

Testimony in opposition to SB 2113 before the Senate Transportation Committee
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Chairman Clemens and Members of the Senate Transportation Committee:

I am an attorney in private practice in Bismarck, focusing in the areas of criminal and DUI defense. I respectfully submit this testimony in opposition to SB 2113, which proposes amendments to three different statutes so as to allow the North Dakota Department of Transportation (Department) to conduct administrative hearings by electronic means at the discretion of the hearing officer.

As a matter of constitutional law, any time a person's liberty interests (such as their driving privileges) are at risk by governmental action, they are entitled to due process. This consists of notice and an opportunity to be heard. Inherent in the guarantee of due process is the requirement that the opportunity to be heard be substantively meaningful.

Administrative hearings are already heavily slanted in favor of the Department. The hearing officers are not independent magistrates. They are employees of the Department. They swear in witnesses, (typically the arresting or citing officer) and conduct all witness examinations on behalf of the Department. They present documentary evidence on behalf of the Department. They rule on all evidentiary issues and objections. They decide all questions of fact. They decide all questions of law. They issue final orders. They are, in essence, functioning as the prosecutor, judge, and jury all at the same time.

The ability to have these proceedings in-person is critical to the preservation of any meaningful due process that still exists in the process. In-person hearings allow for the driver, or an attorney on their behalf to clearly hear and observe the witness. Facial expressions, body language, and other non-verbal communications can be as critical to the taking of testimony as verbal statements. Testifying officers frequently rely upon or refer to reports or other documents during testimony, and in-person proceedings allow examination of those documents. In-person proceedings also allow examination of physical documents and exhibits that the hearing officer is relying upon or referring to during the course of the hearing. Occasionally, video evidence (e.g. from an officer's in-car recording system) needs to be played during a hearing as part of the record, something that is only feasible with in-person proceedings.

Proceedings held by electronic means severely limit or completely eliminate these protections. You cannot see or hear witnesses in an electronically conducted hearing the same as you can when in-person. You cannot examine documents or present video evidence the same as you can when in-person. Technology issues with electronic hearings are also a frequent problem, including poor or dropped cellular reception, internet interruptions or strength issues, and video / audio lags. These limitations not only make proceedings more difficult to conduct, but they can also jeopardize the ability to keep a clear and accurate record of the proceedings for later review. In summary, electronic proceedings are far more vulnerable to problems that dilute preservation of meaningful due process.

Another problem with SB 2113 is that it vests absolute and sole discretion in the hearing officer to decide if a hearing will be held in-person or electronically. There may

occasionally be instances where an electronic proceeding may be most appropriate (e.g. inclement weather making travel unsafe). However, the propriety of conducting a hearing electronically should be determined on a case-by-case basis under particularized facts with the consensus of all parties rather than being a matter of statute or within the sole discretion of the hearing officer.

On March 26, 2020, Governor Burgum issued Executive Order 2020-11, which temporarily suspended in-person Department administrative hearings in direct and limited response to the COVID-19 pandemic. This was never intended to be permanent, as established by Executive Order 2020-44, issued on December 18, 2020 and terminating the previous suspension of in-person proceedings. Unlike the Governor's Executive Order, SB 2113 is not in response to COVID-19. It would not be temporary. It would implement long-term changes that materially impede meaningful due process.

This is the second time that the Department has proposed legislation that would allow hearings to be conducted in an electronic format as determined by the hearing officer. See SB 1129, (65th Legislative Assembly, 2017). That legislation was far narrower than SB 2113, as it only authorized the use of electronic mediums to conduct hearings where a participant was unavailable to appear in person. That legislation failed. SB 2113, being far more reaching than its predecessor, and having far greater negative impact on due process rights, should also fail.

I respectfully ask that this committee recommend a DO NOT PASS on SB 2113. Thank you for your time and attention.