IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Linquista White, Emily Bellamy, and Janice Carter Plaintiffs, v. Kevin Shwedo, in his official capacity as the Executive Director of the South Carolina Department of Motor Vehicles; and Ralph K. Anderson, III, in his official capacity as the Chief Judge of the South Carolina Administrative Law Court and Director of the South Carolina Office of Motor Vehicle Hearings, Defendants.	Civil Action No. 2:19-CV-03083-RMG **MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION (DEFENDANT SHWEDO)**

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INTRODUCTION

Defendant Kevin Shwedo, in his official capacity as the Executive Director of the South Carolina Department of Motor Vehicles (DMV), submits the following memorandum in opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 35. As set forth herein, none of the three named Plaintiffs has standing to maintain this action, because the cause of their drivers' license suspensions was not any action of DMV, but was instead the failure of each one of them to appear in their state court criminal trials to avail themselves of the state statutory mechanism for demonstrating indigency and obtaining a monthly payment plan. S.C. Code Ann. § 17-25-350. That statute, first enacted in 1973, demonstrates that South Carolina, unlike many other states, has codified its concern for the financial needs of its less fortunate citizens who have been convicted of crimes and sentenced to pay fines. The named Plaintiffs failed to avail themselves of South Carolina's statutorily-mandated liberality toward indigent persons convicted of crimes. Their counsel have presented this case as if §17-25-350 did not exist. The result is that Plaintiffs' presentation of their case creates a highly misleading picture, both of the nature of South Carolina law, and of the failure of the Plaintiffs to avail themselves of the benefits conferred on them by South Carolina law.

Even if the named Plaintiffs, or any of them, did have standing, their Motion for Preliminary Injunction should still be denied, because they cannot make the requisite "clear showing that the plaintiff is entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008), and particularly because they cannot "make a clear showing that [they] will likely succeed on the merits at trial." *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009). Plaintiffs' primary argument on the merits, which is essentially that this case should be analyzed under principles applied in a different context in

Bearden v. Georgia, 461 U.S. 660 1983), has been almost unanimously rejected whenever it was raised in the context of suspensions of drivers' licenses.[1]

Plaintiffs' motion should therefore be denied both for lack of standing and, even if they were deemed to have standing, for lack of substantive merit. The absence of standing of the named Plaintiffs also defeats their efforts to have a class certified, as is discussed in Defendants' Memorandum in Opposition to the Motion for Class Certification, which is being filed this date.

STATEMENT

This action was filed on October 30, 2019, by Plaintiffs Linquista White, Emily Bellamy, and Janice Carter. On November 1, 2019, Plaintiffs filed a Motion for Class Certification. ECF No. 8. On November 25, 2019, Plaintiffs filed their Motion for Preliminary Injunction, to which the present memorandum responds. Both Defendants on this date are also filing a Memorandum in Opposition to the Motion for Class Certification.[2]

Plaintiffs seek a preliminary injunction that would effect two different forms of relief. The injunction they seek would:

> (1) prohibit[ ] the DMV from suspending driver's licenses for failure to pay traffic tickets under Section 56-25-20 without first providing a hearing and determining that failure to pay was willful; and
>
> (2) require[ ] the DMV to lift all current suspensions on driver's licenses for failure to pay traffic tickets, strike reinstatement fees related to those suspensions, reinstate any driver's licenses that have no other basis for

[1] As is discussed below, pp. 20-24, the only cases in which "*Bearden's* analysis," as Plaintiffs refer to it, has not been rejected in this context are two Tennessee cases decided by the same district judge. One of those cases was later dismissed by the Sixth Circuit on grounds of mootness, *Thomas v. Lee*, 776 F. App'x 910, (6th Cir. 2019), and the appeal of the other one to the Sixth Circuit is still pending. *Robinson v. Purkey*, 326 F.R.D. 105 (M.D. Tenn. 2018), *appeal docketed sub nom. Robinson v. Long*, No. 18-6121, (6th Cir. Oct. 24, 2018).

[2] Defendant Shwedo's Answer to the Complaint was filed on December 19, 2019, in conformance with a December 20, 2019, deadline set first in a text order dated November 18, 2019, ECF No. 29, and reiterated in a scheduling order issued on December 17, 2019. ECF No. 41.

> suspension, and provide notice to license-holders of these changes, pending a final determination on the merits of Plaintiffs' claims.

ECF No. 35 at 6. The three Plaintiffs seek this relief "on behalf of themselves and two proposed Classes. . . ." *Id.* at 1.

The Motion for Preliminary Injunction is expressly based solely on Plaintiffs' Claim One ("violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution, as delineated in *Bearden v. Georgia*, 461 U.S. 660 (1983)"), and not on any of the other four causes of action set forth in the Complaint.

Before that issue pertaining to the merits can be reached, however, it is necessary to examine the standing of the named Plaintiffs. As will be shown herein, all three named Plaintiffs (only two of whom, Bellamy and Carter, are still under suspension) failed to appear in their magistrate court cases and therefore did not avail themselves of the statutory duty imposed on courts to create a time payment plan for persons who can make a showing of indigency.

The Complaint asserts that "the driver's licenses of Ms. Bellamy and Ms. Carter [were] suspended simply because they cannot afford to pay traffic tickets. . . ," and that [t]he suspensions of the driver's licenses of Ms. Bellamy and Ms. Carter are thus directly the result of their inability to pay." Complaint, ¶ 2.[3] However, neither Ms. Bellamy nor Ms. Carter was "suspended simply because they cannot afford to pay traffic tickets." Nor were their suspensions for failure to pay traffic tickets "thus directly the result of their inability to pay." Instead, they were suspended because they failed to appear at their summary court trials, and were fined the

[3] They also assert that they are unable to pay DMV fees, *id.*, but those fees are part of the same chain of causation that derives from their failures to appear before the summary courts to make a showing of indigency. The root cause of those failures to pay DMV fees is therefore not an inability to pay.

full amount without a payment plan because they did not appear and offer proof of their indigency.[4] The details of their failure to appear are discussed below.

Given the availability of a statutorily-mandated payment plan for persons who appear before the summary courts and show indigency, S.C. Code § 17-25-350, a person claiming that he or she was "suspended simply because they could not afford to pay traffic tickets" would need to show all of the following:

a. The person appeared in the summary court at his or her criminal trial or hearing:

b. At the trial or hearing, the person asked for a time payment plan, was able to show indigency, and, as § 17-25-350 requires under such circumstances, was given a time payment plan by the summary court, and

c. The person was then unable to make their payments because of indigency and then had his or her driver's license suspended.

None of the three named Plaintiffs satisfy any aspect of the above description of a person "suspended simply because they cannot afford to pay traffic tickets." They therefore lack standing to bring this action at all. The motion for preliminary injunction should be denied, and this action dismissed for lack of subject matter jurisdiction.

[4] If the person appeared and did not make a satisfactory showing of indigency, or made a satisfactory showing and was denied a payment plan by the summary court, those determinations would be reviewable in state courts and not in this federal action against DMV.

FACTS

Plaintiffs have submitted a considerable amount of information about their personal situations, in the process obscuring the few facts regarding their driving history that are actually pertinent and operative. Plaintiffs' counsel have also submitted considerable information about the alleged harmful effects of certain matters on Plaintiffs and others. However, the operative facts regarding the situations of the three Plaintiffs, which are the only facts actually pertinent to the present motion, if not to the entire case, have either been admitted by Plaintiffs, or are otherwise uncontested facts that appear in their driving records.[5] Those simple facts are set forth below, after the pertinent state statutes are first discussed.

1. South Carolina law pertaining to ability to pay hearings.

Plaintiffs assert that DMV suspends drivers' licenses for failure to pay traffic tickets without "first providing a hearing and determining Plaintiffs could pay traffic fines and fees but willfully refused to do so." ECF No. 35 at 1. While it is true that DMV does not provide hearings on claims of indigency, Plaintiffs have conspicuously omitted reference to S.C. Code Ann. § 17-25-350, a 1973 enactment which not only permits, but in fact requires, the courts of South Carolina to establish payment plans for indigents who appear in court and make a showing of indigency. Aside from a few passing references in the Complaint with a different context in mind, § 17-25-350 is not mentioned at all in any of Plaintiffs' voluminous filings to date. However, that statute, and Plaintiffs' failures to avail themselves of its provisions, should be dispositive in compelling the denial of preliminary relief, if not dismissal of this entire case.

[5] To the extent that the three named Plaintiffs claim that they did not receive notices from the summary courts, a matter discussed below, any lack of notice from the summary courts is not justiciable in the present case. If any failure to receive notices from DMV is a material issue in this case, which DMV denies, there are conflicting affidavits on the point, thereby raising a question of fact.

Section 17-25-350 provides as follows:

> In any offense carrying a fine or imprisonment, the judge or magistrate hearing the case **shall**, upon a decision of guilty of the accused being determined and it being established that he is indigent at that time, set up a reasonable payment schedule for the payment of such fine, taking into consideration the income, dependents and necessities of life of the individual. Such payments shall be made to the magistrate or clerk of court as the case may be until such fine is paid in full. Failure to comply with the payment schedule shall constitute contempt of court; however, imprisonment for contempt may not exceed the amount of time of the original sentence, and where part of the fine has been paid the imprisonment cannot exceed the remaining pro rata portion of the sentence.
>
> No person found to be indigent shall be imprisoned because of inability to pay the fine in full at the time of conviction.
>
> Entitlement to free counsel shall not be determinative as to defendant's indigency.

(Emphases added.) As will be shown below, it is undisputed that neither Plaintiff Carter nor the other two Plaintiffs actually appeared in court to make a showing of indigency.[6]

2. South Carolina law and practice pertaining to suspensions of drivers' licenses for failure to pay traffic tickets.

Plaintiffs' motion refers to several South Carolina statutes pertaining to DMV, but the only statute challenged in the present motion is S.C. Code Ann. § 56-25-20. That statute was first enacted in 1980 in order to effectuate South Carolina's participation in the Non-Resident Violator Compact. As applied to South Carolina residents such as the named Plaintiffs, that statute provides in pertinent part as follows:

[6] Since Plaintiffs do not mention § 17-25-350 at all, it follows that they have not argued that they should have been given notice of its provisions. Such an argument would fail in any event, because individualized notice of state-law remedies is not constitutionally required when those remedies "are established by published, generally available state statutes. . . .." *City of W. Covina v. Perkins*, 525 U.S. 234, 241 (1999).

> **SECTION 56-25-20. Suspension of license for failure to comply with traffic citation or summons for litter violation; notification of licensing authority in compact jurisdiction**.
>
> When a South Carolina court or the driver licensing authority of a compact jurisdiction notifies the Department of Motor Vehicles that a resident of South Carolina or person possessing a valid South Carolina driver's license has failed to comply with the terms of a traffic citation . . . issued in this or any compact jurisdiction, the department may suspend or refuse to renew the person's driver's license if the notice from a South Carolina court or the driver licensing authority of a compact jurisdiction is received no more than twelve months from the date on which the traffic citation . . . . The license must remain suspended until satisfactory evidence has been furnished to the department of compliance with the terms of the citation . . . and any further order of the court having jurisdiction in the matter and until a reinstatement fee as provided in Section 56-1-390 is paid to the department. A person whose license is suspended under this section is not required to file proof of financial responsibility as required by the Financial Responsibility Act (Chapter 9 of Title 56) as a condition for reinstatement.
>
> Upon notification by a South Carolina court that a nonresident licensed in a compact jurisdiction has failed to comply with the terms of a traffic citation or an official Department of Natural Resources summons for a littering violation, the department shall notify the licensing authority in the compact jurisdiction for such action as appropriate under the terms of the compacts.

While Plaintiffs call attention to the use of the word "may" in the text of the statute, DMV does not dispute that it suspends the licenses of all person for whom DMV receives "Notices of Suspension" from the summary courts indicating that those persons have, among other things, failed to pay fines. To the extent that Plaintiffs seek to claim that "South Carolina summary courts . . . rarely, if ever, send the Defendant's Notice or any comparable notice to inform defendants they owe fines and fees imposed in absentia . . .," Complaint, ¶ 68, that assertion is supported only by the declarations of the three named Plaintiffs themselves. The Complaint itself contradicts this assertion to some extent, because Paragraph 67 reproduces a "Defendant's Copy" of a court notice that the recipient claims in her Declaration not to have received. *See also,*

Rivers Affidavit, Exhibit 1 hereto, ¶ 16. Factual issues aside, those notices are generated by the summary courts, not DMV, and the issue of whether they were sent by the courts or received by the intended recipients is not an issue on which the claims against DMV turn.

3. Facts concerning the individual Plaintiffs.

a. Plaintiff Janice Carter.

Plaintiff Carter is the only Plaintiff who is still under suspension solely for failures to pay traffic tickets. There are three such current suspensions. While all three are based on failures to pay traffic tickets, they all derive from summary court cases in which she did not appear at all in the summary court proceedings, two of which were in South Carolina. As a result, she did not avail herself of the statutorily-mandated opportunity to make a showing of indigency and obtain a payment plan. She was therefore tried in her absence and fined without a payment schedule. Complaint, ¶164 (Yemassee); ¶ 181 (Ravenel).[7]

The details of Ms. Carter's traffic cases illustrate how her failures to appear in court to assert her indigency, rather any such alleged indigency itself, directly led to the suspensions that followed. Unlike Ms. Bellamy, who asserts that she never got notice of any court dates, Ms. Carter candidly does not claim that she was unaware of any of the court dates that underlie her suspensions. Carter Declaration, ECF No. 11, ¶¶ 16, 23, 38. If she had appeared for the first of these, the Ravenel case, which resulted in a fine of $129 (Complaint, ¶ 65), and if, upon appearing, she could have demonstrated that she was indigent at the time and unable to pay that amount all at once, the summary court judge was required by § 17-25-350 to establish a payment schedule for her. Instead, she ignored a known court date and allowed a $129 fine to turn into a

[7] There was also a conviction in Jacksonville, Florida, that led to a suspension for failure to pay, Complaint, ¶ 172, but even if that suspension were to be lifted, it would not redress Ms. Carter's South Carolina suspensions, which would remain in effect. *See Cook v. Taylor*, No. 2:18-CV-977-WKW, 2019 WL 1938794, at *8 (M.D. Ala. May 1, 2019).

suspension of her drivers' license on June 13, 2017. Complaint, ¶ 167. It is undisputed that that suspension is still in effect of the present date.

The Complaint, although not the Declaration of Ms. Carter, asserts that "[b]ecause Ms. Carter never received an Official Notice from the DMV, she continued to drive without knowing that her driver's license was suspended." Complaint, ¶ 168. DMV has submitted evidence that it mailed a copy of the "Official Notice" of the suspension based on the Yemassee conviction to her last known address (the same address as is on the ticket) on June 13, 2017. Rivers Affidavit ¶ 20 and Attachment 10.[8]

In connection with notice given to Ms. Carter generally, her Declaration (ECF No. 11, ¶ 14) asserts that Exhibit A to that Declaration (ECF No. 11-1) is "a true and correct copy of my December 2016 Yemassee speeding ticket." However, that exhibit is not a true and correct copy of the form of the "Violator's Copy" of the ticket, the one she would have actually been given by the arresting officer. As indicated on Exhibit 2 hereto, a copy of Uniform Traffic Ticket, Form 5-438, last revised 12/06, obtained from the website of South Carolina Court Administration, https://www.sccourts.org/forms/pdf/UTT.pdf, there are five copies of a traffic ticket in all. The "Violator's Copy," unlike any of the others, is two-sided. It, of course, is the one issued to the violator. Also unlike all of the various copies of tickets submitted by Plaintiffs in this case, the

[8] While there may a question of fact on this issue, that fact is not material to the issues in this case, because it does not vitiate the effects of her failure to appear at her summary court hearing. Thus, if the resolution of that issue is pertinent to the present motion, which DMV denies, it is a disputed issue of fact for which live testimony would be necessary. Ms. Carter, and Ms. Bellamy as well, have both alleged rather remarkable numbers of failures to receive notices in the mail, both from DMV and from the summary courts. *See* ECF No. 25-1 at 13-16.

Plaintiffs have redacted, probably unnecessarily, the home address of Ms. Carter as shown on documents. If Plaintiffs advise that they contest the issue of the sameness of the address, which would seem an unlikely contention on their part, DMV would ask permission to submit unredacted forms under seal, if necessary.

"Violator's Copy" warns that if the person fails to appear, suspension of the person's driver's license could follow. Ex. 2.

Ms. Carter asserts that "I did not know that the DMV would suspend my driver's license because of this ticket, and so I continued to drive." ECF No. 11 at 5, ¶ 19. She may not have known of this in fact, but if that is the case, it is because she did not read the ticket, not because she received no notice of it. (Notice was not required in any event, because the possibility of a suspension is clearly set forth in § 56-25-20. *West Covina, supra.*) Plaintiffs' omission from the record of the actual text of the Violator's Copy of the tickets, along with Plaintiffs' omission of reference to § 17-25-350, shows that the facts of Plaintiffs' claims are far different from their wishful description of a person allegedly harmed by DMV. It follows that none of the Plaintiffs were actually "suspended simply because they cannot afford to pay traffic tickets." Complaint, ¶ 2.

All of the above details about Ms. Carter aside, it cannot be disputed that she still has a current suspension that derives from her failure to appear in court in Yemassee on February 16, 2017. At that place and time, the summary court was required by statute to hear any claim of indigency which she might have been able to assert, and likewise was required to offer her a payment plan if she had shown an inability to pay $129 at that time. She has also had two other similar traffic issues after that, also involving consistent failure to appear on known hearing dates, but the continuing existence of the first (2017) suspension makes it unnecessary to examine any of the others in detail.

b. Plaintiff Emily Bellamy.

Ms. Bellamy, like the other two named Plaintiffs, failed to appear in connection with any of the summary court cases that led to her current suspensions for failure to pay traffic tickets.

Complaint, ¶¶ 110, 122. That fact, in and of itself, deprives her of standing to bring this action, as discussed herein.[9]

In addition, Plaintiff Bellamy is also currently under suspension for reasons other than failure to pay traffic tickets stemming from summary court cases. She was suspended by DMV for operating an uninsured motor vehicle and for failure to show proof of insurance at the time of an accident. Bellamy Declaration, ECF No. 10 at 8, ¶ 34 ("The DMV placed another two suspensions on my driver's license on August 26, 2018, and on September 25, 2018. These are related to the lapse in my car insurance. . . .). Rivers Affidavit, ¶¶ 5-7.As discussed below, this renders her claims in this case nonredressable, because even if she prevailed on all of those claims, those suspensions would still remain in effect.

c. Plaintiff Linquista White.

Finally, any claims of the last of the three named Plaintiffs, Linquista White, that may have been still active at the time this action was filed on October 30, 2019, have become moot since then. When this action was filed, Ms. White's driver's license was no longer under suspension, but she did have three traffic tickets still pending from July of 2019. Complaint, ¶ 213. Those tickets were resolved on November 19, 2019, as Plaintiffs admit in their November 25, 2019, Memorandum in Support of Preliminary Injunction, ECF No. 35-1 at 16 ("On November 19, 2019, two tickets [issued to Ms. White] were dismissed and one was resolved with a sentence to time served."). It appears from court records that Ms. White did appear in court in those cases, with a favorable result.

[9] Ms. Bellamy contends that she did not receive notice of any of the actual court dates for her magistrate court trials. That is an issue that goes to the validity of the magistrates' court proceedings, and as such is another issue for which Ms. Bellamy has no standing to raise in this case, because it does not relate to a harm caused by DMV

While Ms. White's past activities are now no longer part of this case, it is nevertheless worth pointing out that her most recent suspensions, like those of the other two named Plaintiffs whose records are discussed above, derive from cases where she did not appear at all in the summary court, and as a result, was tried in her absence and fined without a payment schedule. Complaint, ¶ 207.

STANDARD OF REVIEW

"A party seeking a preliminary injunction must establish all four of the following elements: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *The Real Truth About Obama, Inc. v. Fed. Election Comm'n,* 575 F.3d 342, 346–47 (4th Cir.2009), *vacated on other grounds by* 559 U.S. 1089, 130 S.Ct. 2371, 176 L.Ed.2d 764 (2010), *reissued in part by* 607 F.3d 355 (4th Cir.2010), *overruling Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir.1977). A plaintiff must make a clear showing that he is likely to succeed on the merits of his claim. *Winter*, 555 U.S. at 22; *Real Truth,* 575 F.3d at 345–46. Similarly, he must make a clear showing that he is likely to be irreparably harmed absent injunctive relief. *Winter*, 555 U .S. at 20–23; *Real Truth*, 575 F.3d at 347. Only then may the court consider whether the balance of equities tips in the party's favor. *See Real Truth*, 575 F.3d at 346–47.[10] Finally, the court must pay particular regard to the public consequences of employing the extraordinary relief of injunction. *Real Truth*, 575 F.3d at 347 (quoting *Winter*, 555 U.S. at 24)." *Nesbitt v. S.C. Dep't of Corr.*, No.

[10] The Fourth Circuit recognized that "[t]he *Winter* requirement that the plaintiff clearly demonstrate that it will likely succeed on the merits is far stricter than the *Blackwelder* requirement that the plaintiff demonstrate only a grave or serious question for litigation." 575 F.3d at 346-47. (Emphasis in original).

0:13-CV-2456-RMG, 2014 WL 66738, at *7 (D.S.C. Jan. 8, 2014), *aff'd*, 568 F. App'x 201 (4th Cir. 2014). Finally, even before the Court in *Winter* established that the most important factor in obtaining a preliminary injunction was a clear showing of a likelihood of success on the merit, the Court emphasized that "[a] preliminary injunction is an "extraordinary and drastic remedy. . . ; it is never awarded as of right. . . ." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008).

ARGUMENT

1. None of the named Plaintiffs has standing to bring this action.

Under the well-known tests in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), a plaintiff, in order to establish standing, must show: (1) an injury in fact which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) that her injury is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560–61. As discussed in detail above, it is undisputed that all three of the named Plaintiffs failed to appear at their summary court hearings, where they had a right under state law to be given a payment plan upon a showing of indigency. It was that failure, rather than any act of DMV, that led to their suspensions.[11] As a result, none of the three named Plaintiffs can meet the second prong of *Lujan*, that is, the requirement of a causal connection between the injury and the conduct complained of.[12]

There can be little doubt that "a controversy is not justiciable when a plaintiff independently caused his own injury." *Swann v. Sec'y, Georgia*, 668 F.3d 1285, 1288 (11th Cir.

[11] There can be no doubt that trials in absentia can satisfy constitutional requirements. *See* Defendant Anderson's Memorandum in Support of Motion to Dismiss at 3-4. To the same effect, for example, is *Rice v. Cartledge*, No. 6:14-CV-3748-RMG, 2015 WL 4603282, at *22 (D.S.C. July 29, 2015). Plaintiffs do not and cannot in this case make any challenge to the underlying state court judgments.

[12] "The class representative's Article III standing, like any individual's standing to sue, is measured by the test found in the Supreme Court's decision in *Lujan v. Defenders of Wildlife*." 1 Newberg on Class Actions § 2:4 (5th ed.).

2012). As in *Swann, supra,* Plaintiffs' claims in this case are "based on an imaginary set of facts." *Id.* at 1288. They posit that someone, somewhere in South Carolina has had their license "suspended simply because they cannot afford to pay traffic tickets." Complaint, ¶ 2. But if such a person exists, that person is not one of these Plaintiffs. Nor can they establish standing because there may be someone else, as yet not located by Plaintiffs' counsel after a year of preparation of this case, Complaint ¶ 258, who might meet that description in the Complaint.[13] Named plaintiffs who represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Simon v. E. Kentucky Welfare Rights Org.,* 426 U.S. 26, 40, n. 20, quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1976).

There are several other currently pending federal court challenges to drivers' license suspensions. So far, the plaintiffs in most of them have been unsuccessful. But even in those cases where the plaintiffs have had at least temporary success, there was no state statute comparable to § 17-25-350. The statutes of those other states are discussed in the footnote.[14]

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[13] Even if one such person is eventually found, that would not establish that there is any large number of such persons, such as to require class certification. The claims of any such person, who has yet to be located, would fail on its merits in any event, as discussed in the next argument heading.

14 In Virginia, as Chief Judge Gregory observed in his dissent in *Stinnie v. Holcomb*, 734 F. App'x 858, 863 (4th Cir. 2018), "[s]tate courts do not appear to consider defendants' poverty as they impose fines and fees." In contrast,, § 17-25-350 does require courts to "consider defendants' poverty as they impose fines and fees," at least when those defendants appear in court in their cases.

In Tennessee, there was a statute that permitted the post-suspension establishment of a payment plan, but the district court held that statute to be deficient because it was not mandatory, did not establish a standard, and did not apply statewide. *Robinson v. Purkey*, No. 3:17-CV-1263, 2017 WL 4418134, at *2 (M.D. Tenn. Oct. 5, 2017). Section 17-25-350, however, is mandatory (again, at least when the defendant shows up). It also establishes a standard (indigency, "taking into consideration the income, dependents and necessities of life of the individual"), and applies statewide.

It should also be noted that in addition to not being able to show causation, Ms. Bellamy also cannot show redressability, because even if the Court were to order the lifting of her suspensions for failure to pay traffic tickets, her two other suspensions for operating an uninsured motor vehicle and for not having car insurance would remain in effect. Rivers Affidavit, ¶¶ 9-10. A plaintiff in a similar situation was held not to have standing in *Cook v. Taylor*, No. 2:18-CV-977-WKW, 2019 WL 1938794, at *8 (M.D. Ala. May 1, 2019).

With the enactment of § 17-25-350 in 1973, South Carolina long ago demonstrated its concern that truly indigent persons should not be forced to pay more in fines than they could afford to pay on anything other than a periodic basis. The named Plaintiffs totally disregarded this opportunity when they had the chance to avail themselves of it, and their counsel have likewise ignored § 17-25-350, thereby bringing this action "based on an imaginary set of facts."

2. Plaintiffs cannot make the requisite "clear showing that [they are] likely to succeed on the merits."

a. Because none of the named Plaintiffs appeared in the magistrates' courts in any of their cases, they waived the opportunity to make a showing of indigency.[15]

The Statement of Facts above details the failure of all three of the named Plaintiffs to appear in any of their summary court cases and request payment plans upon a showing of indigency (assuming they could have made such a showing, which is by no means a given). Also discussed above is S.C. Code Ann. § 17-25-350, requiring courts at all levels to establish

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Finally, in Michigan, where temporary relief was awarded by the district court on procedural due process grounds not raised in the present motion and subsequently reversed on appeal, there was likewise no statutorily-conferred right to show indigency and obtain a payment plan. *See Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019).

[15] While it is DMV's position that Plaintiffs' failure to appear in the summary courts deprives them of standing, it is contended under this argument heading that that same failure would also show an inability to succeed on the merits.

reasonable payment plans for persons who appear in court, make a showing of their indigency, and request such payment plans.

In other similar contexts in which the plaintiffs made a *Bearden* claim (that is, alleging that they were made subject to incarceration because they could not afford to pay fines) or a claim based on *Tate v. Short*, 401 U.S. 395 (1971), involving the conversion of a sentence of a fine into a sentence of imprisonment for those who were unable to pay, the courts have shown no patience for such claims when made by persons who did not avail themselves of existing and available opportunities to show indigency. One such case is *Garcia v. City of Abilene*, 890 F.2d 773 (5th Cir. 1989):

> Mrs. Garcia contends that the City of Abilene violated the principles established in *Tate* and *Bearden* by attempting to jail her solely because she could not pay her fines. However, these cases rest on the assumption that the indigent appears before the court to assert his inability to pay. Even assuming an individual who is fined is too poor to pay, if he does not appear and assert his indigency, the court cannot inquire into his reasons for not paying and offer alternatives.

890 F.2d at 776. To the same effect is *Sorrells v. Warner*, 21 F.3d 1109 (5th Cir. 1994), which cited *Garcia* and noted that "*Tate* is based on an assumption that the defendant has appeared before the court and asserted his indigency." 21 F.3d 1109 at * 3. In addition, in a district court case where certain courts' debt collection practices were challenged, the court noted that in *Garcia* and *Sorrells*, "the criminal defendant[s] had an opportunity to claim indigence but squandered it by failing (or repeatedly failing) to appear, in person, at scheduled court hearings." *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 652 (E.D. La. 2017)(emphasis added). Still another court, also citing *Garcia*, has noted that "[a]s a practical matter, it is worth noting the difficulty of explaining to the sentencing court that, because of indigency, a fine should be suspended or reduced, when the defendant does not attend the hearing." *Cook v. Taylor*, No.

2:18-CV-977-WKW, 2019 WL 1938794, at *8 (M.D. Ala. May 1, 2019)(emphasis added).[16] In addition, Plaintiffs' failure to appear should be regarded as having preclusive effect on any claim that they were indigent at the time of sentencing. *See* Defendant Anderson's Memorandum in Support of Motion to Dismiss at 29-30, 32-35.

Again, none of the three named Plaintiffs appeared in any of the criminal cases that triggered their suspensions for failure to pay traffic tickets. Those inactions on their part, and nothing else, deprived the summary courts of the opportunity to consider their ability to pay, prior to imposing the fines that were imposed. These three Plaintiffs therefore did not incur suspensions "solely because of their inability to pay," as Plaintiffs' counsel repeatedly insist with no foundation whatsoever. *See, e.g.,* ECF No. 35-1 at 17. Instead, they incurred suspensions because they failed to appear in court to assert their indigency and thereby, if they had shown indigency, obtain a statutorily-required "reasonable payment schedule for the payment of such fine, taking into consideration the income, dependents and necessities of life of the individual." § 17-25-350.

By structuring their entire case as if § 17-25-350 did not exist (and likewise by ignoring language on the violators' copies of their tickets), Plaintiffs have shown by actions more clear than words that they have no answer for their failure to appear in court and request a payment schedule. Aside from any other arguments they may make, their claim fails as a matter of law for this reason alone.

[16] To be clear, DMV does not suggest that a criminal defendant who actually appears in court has a duty to raise his or her own indigence. That may or may not be the case, but it is an issue that is not before the Court in this case, because the named Plaintiffs did not in fact appear.

b. *Bearden v. Georgia* does not apply in cases such as this, where the complaining party is not subject to being incarcerated.

1. Other pending litigation in the Fourth Circuit.

Before discussing the merits of Plaintiffs' arguments based on *Bearden v. Georgia*, 461 U.S. 660 (1983), DMV would note that the arguments made on that issue by Plaintiffs in their Motion for Preliminary Injunction (and that is the central issue on which their Motion for Preliminary Injunction is based) are virtually identical to those made by many of the same counsel in a North Carolina case now pending in the Fourth Circuit, *Johnson v. Jessup*, 381 F. Supp. 3d 619 (M.D.N.C. 2019)(appeal docketed, No. 19–1421 (4th Cir. Apr. 18, 2019))(*"Jessup"*). *Jessup* has tentatively been calendared for argument during the March 17-20 term of the Fourth Circuit.

The lead argument in the Fourth Circuit brief of the Appellants/Plaintiffs in *Jessup* (pertinent pages of the brief attached as Exhibit 3 hereto) is as follows:

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

The lead argument advanced by Plaintiffs in the present case in support of their Motion for Preliminary Injunction is a verbatim repetition of the same argument:

> "1. *Bearden's* analysis applies where a state seeks to sanction a person solely due to inability to pay."

ECF No. 35-1 at p. i.

In referring to "*Bearden's* analysis," Plaintiffs are primarily arguing, without expressly saying so, that *Bearden* should be extended well beyond its facts and holding, which only involved "what kind of process is due before a probationer is subject to confinement, not what kind of process is due before a driver's license is subject to suspension." *Fowler v. Benson*, 924 F.3d 247, 261 (6th Cir. 2019)(emphasis added).

Plaintiffs' next two arguments in the present case, while not word-for-word identical to those made in *Jessup,* are nevertheless identical in substance. Plaintiffs argue in *Jessup* that assuming "*Bearden's* analysis" applies (to use the name Plaintiffs give to their argument), North Carolina's drivers' license suspensions (a) violate substantive due process and equal protection, and (b) fail even the rational basis test, if that test were to be applied. Exhibit 3 at p. i, points B and C. They make the same arguments here. ECF No. 35-1 at p. i, points 2 and 3.

It is therefore readily apparent that Plaintiffs have structured the issues in their Motion for Preliminary Injunction in this case in such a way that those issues mirror those in *Jessup.* While there may not be a rule of law that would prevent this Court from considering these issues at this time, there can be no doubt that, as has often been held, "it would be wasteful to litigate at the same time the same issues in two different courts." *R&B Falcon Drilling USA, Inc. v. Crosby*, No. CIV.A. 02-2059, 2003 WL 145532, at *1 (E.D. La. Jan. 17, 2003); *see also, e.g., Drugstore-Direct, Inc. v. Cartier Div. of Richemont N. Am., Inc.,* 350 F. Supp. 2d 620, 624 (E.D. Pa. 2004)("having two actions on the same subject matter pending in two different courts does not serve judicial economy"). This is especially true in the present case, because any decision by the Fourth Circuit in *Jessup* would almost surely be dispositive of the *Bearden*-related issues presented in the Motion for Preliminary Injunction in the present case, if any such issues are justiciable in this case.

Accordingly, while Defendant Shwedo submits that this Court need not look past the lack of standing in the named Plaintiffs, this Defendant does submit that if the Court were to decide that other issues need to reviewed at all, it would be entirely appropriate to stay consideration of the present Motion for Preliminary Injunction pending the outcome of *Jessup.* Other activities in this case could still proceed, or not proceed, as the Court may determine, keeping in mind

judicial economy and the avoidance of superfluous work by counsel for both parties. In any event, this Defendant submits that if the Court should decide to consider Plaintiffs' arguments based on *Bearden*, those arguments should be rejected, as set forth in the following section.

2. Plaintiffs' "*Bearden* analysis" claim has been almost unanimously rejected elsewhere, and should be rejected here as well.

Plaintiffs' primary argument regarding *Bearden* is that "*Bearden's* analysis applies where a state seeks to sanction a person solely due to inability to pay." ECF No. 35-1 at 17. This argument is doomed from the outset, because as noted above, Plaintiffs were not sanctioned "solely due to ability to pay," a fact which is a prerequisite to having "*Bearden's* analysis" apply. Failing to appear in the summary courts, they never tried to show any claimed inability to pay in those courts where and when they could have and should have made such a showing.

As Plaintiffs themselves acknowledge, there are three federal cases (two district court cases and one appellate case) in which the courts have declined to extend *Bearden* to suspensions of drivers' licenses for failure to pay traffic tickets. ECF No. 35-1 at 26. Those three cases are *Johnson v. Jessup*, 381 F. Supp. 3d 619 (M.D. N.C. 2019), appeal docketed, No. 19–1421 (4th Cir. Apr. 18, 2019), *Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1171 (D. Or. 2018), appeal docketed, No. 19–35506 (9th Cir. June 11, 2019), and *Fowler v. Benson*, 924 F.3d 247, 260–61 (6th Cir. 2019), *rehearing and en banc rehearing denied*, 12/3/19.[17] Plaintiffs argue that those three cases were "incorrectly" or "erroneously" decided.

In addition, there are two other district court cases (both by the same judge) involving arguably similar issues in which the position of the plaintiffs in those cases, in whole or in part. Those cases are *Thomas v. Haslam*, 303 F. Supp. 3d 585 (M.D. Tenn. 3/26/18), vacated as moot

[17] The order denying rehearing in *Fowler* is attached as Exhibit 4.

sub nom *Thomas v. Lee*, 776 F. App'x 910, (6th Cir. 2019), and *Robinson v. Purkey*, No. 3:17-cv-1263, 2017 WL 4418134 (M.D. Tenn. Oct. 5, 2017).[18]

Plaintiffs appear to be making the same argument about "*Bearden's* analysis" in this case that was rejected in *Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019), *supra*, and described in that case as follows:

> Plaintiffs argue that, under these cases, the challenged law is subject to something more than rational basis review. Alternatively, they argue that Michigan's laws cannot survive even rational basis review as they are manifestly "irrational and counterproductive when applied to indigent drivers."

924 F.3d at 260 (emphasis added).[19] As in *Fowler*, the Plaintiffs here are attempting to create a standard of review in cases involving equal protection and substantive due process that falls somewhere between strict scrutiny review and rational basis review. This effort has failed everywhere else it has been attempted, except in the Tennessee cases referenced elsewhere, and should fail in this case as well.

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[18] In *Robinson v. Purkey*, the district court granted a preliminary injunction, 2018 WL 5023330 (10/16/18), which that court then pending the filing of a stay motion in the Sixth Circuit, 2018 WL 5786236 (11/5/18). The preliminary injunction was then stayed by 6th Cir. on May 29, 2019, Exhibit 4. That appeal is still pending as of the date of the present filing.

In a third case, *Stinnie v. Holcomb*, 355 F. Supp. 3d 514 (W.D. Va. 2018), preliminary relief was also granted, although only to the named plaintiffs, and only on procedural due process grounds not raised by Plaintiffs in their present motion. *Stinnie* did not address *Bearden* at all.

[19] Another description of the same argument is found in *Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1165 (D. Or. 2018), appeal pending. There the court noted that

> Plaintiffs contend that under the *Griffin/Bearden* line of cases, due process and equal protection principles combine to prohibit penalizing people simply because they are poor. Plaintiffs suggest that under these cases, the appropriate inquiry is not based solely on either substantive due process or equal protection. Instead substantive due process and equal protection considerations converge into considerations of "fundamental fairness."

358 F.Supp.3d at 1165.

Also as in *Fowler,* and in *Mendoza* and *Jessup* as well,, Plaintiffs attempt to synthesize their new standard based on *Bearden* in combination with such cases as *Griffin v. Illinois*, 351 U.S. 12 (1956), *Williams v. Illinois*, 399 U.S. 235 (1970), *Tate v. Short*, 401 U.S. 395, *Mayer v. City of Chicago*, 404 U.S. 189 (1971), and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). However, as Justice Ginsburg explained in *M.L.B.*, *Mayer* involved access to courts, as did *Griffin*, the seminal case on the issue of the right of an indigent criminal defendant to a trial transcript. In *M.L.B.*, *supra*, Justice Ginsburg's majority opinion extended additional protection to indigent persons who could not afford to pay the costs associated with appeals in parental termination cases. However, that case still involved only an aspect of access to the courts, as did *Griffin* and *Mayer*. As summarized in *Mendoza, supra*, a case which like this one involved drivers' license suspensions:

> What all of these cases teach is that the "fundamental fairness" principles of due process and equal protection originating in *Griffin* have been applied when either incarceration or access to the courts, or both, is at stake. The incarceration cases clearly implicate the fundamental right to be free from wrongful detention, meaning the fundamental right to liberty. The access to courts cases have arisen in either (1) the criminal context where the rights to both a fair trial and a conviction only upon proof beyond a reasonable doubt are implicated by effectively denying an appeal to an indigent defendant, or (2) the narrow circumstance of a parental termination where the state's "awesome" authority to permanently destroy what the Supreme Court had already recognized as "the most fundamental family relationship" was at stake. *M.L.B.*, 519 U.S. at 121 (citing *Santosky v. Kramer*, 455 U.S. 745, 753, (1982)).
>
> None of those rights or interests are present here.

358 F. Supp. 3d at 1171.[20] To the same effect is *Johnson v. Jessup*, *supra*, 381 F. Supp. 3d 619 (M.D.N.C. 2019), where the same counsel for the plaintiffs as in the present case declined to

[20] The opinion in *Mendoza* contains a much longer and more thorough discussion of why "*Bearden* analysis" does not apply here, 358 F. Supp. 3d at 1165-1173, but the essence of it is as summarized above.

argue that there is a fundamental right to a driver's license but, as here, argued that "Plaintiffs have a substantial interest in their driver's licenses." 381 F.Supp. 3d at 631 n. 10. *Cf.* ECF No. 35-1 at 24 ("Plaintiffs have a substantial property interest in their driver's licenses"). The court in *Jessup* further pointed out that the construal of *Bearden* attempted by counsel for the plaintiffs in that case

> comes perilously close to an argument that courts must apply a higher standard of scrutiny to statutory classifications based on indigency – a principle the Supreme Court has "repeatedly" rejected in favor of rational basis analysis. *Harris v. McRae*, 448 U.S. 297, 323–24 (1980). More importantly, Plaintiffs have not proffered a single case from the Supreme Court or Fourth Circuit in the sixty-plus years since *Griffin* in which the fundamental fairness doctrine was applied to an alleged harm not involving fundamental rights or interests

381 F. Supp. 3d at 630.[21]

DMV acknowledges that a different view was taken by Tennessee District Judge Trauger in both *Thomas v. Haslam*, *supra*, and in *Robinson v. Purkey*, 326 F.R.D. 105, 152 (M.D. Tenn. 2018), *appeal docketed sub nom. Robinson v. Long*, No. 18-6121, (6th Cir. Oct. 24, 2018). However, as noted above, Tennessee, unlike South Carolina, does not have a statute that contains a mandatory requirement for trial courts to set up payment plans for persons who establish their indigency. The Tennessee statute also lacked other protections that are present in § 17-25-350, such as a listing of the factors the court must consider ("the income, dependents and necessities of life of the individual"). *See Robinson v. Purkey*, No. 3:17-CV-1263, 2017 WL 4418134, at *2 (M.D. Tenn. Oct. 5, 2017). While this is a reason sufficient in itself for this Court to disregard

[21] The Court in *Jessup* also noted that *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984), cited by plaintiffs in that case and in this one as well (ECF No. 35-1 at 20-21), "did not expressly rely on *Bearden* for anything other than its holding that "an inmate violating any monetary requirement of his probation or restitution regiment cannot be imprisoned if his non-compliance results from poverty alone." *Alexander*, 742 F.2d at 124; *see also id.* at 125–26." 381 F. Supp. 3d at 629 n. 11

Thomas and *Robinson*, DMV would also respectfully submit that those two cases made an unwarranted and unsupported extension of *Bearden, Griffin* and other cases to cases involving drivers' license suspensions, and should be disregarded for that reason as well.

3. South Carolina's drivers' license suspension process bears a rational relationship to the State's interest to disincentivize voluntary nonpayment of traffic fines.

Because Plaintiffs' "*Bearden* analysis" claim is without foundation, the Court (if it holds that Plaintiffs have standing) need only apply rational-basis analysis to its review of South Carolina's driver's license suspension process.[22] As several of the cases already cited have held, that standard is easily met. In *Fowler v. Benson, supra*, for example, it was held that

> It is no struggle to conceive of the legitimate government interests pursued by a law suspending driver's licenses for nonpayment of court debt. The state has a general interest in compliance with traffic laws. By imposing greater consequences for violating traffic laws, the state increases deterrence for would-be violators. The state also has legitimate interests in promoting compliance with court orders and in collecting traffic debt.

924 F.3d at 262. Similarly, in *Johnson v. Jessup, supra*, it was held that

> Revocation of driver's licenses for failure to pay traffic violation fines or costs serves, in the Commissioner's words, to "impos[e] a motivation to accomplish what an individual might otherwise be disinclined to do" – here, to pay the fines and costs properly imposed on traffic defendants.13 (Doc. 47 at 20.) There is no argument that collection of monetary exactions is not a legitimate state interest. Instead, Plaintiffs argue that the DMV sweeps too broadly: that revoking the licenses of all traffic defendants who don't pay their fines and costs irrationally results in the revocation of the licenses of some who cannot pay, and to whom any additional incentive to pay is ineffective.14 But the rational basis test does not require laws to be narrowly tailored to accomplish the State's ends. *See Van Der Linde*, 507 F.3d at 295 ("The 'rational' aspect of rational basis review ... is not an invitation to scrutinize ... the instrumental rationality of the chosen means (i.e., whether the

[22] By its nature, the issue of whether governmental action bears rational relationship to a legitimate government interest is a question of law to be decided by court. *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167 (5th Cir. 1996)

> classification is the best one suited to accomplish the desired result).”). “Neither may a policy's rationality be judged on the basis of its wisdom, fairness, or logic (or lack thereof).” *Id.* at 293–94. Since there is a “reasonably conceivable state of facts,” *Beac*h, 508 U.S. at 313, 113 S.Ct. 2096, under which section 20-24.1(a)(2) provides some traffic defendants with an efficacious incentive to pay fines and costs, the law survives rational basis review.

381 F. Supp. 3d at 631.

Plaintiffs’ arguments to the contrary, like their arguments regarding the applicability of “*Bearden’s* analysis,” have been rejected in every case that has considered such arguments other than the Tennessee cases. DMV reiterates that South Carolina law renders the present case distinguishable from the Tennessee cases, and that even if not distinguishable, the analysis in those cases should not be followed, as stated, for instance, in *Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1172 (D. Or. 2018)(“[a]lthough *Robinson* and *Thomas* purported to apply a rational basis review, the conclusions reached suggest that the court in those cases applied a more stringent level of scrutiny”).

4. Plaintiffs have not shown that they have the requisite property interest.

An alternative reason for holding that Plaintiffs cannot show a likelihood of success on the merits is that they have not established, or even attempted to establish, a property interest under South Carolina law. They simply cite a federal case, *Mackey v. Montrym*, 443 U.S. 1 (1979), wherein the State had conceded that a property interest existed under Massachusetts law. However, and as pointed out at pp. 7-8 of Defendant Anderson’s Memorandum in Support of Motion to Dismiss in the present case, in *State v. Price*, 333 S.C. 267, 271-72, 510 S.E.2d 215, 218 (1998), the South Carolina Supreme Court recognized that “the ability to operate a motor vehicle on the highway is a privilege, rather than a right.” In addition, as was stated in *Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 595, 654 S.E.2d 284, 288 (Ct. App. 2007),

> [b]eing licensed to operate a motor vehicle on the public highways of this State is not a property right, but is merely a privilege subject to reasonable regulations under the police power in the interest of the public safety and welfare. [cases cited]. . . . The privilege may be revoked or suspended for my cause relating to public safety, but it cannot be revoked arbitrarily or capriciously. [cases cited].

See also 31 S.C. Jur., *Automobiles and Other Motor Vehicles*, § 1 (Nov. 2019)("it is similarly well established that the legislature under the police power has full authority, in the interest of public safety to prescribe the conditions under which the privilege to operate a motor vehicle may be granted, and upon which such privilege may be revoked").

Even if some kind of property right in a driver's license might be said to exist under South Carolina law in some contexts, it does not exist in this context. As held in *Fowler v. Benson, supra*,

> Here, as in *Roth*, *Bell*, and *Memphis Light*, we must ask whether state law establishes the entitlement that Plaintiffs' claim in this case—a right of the indigent, who cannot pay court debt, to be exempt from driver's-license suspension on the basis of unpaid court debt. [Footnote omitted] The answer is it has not.
>
> Neither the district court nor Plaintiffs identify any legal authority showing that Michigan law directs anyone to consider a license holder's indigency as part of the process of suspending his driver's license for failure to pay court debt.

924 F.3d at 258. In South Carolina, to the contrary, there does exist a state law requirement that requires a court to consider indigency in cases that can lead to suspensions of drivers' licenses as well as in all other cases where fines are imposed. That requirement is found in § 17-25-350, already extensively cited and discussed above. And as has already been discussed many times above, to the extent that that section conferred a right upon the Plaintiffs, they waived it. There is no reason why DMV should be required by this Court to offer an opportunity to Plaintiffs that they have already waived, at a time (the time of sentencing) when indigency could be most

effectively established and in a forum (the summary court) that had the facilities to hear the case and the power to adjust the sentence to accommodate any demonstrated indigency. As held in *Dixon v. Love*, 431 U.S. 105 (1977), a summary suspension of a driver's license based upon official records does not violate due process, because the plaintiff "had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the . . . [license suspension] was based." 431 U.S. at 113-114. There is no reason why DMV should now be ordered to accommodate the claimed need for Plaintiffs to make a showing when they have already declined their opportunity to make that showing.

5. Even if Plaintiffs had standing and could make a clear showing of likelihood of success on the merits, they cannot satisfy the other requirements for a preliminary injunction.

With regard to the remaining factors which a plaintiff needs to show in order to obtain a preliminary injunction, DMV would first submit that because a plaintiff seeking a preliminary injunction must establish all four factors set forth in *Winter, supra,* 555 U.S. at 20, and because these Plaintiffs cannot show either standing in themselves or a clear likelihood of success on the merits, it is unnecessary to consider the remaining three *Winter* factors. However, a review of the other factors indicates that Plaintiffs cannot establish most or all of those other factors as well.[23]

[23] As a matter of information, it is worth noting that in two cases cited previously, *Jessup* and *Mendoza,* preliminary relief was denied altogether. In a third case, *Fowler v. Johnson*, No. CV 17-11441, 2018 WL 1737122 (E.D. Mich. Apr. 11, 2018), a preliminary injunction was granted as to the named plaintiffs (although denied on the grounds asserted by Plaintiffs in this case) but class certification was held in abeyance pending appeal, and the grant of preliminary injunction was reversed in *Fowler v. Benson,* 924 F.3d 247 (6th Cir. 2019), *en banc rehearing denied,* 12/3/19). Exhibit 4. In all three cases in which preliminary injunctive relief was granted to extent, that relief was either limited to the named plaintiffs or stayed pending appeal; *see Fowler, supra; Stinnie v. Holcomb,* 396 F. Supp. 3d 653, 661 (W.D. Va. 2019)(holding class certification decision held in abeyance; preliminary injunction had previously granted as to named plaintiffs only, 355 F.Supp.3d 514 (2018); *Robinson v. Purkey,* 326 F.R.D. 105 (M.D. Tenn. 2018)(class certified, 6/11/18, preliminary injunction granted, 10/16/18, 2018 WL

To repeat language from the beginning of this memorandum, the injunction Plaintiffs seek would:

> (1) prohibit[ ] the DMV from suspending driver's licenses for failure to pay traffic tickets under Section 56-25-20 without first providing a hearing and determining that failure to pay was willful; and
>
> (2) require[ ] the DMV to lift all current suspensions on driver's licenses for failure to pay traffic tickets, strike reinstatement fees related to those suspensions, reinstate any driver's licenses that have no other basis for suspension, and provide notice to license-holders of these changes, pending a final determination on the merits of Plaintiffs' claims.

ECF No. 35 at 6. The three Plaintiffs seek this relief "on behalf of themselves and two proposed Classes. . . ." *Id.* at 1. However, the Defendants have argued separately that class certification should be denied, so the remaining parts of the *Winter* test will be discussed herein applied to the only named Plaintiff, Ms. Carter, who is currently suspended and who would be able to drive if the requested preliminary relief were to be granted.

Plaintiffs seek both prohibitory and mandatory injunctive relief. The mandatory injunctive relief requested concerns the lifting of existing suspensions and other associated relief. It is discussed herein only with respect to Plaintiff Carter. With regard to the request for prohibitory injunctive relief, i.e., an injunction against future suspensions and associated events, DMV's position is that (a) such relief is not necessary for the named Plaintiffs, and (b) even if it were necessary for the named Plaintiffs or others, no temporary injunction granting such future-oriented relief should be issued, because Plaintiffs have shown no likelihood of success on the merits.

5023330, stayed by district court pending stay motion in 6th Cir, 2018 WL 5786236 (11/5/18), stayed by 6th Cir. 5/29/19 (Exhibit 5), appeal still pending as of 1/10/20).

In other words, to the best of counsel's knowledge, no preliminary injunction extending beyond the named plaintiffs has ever been put into effect in a case involving driver's license suspensions.

a. Irreparable harm in the absence of preliminary relief.

As Plaintiffs admit in the Complaint, the earliest suspension of Plaintiff Carter's driver's license that is still in effect occurred on June 13, 2017. Complaint, ¶ 167. Additional suspensions followed later, but the June 13, 2017 suspension is still in effect.[24] That suspension had therefore been in effect for almost two and a half years before the Motion for Preliminary Injunction was filed.

This delay in seeking preliminary relief mitigates against a finding Ms. Carter is currently suffering irreparable harm. It is axiomatic that "[a] long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction." 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.).

While Ms. Carter appears to be a person of limited means, her counsel allege that they have spent "more than one year of investigation involving court observations, reviews of public records, and numerous interviews with South Carolina driver's license holders and witnesses." Complaint, ¶ 258. The burden is on the plaintiff to establish irreparable harm, and Plaintiff Carter has not credibly shown that she is completely without means of transportation in the absence of a driver's license. Accordingly, she has not made the requisite showing of irreparable harm.

b. Balance of equities and public interest.

For the reasons set forth in the part of this memorandum addressing the rational basis test, the public interest test is met by denying preliminary relief. In addition, the public interest would not be served by excusing compliance with statutory mandates intended to ensure compliance with criminal law, especially in South Carolina, where § 17-25-350 extends considerable

[24] While Plaintiff Bellamy does not have standing to challenge her suspensions for failure to pay traffic tickets because of the absence of redressability, her earliest suspension still in effect occurred on July 8, 2018, well over a year before this action was filed. Complaint, ¶ 120.

leniency and sympathy to indigent persons who make a showing that they cannot pay the entire fine at the time of sentencing. The statutory scheme balances the equities between the need for compliance with criminal law and the need for leniency to persons who make a showing of indigency. This is not a case where injunctive relief is necessary, especially for the present Plaintiffs.

CONCLUSION

For the foregoing reasons, Defendant Shwedo respectfully submits that Plaintiffs' Motion for Preliminary Injunction should either be held in abeyance or denied.

Respectfully submitted,

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