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

SETI JOHNSON and SHAREE SMOOT, on behalf of themselves and those similarily situated, Plaintiffs, v. TORRE JESSUP, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles, Defendant.	Case No. _____ (CLASS ACTION)

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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NATURE OF THE MATTER

Plaintiffs are low-income individuals who have been unlawfully punished under a North Carolina statute that automatically and 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 Department 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 their families, this wealth-based revocation scheme unlawfully punishes the State's low-income residents and traps them in a cycle of poverty, in violation of the Fourteenth Amendment to the U.S. Constitution.

Accordingly, Pursuant to Federal Rule of Civil Procedure 23(a), (b)(2) and (g), Plaintiffs seek to certify two classes. Plaintiff Mr. Seti Johnson seeks to represent the **Future Revocation Class**, defined as:

> All individuals whose drivers' licenses will be revoked in the future by the DMV due to their failure to pay fines, penalties, or court costs assessed by a court for a traffic offense.

Plaintiff Ms. Sharee Smoot seeks to represent the **Revoked Class**, defined as:

> All individuals whose drivers' licenses have been revoked by the DMV due to their failure to pay fines, penalties, or court costs assessed by a court for a traffic offense.

As detailed below, both proposed Classes meet the certification requirements of Rule 23.

STATEMENT OF FACTS

Hundreds of thousands of licenses are revoked for failure to pay fines and costs under North Carolina law at any time.[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 without due process, taking away crucial means of self-sufficiency and further pushing them into poverty.

A. The DMV Automatically Revokes Drivers' Licenses for Failure to Pay Fines and Costs Pursuant to N.C.G.S. Section 20-24.1.

State law requires courts to notify the DMV 40 days after a person fails to pay fines and costs related to a traffic offense. 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). 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 necessary before license revocation. *See id.*

[1] The precise number varies, but over 436,050 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.").

While the statute ironically contemplates that those unable to pay should not be punished, it fails to constitutionally effectuate this desire. It places the burden entirely on individuals to petition to stop the revocation process or to reinstate their licenses by proving to a court that their failure to pay was not willful. N.C.G.S. § 20-24.1(b)(4).[2] 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 be reinstated. Until the motorist satisfies Section 20-24.1(b), the license remains indefinitely revoked. *Id.* § 20-24.1(b), (c).

B. <u>The DMV Sends Deficient and Misleading Notices to Drivers to Induce Payment.</u>

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:

[2] The driver may also have her license reinstated by establishing that she paid her outstanding debt or that she is not the person charged with the offense. N.C.G.S. § 20-24.1(b)(2), (3). The DMV will charge an additional $65 fee if the individual provides the payment or information required under § 20-24.1(b) more than 60 days after the date of the license revocation. *Id.* § 20-24.1(b), (c).

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 Plaintiff Sharee Smoot (Jan. 10, 2018), attached as Attachment B to Declaration of Sharee Smoot ("Smoot Decl.").

The Revocation 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 their revoked license reinstated. *Id.* There is no explanation of what "comply" or "compliance" means, and no

process is outlined for how to comply beyond payment of the underlying citation: 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 Like Plaintiffs Mr. Johnson and Ms. Smoot Further into Poverty.

The impact of Section 20-24.1 on the hundreds of thousands of individuals who have lost their licenses for failure to pay fines and costs is severe—particularly in a state like North Carolina where 1.5 million individuals, including Mr. Johnson and Ms. Smoot, live in poverty.[3]

Plaintiff Mr. Johnson, who is 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. He lacks a stable income and puts his limited resources towards his family's needs. *Id.* ¶ 2. Mr. Johnson has struggled to maintain work, in part, because his license was revoked at least twice before because he was unable to pay his traffic tickets, and because he was required to attend multiple court hearings regarding the unpaid tickets. *Id.* ¶ 2.

Mr. Johnson's has a valid driver's license that provides him substantial economic advantages: he relies on his driver's license to search for work and, when employed, to travel to work; to travel to the grocery store; take his children to school and daycare; and attend doctor's appointments. *Id.* ¶ 4.

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

In April 2018, Mr. Johnson pled guilty to "failure to notify DMV of address change" and was sentenced to pay a $100 fine and $208 in court costs, and an additional $20 because he could not pay that day. *Id.* ¶¶ 9–12. Mr. Johnson was unemployed with only $300 to his name, but he paid $100 that day because the prosecutor told him he had to do so to prevent the immediate revocation of his license. *Id.* ¶ 12.

Mr. Johnson received a Bill of Costs stating that the remainder of his fine and costs were due "within 40 days" on May 22, 2018, and that his license would be suspended if he did not pay in full. *Id.* ¶ 11. Mr. Johnson was unable to pay the fine and costs by May 22, 2018; the DMV entered a revocation order, which will become effective indefinitely on or around July 24, 2018, absent payment. *Id.* ¶ 13; N.C.G.S. § 20-24.1(a).

Mr. Johnson's license had been previously revoked for non-payment, and he was never told that there was any option to get it back other than paying in full. Johnson Decl. ¶ 17. Thus, he fears his license revocation for nonpayment of the 2018 fines and costs will soon become effective and that he will not be able to care for himself and his family. *Id.* ¶ 13. Without his driver's license, Mr. Johnson will struggle to travel to work, obtain food for his family, transport his children, and travel to doctor's appointments. *Id.* ¶ 16. In turn, he will be faced with the impossible choice of driving illegally to maintain his new job and provide for his family or lose the job and face even greater burdens in providing for his family. *Id.* ¶¶ 4, 13, 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. Ms.

Smoot currently works forty-five minutes from her home but has no one to pick her up from, and drop her off at, work. Thus, she must make the difficult choice of losing her job and not being able to care for herself and her family or driving on a revoked driver's license and risking additional tickets. *Id.* ¶ 4.

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 due to her limited economic resources, and was assessed a $50 late fee each time because she did not pay on time. *Id.* ¶¶ 7, 17. She also was notified by DMV that her license was revoked due to these non-payments. *Id.* ¶¶ 8, 18.

DMV sent Ms. Smoot nearly identical notices after she was unable to pay. The Notices failed to tell her how to avoid the revocation or reinstate her driver's license after the revocation, except to "comply" with the citation by the designated date. *See* Notices (Attachs. A, B to Smoot Decl.). She was not given any other options.

Ms. Smoot has struggled financially. She is supporting her daughter and living with her grandmother because she cannot afford to pay rent. *Id.* ¶ 2. With her limited income, Ms. Smoot has been and currently is barely able to meet her and her family's financial needs, including rent, utilities, car note and car insurance, and groceries for herself, her young daughter, and her mother. *Id.* ¶¶ 11–12, 21–23. Consequently, Ms. Smoot has often had to choose between paying the power bill or buying groceries. *Id.* ¶¶ 12, 21, 24. Ms. Smoot also had to stop attending school at the University of North Carolina-Charlotte because she could not afford school and her family's bills. *Id.* ¶ 13.

Ms. Smoot needs a driver's license to travel to work, doctor's appointments, and her church, and to purchase food for her daughter. *Id.* ¶ 21. Without a valid driver's license, she has had to make the difficult choice of staying home, losing her job, and not being able to care for herself and her family, or continuing to drive illegally and risk further punishment. *Id.* ¶ 21, 24.

The experience of Mr. Johnson and Ms. Smoot is typical of the many others who have also 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 to provide for one's family. A driver's license is a "very common requirement" to obtain employment, including most jobs that "can actually lift people out of poverty."[4] Nearly 92% of North Carolinians travel to work by car and only 1.1% travel to work by public transit.[5] Reliable, accessible public transit remains scarce in the state, where the vast majority of counties are rural.[6] Public transit services in urban areas of the State also provide limited access to jobs.[7]

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[4] *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.

[5] 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.

[6] *See* Tazra Mitchell, *Connecting Workers to Jobs Through Reliable and Accessible Public Transit*, Policy & Progress, N.C. Justice Ctr. (Nov. 2012), https://goo.gl/qOF0S, attached as Exhibit E to Brooke Decl.; 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), https://goo.gl/xQjyLj, attached as Exhibit F to Brooke Decl.

[7] Mitchell, *supra* note 6, at 1–2.

Thus, lack of transportation options remains a common barrier to obtaining and maintaining employment for many North Carolinians.[8] Accordingly, license suspensions for failure to pay fines and costs make it even more difficult for North Carolinians to find and keep employment. North Carolina's wealth-based license revocation scheme creates an unjust dilemma: drive illegally and risk further punishment, or stay home and forgo the ability to provide for the most basic of daily living needs.

QUESTIONS PRESENTED

A. Whether Plaintiffs have met the class certification requirements under Rule 23(a), (b)(2) and (g) related to the First, Second, and Third Claims for Relief, for which prospective injunctive and declaratory relief is sought, for the proposed **Future Revocation Class**.

B. Whether Plaintiffs have met the class certification requirements under Rule 23(a), (b)(2) and (g) related to the First, Second, and Third Claims for Relief, for which prospective injunctive and declaratory relief is sought, for the proposed **Revoked Class.**

ARGUMENT

A. Standard of Review for Class Certification.

To be certified, a proposed class must meet, first, the requirements of Rule 23(a) and second, the standards set forth in Rule 23(b)(2). *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014). To satisfy the prerequisites established in Rule 23(a), a plaintiff must

[8] *Id.*

show "(1) numerosity of parties; (2) commonality of factual and legal issues; (3) typicality of claims and defenses of class representatives; and (4) adequacy of representation." *Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417, 423 (4th Cir. 2003) (citing Fed. R. Civ. P. 23(a)). Next, the class action must fall within one of the three categories established in Rule 23(b), including where, as here, "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). If a lawsuit meets these requirements, certification as a class action will serve important public purposes, including "promoting judicial economy and efficiency" and "afford[ing] aggrieved persons a remedy [that may not otherwise be] . . . feasible to obtain . . . through the traditional framework of multiple individual . . . actions." *Gunnells*, 348 F.3d at 424 (quoting Moore's Fed. Practice § 23.02 (3d ed. 1999)).

As a general rule, the district court has "broad discretion" in determining whether to certify a class. *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (quoting *In re Catawba Indian Tribe*, 973 F.2d 1133, 1136 (4th Cir. 1992)). Courts may look beyond the pleadings, analyzing relevant facts and substantive law, to determine whether class certification is appropriate. *See Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006); *Thompkins v. Key Health Med. Sols., Inc.*, No. 1:12CV613, 2015 WL 5007895, at *3 (M.D.N.C. Aug. 20, 2015). However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013). "Merits questions may be

considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* Thus, "[a]n evaluation of the probable outcome on the merits is not properly part of the certification decision." *Id.* (citation omitted). Applying these as well as the following Rule 23(a) and (b)(2) standards to Plaintiffs' class claims, Plaintiffs' proposed Classes should be certified.

B. Rule 23(a)(1): The Proposed Classes Are So Numerous that Joinder of All Members Would Be Impracticable.

The Rule 23(a)(1) requirement is satisfied when the number of potential plaintiffs is "so numerous that joinder of all members" of the class would be "impracticable." Fed. R. Civ. P. 23(a)(1). "No specified number is needed to maintain a class action." *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (quoting *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967)). Even eighteen people can be sufficient. *See Cypress*, 375 F.2d at 653; *see also Rodger v. Elec. Data Sys. Corp.*, 160 F.R.D. 532, 535 (E.D.N.C. 1995) ("[A] class of as few as twenty-five to thirty members raises a presumption that joinder would be impracticable."); *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 595 F. Supp. 1404, 1407-08 (D. Md. 1984) (same).

Furthermore, the fact that the precise number of class members cannot be determined at the certification stage does not preclude class certification. *See Haywood v. Barnes*, 109 F.R.D. 568, 576-77 (E.D.N.C. 1986). The plaintiffs "need only make a reasonable estimate of the number of class members." *Wiseman v. First Citizens Bank & Trust Co.*, 212 F.R.D. 482, 486 (W.D.N.C. 2003) (citation omitted), *adhered to on reconsideration*, 215 F.R.D. 507 (W.D.N.C. 2003). "In fact, difficulty in immediately

identifying all class members makes joinder more impractical and certification more desirable." *Haywood*, 109 F.R.D. at 576 (citation omitted).

Here, the number of class members in both classes makes joinder impracticable. For the **Revoked Class**, data from the DMV establishes that at any particular time, hundreds of thousands of individuals have their licenses indefinitely revoked by the DMV for failure to pay fines and costs assessed for motor vehicle offenses. *See supra* note 1. This volume is far in excess of what would be practicable for joinder. *See Cypress*, 375 F.2d at 653; *Rodger*, 160 F.R.D. at 535; *Dameron*, 595 F. Supp. at 1407-08.

The **Future Revocation Class** consists of all individuals who will in the future face revocation for failure to pay under Section 20-24.1. The precise number of individuals in this class is unknown, but given that hundreds of thousands of individuals are presently revoked for non-payment at any given time, it is reasonable to conclude that the number of persons whose licenses will be revoked in the future for non-payment will also be voluminous. The Future Revocation Class is forward-looking with the potential for new members to join the Classes on an ongoing basis. The DMV will continue to revoke licenses for non-payment absent the injunction from this Court that Plaintiffs are simultaneously requesting via their Motion for Preliminary Injunction. *See Jack v. Am. Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974) (per curiam); *cf., e.g.*, *Walker v. Styrex Indus.*, No. C-74-197-G, 1976 WL 13224, *1 (M.D.N.C. Jan. 7, 1976) ("Future employees can be proper members of the class in an employment discrimination suit, and, while this

makes the exact number of the class unknown, it also contributes to creating so many members as to make joinder impracticable.").

The Court should also take into consideration other relevant characteristics of the class in determining whether joinder is impracticable. Where, as here, class members are subject to a statewide policy and are disbursed throughout the state, joinder will be more difficult. *Pashby v. Cansler*, 279 F.R.D. 347, 353 (E.D.N.C. 2011), *aff'd and remanded sub nom. Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013). Similarly, where class members lack financial resources or are otherwise disadvantaged, joinder is impracticable. *Rodger v. Electronic Data Syss. Corp.*, 160 F.R.D. 532, 536–37 (E.D.N.C. 1995) ("'Relevant considerations include . . . financial resources of class members . . . .'" (quoting *Robidoux v. Celani*, 987 F.2d 931 (2d Cir. 1993))); *Steward v. Janek*, 315 F.R.D. 472, 480 (W.D. Tex. 2016) (citing poverty and disabilities); *Cortigiano v. Oceanview Manor Home for Adults*, 227 F.R.D. 194, 204–05 (E.D.N.Y. 2005) (citing fear of reprisals, mental disabilities, and lack of resources); *Gerardo v. Quong Hop & Co.*, No. C 08-3953 JF (PVT), 2009 WL 1974483, at *2 (N.D. Cal. July 7, 2009) (citing lack of legal sophistication).

Here, putative members face or have experienced the revocation of their licenses precisely because of their failure to pay fines and costs; it is reasonable to assume they will be unable to afford counsel to bring their own separate action against Defendant.

Accordingly, based on a reasonable estimation of the substantial sizes of both Classes and the totality of circumstances of the putative Classes' members, joinder would be impracticable.

C. Rule 23(a)(2): Both Proposed Classes Share Common Questions of Law and Fact.

Rule 23(a)(2) requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Simply put, class "claims must depend upon a common contention" which "must be of such nature that it is capable of class-wide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). This "means that determination of [the contention's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

The commonality requirement of Rule 23(a)(2) "does not require that all, or even most issues be common, nor that common issues predominate, but only that common issues exist." *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 636 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993); *see also Dukes*, 564 U.S. at 369 ("'[E]ven a single [common] question' will do." (citation omitted)). For this reason, factual differences among the claims of putative class members do not defeat certification. Indeed, "Rule 23 does not require precise, mirror-image identity respecting the injuries caused by a single practice or policy." *Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1269–70 (4th Cir. 1981).

Civil rights cases often easily demonstrate commonality because the defendants' actions are "central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct." *Baby Neal ex. rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (citing 7A Charles A Wright, et al., Fed. Prac. & Proc. § 1763 at 219 (1986)).

Here, members of the prospective **Future Revocation Class** and **Revoked Class**, respectively, face indefinite revocation of their drivers' licenses or currently have a driver's license that has been indefinitely revoked by the DMV, pursuant to § 20-24.1. Plaintiffs Mr. Johnson and Ms. Smoot similarly allege on behalf of themselves and their proposed Classes that Section 20-24.1 and DMV's uniform enforcement practices violate their Fourteenth Amendment rights by automatically imposing the punishment of revocation without any determination the motorist willfully failed to pay; a pre-deprivation opportunity to be heard to determine willful non-payment; and sufficient notice of motorists' legal rights under Section 20-24.1. *See* Compl. ¶¶ 32–37, 94–129. All members of the proposed Classes also are equally subject to the DMV's revocation of drivers' licenses for non-payment. Thus, this case presents the typical example where commonality is satisfied because Plaintiffs are challenging an agency's generally applicable systemic practices. *See Bumgarner v. NCDOC*, 276 F.R.D. 452, 456 (E.D.N.C. 2011) ("[I]in a lawsuit wherein individuals with varying disabilities challenge policies and practices that affect all of the putative class members, factual differences regarding their disabilities does not defeat commonality." (citing *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)); *Johnson v. Am. Credit Co. of Ga.*, 581 F.2d 526, 532–33 (5th Cir. 1978) (reversing dismissal and remanding for further proceedings because class could have been certified where class-action challenge to Georgia prejudgment attachment statute satisfied commonality and (b)(2) requirement); *Doe v. Miller*, 216 F.R.D. 462, 465 (S.D. Iowa 2003)

(finding commonality satisfied in facial challenge to statute); *Lebron v. Wilkins*, 277 F.R.D. 664, 667–68 (M.D. Fla. 2011) (same).

Accordingly, Plaintiffs raise claims based on questions of law and fact that are common to, and typical of, the putative class members of both Classes they seek to represent. Common questions of fact include:

i. Whether Section 20-24.1 mandates the DMV to revoke, and whether the DMV has a practice of revoking, a license for non-payment without requiring a pre-deprivation hearing;

ii. Whether Section 20-24.1 mandates the DMV to revoke, and whether the DMV has a practice of revoking, a license for non-payment without requiring an inquiry into a motorist's ability to pay and determining the motorist's non-payment was willful; and

iii. Whether the revocation notice provided by the DMV to drivers whose licenses will be revoked for non-payment fails to inform drivers that (1) they may have a hearing before the revocation becomes effective; (2) a critical issue at that hearing will be their ability to pay fines and costs that they are alleged to have failed to pay; and (3) additional options exist under Section 20-24.1 to avoid revocation for those who cannot pay in full.

Common questions of law include:

iv. Whether Section 20-24.1 and the DMV's enforcement of the statute violate the Fourteenth Amendment by failing to inquire into a motorist's ability to

pay and whether the motorist's non-payment was willful before revoking a license for non-payment;

v. Whether Section 20-24.1 and the DMV's enforcement of the statute violate the Fourteenth Amendment Procedural Due Process Clause by revoking licenses before conducting a pre-deprivation hearing;

vi. Whether Section 20-24.1 and the DMV's enforcement of the statute violate the Fourteenth Amendment Procedural Due Process Clause by failing to provide adequate advance notice and opportunity to be heard; and

vii. Whether injunctive and declaratory relief is appropriate and if so, what the terms of such relief should be.

Compl. ¶ 83.

A resolution of any of these common issues will serve as the "glue" uniting the respective putative Classes' members' factual and legal claims and will provide "a common answer to the crucial question" of whether the DMV is causing unconstitutional injuries to the Classes' members. *See Dukes*, 564 U.S. at 352. Furthermore, the class-wide relief sought—a declaration that Section 20-24.1 and the DMV's practices of enforcing the statute, including its manner of providing notice, are unconstitutional and an injunction enjoining the DMV from revoking licenses for non-payment pursuant to § 20-24.1 and mandating the DMV's restoration of previously revoked licenses—is common to members of each proposed Class.

For all of the above reasons, commonality is satisfied.

D. Rule 23(a)(3): The Claims of Plaintiffs Mr. Johnson and Ms. Smoot are Typical of the Classes They Seek to Represent.

Next, Plaintiffs satisfy "[t]he test for typicality, [which] . . . is not demanding." *See Lightbourn v. Cty. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (citation omitted). The typicality prerequisite requires that the class representatives "be part of the class and possess the same interest and suffer the same injury as the class members." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982)). "Nevertheless, the class representatives and the class members need not have identical factual and legal claims in all respects." *Fisher v. Va. Elec. and Power Co.*, 217 F.R.D. 201, 212 (E.D. Va. 2003) (citation omitted); *see also Casey*, 43 F.3d at 58 ("[F]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." (alteration in original) (citation omitted)). "The essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) (quoting *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998)). Thus, in pursuing their own case, the representative parties "must simultaneously tend to advance the interests of the absent class members." *Id.*

Here, Plaintiffs meet the typicality requirement for the same reason that they meet the commonality requirement: the relief sought would benefit all class members in an identical manner. The claims of Plaintiff Mr. Johnson are typical of the claims of the

proposed **Future Revocation Class** as a whole. Mr. Johnson and the putative members will suffer the same direct, irreparable injury of a loss of their driver's license unless Section 20-24.1 is declared unconstitutional and DMV is enjoined from revoking licenses pursuant to that statute. Because Mr. Johnson and the proposed class members challenge the same unconstitutional statute, the DMV will likely assert similar defenses against Mr. Johnson and proposed members. Moreover, the answer to whether the statute is unconstitutional will determine the success of the claims of named Mr. Johnson and every other proposed Future Revocation Class member: if Mr. Johnson succeeds in the claim that the statute violates his constitutional rights, that ruling will likewise benefit every other member of the proposed class.

Likewise, the claims of Plaintiff Ms. Smoot are typical of the claims of the proposed **Revoked Class** as a whole. Plaintiff Ms. Smoot and the putative class members have suffered the same direct, irreparable injury of loss of their driver's license pursuant to the same statute (Section 20-24.1) and corresponding enforcement process effectuated by the DMV. Because Plaintiff Ms. Smoot and the proposed Class challenge the same unconstitutional statute and DMV practice, the DMV will likely assert similar defenses against Ms. Smoot and proposed Revoked Class members. Moreover, the answer to whether the statute and the DMV's corresponding method of revocation are unconstitutional will determine the success of the claims of Ms. Smoot and every other proposed Revoked Class member: if Ms. Smoot succeeds in the claim that the statute and

DMV violate her constitutional rights, that ruling will likewise benefit every other member of the proposed Revoked Class.

Both the named Plaintiffs and putative Classes' members seek to redress common legal injuries, through the identical legal theories common to the Classes. For these reasons, Plaintiffs meet the typicality requirement of Rule 23(a)(3).

E. Rule 23(a)(4) & (g): Plaintiffs Will Adequately Represent Their Respective Classes and Undersigned Counsel are Qualified to Serve as Class Counsel.

Plaintiffs also satisfy the requirements of adequate representation under Rule 23(a)(4), and counsel for Plaintiffs satisfy the requirements of Rule 23(g). Rule 23(a)(4) states that the class representatives must be fair and adequate representatives of the entire class. This rule has been interpreted to include two separate requirements. One requirement is that the named Plaintiffs must not have any interests antagonistic to the class. *See Barnett v. W.T. Grant Co.*, 518 F.2d 543, 548 (4th Cir. 1975). The other requirement is that the plaintiffs must be represented by adequate counsel. *See* Fed. R. Civ. P. 23(g).

Plaintiffs meet the first requirement of adequacy of representation: Plaintiffs Mr. Johnson and Ms. Smoot have demonstrated their willingness and ability to "vigorously prosecute the interests of the class through qualified counsel." *See Olvera-Morales v. Int'l Labor Mgmt. Corp.*, 246 F.R.D. 250, 258 (M.D.N.C. 2007). They have agreed to be individually named as Plaintiffs and to be active in the litigation on behalf of their fellow absent members of the proposed Classes. *See* Johnson Decl. ¶ 18; Smoot Decl. ¶ 26. Moreover, Plaintiffs have common interests with unnamed members of the Classes and no

potential exists for conflicts of interest between the named Plaintiffs and putative Class members; where, as here, Plaintiffs' claims "rest upon the practices and policies" of the defendant, and there is a "common interest[]" in reforming those practices and policies, no conflict exists. *See J.D. v. Nagin*, 255 F.R.D. 406, 415, 416 (E.D. La. 2009); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (relief sought to reform defendants' systemic practices is in all class members' interests).

With respect to the second Rule 23(a)(4) requirement and the considerations under Rule 23(g), Plaintiffs' counsel here are fully qualified and prepared to pursue this action on behalf of the proposed Classes. *See* Declaration of Samuel Brooke ¶¶ 2–23 ("Brooke Decl."). The attorneys representing Plaintiffs and the putative Classes are experienced in handling class action and civil rights litigation and have particular knowledge of, and experience in, litigating legal claims concerning unconstitutional governmental policies and practices. *Id.* ¶¶ 11–21. Proposed class counsel have sufficient financial and human resources to litigate this matter. *Id.* ¶ 23. Proposed class counsel have also spent appropriate time investigating Plaintiffs' and each proposed class's claims, by, *inter alia*, observing court practices and speaking with court staff about these practices; reviewing the statutory scheme at issue and the corresponding notices sent by the DMV to drivers upon non-payment, and confirming the revocation and restoration process by speaking with advocates who handle such matters. *See* Brooke Decl. ¶ 22. Thus, Plaintiffs' attorneys are appropriate counsel for the class-action matter.

F. Rule 23(b)(2): Defendant Jessup Acts Uniformly Toward Members of the Proposed Classes.

In addition to satisfying the prerequisites of Rule 23(a), the proposed Classes may be maintained as classes under Rule 23(b)(2). A court may certify a class under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also Zimmerman v. Bell*, 800 F.2d 386, 389–90 (4th Cir. 1986) ("[S]ubsection (b)(2) [is] limited to claims where the relief sought [is] primarily injunctive or declaratory."). "The essential consideration is whether the complaint alleges that the plaintiffs have been injured by defendants' conduct which is based on policies and practices applicable to the entire class." *Bumgarner v. NCDOC*, 276 F.R.D. 452, 457–58 (E.D.N.C. 2011) (citation omitted).

The Supreme Court and the Fourth Circuit have repeatedly recognized that lawsuits brought for injunctive relief alleging civil rights violations are precisely the type of suit for which Rule 23(b)(2) was intended to provide class certification. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [where class certification is proper under Rule 23(b)(2)]."); *Thorn*, 445 F.3d at 330 n.24 ("Rule 23(b)(2) was created to facilitate civil rights class actions."); *see also Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 838 F.3d 297, 311 (3d Cir. 2016) ("The consequences can be significant for those who would otherwise benefit from the relief afforded by Rule 23(b)(2), a rule 'designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a

numerous and often unascertainable or amorphous class of persons.'"); *Casey*, 43 F.3d at 58–59 ("The (b)(2) class serves most frequently as the vehicle for civil rights actions and other institutional reform cases that receive class action treatment."). For this reason, Rule 23(b)(2) has been liberally applied in the area of civil rights. *See, e.g.*, *Bumgarner*, 276 F.R.D. at 457; *cf. Thorn*, 445 F.3d at 330 ("The twin requirements of Rule 23(b)(2)—that the defendant acted on grounds applicable to the class and that the plaintiff seeks predominantly injunctive or declaratory relief—make that Rule particularly suited for class actions alleging racial discrimination and seeking a court order putting an end to that discrimination." (citation omitted)).

"The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes*, 564 U.S. at 360 (citation omitted). In interpreting the requirements of Rule 23(b)(2), the Fourth Circuit has held that certification is appropriate where final injunctive relief is sought and will "settl[e] the legality of the behavior with respect to the class as a whole." *Thorn*, 445 F.3d at 329 (quoting Rule 23(b)(2), Adv. Cmt. Notes (1996)). Plaintiffs satisfy these requirements here.

As discussed above, *supra*, members of the respective proposed classes face the same risk of harm—either the future or the current unconstitutional deprivation of their drivers' licenses—and this harm results from the DMV's enforcement of same statutory text—Section 20-24.1—which equally applies to all members simply based on their

impending or past inability to pay their court debt. *See M.D. ex rel. Stukenburg v. Perry*, 675 F.3d 832, 847-48 (5th Cir. 2012) (explaining class claims need not be "premised on a 'specific policy . . . uniformly affecting—and injuring each [class member],'" but rather can show defendant "engages in a pattern or practice of agency action or inaction . . . 'with respect to the class,' so long as declaratory or injunctive relief settling the legality of the [defendant's] behavior with respect to the class as a whole is appropriate" (internal citations omitted)). Thus, injunctive relief to enjoin Section 20-24.1 and the DMV's enforcement thereof and to mandate restoration of previously revoked licenses for non-payment under Section 20-24.1, as well as a declaration to declare Section 20-24.1 and the DMV's revocation practice under the statute, unconstitutional, is appropriate to remedy the unconstitutional deprivations suffered by all members of the **Revoked** and **Future Revocation Classes** and will benefit every member of the classes.

For these reasons, Plaintiffs' requested equitable relief is appropriate for the proposed **Future Revocation Class** as a whole and the proposed **Revoked Class** as a whole.

CONCLUSION

For the above reasons, Plaintiffs Mr. Johnson and Ms. Smoot respectfully request the Court grant Plaintiffs' Motion for Class Certification and certify the proposed Classes pursuant to Rule 23(a), (b)(2) and (g).

Dated May 30, 2018.

Respectfully submitted,

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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. Graunke
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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:

Torre Jessup, Commissioner, or
via Brandon Mattox or Charlotte Hanemann, Designated Agents
Office of the Commissioner
North Carolina Division of Motor Vehicles
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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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