January 13, 2021
Testimony to the **Senate Transportation Committee**
By Jesse H. Walstad, Attorney
Testimony In Opposition to S.B. 2113

Chairman and Members of the Senate Transportation Committee:

My name is Jesse Walstad. I am a criminal defense attorney at the Vogel Law Firm in Bismarck. I write in opposition to S.B. 2113 and recommend a **DO NOT PASS**. S.B. 2113 invites the Legislative Assembly to create a due process exception in conflict with the uniform holdings of the North Dakota and United States Supreme Courts relating to the procedural and substantive rights of licensed motorists. Granting the Department of Transportation this sweeping unilateral authority would significantly erode due process, diminish and conflict with the procedural safeguards of the Administrative Agencies Practice Act ("AAPA"), and give way to a host of practical concerns for which no reliable solution exists.

S.B. 2113 is of dubious constitutional validity. It is a fundamental concept of our jurisprudence that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[1] The North Dakota Supreme Court has long recognized driver's licenses as a protectable property interests that trigger procedural due process protections.[2] The North Dakota Supreme Court has held motorists are entitled to an in-person hearing, and that the Department cannot unilaterally waive that right.[3] The Legislative Assembly should not accept the Department's invitation to overrule decades of due process jurisprudence. Eliminating in-person hearings would substantially erode procedural process in all administrative hearings, elevate the risk of erroneous deprivation of substantial private interests, and diminish the credibility of the Department and the administrative hearing process in North Dakota.

S.B. 2113 also conflicts with the procedural safeguards of the AAPA found in N.D.C.C. ch. 28-32. Under the AAPA, "a formal hearing is required whenever the administrative agency acts in a quasi-judicial capacity unless the parties either agree otherwise or there is no dispute of a material fact."[4] "At any hearing in an adjudicative proceeding, the parties shall be afforded opportunity to present evidence and cross-examine witnesses."[5] "To the extent necessary for full disclosure of all relevant facts and issues, the person presiding at the hearing shall afford to all parties and other persons allowed to participate the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence."[6] Under the AAPA "[n]o information or evidence except that which has been offered, admitted,

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[1] *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

[2] See generally, *Morrell v. N.D. Dep't of Transp.*, 1999 ND 140, 598 N.W.2d 111; *Sabinash v. Director of Dept. of Transp.*, 509 N.W.2d 61, 63 (N.D.1993); *Kobilansky v. Liffrig*, 358 N.W.2d 781 (N.D.1984).

[3] *Landsiedel v. Dir., N.D. Dep't of Transp.*, 2009 ND 196, ¶ 12, 774 N.W.2d 645 ("[A]n ordinary reading of N.D.C.C. § 39-20-05 demonstrates the Legislature intended the Department to conduct in-person hearings, and the Department cannot unilaterally determine hearings will be conducted telephonically."); see also *Wolfer v. N.D. Dep't of Transp.*, 2010 ND 59, ¶ 15, 780 N.W.2d 645 ("In testimony by telephone the image of the witness cannot be seen nor does it disclose if the witness is using or relying upon any notes or documents and, as a result, meaningful communication is effectively curtailed or prevented […] Above all, in testimony by telephone the trier of facts is put in a difficult, if not impossible, position to take into account the demeanor of the witness in determining the witness' [sic] credibility.").

[4] *Steele v. N.D. Workmen's Comp. Bureau*, 273 N.W.2d 692, 701 (N.D. 1978).

[5] N.D.C.C. § 28-32-21(2); see also *People to Save the Sheyenne River, Inc. v. N.D. Dep't of Health*, 2005 ND 104, ¶ 14, 697 N.W.2d 319.

[6] N.D.C.C. § 28-32-35.

and made a part of the official record of the proceeding shall be considered by the administrative agency."[7] In essence, a "fair hearing" under the AAPA requires a reasonable opportunity for a party to meaningfully confronting witnesses and evidence against them and to present witnesses, evidence, and arguments in their defense in a fair, accessible, and effective way. For a variety of technical and practical reasons remote administrative hearings dramatically increase the risk of deprivation of these fundamental statutory and constitutional rights. When a party has not been given a meaningful opportunity to confront, test, and explain evidence against the party and to present evidence and argument in the party's own defense, the party has been deprived of a fair hearing.[8] In practice, unilateral deprivation of in-person administrative hearings will result in fundamentally unfair hearings in conflict with the basic precepts of the AAPA thereby undermining the Department's credibility and denying North Dakota citizens due process of law.

At its most basic form, an administrative hearing is intended to be a truth-finding process. Granting the Department the unilateral authority to eliminate in-person administrative hearings fundamentally impairs that process and diminishes the credibility of the outcome. During the COVID-19 pandemic, my clients and I have observed the practical concerns and obstacles of electronic administrative hearings first hand. During one telephonic administrative hearing, the call dropped during my cross examination of the officer, it dropped again in the middle of my arguments in defense of my client. I have also observed multiple occasions when meaningful examination of material witnesses has been impaired and in some cases rendered impossible by the practical difficultly of refreshing recollection with a document, audio, or video under the technical constraints of the remote hearing platform. As a practical matter, remote hearings make it extraordinarily difficult to introduce full and complete evidence into the record. As a result, it fundamentally undermines the truth-finding process to the great disadvantage of the public who depend on the Department, not only to get the job done, but to do the job fairly, accurately, and legally.

Granting the Department unilateral authority to conduct administrative hearing by electronic means significantly disadvantages individuals of limited means, those without easy access to the requisite technology, and those who may lack the prerequisite technical proficiency for meaningful participation. As an attorney with easy access to reliable technology who has conducted numerous hearings electronically during the COVID-19 pandemic, I continue to encounter unexpected obstacles in nearly every electronic hearing. I have no doubt the obstacles presented by remote hearings would deprive the average North Dakota motorist, without similar experience and access to technology of a fair and meaningful opportunity to defend themselves.

During the 2017 Legislative Assembly, this Committee wisely recommended a Do Not Pass on a nearly identical bill, H.B. 1129, that like S.B. 2113, had the potential to grant the Department unilateral authority to conduct administrative hearings telephonically or by other electronic means. H.B. 1129 went on to fail in the Senate with a vote of 0 yeas to 45 nays. I respectfully urge this Committee to stand firm to its wise prior resolve to uphold the due process rights of our North Dakota motorists and recommend a **DO NOT PASS** on S.B. 2113.

Respectfully,

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[7] N.D.C.C. § 28-32-24(2).

[8] *Mun. Servs. Corp. v. State By & Through N.D. Dep't of Health & Consol. Labs*, 483 N.W.2d 560, 565 (N.D. 1992).