IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NO. 19-1421

SETI JOHNSON, *et al.*, on behalf of themselves and those similarly situated,
Appellants/Plaintiffs,

v.

TORRE JESSUP, Commissioner, Division of Motor Vehicles,
Appellee/Defendant.

On Appeal from the United States District Court for the
Middle District of North Carolina
Case No. 1:18-cv-00467

OPENING BRIEF FOR APPELLANTS/PLAINTIFFS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1421 Caption: Seti Johnson et al. v. Torre Jessup

Pursuant to FRAP 26.1 and Local Rule 26.1,

Seti Johnson, Marie Bonhomme-Dicks, Sharee Smoot, and Nichelle Yarborough
(name of party/amicus)

who is Appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Samuel Brooke Date: August 19, 2019

Counsel for: Plaintiffs-Appellants

CERTIFICATE OF SERVICE

****

I certify that on April 19, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Samuel Brooke (signature) August 19, 2019 (date)

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INTRODUCTION

Hundreds of thousands of individuals have had their driver's licenses revoked simply because they cannot afford to pay fines and costs for North Carolina traffic tickets. Section 20-24.1 of the North Carolina General Statutes mandates the automatic, indefinite revocation of a driver's license when a person fails to pay traffic fines and costs. But the law does not require a hearing or any other inquiry into an individual's ability to pay and does not require a determination of willful nonpayment before the Division of Motor Vehicles ("DMV") indefinitely revokes a license. In a state where nine out of ten people rely on a driver's license to pursue their livelihoods, those revoked under this wealth-based system are robbed of a crucial means of self-sufficiency and pushed deeper into poverty.

Plaintiffs filed this lawsuit on behalf of themselves and thousands of similarly situated individuals to challenge the constitutionality of Section 20-24.1 and the manner in which the DMV revokes driver's licenses for non-payment of traffic fines and costs. J.A. 230; 235. Plaintiffs' Amended Complaint asserts that the statute and DMV policy and practice violate the due process and equal protection right against punishment for inability to pay, as articulated under *Bearden v Georgia*, 461 U.S. 660 (1983), and the procedural due process right to adequate pre-deprivation notice. J.A. 230; 267–68. Plaintiffs moved for class certification and a preliminary injunction with accompanying record evidence. J.A. 5. Defendant moved for a

judgment on the pleadings on Plaintiffs' *Bearden* claim, and opposed Plaintiffs' motions for class certification and a preliminary injunction. *Id*.

The district court order that is before this Court granted Defendant judgment on the pleadings as to Plaintiffs' *Bearden* claim and denied Plaintiffs a preliminary injunction, concluding that Plaintiffs had not shown a likelihood of success on the merits of the *Bearden* or procedural due process notice claim.[1] J.A. 401; 430.

As set forth below, the district court's rulings were predicated on a misapplication of established due process and equal protection precedent and constitute reversible errors of law. This Court should therefore reverse the district court's order dismissing Plaintiffs' *Bearden* claim and denying Plaintiffs' request for a preliminary injunction and remand this case with instructions to enter the requested preliminary injunction and reinstate Plaintiffs' *Bearden* claim.

[1] The district court also denied Plaintiffs' request for a preliminary injunction based on their claim that Section 20-24.1 violates their procedural due process right to a pre-revocation opportunity to be heard. While Plaintiffs are not appealing this ruling, they maintain it was erroneous and intend to pursue discovery to develop a fuller factual record showing that Section 20-24.1's reference to a potential hearing fails to ensure that people who cannot afford to pay traffic fines and costs are provided a pre-deprivation hearing before being punished with indefinite license revocation.

JURISDICTIONAL STATEMENT

This appeal arises from a federal class action lawsuit challenging a North Carolina state law that requires the automatic revocation of the driver's licenses of those who cannot afford to pay their traffic fines and costs. On March 31, 2019, the district court entered an order (the "Order") denying Plaintiffs' Second Motion for a Preliminary Injunction, finding that Appellants/Plaintiffs ("Plaintiffs") were unlikely to succeed on the merits of their claims. Joint Appendix ("J.A.") 401; 417. The Order also granted in part Defendant-Appellee's ("Defendant") Motion for Judgment on the Pleadings and dismissed Plaintiffs' claim challenging Defendant's automatic and indefinite revocation of their driver's licenses as punishment for their inability to pay under *Bearden v. Georgia*, 461 U.S. 660 (1983) (the "*Bearden* claim"), finding Plaintiffs failed to state a plausible claim. J.A. 401. The district court had jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331.

Plaintiffs filed a timely notice of appeal on April 17, 2019, and seek appellate review of the district court's: (1) denial of a preliminary injunction and (2) dismissal of Plaintiffs' *Bearden* claim. J.A. 437. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

Section 1292(a)(1) establishes jurisdiction over the appeal from the district court's Order because it is an "[i]nterlocutory order[]. . . refusing [an] injunction[]." 28 U.S.C. § 1292(a)(1); *see also Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d

638, 641 n.5 (4th Cir. 1975). Furthermore, this Court has jurisdiction over the appeal from the district court's Order dismissing Plaintiffs' *Bearden* claim because the district court denied the preliminary injunction based on its dismissal of that claim. Therefore, the dismissal is "intimately bound up" with the denial of the preliminary injunction. *Nationsbank Corp. v. Herman*, 174 F.3d 424, 427 (4th Cir. 1999); *Fran Welch Real Estate Sales, Inc. v. Seabrook Island Co., Inc.*, 809 F.2d 1030, 1032 (4th Cir. 1987).

STATEMENT OF ISSUES PRESENTED

1. Whether, in seeking a preliminary injunction, Plaintiffs are likely to prevail on the merits of their claim that N.C.G.S. § 20-24.1 violates the due process and equal protection right against punishment for inability to pay recognized in *Bearden v. Georgia*, 461 U.S. 660 (1983), because the statute mandates automatic, indefinite revocation of driver's licenses for nonpayment without a prior determination that nonpayment was willful?

2. Whether Plaintiffs pled a plausible claim that Section 20-24.1 violates the due process and equal protection right against punishment for inability to pay recognized in *Bearden* because the statute mandates automatic, indefinite revocation of driver's licenses for nonpayment without a prior determination that nonpayment was willful?

3. Whether, in seeking a preliminary injunction, Plaintiffs are likely to succeed on the merits of the claim that Defendant's enforcement of Section 20-24.1 violates procedural due process by failing to provide adequate notice that informs people of all options to reinstate their driver's licenses under Section 20-24.1 when they are unable to pay traffic fines and costs?

4. Whether Plaintiffs satisfy the remaining elements for a preliminary injunction: they will suffer irreparable harm absent an injunction; the threatened

injury to Plaintiffs outweighs the potential harm of an injunction to Defendant; and an injunction favors the public interest?

STATEMENT OF THE CASE

I. The DMV Automatically and Indefinitely Revokes Driver's Licenses for Failure to Pay Fines and Costs Pursuant to Section 20-24.1.

Section 20-24.2 of the North Carolina General Statutes requires courts to report to the DMV the name of any individual who fails to pay traffic fines and costs within 40 days of the due date. N.C.G.S. § 20-24.2(a)(2); J.A. 306 ¶ 1. When the DMV receives this notice, Section 20-24.1 requires the DMV to immediately revoke the driver's license and send a revocation order to the driver. § 20-24.1(a); J.A. 306–07 ¶¶ 2, 4. This process is automatic, and Section 20-24.1 provides that the license revocation will become effective 60 days from the date it is mailed or personally delivered to the individual. § 20-24.1(a).

Section 20-24.1 does not allow the DMV to conduct—and the DMV does not conduct—a hearing to determine an individual's ability to pay before entering a revocation order for failure to pay. *See id.*; J.A. 308 ¶ 8. Nor does Section 20-24.1 allow the DMV to determine—and the DMV does not determine—whether an individual willfully failed to pay before entering a revocation order. *See id.* Moreover, the DMV lacks any information as to whether any state court conducts an inquiry into a person's ability to pay before entering the revocation order. *Id.* ¶ 9.

After the revocation order is automatically entered, Section 20-24.1 permits the order to be deleted from the individual's driving record, but places the burden on individuals to petition the court for this action by showing that: a) they are not the

person whose license should be revoked; b) the fines and costs were paid; or c) that the failure to pay was not willful and the person made a bona fide effort to pay and the fines and costs should be remitted. *See* § 20-24.1(b)(2)-(4); J.A. 308 ¶ 11. If individuals make such a showing within 60 days of receiving the revocation order, they can avoid any additional fees; if they do so after 60 days, they must pay an additional restoration fee. *See* § 20-24.1(c).

The DMV's revocation of the driver's licenses of those unable to pay traffic fines and costs is indefinite and absolute. It is indefinite because the revocation will not end until a person secures restoration under Section 20-24.1(b), and thus can and often does extend for years. *See* § 20-24.1(b). It is absolute because during this time the driver is completely prohibited from driving—for example, there is no limited driving privilege available. *See generally id.* This can lead to much more severe treatment than that received by drivers facing revocation for public safety reasons. For example, a driver convicted of impaired driving also faces revocation, but is still eligible for a limited driving privilege that permits driving for "essential" reasons such as employment, maintaining the person's household, accessing education, emergency medical care, and religious worship. N.C.G.S. § 20-179.3. Moreover, the driving restrictions for impaired driving never last longer than one year. *Id.* § 20-19(c1). Those whose licenses are revoked for unpaid fines and costs are not provided any of these protections.

II. The DMV Sends Notices to Drivers to Induce Payment.

The DMV sends impacted individuals a standard boilerplate revocation order, labeled an "Official Notice," that informs individuals that their driving privilege is scheduled for an indefinite revocation on a specified date. J.A. 307 ¶ 4. This effective revocation date is approximately 60 days from the date of the Notice. *Id*. The Parties stipulate that the Official Notice (hereinafter, the "Revocation Notice" or "Notice") in the record is the standard notice the DMV currently uses and has used in the past. J.A. 307 ¶ 5. A copy of this Notice appears below:

01/10/2018

SHAREE ANTONETTE SMOOT
[redacted]
CONCORD NC 28025-6033

OFFICIAL NOTICE
CUSTOMER NO. [redacted]

WE REGRET TO INFORM YOU THAT EFFECTIVE 12:01 A.M., 03/11/2018, YOUR NC DRIVING PRIVILEGE IS SCHEDULED FOR AN INDEFINITE SUSPENSION IN ACCORDANCE WITH GENERAL STATUTE 20-24.1 FOR FAILURE TO PAY FINE AS FOLLOWS:

VIOLATION DATE: 2017-08-02 CITATION NUMBER: 04G82989
COURT: CABARRUS COUNTY COURT PHONE: (704)262-5500

UNFORTUNATELY THE DIVISION OF MOTOR VEHICLES CANNOT ACCEPT PAYMENTS FOR FINES AND COSTS IMPOSED BY THE COURTS. PLEASE CONTACT THE COURT ABOVE TO COMPLY WITH THIS CITATION.

NOTE: PLEASE COMPLY WITH THIS CITATION PRIOR TO THE EFFECTIVE DATE IN ORDER TO AVOID THIS SUSPENSION.

IF YOU HAVE NOT COMPLIED WITH THIS CITATION BY THE EFFECTIVE DATE OF THIS ORDER, YOU WILL NEED TO MAIL YOUR CURRENT NORTH CAROLINA DRIVER LICENSE, IF APPLICABLE, TO THE DIVISION. FAILURE TO DO SO MAY RESULT IN AN ADDITIONAL $50.00 SERVICE FEE.

REINSTATEMENT PROCEDURES:

UPON COMPLIANCE WITH THIS CITATION, YOU MAY VISIT YOUR LOCAL DRIVER LICENSE OFFICE. AT SUCH TIME PROPER IDENTIFICATION AND PROOF OF AGE WILL BE NEEDED.

A RESTORATION FEE OF $65.00 AND THE APPROPRIATE LICENSE FEES ARE NEEDED AND HAVE TO BE PAID AT THE TIME YOUR DRIVING PRIVILEGE IS REINSTATED.

THIS ORDER IS IN ADDITION TO AND DOES NOT SUPERSEDE ANY PRIOR ORDER ISSUED BY THE DMV. IF ADDITIONAL INFORMATION CONCERNING THIS ORDER IS NEEDED, PLEASE CONTACT A REPRESENTATIVE OF THE DIVISION AT (919)715-7000.

DIRECTOR OF PROCESSING SERVICES

DMV Notice (Jan. 10, 2018), J.A. 13–15; 19; 307 ¶ 5.

The Notice alerts individuals that their "driving privilege is scheduled for an indefinite suspension" because of "failure to pay a fine." *Id.* It tells the individual to "comply" with the citation to avoid the indefinite revocation but does not describe what "comply," "complied," or "compliance" means beyond payment of the underlying citation. *Id.* The Notice then says that the DMV itself "cannot accept payments for fines and costs imposed by the courts," referring the person to the court for payment. *Id.*

Aside from directing the individual to pay the court, the notice does not give any other instructions. *Id*. The DMV does not provide any information on how to obtain a hearing or indicate that other options beyond full payment are available to cancel the revocation order under Section 20-24.1(b). Nor is there any mention that a person's ability to pay will be a relevant, critical issue at any hearing sought under Section 20-24.1. *Id.*

Plaintiffs understood the Notice to require full payment to avoid indefinite revocation. J.A. 10 ¶ 9–11; 271 ¶ 10; 272 ¶ 8. Moreover, when Plaintiffs Seti Johnson and Marie Bonhomme-Dicks asked the district attorney's office and court, respectively, if there were anything they could do to avoid having their licenses revoked, they were told the only option was to pay in full. J.A. 10 ¶ 6; 271 ¶ 8.

III. This Revocation Process Pushes Individuals Further into Poverty and Causes Irreparable Injury.

The number of people adversely affected by Section 20-24.1 is staggering. The parties have not engaged in discovery on this issue, but Defendant himself conceded that more than 264,000 people had been revoked under the statute. J.A. 278–79 ¶ 5. On the eve of the preliminary injunction hearing, Defendant submitted more data showing that in the three years from June 1, 2015, to May 31, 2018, 198,406 North Carolina residents received a revocation order. J.A. 312–13. Of these, 130,597 were not able to pay off their fines and costs before the 60-day grace period ended, and 62,788 were never able to pay off their fines and costs. *Id.*

The impact on the hundreds of thousands who have indefinitely lost their licenses for failure to pay is severe—particularly in North Carolina, where 1.5 million people live in poverty,[2] and public transportation is sparse.[3]

Plaintiffs are unable to pay outstanding fines and costs for traffic tickets due to their limited economic means. They therefore face imminent revocation or have already had their driver's licenses revoked because of their inability to pay; and will suffer, or are suffering, the consequences of the loss of their driver's licenses. They

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[2] U.S. Census Bureau, *Quick Facts North Carolina*, https://www.census.gov/quickfacts/NC, J.A. 33–36; 309 ¶ 15.

[3] Tazra Mitchell, *Connecting Workers to Jobs through Reliable and Accessible Public Transit*, Policy & Progress, N.C. Justice Center (Nov. 2012), https://goo.gl/qOF0S, J.A. 103–04.

are fathers, mothers, and grandparents who rely on their driver's licenses for work, to obtain food, to take their children and grandchildren to school, to attend their place of worship, and to get their children to medical appointments critical for their development. J.A. 11 ¶ 16; 15 ¶ 21; 244 ¶ 47; 272 ¶ 2; 247 ¶ 62; 270 ¶ 6.

Plaintiffs have limited income and often are only able to find work in part-time, temporary jobs. J.A. 11 ¶¶ 12–14; 15 ¶ 23; 247 ¶ 61; 270 ¶ 3. As a result, some Plaintiffs must resort to extreme measures for money, including donating plasma, to try to make ends meet for themselves and their families. J.A. 247 ¶ 61; 270 ¶ 4.

North Carolina's revocation of Plaintiffs' driver's licenses for their inability to pay makes it even more difficult for Plaintiffs to resolve their court debt. Defendant's enforcement of Section 20-24.1 snares Plaintiffs and those similarly situated in a vicious cycle of poverty. Plaintiffs have lost job opportunities that would permit them to pay off their court debts while supporting their families. J.A. 14 ¶ 19; 270 ¶ 3; 271 ¶ 11. They are also cut off from critical forms of community engagement and support, such as attending church and similar activities that provide emotional and sometimes financial support. J.A. 15 ¶¶ 21, 24; 271 ¶ 11; 314 ¶ 6.

Plaintiffs' experiences are typical of the many others confronting revocation orders due to poverty. The inability to drive makes it nearly impossible to sustain a

livelihood or provide for one's family.[4] For example, in North Carolina a driver's license is a "very common requirement" to obtain employment, including most jobs that "can actually lift people out of poverty."[5] Nearly 92% of residents travel to work by car and only 1.1% travel to work by public transit.[6] Reliable, accessible public transit remains scarce in the state, where the vast majority of counties are rural.[7] Public transit services in urban areas also provide limited access to jobs.[8]

Thus, lack of transportation options remains a common barrier to obtaining and maintaining employment for many North Carolinians. Revocations for failure to pay make it even more difficult to find and keep employment, and create an unjust and impossible dilemma: drive illegally and risk further punishment, or stay home, lose employment, curtail community and spiritual engagements with family and friends, and forgo the ability to provide for one's basic daily needs.

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[4] Sandra Gustitus, *et al.*, *Access to Driving and License Suspension Policies for the Twenty-First Century Economy* 4 (2008), http://bit.ly/2Z8IgsM ("Access to driving—including . . . a valid driver's license—is vital to economic security . . . .").

[5] *See, e.g.*, Alana Semuels, No Driver's License, No Job, The Atlantic (June 15, 2016), https://goo.gl/xQjyLj, J.A. 38–44; Stephen Bingham, *et al., Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*, J.A. 46–96.

[6] U.S. Dep't of Transp., Bureau of Transp. Stats., *NORTH CAROLINA Transportation by the Numbers* 2 (2016), https://goo.gl/eM6NWy, J.A. 98–101.

[7] *See* Mitchell, *supra* note 3, J.A. 103–04 (noting scarcity of public transit options); Chandra T. Taylor and J. David Farren et al., *Beyond the Bypass: Addressing Rural North Carolina's Most Important Transportation Needs*, So. Envtl. Law Ctr. 1 (2012), http://bit.ly/31PGbQt, J.A. 106–22.

[8] Mitchell, note 3, J.A. 103–04.

SUMMARY OF ARGUMENT

The Supreme Court has long "confront[ed], in diverse settings, the 'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (quoting *Griffin v. Illinois*, 351 U.S. 12, 16 (1956)). The Court's concern about "the disparate treatment of indigents in the criminal process" has "heightened rather than weakened" over time. *Williams v. Illinois*, 399 U.S. 235, 241 (1970). In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Supreme Court recognized that it is impermissible to impose punishment solely for inability to pay and articulated four factors to balance when reviewing such sanctions: "[1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between" the policy or practice and the state's "purpose," and [4] "the existence of alternative means for effectuating the purpose." *Id.* at 666–67 (quotations omitted).

In violation of this precedent, Section 20-24.1 imposes an automatic and indefinite sanction based solely on inability to pay. *See* N.C.G.S. § 20-24.1(b). The DMV sends drivers a revocation order in the form of a misleading notice informing them that their licenses are scheduled for indefinite revocation for non-payment of traffic fines and costs, and further provides that the only option is to pay in full. Unsurprisingly, hundreds of thousands of low-income people have had their driver's licenses revoked.

The district court erred in denying Plaintiffs' preliminary injunction on these facts for three independent reasons:

First, the district court erroneously held that the constitutional protection against punishment for inability to pay applies only when there is a fundamental right at stake. This error contravenes Supreme Court precedent which has never limited this doctrine to fundamental rights. *Bearden* squarely applies whenever a state sanctions individuals solely due to their inability to pay, as North Carolina does. Under *Bearden*, Section 20-24.1 violates equal protection and due process.

Second, in the alternative, the district court erred in finding that Section 20-24.1 survives rational basis review. Though "on its face the statute extends to all defendants an apparently equal opportunity" to pay their tickets to avoid the punishment of an indefinite driver's license revocation, this is an "illusory choice . . . for any indigent who, by definition, is without funds." *Williams*, 399 U.S. at 242. Thus, the statute's classification does not single out those who do not pay their tickets, but rather those who cannot exercise the choice of paying their tickets to avoid the sanction driver's license revocation. Because punishing those unable to pay to incentivize collections of unpaid fines and costs is not rationally related to a legislative government interest, the statute is unconstitutional.

Third, the district court erred in finding that Plaintiffs were unlikely to succeed on their claim that the DMV's misleading Notice violates procedural due process.

The district court incorrectly reasoned that the notice automatically comports with due process merely because it references Section 20-24.1. To the contrary, for notice to be constitutionally sufficient, the Supreme Court requires a comprehensive reasonableness analysis: notice must be "*reasonably calculated*, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (emphases added). Notice must also "be of such nature as to convey the required information." *Id.* The Notice fails to meet this standard because it advises that the *only* way to prevent the indefinite revocation of their driver's license is to pay the outstanding fines and costs, while omitting any explanation of alternatives to payment to prevent the indefinite revocation under Section 20-24.1.

For each of these reasons, the district court wrongly concluded that Plaintiffs were unlikely to prevail on the merits. Because Plaintiffs have met the remaining elements for a preliminary injunction, this Court should reverse and remand with direction to issue a preliminary injunction. Additionally, because the Court wrongly dismissed the *Bearden* claim, it should reverse and remand with instruction to reinstate that claim.

ARGUMENT

I. Standard of Review

The Court reviews the district court's denial of a preliminary injunction for abuse of discretion. *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004). Factual determinations are reviewed for clear error and legal conclusions are reviewed de novo. *Id.* The district court's conclusion that Plaintiffs are unlikely to prevail on the merits is a legal conclusion and reviewed de novo. *Id.* For a preliminary injunction, Plaintiffs must show that: "(1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest." *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (citation omitted).

The Court reviews de novo the district court's grant of a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014) (citations and quotations omitted). Like a Rule 12(b)(6) motion, a motion for judgment on the pleadings should be granted only "if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Id.*

II. Section 20-24.1 Violates Equal Protection and Due Process by Sanctioning Those Unable to Pay Traffic Fines and Costs.

North Carolina punishes indigent people for failing to do the impossible: pay their traffic fines and costs when they lack the means to do so. A long line of Supreme Court decisions has held that the state cannot sanction people solely due to their inability to pay. Doing so "would be little more than punishing a person for his poverty" in violation of the right to due process and equal protection. *Bearden*, 461 U.S. at 671, 673. Section 20-24.1 and the DMV's enforcement of the statute violates these rights by entering a revocation order without ensuring a pre-deprivation determination occurs that the individual could pay and willfully did not. The district court erred as a matter of law in dismissing Plaintiffs' *Bearden* claim on the theory that *Bearden's* analysis is triggered by the loss of a fundamental right only. The Supreme Court's wealth-discrimination doctrine has never been limited to fundamental rights and the district court's holding squarely conflicts with binding precedent from the *Bearden* line of cases. The decision below is due to be reversed.

A. *Bearden*'s analysis applies where the state seeks to sanction a person solely due to inability to pay.

The Supreme Court's decision in *Bearden* provides the controlling analysis applicable to Section 20-24.1. *Bearden* involved a probationer whose poverty prevented him from paying fines and restitution that were a condition of his probation. *Bearden*, 461 U.S. at 662–63. He was jailed for nonpayment without

consideration of whether he could actually pay. *Id.* at 663. The Supreme Court reversed on due process and equal protection grounds. *Id.* at 664–74.

Bearden is part of a long line of cases establishing the basic principle that the state may not sanction people who are unable to pay. *Id.* at 671–72; *see also Alexander v. Johnson*, 742 F.2d 117, 126 (4th Cir. 1984) ("The indigent defendant[] . . . is protected against heightened civil or criminal penalties based solely on his inability to pay."). These cases all "confront[], in diverse settings, the 'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (quoting *Griffin v. Illinois*, 351 U.S. 12, 16 (1956)).

In *Griffin v. Illinois*, the foundational "equal justice" case, the Court held that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 19. The Court subsequently pronounced a "basic command that justice be applied equally to all persons." *Williams v. Illinois*, 399 U.S. 235, 241 (1970).

The Court's concern about "the disparate treatment of indigents in the criminal process" has "heightened rather than weakened" over time. *Id.* Thus, in *Bearden*, the Court held that a court must "inquire into the reasons for the failure to pay" and "determine that alternate punishment is not adequate" before sanctioning a person for nonpayment. *Bearden*, 461 U.S. at 672–74. Imposing sanctions for

nonpayment when a person cannot pay is "fundamentally unfair" under these circumstances. *Id.* at 668–69; *see also Tate v. Short*, 401 U.S. 395, 398 (1993) (imprisonment "solely because of his indigency" constitutes "unconstitutional discrimination"); *Williams*, 399 U.S. at 241 (extending imprisonment because of unpaid "fine or court costs" is "impermissible discrimination that rests on ability to pay"). Doing so amounts to punishing people "solely by reason of their indigency." *Williams*, 399 U.S. at 242.

These decisions applied both equal protection and due process analyses when determining whether the sanction at issue was warranted: the Due Process Clause guards against practices that are "fundamentally unfair or arbitrary," and the Equal Protection Clause protects people from being "invidiously denied . . . a substantial benefit" available to those with the financial resources to pay. *Bearden*, 461 U.S. 665–66. In *Bearden*, the Court synthesized and built on this precedent, explaining that "[d]ue process and equal protection principles converge" when defendants are treated differently based on their wealth. 461 U.S. at 665. The decision formally eschewed the traditional framework for equal protection and due process claims that would otherwise apply outside the context of punishment for inability to pay.

Because shoehorning the cases into "the equal protection framework is a task too Procrustean to be rationally accomplished," the Supreme Court did not consider whether a fundamental right or suspect classification was at issue. *Bearden*, 461 U.S.

at 666 n.8. It further held that neither strict scrutiny nor rational basis is the appropriate standard of review and rejected "easy slogans or pigeonhole analysis." *Id.* at 666. Instead, the Court required a "careful inquiry" into four relevant factors: "[1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the rationality of the connection between" the policy or practice and the state's "purpose," and [4] "the existence of alternative means for effectuating the purpose." *Id.* at 666–67 (quotations omitted); *see also Alexander*, 742 F.2d at 123 n.8 (recognizing *Bearden* four-factor balancing test for analyzing hybrid due process/equal protection claim); *see also M.L.B.*, 519 U.S. at 120–21 (surveying the *Bearden/Griffin* line of cases and explaining that, "[i]n line with those decisions, we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other.").

Here, the district court disregarded the *Bearden* line of cases, reasoning incorrectly that the Supreme Court's wealth discrimination doctrine applies only where "a state has deprived persons of *fundamental rights* because of their indigency—specifically, incarcerating them or denying them access to the courts when they cannot make a certain payment." J.A. 397 (emphasis added); *see also Fowler v. Benson*, 924 F.3d 247, 261 (6th Cir. 2019) (describing *Bearden* as limited to incarceration). This was erroneous.

Contrary to the district court's analysis, the *Bearden* line of cases has never been limited to the deprivation of fundamental rights. Instead, it applies where the state sanctions an individual solely due to inability to pay. Supreme Court authority makes this clear. In *Griffin*, for example, the Supreme Court stressed that there was no right to the interest at issue—an appeal. 351 U.S. at 18. As the Court explained, "a State is not required by the Federal Constitution to provide . . . a right to appellate review at all," but if it does provide such review, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." *Id.*

Furthermore, the Supreme Court has stated directly that the prohibition against punishment for inability to pay is not limited to incarceration. *M.L.B.*, 519 U.S. at 111 ("*Griffin*'s principle has not been confined to cases in which imprisonment is at stake."). In *Mayer v. City of Chicago*, 404 U.S. 189 (1971), where a fine but no incarceration was at issue, the Court held that "the invidiousness of the discrimination . . . is not erased by any differences in the sentences that may be imposed." *Id.* at 197. The Court explained that "[a] fine may bear as heavily on an indigent accused as forced confinement." *Id.* In fact, the Court specifically mentioned the loss of a professional license as a "collateral consequence[]" that could be "even more serious" than confinement. *Id.* And the Supreme Court has also observed that "[l]osing one's driver's license is more serious for some individuals than a brief stay in jail." *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972).

Moreover, the logic of *Bearden* itself makes clear that its protections are not triggered by the existence of a fundamental right: *Bearden* eschewed traditional equal protection analysis, delineating instead a multi-part analysis that explicitly considers "the nature of the individual interest affected . . . ." *Bearden*, 461 U.S. at 666–67; *see also M.L.B.*, 519 U.S. at 120–21. Had *Bearden* been limited to fundamental rights, the Court would not have needed to require a "careful inquiry" into "the nature of the interest affected." *Id. Bearden*'s first factor would have been entirely superfluous—the "careful inquiry" would always yield the same result: that the relevant interest is a fundamental right. Moreover, had the Court sought to reach only rights protected as fundamental under the Constitution, a more straightforward strict scrutiny analysis would have been applied in *Bearden*. *See, e.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (noting court has "long been mindful" that restrictions of fundamental rights are closely scrutinized).

The Supreme Court's decisions in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and *M.L.B.*, 519 U.S. 102, further clarify that the *Bearden* line of cases is not limited to cases involving the deprivation of fundamental rights. In *Rodriguez*, the Supreme Court evaluated an equal protection challenge to the inadequate funding of Texas school systems based on wealth, finding that education is not a fundamental right. 411 U.S. at 37. Rather than distinguish *Griffin* because there is no fundamental right to education, the Court instead noted that it

would likely be unconstitutional if public education was "made available by the State only to those able to pay a tuition assessed against each pupil" because those unable to pay "the prescribed sum . . . would be absolutely precluded from receiving an education." *Id*. at 25 n.60. Texas's program was upheld because the constitutional challenge rested on a contention that plaintiffs were "receiving a poorer quality education" than students in wealthier districts as opposed to "no public education" at all. *Id*. at 23. If, as the district court erroneously concluded, *Griffin* and *Bearden* only applied to fundamental rights, then the Court's recognition that a fee-based education system would fit within the *Griffin* line of cases was entirely baseless. Moreover, in contrast to the facts of *Rodriguez*, here the deprivation is tied to the person's (in)ability to pay and is absolute, *see supra* p. 8, and fits squarely under *Griffin* and its progeny.

Similarly, in *M.L.B.*, the Supreme Court's detailed historical analysis demonstrates that the *Griffin/Bearden* line of cases was predicated not on fundamental rights, but on protection from state sanctions based on inability to pay. There, the Court applied *Griffin* and its progeny to constitutional claims raised by an impoverished mother who could not afford the fees to appeal the termination of her parental rights in a civil proceeding. The Court was careful to distinguish between cases seeking "to alleviate the consequences of differences in economic circumstances that existed apart from state action," which do not trigger application

of *Bearden*, from cases where "the State's devastatingly adverse action" is applied solely on the poor because of their poverty, which do. *M.L.B.*, 519 U.S. at 125; *see id.* at 114–16 (discussing *United States v. Kras*, 409 U.S. 434 (1973) (finding no applicability to accessing courts for bankruptcy), and *Ortwein v. Schwab*, 410 U.S. 656 (1973) (same for appealing welfare benefit reduction)). By contrast, where the State is imposing a sanction because of one's inability to pay, *Bearden*'s analysis applies. *See M.L.B.*, 519 U.S. at 125 ("Like a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action. That is the very reason we have paired her case with *Mayer*, not with *Ortwein* or *Kras*.").

This Court has also recognized that *Bearden* provides the correct framework to evaluate allegations that those unable to pay are being disproportionately sanctioned because of their poverty. In *Alexander v. Johnson*, the Fourth Circuit considered a challenge to a practice of conditioning parole on the repayment of attorneys' fees. 742 F.2d at 123. Although "there is no fundamental right to parole," *Moss v. Clark*, 886 F.2d 686, 690 (4th Cir. 1989), the *Alexander* court still emphasized that "in cases such as this" the "traditional principles of equal protection and due process converge," and "the constitutionality of the program can only be determined by careful scrutiny of such factors as 'the nature of the individual interest affected, the rationality of the connection between legislative means and purpose,

[and] the existence of alternative means for effectuating the purpose . . . .'" 742 F.2d at 123 n.8 (quoting *Bearden*, 461 U.S. at 666–67).[9]

Finally, another circuit has offered an alternative rationale for why *Bearden* does not apply to a statute mandating driver's license suspension: because one's interest in liberty is purportedly protected to a greater extent than one's interest in property, including a driver's license. *See Fowler*, 924 F.3d at 261 (citation omitted). This holding is erroneous. There is no categorical distinction between the type of procedural due process protection owed based on whether the affected private interest is property or liberty. *See Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (noting no "support in precedent for a categorical distinction between a deprivation of liberty and one of property") (citing *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one." (other citations omitted)). Indeed, there are times when the deprivation of a property interest imparts more harm than the deprivation of a liberty interest, further undermining the categorical rule adopted in *Fowler*. *See Argersinger*, 407 U.S. at 48 ("Losing one's driver's license is more serious for some individuals than a brief stay in jail." (Powell, J., concurring)).

[9] The *Alexander* court ultimately declined to engage in a "detailed discussion of these factors" because it relied on related Supreme Court precedent that explicitly addresses attorney fee recoupment statutes. *See* 742 F.2d at 123 n.8 (citing *James v. Strange*, 407 U.S. 128 (1972); *Fuller v. Oregon*, 417 U.S. 40 (1974)).

In sum, the district court erred as a matter of law in rejecting the application of *Bearden* to North Carolina's indefinite wealth-based revocation of driver's licenses. For purposes of applying *Bearden*, the revocation of driver's licenses for inability to pay fines and costs from a criminal sentence is directly equivalent to the revocation of probation for inability to pay fines from a criminal sentence: *Bearden*'s analysis applies whenever the State imposes "adverse consequences against indigent defendants solely because of their financial circumstances, regardless of whether those adverse consequences take the form of incarceration, reduced access to court procedures, or some other burden." U.S. Stmt. of Interest, *Stinnie*, No. 3:16-cv-00044, 2016 WL 6892275, at *15–16 (W.D. Va. Nov. 7, 2016), J.A. 221. The multi-factored inquiry articulated in *Bearden* is appropriate where the state imposes "sanctions of the *Williams* genre," which are "wholly contingent on one's ability to pay." *M.L.B.*, 519 U.S. at 127; *Rodriguez*, 411 U.S. at 23 (heightened scrutiny applies when "lack of personal resources" causes "an absolute deprivation of [a] desired benefit").

B. Under *Bearden*, Section 20-24.1 violates equal protection and due process.

Applying the multi-factor "careful inquiry" articulated in *Bearden*, Defendant's automatic, indefinite driver's license revocation system is unconstitutional because (1) it affects a substantial property interest in a driver's license; (2) the extent of the effect on the interest is substantial because the

deprivation is indefinite; (3) there is no rational connection between the policy and the state's "purpose;" and (4) there are alternative means for effectuating the state's purpose. *See Bearden*, 461 U.S. at 666.

1. Section 20-24.1 deeply impairs Plaintiffs' substantial property interest in their driver's licenses.

Plaintiffs have a substantial property interest in their driver's licenses because they rely on their licenses as a means of economic survival. *See Mackey v. Montrym*, 443 U.S. 1, 11 (1979). A person's means of support enjoys heightened significance as a property interest. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539 (1985); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). A driver's license is "essential in the pursuit of a livelihood." *Bell*, 402 U.S. at 539; *see also Miller v. Anckaitis*, 436 F.2d 115, 120 (3d Cir. 1970) (license indispensable "for virtually everyone who must work for a living"); U.S. Stmt. of Interest, *Stinnie*, 2016 WL 6892275, at *9, J.A. 215. The interest of people in their driver's licenses is therefore "substantial." *Scott v. Williams*, 924 F.2d 56, 59 (4th Cir. 1991).

The need to access and legally operate a vehicle is particularly acute in North Carolina, where public transportation is limited, and nine out of ten residents need a car for employment. *Supra* pp. 11–13. Absent a valid driver's license, North Carolinians like Plaintiffs have extremely limited avenues for economic survival.

2. The private interest is substantially affected.

Defendant's automatic, indefinite revocation of Plaintiffs' driver's licenses completely bars them from driving, and therefore is absolute. After the license is revoked, an individual must stop driving or run an immediate risk of further criminal sanctions, including possible imprisonment, for driving on a revoked license. *See* N.C.G.S. §§ 20-28(a), 15A-1340.23. This process inhibits the ability of low-income persons to pursue a livelihood and support their families because a person with a revoked driver's license "is at an extraordinary disadvantage in both earning and maintaining material resources." *See Purkey*, 2017 WL 4418134, at *9. Plaintiffs are also inhibited in fulfilling the basic necessities of life, including picking up their children from school and going to a grocery store to purchase food for family members. Indeed, the punishment for those unable to pay can be more severe than it is for those who endanger public safety by, for example, driving while impaired; the latter group is eligible for a limited driving privilege that allows them to go to work, maintain their household, seek emergency medical care, and attend religious worship, among other things, and their revocation can never last more than one year. N.C.G.S. §§ 20-179.3, 20-19(c1); *see also supra* p. 8. Those revoked for failing to pay are afforded none of these protections.

3. The legislative means of Section 20-24.1 and its purpose are not rationally related.

Defendant and the district court contend that the purpose of Section 20-24.1(a)(2) is to ensure compliance with court orders by incentivizing payment of unpaid fines and costs. J.A. 400. But as explained in *Bearden*, when determining whether legislative means are rationally related to legislative purpose, it "is of critical importance" whether the statutory scheme accounts for the reason for nonpayment *before* sanctioning a person for failure to pay. 461 U.S. at 668. Section 20-24.1 fails to do so.

Revoking licenses of those who cannot afford to pay fines and costs is not rationally related to collecting money, because punishing "someone who through no fault of his own is unable to [pay] will not make [payment] suddenly forthcoming." *Id.* at 670. Moreover, such a practice is counterproductive because suspending driving privileges actually undermines these individuals' ability to earn money to pay their fines and costs, amounting to "little more than punishing a person for his poverty." *Id*. at 671; *see also Purkey*, 2017 WL 4418134, at *9 ("[T]aking an individual's driver's license away to try to make her more likely to pay a fine is not using a shotgun to do the job of a rifle: it is using a shotgun to treat a broken arm. There is no rational basis for that.").

Nor is the process laid out in Section 20-24.1(b) adequate to remedy this discriminatory effect. The statute envisions that drivers may obtain relief from the

automatic revocation order if they "demonstrate to the court that [their] failure to pay the penalty, fine, or costs was not willful and that [they are] making a good faith effort to pay or that the penalty, fine, or costs should be remitted." N.C.G.S. § 20-24.1(b)(4). Yet, in practice this process is illusory: no Plaintiff was told of any alternative to payment in full, and the two Plaintiffs who specifically inquired if they had any other options available to them were told that they did not. J.A. 10 ¶ 6; 270 ¶ 8.

Even assuming *arguendo* that the hearing is available to Plaintiffs, and even assuming *arguendo* drivers were actually informed about the hearing—but *see infra* pp. 41–49 (discussing how the DMV Notice misleads drivers into believing their only option to lift the revocation order is full payment)—the hearing process is still insufficient to satisfy due process and equal protection. The Supreme Court held in *Bearden* that a court "must inquire" into the person's ability to pay and determine if the person is unable to pay *before* enforcing a sanction. 461 U.S. at 672. In short, if the state is going to sanction someone for nonpayment, it must *first* be assured that the nonpayment was willful. Thus, courts have consistently held that it is impermissible to put the onus on the defendant to affirmatively seek out the protection of an ability-to-pay hearing. *See Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 652 (E.D. La. 2017) ("[T]here is no authority for the proposition that a criminal defendant must raise the issue of her inability to pay. . . . [A] contrary

rule, requiring the criminal defendant to raise the issue on her own, would undermine *Bearden*'s command that a criminal defendant not be [punished] solely because of her indigence."); *West v. City of Santa Fe, Texas*, No. 3:16-CV-0309, 2018 WL 4047115, at *9 (S.D. Tex. Aug. 16, 2018) ("The Court strongly disagrees that the burden rests with [defendants] to bring the inability to pay issue to the Court's attention."); *Rucker v. Spokane Cty.*, No. CV-12-5157, 2013 WL 6181258, at *5 (E.D. Wash. Nov. 26, 2013) ("Because due process requires the court to inquire into Nason's reason for nonpayment, and because the inquiry must come at the time of the collection action or sanction, ordering Nason to report to jail without a contemporaneous inquiry into his ability to pay violated due process." (quoting *State v. Nason*, 233 P.3d 848 (Wash. 2010))); *De Luna v. Hidalgo Cty., Tex.*, 853 F. Supp. 2d 623, 648 (S.D. Tex. 2012) ("The process in place in Hidalgo County clearly risks that defendants who do not think to 'speak up' during arraignment about their inability to pay fines may be jailed solely by reason of their indigency, which the Constitution clearly prohibits. . . . Rather, due process requires a forum in which defendants' reasons for failing to pay are considered before committing them to jail [because] some indigent persons will not directly raise their inability to pay and will be incarcerated solely, and unconstitutionally, because they are indigent."); *Smith v. Whatcom Cty. Dist. Court*, 52 P.3d 485, 492 (Wash. 2002) ("[T]he court may place

the burden on the defendant to prove inability to pay," but "this does not eliminate the court's duty to inquire, which *Bearden* plainly demands.").[10]

Section 20-24.1(b) suffers from the same defect; it requires the drivers to seek a hearing in order to lift the automatic revocation order, in contravention of the directive in *Bearden* that this inquiry happen prior to the imposition of a sanction. And the real-world consequence of putting the burden on the defendant is clear: the statute has forced over 130,000 individuals to live with a revoked license in just the last three years alone. *See supra* p. 12.

Because Section 20-24.1 does not ensure that the sanction of a revoked license is reserved to those who cannot pay, it is inevitably "punishing a person for his poverty." 461 U.S. at 671. This sanction has no rational relationship to the goal of increasing collections of fines and costs.

[10] Moreover, a suspension under Section 20-24.1, like civil contempt, "seeks only to 'coerce[e] the defendant to do' what a court had previously ordered him to do." *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (modifications in original, citation omitted); *see also Williams*, 399 U.S. at 240, 243 (Jailing a defendant for nonpayment is not part of the original sentence but "a coercive means of collecting or 'working out' a fine"). Just as civil contempt is impermissible when the individual is "unable to comply," *Turner*, 564 U.S. at 442, a driver's license suspension is unconstitutional without an ability to pay hearing and findings. *See also United States v. Rylander*, 460 U.S. 752, 757 (1983) (contempt order improper "[w]here compliance is impossible"); *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948) (even wrongful acts do not "warrant issuance of an order which creates a duty impossible of performance").

4. Alternative means exist to effectuate the State's legislative purpose.

To the extent there is a legislative purpose of trying to achieve compliance with the requirement to pay traffic fines and costs by those unable to pay, there are clear alternatives. For example, North Carolina could extend the time to pay, reduce payment amounts, or utilize a graduated payment plan to elicit payment of traffic fines and costs. *See Tate v. Short*, 401 U.S. 395, 400 n.5 (1993). The State could also create alternatives, including the performance of public service or completion of traffic safety classes. *See* U.S. Stmt. of Interest, *Stinnie*, 2016 WL 6892275, at *19; J.A. 225; *Bearden*, 461 U.S. at 671 ("Punishment and deterrence can often be served fully by alternative means to incarceration, including an extension of time to pay or reduction of the amount owed.").[11]

[11] The district court characterized the state's indefinite revocation of driver's licenses as a type of alternative means of punishment to payment and incarceration, as alluded to in *Bearden*. J.A. 399–400. This is error. In North Carolina, the indefinite revocation of driver's licenses under Section 20-24.1 is not itself an *alternative* to payment that one cannot afford—it does not replace the financial penalty that is owed. Rather, it is an *additional* punishment—the person still owes the fees and fines, but now is also sanctioned with being legally prohibited from driving and will owe additional money to the DMV in order to reinstate the license. By contrast, in *Bearden*, the Court offered examples of alternatives like extending the time to pay, reducing the fine, or requiring "some form of labor or public service *in lieu of the fine*." *Bearden*, 461 U.S. at 672 (emphasis added). In other words, *Bearden's* "alternative means" language is referring to a *substitute* to immediate payment or incarceration.

C. Under rational basis, Section 20-24.1 violates equal protection.

Even if this Court does not follow the mandate of *Bearden* and applies rational basis, Section 20-24.1 still falters. Rational basis is a deferential standard, yet it is not "toothless." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). The law still must be "*rationally related* to a legitimate state interest" to withstand scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added). Because there is no rational connection between the classification created—those who cannot pay—and the government interest in collecting revenue, the statute is irrational and thus, unconstitutional.

1. Section 20-24.1 establishes a classification based on inability to pay.

"The first task of a court in evaluating an equal protection claim under the rational relation test is to identify with particularity the precise classification alleged to be irrational." *Murillo v. Bambrick*, 681 F.2d 898, 906 (3d Cir. 1982). The district court failed to engage in any analysis of the classification at issue, instead simply assuming that Section 20-24.1's classification is between those who *do* and *do not pay* their traffic fines and costs. *See* J.A. 400. This analysis is fundamentally erroneous because it miscomprehends the classification at issue, and led to the court's ultimate, erroneous conclusion that Section 20-24.1 is rationally related to furthering an interest in court debt collection. *See* J.A. 401.

As the Supreme Court has explained, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *See Griffin*, 351 U.S. at 17 n.11.[12] Here, the statue discriminates between those who *can afford to pay* and those who cannot. This is because those who cannot pay are subject to automatic and indefinite revocation, while those with means can simply pay their fines and costs.

The Supreme Court's reasoning in *Williams v. Illinois*, 399 U.S. 235 (1970), underscores why the district court's understanding of the classification at issue is incorrect. In *Williams*, the challenged statute authorized a fine and a maximum period of incarceration, and subjected defendants who did not pay the fine to an additional period of confinement beyond the statutory maximum. The Court recognized that "on its face the statute extends to all defendants an apparently equal opportunity" to avoid further punishment, but then observed that this was an "illusory choice . . . for any indigent who, by definition, is without funds." 399 U.S. at 242. The Court explained that "[s]ince only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statute maximum."

[12] *Griffin* and *Williams*, cited herein, applied a heightened level of scrutiny. They are still relevant to identifying the appropriate classification at issue, however, because identifying the classification is the first step of any equal protection analysis, regardless of the level of scrutiny ultimately applied.

Id.; *see also Tate*, 401 U.S. at 399. In this way, the facially neutral statute sanctions only those unable to pay.

Here, as in *Williams*, Section 20-24.1 creates a classification based on inability to pay because it "in operative effect exposes only indigents to the risk of" indefinite license revocation. *Williams*, 399 U.S. at 242. And the real world confirms this classification. Defendant's own evidence establishes that in the last three years, at least 130,597 North Carolina residents received the revocation order and were unable to pay their court debt before the effective date of suspension, and at least 62,788 have never been able to pay it off. J.A. 312–13.[13] The "practical effect" of this statutory classification is to punish those unable to pay. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537 (1973) (focusing on the "practical effect" of classification to conclude it did not further a legitimate governmental interest).

Thus, to withstand even the lenient scrutiny of rational basis review, Section 20-24.1 must have a rational relationship between its means—depriving indigent people of their licenses when they cannot afford to pay traffic fines and costs—and its end, collecting unpaid traffic fines and costs. As detailed below, it does not.

[13] That an additional 55,336 received a revocation order and paid off the fines and costs during the grace period before the suspension went into effect, J.A. 312 ¶ 4, is inconsequential. Even these individuals received an automatic revocation order. And as noted above, *Williams* rejected the idea that some being able to pay alters the analysis—the critical consideration is whether the sanction is ultimately premised on the ability to pay. 399 U.S. at 242. Here, it is.

2. There is no logical connection between punishing a person unable to pay with indefinite driver's license revocation and the government's interest in collecting money.

To survive the rational basis test, a law must be "*rationally related* to a legitimate state interest." *Dukes*, 427 U.S. at 303 (emphasis added). The relationship between the classification and the interest offered by the government may not be "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 446 (1985); *see also Smith Setzer & Sons, Inc., v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1320 (4th Cir. 1994) (asking "whether it was 'reasonable for the lawmakers to believe that use of the challenged classification would promote [the stated] purpose'" (citation omitted)). A law is invalid if the classification is "so discontinuous with the reasons offered for it" that any pretense of rationality cannot be sustained. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

The Supreme Court's decisions striking down laws under rational basis review illustrate the importance of demonstrating a logical connection between the challenged action and the government interest offered to support it. *See, e.g.*, *Cleburne*, 473 U.S. at 449–50 (no logical connection between denying permit to proposed group home based on its large size when similarly-sized homes were routinely granted permits); *Williams v. Vermont*, 472 U.S. 14, 24–25 (1985) (no logical connection between taxing cars purchased out of state before residents

moved to the state and the government interest in encouraging in-state car purchases); *Zobel v. Williams*, 457 U.S. 55, 61–63 (1982) (no logical connection between larger payments based on length of prior residency and the government interest in incentivizing individuals to move to Alaska). Moreover, the court must evaluate the logic of the government's interest in light of record evidence. *See Romer*, 517 U.S. at 632–33 (stating laws must be "grounded in a sufficient factual context" to allow court "to ascertain some relation between the classification and the purpose it served").

Given that the purported purpose of Section 20-24.1 is to compel payment of traffic fines and costs but the real-world effect is to revoke the licenses of those unable to pay, *see supra* p. 37, it follows that the statute draws a classification that does not advance that purpose. "No person . . . can be threatened or coerced into doing the impossible, and no person can be threatened or coerced into paying money that she does not have and cannot get." *Robinson v. Purkey*, No. 3:17-cv-1263, 2017 WL 4418134, at *8 (M.D. Tenn. 2017), *appeal filed*, No. 18-6121 (6th Cir.); *see also Bearden*, 461 U.S. at 670 ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming."). In other words, there is simply no logical connection between revoking the driver's license of people who cannot afford to pay and the state's interest in eliciting payment.

Moreover, revoking the driver's licenses of people who presently lack the funds to pay is actually counterproductive. "[T]he ability to drive is crucial to the debtor's ability to actually establish the economic self-sufficiency that is necessary to be able to pay the relevant obligations." *Purkey*, 2017 WL 4418134, at *9; *see also Bell*, 402 U.S. at 539 (driver's licenses "may become essential in the pursuit of a livelihood"). Also, punishing people for their inability to pay "may have the perverse effect of inducing the [impoverished] to use illegal means to acquire funds to pay in order to avoid revocation." *Bearden*, 461 U.S. at 670–71. Thus, the classification is far from "reasonable." *Smith Setzer & Sons, Inc.*, 20 F.3d at 1320.

Plaintiffs' own experiences and uncontested evidence affirms that this is especially true in North Carolina, where public transportation is very limited and the overwhelming majority of residents must drive to work. *See supra* pp. 12–13. This is certainly true of Plaintiffs, whose livelihoods would be imperiled if they were unable to drive—and with it, their ability to pay off the fines and costs owed. *See id*. This is hardly surprising as "one needs only to observe the details of ordinary life to understand that an individual who cannot drive is at an extraordinary disadvantage in both earning and maintaining material resources." *Purkey*, 2017 WL 4418134, at *9. Revoking a license is "not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end." *Id.*; *see also*

Argersinger, 407 U.S. at 48 ("Losing one's driver's license is more serious for some individuals than a brief stay in jail." (Powell, J., concurring)).

Section 20-24.1 fails rational basis review because it simply is not logical for lawmakers to believe that punishing those unable to pay by stripping them of their ability to drive would promote the goal of collecting unpaid fines and costs. *See Smith Setzer & Sons, Inc.*, 20 F.3d at 1320. The district court thus erred in dismissing Plaintiffs' equal protection claim for failure to state a claim, and erred in failing to find that Plaintiffs are likely to prevail, whether under a heightened standard or rational basis review.

III. The License Revocation Process for Non-Payment Violates Due Process Because it Fails to Provide Sufficient Notice.

The district court incorrectly concluded that Plaintiffs were unlikely to succeed on the merits of their due process notice claim simply because the Notice cites Section 20-24.1, and that this allegedly obviates the need for individualized notice of the alternatives to full payment. J.A. 433–35. As detailed below, by relying solely on the citing to and public availability of Section 20-24.1, the district court misconstrued Supreme Court precedent and disregarded its obligation to perform a holistic assessment of whether the Notice reasonably conveyed the necessary information to enable people to invoke their rights under Section 20-24.1.

Adequate notice is "a vital corolary [sic] to one of the most fundamental requisites of due process—the right to be heard." *Schroeder v. City of New York*, 371

U.S. 208, 212 (1962). Notice is necessary to allow a person to choose "whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The standard for determining the sufficiency of notice—the "*Mullane* standard"—involves a holistic reasonableness analysis: notice must be "*reasonably calculated*, *under all the circumstances*, to apprise interested parties of the pendency of the action; afford them an opportunity to present their objections" and "to convey the required information." *Id.* (emphases added); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978); *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970). Accordingly, adequacy of notice depends on the factual circumstances at issue.

Generally, a person must be able to learn of her rights through the notice, including the substantive standard to be applied at a hearing. *Grayden v. Rhodes*, 345 F.3d 1225, 1243 (11th Cir. 2003); *Nnebe v. Daus*, 931 F.3d 66, 88–89 (2d Cir. 2019), *affirming & reversing in part*, 184 F. Supp. 3d 54, 74 (S.D.N.Y. 2016); *see also Sourovelis v. City of Philadelphia*, 246 F. Supp. 3d 1058, 1076 (E.D. Pa. 2017). Notice also should apprise individuals of the "critical issue" to be considered at a hearing. For example, in *Turner v. Rogers*, 564 U.S. 431 (2011), the Supreme Court found that notice was sufficient where the recipient was advised that ability to pay would be a critical issue in a contempt proceeding concerning unpaid child support. *See id.* at 447.

Moreover, to be adequate, "notice requires *accuracy* in the description of legal rights and options available to parties." *Dealy v. Heckler*, 616 F. Supp. 880, 886 (W.D. Mo. 1984) (emphasis added, citation omitted); *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 67–68 (N.D. Cal. 1976). Federal circuits throughout the country, including this Court, have repeatedly confirmed this principle.

For example, in *Mallette v. Arlington Cty. Employees' Supplemental Ret. Sys. II*, 91 F.3d 630 (4th Cir. 1996), this Court recognized that notice that is "affirmatively misleading" is unconstitutional. *Id.* at 641.[14] In *Mallette* the applicant was aware of a hearing on her application for retirement benefits based on disability, was aware of the standard to be applied at the hearing, and appeared and provided written testimony. *Id.* Still, this Court found the process insufficient because the retirement system had implied to the applicant that the application would be approved without revealing that it would oppose the application at the hearing. *Id.*

Similarly, in *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998), the Ninth Circuit held that a form that failed to notify immigrants that they were required to request an additional hearing to prevent deportation was not constitutionally sufficient

[14] This Court recognized that under both *Mullane* and *Matthews*, an affirmatively misleading notice violates due process for failing to convey the information required to ensure defense against a deprivation. See *Mallette* at 641–42 (applying *Mullane* 339 US at 314, and *Matthews*, 424 U.S. at 335).

notice, as it "lulls the alien into a false sense of procedural security." *Id.* at 1043. According to the court, the notice should have told the immigrants how they could "take advantage" of the law's procedures. *Id. See also United States v. Charleswell*, 456 F.3d 347, 356–57 (3d Cir. 2006) (finding notice unconstitutional because it misled reader into believing only one agency option existed to contest an adverse order, while obscuring a statutory right "to direct judicial review in the appropriate court of appeals"); *Conyers v. City of Chicago*, No. 12 C 06144, 2015 WL 1396177, at *5–6 (N.D. Ill. Mar. 24, 2015) (finding notice misleading because it indicated property owners may have more than 30 days to reclaim seized property when in fact they had only 30 days); *Butland v. Bowen*, 673 F. Supp. 638, 641 (D. Mass. 1987) (notice providing incomplete information regarding statute of limitations was insufficient); *Nnebe*, 931 F.3d at 88–89, *aff'ing & rev'ing in part*, 184 F. Supp. 3d at 74 (same where notices failed to convey factors considered in suspending taxi license); *Noah v. McDonald*, 28 Vet. App. 120, 131–32 (2016) (same regarding deadline to submit evidence).

This obligation to provide accurate notice applies regardless of whether individualized notice is constitutionally required or state-law remedies are publicly published. *See Conyers*, 2015 WL 1396177, at *5–6 (citing *West Covina* but emphasizing that "any individualized notice provided—*whether required or not*—cannot be misleading." (emphases added, citation omitted)). The Seventh Circuit,

for example, reversed a lower court's grant of summary judgment for a city that provided "misleading and incomplete information" in its notice—even when the state law remedies were publicly available. *Gates v. City of Chi.*, 623 F.3d 389, 401 (7th Cir. 2010). This Court has reached the same conclusion. *See Mallette*, 91 F.3d at 635–36, 641 (describing robust statutory scheme but finding violation because of "affirmatively misleading" notice).

The district court did not engage with this *Mullane* analysis. Instead, the court focused only on the fact that Section 20-24.1 is cited in the Notice, and that Section 20-24.1 is publicly available. J.A. 433–35 (relying on *City of West Covina v. Perkins*, 525 U.S. 234, 242 (1999)). This myopic focus on a single sentence of the Notice was error. Indeed, under the district court's reasoning, *any* notice—even a misleading one—would be constitutionally adequate merely by citing a publicly available source that sets forth the state's redress procedures. That is contrary to the law. *See Gates*, 623 F.3d at 401 ("[T]he City may not mislead arrestees about the necessary procedures for the return of their [property] . . . ."); *Mallette*, 91 F.3d at 635–36, 641 (describing robust statutory scheme and finding error because notice misled).

West Covina has no application to this case. In *West Covina*, the Supreme Court held that the police's provision of post-deprivation notice of the seizure of personal property, pursuant to a valid warrant in a criminal investigation, satisfied due process because public state laws explained the procedures available to recover

property. 525 U.S. at 241, 242. The Court held that in the post-deprivation context, the government need not always provide affirmative notice of the right to, and procedures for requesting, a hearing. *Id.*

However, *West Covina* "does not stand for the . . . proposition that statutory notice is *always* sufficient to satisfy due process." *Grayden*, 345 F.3d at 1242–44 (emphasis added) (citing *West Covina*, 525 U.S. at 242). Nor does it absolve the government from the requirement in *Mullane* that notice must be "reasonably calculated, under all the circumstances," to convey the required information. *Mullane*, 339 U.S. at 314; *see Grayden*, 345 F.3d at 1244 ("*West Covina*, while citing *Mullane*, did not mention the 'reasonably calculated' standard or apply it. Based on the Court's endorsement of the *Mullane* standard in *Dunsenberry v. United States*, . . . *three years after the decision in West Covina*, we believe that our 'reasonably calculated' analysis is not controlled by the Court's decision in *West Covina*." (emphasis added)); *see also Dusenbery v. United States*, 534 U.S. 161, 167–68 (2002).

Accordingly, numerous courts have continued to apply the *Mullane* standard since *West Covina*, despite redress procedures appearing in public documents. *Accord Martinez–De Bojorquez v. Ashcroft*, 365 F.3d 800 (9th Cir. 2004) (recognizing that whether affirmative notice beyond publicly-available documents is necessary depends on circumstances of case); *e.g.*, *Grayden*, 345 F.3d at 1243

(11th Cir. 2003) (same); *Bentley v. Atlantic County, New Jersey*, No. 05-2942, 2008 WL 11383797, at *2 (D. N.J. Apr. 16, 2008) (same, without citing *Mullane*). The district court therefore erred in automatically concluding, under *West Covina*, that the DMV notice is constitutionally adequate simply because it cites Section 20-24.1.[15]

The district court's failure to engage in the *Mullane* analysis was fatal: when the Notice is considered in totality, it fails *Mullane*'s "holistic reasonableness" standard. The Notice does not provide any meaningful opportunity to choose "whether to appear or default, acquiesce or contest," *Mullane*, 339 U.S. at 314, because it makes clear that the only way to lift the revocation order is to pay in full. The Notice tells individuals that their license is being indefinitely revoked "for failure to pay [the] fine," and that they must "comply" with the underlying citation

[15] *West Covina* is also inapposite because the plaintiffs there, unlike Plaintiffs here, did not contest the initial deprivation of their property or the state law procedures for seeking to recover their property—a fact dispositive to the Court's ruling on the sufficiency of statutory notice. *See West Covina*, 525 U.S. at 240-41. Specifically, the Court's finding that due process did not mandate individualized notice of state law procedures turned not only on the public availability of state law procedures, but on the absence of a due process challenge to those procedures. *See id*. at 241 ("In prior cases in which we have held that *post-deprivation state-law remedies were sufficient to satisfy the demands of due process* and *the laws were public and available*, we have not concluded that the State must provide further information about those procedures." (emphases added)). Thus, because of the facial challenge Plaintiffs raise against the sufficiency of Section 20-24.1, *West Covina* has no place in this case.

to lift the revocation order. It further directs the person to the court for payment, stating explicitly that the DMV cannot accept payment on the court's behalf. And as the district court even observed, the Notice does not address any alternative to payment under Section 20-24.1(b), much less the possibility to request a hearing to show that non-payment was not willful. *See* J.A. 432.

Consequently, a typical reader would interpret the Notice's demand for "compliance" to mean that the citation must be fully paid and that such payment is the sole avenue to lift the revocation order. That is exactly how Plaintiffs interpreted the Notice. *See* Smoot Decl., J.A. 13–14 ¶¶ 8–9, 18; Yarborough Decl., J.A. 272 ¶¶ 7–8; Johnson Decl., J.A. 11 ¶¶ 15, 17. And this is exactly what the court systems told those who inquired into whether there was any option other than payment in full to lift the revocation order. J.A. 10–11 ¶¶ 6, 10, 11; 13–14 ¶¶ 6, 16; 270 ¶ 8. Because the Notice obscures the availability of any options other than full payment of fines and costs to lift the revocation order entered under Section 20-24.1, Plaintiffs did not—and indeed, reasonably could not—read "comply" as giving them an option to contest the revocation based on a showing of non-willful non-payment—a factual showing that was not contested in the district court.

Such "affirmatively misleading" notice is unconstitutional. *Mallette*, 91 F.3d at 641; *Walters*, 145 F.3d at 1043 (finding misleading notice that obscured availability of relief unconstitutional); *Charleswell*, 456 F.3d at 356–57 (finding

misleading notice that obscured alternatives to be unconstitutional); *see also supra* pp. 43–45 (collecting cases).

In sum, to satisfy procedural due process, notice must be accurate and reasonably inform people of their legal rights based on the factual circumstances—a standard the district court failed to apply. Here, Defendant's misleading Notice fails these requirements because it does not reasonably apprise Plaintiffs of their rights regarding revocations under Section 20-24.1. It is therefore unconstitutional.

IV. The Remaining Requirements for a Preliminary Injunction Are Satisfied.

A. Plaintiffs will suffer immediate, irreparable injury without a preliminary injunction.

Plaintiffs will suffer immediate irreparable injury absent the entry of a preliminary injunction. Where, as here, a constitutional right is being violated, irreparable injury is assumed. *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987); *Messmer v. Harrison*, No. 5:15-CV-97, 2015 WL 1885082, at *2 (E.D.N.C. Apr. 24, 2015) (collecting cases). The Court "will not be able to make a driver whole" for any economic harm or inconvenience caused by an erroneously revoked license. *See Mackey*, 443 U.S. at 11.

Without a driver's license, Plaintiffs and those similarly situated will continue to be trapped in a vicious cycle of poverty and prevented from pursuing economic opportunities permitting them to provide for their families' basic needs and to ultimately pay off the fines and costs they owe. Here, the inability to drive impedes

their ability to work, access groceries and medical care, care for and support their families, and be active community members. *See supra* pp. 12–13; *see* also *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017). These injuries cannot be redressed through damages and are irreparable. *See id.* (noting loss of opportunity to pursue employment constitutes irreparable harm (citations omitted)); *Purkey*, 2017 WL 4418134, at *10 (same); *see also Padberg v. McGrath-McKechnie*, 108 F. Supp. 2d 177, 183 (E.D.N.Y. 2000) (finding irreparable injury where deprivation of license "imminently threaten[ed]" plaintiff's "continued subsistence, an injury . . . which could not be adequately compensated by a monetary award"); *cf. Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 339 (S.D.N.Y. 1999) ("To indigent persons, the loss of even a portion of subsistence benefits constitutes irreparable injury." (citation omitted)).

B. The threatened injury to Plaintiffs outweighs any potential harm injunctive relief might cause to Defendant, and an injunction serves the public interest.

The threat of injury to Plaintiffs considerably outweighs any potential harm to Defendant, and the requested injunction would serve the public interest. Plaintiffs are being denied a critical ability to support themselves and their families. *See supra* pp. 11–13; *see also Bell*, 402 U.S. at 539. By contrast, Defendant is being asked to comply with the law; this is not a cognizable hardship. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002); *see also Messmer*, 2015 WL 1885082, at

*2. Any administrative costs associated with affording pre-deprivation hearings and sufficient notice are outweighed by the harms to Plaintiffs' ability to drive to keep their jobs, support their families, and meet other critically important basic needs.

Moreover, Section 20-24.1's revocation scheme does not serve the State's interest in collecting fines and costs when the person cannot pay. *See supra* pp. 30–33. And because Plaintiffs are not challenging the underlying judgments to pay traffic fines and costs, the State can enforce the judgments through alternative measures other than indefinite license revocations. *See supra* p. 34.

An injunction also serves the public interest. "[U]pholding constitutional rights surely serves the public interest." *Cento Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (citation omitted); *Giovani Carandola, Ltd.*, 303 F.3d at 521 (same). Granting the injunction would enable Plaintiffs to drive, which would permit them to obtain and retain employment, meet their and their families' daily needs, and ultimately pay off their unpaid court debt.

CONCLUSION

"Appellate courts have the power to vacate and remand a denial of a preliminary injunction with specific instructions for the district court to enter an injunction." *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014) (citations omitted) (ordering entry of injunction of same-

day registration voting requirements even though district court ruled solely on likelihood of success of claim).

Accordingly, in consideration of the foregoing arguments, the Court should: **(1)** conclude that Plaintiffs are likely to prevail on their *Bearden* and notice claims, that they will suffer irreparable injury absent a preliminary injunction, that the balancing of hardships tips in their favor, and that the injunction is in the public interest; **(2)** reverse the district court's order dismissing Plaintiffs' equal protection and due process claim under *Bearden* and denying Plaintiffs' request for a preliminary injunction with respect to that claim,[16] and **(3)** remand with instructions for the district court to enter a preliminary injunction to:

(a) enjoin Section 20-24.1(a)(2) and (b)(3)-(4);

(b) bar the DMV from revoking licenses for non-payment under Section 20-24.1(a)(2); and

(c) lift current license revocations entered under Section 20-24.1(a)(2) and reinstate those licenses without charging a reinstatement fee if there are no other bases for the license revocation pending the ultimate determination of the merits of Plaintiffs' claims.

[16] Because other portions of the order are not being appealed, including the denial of other parts of Defendant's Motion for Judgment on the Pleadings and the grant of Plaintiffs' Motion for Class Certification, those portions of the order should remain in force.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted here to assist the Court in resolving the important legal questions presented by this appeal—questions that bear on what findings and procedural protections are required before the State may sanction an individual for failing to pay traffic fines and costs by revoking their driver's license.

Dated: August 19, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). According to the word-count feature of the word-processing program with which it was prepared (Microsoft Word)—the brief contains 12,436 words, excluding portions exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Date: August 19, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, which will send a copy of the foregoing to all registered counsel of record.

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