

**IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 24-1422
Dubuque County Case No. CVCV115206**

BEECHER STORE INC.,

Plaintiff-Appellant,

vs.

IOWA DEPARTMENT OF REVENUE,
ALCHOLIC BEVERAGES DIVISION

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
HON. THOMAS J. BITTER

AMENDED BRIEF OF PLAINTIFF-APPELLANT BEECHER STORE, INC.

KEVIN C. RIGDON (#AT0011385)
Direct Dial: (319) 861-8705
Email: crigdon@bradleyriley.com
THEODORE T. APPEL (#AT0014941)
Direct Dial: (319) 861-8769
Email: tappel@bradleyriley.com
OLIVIA A. McGOVERN (#AT0015751)
Direct Dial: (319) 861-8794

Email: omcgovern@bradleyriley.com
of

BRADLEY & RILEY PC

2007 First Avenue SE

P.O. Box 2804

Cedar Rapids, IA 52406-2804

Phone: (319) 363-0101

Fax: (319) 363-9824

ATTORNEYS FOR BEECHER STORE
INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	5
STATEMENT OF ISSUES	9
ROUTING STATEMENT	10
NATURE OF THE CASE.....	11
STATEMENT OF THE FACTS	12
ARGUMENT	14
I. Iowa Code section 123.50(3) Imposes a Progressive Civil Penalty Scheme for Habitual Violators that is Subject to Strict Construction and Recidivist Principles. Otherwise, the Statute Fails to Operate Effectively. The Appellate Court should Reverse and Remand for the Dismissal of a Second Violation.....	14
A. Error Preservation.....	14
B. Standard of Review	15
C. Iowa Code section 123.50(3) Imposes a Progressive Civil Penalty Scheme that Should be Subject to Strict Construction and Recidivist Principles.	17
D. The ABD’s imposition of a Second Violation on the Same Date is Incompatible with Iowa Code section 123.50’s Plain Text, Scheme, and Purpose.....	24
II. Alternatively, Iowa Code section 123.50(3) is Void for Vagueness .	31
A. Error Was Sufficiently Preserved on Beecher’s Void for Vagueness Argument.....	31

B. Standard of Review33

C. Iowa Code section 123.50(3) does not Provide Sufficient
Guidance and Invites Arbitrary Enforcement in Violation of the
Due Process Clause..... 33

CONCLUSION 36

REQUEST FOR ORAL ARGUMENT.....36

CERTIFICATE OF FILING AND SERVICE..... 37

CERTIFICATE OF COMPLIANCE 38

TABLE OF AUTHORITIES

Cases:

<i>Alcala v. Marriott Int’l, Inc.</i> , 880 N.W.2d 705 (Iowa 2016)	31
<i>Auen v. Alcoholic Beverage Div.</i> , 679 N.W.2d 586 (Iowa 2004).....	16
<i>Brewbaker v. State Bd. of Regents</i> , 843 N.W.2d 466 (Iowa Ct. App. 2013).....	14
<i>Carreras v. Iowa Dep’t of Transp.</i> , 977 N.W.2d 438 (Iowa 2022)	19
<i>Eddy v. Casey’s General Store, Inc.</i> , 485 N.W.2d 633 (Iowa 1992)	21
<i>Envil’ L. and Policy Cntr. v. Iowa Utils. Bd.</i> , 989 N.W.2d 775 (Iowa 2023)	16
<i>Estate of Butterfield v. Chautauqua Guest Homes, Inc.</i> , 987 N.W.2d 834 (Iowa 2023)..	
.....	25
<i>In re Detention of Anderson</i> , 895 N.W.2d 131 (Iowa 2017).	31
<i>Jensen v. Nelson</i> , 19 N.W.2d 596 (Iowa 1945)	25
<i>Kirby v. Alcoholic Bev. Control Appeals Bd.</i> , 47 Cal. App.3d 874 (1975).....	23
<i>Lagandaon v. Aschroft</i> , 383 F.3d 983 (9th Cir. 2004).....	26
<i>Lewis v. Jaeger</i> , 818 N.W.2d 165 (Iowa 2012)	34
<i>Mason v. Bd. of Educ.</i> , 826 A.2d 433 (Md. 2003).....	26
<i>Meier v. Senecaut</i> , 641 N.W.2d 532 (Iowa 2002)	14
<i>Motif, Ltd. v. Iowa Department of Commerce-Alcoholic Beverages Division</i> . No. 11-0793, 2012 WL 170211 (Iowa Ct. App. Jan. 19, 2022).....	32, 33, 35
<i>Nash Finch Co., v. City Council of City of Cedar Rapids</i> , 672 N.W.2d 822 (Iowa 2003).....	<i>en passim</i>
<i>Ngwangwa v. Tyson Fresh Meats, Inc.</i> , No. 23-1538, 2024 WL 4615628 (Iowa Ct. App. Oct. 30, 2024).....	16, 26, 27

<i>Oyens Feed & Supply, Inc. v. Primebank</i> , 879 N.W.2d 853 (Iowa 2016).....	25, 27
<i>P.M. Lattner Manufacturing Co. v. Rife</i> , 2 N.W.3d 859 (Iowa 2024).....	15
<i>Renda v. Iowa Civil Rights Com’n</i> , 784 N.W.2d 8, 13 (Iowa 2010).....	16, 17
<i>Schoenberger v. Acuity</i> , No. 22-1613, 2023 WL 2908622 (Iowa Ct. App. Apr. 12, 2023).....	33
<i>Simmons v. State Public Defender</i> , 791 N.W.2d 69 (Iowa 2010).....	35
<i>Staff Mgmt. v. Jimenez</i> , 839 N.W.2d 640 (Iowa 2013).....	14
<i>Star Equipment, Ltd. v. Iowa Dept. of Transp.</i> , 843 N.W.2d 446 (Iowa 2014).....	25
<i>State v. Christensen</i> , No. 09-1457, 2010 WL 5276884 (Iowa Dec. 17, 2010)	31
<i>State v. Conley</i> , 222 N.W.2d 501 (Iowa 1974)	10, 21, 24
<i>State ex rel. Turner v. Koscot Interplanetary, Inc.</i> , 191 N.W.2d 624 (Iowa 1971)	20
<i>State v. Middlekauff</i> , 974 N.W.2d 781 (Iowa 2022).....	33
<i>State v. Nail</i> , 743 N.W.2d 535 (Iowa 2007)	34
<i>State v. Sheets</i> , 338 N.W.2d 886 (Iowa 1983)	26
<i>State v. Stanley</i> , 67 S.W.3d 1 (Tenn. Crim. App. 2001).....	26
<i>State v. Stem</i> , 50 S.E.2d 175 (S.C. 1948)	19
<i>State v. Tucker</i> , 982 N.W.2d 645 (Iowa 2022).....	31
<i>Summy v. City of Des Moines</i> , 708 N.W.2d 333 (Iowa 2006).....	31
<i>Vroegh v. Iowa Dep’t of Corrections</i> , 972 N.W.2d 686 (Iowa 2022).....	19
<i>Walnut Brewery, Inc. v. Iowa Dept. of Commerce-Alcoholic Beverages Div.</i> , 775 N.W.2d 724 (Iowa Ct. App. 2009)	16, 27, 28
<i>Walsh v. Kirby</i> , 529 P.2d 33 (Cal. 1974) (<i>en banc</i>).....	<i>en passim</i>

<i>Washington v. Dist. of Columbia Dept. of Public Works</i> , 954 A.2d 945 (D.C.C. 2008)	19
<i>Winster v. Hardester</i> , 98 So.2d 629 (Miss. 1957)	22

Constitutional Provisions:

U.S. Const. amend. XIV, § 1	33
Iowa Const. art. 1, § 9	33

Statutes:

Cal. Bus. & Prof. Code § 24755.1	23
Iowa Code § 4.6	27
Iowa Code § 17A.19	12, 15
Iowa Code § 123.1	19
Iowa Code § 123.17	18, 30
Iowa Code § 123.30	17
Iowa Code § 123.31	17
Iowa Code § 123.38	19
Iowa Code § 123.39	18, 28, 35
Iowa Code § 123.49	<i>en passim</i>
Iowa Code § 123.50	<i>en passim</i>
Iowa Code § 123.50A	<i>en passim</i>
Iowa Code § 453A.22	18, 20

Iowa Court Rules:

Iowa R. App. P. 6.1101	10
------------------------	----

Secondary Sources:

23 Am. Jur., p. 638, Forfeitures and Penalties, par. 47 22

36 Am. Jur. 2d Forfeitures and Penalties § 8 (Aug. 2024 Update) 19

Date, *Black’s Law Dictionary* (12th ed. 2024) 25

48 C.J.S. Intoxicating Liquors § 544 (May 2024 Update) 21

Department of Revenue, *Iowa Program for Alcohol Compliance Training (I-Pact)*
<https://revenue.iowa.gov/education-outreach/alcohol-tobacco/iowa-program-alcohol-compliance-training-i-pact>..... 29

Period, *Black’s Law Dictionary* (12th ed. 2024) 26

S.F. 2261, 80th GA, 2d Sess. explanation (Iowa 2004)
<https://www.legis.iowa.gov/legislation/BillBook?ga=80&ba=S-5068> 25

3 Norman J. Singer, *Sutherland Statutory Construction* § 59.2 (6th ed. 2001).. 19

STATEMENT OF ISSUES

- I. **Iowa Code section 123.50(3) Imposes a Progressive Civil Penalty Scheme for Habitual Violators that is Subject to Strict Construction and Recidivist Principles. Otherwise, the Statute Fails to Operate Effectively. The Appellate Court should Reverse and Remand for the Dismissal of a Second Violation.**

- II. **Alternatively, Iowa Code section 123.50(3) is Void for Vagueness.**

ROUTING STATEMENT

The Iowa Supreme Court should retain this appeal. *See* Iowa R. App. P. 6.1101(2). This appeal involves a substantial issue of first impression: whether a class E retail liquor license holder should be subject to heightened civil penalties for a “second violation” under Iowa Code section 123.50(3)(b), for the sale of alcohol to an underage individual by its employee, when this “second violation” occurred within *mere seconds* after the “first violation” under Iowa Code section 123.50(3)(a), for the sale of alcohol to a different underage minor on the same date. *See* Iowa R. App. P. 6.1101(2)(c). The Iowa Supreme Court has previously noted that it is unclear what constitutes successive violations under a similar progressive civil penalty statute. *See Nash Finch Co., v. City Council of City of Cedar Rapids*, 672 N.W.2d 822, 826 (Iowa 2003) (explaining a similar statute “does not, however, expressly state when a violation should be considered a ‘second,’ ‘third,’ or ‘fourth’ violation by the particular retailer.”). Additionally, Appellants raise a novel issue of whether recidivist statutory principles apply, requiring the imposition of first penalty precede the imposition of the second penalty as explained in *State v. Conley*, 222 N.W.2d 501 (Iowa 1974), should be applied to statutes involving progressive civil penalties against licensees for the same repeated criminal acts of their agents. Iowa R. App. P. 6.1101(2)(c).

NATURE OF THE CASE

Beecher Store Inc. [Beecher] appeals a final agency action holding that it is subject to heightened civil penalties for a “second violation” of its employee selling alcohol to a minor (under Iowa Code section 123.50(3)(b)) when this second violation occurred within mere seconds after the sale to a different minor that constituted a “first violation” under Iowa Code section 123.50(3)(a). *See* D0016, Ruling on Pet. for Judicial Review at 2 (08/09/24). Specifically, Beecher contends the Defendant, Alcoholic Beverages Division [ABD] cannot impose a civil penalty for a “second violation” under a progressive civil penalty regime until the penalty for the first violation is imposed in accordance with recidivist statutory principles. *See* D0008, Br. in Supp. of Pet. for Judicial Review at 3 (03/20/24). Otherwise, the progressive civil penalty statutory schemes, such as 123.50(3), would not operate as written or intended by the legislature to allow licensees to learn and adapt from these “violations.” *Id.* at 6–7. Furthermore, the interpretation of the statute accepted by the District Court allows the ABD to impose cumulative penalties for violations occurring on the same date, contrary to the plain language of the statute and which construction would render the statute impermissibly vague in violation of the due process clause of the United States and Iowa Constitutions. *Id.* at 9–12.

The Administrative Law Judge [ALJ] issued a ruling on February 16, 2023, upholding the imposition of heightened penalties for a second violation, despite noting

that the nature of the progressive civil penalty scheme in Iowa Code section 123.50(3) and explicitly denying support or approval for tactics used in this case to secure a second violation. *See* D0006, Certificate of Agency Record Pursuant to Iowa Code section 17A.19(6) at 117–120 (10/10/23) (Proposed Decision). The Director and the District Court upheld the ALJ’s ruling. *See generally* D0006 at 148–153 (Director’s Final Order); D0016.

This timely appeal follows. *See* D0017, Plf.’s Notice of Appeal (09/05/24).

STATEMENT OF THE FACTS

The underlying facts in this appeal are not in dispute. *See* D0016 at 1. Beecher is an Iowa Corporation which holds a class E retail alcohol license and does business in Dubuque County, Iowa. *Id.*; *see* D0006, Certificate of Agency Record Pursuant to Iowa Code section 17A.19(6) at 3 (10/10/23).

On October 15, 2022, the Dubuque Police Department [DPD] asked two underage individuals, at the same time, to attempt to buy alcohol from Beecher’s store as part of an undercover compliance investigation. *See* D0016 at 1; *see also* D0006 at 100 (Tr. Administrative Hearing at 39:17–20). The DPD was assisted by ABD investigator Brandon Trapp who provided “any expertise on different events that could come up at a liquor license establishment and act as a witness to any possible violations.” D0006 at 100 (Tr. Administrative Hearing at 38:17–20).

Investigator Trapp explained that “The minors entered [Beecher’s] store, [and] went to a cooler. Each one grabbed one alcoholic beverage and then approached the counter to check out.” *Id.* at 101 (Tr. Administrative Hearing at 40:9–12). The minors “basically walked up . . . together” to the same register, and then one of Beecher’s cashiers “checked them each out separately.” *Id.* at 101–03 (Tr. Administrative Hearing at 40:24–41:1, 42:19). Although Beecher’s cashier looked at their ID’s, the cashier did not scan it and did not verify their age. *Id.* at 102 (Tr. Administrative Hearing at 41:15–17). The underage individuals walked out of the liquor store with alcohol in their hand and then turned it over to the police department. *Id.* at 105–06 (Tr. Administrative Hearing at 44:25–45:2).

The DPD issued two citations to Beecher’s clerk for violating Iowa Code section 123.49(2)(b), which were both charged as simple misdemeanors. *Id.* at 47, 55. The first citation was listed at 9:45 on October 15, 2022. *Id.* at 47. The second citation was listed at 9:50 on October 15, 2022. *Id.* at 55. Beecher’s clerk pleaded guilty to both citations on October 19. *Id.* at 48, 54.

The ABD issued two orders, first ordering the civil penalty for a “first violation” under Iowa Code section 123.50(3)(a) on November 8, 2022, and then ordering the civil penalty for a “second violation” under Iowa Code section 123.50(3)(b) on November 15th. *See id.* at 51–53 (first order), *id.* at 15–17 (second order); *see also id.*

at 94–95 (Tr. Administrative Hearing at 33:22–35:13) (explaining when the orders were sent). Beecher timely contested the second violation which began the proceedings for this appeal. *Id.* at 21.

ARGUMENT

I. Iowa Code section 123.50(3) Imposes a Progressive Civil Penalty Scheme for Habitual Violators that is Subject to Strict Construction and Recidivist Principles. Otherwise, the Statute Fails to Operate Effectively. The Appellate Court should Reverse and Remand for the Dismissal of a Second Violation.

A. Error Preservation.

“It is fundamental doctrine of appellate review that issues ordinarily be raised and decided by the district court before we will decide them on appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). However, “[t]he rule is different for administrative law cases.” *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 647 (Iowa 2013). “[E]rror may be preserved if a party raises the issue during an intra-agency appeal and the agency rules on the issue, even if it was not previously raised during the initial agency hearing.” *Brenbaker v. State Bd. of Regents*, 843 N.W.2d 466, 471 (Iowa Ct. App. 2013).

Here, Beecher raised the issue at the initial hearing on whether it was fundamentally unfair to issue a second violation for conduct that occurred within minutes of each other. D0006 at 21. On intra-agency appeal, Beecher specifically argued that Iowa Code section 123.50 is a recidivist statute and that statutory recidivism

principles – that a second violation and its heightened penalties can only be incurred after a first violation’s penalty is imposed – should apply. D0006 at 129–133. Otherwise, the statute failed to carry out its intentions. *Id.* The director issued a ruling on this issue. D0006 at 149–150.

The same argument was raised in Beecher’s petition for judicial review and the subsequent briefing. *See* D0002, Pet. for Judicial Review at ¶¶ 24–28 (09/20/23); D0008, Br. in Support of Pet. for Judicial Review at 4–9 (03/20/24). The district court made a ruling on this issue. D00016, Ruling on Pet. for Judicial Review at 2–5 (08/09/24). Error is undoubtedly preserved.

B. Standard of Review.

Iowa Code chapter 17A governs judicial review of agency actions. *See P.M. Lattner Manufacturing Co. v. Rife*, 2 N.W.3d 859, 865 (Iowa 2024). Beecher raised several different provisions of Iowa Code section 17A.19(10): including a) that the ruling was unconstitutional, beyond the authority delegated to the agency, c) made on an erroneous interpretation of law not clearly vested to the ABD, h) was inconsistent with prior agency precedent, i) the reasoning was so illogical as to render it irrational, and n) was unreasonable, arbitrary, capricious. *See id.*

“The standard of review differs depending on the error alleged.” *Env’tl’ L. and Policy Cntr. v. Iowa Utils. Bd.*, 989 N.W.2d 775, 781 (Iowa 2023). As applied to this error,

Beecher contends that the agency did not correctly interpret Iowa Code section 123.50 in assessing escalating penalties for a second violation. Under published Iowa Court of Appeals precedent, it has been generally said that “the legislature has clearly vested the interpretation of sections 123.49 and 123.50 with the agency.” *Walnut Brewery, Inc. v. Iowa Dept. of Commerce-Alcoholic Beverages Div.*, 775 N.W.2d 724, 729 (Iowa Ct. App. 2009). “Thus, the administrator’s interpretations of the statute at issue are entitled to deference and we may reverse only upon a finding the agency’s interpretation was ‘irrational, illogical, or wholly unjustifiable.’” *Id.* (quoting *Auen v. Alcoholic Beverage Div.*, 679 N.W.2d 586, 590 (Iowa 2004)).

However, “each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes.” *Renda v. Iowa Civil Rights Com’n*, 784 N.W.2d 8, 13 (Iowa 2010). “When a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency, we generally conclude the agency has not been vested with interpretative authority.” *Id.* at 14. This, for example, includes the definition of “day.” See *Ngwangwa v. Tyson Fresh Meats, Inc.*, No. 23-1538, 2024 WL 4615628, *5–6 (Iowa Ct. App. Oct. 30, 2024). Thus, to the extent this appeal is resolved on whether violations that occur on the same date constitutes a period “within two

years,” the Appellate Court’s review should be for errors at law. *Id.*; *see also Renda*, 784 N.W.2d at 13.

C. Iowa Code Section 123.50(3) Imposes a Progressive Civil Penalty Scheme that Should be Subject to Strict Construction and Recidivist Principles.

Iowa Code chapter 123, the Iowa Alcoholic Beverage Control Act, regulates the manufacturing, sale, possession, and transportation of alcohol. To accomplish this goal, businesses and individuals seeking to sell alcohol in Iowa can apply to the ABD for various types of liquor licenses. *See id.* § 123.31 (describing the application for a license); *see also id.* § .30 (explaining the different types of licenses). Aside from creating this licensure scheme, chapter 123 also makes it a crime for a licensee, and their agents and employees, to

Sell, give, or otherwise supply any alcoholic beverage to any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age, to consume any alcoholic beverage.

Iowa Code § 123.49(2)(*b*). “A person violates section 123.49, subsection 2, paragraph ‘h,’ commits a simple misdemeanor.” Iowa Code § 123.50(1).

In addition to imposing criminal penalties on the person that sells liquor to a minor, the chapter also imposes penalties on the licensee associated with the sale. *Id.* § 123.50(3) (“If any retail alcohol licensee or employee of a licensee is convicted or found in violation of section 123.49, subsection 2, paragraph ‘h,’ the director . . . shall, in

addition to criminal penalties fixed for violations by this section, assess a civil penalty”). This vicarious responsibility section imposes on the licensee “progressive penalties for multiple violations of this prohibition, including suspension and ultimately revocation of the [licensee]’s permit.” *Nash Finch Co.*, 672 N.W.2d at 826 (citing a similar statute, Iowa Code section 453A.22, involving penalties for a retailer’s sale of cigarettes to minors); *see also* Iowa Code § 123.50(3)(a–d).¹

Specifically, “a first violation shall subject the licensee to a civil penalty in the amount of five hundred dollars.” Iowa Code § 123.50(3)(a); *see also id.* § .39(4) (“If the cause for suspension is a first offense violation of section 123.49, subsection 2, paragraph ‘h’, the director or local authority shall impose a civil penalty in the amount of five hundred dollars in lieu of suspension of the license or permit.”). “A second violation within two years shall subject the licensee to a thirty-day suspension and a civil penalty in the amount of one thousand five hundred dollars.” *Id.* § 123.50(3)(b). A third violation within three years requires a sixty-day license suspension and a civil penalty of

¹ “The moneys from the civil penalties shall be used by the department . . . for the purpose of providing educational programs, information and publications for alcoholic beverage licensees . . . regarding the laws and rules which govern the alcoholic beverage industry, and for promoting compliance with alcoholic beverage laws and rules.” Iowa Code § 123.17(10). One of those programs is the alcohol compliance employee training program. *Id.* § 123.50A.

one thousand five hundred dollars, while a fourth violation within three years requires license revocation. *Id.* § 123.50(3)(c–d).

“Statutes imposing penalties . . . are subject to th[e] rule of strict construction.” 36 Am. Jur. 2d Forfeitures and Penalties § 8 (Aug. 2024 Update); *see also* *Washington v. Dist. of Columbia Dept. of Public Works*, 954 A.2d 945, 948 (D.C.C. 2008) (“It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed.” (quoting 3 Norman J. Singer, *Sutherland Statutory Construction* § 59.2 at 125–26 (6th ed. 2001))). “[I]t is immaterial, for the purpose of the application of the rule of strict construction, whether the proceedings for the enforcement of the penal law, be criminal or civil.” *State v. Stem*, 50 S.E.2d 175, 176 (S.C. 1948).² Iowa Code section 123.50(3) provides civil penalties for a violation of

² Iowa Code section 123.1 does provide that all provisions of the Iowa Alcoholic Beverage Control Act “shall be liberally construed” to effectuate “the protection of the welfare, health, peace, morals, and safety of the people of the state.” However, “such a provision doesn’t allow courts to ignore the ordinary meaning of words in a statute and to expand or contract their meaning to favor one side in a dispute over another.” *Vroegh v. Iowa Dep’t of Corrections*, 972 N.W.2d 686, 702 (Iowa 2022); *see also* *Carreras v. Iowa Dep’t of Transp.*, 977 N.W.2d 438, 454 (Iowa 2022) (Oxley, J., concurring in part and dissenting in part) (“Even a liberal construction of a statute must be based on the language of the statute, not its stated purpose.”). And it merits comment that Chapter 123 includes both statutes of penal (section 123.50(3)) and nonpenal nature. *See, e.g.*, Iowa Code § 123.38 (granting the director discretion to allow a personal representative to operate under a retail alcohol license after the licensee’s

a penal statute, Iowa Code section 123.49(2)(b). Therefore, section 123.50(3) is a penal statute and a strict construction is required. *See State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624, 629 (Iowa 1971) (“[A]n act penal in nature is generally one which imposes punishment for an offense committed against the State.”).

The required strict construction of Iowa Code section 123.50(3)’s progressive penalty scheme reveals that it is a recidivist statute because it provides escalating penalties for repeat violations of a crime. *See Nash Finch Co.*, 672 N.W.2d at 826; *see also Walsh v. Kirby*, 529 P.2d 33, 41 n.13 (Cal. 1974) (*en banc*) (interpreting a similar statute involving escalating penalties for illegal liquor price cutting). In fact, the Iowa Supreme Court has previously construed a statute with a nearly identical progressive penalty scheme evinces “the legislative goal of deterring violations by the same retailer.” *Nash Finch Co.*, 672 N.W.2d at 826 (quoting Iowa Code chapter 453A, which relates to cigarette licensure and sales to minors). Iowa Code section 123.50(3)’s progressive civil penalty scheme reveals “that the Legislature intended to establish a careful gradation of penalties so that persistent violators will be punished more severely than occasional violators.” *Walsh*, 529 P.2d at 41 n.13. Indeed, “the statute is . . . [of a] character intended to serve as a notice or warning as it provides a relatively light penalty for the initial

death); *see also Koscot Interplanetary Inc.*, 191 N.W.2d at 629 (regulations “conducive to the public good” and “absent any penalty” are liberally interpreted).

violation with the threat of more severe penalties should the licensee thereafter fail to conform.” *Id.* at 39.

This is clearly a recidivist purpose. The Iowa Supreme Court has explained that “[r]ecidivist statutes are enacted in an effort to deter and punish incorrigible offenders.” *State v. Conley*, 222 N.W.2d 501, 503 (Iowa 1974). “They are intended to apply to persistent violators who have not responded to the restraining influence.” *Id.* “In accordance with this logic each conviction and sentence which serves as a predicate for application of an habitual criminal statute is viewed as a separate warning.” *Id.* The defining feature of a recidivist statute is that an escalating penalty cannot be assessed “until after conviction of a crime *and imposition of penalty.*” *Id.* at 502–03 (emphasis added).

Requiring the assessment of a penalty for a first violation prior to the imposition of a penalty for a second violation is also consistent with alcoholic beverage laws generally. This is because “[i]n assessing a penalty for violating the laws and regulations governing the manufacture and sale of alcoholic beverages, the enforcing agency should give effect to the major purpose of civil penalty, which is deterrence.” 48 C.J.S. Intoxicating Liquors § 544 (May 2024 Update); *see also Eddy v. Casey’s General Store, Inc.*, 485 N.W.2d 633, 640 (Iowa 1992) (Larson, J., dissenting) (acknowledging that the civil penalties in Iowa Code section 123.50(3) are intended to be deterrents for

licensees). “The theory of prosecutions to recover penalties has been considered to be for the purpose of administering warnings not to continue the acts complained of.” *Winster v. Hardester*, 98 So.2d 629, 631 (Miss. 1957) (quoting 23 Am. Jur., p. 638, Forfeitures and Penalties, par. 47) (applying this theory to a prosecution for a collection of penalties for several unlawful and illegal liquor sales). That “purpose will be sufficiently subserved *when one violation or one default is recovered for*, which shall act as a deterrent on continuing to disregard the statute.” *Id.* (quoting 23 Am. Jur., p. 638, Forfeitures and Penalties, par. 47) (emphasis added).

Instructive is the choice of the California Supreme Court to apply a recidivist approach for a similar liquor license violation statute in *Walsh v. Kirby*. 529 P.2d 33 (Cal. 1974) (*en banc*). In *Walsh*, California’s Department of Alcoholic Beverage Control “filed an accusation in 11 counts charging that on 10 separate occasions from August 31 to October 5, 1971, the licensee sold ‘distilled spirits at retailed to an employee of the (department) at a price less than that provided for in the Minimum Retail Price Schedule duly filed with the department.’” *Id.* at 36. The relevant statute stated that “the penalties imposed by the department for violations of such section shall be confined solely to monetary penalties for each violation committed during 36 consecutive months and shall be in the following amounts: For the first violation, two hundred fifty dollars

(\$250); for the second and subsequent violations, one thousand dollars (\$1,000).” *Id.* at 36 n.4 (quoting Cal. Bus. & Prof. Code § 24755.1).

The California Supreme Court in *Walsh* explained that the Department had clearly acted in an excessive manner by accumulating civil penalties for violations of its liquor price cutting statute. First, the Department was “proceeding against the licensee in a way designed not to induce conformance with” the statute by collecting cumulative penalties. *Id.* at 40. Second, the cumulative penalties were “excessive when measured against the licensee’s conduct and the purposes sought to be achieved by the penalty provisions.” *Id.*

This approach was improper, the *Walsh* Court explained, because “it is evident that the purposes of the statute are further frustrated by the imposition of heavy cumulative penalties upon a retailer when such penalties are used as weapons to effect a de facto revocation of a license without prior adequate notice of wrongdoing to a licensee.” *Id.* at 40–41. Indeed, the Court explained that it was a “particular vice . . . by the department that it would seek a penalty beyond that provided for a first violation in light of the licensee’s previous good record.” *Id.* at 41. It further noted that a tactic of accumulating penalties would “mak[e] the careful graduation of penalties established . . . meaningless.” *Id.* at 41 n. 13; *see, e.g., Kirby v. Alcoholic Bev. Control Appeals Bd.*, 47 Cal.

App.3d 874 (1975) (applying the same rationale to a case in which the department accumulated price lowering violations over a course of three days).

The Appellate Court should employ a similar rationale as described in *Walsh* and its basic recidivist principles described in *Conley* to this case. Proper application of those principles establishes that the October 15, 2022, sales cannot constitute a “second violation” because a penalty for the first violation was not imposed prior to the October 15, 2022, sales. It is undisputed that the sales occurred within mere moments of each other. D0006 at 20, 55. It is also undisputed that no penalty was imposed against Beecher by the Department until—at the earliest—November 8, 2022. *Id.* at 51–53. The Appellate Court should reverse and remand on this ground.

D. The ABD’s Imposition of a Second Violation on the Same Date is Incompatible with Iowa Code section 123.50’s Plain Text, Scheme, and Purpose.

The ABD has generally argued that the imposition of a second penalty is mandatory based on the plain language of the statute. D0011, Resp’t’s Br. in Supp. of Resistance to Pet. for Judicial Review at 6–7 (04/24/24); *see also* D0016 at 4. But this contravenes the statute. An examination of Iowa Code section 123.50 and its relevant provisions aptly demonstrate why the imposition of a heightened penalty for a second violation is improper.

To impose penalties for a second violation under Iowa Code section 123.50(3)(b), that second violation must occur “*within* two years” of the first violation. *Id.* (emphasis added). The term “within” as a statutory provision has been “fairly susceptible of different meanings” in terms of calculating an appropriate timeframe. *Oyens Feed & Supply, Inc. v. Primebank*, 879 N.W.2d 853, 862 (Iowa 2016) (quoting *Jensen v. Nelson*, 19 N.W.2d 596, 598 (Iowa 1945)). However, “within” is clarified by looking at Iowa Code section 123.50(e)(1). *Estate of Butterfield v. Chatuaqua Guest Homes, Inc.*, 987 N.W.2d 834, 838 (Iowa 2023) (explaining that Court’s review the whole statute in defining a term).

There, the Iowa legislature requires that “[t]he date of any violation shall be used in determining the period between violations.” Iowa Code § 123.50(3)(e)(1).³ A date is defined as “the day when an event happened or will happen.” *Date, Black’s Law*

³ The fact that the legislature self-defined how to calculate the period for violations under Iowa Code section 123.50(3) demonstrates that the legislature did not delegate authority to the ABD to interpret this provision. Notably, Senate File 2261, the bill establishing 123.50(3)(e)(1), contained a bill explanation on this requirement. *Star Equipment, Ltd. v. Iowa Dept. of Transp.*, 843 N.W.2d 446, 454 n.3 (Iowa 2014) (“[W]hen the explanation accompanies the text of the bill enacted without a relevant substantive change, the explanation is part of the legislative history that can be examined in our efforts to determine the meaning of the text.”). The bill explanation regarding this provision explains “that for the purpose of determining the length of time between violations, which dictate which penalty shall be applicable, the date of any violation shall be used in determining the period of time between violations.” See S.F. 2261, 80th GA, 2d Sess. explanation (Iowa 2004) <https://www.legis.iowa.gov/legislation/BillBook?ga=80&ba=S-5068>.

Dictionary (12th ed. 2024). The widely accepted plain language definition of a “date” is an indivisible day rather than a specific time on a clock, *e.g.* 9:55, within a particular date. *See State v. Sheets*, 338 N.W.2d 886, 886 (Iowa 1983) (“The general rule is that when the word ‘day’ is used it means calendar day which includes the entire day from midnight to midnight); *accord Ngwangwa*, 2024 WL 4615628 at *5–6; *see, e.g., Lagandaon v. Aschroft*, 383 F.3d 983, 990 (9th Cir. 2004) (“With very limited exceptions, however, common law legal systems have long reckoned periods of legal significant by the calendar, not by the clock.”); *Mason v. Bd. of Educ.*, 826 A.2d 433, 435 (Md. 2003) (“[A] day is usually considered by the law to encompass a single, indivisible moment in time.”); *State v. Stanley*, 67 S.W.3d 1, 3 (Tenn. Crim. App. 2001) (“[T]he general rule for computation of time is that the law knows no fractions of a day.”). A period is further defined as “a length or portion of time.” *Period*, *Black’s Law Dictionary* (12th ed. 2024).

With the words chosen by the legislature now defined, it becomes apparent that the imposition of a second or subsequent violation depends on an examination of the date of the first violation as compared to the date of the act alleged to be a second violation. *See* Iowa Code §§ 123.50(3)(b), (e)(1). Improper application of the statute is the approach taken by the ABD, which is to identify the time of a violation and then compare that time to the time of an alleged second event giving rise to a violation. *Cf. Ngwangwa*, 2024 WL 4615628, *5–6. The first date (of the first violation) occurred on

October 15, 2022. *See* D0006 at 47. The second date (of the “second violation”) occurred on October 15, 2022. *See id.* at 55. No “period of time” can elapse between one, indivisible date. Thus, the second violation has not occurred “within two years” of the first violation because at the time of the second violation, no period of time had elapsed to make the second violation occur “within two years” of the first. *See Oyens Feed & Supply, Inc.*, 879 N.W.2d at 862.

Recognizing the impact of these words in Iowa Code section 123.50(3), as requiring at least a minimum “period of time” to elapse, a day, makes sense considering the intent of the statute. Under this interpretation, a licensee at least has some notice of a violation, and provided a potential opportunity to take swift corrective action to prevent a second violation from occurring. *Walsh*, 529 P.2d at 39; *see also Nash Finch Co.*, 672 N.W.2d at 826. This could be implementing different policies or procedures, providing employee training, or suspension/termination of the underlying employee to prevent a subsequent violation from occurring.

To hold otherwise, imposes severe consequences and “unintended burdens” on licensees without legislative permission. *See* Iowa Code § 4.6(4); *see also Walnut Brewery, Inc.*, 775 N.W.2d at 731 (determining an administrator’s interpretation of Iowa Code section 123.49(2)(b) was illogical when it created unintended burdens on licensees). A police department could send four underage individuals into a licensee’s

store to purchase alcohol in violation of Iowa Code section 147.149(2)(b) from the licensee’s employee(s). Those four convictions or findings would effectively result in revocation of a license, on one date, that the legislature plainly intended to be stretched over a period consisting of at least one date per violation, let alone for violations that are to accumulate over three years. *See* Iowa Code § 123.50(3)(d). That makes for an absurd result that would “mak[e] the careful graduation of penalties established . . . meaningless” contrary to the legislative intent. *Walsh*, 529 P.2d at 41 n. 13. This is particularly true under chapter 123 scheme’s that significantly emphasizes, in two different provisions, that the first violation under 123.49(2)(b) is to not be a suspension. *See* Iowa Code § 123.50(3)(a); *id.* § .39(4).

Allowing the ABD to collect penalties for a “first violation” and “second violation” from the same date also allows the ABD to abrogate a legislatively created affirmative defense, given to licensees under Iowa Code section 123.50(5) for such violations. *See Walnut Brewery, Inc.*, 775 N.W.2d at 725 (concluding that the administrator’s interpretation of Iowa Code section 123.49(2)(b) was illogical after reviewing an impact to an affirmative defense). Iowa Code section 123.50A(1) authorizes the ABD to “develop an alcohol compliance training employee training program . . . for employees and prospective employees of licensees and permittees, to inform the employees about state laws and regulations regarding the sale of alcoholic

beverages to persons under legal age, and compliance with and the importance of laws regarding the sale of alcoholic beverages to persons under legal age.” *Id.* Iowa Code section 123.50(5) incentivizes the completion of alcohol compliance training program by making it a “bar” toward counting a violation under section 123.50(3). Iowa Code section 123.50(5) states:

If an employee of a retail alcohol licensee violates section 123.49, subsection 2, paragraph “h”, the licensee shall not be assessed a penalty under subsection 3, and the violation shall be deemed not to be a violation of section 123.49, subsection 2, paragraph “h”, for the purpose of determining the number of violations for which a penalty may be assessed pursuant to subsection 3, if, at the time of the violation, the employee holds a valid certificate of completion of either the alcohol compliance employee training program pursuant to section 123.50A or a third-party responsible alcohol service program approved by the director, and if the violation involves selling, giving, or otherwise supplying any alcoholic beverage to a person between the ages of eighteen and twenty years of age.

Id. (emphasis added); *see also* Department of Revenue, *Iowa Program for Alcohol Compliance Training (I-Pact)* <https://revenue.iowa.gov/education-outreach/alcohol-tobacco/iowa-program-alcohol-compliance-training-i-pact> (“Establishments choosing to participate in I-Pact training . . . may avoid civil prosecution if an alcohol sale-to-minor occurs in their establishment.”). However, the “licensee *may assert only once* in a four-year period the bar under this subsection against assessment of a penalty” Iowa Code § 123.50(5) (emphasis added).

Under the ABD’s interpretation, the 123.50(5) “affirmative defense” becomes meaningless for violations occurring on the same date.⁴ Under this fact pattern, the provision is no longer a bar to civil prosecution, but it instead becomes a dull tool that may limit the severity of the penalty assessed in 123.50(3). And this affirmative defense might not even be effective to stopping revocation of the license if the police sent five underage individuals on the same date. *See* Iowa Code § 123.50(3)(d). The practical effect of this consequence is that it disincentivizes licensees from partaking in the training program which is designed to reduce violations of Iowa Code section 123.49(2)(b) in the first place.

To conclude, the ABD’s interpretation does not fit within the plain text of Iowa Code section 123.50; and for good reason. The ABD’s approach violates the legislative intent of the progressive civil penalty scheme and creates grave consequences that inhibit or defenestrate several provisions of the statute. The Appellate Court should reverse and remand.

⁴ The result is especially perverted when considering where the funds recovered from civil penalties in Iowa Code section 123.50(3) go. The civil penalties collected under Iowa Code section 123.50 go to “providing educational programs for licensees . . . and for promoting compliance with alcoholic beverages law.” *See* Iowa Code § 123.17(10). One of those programs appears to be the alcohol compliance training program in Iowa Code section 123.50A. In applying the affirmative defense under this fact pattern, a licensee would effectively pay a fine to utilize an affirmative defense that is supposed to be free under Iowa Code. *See id.* § 123.50A(2).

II. Alternatively, Iowa Code section 123.50(3) is Void for Vagueness.

A. Error Was Sufficiently Preserved on Beecher’s Void for Vagueness Argument.

The parties disputed whether error was preserved on Beecher’s void for vagueness argument. *See* D0016 at 5. The District Court erroneously concluded that error was not preserved, and did not address Beecher’s void for vagueness argument.

Id.

“[O]ur error preservation rules were not designated to be hypertechnical.” *In re Detention of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017). Whether “a party fails to cite the specific statute or rule in support of an issue at the district court level is not dispositive of whether the issue has been preserved for appeal.” *State v. Christensen*, No. 09-1457, 2010 WL 5276884, at *2 (Iowa Dec. 17, 2010); *see also Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006) *overruled on other grounds by Alcala v. Marriott Int’l, Inc.*, 880 N.W.2d 705, 708 n.3 (Iowa 2016) (“Error preservation does not turn, however, on the thoroughness of counsel’s research and briefing.”). “Parties to an appeal frequently make novel arguments on preserved issues. Indeed, such arguments are at the heart of appellate advocacy” *State v. Tucker*, 982 N.W.2d 645, 656 n. 2 (Iowa 2022).

Beecher raised the general issue at the initial hearing as to whether it was fundamentally unfair to issue a second violation. D0006 at 21. Beecher's counsel questioned the ABD witnesses regarding ambiguities in policy and procedure for issuing a second violation arising out of the same sting operation. D0006 at 90–92, 103–105 (Tr. Administrative Hearing at 29:14–31:3, 42:24–44:7). The administrative law judge's order noted that the tactics were potentially problematic under Iowa Code section 123.50(3)'s progressive civil penalty structure. *See* D0006 at 119–120.

On intra-agency appeal, Beecher further expanded on this argument by citing *Motif, Ltd. v. Iowa Department of Commerce-Alcoholic Beverages Division*. No. 11-0793, 2012 WL 170211 (Iowa Ct. App. Jan. 19, 2022); *see* D0006 at 132–33. In *Motif*, the Iowa City Police Department sent in two underage individuals, B.R. and K.B., into a bar who were *both* inappropriately served alcohol. 2012 WL 170211 at *1 (After paying for their beers, B.R. and K.B. gave the beers to the officers, left the bar, and waited in the unmarked police car.”). However, the ABD in *Motif* only filed a complaint for a second violation even though two separate transactions violating Iowa Code section 147.149(2)(b) had occurred. *Id.* at *1 (“The complaint noted Bo-James’s October 24, 2008 violation, ‘making this the second violation with a period of two years.’”).

Under the ABD's interpretation of the statute proffered in this proceeding, the ABD in *Motif* was required to pursue a second and a third violation. But the *Motif*

opinion clearly establishes that the ABD did not pursue a third violation, which set up Beecher’s argument on intra-agency appeal that the ABD was applying the progressive penalty provisions in a vague and arbitrary manner. *See generally* 2012 WL 170211. The director of the agency dismissed the argument explaining that the agency, again, had no discretion in issuing a second penalty in this matter despite the approach undertaken in *Motif*. *See* D0006 at 151–52.

The agency record demonstrates that error was sufficiently preserved on the issue of whether the disparate approach taken by the ABD here is irreconcilable with that taken in *Motif*. To interpret section 123.50(3) in a way that permits such disparate enforcement efforts would make the section unconstitutionally void for vagueness. The District Court erred in determining error was not preserved. Remand for determination of this issue is appropriate. *See Schoenberger v. Acuity*, No. 22-1613, 2023 WL 2908622, at *5 (Iowa Ct. App. Apr. 12, 2023) (reversing and remanding after determining that the appellant had preserved error on intra-agency appeal).

B. Standard of Review.

Constitutional questions are reviewed de novo. *State v. Middlekauff*, 974 N.W.2d 781, 791 (Iowa 2022).

C. Iowa Code section 123.50(3) does not Provide Sufficient Guidance and Invites Arbitrary Enforcement in Violation of the Due Process Clause.

The Iowa and United States constitutions protect citizens in Iowa against the deprivation “of life, liberty, or property without due process of law” (hereafter “Due Process Clause”). U.S. Const. amend. XIV, § 1; Iowa Const. art. 1, § 9. Protection afforded by the Due Process Clause “is designed to ensure fundamental fairness in interactions between individuals and the state.” *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). This protection “prohibits enforcement of vague statutes under the void-for-vagueness doctrine.” *Id.* This prohibition applies to statutes imposing either “civil or criminal sanctions.” *Id.*

The void for vagueness doctrine “requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion.” *Id.*; see also *Lewis v. Jaeger*, 818 N.W.2d 165, 184 (Iowa 2012) (“[A] second important prong of void for vagueness doctrine, namely, [is] to prevent the vesting of virtually unlimited discretion in governmental officials.”). The California Supreme Court in *Walsh* was significantly concerned that “the departmental practice complained of could result in the imposition of whatever total penalty the department, arbitrarily or otherwise, deemed to be sufficient before filing an accusation and giving notice that illegal sales must be terminated.” 529 P.2d at 41. The California Supreme Court concluded that “a governmental entity vested with broad administrative powers acts in an arbitrary manner so as to affect capriciously the property or property rights

of persons subjected to its administrative controls it has denied to those persons due process of law.” *Id.*

The same logic from *Walsb* applies in this case. *See Simmons v. State Public Defender*, 791 N.W.2d 69, 74 (Iowa 2010) (“If fairly possible, a statute will be construed to avoid doubt as to constitutionality.”). The ABD and police departments, through their tactics of sending multiple underage individuals to secure multiple violations for a licensee, can arbitrarily decide what level of sanctions a different licensee can receive without even giving them notice of a first violation.⁵ This is particularly true under a chapter that emphasizes a first violation is not supposed to result in a suspension by a licensee. *See* Iowa Code § 123.50(3)(a); *id.* § .39(4). Indeed, a facial reading of the *Motif* case demonstrates that the ABD and a different police department has previously not pursued another additional violation that occurred on the same date under Iowa Code section 123.50(3), even though there were two separate underage individuals for serving alcohol to a minor occurred. 2012 WL 170211 at *1. The ABD’s interpretation of the statute only encourages “arbitrary or discriminatory” enforcement of its laws, and thus, would be unconstitutional if upheld.

⁵ Even the ABD’s attorney acknowledged an open question of “the fairness” related to how the DPD conducted its age-compliance check. *See* D0006 at 73 (Tr. Administrative Hearing at 12:7–11).

CONCLUSION

Iowa Code section 123.50(3) is a carefully designed statute intended to provide escalating civil penalties for repeat offenses. That intention falls apart if a police department and the ABD can unilaterally assess several violations stemming from transactions that occur within mere minutes of each other on a single date. The Appellate Court should reverse and remand to the agency for an order dismissing the entry of the heightened penalty for a second violation.

REQUEST FOR ORAL ARGUMENT

Beecher requests oral argument.

Dated November 15, 2024.

/s/ Kevin C. Rigdon

KEVIN C. RIGDON (#AT0011385)

Direct Dial: (319) 861-8705

Email: crigdon@bradleyriley.com

THEODORE T. APPEL (#AT0014941)

Direct Dial: (319) 861-8769

Email: tappel@bradleyriley.com

OLIVIA A. McGOVERN (#AT0015751)

Direct Dial: (319) 861-8794

Email: omcgovern@bradleyriley.com

of

BRADLEY & RILEY PC

2007 First Avenue SE

P.O. Box 2804

Cedar Rapids, IA 52406-2804

Phone: (319) 363-0101

Fax: (319) 363-9824

ATTORNEYS FOR BEECHER STORE
INC

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies this brief was electronically filed and served on the 15th day of November, 2024 upon the Clerk of Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

John Lundquist
Iowa Attorney General
1305 E. Walnut Street
Des Moines, Iowa 50319
John.lundquist@ag.iowa.gov

*Attorneys for Department of Revenue
Iowa Alcohol Beverages Division*

/s/ Kevin C. Rigdon
Signature

11/15/24
Date

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. 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 Times New Roman in 14-point type and contains 6,506 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Kevin C. Rigdon
Signature

11/15/24
Date