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Commonwealth of Pennsylvania, DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER LICENSING, Appellant
v.
Stephen MIDDAUGH, Appellee

No. 45 MAP 2019

Supreme Court of Pennsylvania.

Argued: March 10, 2020
Decided: January 20, 2021

OPINION

CHIEF JUSTICE SAYLOR

We allowed appeal to determine whether the Department of Transportation (PennDOT) was precluded from suspending an individual's driving privileges based on a DUI conviction, where there was a lengthy

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delay between the conviction and the time the driver was notified of the suspension.

I.

In March 2014, Appellee was convicted in the Delaware County common pleas court of driving under the influence ("DUI") pursuant to Section 3802(a)(2) of the Vehicle Code. *See* 75 Pa.C.S. § 3802(a)(2) (relating to "general impairment" and prohibiting the operation of a vehicle if the driver has a blood-alcohol content between 0.08% and 0.10% within two hours after driving).[1] The Delaware County Office of Judicial Support – the equivalent in that county of a court clerk's office, *see Middaugh v. PennDOT* , 196 A.3d 1073, 1075 & n.5 (Pa. Cmwlth. 2018) – was required to send PennDOT a record of the conviction within ten days after its occurrence. *See* 75 Pa.C.S. § 6323(1)(i). For reasons that remain unclear, that office waited until early August 2016, twenty-eight months after the ten-day deadline had passed, to notify PennDOT of the conviction. When PennDOT received the notification, it sent Appellee a letter, dated August 23, 2016, informing him that his driving privileges would be suspended for one year beginning in late September 2016. *See id* . § 3804(e) (relating to the suspension of operating privileges upon conviction of a predicate offense such as DUI). The letter added that Appellee had the right to file a timely appeal. *See id* . § 1550(a).

Appellee exercised that right and filed an appeal in the Delaware County Court, challenging the suspension's validity due to the delay involved. The court held a hearing at which Appellee's driving record was entered into evidence, and Appellee was the sole witness. His testimony centered largely on changes in his life between 2014, when his license would have been suspended but for the Office of Judicial Support's delay in reporting the conviction to PennDOT, and 2016.

Specifically, Appellee testified that: in 2014 he was employed as an information-technology professional and lived with his wife; his car was "totaled" the day he was arrested for DUI, and he waited to buy a new one because he was expecting his driving privileges to be suspended; when it appeared that might not occur, he bought a new car; at the time, he could afford such a purchase because he was employed; had his privileges been suspended in a timely manner, he could have relied on his wife to drive him to appointments in her car; now, however, he is divorced, unemployed, and lives alone; he is 61 years old and classified for Social Security purposes as totally disabled due to a neurological disorder ; his condition has worsened since the time of his conviction; his treatment requires regular visits to five doctors; his only income is a monthly Social Security disability payment of $1,621; he needs to drive to attend doctor's appointments and purchase medicine and groceries, because there is no friend or relative available to help with these tasks; he cannot afford to hire a ride for such purposes because his disability income – which is approximately one third of his income when he was employed – would be insufficient for that expense; moreover, his spending already

exceeds his income by about $250 per month. Additionally, Appellee explained that he was expecting his license to be suspended shortly after he pled guilty and did not know the reason for the delay. *See* N.T., Jan. 24, 2017, at 5-24.

The trial court credited Appellee's testimony and ultimately ruled in his favor. In reaching its holding, the court relied on

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Gingrich v. PennDOT , 134 A.3d 528 (Pa. Cmwlth. 2016), which set forth the following rule for situations where the delay is attributable to a court clerk rather than PennDOT:

> [W]here ... a licensee is able to demonstrate all of the following: [(1)] a conviction that is not reported for an extraordinarily extended period of time; [(2)] the licensee has [no further violations of the Vehicle Code] for an extended period; and [(3)] prejudice, it may be appropriate for common pleas to grant relief.

Id . at 535. Applying the standard, the trial court found that the 28-month delay was extraordinary, Appellee did not have any further violations during that period, and Appellee had demonstrated he would be prejudiced by the lateness of the suspension, particularly in view of his medical condition and the impact a suspension would have on it. *See PennDOT v. Middaugh* , No. 2016-8188, Findings of Fact and Conclusions of Law, at 5, ¶¶30-33 (C.P. Del. May 19, 2017).

A divided Commonwealth Court panel affirmed in a published decision. *See Middaugh v. PennDOT* , 196 A.3d 1073 (Pa. Cmwlth. 2018) (*en banc*). The majority initially noted that, where PennDOT is at fault, license suspensions have been judicially set aside where the delay was so protracted that it led the driver to believe no suspension was forthcoming, and the driver relied on that belief to his or her detriment. *See id* . at 1080-81 (quoting, *inter alia* , *PennDOT v. Green* , 119 Pa. Cmwlth. 281, 284, 546 A.2d 767, 769 (1988), *aff'd per curiam* , 524 Pa. 98, 569 A.2d 350 (1990)); *accord Terraciano v. PennDOT* , 562 Pa. 60, 66, 753 A.2d 233, 236 (2000) (citing *Fischer v. PennDOT* , 682 A.2d 1353, 1355 (Pa. Cmwlth. 1996)). The majority observed, however, that when the clerk's office of one of Pennsylvania's sixty judicial districts is responsible for the delay, courts have traditionally been reluctant to provide such relief so as to prevent erosion of the roadway-safety rationale underlying the license suspensions. *See Middaugh* , 196 A.3d at 1081-82 (discussing cases); *accord Pokoy v. PennDOT* , 714 A.2d 1162, 1164 (Pa. Cmwlth. 1998) (indicating that only delays attributable to PennDOT can form the basis for relief). *See generally infra* note 4.

Nevertheless, the majority explained, the advent of electronic reporting has improved the ease with which clerks can transmit notices to PennDOT and detect reporting delays. Thus, the majority continued, it has become more reasonable for reviewing courts to scrutinize lengthy intervals occasioned by a court clerk's failure to notify PennDOT of a predicate conviction within a reasonable time. The majority expressed that this line of reasoning ultimately led to the *Gingrich* decision and its articulation of the above-quoted three-factor test for delays which are not attributable to PennDOT. *See Middaugh* , 196 A.3d at 1082 (discussing *Gingrich*).[2]

The majority clarified that, under *Gingrich* , relief based on a judicial clerk's delay is reserved for "extraordinary circumstances where 'the suspension loses its public protection rationale and simply becomes an additional punitive measure resulting from the conviction, but imposed long after the fact.' " *Id* . at 1083 (quoting *Gingrich* , 134 A.3d at 534). Thus, the court stated that *Gingrich* , in effect, applied a rationale based on due process and fairness, pursuant to which PennDOT may not

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suspend privileges where doing so would no longer meaningfully protect the public and would become additional punishment resulting from the conviction. *See id* . (quoting *Gingrich* ,

134 A.3d at 534). It specified, though, that a court clerk's reporting delay can only be deemed "extraordinary" if it exceeds the suspension period (here, twelve months) plus the ten-day window statutorily prescribed for notification to PennDOT. *See id* . at 1086.[3]

Applying *Gingrich* to the present facts, the majority pointed out that, as the 28-month delay exceeded the suspension period plus ten days, the trial court was permitted to view it as extraordinary. It also agreed summarily with the trial court's conclusion that Appellee's suspension "is not in the interest of protecting the public, but rather will be an additional punishment to be imposed years later." *Id* . at 1087 (quoting *PennDOT v. Middaugh* , No. 2016-8188, Opinion, at 11 (C.P. Del. June 21, 2017)).

Judge Covey filed a concurring and dissenting opinion, agreeing that Appellee was entitled to relief, but disagreeing with the formula fashioned by the majority for the smallest delay that can be deemed extraordinary. She opined, as well, that the *Gingrich* test should be abandoned. In her view, because prejudice is inherent to the suspension of driving privileges, it should not be a factor that can give rise to relief. She concluded that a flexible standard aimed at assessing the threat to public safety in each individual case should be used – for example, by giving substantial weight to whether the driver accrued additional Vehicle Code violations after the conviction which triggered the license suspension. *See Middaugh* , 196 A.3d at 1087-88.

Judge Ceisler dissented, suggesting that *Gingrich* should be overruled and the court should return to the pre- *Gingrich* rule exemplified by *Pokoy* , where only delays attributable to PennDOT can potentially form the basis for relief.[4] In her view, drivers who are uncertain about the status of a pending suspension can seek

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information from PennDOT, and unsafe drivers should not receive a windfall simply because a county court's clerical staff failed to comply with its statutory obligations in a timely manner. *See id* . at 1088-90.

This Court granted allocatur to decide the following issue framed by PennDOT:

> Did the Commonwealth Court err as a matter of law and abuse its discretion in affirming the trial court's order rescinding an operating privilege suspension that was imposed less than three years after [Middaugh]’s driving under the influence (DUI) conviction, where the delay was entirely due to the failure of the Delaware County Office of Judicial Support to timely notify the Department of Transportation of the conviction?

Middaugh v. PennDOT , 652 Pa. 305, ––––, 208 A.3d 460, 461 (2019) (*per curiam*).

II.

When reviewing a trial court's ruling in a license-suspension appeal, we evaluate whether its findings of fact are supported by competent evidence and whether it committed an error of law or abused its discretion. *See Terraciano* , 562 Pa. at 65-66, 753 A.2d at 236. Here, the findings largely tracked Appellee's testimony which, as noted, was expressly credited by the trial court. Beyond this, the court applied precepts set forth in the Commonwealth Court's *Gingrich* decision. Whether that action was proper largely depends on the viability of the *Gingrich* standard. This, in turn, raises an issue of law as to which our review is plenary and *de novo* . *See PennDOT v. Weaver* , 590 Pa. 188, 191, 912 A.2d 259, 261 (2006).

In arguing that the Commonwealth Court's order should be reversed, PennDOT refers to this Court's decisions in *Terraciano* and *PennDOT v. Gombocz* , 589 Pa. 404, 909 A.2d 798 (2006). Those cases involved license suspensions which, like the one in this case, were delayed for years. However, the delays in those matters occurred in the midst of litigation ensuing from the

driver's decision to appeal the license suspension, and were not based on belated notification from PennDOT. The decisions employed a straightforward rule: when the litigation delay is attributable to the driver's inaction, the suspension will be upheld; but when the litigation delay is chargeable to PennDOT, the suspension will be set aside so long as the driver is able to demonstrate two elements: that the delay led the driver to believe no suspension would ultimately issue, and that the driver would be prejudiced by it.[5]

Presently, PennDOT highlights that it lacks statutory authorization to suspend a driver's license until it receives a certified record from the court system. It suggests that, since it cannot be held responsible for such a delay, it should not be judicially restrained from suspending a driver's privileges under those circumstances. PennDOT points out that this principle was expressly recognized in *Terraciano* , which stated that "judicial delay may not be attributable to PennDOT when determining whether there was an unreasonable delay," *Terraciano* , 562 Pa. at 67 n.9, 753 A.2d at 237 n.9 (citing

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Walsh v. PennDOT , 137 Pa. Cmwlth. 549, 553, 586 A.2d 1034, 1036-37 (1991)), and that it was reaffirmed in *Gombocz* , which applied the same rule in holding that PennDOT was permitted to suspend the driver's privileges. *See Gombocz* , 589 Pa. at 409-10, 909 A.2d at 802 (2006). *See* Brief for PennDOT at 11-12.

The statement in *Terraciano* did acknowledge the governing rule in the Commonwealth Court in this regard. However, the case concerned litigation delay, not a delayed initial notice of suspension to the driver. *Gombocz* likewise involved litigation delay, the only difference being that the driver rather than PennDOT had the burden to move the case forward in the common pleas court. This latter situation differs materially from the present one in that the driver always maintained the ability to advance the proceedings toward a final judicial resolution of whether his license would be suspended; it was *his* inaction which resulted in the delay, not that of any governmental entity. In both *Terraciano* and *Gombocz* , then, the threshold question was whether the driver or the government was at fault for the delay.

This Court has never decided a case involving an unreasonably-delayed *initial* PennDOT suspension notice to a driver, nor has it undertaken to resolve whether an extraordinary license-suspension delay arising from a belated report from a court clerk to PennDOT should be treated differently from a situation where PennDOT fails to take timely action in response to a timely report. This latter question is fairly subsumed within the issue framed by PennDOT (quoted above), which emphasizes that the long delay here was attributable to the Office of Judicial Support – again, the equivalent of a common pleas court clerk's office – rather than to PennDOT.

III.

Initially, we note that the statutory scheme presently in issue is mandatory in that it does not leave room for administrative discretion in deciding whether to suspend a driver's operating privileges. In this respect, the General Assembly clarified that certain predicate offenses such as DUI must be reported to PennDOT:

> The clerk of any court of this Commonwealth, within ten days after final judgment of conviction or acquittal or other disposition of charges under any of the provisions of this title or under section 13 of the [Controlled Substance, Drug, Device and Cosmetic Act], including an adjudication of delinquency or the granting of a consent decree, *shall* send to [PennDOT] a record of the judgment of conviction, acquittal or other disposition.

75 Pa.C.S. § 3804(e)(1) (emphasis added). PennDOT is then required to suspend privileges: when a driver is convicted of DUI, upon receiving the report PennDOT "shall suspend the [driver's] operating privileges" for the specified

period of time. *Id* .

This mandatory feature of the system is consistent with the underlying policy objective of enhancing public safety by removing dangerous drivers from the roadways for a defined period of time after a predicate violation. The inconvenience and disruption stemming from a license suspension serves the same purpose by deterring drivers from repeating their dangerous conduct after privileges are restored. *Accord People v. Schaefer* , 154 Ill.2d 250, 182 Ill.Dec. 26, 609 N.E.2d 329, 331 (1993) ("The Illinois legislature has determined that drivers impaired by alcohol or drugs pose a threat to public safety and welfare, and that the suspension of driving privileges represents an appropriate means to deter and remove these problem drivers from the highway." (internal quotation marks and citation omitted)).

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The fact that the clerk of the common pleas court is given only ten days to report the violation reflects a clear legislative intent that suspensions should occur soon after the conviction. Unfortunately, though, the General Assembly did not specify what should occur vis-à-vis the driver's operating privileges when the report is sent beyond the ten-day period. We believe it would be inconsistent with legislative intent to read the statute to suggest that such a report cannot be acted upon by PennDOT. A holding along those lines would allow license suspensions to be thwarted due to administrative failures, including minor ones such as the sending of the report one day late. Notably, even Appellee does not suggest such a result would have been intended by the Legislature. *Cf. Samdahl v. Dep't of Transp. Dir.* , 518 N.W.2d 714, 717 (N.D. 1994) (suggesting "an absurd result" would follow if an intoxicated driver's privileges could not be suspended solely because the notice of such suspension was provided beyond the statutory period). Given the importance of roadway safety to the traveling public, if this is indeed the General Assembly's intent, it will need to so state in more explicit terms.

In light of the above, we read the relevant statutory provisions as requiring license suspensions notwithstanding administrative lapses. This leaves open multiple questions: whether there is any avenue of relief for a driver who receives, after an unreasonable delay, notice that his or her operating privileges are being suspended; if so, whether the availability of such relief depends on which government entity is responsible for the delay – PennDOT or the common pleas court; and whether the driver must demonstrate any additional factors beyond the delay to obtain relief.

A. Due process

As to the first question, although we have concluded that there is no statutory basis for relief, restrictions imposed by the Constitution can limit whether otherwise-valid legislation may be applied in specific circumstances. *See Ladd v. Real Estate Comm'n* , ––– Pa. ––––, ––––, 230 A.3d 1096, 1111 (2020). *See generally Commonwealth ex rel. Corbett v. Griffin* , 596 Pa. 549, 560, 946 A.2d 668, 675 (2008) (explaining that the General Assembly establishes public policy "which this Court enforces subject to constitutional limitations" (citing *Program Admin. Servs., Inc. v. Dauphin Cty. Gen. Auth.* , 593 Pa. 184, 192, 928 A.2d 1013, 1017-18 (2007))). Beginning with *Gingrich* and continuing with the present case, the Commonwealth Court has begun to refer to due process as the basis on which a license-suspension appeal may be sustained in an extraordinary-delay scenario where the delay is not chargeable to PennDOT.[6] In *Gingrich* , the court did not expressly state it was relying on due process. However, it noted that the common pleas court considered the ten-year delay to have given rise to a "patent denial of due process," *Gingrich* , 134 A.3d at 530, and it ultimately rested its decision on the view that a suspension that stale would "los[e] the underlying public safety purpose and now simply [be] a punitive measure ... imposed too long after the fact." *Id* . at 535 ; *accord*

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Middaugh , 196 A.3d at 1083 (characterizing

Gingrich 's holding as being grounded on an "implicit ... due process consideration"). As such, the court's reasoning implicated a rational-basis inquiry. The *Middaugh* decision made the due process rationale express. *See Middaugh* , 196 A.3d at 1087 (indicating that the standard developed in *Gingrich* and applied in the present case sought to balance the legislative goal of removing unsafe drivers from the roads with the constitutional mandate to afford due process in the context of an extraordinary delay). *Accord* Brief for Appellee at 2 (arguing that "due process considerations are applicable in driver license suspension cases").

The United States Supreme Court endorsed this type of means-ends assessment for purposes of the Fourteenth Amendment's Due Process Clause in *Nebbia v. New York* , 291 U.S. 502, 54 S. Ct. 505, 78 L.Ed. 940 (1934).[7] The Court explained that state laws may not be "unreasonable, arbitrary, or capricious," and that "the means selected [to achieve a valid governmental objective] shall have a real and substantial relation to the object sought to be attained." *Id* . at 525, 54 S. Ct. at 511. In more recent years, this Court has viewed such concepts as also pertaining within the Pennsylvania Constitution's due process guarantee, which in turn has been identified as stemming from Article I, Section 1.[8] *See, e.g.* , *Nixon v. Commonwealth* , 576 Pa. 385, 404, 839 A.2d 277, 290 (2003) ; *Gambone v. Commonwealth* , 375 Pa. 547, 551, 101 A.2d 634, 637 (1954). This is, in essence, the rational-basis standard prevailing under the rubric of substantive due process. *See Shoul v. PennDOT* , 643 Pa. 302, 320, 173 A.3d 669, 679-80 (2017) ; *see also id* . at 314-17, 173 A.3d at 676-78 (reviewing substantive due process precepts as applied by this Court). *But see id* . at 333-43, 173 A.3d at 688-94 (Wecht, J., concurring) (offering a developed critique of the continued use of substantive due process to invalidate legislative provisions).[9]

In outlier situations – that is, situations that depart substantially from the ordinary and expected application of a law – due process norms can be invoked to restrain enforcement of a law under the circumstances where it appears that the targeting of the particular person or entity in question will do little to achieve the evident legislative objective. In *Ladd* , for example, this Court reversed the dismissal of a substantive due process challenge to the application of a law regulating real-estate brokerage businesses to a person whose activities were limited to managing several short-term vacation rental properties. The *Ladd* Court noted that the individual's claim sounded in substantive due process. As explained, under that standard the right infringed by the law is weighed against the interest sought to be achieved by its application. *See*

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Ladd , ––– Pa. at ––––, 230 A.3d at 1108 ; *see also Bucks Cty. Servs., Inc. v. Phila. Parking Auth.* , 649 Pa. 96, 116-17, 195 A.3d 218, 231 (2018) (stating that, in addition to asking whether a challenged statute seeks to achieve a valid state objective by means rationally related to it, "a substantive due process analysis requires courts to balance the rights of the individuals subject to the regulation against the public interest" (citation omitted)). This Court ultimately concluded that Ms. Ladd's claim raised a colorable argument that the law's requirements were unconstitutional as applied to her because, in her specific context, its application would be "unreasonable, unduly oppressive, and patently beyond the necessities of the case, thus outweighing the government's legitimate policy objective." *Ladd* , ––– Pa. at ––––, 230 A.3d at 1111 (citing *Gambone* , 375 Pa. at 551, 101 A.2d at 637).[10]

Relatedly, due process incorporates the concept that the government must treat individuals with basic fairness. *See, e.g.* , *N.C. Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust* , ––– U.S. ––––, 139 S. Ct. 2213, 2219, 204 L.Ed.2d 621 (2019) (explaining the Fourteenth Amendment's Due Process Clause is centrally concerned with the fundamental fairness of governmental activity); *Pennsylvania v. Finley* , 481 U.S. 551, 557, 107 S. Ct. 1990, 1994, 95 L.Ed.2d 539 (1987) (referring to "the fundamental fairness mandated by the Due

Process Clause"); *Rogers v. Tennessee* , 532 U.S. 451, 462, 121 S. Ct. 1693, 1700, 149 L.Ed.2d 697 (2001). Like the requirement of a means-end correspondence, this fairness mandate is a facet of "substantive" due process. *See Perry v. New Hampshire* , 565 U.S. 228, 249, 132 S. Ct. 716, 730, 181 L.Ed.2d 694 (2012) (Thomas, J., concurring) (citing cases). *See generally* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule* , 35 HARV. J. LAW & PUB. POL'Y 283, 307 (arguing that the "of law" portion of the phrase "due process of law" was historically understood to encompass a requirement that laws and their implementation must "accord basic fairness and equality" to all individuals).

We find that appeals of license suspensions based on the staleness of the underlying conviction bear some parallels to litigation in which other recognized, but non-fundamental, rights are at stake – such as the right to engage in lawful employment at issue in *Ladd* : as in *Ladd* , such appeals involve as-applied challenges to presumptively valid statutory provisions; the regulation under review affects the continued possession of an important, constitutionally-protected interest;[11] and

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where the suspension is delayed for an extraordinary period of time, the staleness of the predicate conviction tends to diminish the connection between the suspension and the statute's objectives, particularly where there have been no Vehicle Code violations in the interim. *See generally Sec'y of Revenue v. John's Vending Corp.* , 453 Pa. 488, 493, 309 A.2d 358, 361-62 (1973) (observing that remote convictions have little value in assessing a person's present character or likely future conduct). Separately, it would be difficult to contend that fundamental-fairness concerns can never be implicated regardless of how long the government waits to suspend a licensee's privileges in a particular case.[12]

In light of the foregoing, we ultimately agree with the *Gingrich / Middaugh* line of Commonwealth Court decisions to the extent it suggests that a license suspension which is unreasonably delayed through no fault of the driver's can potentially result in a denial of due process.

B. Government entity at fault

We now turn to second question mentioned above: whether the availability of relief can be made to depend on which governmental entity – PennDOT or the clerk of the common pleas court – is at fault for the delay. With regard to the Commonwealth Court's decisions in which that distinction was made, such as *Green* and *Pokoy* , *see supra* note 4, Appellee argues those cases

> can be considered somewhat counter-intuitive in that, from the perspective of the motorist who has been prejudiced by a delay, it makes little difference which government entity ... is responsible for it. Indeed, in suffering through an untimely suspension following a change in personal circumstances, a motorist such as [Appellee] is not likely to even know or care about the actual source of his or her predicament.

Brief for Appellee at 3-4. Thus, Appellee maintains that the intermediate court's decisions in *Gingrich* and the present controversy appropriately recognized that, where a delay is so long as to result in prejudice, the driver is entitled to relief although PennDOT is not at fault. *See id* . at 5.

For its part, PennDOT criticizes the *Gingrich* court for having departed from the Commonwealth Court's previous rule that a suspension may only be invalidated where PennDOT is at fault for the delay. Somewhat inconsistently, PennDOT also notes it elected not to challenge the decision at the time because the delay involved was "too lengthy, regardless of who was at fault[.]" Brief for PennDOT at 14. In all events, PennDOT seeks to distinguish *Gingrich* on the basis that the delay involved

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in the present dispute was shorter than the amount of time Ms. Gingrich waited to receive her suspension notice. In making this distinction, PennDOT additionally takes issue with the *Middaugh* court's bright-line rule that any delay less than or equal to the sum of the suspension period plus the ten-day reporting period is reasonable as a matter of law. *See id* . at 15.[13]

To the extent a delayed notice of suspension is alleged to violate the driver's due process rights, nothing in the above analysis, or in the parties' advocacy, suggests that such allegation may only have merit where the delay is chargeable to PennDOT rather than some other facet of the government. The focus here is on whether relief is due based on an alleged violation of the driver's rights; and as Appellee correctly observes, as far as the driver is concerned the mechanism by which inter-agency communication takes place – ultimately resulting in a notice of suspension – is internal to the government and of little relevance to those rights, so long as the driver is not at fault for the delay. It follows that the locus of a breakdown in that mechanism is also immaterial to an evaluation of whether the driver's rights have been impacted.

Accordingly, we conclude that a claim that a license suspension imposed after an unreasonable delay violates the driver's due process rights stands on the same footing regardless of whether the delay is chargeable to PennDOT or the clerk of the common pleas court.

C. Interim driving record

With that said, in view of the important governmental interests advanced by the statutory license-suspension provisions, in assessing whether relief is due courts should take into account the driver's violations (if any) during the course of the delay. If it appears the driver remains a danger to the public, it will be difficult to argue that the suspension fails to satisfy the means-end requirement – *i.e.* , that due process is offended on the basis that there is little connection between a suspension of privileges and the legislative goal of protecting the public. For present purposes, we need not set forth a *per se* rule that *any* moving violation is fatal to a due process claim regardless of its nature, age, or severity – as here it is undisputed that Appellee had no further violations, and hence, this factor does not detract from his entitlement to relief under a due process theory. We note, however, that the severity of the predicate offense, and the severity and age any further violations, are relevant to the inquiry.

D. Prejudice

We also agree with Commonwealth Court and extra-jurisdictional decisions which have imposed a requirement that the driver demonstrate he or she suffered prejudice from the delay. *See Rea v. PennDOT* , 132 Pa. Cmwlth. 145, 150-51, 572 A.2d 236, 238 (1990) ; *Miller* , 726 S.E.2d at 39, 40 (stating that actual prejudice from the delay must be demonstrated and then balanced against the reasons for

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the delay); *In re Garber* , 357 A.2d 297, 299 (N.J. Super. Ct. App. Div. 1976) (holding that prejudice must be proved as a prerequisite to relief from a delayed suspension); *cf. Dubbelde v. Dep't of Transp.* , 324 P.3d 820, 826 (Wyo. 2014) (indicating that a driver could not establish a violation of procedural due process without demonstrating prejudice from a one-year administrative delay, as there was no reason to believe a different outcome would have been reached absent the delay). Of particular salience is the Iowa Supreme Court's explanation that the "mere passage of time in and of itself" does not violate the driver's substantive rights. *McFee v. Dep't of Transp.* , 400 N.W.2d 578, 581 (Iowa 1987). The court continued that, to hold that a long delay alone is grounds for relief "would promote the dangerous driver's rights over those of the general public and would frustrate the legislature's strongly established goal of removing dangerous drivers from the highways." *Id* .

This precept, however, is subject to a limiting principle whereby an extreme delay such as ten or twelve years may be viewed as *per se*

prejudicial. Thus, the South Carolina Supreme Court in *Hipp* determined that allowing a suspension twelve years after the underlying conviction would in itself violate due process by denying the driver fundamental fairness. *See Hipp* , 673 S.E.2d at 417. Finally, the prejudice must be occasioned by the delay and not by the suspension alone – which, while perhaps prejudicial in itself, is an ordinary part of the governing statutory framework. *See generally Reitz v. Mealey* , 314 U.S. 33, 36, 62 S. Ct. 24, 26-27, 86 L.Ed. 21 (1941) (recognizing that states are permitted to enforce licensing regulations aimed at promoting public safety), *overruled on other grounds by Perez v. Campbell* , 402 U.S. 637, 651-52, 91 S. Ct. 1704, 1712, 29 L.Ed.2d 233 (1971).[14]

IV.

Applying the above precepts, we believe that upon a showing of prejudice, the approximately 28-month delay in this case can appropriately be viewed as denying Appellee his due process rights. Although this is not as long as the delays that have occurred in some of the other matters discussed above, it seems to us objectively unreasonable for a driver to have to wait nearly two and a half years for administrative action that is expected to occur within approximately two months – and would occur during that timeframe where the governmental entities involved are functioning competently, as citizens have a right to expect them to do.

The question becomes, then, whether Appellee demonstrated prejudice in the common pleas court. As detailed above, his credited testimony established that he was expecting his license to be suspended within the ordinary timeframe and, as such, he postponed purchasing a vehicle to replace the one which had been "totaled" in an accident. Further, had his privileges been suspended in a timely manner, his wife could have helped him travel to and from doctor's appointments. By the time his suspension notice arrived, however, he was divorced, his income was insufficient to pay for rides, and no friend or relative was available to provide transportation. Further, his medical condition had worsened

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and he was now treating with multiple doctors.

Under these facts, we conclude that the trial court's finding – that Appellee would suffer prejudice if the suspension were to be imposed at this juncture – is supported by competent evidence of record, and moreover, it demonstrates that prejudice would follow from the fact of the delay itself. Additionally, there is no dispute that Appellee did not accrue any additional Vehicle Code violations after his predicate DUI conviction. We therefore agree with the Commonwealth Court majority that a suspension at this late date will have lost much of its effectiveness with regard to its underlying legislative purposes, result in prejudice which can be attributed to the delay, and ultimately deny fundamental fairness.

V.

Accordingly, the order of the Commonwealth Court is affirmed.

Justices Baer, Donohue and Dougherty join the opinion.

Justice Wecht files a concurring and dissenting opinion in which Justice Todd joins.

Justice Mundy files a dissenting opinion.

JUSTICE WECHT, concurring and dissenting

I agree with the learned Majority that Stephen Middaugh's driving privileges should be restored, but for entirely different reasons. Because the Vehicle Code[1] applies no time limit to PennDOT's obligation and authority to suspend a driver's license upon receipt of a judicial report of a qualifying conviction, we must look outside the Code to find a remedy for extreme unexcused delay. Thus in *Terraciano v. PennDOT* ,[2] this Court correctly held that PennDOT's inexcusable failure for years to advance litigation concerning a driver's mandatory suspension caused prejudice to the subject driver that required relief. However, PennDOT is not at fault for the delay that engendered this case. Instead, we confront delay

occasioned by the Delaware County Court of Common Pleas' Office of Judicial Support,[3] upon whom the Vehicle Code imposes an unequivocal ten-day time limit with no analog in the Code's provisions setting forth PennDOT's obligations. In holding that judicial delay must be treated identically to PennDOT delay as a matter of substantive due process, the Majority effectively obviates the statutory time limit imposed upon clerks to fulfill their reporting obligation and unnecessarily constitutionalizes the inquiry. Under these circumstances, I disagree with the Majority's reliance upon due process principles to address judicial delay. Nonetheless, I concur in the Majority's mandate because my application of the statute according to its terms would lead to the same outcome for Appellee Stephen Middaugh.

This case requires us to interpret the Vehicle Code. "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all

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its provisions."[4] Thus, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."[5] Moreover, "when faced with an issue raising both constitutional and non-constitutional questions, we will make a determination on non-constitutional grounds, and avoid the constitutional question if possible."[6]

Subsection 6323(1)(i) of the Vehicle Code provides in relevant part: "The clerk of any court of this Commonwealth, *within ten days* after final judgment of conviction or acquittal or other disposition of charges under any of the provisions of this title ..., *shall send* to [PennDOT] a record of the judgment of conviction, acquittal or other disposition."[7] The Vehicle Code further provides that PennDOT "*shall* suspend the operating privilege of an individual ... upon receiving a certified record of the individual's conviction."[8] Thus, the clerk's transmittal is necessary to effectuate the mandatory license suspension required for a conviction of, *inter alia* , driving under the influence ("DUI"), the predicate violation at issue in this case.[9]

Incongruously, both clerks of courts and PennDOT have nominally mandatory obligations, but only clerks face a statutory time limit within which to perform their duty. More incongruously still, for decades the Commonwealth court recognized a remedy *only* for egregious delay by PennDOT, the agency upon which the Code imposes *no* specific time limit by which to measure compliance.[10] But judicial delay, despite being subject to an express (and reasonable, if stringent) statutory time limit and causing an indistinguishable injury to the licensee, was deemed irremediable. Among the court's rationalizations for the disparate treatment was that the legislature intended the express time limit imposed upon clerks of court to be read as directory rather than mandatory.[11]

More recently, in *Gingrich* and in this case, the Commonwealth Court has shifted its treatment of drivers whose suspensions are delayed due to judicial, rather than Department, inaction to more closely resemble how it long has assessed delayed enforcement by PennDOT. The principal means by which the lower court has equated PennDOT and judicial delay is by reference to the court's collective views on "sound policy," rather than its treatment of the ten-day mandate as mandatory.[12] In effect, the court has found that PennDOT's obligation to impose the suspension is mandatory simply because it does *not* furnish a time limit, and thus leaves room for courts in their discretion to rectify egregious delay, but the express time limit imposed upon clerks of courts for fulfilling their duty is merely "directory" because to apply it strictly would *eliminate* court discretion to square the statute with judicial

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assessments of public policy. Heads discretion wins, tails the statute loses. But as we often reiterate, courts should not defy statutory language in the interests of whatever policy strikes them as sound.[13] The consequences of

interpreting a statute consistently with its unambiguous terms typically are not our concern unless to do so violates a clear constitutional right or command.

The only policy rationale ever ventured for the pre- *Gingrich* discrepant treatment based upon the source of the delay derived from the Commonwealth Court's speculation that strict enforcement of the ten-day limit in each of the sixty Courts of Common Pleas—on peril of returning a convicted driver to the road before the legislature intended—was impracticable. For example, in *Green* , the court explained:

> The principle [that only PennDOT-occasioned delay should be a basis for relief] is consistent with sound policy. Under the Vehicle Code, [PennDOT] is the agency made responsible for imposition of the sanctions which the law uses to keep unsafe drivers off the highways for stated periods. This court has held that a material breach by [PennDOT] of that responsibility will invalidate the legal effectiveness of the sanction. If [PennDOT] too often failed to meet the responsibility thus focused upon it, the locus of the fault would be clear and executive and legislative remedies could be directed at [PennDOT]. But a very different situation would prevail if the effectiveness of the Vehicle Code sanctions became dependent upon scores of court clerks and hundreds of functionaries within the minor judiciary. This court's rule therefore protects the vehicle safety laws from vulnerability to delays within a system where detection and correction of official failure would be much more difficult.[14]

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Thus, the Commonwealth Court obviated a facially clear statutory mandate that applied to clerks of court because the consequence of adhering to its terms would disserve what it took to be the spirit of the relevant provision, even as it held otherwise with respect to PennDOT delay. Yet the effect of granting relief in the event of delay by either category of actors upon public safety presumably would be the same.

Nonetheless, the Majority correctly observes that what requires a remedy in severe cases of PennDOT delay, where the statute furnishes no way to police such delay or ensure timely action, is the injury to the driver's reasonable reliance upon government actors to fulfill their duties. I find wholly unconvincing PennDOT's suggestion that it suffers some cognizable injury when a dereliction for which it bears no responsibility interferes with its ability to fulfill some standing mandate. PennDOT *has* no unfulfilled mandate until it arises in due course. If a Court of Common Pleas fails to transmit a notice of conviction, PennDOT has no obligation to meet. Individuals have rights, but PennDOT has only duties.

Viewing PennDOT delay in isolation, it seems clear that absent any semblance of statutory guidance regarding the question of timing and delay, the courts must have the authority to intercede to prevent severe injustice, and even PennDOT implicitly concedes as much.[15] Where the statute in question lacks any facial limitation upon such delay, or any provision that provides for a remedy in the event of delay, it is necessary to look elsewhere for a sound basis to avoid rampant unfairness.

What is less clear to me is the Majority's basis for extending its reasoning to judicially-occasioned delay without substantially accounting for the critical distinction between the Code provisions that delineate the judiciary's and PennDOT's respective statutory duties. The Majority appears to avoid *Gingrich* 's mandatory/directory approach entirely, allowing only that the Code provision setting forth clerks of court's obligation "is mandatory in that it does not leave room for administrative discretion in deciding whether to suspend a driver's operating privileges."[16] But the mandatory/directory distinction lurks as a critical implied premise in the Majority's argument. The time-honored principle of constitutional avoidance dictates

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that, where a court confronts a question to which a statutory provision furnishes the answer, the court should not resort to a constitutional solution.[17] Thus, to explain its resort to a constitutional solution, the Majority must find the facially mandatory ten-day reporting obligation inadequate to resolve the question before us. Instead, the Majority concludes that the legislature could not have intended to imperil public safety by ensuring that automatic consequences would attach as a matter of law to the unequivocal derelictions of judicial staff unless it spelled out in painstaking detail how delay should be addressed.[18] No matter how you approach it, the Majority's analysis begins from the implied premise that shall does not necessarily mean shall.

I cannot dispute that this Court and others have acknowledged circumstances in which "shall" serves a directory rather than mandatory purpose. We observed over a century ago that "[t]he word shall in its ordinary sense is imperative. But the intent of the act controls, and, when the spirit and purpose of the act require the word shall to be construed as permissive, it will be done."[19] We also once noted an exception to mandatory treatment of "shall" "when relat[ed] to the time of doing something," which at least suggests a basis to uphold PennDOT's interpretation in this case, given that a time limit for action is at issue.[20] More recently still, a plurality of this Court applied the same distinction to reject a strict account of an Election Code provision providing that a voter transmitting his or her ballot by mail "shall ... fill out, date and sign the declaration printed on" the ballot mailing envelope.[21]

The Commonwealth Court in this case cited *Pleasant Hills* for its observation that deeming the word "shall" directory in a given instance does "not mean that it is optional—to be ignored at will. A directory provision ... must still be followed, but the effect of the noncompliance with that provision would not invalidate the proceedings."[22] As nice as it would be to think that merely knowing that the legislature very much wants a given official to perform a given duty is enough to ensure that he or she will do so, lived experience teaches that a mandate with an incentive structure that comes with an at-best abstract carrot

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and no stick will not function as a mandate.[23]

Time and again, judicial efforts to impose structure on the mandatory/directory inquiry have revealed that it is all but impossible to do so. In *Pleasant Hills* , for example, the Superior Court suggested that the distinction inheres in "the *effect* of noncompliance .... A provision is mandatory when failure to follow it renders the proceedings to which it relates illegal and void; it is directory when the failure to follow it does not invalidate the proceedings."[24] But where, as in this case, we must determine the consequences of a failure to perform a task stated in mandatory language, this distinction begs the question. We cannot determine what the effect of non-compliance is by asking what the effect of non-compliance is.

In *Bell v. Powell* ,[25] we proposed a somewhat different account:

> [Shall] may be construed to mean 'may' when no right or benefit to any one depends on its imperative use, when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction, or when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with vested rights, or conflict with the proper exercise of power by either of the fundamental branches of government ....
>
> In *Bladen v. Philadelphia* , 60 Pa. 464, page 466 [(Pa. 1869)], Mr. Justice Sharwood said:
>
> It would not perhaps be easy to lay down any general rule as to when

> the provisions of a statute are merely directory, and when mandatory or imperative. Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may and often have been construed to be directory.[26]

But this passage is as circular as *Pleasant Hills* . Certainly, directing transmission of a given record "relate[s] to the manner in which [the clerk's] power or jurisdiction ... is to be exercised,"[27] but whether a clerk retains the authority to transmit a record to PennDOT beyond the ten days afforded by the statute is the question at hand. The very range and generality of the numerous considerations the *Bell* Court proposed reveals the futility of any effort to circumscribe judicial discretion to distinguish when a textual command is mandatory or directory in the breach. We should not prefer the arbitrariness that comes with unfettered discretion over even an assured result that, in a court's judgment, embodies bad policy, at least when that result is consistent with a common-sense reading of clear statutory language.

But the foregoing discussion pertains only to the Majority's tacit treatment of

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the express statutory command as less than mandatory in practice. The balance of the Majority's analysis, which proceeds from that premise, is similarly discomfiting to me for reasons I have addressed elsewhere at length.

In questioning the hidden legislative intent that underwrites express statutory language, the Majority reinforces this Court's persistent reliance upon our manifestly flawed decision in *Gambone v. Commonwealth* .[28] Discerning no explicit remedy on the face of the Code for a clerk's patent failure to fulfill his or her duty in the time allotted, and declining to give life to the Code's language by choosing to deem a tardy judicial report invalid for want of statutory authority, the Majority turns instead to substantive due process principles. Noting that this move informed the Commonwealth Court's decision in *Gingrich* , the Majority correctly observes that the court's reasoning in that case "implicated a rational-basis inquiry" that the lower court in this case made express.[29]

The Majority expands upon the lower court's approach by invoking the United States Supreme Court's endorsement of a "means-ends assessment for purposes of the Fourteenth Amendment's Due Process Clause,"[30] which finds its corollary in this Court's own discernment of "substantive due process" principles under Article I Section I of the Commonwealth's own Constitution.[31] The Majority then explains that in certain "outlier" situations, "due process norms can be invoked to restrain enforcement of a law under the circumstances where it appears that the targeting of the particular person or entity in question will do little to achieve the evident legislative objective."[32] The numerous imprecise terms in this one excerpt demonstrate precisely why I have repeatedly voiced my concern with the invocation of substantive due process to license our departure from statutory language in service of judicial assessments of hidden legislative intent or, worse, our own perception of salutary public policy.[33] "The legislature *couldn't* have

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intended that result" is seldom a suitable basis for an interpretation at odds with the statutory text.

I do not disagree that such protections serve an important function in circumstances of gross unfairness in which no colorable reading of the applicable statute offers any recourse. That is why I agree generally that our decision in *Terraciano* , providing for relief from truly excessive and unexcused PennDOT-occasioned delay in imposing a mandatory suspension, is sound. The only alternative to our ruling in that case would be to allow PennDOT absolute impunity, no matter how much harm it causes those whose lives are destabilized by its

inaction. But the Majority does not invoke substantive due process to protect the individual against government overreach, but rather to protect the general public against the vicissitudes of a statutory provision that, rigorously interpreted, protects the individual—in a sense, protecting the legislature from itself.

My principal concern, here and elsewhere, is the resort to such an imprecise doctrinal framework[34] to avoid outcomes a Majority of justices deems undesirable—here the prospect that some irresponsible licensees will remain on the road because a clerk failed to discharge his or her prescribed statutory duty. Our constitutional design, specifically the separation of powers, vests the legislature with the power to conduct precisely the sort of balancing of interests that the Majority undertakes here.

The canonical "outlier" case described by the Majority should be one that requires the application of judge-made law for want of *any* plausible statutory alternative, precisely the circumstances presented by PennDOT delay. But the time-limited mandate the Code imposes upon clerks provides a reasonable alternative to protect against such abuses without resorting to constitutional analyses. Upon the clerk is imposed a certain duty arising from a triggering event, *i.e.* , the transmission to PennDOT of proof of a conviction of a predicate crime under the Vehicle Code, which in turn activates PennDOT's statutory duty to effectuate a mandatory suspension. Thus, the scope of a clerk's obligation is circumscribed by a clear ten-day time limit. Not only does nothing in the statute suggest that the clerk has a duty to report such a conviction *after* the passage of ten days, nothing in the statute compels the conclusion that any authority to do so survives beyond that time limit's expiration.[35]

This may not be the most appealing reading of the Code. This may, indeed, not

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be consistent with the actual will of some or all of the legislators who drafted and voted in support of these provisions. And the consequences may well prove unfortunate. But it would hardly be the first time unfortunate consequences followed from imperfect legislation. It is not our burden or our privilege to ask the constitution questions that have statutory answers.

Indeed, the legal basis to do so is at its nadir where, as here, a reasonable reading of the statute *ensures* the very fairness to the potentially injured party that we usually invoke substantive due process to protect. The Majority's laudable effort to provide a mechanism for relief to licensees harmed by prejudicial government lassitude would be served simply by reading the statute according to its terms. Thus, the Majority's resort to substantive due process does not protect a licensee otherwise defenseless against harms occasioned by government neglect. Rather, it tilts the scales *away* from the driver's interest in the punctilious discharge of government duties (which interest the general public shares) in the name of public safety.

Certainly, it would be preferable for the General Assembly to prescribe both clear time limits to all stages in the suspension process *and* , as it has in other contexts, to specify consequences that follow a government office's failure to comply with those time limits.[36] But if wishes were horses, beggars would ride. Instead, the legislature has left the judiciary with an understandably stringent limit for transmitting proofs of conviction—one that, in its stringency, serves both the public's interest in road safety and convicted drivers' interests in clarity and timeliness. It is incumbent upon this Court to interpret statutes to give meaning and effect to all of their constituent parts. If no consequence befalls a clerk who falls down on the job, the statutory mandate is aspirational at best.

Nonetheless, my reading of the statute leads me to concur in the result reached by the Majority. In light of the clerk's delay in relaying notice of Middaugh's conviction to PennDOT for suspension, the suspension cannot stand under the Vehicle Code. But I dissent from the unnecessary resort to due process that the

Majority prescribes moving forward.

Justice Todd joins this concurring and dissenting opinion.

JUSTICE MUNDY, dissenting

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I respectfully disagree with the framework for analyzing license suspensions endorsed by the majority.

Since the Commonwealth Court rendered its decision in *Gingrich v. Department of Transportation, Bureau of Driver Licensing* , 134 A.3d 528 (Pa. Cmwlth. 2016), I have had reservations about the holding that adequate grounds exist for sustaining a civil license appeal where: (1) a conviction is not reported for an extraordinarily long period of time; (2) the licensee has a lack of further violations for a number of years before the report is finally sent; and (3) the licensee is able to demonstrate prejudice. *Id* . at 534-35.

The difficulty in defining an extraordinary delay became obvious through the development of post- *Gingrich* cases, including the instant matter where the Commonwealth Court created a rule that "if a clerk of courts reports a conviction to the Department within the applicable period of the license suspension plus 10 days, such delay, as a matter of law, cannot be an extraordinarily extended period of time sufficient to meet the first *Gingrich* factor." *Middaugh v. Commonwealth, Department of Transportation, Bureau of Driver Licensing* , 196 A.3d 1073, 1086 (Pa. Cmwlth. 2018).

Rather, as Judge Ceisler noted in her dissenting opinion when this case was before the Commonwealth Court, giving consideration to the length of time between a conviction and notice thereof to PennDOT, "allows licensees to unfairly benefit from a county court clerks' failure to comply with their statutory obligation. It also keeps licensees on the roadways despite their DUI convictions, which contradicts the public safety purpose that license suspensions are intended to serve. That cannot be the result our legislature intended." *Id* . at 1089 (Ceisler, J., dissenting).

As the majority notes, "Appellee explained that he was expecting his license to be suspended shortly after he pled guilty and did not know the reason for the delay." Majority Op. at 428. I agree with Judge Ceisler that "[l]icensees convicted of DUI can always contact the Department to ascertain the status of their licenses if they are concerned about the delay, as Steven Middaugh [Appellee] was in this case." *Middaugh* , 196 A.3d at 1090. In my view, any prejudice that Appellee suffered was due, at least in part, to his own failure to follow through with PennDOT regarding his license suspension. I see no purpose in allowing Appellee to take advantage of a delay he could have prevented simply by sending an email message or making a telephone call.

Therefore, I would use this case to overrule *Gingrich* , and restore prior decisional law holding that in the absence of delay by the Commonwealth, a license suspension may be imposed. *See Pokoy v. Commonwealth, Department of Transportation, Bureau of Driver Licensing* , 714 A.2d 1162 (Pa. Cmwlth. 1998).[1]

Notes:

[1] Appellee's conviction was based on a negotiated guilty plea.

[2] In *Gingrich* , relief was granted where the court clerk waited ten years to report the conviction to PennDOT, and, in the interim, the driver had changed her position to her detriment based on her belief that her license would not be suspended. *See Gingrich* , 134 A.3d at 534-35. The circumstances involved in *Gingrich* are discussed below.

[3] This lower limit of ten days plus the suspension period does not appear in *Gingrich* . It was added to the *Gingrich* test by the panel in the present matter to serve "the need for consistency and certainty in *Gingrich* 's application," *id* . at 1086 n.17, and to balance

objectives relating to public safety with drivers' due process rights. *See id* . at 1086-87.

In deciding that the sum of the two statutory periods constitutes the lower bound for a determination of extraordinariness, the panel referred to the trial court's explanation that drivers should not have to "put [their lives] on hold" indefinitely waiting for a notice of suspension that may arrive years later than contemplated by statute. *PennDOT v. Middaugh* , No. 2016-8188, Opinion, at 10 (C.P. Del. June 21, 2017). The panel expressed that it would not be extraordinary for drivers to have to put their lives on hold during the anticipated period of suspension. *See Middaugh* , 196 A.3d at 1085-86.

[4] In *Green* , the intermediate court explained the rationale for this rule as follows:

> Under the Vehicle Code, [PennDOT] is the agency made responsible for imposition of the sanctions which the law uses to keep unsafe drivers off the highways for stated periods. This court has held that a material breach by [PennDOT] of that responsibility will invalidate the legal effectiveness of the sanction. If [PennDOT] too often failed to meet the responsibility thus focused upon it, the locus of fault would be clear and executive and legislative remedies could be directed at [PennDOT]. But a very different situation would prevail if the effectiveness of the Vehicle Code sanctions became dependent upon scores of court clerks and hundreds of functionaries within the minor judiciary. This court's rule therefore protects the vehicle safety laws from vulnerability to delays within a system where detection and correction of official failure would be much more difficult.

Green , 119 Pa. Cmwlth at 284, 546 A.2d at 769.

[5] A fair reading the cases suggests that the prejudice involved would have to exceed that ordinarily associated with suspended driving privileges, as it would have to stem from the delay itself. Thus, for example, during the seven-year period between her conviction and her license suspension, Ms. Terraciano obtained a commercial driving license from PennDOT and became employed as a bus driver. Because she would have lost her job if her license had been belatedly suspended, she was found to have demonstrated prejudice. *See Terraciano* , 562 Pa. at 68-69, 753 A.2d at 237.

[6] Prior to *Gingrich* , in *Smires v. O'Shell* , 126 A.3d 383 (Pa. Cmwlth. 2015), a group of licensees filed a mandamus petition directed to the Commonwealth Court's original jurisdiction, and alleged that their rights under, *inter alia* , the Due Process Clause, were violated when the clerk of courts reported their convictions to PennDOT five-to-ten years late. The court dismissed the petition, holding that the drivers should instead have filed statutory appeals. *See id* . at 394. Hence, in that matter the court did not reach the merits of the drivers' due process contention.

[7] That provision indicates that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[8] *See* PA. CONST. art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.").

[9] The rational-basis inquiry under the state Constitution is implicated for rights which are not considered fundamental, and it is more exacting than the rational-basis test under the federal Constitution. *See Ladd* , ––– Pa. at –––– & n.14, 230 A.3d at 1108 & n.14. Where fundamental rights are impacted, courts apply strict scrutiny. *See D.P. v. G.J.P.* , 636 Pa. 574, 585, 146 A.3d 204, 210 (2016).

[10] This Court has referred to substantive due process in other situations where the

government's delay in the particular case, rather than the facial validity of a statute, was alleged to have violated individual rights. *See State Dental Council v. Pollock* , 457 Pa. 264, 274, 318 A.2d 910, 916 (1974) (recognizing that an unreasonable delay in the suspension of a dental license, combined with demonstrable harm from the delay, can deny the practitioner due process); *Commonwealth v. West* , 595 Pa. 483, 492, 938 A.2d 1034, 1040 (2007) (observing that Pennsylvania courts have applied a test derived from *Barker v. Wingo* , 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972), when determining whether lengthy delays in criminal cases, such as pre-trial delays or sentencing delays, amount to due process violations).

[11] *See Bell v. Burson* , 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L.Ed.2d 90 (1971) (noting that the ability to drive an automobile constitutes a protected interest whether the state refers to it as a right or a privilege); *see also id* . (recognizing that the continued possession of driving privileges may be essential to the pursuit of one's livelihood); *accord Bragg v. Dir., Div. of Motor Vehicles* , 141 N.H. 677, 690 A.2d 571, 573 (1997) ; *People v. Fisher* , 184 Ill.2d 441, 235 Ill.Dec. 454, 705 N.E.2d 67, 77 (1998) (observing that "drivers have a strong interest in the continued possession of their drivers' licenses").

[12] Other states have also found that due process may be violated where a licensee's driving privileges are suspended after an unreasonable delay. *See, e.g.* , *Hipp v. Dep't of Motor Vehicles* , 381 S.C. 323, 673 S.E.2d 416 (2009) ; *Miller v. Moredock* , 229 W.Va. 66, 726 S.E.2d 34 (2011). In *Hipp* , the South Carolina court determined that allowing a suspension twelve years after the predicate conviction would violate due process by denying the driver fundamental fairness. *See Hipp* , 673 S.E.2d at 417. And in *Miller* , the West Virginia court held that a 17-month delay could give rise to a due process violation if prejudice were to be demonstrated on remand. *See Miller* , 726 S.E.2d at 41. In both matters, like here, the delay was not the fault of either the driver or the state department of motor vehicles. *But cf. Alvarez v. Div. of Motor Vehicles* , 249 P.3d 286 (Alaska 2011) (finding that a two-and-a-half year delay did not violate procedural due process as required by *Mathews v. Eldridge* , 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)).

[13] PennDOT appears to misapprehend the rule as stating that a delay greater than that period of time is *per se* unreasonable. *See id* . at 16 ("[N]owhere in its *Middaugh* decision does the Commonwealth Court explain why a delay of one year and ten days is permissible, but a delay of one year and eleven days is not.").

As for PennDOT's efforts to distinguish *Gingrich* , we note that they are unnecessary. Neither PennDOT nor this Court has previously endorsed the holding in *Gingrich* , and PennDOT was not under any obligation to seek further review in that matter on pain of waiving its subsequent ability to argue that *Gingrich* was wrongly decided.

[14] We recognize that *Terraciano* spoke in terms of affording "equitable relief" where an unreasonable delay caused a licensee to believe that her operating privileges would not be suspended. *Terraciano* , 562 Pa. at 66, 753 A.2d at 237. However, we find the Commonwealth Court's present invocation of due process and fundamental fairness to be more apt for the reasons given.

[1] *See* Act of June 17, 1976, P.L. 162, No. 81, *codified as amended* , 75 Pa.C.S. §§ 101, *et seq* .

[2] 562 Pa. 60, 753 A.2d 233 (2000) ; *see* Maj. Op. at 430–32.

[3] The Office of Judicial Support is that court's equivalent of the clerk of court in other jurisdictions. To harmonize my discussion with the relevant statutory language, hereinafter I refer to clerks and clerks of court.

[4] 1 Pa.C.S. § 1921(a).

[5] *Id.* § 1921(b).

[6] *In re* "*B,*" 482 Pa. 471, 394 A.2d 419, 421-22 (1978).

[7] 75 Pa.C.S. § 6323(1)(i) (emphasis added).

[8] *Id* . § 3804(e)(1)(emphasis added).

[9] *See Id*. § 3804(e)(1)(i).

[10] *See* Maj. Op. at 429 (citing *inter alia PennDOT v. Green* , 546 A.2d 767 (Pa. Cmwlth. 1988) ; *Pokoy v. PennDOT* , 714 A.2d 1162 (Pa. Cmwlth. 1998)); *see also Gingrich v. PennDOT* , 134 A.3d 528, 531-34 (Pa. Cmwlth. 2016) (*en banc*) (reviewing at length the relevant line of cases establishing disparate treatment).

[11] *Gingrich* , 134 A.3d at 533-34.

[12] *See Middaugh v. PennDOT* , 196 A.3d 1073, 1080-82 (Pa. Cmwlth. 2018) (*en banc*).

[13] *See , e.g. , Hosp. & Healthsys. Ass'n of Pa. v. Commonwealth* , 621 Pa. 260, 77 A.3d 587, 603 (2013) ("[T]his Court is not tasked with evaluating the wisdom of [the General Assembly's] policy choices."); *Williams v. GEICO* , 613 Pa. 113, 32 A.3d 1195, 1204 (2011) ("[I]t is not the proper function of this Court to weigh competing public policy interests; rather that task is best suited for the legislature."). Notably, those who would preserve the disparate treatment that prevailed before *Gingrich* rely upon the same policy concerns. Justice Mundy, for example, would continue to honor the arbitrary distinction between judicial and PennDOT delay, relegating the prejudiced driver to bystander status—presumably based upon the same concerns for public safety and specious distinction between the ability to police delay in the judiciary and the ability to do so in PennDOT relied upon by the pre-*Gingrich* cases that she endorses. But in a feint even those earlier cases did not rely upon, Justice Mundy further endorses the view that "licensees convicted of DUI can always contact the Department to ascertain the status of their licenses if they are concerned about the delay." Diss. Op. at 448 (quoting *Middaugh* , 196 A.3d at 1090 (Ceisler, J., dissenting)). This approach not only would punish drivers who, lacking the sophistication to know what *should* have happened, would discern no cause to self-report even if they were predisposed to do so, but also would shift the clerk's burden to satisfy his or her duty to the person who finds himself at the law's sharp end. Justice Mundy cites no authority to support putting the onus for identifying and curing government derelictions upon the party in the breach.

[14] *Green* , 546 A.2d at 769 ; *see Middaugh* , 196 A.3d at 1081 ("Although [Subsection] 6323(1)(i) does contain a 10-day reporting requirement, there was concern that strictly enforcing this requirement by invalidating license suspensions that were not reported within 10 days would undermine public safety."); *PennDOT v. Claypool* , 152 Pa.Cmwlth. 332, 618 A.2d 1231, 1233 (1992) ("[T]ying the department's attempts to keep unsafe drivers off the road to the performance of court clerks, over whom the department has no power to supervise or reprimand, is unsound policy."). Notably, no court has ever compared the number of "functionaries" in PennDOT and in the courts who have responsibility for some aspect of the suspension process, the scope of their responsibilities, how thinly they may be spread, or why the executive and legislative remedies available to address PennDOT derelictions are not equaled by similar remedies available to individual Common Pleas Courts' clerks and their President Judges, as well as this Court's broad supervisory authority over the unified judiciary. *See Renner v. Court of Common Pleas of Lehigh Cty.* , --- Pa. ----, 234 A.3d 411, 422 (2020) ; *cf. Middaugh* , 196 A.3d at 1089 (Ceisler, J., dissenting) (asserting that "county court clerks should be accountable for fulfilling their statutorily required reporting obligation," but worrying that "whether an individual's license suspension is sustained depends, in large part, on the caprice, efficiency, and attitude of county court clerks," without considering the prospect that long before *Gingrich* the same was true of PennDOT "functionaries," at least provided their delay was measured in months rather than years). That instances of PennDOT delay and judicial delay alike recur in our case law should militate against harboring undue optimism about Department accountability and internal enforcement.

[15] *See* Maj. Op. at 436–37 (quoting Brief for PennDOT at 14) (conceding that the ten-year delay in *Gingrich* was "too lengthy, regardless of who was at fault").

[16] *Id* . at 432. The word "directory" does not appear anywhere in the Majority's opinion, even in its review of the Commonwealth case law in which the mandatory/directory distinction looms large.

[17] *See In re "B," supra* .

[18] *See* Maj. Op. at 433 ("Given the importance of roadway safety to the traveling public, if this is indeed the General Assembly's intent, it will need to so state in more explicit terms.").

[19] *Commonwealth ex rel. Bell v. Powell* , 249 Pa. 144, 94 A. 746, 748 (1915) (cleaned up).

[20] *Francis v. Corleto* , 418 Pa. 417, 211 A.2d 503, 509 (1965) (quoting *Borough of Pleasant Hills v. Carroll* , 182 Pa.Super. 102, 125 A.2d 466, 468 (1956) (*en banc*)) (emphasis in original).

[21] 25 P.S. § 3146.6(a) ; *see In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election* , ––– Pa. ––––, 241 A.3d 1058, 1071 (2020) (Opinion Announcing the Judgment of the Court) ("It has long been part of the jurisprudence of this Commonwealth that the use of "shall" in a statute is not always indicative of a mandatory directive; in some instances, it is to be interpreted as merely directory."); *id* . at 1073 (holding that to choose whether to apply a mandatory or directory interpretation to the word "shall" the court must "determine whether the intent of the General Assembly was clear" and applying an election-specific balancing test involving whether a voter's failure to satisfy a statutory mandate results in a "minor irregularity" or contravenes "weighty interests"). *But see id.* at 1073 (Wecht, J., concurring and dissenting) (noting "my increasing discomfort with this Court's willingness to peer behind the curtain of mandatory statutory language in search of some unspoken directory intent").

[22] *Middaugh* , 196 A.3d at 1081-82 (cleaned up) (citing *Claypool* , 618 A.2d at 1233).

[23] As I recently observed:

> [I]f we are to maintain a principled approach to statutory interpretation that comports with the mandate of our Statutory Construction Act, if we are to maximize the likelihood that we interpret statutes faithfully to the drafters' intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all.

Pa. Dem. Party v. Boockvar , ––– Pa. ––––, 238 A.3d 345, 391 (2020) (Wecht, J., concurring).

[24] *Pleasant Hills* , 125 A.2d at 469 (emphasis in original).

[25] 249 Pa. 144, 94 A. 746 (1915).

[26] *Id* . at 748 (cleaned up).

[27] *Id* .

[28] 375 Pa. 547, 101 A.2d 634 (1954).

[29] Maj. Op. at 433–34.

[30] *Id* . at 433–34 (citing *Nebbia v. New York* , 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934)).

[31] *See* Pa. Const. art. I § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."); *see also* Maj. Op. at 433–34.

[32] Maj. Op. at 434.

[33] *See Shoul v. PennDOT* , 643 Pa. 302, 173 A.3d 669, 688-92 (2017) (Wecht, J., concurring) (citing this Court's persistent reliance upon *Gambone* , and by extension its tacit embrace of the United States Supreme Court's reasoning in *Lochner v. New York* , 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), for its intrusive account of rational basis-review as having resulted in the doctrine's "amorphous and inconsistent

application," and observing that, "[a]lthough we are of course the arbiters of constitutionality, we do no violence to that role when we defer prudentially to legislative policymaking"); *see also Ladd v. Real Estate Comm'n of the Commonwealth* , ––– Pa. ––––, 230 A.3d 1096, 1116-1123 (2020) (Wecht, J., dissenting) (expanding upon the same concerns). As I noted in *Shoul* , shortly after our decision in *Gambone* embraced a *Lochner* -inflected account of substantive due process, the United States Supreme Court began substantially to chip away at *Lochner* 's expansive account of judicial authority to second-guess legislative judgments. *See Shoul* , 173 A.3d at 690 (reviewing this evolution away from *Lochner* , beginning with *Williamson v. Lee Optical of Okla., Inc.* , 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)). Nonetheless, in myriad cases, most recently *Shoul* and *Ladd* , this Court has reified the *Gambone* doctrine for a half century past the expiration of the shelf life of the cases that nourished it.

[34] As is often true in cases relying upon substantive due process to interrogate the legislature's "true" intent, the Majority's analysis is replete with qualitative terms that read as an invitation to broad judicial discretion. *See* Maj. Op. at 433–34 (quoting the Court's *Lochner* era decision in *Nebbia* , 291 U.S. at 525, 54 S.Ct. 505) (state law must have a "real and substantial relation to the object sought to be attained"), 434 (identifying outlier cases as "those that depart substantially from the ordinary and expected application of a law," and citing judicial authority to preclude enforcement of the law where "it appears that the targeting of the particular person or entity in question will do little to achieve the evident legislative objective"), 435 ("[T]he government must treat individuals "with basic fairness"). Of course, courts long have recognized fairness as a quality within courts' province to discern under certain circumstances. My point is merely that because these terms are so elusive, and so readily invite arbitrariness, they should be a last resort for use only in cases in which no statute offers a tangible basis for decision.

[35] In this regard, arguably, the better constitutional fit may be procedural due process. The legislature has set forth specific procedures to be followed before a suspension may be imposed, the first step of which is a predicate conviction and the second of which is transmission of notice to PennDOT by a time certain. Failure to comply within the time limit patently falls outside the legislature's grant of authority. Accordingly, a clerk's attempt to exercise that authority past the time limit lacks statutory authorization, and is void *ab initio* . *Cf. generally Luke v. Cataldi* , 593 Pa. 461, 932 A.2d 45, 51 (2007). Consequently, no duty or authority ever vests in PennDOT to impose the suspension. If official action is void *ab initio* , no explicit remedy need be specified because the remedy is self-evident. To be clear, this argument has never been considered in this case, is not presented now, and is unnecessary to my rejection of the Majority's invocation of substantive due process. As I argue throughout this Opinion, to say that official authority to perform a statutorily-authorized act expires at the conclusion of the time allotted for doing so does not require resort to constitutional principles.

[36] *See* 75 Pa.C.S. §§ 1535(c) (providing that any points PennDOT attempts to apply to a licensee's driving record more than six months after the underlying conviction are "null and void"), *Id* . § 1541(a) (authorizing a court to stay the effect of a mandatory suspension during the pendency of an appeal upon a showing of hardship). For example, the General Assembly might provide that the period of suspension begins to run at the expiration of ten days regardless of whether notice has been served, but that only upon notice will the licensee's privilege be suspended. Thus, in the case of a one-year suspension, ten days after the judgment of sentence is entered, the one year clock begins to run. If the licensee does not receive notice until six months have passed, then his or her privileges will be suspended only for the remaining six months of that period.

[1] I respectfully disagree with the position set forth in the concurring and dissenting opinion

that the distinction between delay caused by the clerk of court and PennDOT is arbitrary. Rather, the distinction is a rational one based on *PennDOT v. Green* , 546 A.2d 767, 769 (Pa. Cmwlth. 1988) (detection and correction of official failure by PennDOT materially different from detection and correction of such failure by hundreds of functionaries within the minor judiciary).

I further note that unlike Justice Wecht, I do not believe that the clerk of court's failure to report Appellee's DUI conviction within ten days affects the validity of his license suspension. Accordingly, my observation that Appellee could have mitigated any prejudice resulting from the delay by inquiring about its status does not place a burden upon him. Rather, it recognizes that Appellee could have taken steps to move the process forward but instead chose not to do so. Regardless of when PennDOT receives notice of the conviction, and regardless of whether the initial notification is by the clerk of court or through an inquiry by the licensee, the result is the same, a valid one-year suspension.
