 (Iowa 2000) ("We will not interpret statutes in a way that makes portions of them irrelevant or redundant."); *cf.* Iowa Code § 4.4(2). The trial court applied a more sensible interpretation in its ruling:

> [T]he suspect vehicle was moving more slowly than the officer's vehicle and when the officer approached from the rear, Salcedo had a duty to pull his vehicle over to the right. His failure to do that or speed up gave O'Hare reasonable suspicion that Salcedo was violating that statutory duty and thus, the stop was justified.

See MTS Order (7/11/18) at 5; App. 36. This is the correct approach: the "normal speed of traffic" for purposes of section 321.297(2) must be determined by reference to the posted speed limit and the flow of *faster* traffic, which (from the perspective of slower traffic) is only ever encountered when it approaches from behind, passes on the left, and disappears into the distance ahead. Under section 321.297(2), that slower driver has the duty to move rightward and let the other vehicle pass by safely, so that all traffic may continue at its "normal" speed.

This case would be closer if Salcedo were not traveling at speeds that fluctuated around 10 mph below the applicable speed limit. *See* MTS Tr. 7:2–9:17. A reasonable driver would need nothing besides an awareness of the difference between his own speed and the posted limit to know, upon Deputy O'Hare's approach, that he should move aside.

When Deputy O'Hare first noticed Salcedo's speed, he observed that there was no other traffic around them—Deputy O'Hare had been expecting to pass on the left, and there was no traffic on the right that would have prevented Salcedo from moving to the right-hand lane. *See* MTS Tr. 10:4–15. About three minutes later, as Deputy O'Hare and Salcedo moved off of the road, nine vehicles passed them in quick succession, within seconds. *See* State's Ex. 1, at 21:05:50–21:06:07.

Thus, over that short period, nine vehicles that were traveling faster than Salcedo and Deputy O'Hare had approached them from behind, discovered that Salcedo was blocking them from passing, and added their headlights to the growing collection that was swiftly accumulating in Salcedo's rear-view mirror. Meanwhile, Deputy O'Hare made sure he was "back far enough where [Salcedo] could safely change lanes"—but Salcedo never did. *See* MTS Tr. 42:1–13. This establishes a clear violation of section 321.297(2)—the normal flow of traffic on I-80 was traveling so much faster than Salcedo that a handful of vehicles were backed up behind him, waiting for him to move into the right lane and let them resume traveling at speeds closer to the posted speed limit.

Salcedo contends the court "failed to consider the 'conditions then existing' which included . . . the dark of night." *See* Def's Br. at 61. But the video shows it was a clear night, with unimpeded visibility. *See* State's Ex. 1, at 21:04:10–21:05:30. And Deputy O'Hare explained there was no traffic snarl, no adverse weather, and no other condition that would have made it unsafe for Salcedo to move to the right lane as Deputy O'Hare approached or would have led Salcedo to expect that the "normal speed of traffic" would be substantially lower than the posted speed limit. *See* MTS Tr. 10:4–11:7; MTS Tr. 31:3–32:21.

Finally, Salcedo argues "the District Court failed to address the significance of the deputy's misunderstanding of the law." *See* Def's Br. at 61–62. Salcedo is correct that Deputy O'Hare was imprecise in explaining the duty imposed by section 321.297(2)—he explained it as a requirement that "if you're traveling under the speed limit, you need to be in the far most right lane." *See* MTS Tr. 10:19–2; State's Ex. 1, at 21:09:26–21:10:36. That explanation is functionally correct to enable Deputy O'Hare to enforce the statute, as long as he drives at (or above) the speed limit on the highway. Whenever that happens, anyone who is driving slower would need to move to the right lane—not because Deputy O'Hare is a law enforcement officer, but because his vehicle is part of the flow of traffic that is impeded by slow traffic in the left lane. Indeed, that is just what happened here: Deputy O'Hare approached at 75 mph, and Salcedo was traveling well below the speed limit, so he needed to move to the right. *See* MTS Order (7/11/18) at 5; App. 36.

If there had been no objectively reasonable basis to support the traffic stop under a correct understanding of the relevant statute (or to support a violation of any alternative provisions the State identified in resistance to the motion to suppress), then the stop would be invalid and Deputy O'Hare's mistake of law, if any, would not save it. *See, e.g.*,

State v. Tyler, 830 N.W.2d 288, 294–95 (Iowa 2013). But because there *was* an objectively reasonable basis for the traffic stop under a correct understanding of section 321.297(2), Deputy O'Hare's inexact explanation does not undermine the constitutionality of the stop. The district court was correct not to analyze this as a "mistake of law" case because Deputy Salcedo had correctly identified a violation of the law and had objectively reasonable probable cause to initiate a traffic stop based on the specific violation that he successfully identified.

C. Deputy O'Hare developed reasonable suspicion of drug trafficking at the start of the traffic stop and could expand the scope and duration of the stop to investigate further based on that suspicion.

"[I]t is well-settled law that a traffic violation, no matter how minor, gives a police officer probable cause to stop the motorist." *See State v. Hoskins*, 711 N.W.2d 720, 726 (Iowa 2006) (citing *State v. Aderholdt*, 545 N.W.2d 559, 563 (Iowa 1996)). Once Deputy O'Hare witnessed a violation of section 321.297(2), he had probable cause to initiate a traffic stop. While conducting a traffic stop, officers "may conduct certain unrelated checks," but officers "may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *See In re Pardee*, 872 N.W.2d 384, 393 (Iowa 2015) (quoting *Rodriguez v. United States*,

135 S.Ct. 1609, 1615 (2015)); *accord State v. Coleman*, 890 N.W.2d 284, 301 (Iowa 2017) ("[W]hen the reason for a traffic stop is resolved and there is no other basis for reasonable suspicion, article I, section 8 of the Iowa Constitution requires that the driver must be allowed to go his or her way without further ado."). Salcedo's argument is that he was detained for longer than was necessary to investigate and resolve the observed violation of section 321.297(2). *See* Def's Br. at 34–45. But that argument misses the more important point: Deputy O'Hare made specific observations while speaking with Salcedo at the outset of the traffic stop that gave rise to reasonable suspicion that Salcedo and Rodriguez were transporting drugs in their vehicle. Deputy O'Hare could expand the scope and duration of the traffic stop accordingly, to investigate that well-founded suspicion of ongoing criminal activity.

To justify such an expansion of the duration of a traffic stop, "the police need only have reasonable suspicion, not probable cause, to believe criminal activity has occurred or is occurring." *See State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). Reasonable suspicion can arise from facts that are susceptible to innocuous explanations, and police may detain suspects to conduct reasonable investigations and resolve that ambiguity as to whether criminal activity is occurring:

> The test is founded suspicion. . . . Even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, police officers must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.

State v. Kreps, 650 N.W.2d 636, 642 (Iowa 2002) (quoting *United States v. Holland*, 510 F.2d 453, 455 (9th Cir. 1975)). In short, the fact that "[t]he principal function of an investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot" necessarily means that reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence," and it "may exist to investigate conduct which is subject to a legitimate explanation and turns out to be wholly lawful." *See id.* (quoting *State v. Richardson*, 501 N.W.2d 495, 496–97 (Iowa 1993)).

A typical traffic stop that involved issuing a citation would take Deputy O'Hare "anywhere from 10 to 20, 25 minutes." *See* MTS Tr. 25:22–26:7. Deputy O'Hare specifically identified the questions about Salcedo's route and destination as questions that were relevant to any investigation into the traffic violation because he wanted to understand "why they would be in the left lane driving at that speed." *See* MTS Tr. 27:13–28:11. At least some conversation and interaction with Salcedo was permissible within the scope of the initial traffic stop, arising out

of the violation of section 321.297(2). In *Aderholdt*, officers initiated a traffic stop based on observations giving rise to reasonable suspicion that the vehicle's occupants were not wearing seatbelts and that the vehicle's windows had an impermissibly dark tint. *See Aderholdt*, 545 N.W.2d at 561, 563. The Iowa Supreme Court affirmed that officers in that situation could conduct a "reasonable investigation" related to the suspected violations, and clarified: "This reasonable investigation includes asking for the driver's license and registration, requesting that the driver sit in the patrol car, and asking the driver about his destination and purpose." *See id.* at 563–64 (quoting *United States v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994)). This helps establish the parameters of the inquiry that resolves this challenge: Deputy O'Hare could, at the very least, speak to Salcedo about relevant circumstances surrounding Salcedo's use of this rental vehicle on Iowa highways in determining the nature, extent, and seriousness of Salcedo's violation of section 321.297(2). Therefore, it is appropriate to consider the facts that Deputy O'Hare uncovered from the beginning of his interaction with Salcedo through the portion of their conversation that discussed Salcedo's obligations under section 321.297(2) in determining whether Deputy O'Hare had reasonable suspicion to expand his investigation.

Accord United States v. Rivera, 570 F.3d 1009, 1013 (8th Cir. 2009) (finding inquiries "into the destination and purpose of Rivera's trip" were "permissible incidents of a routine traffic stop"); *United States v. Brigham*, 382 F.3d 500, 508 (5th Cir. 2004) (noting that officers may "ask about the purpose and itinerary of a driver's trip during the traffic stop" because such questioning will often help to "determine whether a traffic violation has taken place, and if so, whether a citation or warning should be issued or an arrest made"); *United States v. Givan*, 320 F.3d 452, 459 (3rd Cir. 2003) ("[Q]uestions relating to a driver's travel plans ordinarily fall within the scope of a traffic stop."); *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001) (observing that "[t]ravel plans typically are related to the purpose of a traffic stop because the motorist is traveling at the time of the stop," and that "a motorist's travel history and travel plans may help explain, or put into context, why the motorist was weaving" or committing traffic offense), *overruled on other grounds by Muehler v. Mena*, 544 U.S. 93 (2005); *State v. Morlock*, 218 P.3d 801, 810 (Kan. 2009) ("[W]e hold that Deputy Cocking's travel questions of O'Kelly—how long he had been in Phoenix and why he was there—were proper because they were permissible incidents to a routine traffic stop."). Even after *Rodriguez*,

most courts have recognized that routine traffic stops may include questioning the driver "regarding the purpose of their trip and their travel route." *See United States v. Murillo-Salgado*, 854 F.3d 407, 415–16 (8th Cir. 2017); *see also United States v. Iturbe-Gonzales*, 100 F.Supp.3d 1030, 1037–38 (D. Mont. 2015) (holding officer's questions were "permissible under *Rodriguez*" as "traffic safety-related inquiries of a general nature, which included Iturbe–Gonzalez's travel plans and travel objectives"); *accord Fisher v. State*, 481 S.W.3d 403, 411–12 (Tex. Ct. App. 2015) ("[T]he purpose of the traffic stop in this case was still not completed until after Thompson questioned Fisher *and* Bradley about their origination, destination, and travel purpose, and we find that his questions were related to that purpose.").

Deputy O'Hare had just completed a refresher training course on highway drug interdiction. *See* MTS Tr. 5:15–6:6. He knew that California is "a common entry point" for illegal drugs, which are often transported to their high-demand destinations (including New York) via rental cars. *See* MTS Tr. 6:7–7:1. He also knew that obtaining those rental cars by using a third-party's name on the rental agreement was "common practice for drug traffickers," and that third-party renter was typically "someone who is not in the vehicle." *See* MTS Tr. 6:12–19 and

MTS Tr. 15:6–11. So when Salcedo told Deputy O'Hare that they had traveled to New York to Florida and then to California by plane, and were driving back to New York in this rental car with California plates that had been obtained in someone else's name, Deputy O'Hare knew that Salcedo's activities were a perfect match with the drug trafficking practices that had been described in his drug interdiction training. *See* MTS Tr. 14:16–16:13. And Deputy O'Hare could use common sense to infer that it would be odd for Salcedo and Rodriguez to pay for flights to Florida and California and then choose to drive home to New York, which would add more than thirty hours of driving to that return trip (and any potential savings would have been offset by the cost of gas, food, lodgings, and the rental car itself). *See* MTS Tr. 15:12–16:21.

Moreover, Deputy O'Hare could consider what he already knew about the luggage in the backseat (not in the trunk) and the presence of three cell phones in the vehicle (more than one phone per person). Deputy O'Hare saw that luggage and those cell phones "right away," during his first interaction with Salcedo at the beginning of the stop—he must have made those observations at the outset because they were part of the reason that Deputy O'Hare expected that he might search the vehicle before the end of his investigation, which led him to call

for backup at approximately 9:09 p.m., while he sat in his vehicle with Salcedo and before he returned to verify Salcedo's answers by speaking with Rodriguez. *See* MTS Tr. 33:5–34:7. The presence of a third cell phone was a "red flag" because drug traffickers were known to use "a burner phone to make contacts or anything with the people that they are working for." *See* MTS Tr. 18:14–20. And the luggage in the backseat suggested that something more sensitive was in the trunk. Deputy O'Hare drew reasonable inferences from those observations. *Cf. State v. Bullock*, 805 S.E.2d 671, 677–78 (N.C. 2017) (noting that police officer's "extensive experience investigating drug running" and knowledge that highway I-95 was "a major drug trafficking corridor" together with observations that defendant had "two cell phones" and was driving "a rental car that had been rented in someone else's name" created reasonable suspicion and "suggested possible drug-running, even before defendant began talking").

There may have been an innocuous explanation for those facts. But they matched known patterns of transcontinental drug trafficking to such a striking degree that they gave rise to reasonable suspicion, and Deputy O'Hare could expand the scope and duration of the stop to investigate those well-founded suspicions.

It is also permissible to consider Deputy O'Hare's observations from his subsequent conversation with Rodriguez, which included the Rodriguez's statement that the trunk of the vehicle was empty (which turned the presence of the luggage in the car's back seat into a fact that suggested the trunk contained contraband). *See* MTS Tr. 18:21–19:12. During the course of a reasonable investigation for a traffic violation that involves a discussion with the vehicle's driver, an officer "may also question a vehicle's passengers to verify information provided by the driver." *See United States v. Ward*, 484 F.3d 1059, 1061 (8th Cir. 2007) (quoting *United States v. Sanchez*, 417 F.3d 971, 975 (8th Cir. 2005)). But it is unnecessary to pile on. Long before that point, there was a convergence of specific and articulable facts that, with Deputy O'Hare's training and experience, gave rise to reasonable suspicion that Salcedo and Rodriguez were transporting drugs in their vehicle. Those facts must be considered together, not separately: "[W]e do not evaluate reasonable suspicion based on each circumstance individually, but determine the existence of reasonable suspicion by considering all the circumstances together." *See State v. McIver*, 858 N.W.2d 699, 702 (Iowa 2015) (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). The facts, when considered together, warranted a reasonable inquiry.

Once Deputy O'Hare learned about their one-way road trip from a known point of entry for drugs to a known destination for traffickers, in a rental car that was obtained with an absent third party's name, with an extra cell phone that may be a "burner," he had grounds to extend the stop and "resolve the ambiguity as to whether criminal activity is afoot." *State v. Melohn*, 516 N.W.2d 24, 25 (Iowa 1994).

This case is distinguishable from *In re Pardee* because the facts giving rise to reasonable suspicion to expand the scope and duration of the traffic stop were discovered through questioning that related to the infraction at issue, and that suspicion arose before any extension of the duration of the stop. *See In re Pardee*, 872 N.W.2d at 395–96. This case is distinguishable from *Coleman* because Deputy O'Hare did not discover facts that *dispelled* the basis for the initial stop, and therefore was not obligated to terminate the detention immediately. *See Coleman*, 890 N.W.2d at 299–301; *accord State v. Coffman*, 914 N.W.2d 240, 251–52 (Iowa 2018) ("This case is actually the reverse of a *Coleman* situation. After making the initial stop, [police] determined that there was a violation with respect to vehicle registration, thus providing further justification for the stop."). Instead, this case is a straightforward application of the principle described in *Aderholdt*:

when "the detainees' responses or actions raise suspicions unrelated to the traffic offense, the officer's inquiry may be broadened to satisfy those suspicions" and the duration of the stop may extend accordingly. *See Aderholdt*, 545 N.W.2d at 563–64. Thus, Salcedo's challenge fails.

Salcedo argues that, even if the *duration* of the traffic stop was not impermissibly extended before reasonable suspicion arose, the Iowa Constitution should require suppression because the *scope* of the stop was still impermissibly expanded. *See* Def's Br. at 40–43. Like most Iowa Constitution claims, this argument has already been rejected by the United States Supreme Court. *See Arizona v. Johnson*, 555 U.S. 323, 332–33 (2009) (citing *Muehler*, 544 U.S. at 100–01) ("An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). Moreover, there is no ruling from the district court on any argument that challenged the scope of the detention, rather than its duration. *See* MTS Order (7/11/18) at 2; App. 33 (noting that Salcedo and Rodriguez "challenge[d] both the stop of the vehicle as being illegal and the length of the detention that lead to an allegedly involuntary consent to search the vehicle."). That

poses an error preservation problem, and this Court should decline to reach this unpreserved claim. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) ("Ordinarily, we attempt to protect the district court from being ambushed by parties raising issues on appeal that were not raised in the district court."). Finally, this issue is moot because reasonable suspicion arose from Salcedo's answers to questions about his highway travel and from Deputy O'Hare's plain view observations, which *were* within the scope of the initial stop for the traffic violation. This Court should decline to consider a novel constitutional question in any case where resolution of the issue cannot impact the result. *See State v. Williams*, 695 N.W.2d 23, 30 (Iowa 2005); *Cmty. Lutheran Sch. v. Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 291–92 (Iowa 1982).

Beyond those prudential concerns, this Court should reject any attempt to shoehorn a freestanding scope-of-detention limitation into Article I, Section 8 of the Iowa Constitution. Such an approach would require Iowa courts to entertain challenges to investigative action that does not magnify any burden or intrusion on privacy/liberty interests:

> Officers ask persons stopped for traffic offenses whether they are committing any other crimes. That is not an unreasonable law-enforcement strategy, either in a given case or in gross; persons who do not like the question can decline to answer. Unlike many other methods of enforcing the criminal law, this respects everyone's privacy.

United States v. Childs, 277 F.3d 947, 954 (7th Cir. 2002). As much as *Coleman* castigated United States Supreme Court precedent construing the Fourth Amendment, it retained one critical feature of that federal jurisprudence: the boundaries of a traffic stop are set with reference to the *duration* reasonably required to perform the investigation that warranted the stop—not by cataloguing a solution set of specific acts that are germane to the investigation and can be done during the stop, and declaring all others invalid. *Compare Rodriguez*, 135 S.Ct. at 1614 (explaining that "the Fourth Amendment tolerate[s] certain unrelated investigations that [do] not lengthen the roadside detention" and that "[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."), *with Coleman*, 890 N.W.2d at 295 ("When the purpose of the original stop remains valid, a number of courts have held that a request for driver's license, insurance, and registration is not invalid as long as the stop is not unduly prolonged."); *id.* at 299 (reiterating that "it is possible that when there is a valid ongoing traffic stop officers may properly seek driver's identification, registration, and insurance information"). This makes sense from a constitutional perspective because, whenever an officer pursues an unrelated inquiry that does not prolong the duration

of the traffic stop, there is no additional *seizure*—the actual seizure is still only defined by the length of the stop, which remains unaffected. And it makes sense from a practical perspective because Iowa courts should not be required to examine transcripts of every conversation between law enforcement and suspects and permit defense counsel to interpose relevance objections to every single question asked during the investigative seizure. Police officers are not passive receptacles or mindless automata—they are expected to take the initiative and delve into ambiguous situations to uncover facts not yet known. In doing so, police need not wait for reasonable suspicion before taking action that does not magnify a burden or intrusion on privacy or liberty interests.

Focusing on scope over duration would risk suppressing evidence discovered through sharp observation or insight during the course of valid traffic stops. Officers are not required to ignore any "plain view" or "plain smell" evidence they discover while pursuing legitimate investigations or traffic enforcement. *See, e.g.*, *Storm*, 898 N.W.2d at 142; *State v. Cooley*, 229 N.W.2d 755, 757 (Iowa 1975). But any scope limitation that was independent from a duration limitation would prompt litigation about whether certain vantage points were outside the scope of routine traffic stops. Evidence observed inside a

stopped vehicle would be suppressed—even contraband displayed in plain view during a traffic stop, if looking into the stopped vehicle was characterized as "outside the scope" of the initial stop. And any driver who obviously had alcohol on his breath during an unrelated stop and was arrested for OWI would inevitably claim that smelling his breath was "outside the scope" of the initial stop. This would strip police of their ability to protect Iowa communities—police must identify risks to the public and address them, not ignore them. *See State v. Kinkead*, 570 N.W.2d 97, 101 (Iowa 1997) ("If officers were not allowed to rely on their sensory perception in performing their jobs, their positions as enforcers of our state's laws would be rendered futile.").

State v. Campbell proposed that a limit on investigative scope offers a "bright line." *See State v. Campbell*, No. 15–1772, 2017 WL 706208, at *11 (Feb. 22, 2017). But in application, constitutionalizing a scope-of-inquiry limitation only blurs lines and creates confusion. Salcedo cites to *State v. Jimenez*, in which the Oregon Supreme Court held the Oregon Constitution forbids an officer from asking a detainee about weapons during a traffic stop, unless that is "reasonably related to his traffic investigation and reasonably necessary to effectuate it." *See State v. Jimenez*, 353 P.2d 1227, 1232–35 (Or. 2015); Def's Br. at 40.

But *Jimenez* also clarified that it only addressed "the constitutionality of a weapons inquiry in the context of an acknowledged seizure," and it did not disturb other Oregon precedent that would permit the same inquiry outside of the context of an investigative seizure. *See Jimenez*, 353 P.3d at 1233 n.12 (citing *State v. Amaya*, 89 P.3d 1163, 1169 (Or. 2004)). Thus, it cannot be some quality inherent to the question itself that burdens the constitutionally protected liberty/privacy interest—if officers may ask a person who is *not* seized whether she has a weapon without automatically initiating a seizure or acting unconstitutionally by asking that question, then it must be some effect of the interaction between the ongoing seizure and the otherwise permissible inquiry that violates the detainee's constitutional rights. The only explanation that the Oregon Supreme Court has ever offered on this issue is that unrelated questions impermissibly *extend the duration* of the stop. *See State v. Miller*, 422 P.3d 240, 245 n.4 (Or. 2018) ("[Q]uestions that are not reasonably related to the purpose of the stop extend the stop in a way that requires some independent justification under Article I, section 9."). Indeed, *Jimenez* deliberately dodged the task of identifying a burdened privacy/liberty interest if an unrelated inquiry "occurred during an 'unavoidable lull' in the traffic investigation" and

expanded the scope *without* extending the duration of the stop—so it did not truly establish a limitation on scope that stands apart from limitations on duration. *See Jimenez*, 353 P.3d at 1230 n.7; *see also State v. Rodgers*, 227 P.3d 695, 627 n.5 (Or. 2010) ("We express no opinion about the effect of unrelated police inquiries that occur during the course of the traffic violation investigation and that do not result in any further restriction of movement of the individual."). This focus on scope over duration has failed to clarify or streamline the analysis.

Anyone looking for a "bright line" in Oregon needs to turn to the Oregon Court of Appeals, which summarized the law like this:

> At least two clear rules have emerged. First, an officer may inquire about unrelated matters during an "unavoidable lull" in a lawful traffic stop, at least so long as those inquiries do not result in any further restriction of movement. Second, an officer may not inquire about unrelated matters in conjunction with a lawful traffic stop if doing so extends the length of the stop, even by a brief period, without separate legal justification. Once a traffic stop is completed or reasonably should be completed, an officer must have reasonable suspicion of the defendant's involvement in a crime to question the defendant about that unrelated matter. Inquiring about unrelated crimes without reasonable suspicion after a lawful traffic stop should have ended is unlawful.

State v. Blackstone, 410 P.3d 354, 358–59 (Or. Ct. App. 2017) (citations and quotations omitted). The necessary implication is that expanding "scope" without extending duration presents no problem:

> [Q]uestioning *during* an otherwise valid traffic stop that does not have such a detaining effect does not require reasonable suspicion. That is because. . . it is detention that triggers Article I, section 9, not the mere fact that the officer is asking questions. Said another way, only when the questioning rises to the level of a seizure is the constitution implicated. Not all questioning will rise to that level, particularly when it takes place during a lawful stop and does not have the effect of extending its duration.

State v. Amaya, 29 P.3d 1177, 1181 (Or. Ct. App. 2001), *aff'd*, *Amaya*, 89 P.3d at 1168–69 ("To the extent that defendant argues that every question by an officer that is unrelated to the reason for a valid traffic stop violates Article I, section 9, unless the question is based on reasonable suspicion, we reject defendant's argument."). The actual "bright line" rule in Oregon is this: "there are no Article I, section 9, implications if an inquiry unrelated to the traffic stop occurs during a routine stop but does not delay it," and suppression is unwarranted if "the inquiry that transformed the encounter from a routine traffic stop into a more extended criminal investigation occurred *during* the time that [the police officer] was lawfully and expeditiously conducting the traffic stop." *State v. Gomes*, 236 P.3d 841, 845 (Or. Ct. App. 2010). Again, the only real "bright-line" and the only approach that correctly targets *unreasonable seizures* for scrutiny uses reasonable duration as its touchstone in assessing whether a constitutional violation occurred.

Salcedo also cites New Hampshire as a model. *See* Def's Br. at 41 (citing *State v. McKinnon-Andrews*, 846 A.2d 1198 (N.H. 2014)). *McKinnon-Andrews* adopted the approach temporarily taken by the Illinois Supreme Court in *Gonzalez*:

> If the question is reasonably related to the purpose of the stop, no [constitutional] violation occurs. If the question is not reasonably related to the purpose of the stop, we must consider whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question. If the question is so justified, no [constitutional] violation occurs. In the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, we must consider whether in light of all the circumstances and common sense, the question impermissibly prolonged the detention or changed the fundamental nature of the stop.

McKinnon-Andrews, 846 A.2d at 1203 (quoting *People v. Gonzalez*, 789 N.E.2d 260, 268 (Ill. 2003)). But *Gonzalez* was subsequently overruled in *People v. Harris*, which rejected the premise that "the reasonableness of a traffic stop must be judged . . . by the additional criterion of whether the actions of the officer alter the fundamental nature of the stop" and then clarified that the duration of the stop must be "the sole focus of the scope inquiry." *See People v. Harris*, 886 N.E.2d 947, 958–61 (Ill. 2008). Moreover, the New Hampshire analysis still recognizes that, for unrelated questioning to burden a privacy/liberty interest, it must either extend the duration of the stop

or change its "fundamental nature"—which means it still demands that defendants who challenge unrelated questioning during a stop must identify how the questioning burdened a protected privacy or liberty interest, beyond the fact that it occurred. And it is easy to identify which part of that test is responsible for the ambiguity that has crept into New Hampshire caselaw on this subject. *See, e.g.*, *State v. Bledsell-Moore*, 91 A.3d 619, 625 (N.H. 2014) (finding a request for the driver to show his tongue "altered the fundamental nature of the stop by transforming a routine traffic stop into an investigation of potential drug activity"); *id.* at 627 (Lynn, J., specially concurring) (noting that, if fundamental-nature prong "so narrowly circumscribes the scope of questioning during a traffic stop that any inquiry aimed at detecting non-germane criminal activity changes the fundamental nature of the stop," then the result is that "the third prong of the test has little practical meaning because virtually all inquiries that fail the second prong of the test will automatically fail the third prong as well").

Salcedo also points to Minnesota, although he cites a case where the Minnesota Supreme Court skipped the scope/duration analysis because the reasonable suspicion that supported extension of the stop was so severe. *See* Def's Br. at 41 (citing *State v. Smith*, 814 N.W.2d

346 (Minn. 2012)). In other cases, the Minnesota Supreme Court has been very particular in confining this test to "incremental intrusions":

> Article I, Section 10 of the Minnesota Constitution requires that each incremental intrusion during a traffic stop be tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*.

State v. Askerooth, 681 N.W.2d 353, 365 (Minn. 2004). It is true that the *Smith* opinion remarked, in dicta, that "even a single question, depending on its content, could expand the scope of a traffic stop under other facts." *See Smith*, 814 N.W.2d at 351 n.1. But for that to pose a constitutional problem under *Askerooth*, that question must qualify as an "incremental intrusion"—either because it extends the duration of a seizure, or magnifies its intensity, or has another effect. *See Askerooth*, 681 N.W.2d at 365. Minnesota's failure to recognize that inherent limitation in applying its own caselaw is in line with its failure to grasp the proper contours of similar federal precedent. *E.g.*, *State v. Wiegland*, 645 N.W.2d 125, 136–37 (Minn. 2002) (holding "search and seizure limitations in the federal and state constitutions" both required that "a law enforcement officer must have a reasonable, articulable suspicion of drug-related criminal activity" to conduct an open-air drug dog sniff during unrelated traffic stop still in progress).

Salcedo also cites to Hawaii authority. *See* Def's Br. at 37 (citing *State v. Estabillio*, 218 P.3d 749, 761–62 (Haw. 2009)). But Hawaii's approach to encounters between police and citizens is different in a key respect that illustrates the problem with Salcedo's claim: while Iowa recognizes that police may ask questions in an effort to uncover criminal activity without necessarily effectuating a seizure, Hawaii rejects that proposition entirely. *See, e.g.*, *State v. Kearns*, 867 P.2d 903, 907 (Haw. 1994) ("[A] person is seized, for purposes of article I, section 7 of the Hawai'i Constitution, when a police officer approaches that person for the express or implied purpose of investigating him or her for possible criminal violations and begins to ask for information."). As a result, under Hawaii law, the holding in *Estabillio* makes sense: because the additional questions *themselves* amounted to a seizure that was separate from the initial stop, they needed to be "supported by independent reasonable suspicion to be constitutional." *Estabillio*, 218 P.3d at 761. But when considering investigative action that "did not, in and of itself, amount to a seizure," Hawaii courts are just like courts nearly everywhere else—they have no trouble permitting those investigative acts during an ongoing, unrelated seizure. *See id.* at 760 (discussing *State v. Barros*, 48 P.3d 584, 589–91 (Haw. 2002)).

Finally, consider Salcedo's reliance on Alaska jurisprudence. *See* Def's Br. at 36, 41. Alaska, unlike Iowa, has a real textual basis for departing from federal precedent construing the Fourth Amendment. *See Brown v. State*, 182 P.3d 624, 633 (Alaska Ct. App. 2008); *cf. Storm*, 898 N.W.2d at 152–53 (rejecting applicability of authority from states with textually different constitutional provisions because "there is no such textual difference between the search and seizure provisions of the Fourth Amendment and article I, section 8 of the Iowa Constitution" and no "separate privacy provision"). Claims under Article I, Section 8 of the Iowa Constitution must start by identifying the allegedly impermissible search or seizure—but "questions are neither searches nor seizures," and so "police need not demonstrate justification for each inquiry" during an otherwise lawful seizure. *See Childs*, 277 F.3d at 949. There is no basis for any contrary holding.

To summarize: Deputy O'Hare could inquire about the pair's travel plans in the course of the initial traffic stop—and once he did, his recent drug interdiction training informed his assessment of their one-way transcontinental trip by rental car. From that point, there was reasonable suspicion to extend the duration of the stop to investigate. Thus, Salcedo's claim that he was impermissibly detained must fail.

D. Salcedo consented to the search of the vehicle. His consent was freely and voluntarily given.

"Consent is considered to be voluntary when it is given without duress or coercion, either express or implied." *See State v. Lowe*, 812 N.W.2d 554, 572 (Iowa 2012) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). Voluntariness is determined through fact-based analysis of the totality of the circumstances. *See id.* at 572–73 (quoting *United States v. Golinveaux*, 611 F.3d 956, 959 (8th Cir. 2010)).

Salcedo argues his consent was involuntarily given under *Pals*. *See* Def's Br. at 49–52. But the recorded audio tells a different story. *See* State's Ex. 1, at 21:19:45–21:20:25. Salcedo focuses on the same four factors that were examined in *Pals*, but the Iowa Supreme Court subsequently clarified that a broader range of factors are relevant in assessing whether consent to search was voluntarily given, including:

> personal characteristics of the defendant, such as age, education, intelligence, sobriety, and experience with the law; and features of the context in which the consent was given, such as the length of detention or questioning, the substance of any discussion between the defendant and police preceding the consent, whether the defendant was free to leave or was subject to restraint, and whether the defendant's contemporaneous reaction to the search was consistent with consent.

State v. Pettijohn, 899 N.W.2d 1, 32 (Iowa 2017) (quoting *United States v. Jones*, 254 F.3d 692, 696 (8th Cir. 2001)).

Deputy O'Hare and the other deputy were the only two officers present on the scene, and there were no weapons drawn. Salcedo was 24 years old, he appeared to be sober, and he did not seem to have any cognitive deficiency or mental abnormality. Consent was requested and granted within 15 minutes of the start of the traffic stop, which is a relatively short period that weighs against finding involuntariness. *See Lowe*, 812 N.W.2d at 572 (finding Audsley provided valid consent to search, in part because "[t]he questioning of Audsley was of a short duration, perhaps twenty minutes"); *cf. State v. Lane*, 726 N.W.2d 371, 379 (Iowa 2007) (upholding consent obtained after "a lengthy discussion"). And the polite, amicable nature of that early interaction also weighs against finding involuntariness here—just like in *Lowe*, "[t]here is no evidence of threats or physical intimidation." *See Lowe*, 812 N.W.2d at 574. Deputy O'Hare had conducted a brief pat-down of Salcedo before they sat in the police vehicle—but Deputy O'Hare had asked for Salcedo's permission to do that too, which undermines any attempt to characterize the pat-down as a coercive show of force. *See* State's Ex. 1, at 21:07:35–21:07:53. This is distinguishable from the "command" given to submit to a pat-down search in *Pals*, which was unmistakably coercive in character. *See Pals*, 805 N.W.2d at 782.

Some cases involving requests for consent searches that are unrelated to any articulable suspicion have found that consent was involuntarily given because drivers were not told they were free to go. *See, e.g.*, *Pals*, 805 N.W.2d at 776 (collecting cases). Here, Salcedo truly was not free to go, because Deputy O'Hare extended the initial detention to investigate his reasonable suspicion of drug trafficking. *See State v. English*, No. 17–0836, 2018 WL 3060261, at *2 (Iowa Ct. App. June 20, 2018) (finding consent to search was voluntarily given and dismissing an argument that officer "had not advised English the reason for the stop had concluded" because "it had not," when there was reasonable suspicion to extend the stop for another investigation). Salcedo argues that his consent was still involuntarily given because Deputy O'Hare had not "closed out the traffic stop with issuance of a citation nor warning, so the lack of closure of the original purpose of the stop made the request for consent . . . even more threatening." *See* Def's Br. at 51–52. Any such implied threat—that Salcedo might get a ticket/citation for a minor traffic offense for some negligible amount—cannot seriously be said to have exerted such force to compel him to consent to a search that would uncover a gigantic stash of marijuana that would have been worth a small fortune.

The lurking question, which often arises when a consent search uncovers massive amounts of contraband, is: assuming that both men knew about the contraband, why did they both consent to this search? One possible explanation is that they had hoped that offering consent without hesitation would result in Deputy O'Hare crediting that offer as satisfactory proof that, in fact, the vehicle contained no contraband that would have prevented him from consenting to a search. Note that Salcedo and Rodriguez kept that performance going: another deputy approached Deputy O'Hare while he was conducting the search and announced that Salcedo and Rodriguez were watching as he searched their vehicle and they did not "give a shit" about what he was doing. *See* State's Ex. 1, at 21:29:16–21:29:32. Perhaps this was an attempt to dissuade Deputy O'Hare from summoning a drug dog to the scene. The record contains no explanation of their reasons for consenting.

In any event, this Court should not fall into the trap of believing that any consent to a search that would uncover evidence of a crime is automatically involuntary because there is no good reason to give it. The California Supreme Court explained that consent may be given in similar circumstances for a variety of reasons—and the Constitution does not protect a defendant from his own decision-making calculus:

> Defendant next asserts there was 'no rational or logical reason' for him to agree to the search because he knew it would disclose incriminating evidence, i.e., the stolen television set. This point has occasionally been noted in our cases . . . ; but in none has it been held dispositive, for the obvious reason that to do so would nullify virtually every consent search which turns up incriminating evidence. Contrary to defendant's implication, there may be a number of 'rational reasons' for a suspect to consent to a search even though he knows the premises contain evidence that can be used against him: for example, he may wish to appear cooperative in order to throw the police off the scent of at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile.

People v. James, 561 P.2d 1135, 1143 (Cal. 1977). More importantly, if the purpose of the exclusionary rule is to deter police misconduct, it would be incongruous to suppress evidence based on a finding that *Salcedo* acted unreasonably in granting consent, rather than a finding that Deputy O'Hare acted unreasonably in requesting or accepting it. There is no need to find that Salcedo or Rodriguez acted reasonably—Deputy O'Hare's actions were reasonable, and that is what matters.

Salcedo argues his consent was involuntary because he was never expressly informed that he could refuse to give consent. *See*

Def's Br. at 51–52. Iowa precedent establishes that an individual's consent to a search may still be "considered consensual, even though the person has not been advised that he is free to refuse to respond." *See State v. Reinders*, 690 N.W.2d 78, 82 (Iowa 2004) (citing *United States v. Drayton*, 536 U.S. 194, 203 (2002)). While *Pals* declared that absence of such an advisory was "a strong factor cutting against the voluntariness of the search, particularly in the context of a traffic stop where the individual is seized in the front seat of a police car," that statement was unsupported by citation to Iowa precedent and drew harsh criticism from the dissent. *See Pals*, 805 N.W.2d at 763; *see also id.* at 787–88 (Waterman, J., dissenting) ("Today's holding cannot be reconciled with *Reinders*. We should follow our own precedent, not a minority view expressed by courts in other states."). Moreover, when Deputy O'Hare specifically asked Salcedo to confirm that he was giving them permission to search the vehicle, that clearly conveyed that Deputy O'Hare *needed permission* to conduct a search, and that Salcedo could choose to grant it or deny it. *See James*, 561 P.2d at 1144–45 ("[W]hen a person of normal intelligence is expressly asked to give his consent to a search of his premises, he will reasonably infer he has the option of withholding that consent if he chooses.").

Salcedo wants this Court to require a "right-to-refuse" advisory before consent to a search may be valid, but there is no record evidence to support any claim that Salcedo did not know he could refuse to give consent. This failure of proof undermined a similar request in *Lowe*:

> Though both parties presented evidence and made arguments regarding the voluntariness of Audsley's consent to search, neither party presented evidence on the "knowing" and voluntary nature of her consent (requiring law enforcement to advise her of her right to refuse consent to search). Audsley did not testify at the suppression hearings. There is no direct evidence of her knowledge of her right to refuse consent to a search. . . . Without a full development of the legal and factual arguments on this issue, we decline to adopt a new standard regarding consent in this case.

See Lowe, 812 N.W.2d at 573 n.7. There is no reason to assume that Salcedo lacked that knowledge of his right to refuse, and no basis for granting relief even if Article I, Section 8 imposed a new requirement that consent be given with specific awareness of any right to refuse.

It is likely that Salcedo *did* know that he could refuse, because most motorists do. *Pals* noted various empirical studies have shown that requiring officers to inform motorists that they may refuse to consent to a search has a surprisingly small impact on resultant consent rates, which strongly suggests that motorists usually know they can refuse even when such an advisory is not given. *See Pals*,

805 N.W.2d at 781–82; *accord* Matthew Phillips, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1204–06 (2008) (analyzing New Jersey data showing that "even with requirements more stringent than the bare warning requirement that was rejected in *Schneckloth*, there was little effect on the rate of consent," which indicated mandatory advisories on right to refuse "do not seem to encourage people to invoke their right to deny consent"); *cf.* Illya Lichtenberg, Miranda *in Ohio: The Effects of Robinette on "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349, 370–73 (2001) (noting that *Robinette* produced no noticeable impact on consent rates in Ohio, which tends to "refute the inferred assumption of the *Schneckloth* dissent" because it showed consent rates had not been artificially inflated by lack of awareness about the right to refuse). There is no reason to assume that the absence of an advisory rendered *any* motorist's consent involuntary.

Most other states have "rejected the notion that knowledge of one's right to refuse consent to a warrantless search is required under the applicable state constitution, opting instead to follow the federal voluntariness standard [from *Schneckloth*] which focuses on the totality of the circumstances as opposed to any one factor." *See*

Commonwealth v. Cleckley, 738 A.2d 427, 432 (Pa. 1999) (collecting cases treating the issue); *see also State v. Cox*, 171 S.W.3d 174, 182–83 (Tenn. 2005) (collecting additional cases). Salcedo relies on cases from Arkansas, Mississippi, New Jersey, and Washington, and he argues that Iowa should follow the same approach. *See* Def's Br. at 46, 48.

Both *Pals* and Salcedo cited to *Penick v. State*, where the Mississippi Supreme Court held that the Mississippi Constitution required the State to prove that consent was given with knowledge of the right to refuse to give consent. *See Penick v. State*, 440 So.2d 547, 549–51 (Miss. 1983); *Pals*, 805 N.W.2d at 779; Def's Br. at 46. But the Mississippi Supreme Court subsequently limited *Penick*:

> The *Penick* knowledgeable waiver test was limited by this Court in *Jones v. Mississippi Dept. of Public Safety*, 607 So.2d 23 (Miss. 1991), where the defendant did not claim that "his consent was not knowledgeable." *Jones*, 607 So.2d at 28. *Jones* states that "*[t]he State is not required to demonstrate knowledge*" but rather the "*burden is on the defendant to show impaired consent or some diminished capacity*." *Jones*, 607 So.2d at 28 (emphasis added). *Jones* limits *Penick*'s knowledgeable waiver requirement to only those cases where the defendant specifically claims that his or her consent was not knowledgeable.
>
> *Jones* holds that the State has no initial burden to demonstrate knowledgeable waiver. If the defendant claims that his waiver was not knowledgeable, the burden is on him to raise the issue of lack of knowledgeable waiver.

Graves v. State, 708 So.2d 858, 863–64 (Miss. 1997).

Graves positions Mississippi firmly against Salcedo's proposal. Salcedo is arguing for a presumption that consent is invalid without an advisory on the right to refuse—but *Graves* and *Jones* rejected the idea that consent becomes invalid without some showing that officers provided a prophylactic advisory. *Id.* (citing *Jones*, 607 So.2d at 28). *Jones* even cited *Schneckloth* for the proposition that "[t]he State is not required to demonstrate knowledge." *See Jones*, 607 So.2d at 28 (citing *Schneckloth*, 412 U.S. at 249). In reality, Mississippi adopted the *Schneckloth* approach to voluntariness under its state constitution.

Pals and Salcedo also cited an Arkansas case. *See* Def's Br. at 46 (citing *State v. Brown*, 156 S.W.3d 722, 731–32 (Ark. 2004)); *Pals*, 805 N.W.2d at 779 (same). But the Arkansas Supreme Court's holding in *Brown* was specifically limited to consent searches of residences, which implicate "a fundamental right to privacy in our homes implicit in the Arkansas Constitution." *See Brown*, 156 S.W.3d at 731. Later, that limitation was reaffirmed when the Arkansas Supreme Court expressly stated that it found "no authority or convincing argument to cause us to extend the holding in *Brown* to the search of a vehicle." *See Welch v. State*, 219 S.W.3d 156, 159 (Ark. 2005); *accord Jones v. State*, No. CR 08–1417, 2010 WL 4922348, at *3 (Ark. Dec. 2, 2010).

New Jersey adopted a version of the rule that Salcedo seeks in *State v. Johnson*, although it did not specifically require advisories; instead, it concluded that the State "has the burden of demonstrating knowledge on the part of the person involved that he had a choice in the matter," and that "the police would not necessarily be required to advise the person of his right to refuse to consent to the search" if there were other facts that provided proof of that specific knowledge. *See State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975); *see also Pals*, 805 N.W.2d at 779; Def's Br. at 46. That holding was extended to vehicles in *State v. Carty*, which also prohibited law enforcement from asking for consent to search a vehicle after the initial traffic stop had ended and the motorist was already free to leave. *See State v. Carty*, 790 A.2d 903, 908–14 (N.J. 2002). *Carty* is not popular among other jurisdictions. *See, e.g.*, *State v. Jenkins*, 3 A.3d 806, 844–45, 852 (Conn. 2010); *State v. Snell*, 99 P.3d 191, 194 (Mont. 2004); *Cox*, 171 S.W.3d at 181. Indeed, even the same court that decided *Carty* would not do so again without an empirical showing that "law enforcement officials were indiscriminately misusing the warrant requirement's consent search exception." *See State v. Domicz*, 907 A.2d 395, 406–07 (N.J. 2006). In this case, the record contains nothing of the sort.

Finally, both *Pals* and Salcedo cite *State v. Ferrier*, in which the Washington Supreme Court mandated right-to-refuse advisories for consent to search homes under the Washington Constitution. *See State v. Ferrier*, 960 P.2d 927, 930 (Wash. 1998); *see also Pals*, 805 N.W.2d at 779; Def's Br. at 46. But *Ferrier*, like *Brown*, was limited to special concerns that inhere in searches of homes, not vehicles. *See Ferrier*, 960 P.2d at 931 (quoting *State v. Young*, 867 P.3d 593, 599 (Wash. 1994)) (noting that, for purposes of Article I, Section 7 of the Washington Constitution, "the closer officers come to intrusion into a dwelling, the greater the constitutional protection"). Moreover, *Ferrier* relied on unique constitutional text that provides a textual basis for a much broader right, which the Iowa Constitution lacks. *See id.* at 930 (quoting *Young*, 867 P.3d at 596) ("[U]nlike the Fourth Amendment, [the Washington Constitution] clearly recognizes an individual's right to privacy with *no* express limitations."); *accord Storm*, 898 N.W.2d at 153 (rejecting Washington approach to state constitutional question because "[t]he Iowa Constitution lacks a separate privacy provision"). And even Washington courts decline to apply *Ferrier* in the context of vehicle searches. *See, e.g.*, *State v. Witherrite*, 339 P.3d 992, 992–94 (Wash. Ct. App. 2014); *State v. Targas*, 90 P.3d 1088, 1091 (Wash.

Ct. App. 2004). Note that *Pals* missed critical distinctions in its treatment of cases from Arkansas, Mississippi, *and* Washington—three of the four jurisdictions that it contemplated following. *See Pals*, 805 N.W.2d at 779, 782.

The vast majority of state courts still follow *Schneckloth* and treat knowledge of the right to refuse as one factor to consider in assessing voluntariness, instead of enshrining a potentially redundant advisory as the only relevant factor to analyze. *See, e.g.*, *State v. Flores*, 185 P.3d 1067, 1071–72 (N.M. Ct. App. 2008) (collecting state cases rejecting *Ferrier* approach "as a matter of state constitutional law"); *accord Jenkins*, 3 A.3d at 839–53 (applying *Geisler* analysis, rejecting similar argument under Connecticut Constitution, and noting "studies do not indicate that adoption of the defendant's proposal is likely to have any significant effect on protecting motorists' rights beyond that of a scrupulous application of the governing federal principles").

There is no principled basis for adopting Salcedo's proposed requirement because it sidesteps the question of voluntariness, along with the question of whether Salcedo was aware he could refuse. Even if Salcedo had refused to consent without repercussions hours earlier, during a hypothetical traffic stop as he passed through Des Moines,

this rule would suppress all evidence discovered by Deputy O'Hare based on a failure to impart information that Salcedo already knew. The *Schneckloth* framework avoids that problem—under *Schneckloth*, "one's knowledge of his or her right to refuse consent remains a factor to consider in determining the validity of consent," though the absence of facts that affirmatively demonstrate such knowledge may not matter if other facts are "adequate to prove the voluntariness of a consent." *See Cleckley*, 738 A.2d at 433. Knowledge may be relevant if provable, but it is still subordinate to the ultimate question of voluntariness.

This case illustrates why that is the correct approach. There is no hint of coercion or involuntariness in the audio recording of the conversation between Deputy O'Hare and Salcedo surrounding the issue of consent to search the vehicle. *See* State's Ex. 1, at 21:19:45–21:20:25; State's Ex. 1 (bodycam), at 21:18:05–21:18:45. The court was correct that "the consent by Salcedo was initially volunteered as a response to what was clearly interrogation but was not a direct request to search." *See* MTS Ruling (7/11/18) at 6; App. 37. Even after that, Deputy O'Hare confirmed Salcedo's response was not just fatalism—after listing various categories of contraband, he specifically asked if Salcedo's response meant that he could search the vehicle. *See* State's

Ex. 1, at 21:19:45–21:20:25. Salcedo reiterated his consent to this. There was no trickery, no intimidation, no insistence—Salcedo had started at "yes" and Deputy O'Hare did not even need to ask him for consent to search the vehicle before Salcedo gave it to him. If this is somehow not "voluntary," then the word has lost its meaning and is untethered from the underlying reasonableness inquiry that animates search-and-seizure jurisprudence. *See, e.g.*, *State v. King*, 867 N.W.2d 106, 111 (Iowa 2015) (explaining that emphasis on "reasonableness" as the touchstone of Article I, Section 8 "allows the right to take on a new shape over time in response to new understandings of those times when government is permitted to conduct a reasonable search"). Deputy O'Hare stated his concerns about illegal drug trafficking and asked for consent to search, without hiding the ball. Salcedo's consent was "given without duress or coercion, either express or implied." *See Lowe*, 812 N.W.2d at 572 (citing *Schneckloth*, 412 U.S. at 227). Under any sensible framework, that means consent was voluntarily given.

Based on this evidence, the trial court was correct to conclude that Salcedo's consent was voluntarily given and that Deputy O'Hare did not violate Salcedo's constitutional rights by searching the vehicle. Thus, Salcedo's claim must fail.

CONCLUSION

The State respectfully requests that this Court reject these challenges and affirm the district court's ruling.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **13,120** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: March 7, 2019

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov