

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

SETI JOHNSON and SHAREE SMOOT,
on behalf of themselves and those
similarly situated,

Plaintiffs,

v.

TORRE JESSUP, in his official capacity
as Commissioner of the North Carolina
Division of Motor Vehicles,

Defendant.

Case No.

(CLASS ACTION)

Expedited Ruling Requested

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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NATURE OF THE MATTER

Plaintiffs are low-income individuals who have been unlawfully punished under a North Carolina statute that indefinitely revokes their drivers' licenses because they cannot afford to pay fines, court costs, and penalties for traffic offenses ("fines and costs"). This revocation process is carried out by the North Carolina Division of Motor Vehicles ("DMV"), pursuant to N.C.G.S. § 20-24.1, without any meaningful notice, pre-deprivation hearing, or determination of ability to pay. In a state where 92% of residents rely on a license to pursue their livelihoods and support family, this wealth-based revocation scheme unlawfully punishes the State's low-income residents and pushes them further into poverty, in violation of the Fourteenth Amendment to the U.S. Constitution.

Plaintiffs Seti Johnson and Sharee Smoot's experiences exemplify the abuses of this system. Both received traffic tickets. Neither was able to pay the associated fines and costs. The DMV entered a revocation order revoking Mr. Johnson's license, which will become indefinitely effective on or around July 24, 2018. The DMV has already indefinitely revoked Ms. Smoot's license, which remains revoked. Both currently or will soon face the impossible choice of failing to provide for themselves and their families or of driving illegally to meet basic needs. Neither has ever been provided any sort of hearing or assessment of ability to pay, and both received a DMV notice that told them they had to pay in full to avoid revocation, without mentioning alternatives under state law for those who cannot pay.

Plaintiffs bring this action to vindicate their constitutional rights and request a preliminary injunction: (1) to enjoin Section 20-24.1(a)(2) and (b)(3)-(4); (2) to bar the

DMV from revoking licenses for non-payment under Section 20-24.1(a)(2); and (3) to 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 revocation—pending the ultimate determination of the merits of Plaintiffs’ claims.

STATEMENT OF THE FACTS

At any time, hundreds of thousands of drivers’ licenses are revoked for failure to pay fines and costs for traffic offenses under North Carolina law.¹ Section 20-24.1 of the North Carolina General Statutes mandates automatic and indefinite revocation of a driver’s license when a person fails to pay fines and costs, without any inquiry into the driver’s ability to pay or notice of permissible alternatives to payment. N.C.G.S. § 20-24.1. This revocation scheme disproportionately punishes impoverished residents in violation of federal law, taking away crucial means of self-sufficiency and further pushing them into poverty.

A. The DMV Indefinitely Revokes Drivers’ Licenses for Failure to Pay Fines and Costs Pursuant to Section 20-24.1.

State law requires courts to notify the DMV of a person’s failure to pay fines and costs 40 days after the non-payment. N.C.G.S. § 20-24.2(a)(2). After receiving this notice from the court, the DMV “must revoke” the individual’s driver’s license. *Id.* § 20-24.1(a).

¹ The precise number varies, but over 436,000 licenses were revoked in the fall of 2017. Email from DMV (Sept. 26, 2017), attached as Exhibit I to Declaration of Samuel Brooke (“Brooke Decl.”).

The DMV does this by entering a revocation order, which becomes effective 60 days after it is mailed or personally delivered to the individual. *Id.*

Section 20-24.1 does not require—and the DMV does nothing to ensure—that individuals are capable of paying their fines and costs before their license is revoked. No prior hearing, inquiry, or determination that the individual willfully refused to pay is required by statute, or otherwise ensured, before the license revocation. *See id.*

While the statute ironically creates an option for those unable to pay to regain their licenses, it fails to do so in a constitutionally effective manner. It places the burden on individuals to petition to stop the revocation or to reinstate their licenses by proving that their failure to pay was not willful. *See* N.C.G.S. § 20-24.1(b)(4). And as noted below, the State not only fails to inform anyone of this process, but affirmatively misleads drivers into believing they must pay in full to halt revocation or be reinstated. Until the motorist satisfies Section 20-24.1(b), the license remains indefinitely revoked. *Id.* § 20-24.1(b), (c).

B. The DMV Sends Deficient, Misleading Notices to Drivers to Induce Payment.

The DMV presents drivers who have unpaid fines and costs with only two options: pay or have the license revoked. The DMV uses a standard form for the revocation order, which it labels as an “Official Notice.” A copy of this notice, referred to hereafter as the “Revocation Notice,” appears below:

01/10/2018

SHAREE ANTONETTE SMOOT
3726 PATRIOTS PLACE DR
CONCORD NC 28025-6033

OFFICIAL NOTICE
CUSTOMER NO. 000028880058

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

Revocation Notice from N.C. DMV to Sharee Smoot (Jan. 10, 2018), attached as Attachment B to Declaration of Sharee Smoot (“Smoot Decl.”).

The Notice alerts individuals that their “driving privilege is scheduled for an indefinite suspension in accordance with general statute 20-24.1 for failure to pay [a] fine” by the effective date. *Id.* It also instructs that the driver must “comply” with the citation to prevent “suspension” by the effective date or to have the revoked license reinstated. *Id.* There is no explanation of what “comply” or “compliance” means and no process outlined on how to comply beyond payment of the underlying citation. *Id.* Rather, the Notice

simply states: “PLEASE COMPLY WITH THIS CITATION PRIOR TO THE EFFECTIVE DATE IN ORDER TO AVOID THIS SUSPENSION.” *Id.*

C. The Revocation of Drivers’ Licenses Pushes Individuals Plaintiffs Further into Poverty.

The impact of Section 20-24.1 on the thousands of individuals who have lost their licenses for failure to pay is severe—particularly in a state like North Carolina, where 1.5 million individuals like Mr. Johnson and Ms. Smoot live in poverty.²

Plaintiff Mr. Johnson, a father of young children, lives with his mother because he cannot afford to pay his own rent. Declaration of Seti Johnson (“Johnson Decl.”) ¶¶ 3, 4, 7. He has a valid driver’s license on which he relies for work, to obtain food, and to take his children to school. *Id.* ¶¶ 4, 16. Although Mr. Johnson just obtained a new job, he lacks a stable income and has struggled to maintain work, in part, because his license was revoked at least twice before due to inability to pay traffic tickets. *Id.* ¶ 7, 13, 14, 17, 18.

In April 2018, Mr. Johnson pled guilty to “failure to notify DMV of address change” and was sentenced to pay a \$100 fine, \$208 in court costs, and an additional \$20 because he could not in full pay that day. *Id.* ¶¶ 9–10, 12. He did scrape together \$100 that day, however, and was told the remainder was due “within 40 days,” on May 22, 2018, and that his license would be suspended if he did not pay in full. *Id.* ¶¶ 11–13. Mr. Johnson was unable to pay by May 22, 2018, and his license was automatically revoked by the DMV.

² U.S. Census Bureau, *Quick Facts North Carolina*, <https://www.census.gov/quickfacts/NC>, attached as Exhibit A to Brooke Decl.

Id. ¶¶ 13–14. The revocation will soon become effective on or around July 24, 2018. N.C.G.S. § 20-24.1(a).

Because Mr. Johnson still cannot pay the ticket, he fears his imminent license revocation will prevent him from supporting himself and his family. *Id.* ¶¶ 4, 14, 16. Mr. Johnson relies on his driver’s license to search for work and when employed, to travel to work; to travel to the grocery store; to take his children to school and daycare; and to attend doctor’s appointments. *Id.* If his license is revoked, he will be unable to fulfill any of these needs *Id.* ¶ 16.

Plaintiff Sharee Smoot’s driver’s license is currently revoked because she could not pay fines and court costs for traffic tickets in 2016 and 2017. Smoot Decl. ¶¶ 3, 14, 20. Ms. Smoot, however, currently needs a license to support herself, her daughter, and her grandmother. *Id.* ¶ 24. She works forty-five minutes from her home but has no one to pick her up from, and drop her off at, work. *Id.* ¶ 4. She also needs to travel to doctor’s appointments and church and to get food for her daughter. *Id.* ¶ 21.

The tickets Ms. Smoot received and pled guilty to in 2016 and 2017 resulted in fines and costs of \$308 and \$235, respectively. She could not afford to pay these tickets within 40 days of the court’s due date due to her limited finances. *Id.* ¶¶ 5–7, 15–17.

Each time after Ms. Smoot was unable to pay the tickets, the DMV sent her nearly identical Revocation Notices, which failed to tell her how to avoid the revocation or reinstate her license after the revocation, except to “comply” with the citation by the designated dates. *See* Smoot Decl. ¶¶ 8, 18 & Attachments A & B (Notices). The DMV

indefinitely revoked her license in late 2016 and again in early 2018 because she did not pay by the dates due to her strained finances. *Id.* ¶¶ 14, 20.

The Supplemental Nutrition Assistance Program benefits Ms. Smoot received for a time were cancelled, and with her limited income, she was barely able to meet her and her family's financial needs, including rent, utilities, car note and car insurance, and groceries. She often had to choose between paying utilities or buying groceries. *Id.* ¶¶ 10–12. Ms. Smoot also stopped attending the University of North Carolina because she could not afford it along with family bills. *Id.* ¶ 13. In 2017, Ms. Smoot also lost her car because she could not afford the car note and due to her lack of transportation, lost her job at the time. *Id.* ¶ 19.

Ms. Smoot still cannot pay her tickets due to her limited hours at work and her family's financial reliance on her. She is living with her grandmother to avoid paying extra rent. *Id.* ¶¶ 21–23. Consequently, Ms. Smoot continues to face ongoing, imminent harm arising from the revocation of her license, including loss of her ability to work to care for herself and her family or the risk of additional tickets for driving without a valid license. *Id.* ¶¶ 21, 24.

Mr. Johnson and Ms. Smoot's experiences are typical of many others who have lost—or will soon lose—their ability to drive due to poverty. In North Carolina the inability to drive makes it nearly impossible to sustain a livelihood or provide for family. A driver's license is a “very common requirement” to obtain employment, including most

jobs that “can actually lift people out of poverty.”³ Nearly 92% of North Carolinians travel to work by car and only 1.1% travel to work by public transit.⁴ Reliable, accessible public transit remains scarce in the state, where the vast majority of counties are rural.⁵ Public transit services in urban areas of the State also provide limited access to jobs.⁶

Thus, lack of transportation options remains a common barrier to obtaining and maintaining employment for many North Carolinians.⁷ Accordingly, revocations for failure to pay make it even more difficult for North Carolinians to find and keep employment, and create an unjust and impossible dilemma: drive illegally and risk further punishment, or stay home, lose employment, and forgo the ability to provide for the most basic daily living needs for one’s self and family.

QUESTIONS PRESENTED

A. Whether the license revocation process for failure to pay, enforced by the DMV

³ See, e.g., Alana Semuels, *No Driver’s License, No Job*, The Atlantic (June 15, 2016), <https://goo.gl/xQjyLj>, attached as Exhibit B to Brooke Decl.; Stephen Bingham et al., *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California* 26–28 (2016), <https://goo.gl/uLhFfL>, attached as Exhibit C to Brooke Decl.

⁴ U.S. Dep’t of Transp., Bureau of Transp. Stats., *NORTH CAROLINA Transportation by the Numbers 2* (2016), <https://goo.gl/eM6NWy>, attached as Exhibit D to Brooke Decl.

⁵ See Tazra Mitchell, *Connecting Workers to Jobs through Reliable and Accessible Public Transit*, Policy & Progress, N.C. Justice Center (Nov. 2012), <https://goo.gl/qOF0S>, attached as Exhibit E to Brooke Decl. (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. Env’tl. Law Ctr. 1 (2012), <https://goo.gl/xQjyLj>, attached as Exhibit F to Brooke Decl.

⁶ Mitchell, *supra* note 5, at 1–2.

⁷ *Id.*

pursuant to N.C.G.S. § 20-24.1, violates the Fourteenth Amendment, including whether the notice used by the DMV is constitutionally deficient.

B. Whether Plaintiffs are entitled to preliminary injunctive relief.

ARGUMENT

A plaintiff seeking a preliminary injunction 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). Where mandatory relief is requested, the movant must additionally show that an injunction is ““necessary . . . to protect against irreparable harm in a deteriorating circumstance created by the [non-moving party].”” *Wheelihan v. Bingham*, 345 F. Supp. 2d 550, 553 (M.D.N.C. 2004) (citation omitted). An injunction to prevent Plaintiffs’ licenses from being revoked would be prohibitory, whereas an injunction to reinstate revoked licenses would be mandatory.

A. Plaintiffs Are Likely to Prevail on Their Claims.

It is unconstitutional for a State to revoke the drivers’ licenses of people who cannot afford to pay fines and costs. It is also unconstitutional to revoke driver’s licenses without providing sufficient notice and an opportunity to be heard. Indeed, within the last year, two courts have deemed comparable driver’s licenses revocation schemes in Tennessee and Michigan likely unconstitutional and enjoined their enforcement. *See Robinson v. Purkey*, No. 3:17-CV-1263, 2017 WL 4418134, at *9 (M.D. Tenn. Oct. 5, 2017); *Fowler*

v. Johnson, No. CV 17-11441, 2017 WL 6379676, at *12 (E.D. Mich. Dec. 14, 2017).⁸ A similar conclusion is warranted here.⁹

1. Defendant’s automatic revocation of drivers’ licenses without a prior determination of ability to pay violates the Fourteenth Amendment (*First Claim for Relief*).

North Carolina’s license revocation statute violates fundamental constitutional principles of equal protection and due process by subjecting those who cannot afford to pay fines and costs to an additional punishment not imposed on those who can pay. It is well-established that a person may not be punished, either by incarceration or by other means, solely because they cannot afford to pay fines and costs. *See Bearden v. Georgia*, 461 U.S. 660, 664 (1983) (“[The Court] has long been sensitive to the treatment of indigents in our criminal justice system”); *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971) (striking down prohibition on right of indigent criminal defendant to appeal fine-

⁸ Plaintiffs respectfully submit that *Robinson* and *Fowler* misapplied the judicial standard mandated by *Bearden v. Georgia*, 461 U.S. 660, 664 (1983). *Fowler* concluded that *Bearden* did not apply while *Robinson* applied a lower rational basis analysis of *Bearden* in deference to dicta from the Sixth Circuit. As discussed below, this was error. But *even under the lowest standard of judicial review*, both *Robinson* and *Fowler* concluded that Tennessee and Michigan’s license revocation statutes did not pass constitutional muster. *See infra* p. 15.

⁹ A third case challenged Virginia’s suspension scheme and was dismissed for lack of jurisdiction because the court found that the statutory scheme directed the *state court* to order suspension of licenses, although plaintiffs had sued the state Department of Motor Vehicles Commissioner. *Stinnie v. Holcomb*, 2017 WL 963234, at *9 (W.D. Va. Mar. 13, 2017). *Stinnie* is inapposite, however, because North Carolina law places revocation authority within the exclusive domain of the DMV—not with state courts. *See* N.C.G.S. §§ 20-24.1, 20-24.2 (directing court to provide notice and DMV to do revocation); *Smith v. Walsh*, 238 S.E.2d 157 (N.C. App. 1977) (DMV has exclusive authority to revoke).

only offense). In articulating the Court’s commitment to the “basic command that justice be applied equally to all persons,” the Court has emphasized that “the passage of time has heightened rather than weakened attempts to mitigate the disparate treatment of indigents in the criminal process.” *Williams v. Illinois*, 399 U.S. 235, 241 (1970).

In the seminal case of *Bearden v. Georgia*, the Supreme Court outlined the framework for evaluating whether a criminal justice sanction unconstitutionally punishes a defendant for being poor. 461 U.S. 660.¹⁰ Because “[d]ue process and equal protection principles converge” in evaluating such claims, the Court dismissed the traditional equal protection framework—which usually requires analysis under a particular level of scrutiny—as a “task too Procrustean to be rationally accomplished.” *Id.* at 666 n.8. Instead, the Court required a more searching approach directed at weighing the impact a sanction may have on an indigent defendant. 461 U.S. at 666 n.8; *see also M.L.B.*, 519 U.S. at 120 (requiring balance of “the character and intensity of the individual interest at stake . . . and the State’s justification” (internal citation marks omitted)).

In assessing whether a criminal justice sanction punishes individuals for their poverty, *Bearden* requires a “careful inquiry” into: (1) “the nature of the individual interest

¹⁰ While *Bearden* involved a probationer jailed for failing to pay costs, the principle that a person may not be punished for her poverty “is not confined to cases in which imprisonment is at stake.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 111, 112 (1996) (citations omitted); *see also Mayer*, 404 U.S. at 197 (indigent litigant entitled to copy of appellate record); *Miller v. Smith*, 115 F.3d 1136, 1141 (4th Cir. 1997) (appellate rights); *Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984) (attorney fee reimbursement statute); *see also* U.S. Stmt. of Interest at 15-16, No. 3:16-cv-00044 (W.D. Va. Nov. 7, 2016) (summarizing same), attached as Exhibit H to Brooke Decl.

affected,” (2) “the extent to which it is affected,” (3) “the rationality of the connection between legislative means and purpose,” and (4) “the existence of alternative means for effectuating the purpose” 461 U.S. at 666 (citation omitted). Under this standard, Defendant’s automatic, indefinite revocation system is unconstitutional for the reasons set forth below.

- i. Section 20-24.1 deeply impairs Plaintiffs’ substantial property interest in their drivers’ licenses.

Plaintiffs have a substantial property interest in their drivers’ 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 livelihood,” *Bell*, 402 U.S. at 539; *see also Miller v. Anckaitis*, 436 F.2d 115 (3rd Cir. 1970) (license indispensable “for virtually everyone who must work for a living”); U.S. Stmt. of Interest, *Stinnie*, at *9, Ex. H to Brooke Decl. Individuals’ interest in their driver’s license 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. 7–8. Absent a valid driver’s license, North Carolinians like Mr. Johnson and Ms. Smoot have extremely limited avenues for economic survival. Accordingly, Plaintiffs prevail on the first *Bearden* factor.

ii. The private interest is substantially affected.

Defendant's automatic revocation of Plaintiffs' drivers' licenses completely bars them from driving. After the license is revoked, an individual must stop driving or run an immediate risk of further criminal sanctions for driving on a revoked license. This process inhibits the ability of low-income persons from pursuing a livelihood and supporting their families, since a person with a revoked driver's license "is at an extraordinary disadvantage in both earning and maintaining material resources." *Robinson*, 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. For these reasons, the second *Bearden* factor weighs strongly in Plaintiffs' favor.

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

The legislative purpose of Section 20-24.1(a)(2) is to ensure compliance with orders by collecting unpaid fines and costs. But as explained in *Bearden*, in 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 when sanctioning a person for failure to pay. 461 U.S. at 668. Revoking the driver's licenses of people 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. It is also 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 Robinson*, 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.”). Thus, the third *Bearden* factor weighs strongly in Plaintiffs’ favor.

iv. Alternative means exist to effectuate the State’s legislative purpose.

Alternative means that are more effective than automatic, indefinite license revocations of people unable to pay exist to effectuate the State’s interest in ensuring compliance with monetary court judgments. For example, North Carolina could extend the time to pay, reduce payment amounts, or utilize a graduated payment plan to collect unpaid fees and costs. *See Tate*, 401 U.S. at 399–400 & n.5. The State could also create alternative sanctions, including performing public service or completing traffic safety classes. *See U.S. Stmt. of Interest, Stinnie*, at *14, Ex. H to Brooke Decl.

2. Defendant violates procedural due process by automatically revoking drivers’ licenses for nonpayment without any meaningful pre-deprivation opportunity to be heard (*Second Claim for Relief*).

The “central meaning” of procedural due process is notice and an opportunity to be heard at a meaningful time and manner. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Mallette v. Arlington Cty. Employees’ Supp. Retirement Sys. II*, 91 F.3d 630, 634 (4th Cir. 1996). In determining what process is due, a court must balance: (1) the nature of the private interest that will be affected by the governmental action; (2) the risk of erroneous deprivation through the procedures used and the probable value of requiring additional

procedural safeguards; and (3) the government’s interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Ordinarily due process requires an opportunity for ‘some kind of hearing’ *prior to* the deprivation of a significant property interest.” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) (emphasis added) (citations omitted); *see also Fuentes*, 407 U.S. at 82. Indeed, courts have held that revocation of a driver’s license without a prior ability-to-pay hearing violates due process. *See Robinson*, 2017 WL 4418134, at *9; *Fowler*, 2017 WL 6379676, at *12; *cf. Craft*, 436 U.S. at 18 (same for termination of utilities); *Goldberg*, 397 U.S. at 264 (1970) (same for welfare benefits).

i. The private interest affected by the deprivation is substantial.

Individuals have a substantial property interest in their drivers’ licenses. *Mackey*, 443 U.S. 1, 11 (1979). License revocation is a complete deprivation. *See Dixon v. Love*, 431 U.S. 105, 113 (1977). Therefore, a license may not be suspended “without that procedural due process required by the Fourteenth Amendment.” *Bell*, 402 U.S. at 539.

ii. The risk of erroneous deprivation under section 20-24.1 is substantial absent additional procedural safeguards.

As the Supreme Court has explained, when a state fails to permit “consideration of an element essential to the decision” of whether to revoke a license before revocation—particularly an element that is fact-dependent—the process does not satisfy due process because there is too great a risk that an erroneous result will occur. *Bell*, 402 U.S. at 542; *see also Conn. Dep’t of Public Safety v. Doe*, 538 U.S. 1, 7 (2003) (recognizing that procedural due process requires opportunity to prove facts material to state’s statutory

scheme leading to deprivation); *cf. Plumer v. Maryland*, 915 F.2d 927 (4th Cir. 1990) (citations omitted) (statute constitutional where evidentiary hearing was required before suspension); *Jones v. Penny*, 387 F. Supp. 383, 394–95 (M.D.N.C. 1974) (requiring competency hearing before suspension). By contrast, where the suspension is “largely automatic,” a pre-deprivation hearing is not necessary. *See Dixon*, 431 U.S. at 113 (hearing unnecessary when suspension is based on objective point system); *Mackey*, 443 U.S. at 1 (same where based on refusal to take breath-analysis test).

Here, the willfulness of an individual’s non-payment is a material consideration: if one did not willfully fail to pay, she should not be punished for it.¹¹ Yet, the statutory scheme does not ensure that willfulness will be found before imposing the sanction of prohibiting use of an individual’s driver’s license. Rather, the scheme requires that DMV revocation orders result in the automatic, indefinite revocation of licenses. § 20-24.2(a)(2). This process is entirely insufficient to ensure that only those who have the means to pay will be coerced to pay through license revocation. *Bell*, 402 U.S. at 542.

Moreover, this deficiency is not cured by the 60-day window before the revocation becomes effective. Relief from indefinite license revocation is still conditioned on the individual knowing about, and affirmatively seeking, a hearing on ability to pay, which is entirely undermined by the insufficient notice the DMV sends the driver that makes no

¹¹ “Willfulness” is a factor the legislature clearly intended to be considered for proper license revocation. *See* N.C.G.S. § 20-24.1(b)(4); *see also Bell*, 402 U.S. at 541 (evaluating statutory scheme to identify critical issues requiring hearing).

mention of this process. *See infra* pp. 19–21. Thus, a pre-deprivation hearing is necessary to ensure that the substantive standard of willful nonpayment is met *before* the State revokes a person’s license.

By analogy, the same conclusion is reached by examining Section 20-24.1 through the lens of civil contempt. Civil contempt is defined by an intent to coerce compliance with a prior order. *See Hicks ex. rel. Feiock v. Feiock*, 485 U.S. 624, 646–47 (1988); Black’s Law Dictionary, *Civil Contempt* (10th ed. 2014) (“A civil-contempt proceeding is coercive or remedial in nature. . . .”). To be constitutional, a civil contempt process requires a willfulness determination because “[a] court may not impose punishment ‘in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.’” *Turner v. Rogers*, 564 U.S. 431, 442 (2011) (citation omitted); *see also McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 251 (1972) (requiring willfulness); Black’s Law Dictionary, *Civil Contempt* (10th ed. 2014) (“The act (or failure to act) complained of must be within the defendant’s power to perform . . .”).

Like civil contempt, Section 20-24.1 seeks to coerce payment of unpaid fines and costs. For this coercive scheme to satisfy due process, the DMV must first ensure that non-payment was willful. Failing to do so results in an extremely high risk that people who have not willfully failed to pay will suffer erroneous license revocations.

iii. The State’s interests do not justify dispensing with a pre-deprivation hearing.

The Supreme Court has permitted states to deprive persons of property interests without a pre-deprivation hearing in only “extraordinary circumstances.” *Fuentes*, 407 U.S. at 90. To do so, “three criteria must be satisfied”:

(1) the seizure must be directly necessary to secure an important governmental or general public interest; (2) there must be a special need for very prompt action; and (3) the person initiating the seizure must be a government official responsible for determining, under the standards of a narrowly drawn statute, that seizure is necessary and justified in the particular instance.

Richmond Tenants Org., Inc. v. Kemp, 956 F.2d 1300, 1307 (4th Cir. 1992) (citation omitted).

None of these criteria is applicable here. First, the government does not have an important interest in revoking drivers' licenses of individuals who *cannot* pay fines and costs: license revocations cannot achieve payment. *Supra* pp. 13–14. And while the State has a strong interest in protecting public safety by suspending the licenses of dangerous drivers, *see Dixon*, 431 U.S. at 114; *Mackey*, 443 U.S. at 17, 18, non-payment of fines and costs is not a public safety issue, *Dixon*, 431 U.S. at 114. *Robinson* highlighted this contradiction between the government's interest in public safety and revoking licenses for non-payment of fines, reasoning that a person who could afford to pay could, in fact, verifiably be a greater danger on the road than an individual who cannot afford to pay. 2017 WL 4418134, at *8. Indeed, by revoking licenses for nonpayment, the state *undermines* public safety because revocations divert law enforcement resources away from scenarios that do legitimately pose a risk to the public, and lead to more unlicensed and uninsured drivers on the road.¹²

¹² *See* Am. Ass'n of Motor Veh. Adm'rs, *Best Practices Guide to Reducing Suspended Drivers* 3 (2013), <https://goo.gl/2jtka7> (recommending ceasing suspension of licenses “for non-highway safety related violations” because it would increase public safety).

Second, there is no special need for automatic license revocation. The State's ability to collect unpaid debt would not be altered by deferring revocation until after a hearing.

Third, the revocation process is *not* initiated by a "government official responsible for determining, under the standards of a narrowly drawn statute, that seizure is necessary and justified in the particular instance." *Richmond Tenants Org.*, 956 F.2d at 1307. To the contrary, the revocation is automatic; no government official monitors the process to ensure that a license revocation is justified so that only those able to pay face revocation. *See* N.C.G.S. §§ 20-24.1, 20-24.2.

Finally, while a pre-revocation hearing could cause some fiscal and administrative burden, "[f]inancial costs alone [are] not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." *Mathews*, 424 U.S. at 348. Such considerations are instead a "factor that must be weighed" to assess how *extensive* the procedural safeguard must be. *Id.* But cost cannot justify the DMV abdicating its responsibility to hold a pre-deprivation hearing that is necessary to establish under Section 20-24.1 whether a person willfully failed to pay.

3. The DMV violates procedural due process by revoking licenses for non-payment without adequate notice of legal rights under Section 20-24.1 (*Third Claim for Relief*).

Adequate notice is "a vital corollary 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 allows 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 whether notice is sufficient 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 “convey the required information.” *Id.*; *Craft*, 436 U.S. at 14; *Goldberg*, 397 U.S. at 268–69. In circumstances where a punishment may be imposed, notice must inform the party as to what the “critical issue[s]” of the hearing will be. *Turner*, 564 U.S. at 447.

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) (citation omitted); *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62 (N.D. Cal. 1976)). A misleading notice violates the core constitutional principle of due process. *See, e.g., id.* (notice providing incomplete and misleading information found insufficient); *see also Nnebe*, 184 F. Supp. 3d at 74 (same where notices did not convey factors commission would consider in suspending licenses); *Noah v. McDonald*, 28 Vet. App. 120, 123 (2016) (same where notice misled claimant as to time to submit necessary evidence); *Butland v. Bowen*, 673 F. Supp. 638, 641 (D. Mass. 1987) (same where notice misinformed claimant about statute of limitations); *Mallette*, 91 F.3d at 641 (notice “affirmatively misl[ed]” by suggesting benefits would be granted, although benefits were going to be contested).

Here, the Revocation Notice is critically misleading. The Notice gives the drivers only one option to avoid having their licenses revoked—“comply” with the citation—and omits any reference to the option of a hearing under Section 20-24.1(b) and (b1) to prevent indefinite revocation of the license by demonstrating inability to pay.

Because the Notice advises recipients of their monetary debt but gives no information regarding any alternative beyond full payment, a typical reader would interpret “compliance” to mean that the citation must be paid in full to prevent the revocation from becoming effective. Smoot Decl. ¶¶ 8–9, 18; *see also* Johnson Decl. ¶¶ 15, 17. This omission is unconstitutionally misleading and deficient. *See Turner*, 564 U.S. at 447; *Nnebe*, 184 F. Supp. 3d at 74.

B. 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 erroneously suspended license. *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 that will allow them to provide for their and their families’ basic living needs. Here, the inability to drive impedes Ms. Smoot and Mr. Johnson’s ability to work, access groceries and medical care, care for and support their families, and be active community members, Smoot Decl. ¶¶ 4, 21, 23, 24, 26; Johnson Decl. ¶¶ 2, 4, 16–18; *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)); *Robinson*, 2017 WL 4418134, at *10 (same); *see also Mackey*, 443 U.S. at 11 (noting state “will not be able to make a driver whole” for any economic harm or inconvenience caused by erroneously suspended license); *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)).

C. 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. Mr. Johnson and Ms. Smoot, respectively, will be, and are being, denied a critical ability to support themselves and their families, search for and maintain employment, and attend to their children’s schooling needs. Smoot Decl. ¶¶ 4, 21, 23, 24, 26; Johnson Decl. ¶¶ 2, 4, 16–18; *see also Bell*, 402 U.S. at 539.

Defendant, on the other hand, is merely being asked to comply with the law; this is not a cognizable hardship on a defendant. *Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (state not harmed by issuance of preliminary junction to prevent enforcement of unconstitutional restrictions); *see also Messmer*, 2015 WL 1885082, at *2 (citation omitted). Any administrative costs associated with affording pre-deprivation

hearings is outweighed by the harms to Plaintiffs' ability to drive to keep their jobs, support their families, and meet other critically important basic needs.

Moreover, as noted above, Section 20-24.1's revocation scheme does not serve the State's interest in collecting fines and costs if the driver cannot pay. *See supra* 13–14, 18–19. And because Plaintiffs are not challenging their underlying monetary sentences, the State can still enforce monetary sentences through alternative measures other than license revocations. *See supra* at 14.

Relatedly, no harm to the public interest would result from issuing an injunction. Instead, “[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). In fact, granting the injunction would serve the important public purpose of enabling Plaintiffs to drive and thus, obtain and retain employment and meet their and families' daily needs.

For all of the above reasons, the preliminary injunction, as Plaintiffs have requested, *supra* 2–3, is warranted.

Dated May 30, 2018.

Respectfully submitted,

/s/ Kristi L. Graunke

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), I certify that the body of this memorandum, including headings and footnotes but excluding the caption, signature lines, certificates, and any cover pages or indices, does not exceed 6,250 words.

/s/ Kristi L. Granke

Kristi L. Graunke

CERTIFICATE OF SERVICE

I certify that arrangements have been made to this day deliver a true and correct copy of the foregoing by hand delivery to the following:

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Formal proof of service will be filed with the Court when completed.

I further certify that arrangements have been made to this day deliver a true and correct courtesy copy of the foregoing to the following, in the manners described below:

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DATED this May 30, 2018.

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