IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NO. 19-1421

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

v.

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

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

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INTRODUCTION

In the three years before this litigation commenced, 130,597 North Carolinians lost their drivers' licenses "for failure to pay fines and costs mandated by the court," and 62,788 of these licenses remain revoked. J.A. 312–13 ¶¶ 5, 6.[1] Defendant does not dispute that the Division of Motor Vehicles ("DMV") is enforcing these revocations without any assessment of willfulness of nonpayment. He also does not dispute that they remain in effect until the driver pays in full or identifies, seeks, and then qualifies for other relief. And the indefinite nature of these revocations is significant: an examination of data from 2018 and part of 2019 showed that 40% of those revoked for nonpayment lost their license for at least two years and may never regain it, and data from the last forty years shows licenses remain revoked for nonpayment for a median of 5.82 years.[2]

Defendant tries to evade these facts by focusing on the language of Section 20-24.1(b) and (b1) that authorizes a post-revocation hearing for a driver savvy enough to research its existence and to request one. He essentially contends that the

[1] The data were from June 1, 2015, to May 31, 2018. J.A. 312 ¶ 3. The report was generated on March 11 and 12, 2019, J.A. 311 ¶ 2.

[2] Br. of *Amici Curiae* Mbrs. of the Free to Drive Coal. (hereinafter "Free to Drive Coal. Amicus Br.") 12 (citing Brandon L. Garrett & William Crozier, *Driven to Failure: Analysis of Failure to Appear and Pay Driver's License Suspension Policy in North Carolina* 34 (unpublished preprint, Aug. 21, 2019), https://ssrn.com/abstract=3440832), Doc. 29-1.

problem faced by the 130,597 drivers who just lost their licenses was that they *chose* not to prevent this injustice.

This argument belies common sense. One cannot credibly infer that all these drivers knew exactly what to do to reinstate, but simply chose to do nothing. It is especially unreasonable to make this inference in a state like North Carolina, where public transportation is scarce and nine out of ten residents need a car for employment. Pls.' Opening Br. (hereinafter "Pls.' Br.") 7–9.

The facts provide a more straightforward explanation: Section 20-24.1's plain text mandates that drivers automatically lose their license for failure to pay without any prior willfulness determination. Defendant concedes that the only notice they use affirmatively advises drivers that the only way to lift the revocation is full payment. Def.'s Br. 4 ("Finally, the notice also notes that if the defendant *does not pay her fine*, pursuant to Section 20-24.1, she may have her driver's license indefinitely suspended." (emphasis added)). And this is precisely what happened to Plaintiffs: when they inquired whether there were ways to avoid revocation short of paying in full, they were told "No." *See* Pls.' Br. 48. Under this system, those without resources are not going to research, much less discover, that there are alternatives to full payment when the local state court and the DMV are telling them the only option they have is to pay in full.

Given this reality, Defendant's defenses fade away. *Bearden* applies to Section 20-24.1 because the statute requires automatic revocation of licenses for nonpayment without first inquiring into one's ability to pay. The statute violates the Fourteenth Amendment to the U.S. Constitution because the interests at stake are substantial, significantly affected, and not rationally related to the interest of the state. Moreover, the state fails to consider available alternatives before enforcing the harsh sanction of revocation.

Even if *Bearden* did not apply, Defendant's enforcement of the statute cannot satisfy rational basis scrutiny. The statute does not promote an interest in public safety or collection. Dangerous drivers who pay off their tickets can still legally drive, while safe drivers who lack the financial resources to pay cannot. This is an irrational means to advance public safety. And any interest in collection of fines and fees cannot be advanced by requiring payment from those unable to pay.

Finally, Defendant concedes that the Notice informs individuals that they must pay to lift the revocation order. This misleading instruction cannot be cured by an obscure and indirect statutory citation. Therefore, the Notice independently violates due process.

ARGUMENT[3]

I. *Bearden* Sets Forth the Relevant Test for Evaluating the Constitutionality of Section 20-24.1.

A. *Bearden* applies where a sanction is imposed because of one's poverty, even if no fundamental right is implicated.

As this Court has explained, "[t]he indigent defendant[] . . . is [to be] protected against heightened civil or criminal penalties based solely on his inability to pay." *Alexander v. Johnson*, 742 F.2d 117, 126 (4th Cir. 1984) (relying on *Bearden v. Georgia*, 461 U.S. 660 (1983)). Section 20-24.1 violates this directive: those unable to pay face the heightened sanction of license revocation.

Defendant tries to limit *Bearden* by suggesting it turns on a fundamental liberty interest. Def.'s Br. 27–28. This argument is belied by his own understanding of the precedent. *Bearden* builds off of *Griffin*, and as Defendant notes, *Griffin* "held that a statute may violate the equal-protection and due-process clauses of the Fourteenth Amendment even when the statute does not create a suspect classification or *implicate a traditional fundamental right.*" Def.'s Br. 27 (emphasis added).

The Supreme Court emphatically underlined this point in *Mayer v. City of Chicago*, 404 U.S. 189 (1971), where the punishment was a fine—*not imprisonment*.

[3] Because Plaintiffs do not appeal the district court's ruling that they were unlikely to succeed on the merits of their claim that Section 20-24.1's failure to ensure a pre-revocation hearing also violates procedural due process, *see* Pls.' Br. 2 n.1, 5–6, Plaintiffs do not reply to Defendant's arguments on this point, *see* Def.'s Br. 40–45.

The Court stressed that the "invidiousness" of wealth-based discrimination "is not erased by any differences in the sentences that may be imposed," and the collateral consequences of a fine could be "even more serious" than a loss of one's liberty. *Id.* at 197.

After agreeing that *Griffin* is not restricted to fundamental rights, Defendant tries to explain away *Griffin* and *Mayer* by arguing that the *Bearden* line of cases also reaches challenges to some "access to the courts" cases, but extends no further. Def.'s Br. 28. There is nothing implicit or explicit in the *Griffin* case line that has ever described such a restriction, and Defendant fails to explain why this would be so. Indeed, as noted in Plaintiffs' opening brief, the Supreme Court examined the *Griffin* case line in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), noting it could apply to the deprivation of public education even though neither fundamental rights nor access to the courts was implicated. *See id.* at 25 n.60; Pls.' Br. 23–24. *See also Walker v. City of Calhoun*, 901 F.3d 1245, 1261 (11th Cir. 2018) (noting *Griffin/Bearden* analysis applies when, "because of their impecunity[, the indigent] . . . sustained an absolute deprivation" (modifications in original, quoting *Rodriguez*, 411 U.S. at 20)).

More generally, Defendant's effort to limit the *Griffin*/*Bearden* line of cases fails to provide any affirmative explanation of when they *do* apply. It also contradicts the Supreme Court's explicit refusal to limit this doctrine to the facts of previous

decisions, where the Court recognized that the principle "confront[s], *in diverse settings*, the 'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (emphasis added, quoting *Griffin*, 351 U.S. at 16); *see also Williams v. Illinois*, 399 U.S. 235, 241 (1970) ("[T]he passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process.").

The Court's operative theory is, instead, to subject state sanctions that are premised on poverty to heightened scrutiny. For example, in *M.L.B.*, the Court explained it was applying heightened scrutiny *not* because *M.L.B.* involved an access-to-court question or a fundamental right, but because the parent was "endeavoring to defend against" a sanction that was "wholly contingent on one's ability to pay." 519 U.S. at 125, 127.[4] And while the sanction at issue was different in *M.L.B.*, the loss of a license is as devastating as the financial penalty in *Mayer*, where the Court applied heightened scrutiny to a $500 fine. *See Mayer*, 404 U.S. at

[4] Defendant tries to dismiss *M.L.B.* by focusing on the portion of the decision that notes two exceptions to the "general rule . . . that *fee requirements* ordinarily are examined only for rationality": "participat[ion] in political processes" and "access to judicial process in cases criminal or 'quasi criminal' in nature." *M.L.B.*, 519 U.S. at 123–24 (emphasis added); Def.'s Br. 30–31. But Plaintiffs are not challenging a "fee requirement," such as the license application fee. Instead, they "seek[] to be spared from . . . adverse action" of losing their driver's licenses because of their inability to pay—and their licenses provide a critical means of providing for themselves and their families and maintaining cultural and social relationships. *See M.L.B.*, 519 U.S. at 125.

197 (noting "[a] fine may bear as heavily on an indigent accused as forced confinement," and the loss of a professional license as a "collateral consequence[]"could be "even more serious" than confinement). Defendant agrees that one's interest in a driver's license is "substantial," and notes he has "no reason to doubt Plaintiffs' contention that, for many North Carolinians, the loss of a driver's license negatively impacts individuals' ability to get to work, make doctor's appointments, go grocery shopping, and more." Def.'s Br. 33–34. And as Justice Powell observed, "[l]osing one's driver's license is more serious for some individuals than a brief stay in jail." *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) (Powell, J., concurring).[5] Because the *Bearden* line of cases applies to the sanction of a fine (*Mayer*), it must apply with equal force to the sanction of a loss of one's driver's license. Defendant's reliance on *M.L.B.* to argue against the application of the *Griffin/Bearden* line of cases entirely fails to address this point.

Finally, this Court's discussion in *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1989), confirms that *Bearden* controls here. Defendant tries to suggest

[5] Relatedly, the distinction Defendant draws between liberty and property interests is misplaced. *See* Def.'s Br. 14; Pls.' Br. 26. Given how vital a license is to accessing work in North Carolina, *see* Pls.' Br. 7–9, one's interest in a license takes on even greater meaning. *See Truax v. Raich*, 239 U.S. 33, 41 (1915) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." (citations omitted)).

Alexander declined to apply *Bearden* because there was no fundamental right at stake. *See* Def.'s Br. 32 n.2. The opposite is true. *Alexander* held that *Bearden* applies where a party alleges a wealth-based sanction. *See Alexander*, 742 F.2d at 123 n.8 ("[T]he constitutionality of the program can only be determined by careful scrutiny of [the *Bearden*] factors."). This Court ultimately did not discuss *Bearden* at length because the Supreme Court had already outlined a more specific, comparable test for challenges to attorney fee recoupment practices. *Id.* But had that precedent not existed, this Court was clear that it would have utilized the *Bearden* framework.

Because this case involves a wealth-based sanction, *Alexander* requires, and the *Bearden* line of cases instructs, that heightened scrutiny applies here.

B. Section 20-24.1 does not survive *Bearden*.

Defendant's arguments that Section 20-24.1 could survive a *Bearden* analysis are unavailing. *See* Pls.' Br. 27–34; Def.'s Br. 33–39.

1. Plaintiffs' interest is substantial.

Defendant concedes that Plaintiffs' interest in their driver's license is substantial. Def.'s Br. 33–34.

He then tries to counter that the state has a competing interest in "the regulation and administration of transportation laws," *id.* at 34, but cites to decisions discussing procedural due process challenges to a lack of a pre-deprivation hearing

under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). None of these citations involved a mixed question of due process and equal protection where individuals faced a sanction for their inability to pay.[6]

This distinction matters. *Bearden* does not envision a direct comparison of the claimant's versus the state's interests, but rather, a "careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.'" *Bearden*, 461 U.S. at 666–67 (modification in original, citation omitted). The reason is simple: by comparing a driver's interest in her license to the state's interest in transportation laws, Defendant creates a false choice. Plaintiffs do not dispute their underlying fines and costs; they simply contend they should not face the *additional* sanction of an absolute, indefinite deprivation of their licenses because of their inability to pay,

[6] *See Tomai-Minogue v. State Farm Mut. Auto. Ins. Co.*, 770 F.2d 1228, 1230, 1234 (4th Cir. 1985); *Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1178–80 (D. Or. 2018), *appeal pending on related order dismissing case*, No. 19-35506 (9th Cir. 2019); *Crawford v. Blue*, 271 F. Supp. 3d 316, 329 (D. Mass. 2017).

Mendoza separately found *Bearden* to be inapposite to the suspension of a driver's license for lack of a fundamental interest, *see* 358 F. Supp. 3d at 1165–76. This is incorrect as explained above, *see supra* 4–8, and inapposite to the current discussion. The section of *Mendoza* that Defendant cites to balance the driver's and state's interests evaluates a procedural due process claim under *Mathews*, where the court explicitly (but wrongly) states that it assumes there is no right to an ability-to-pay assessment. *Id.* at 1178–79.

without first considering the adequacy of alternatives. Defendant acknowledges the state's interests can be served in other ways such as a payment plan, and as *Bearden* observed, "the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment." *Id.* at 672 (quoting *Williams*, 399 U.S. at 265 (Harlan, J., concurring)). This is why the Supreme Court has repeatedly rejected the idea that an interest in fine collection could justify an *additional* sanction where one is unable to pay. Just as the Court reasoned in *Bearden*, "[r]evoking the [license] of someone who through no fault of his own is unable to [pay] will not make [payment] suddenly forthcoming." 461 U.S. at 670; *see also Mayer*, 404 U.S. at 196–98; *Tate v. Short*, 401 U.S. 395, 399 (1971) (dismissing imprisonment as mechanism for collecting fines because "[i]t is imposed to augment the State's revenues but obviously does not serve that purpose").

Thus, as conceded by Defendant and properly understood under *Bearden*, the interest at stake here is substantial.

2. Plaintiffs' interest is substantially affected.

Defendant does not dispute that the license revocation is absolute under Section 20-24.1. The interest is thus substantially affected.

Defendant instead argues that the revocations are neither "automatic" nor "indefinite." Sections 20-24.2 and 20-24.1 state otherwise: courts "must report to the [DMV]" those who fail to pay their fines and costs within 40 days, N.C.G.S. § 20-

24.2(a)(2), and the DMV "must revoke the driver's license upon receipt of" that report, *id.* § 20-24.1(a)(2). This is quintessentially automatic.

It is also indefinite. The revocation order remains in place until the driver pays or otherwise finds a way to get the revocation lifted. And data show this indefinite period is not fleeting, often lasting years. *See supra* 1. By contrast, someone convicted of impaired driving is guaranteed to be back on the road in a year. N.C.G.S. § 20-19(c1).

Because the revocation is absolute, automatic and indefinite, the interest is substantially affected.

3. The statute's means and purpose are not rationally connected.

Defendant does not dispute the lack of a rational connection between the government's interest in collection and sanctioning those unable to pay. He instead contends that the provision permitting a post-revocation hearing saves the statute, and the true reason 130,597 drivers lost their licenses for failing to pay fines and costs—and the real reason it takes many years to get their revocation order lifted—is because these drivers affirmatively chose to "make no efforts" to seek a hearing to regain their license. *See* Def.'s Br. 3. Such a theory is very difficult to credit. The more straightforward explanation for why so many licenses are revoked for so long is that the State automatically revokes licenses without any determination of ability

to pay and then advises that the only way to regain the license is through full payment. Such was Plaintiffs' experience.

Defendant admits that the only notice provided to drivers who have not paid their fines and costs is a piece of paper that tells them they must "pay [their] fine" to avoid revocation. Def.'s Br. 4. As discussed more fully below, this misleading notice violates due process because it does not notify drivers of any other option besides payment. *See infra* 18–25. This, combined with the fact that those who asked about alternative options were told that there were none, Pls.' Br. 48, demonstrates that Defendant's position is misplaced.

Moreover, Defendant has never proffered *any* evidence to suggest *anyone* has obtained relief through those hearings. The data he *has* proffered refer only to those who (i) "paid the court mandated fines and costs before their driver's license was revoked," (ii) "did not pay the fines and costs until after their driver's licenses were revoked for failure to pay fines and costs as mandated by the court," or (iii) did not pay at all. J.A. 312 ¶ 2. He says nothing about the number who were granted relief under Section 20-24.1(b)(4) based on a showing of their inability to pay. Defendant points to Plaintiff Ms. Smoot, *see* Def.'s Br. 36, but her story is the same: she was able to get her revocation lifted after many months because she was finally able to *pay*, not because she was able to access a hearing. *See* J.A. 386 n.3.

Courts have consistently held that *Bearden* requires that an inquiry into ability to pay must be made at the time a sanction for nonpayment is imposed; the statute violates this requirement by revoking immediately and automatically, and then placing the onus on the defendant to raise this issue. *See* Pls.' Br. 31–33 (collecting cases). Defendant attempts to deflect by arguing that people should raise their inability to pay at sentencing or some other unspecified ability-to-pay hearing. Def.'s Br. 37.[7] But he offers no evidence that individuals are given notice *at sentencing* that their license will be revoked for nonpayment, such that they would know to raise the issue at that juncture. He also ignores that one can lose the ability to pay after sentencing, which is why courts require an inquiry at the time a sanction is imposed.[8] *See Cain v. City of New Orleans*, No. CV 15-4479, 2016 WL 2962912, at *7 (E.D. La. May 23, 2016). This case makes clear why *Bearden*'s pre-sanction willfulness

[7] Defendant suggests "many in the plaintiff class do not even appear" for sentencing. Def.'s Br. 37. This is untrue. Section 20-24.1(a)(1) authorizes revocation for failing to *appear*, but Plaintiffs limit their challenge and requested relief to Section 20-24.1(a)(2) related to revocation for failure to *pay*. *See* Pls.' Br. 52–53; J.A. 268. The certified classes also relate only to failure to pay. J.A. 436.

[8] Additionally, Defendant ignores that because Section 20-24.1 is attempting to coerce payment, it is like civil contempt, which permits a sanction only after finding that compliance is possible. *See* Pls.' Br. 33 n.10 (collecting cases).

determination is so critical: thousands of licenses remain revoked for years because drivers have no knowledge of the existence of any hearing option.[9]

4. Alternative means exist.

Defendant also argues that the "revocation statute already contains provisions for alternative means to help traffic defendants pay their fines." Def.'s Br. 39. This misapprehends the point in *Bearden* that a court must consider whether there are "alternative means for effectuating the purpose" of the statute *before* enforcing a sanction. *Bearden*, 461 U.S. at 667. A court must determine whether there are alternatives *to the sanction*, such that the government's purpose can be achieved *without enforcing that sanction*. Where, as here, alternatives exist, it is inappropriate to nevertheless enforce the sanction without first determining that these alternatives are insufficient. *See id*. at 672 ("Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.").

[9] Defendant also cites two inapposite decisions. *See* Def.'s Br. 37–38. *Kendall v. Balcerzak*, 650 F.3d 515 (4th Cir. 2011), involved a challenge to a referendum process where the claims did not implicate any heightened scrutiny. *Id*. at 525. *Shavitz v. City of High Point*, 270 F. Supp. 2d 702 (M.D.N.C. 2003), involved a due process challenge to how a hearing was conducted, where the party never attended the hearing. *Id*. at 710. These cases do not speak to why *Bearden* would not require an inquiry into one's ability to pay contemporaneous with enforcing a sanction for nonpayment. *See Bearden*, 461 U.S. at 672; *see also* Pls.' Br. 31–33.

The fact that alternatives such as payment plans, remittance, and alternate arrangements such as community service already exist in North Carolina highlights the state's ability to adequately enforce its fines and costs *without* resorting to the harsh punishment of license revocation. Section 20-24.1 is unconstitutional because it does not compel an inquiry into whether these alternatives are inadequate before revoking the driver's license.

Defendant's argument also implicitly assumes the driver knows how to obtain a payment plan. But as the State concedes, it only apprises defendants of one option: they must *pay* the full amount of the ticket to lift the revocation order. *See* Def.'s Br. 4. The Notice is also written at a level that is in excess of most Americans' reading comprehension. *See infra* 24 (discussing reading level of Notice). To suggest that an indigent defendant navigating these proceedings without an attorney would nevertheless engage in legal research to explore potential alternatives belies common sense and reality.

II. Under Rational Basis, Section 20-24.1 Violates Equal Protection.

Section 20-24.1 also violates equal protection under the more deferential rational basis standard. Defendant argues that the revocation statute does not establish a classification based on inability to pay, but rather creates one based on a driver's "willingness" to pay or request relief from a court. Def.'s Br. 22–23. This is erroneous, for even though the statute is facially neutral, it "in operative effect

exposes only indigents to the risk of" indefinite license revocation. *Williams v. Illinois*, 399 U.S. 235, 242 (1970). Those who are able to pay simply do so, while those who cannot are subject to automatic license revocation. Moreover, the hearing provisions of Section 20-24.1(b) are illusory given that the Notice used by Defendant tells the driver only that she must pay in full, *see infra* 18–25, and Plaintiffs were affirmatively advised that this was their only option, *see* Pls.' Br. 48. This has resulted in 130,597 North Carolinians losing their licenses "for failure to pay fines and costs mandated by the court" in the last three years alone, and it often takes years to lift that revocation, if it happens at all. *See supra* 1, 12. Because the statute mandates automatic revocation regardless of ability to pay, and the State conceals the availability of a hearing option to regain one's license, the operative effect of this regime is to sanction those who are unable to pay.

Defendant next argues that Section 20-24.1 is rationally related to the State's legitimate interest in regulating its public highways and protecting public safety. *See* Def.'s Br. 24, 36. Again, this is erroneous. There are several North Carolina statutes that permit or require the revocation of driver's licenses for conduct that poses a threat to public safety, such as driving while impaired, N.C.G.S. §§ 20-138.1, 20-17(a)(2)(a); accumulating too many points, *id*. §§ 20-16(a)(5); 20-16(c); and excessive speeding, *id*. §§ 20-16.1; 20-16(a)(9); 20-19(a). By contrast, Section 20-24.1 is not directed at conduct that poses a safety threat; revocations occur for

nonpayment only—regardless of the nature, severity or frequency of the underlying traffic ticket. For this reason, dangerous drivers who pay their traffic tickets can still legally drive, while safe drivers who are unable to pay cannot. This is illogical. *See Robinson v. Purkey*, No. 3:17-CV-1263, 2017 WL 4418134, at *8 (M.D. Tenn. Oct. 5, 2017) (Defendant's purported "interest in safety, therefore, is insufficient to support the distinction challenged" by Plaintiffs.).

Defendant also contends that Section 20-24.1's automatic revocation scheme is rationally related to the State's interest in ensuring compliance with court orders. *See* Def.'s Br. 24, 36. But there is no logical connection between revoking the license of those who cannot afford to pay and the State's interest in eliciting payment. *See* Pls.' Br. 39–49; *see also* Free to Drive Coal. *Amici* Br. 4–11, Doc. 29-1. Given the multi-year delay many drivers face in lifting the revocation, as well as the huge number revoked each year who are unable to comply, Defendant's assertion that Section 20-24.1's automatic revocation scheme is rationally related to ensuring compliance with court orders must be rejected. *See Romer v. Evans*, 517 U.S. 620, 632–33 (1996) (stating laws must be "grounded in a sufficient factual context" to allow courts "to ascertain some relation between the classification and the purpose it served.").

Defendant finally argues that Plaintiffs demand more precision than rational basis requires. *See* Def.'s Br. 23–24. This misunderstands Plaintiffs' argument.

While a statute need not be "narrowly tailored" to survive rational basis review, it must be rational. As explained in *Purkey*, "taking an individual's driver's license away to try to make her more likely to pay a fine is not using a shotgun to do the job of a rifle: it is using a shotgun to treat a broken arm. There is no rational basis for that." *Id.*, 2017 WL 4418134, at *9. Here, the effect of the statute is more harmful than helpful: it is counterproductive to the State's interest in collecting court debt because the lack of a driver's license limits an individual's ability to earn income, and also leads to more traffic law violations for driving under revocation when people are confronted with the impossible choice of driving on a revoked license to fulfill life's necessities, or refraining from driving and potentially losing their job and ability to care for themselves and their families. *See* Pls.' Br. 40–41. The Court is fully empowered to declare this to be irrational. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (rejecting argument that denying public education to children of immigrants without lawful status could save money because this alleged benefit was "wholly insubstantial in light of the costs involved to these children, the State, and the Nation.").

III. Defendant's Notice Violates Procedural Due Process Because It Misleads Drivers as to How They Can Lift the Revocation Order under Section 20-24.1 Based on Inability to Pay.

Defendant's argument that Plaintiffs are unlikely to succeed on the merits of their procedural due process notice claim also fails. Relying on *City of West Covina*

v. Perkins, 525 U.S. 234 (1999), Defendant asserts that the Notice is accurate because it cites Section 20-24.1 and purportedly contains "detailed information" on how drivers can resolve "unpaid fines and court costs." Def.'s Br. 5, 43, 46–47 (citations omitted). But this argument ignores two essential elements of Plaintiffs' notice claim: (1) the mere citation to a statute referencing a potential redress procedure does not replace or satisfy *Mullane*'s "holistic reasonableness" test for accurate notice, and (2) under that standard, a misleading notice violates due process—irrespective of whether individualized notice about that procedure was otherwise required.

In their opening brief, Plaintiffs cited numerous cases, including from this Circuit, that support their claim that a misleading notice is unconstitutional under *Mullane*. Pls.' Br. 43–44 (relying on *Mallette v. Arlington Cty. Emps.' Suppl. Ret. Sys. II*, 91 F.3d 630 (4th Cir. 1996), and collecting additional cases). Defendant fails to meaningfully address any of Plaintiffs' case authority, offering only a citation to a portion of *Nnebe v. Daus* that the Second Circuit has overruled.[10] *See* Def.'s Br.

[10] As Plaintiffs previously noted, *see* Pls.' Br. 42, 44, the Second Circuit in *Nnebe* reversed the district court's finding of a constitutionally sufficient notice, and affirmed its finding of a misleading notice because the notices failed to explain the substantive standard actually applied under the public rule cited in the notices. *See* 931 F.3d 66, 88–89 (2d Cir. 2019), *aff'ing & rev'ing in part*, 184 F. Supp. 3d 54, 74 (S.D.N.Y 2016). Defendant's reliance on the district court decision is therefore erroneous. *See* Def.'s Br. 49 (relying on holding in *Nnebe*, 184 F. Supp. 3d at 74,

46–50. Instead, Defendant relies on numerous cases that have nothing to do with a notice's misrepresentation of purportedly available state redress procedures.[11]

While Defendant generally concedes the *Mullane* standard, Def.'s Br. 45–46 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)), he fails to apply the well-established principle—recognized by this and other Circuits—that statutory notice is not always sufficient to satisfy due process and that *West Covina* does *not* override the *Mullane* standard, Pls.' Br. at 46–47. As Plaintiffs noted in their opening brief—to which Defendant did not respond:

> *West Covina*, while citing *Mullane*, did not mention the 'reasonably calculated' standard or apply it. Based on the Court's endorsement of the *Mullane* standard in *Dunsenberry v. United States*, 534 U.S. 161, 167-68 (2002), three years after the decision in *West Covina*, we believe that ***our 'reasonably calculated' analysis is not controlled by the Court's decision in West Covina***.

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that notice was sufficient, "despite 'not contain[ing]' some important information about the opportunity to be heard").

[11] *E.g.*, *Brody v. Vill. of Port Chester*, 434 F.3d 121, 129–32 (2d. Cir. 2005) (solely addressing statutory notice's availability); *Reams v. Irvin*, 561 F.3d 1258, 1265 (11th Cir. 2009) (same); *cf. Grayden*, 345 F.3d at 1244 (finding statutory notice insufficient where plaintiffs had limited ability to consult statute); *Stinnie v. Holcomb*, 355 F. Supp. 3d 514, 529 (W.D. Va. 2018) (finding no notice in statute because no such process existed); *Adams v. City of Marshall*, No. 4:05-CV-62, 2006 WL 3825250, at *5 (W.D. Mich. Dec. 27, 2006) (denying summary judgment because, while notice "adequately apprised Plaintiffs of the alleged problem and of the threat of abatement," parties failed to establish whether information related to hearings were in public source); *id.* at *4 (noting plaintiffs understood notice); *see also Fowler v. Benson*, 924 F.3d 247, 256–60 (6th Cir. 2019) (focusing solely on opportunity to be heard).

Id. at 46 (emphasis added, quoting *Grayden v. Rhodes*, 345 F.3d 1225, 1244 (11th Cir. 2003)).

Thus, analysis of a notice's constitutional sufficiency cannot end with a finding under *West Covina* that state-law redress procedures are generally publicly available.[12] Rather, determination of a notice's constitutional adequacy must be governed by the holistic reasonableness analysis under *Mullane*: whether the notice is "reasonably calculated, under *all* circumstances" to enable drivers to learn their rights, raise their objections to the revocation order, and be heard. *See Mullane*, 339 U.S. at 314; *Arrington v. Helms*, 438 F.3d 1336, 1353 (11th Cir. 2006) (explaining analysis "cannot end" with public availability of statutes or rules explaining rights, and that "*Mullane* . . . still require[s] . . . consider[ation of] the adequacy, under all the circumstances, of this notice"); *Grayden*, 345 F.3d at 1243–44 (same); Pls.' Br. 42.

While the public availability of a statute setting forth state-law redress procedures may be one factor to consider in this analysis, such statutory notice becomes irrelevant where, as here, an individual notice misleads people about those procedures. *See, e.g.*, *Nnebe v. Daus*, 931 F.3d 66, 88–89 (2d Cir. 2019), *aff'ing* &

[12] Moreover, Defendant ignored an additional ground Plaintiffs raised for rejecting *West Covina*: that the *West Covina* plaintiffs did not contest their property deprivation—a central finding to that decision—while Plaintiffs here *do* contest the underlying deprivation. Pls.' Br. 47 n.15.

rev'ing in part, 184 F. Supp. 3d 54, 74 (S.D.N.Y 2016); *see also Noah v. McDonald*, 28 Vet. App. 120, 131 (2016) ("This is not a matter of whether a claimant is properly charged with knowledge of the relevant law. Rather, VA provided Mr. Noah inaccurate and misleading notice that gave him significantly less time than the law allowed to respond to VA's request for information."); Pls.' Br. 43–47 (citing cases finding misleading notice violates due process, despite state-law redress procedures set forth in public documents). This is because when such notice misrepresents the process set forth in a publicly available source, it fails to accurately convey the information necessary to ensure defense against a deprivation and thus fails to satisfy *Mullane*. *See id.* at 44–47.

Here, the Notice solely provides one option to lift the revocation order: full payment. This is clearly shown by: the Notice's reference to indefinite revocation for failure to *pay the fine*; direction to contact the court for *payment*; warning that the DMV cannot accept *payment*; and omission of alternatives to *full payment* under Section 20-24.1, as well as the unrefuted evidence that Plaintiffs were told that *full payment* was the only option when they informed the court of their inability to pay. *See* Pls.' Br. 47–48; *see also* Br. of *Amici Curiae* Dr. Rima Rudd, *et. al.* 19, Doc. 30-1 ("[T]he only option provided is to contact the traffic court to make a payment," and the Notice does not "address how to get a hearing on the pending suspension or whether there are options if the reader cannot pay the full cost."). Moreover, while

the Notice cites Section 20-24.1, it only does so to explain the *statutory authority* for the revocation for nonpayment, Pls.' Br. 9 ("YOUR NC DRIVING PRIVILEGE IS SCHEDULED FOR AN INDEFINITE SUSPENSION *IN ACCORDANCE WITH GENERAL STATUTE 20-24.1* FOR FAILURE TO PAY FINES . . ." (citing Notice, emphasis added)); it does not suggest in any way that Section 20-24.1 may contain alternatives to lift the revocation order.

Defendant admits that the Notice indicates that full payment is the only option to lift the revocation order. *See* Def.'s Br. 4 (explaining that Notice "remind[s a driver] of her ongoing *financial* obligation," notes that "she has failed to pay a *fine*," "notes that if the driver does not *pay her fine*, pursuant to section 20-24.1, she may have her license indefinitely suspended," and that "*payment* cannot be made to the DMV" (emphases added)). He also admits that the Notice omits explanation of any alternatives to payment under Section 20-24.1, and merely cites the statute without explanation.[13] *See id.* at 47.

[13] Defendant further contends that due process does not require the Notice's explanation of Section 20-24.1's nonpayment alternatives "to protect a non-fundamental right." Def.'s Br. 48; *see also id.* at 50 (rejecting *Turner v. Rogers*, 564 U.S. 431 (2011), because "no fundamental right is at stake"). But similar to the faulty foundation of Defendant's *Bearden* argument, a "fundamental right" alone does not determine the sort of notice mandated by due process. Losing one's license can be even more severe than a short stay in jail, *see supra* 7, and due process does not tolerate a notice that misleads drivers about their options to redress constitutional deprivations.

And Defendant's emphasis on the Notice's instruction to call the court clerk only underscores the conclusion that full payment is the only option presented in the Notice to lift the revocation order. Defendant does not explain how an individual would understand from the Notice that a call to the clerk could lead to any option but full payment. Indeed, when Plaintiffs contacted their local courts about their inability to pay, they were told the only option was to pay in full. *See* Pls.' Br. 48. Moreover, the inaccessibility of the Notice's language—which requires an education level of a second-year college student for full comprehension, and thus is well above the reading level of an average North Carolinian—further rejects any reasonable conclusion that a typical reader would discern any option to lift the revocation order but full payment. *See* Br. *Amici Curiae* Dr. Rima Rudd, *et. al.*, 7–8, 11–12, 14–15, Doc. 30-1 (noting "serious mismatch" between reading skills of North Carolina public and Notice's reading level demands).

Accordingly, individuals relying on the Notice reasonably understand that they only have two options: pay in full to lift the revocation order or indefinitely lose their license if they cannot. Individuals cannot reasonably be expected to pursue any other option, including researching and invoking an ability-to-pay hearing under Section 20-24.1, due to the misleading Notice. A contrary conclusion would render any notice constitutionally sufficient simply because it cites publicly available state

redress procedures, despite the notice's contradiction of those procedures. Such reasoning is inconsistent with due process.

In sum, the Notice fails the *Mullane* standard because it conveys full payment as the only option to lift the revocation order while obscuring how individuals can "appear or default, acquiesce, or contest" the revocation order based on inability to pay. *Mullane*, 339 U.S. at 314. Thus, the district court's conclusion that Plaintiffs are unlikely to succeed on their notice claim was erroneous.

IV. The Court Should Remand with Instructions to Enter a Preliminary Injunction.

The Court should remand with instructions to enter a preliminary injunction. Pls.' Br. 51–52. Since Plaintiffs are likely to prevail on their constitutional claims, irreparable injury is presumed. *See* Pls.' Br. 49–50. The district court and Defendant do not materially dispute this, even noting that there is "no reason to doubt Plaintiffs' contention that, for many North Carolinians, the loss of a driver's license negatively impacts individuals' ability to get to work, make doctor's appointments, go grocery shopping, and more." Def.'s Br. 33–34; J.A. 419–20.

The balance of hardships also weighs in favor of the party whose constitutional rights are aggrieved, and the public interest would be served by the entry of an injunction. *See* Pls.' Br. 50–51.

Therefore, the Court should remand with instructions that a preliminary injunction be entered. *See League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014).

CONCLUSION

Plaintiffs respectfully request that the Court reverse and remand with instructions to reinstate Plaintiffs' *Bearden* claim and to enter Plaintiffs' requested preliminary injunctive relief.

Dated: November 18, 2019.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). According to the word-count feature of the word-processing program with which it was prepared (Microsoft Word)—the brief contains 6,486 words, excluding portions exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: November 18, 2019.

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CERTIFICATE OF SERVICE

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

Dated: November 18, 2019.

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