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

SETI JOHNSON and MARIE BONHOMME-DICKS, on behalf of themselves and those similarly situated, and SHAREE SMOOT and NICHELLE YARBOROUGH, on behalf of themselves and those similarily situated, Plaintiffs, v. TORRE JESSUP, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles, Defendant.	Case No. 1:18-cv-00467 (CLASS ACTION)

PLAINTIFFS' REPLY IN SUPPORT OF SECOND MOTION FOR PRELIMINARY INJUNCTION

Defendant's opposition, DE 45 ("Opp."), misconstrues Plaintiffs' core legal claims and the pertinent law supporting Plaintiffs' requested preliminary injunction.[1] Indeed, Defendant does not materially address Plaintiffs' third claim, that DMV's notice is facially deficient, a matter which independently warrants issuance of an injunction. *See* First Am. Compl. ("FAC"), DE 35, ¶¶ 142–50; Pls.' Opening Br. ("Opening"), DE 39, 20–22. Because Plaintiffs are likely to prevail on all three of their claims, are facing

[1] Defendant suggests Plaintiffs seek a "temporary restraining order." *See* Opp. 2, 7, 8-9, 25. Plaintiffs seek a preliminary injunction only. *Compare* Fed. R. Civ. P. 65(a) *with* 65(b); *see* DE 38.

irreparable injury if this Motion were to be denied, and because the public interest favors an injunction, Plaintiffs respectfully request the Court grant the Motion.

A. Defendant's Automatic Revocation Of Driver's Licenses Without A Prior Determination Of Ability To Pay Violates The Fourteenth Amendment.

Plaintiffs' first claim is grounded in established Supreme Court authority holding that indigent defendants may not be punished because of their poverty. The Court has repeatedly articulated this principle, including in the seminal case *Bearden v. Georgia*, 461 U.S. 660 (1983), as well as its precursors *Griffin v. Illinois*, 351 U.S. 12 (1956), *Williams v. Illinois*, 399 U.S. 235 (1970), and *Tate v. Short*, 401 U.S. 395 (1971). *See* FAC ¶¶ 115–25; Opening 11–15. Rather than addressing this central issue in the case, Defendant dismisses *Bearden* as inapposite because it is "in the criminal context" and is limited to "whether 'a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution . . .'" Opp. 22 (quoting *Bearden*, 461 U.S. at 665). Plaintiffs respectfully disagree.

First, probation revocation is not "a stage of a criminal prosecution," *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973), but rather a post-conviction process to address whether further punishment is needed due to technical noncompliance. Section 20-24.1 is the same. It seeks to compel compliance with criminal sentences by revoking driver's licenses for nonpayment of fines and conditioning restoration on payment. *See* § 20-24.1(b). The underlying traffic cases are criminal infractions, misdemeanors, or felonies, *see* N.C.G.S. § 20-176, filed in criminal court. Thus, for purposes of determining whether to engage in the analysis articulated in *Bearden*, revocation of driver's licenses

for nonpayment of fines from a criminal sentence is directly equivalent to the revocation of probation for nonpayment of fines from a criminal sentence.

Second, *Bearden* involved a different sanction, but the fundamental principle outlined in *Griffin*, *Williams*, *Tate*, and *Bearden* "has not been confined to cases in which imprisonment is at stake." *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996). "Rather, the constitutional principle reaffirmed by these cases prohibits the imposition of adverse consequences against indigent defendants solely because of their financial circumstances, regardless of whether those adverse consequences take the form of incarceration, reduced access to court procedures, or some other burden." U.S. Stmt. of Interest 15, *Stinnie v. Holcomb*, No. 3:16-cv-44, 2017 WL 963234 (W.D. Va. Mar. 13, 2017), DE 6-8; *see also id* at 15-16 (collecting cases). This is for good reason, as the relative punitiveness of the sanction may be in the eye of the beholder. *See Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) ("Losing one's driver's license is more serious for some individuals than a brief stay in jail."). In any event, if, as Defendant suggests, *Bearden*'s analysis were restricted to cases of imprisonment, then the Supreme Court would not have required "a careful inquiry into such factors [including] 'the nature of the individual interest affected[.]'" 461 U.S. at 666–67.

The touchstone of *Bearden* is that it violates equal protection and due process to subject indigents in the criminal justice system to disparate punishment due to their poverty. 461 U.S. at 665–66. Applying *Bearden* here, "there is no doubt that the State

[is treating Plaintiffs] differently from a person who did not fail to pay the imposed fine . . . ." *Id.* at 665.

Defendant also suggests that Section 20-24.1 passes constitutional muster because "'wealth' qualifications do not discriminate against a suspect class." Opp. 10. But this is precisely the analytical approach the Supreme Court has rejected in this context. *See id.* at 666 & n.8 (cautioning against "easy slogans or pigeonhole analysis"). Instead, it demands a careful balancing test that takes into account the relative weight of the interest at stake alongside other factors. *See id.* at 666 (balancing, *inter alia*, "the nature of the individual interest affected"). Section 20-24.1 cannot withstand scrutiny under this inquiry. There is not a sufficient justification for denying Plaintiffs access to the driver's licenses that are so essential to their ability to provide for themselves and to ultimately repay their court debt. *See* Opening 13–15.

Even if the Court resorted to a traditional equal protection analysis as advocated by Defendant, and further assumed that rational basis applied, Section 20-24.1 still fails. Defendant proffers two rationales. First, he argues that Section 20-24.1 has a "direct and rational relationship to . . . protecting the safety and welfare of its citizens." Opp. 16, *see also id.* 15. This is untrue, for Section 20-24.1 strictly concerns *payment*; it has no relationship to safety or welfare. As the U.S. District Court for the Middle District of Tennessee recently explained in rejecting a similar rationale for Tennessee's license suspension statute, for this rationale to be valid,

> the underlying laws would have to draw some distinction based on actual expectation of safety risk, such as, for example, a distinction based on the

> severity or numerousness of the underlying offenses. The provisions at issue here are concerned only with whether the offender has paid her Traffic Debt or not. An individual capable of paying her fines and costs may, in any particular case, in fact be demonstrably more dangerous than an individual who cannot, but the provisions at issue do not take account of that fact.

Robinson v. Purkey, No. 3:17-CV-1263, 2017 WL 4418134, at *8 (M.D. Tenn. Oct. 5, 2017). Indeed, the State has *other statutes* that serve the purpose of safety, such as a revocation based on accumulating too many "points," N.C.G.S. § 20-16; engaging in excessive speeding, *id*, *see also id.* § 20-16.1; or driving while impaired or engaging in other dangerous activities, *id.* § 20-17. Section 20-24.1, by contrast, does not promote safety.

Defendant also argues that Section 20-24.1 bears a "direct and rational relationship to . . . ensuring compliance with court orders." Opp. 16, *see also id.* 15. This argument is valid for those able to pay who simply refuse to do so. "No person, however, can be threatened or coerced into doing the impossible, and no person can be threatened or coerced into paying money that she does not have and cannot get." *Purkey*, 2017 WL 4418134, at *8; *see also United States v. Rylander*, 460 U.S. 752, 757 (1983) (contempt order improper "[w]here compliance is impossible"); *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948) (even wrongful acts by debtor cannot "warrant issuance of an order which creates a duty impossible of performance"). Moreover, "the ability to drive is crucial to the debtor's ability to actually establish the economic self-sufficiency that is necessary to be able to pay the relevant obligations." *Purkey*, 2017 WL 4418134, at *9; *see also Bell v.*

Burson, 402 U.S. 535, 539 (1971) (driver's licenses "may become essential in the pursuit of a livelihood").

Plaintiffs' own experiences, and uncontested evidence put forth in support of Plaintiffs' motion, affirms that this is especially true in North Carolina. *See* Opening 5–9. "[B]ut one needs only to observe the details of ordinary life to understand that an individual who cannot drive is at an extraordinary disadvantage in both earning and maintaining material resources," and thus, revoking a license is "not merely out of proportion to the underlying purpose of ensuring payment, but affirmatively destructive of that end." *Purkey*, 2017 WL 4418134, at *9; *see also Argersinger*, 407 U.S. at 48 ("Losing one's driver's license is more serious for some individuals than a brief stay in jail."). Plaintiffs therefore submit that, whether analyzed under *Bearden* or under a more lenient standard, Section 20-24.1 cannot withstand scrutiny to the extent it requires revocation of licenses for nonpayment without first assessing the driver's ability to pay.

B. Defendant Violates Procedural Due Process By Automatically Revoking Driver's Licenses For Nonpayment Without Any Meaningful Pre-Deprivation Opportunity To Be Heard.

In determining what process is due, a court must balance: (1) the nature of the private interest that will be affected by the governmental action; (2) the risk of erroneous deprivation through the procedures used and the probable value of requiring additional procedural safeguards; and (3) the government's interest. *Mathews v. Eldridge,* 424 U.S. 319, 355 (1976); *see also* Opening 15–20 (applying *Mathews* factors). Rather than engage with the *Mathews* analysis directly, Defendant tries to analogize to the Supreme

Court's ruling in *Dixon v. Love*, 431 U.S. 105 (1977), finding a post-deprivation hearing sufficient. As explained below, *Dixon* is inapposite.

The regulation being challenged in *Dixon* was an objective traffic point system tied directly to traffic convictions: the state of Illinois suspended a person's driver's license when a driver accumulated a certain number of points for violating Illinois' traffic laws. 431 U.S. at 107. The court thus emphasized that the driver had a "a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based," *Dixon*, 431 U.S. at 113, and emphasized that the regulations directly implicated public safety since it was tied to an objective assessment of serial traffic convictions, *id.* at 114–15.

Section 20-24.1 is dissimilar to the regulations in *Dixon*, and much more analogous to those at issue in *Bell v. Burson*, 402 U.S. 535 (1971) (finding pre-deprivation hearing necessary), for three reasons. *First*, the revocation under Section 20-24.1 is not tied to a *conviction*. It is instead tied to a failure to pay a fine assessed *after* a conviction. This is a critical distinction because the judicial hearing in traffic court assesses a defendant's *liability* for a traffic ticket, not their ability to pay the fines imposed. Thus, this liability hearing provides no procedural protections concerning whether a person's nonpayment was willful.

Second, Section 20-24.1 does not tie revocation to a simple, objective standard like in *Dixon*. Rather, as noted in Plaintiffs' opening brief and without direct response from Defendant, Section 20-24.1 envisions an underlying substantive standard that seeks

to punish only those who willfully failed to pay. *See* Opening 16–18.[2] The fact that the *procedure* employed by Section 20-24.1 is objective—every person who fails to pay has her license revoked—is immaterial. As the Supreme Court instructed in *Bell*, the Court must assess the propriety of that procedure by evaluating the statutory scheme, to identify key issues that may require a hearing. *Bell*, 402 U.S. at 541 (finding that liability was a critical issue). Here, the legislature clearly intended to permit those unable to pay to be able to drive legally. *See* N.C.G.S. § 20-24.1(b). It simply failed to create a procedurally sufficient process to assess this before a license is revoked.

Third, *Dixon* related to public safety, which justified delaying a hearing until after the revocation. 431 U.S. 114–15. By contrast, Section 20-24.1 has nothing to do with safety. *See supra* at 4–6. Therefore, the argument for a post-deprivation hearing in *Dixon* is inapposite to Section 20-24.1. More generally, Defendant's silence on the third *Mathews* factor makes plain that there is no legitimate state interest to justify depriving a person of their driver's license for failure to pay without first affording them an opportunity to be heard.

Defendant also asserts that Plaintiffs provide no authority for their argument, *see* Opp. 23, but of course this is untrue. Not only have Plaintiffs provided the Court with controlling precedent that establishes the applicable standards, Plaintiffs have also

[2] Plaintiffs are not arguing they have a substantive due process right to a driver's license. *See* Opp. 17, 24. Plaintiffs' point is, instead, that to understand whether the procedural protections permitted by Section 20-24.1 are sufficient, one must first analyze the underlying substantive standard to determine whether the procedures are adequate. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003).

pointed the Court to three recent decisions that have held comparable driver's license revocation statutes unconstitutional. *See* Opening 10. Defendant cites *Evans v. Rhodes*, *see* Opp. 23, but *Evans* is an unpublished, non-precedential decision disposing of a case brought by a *pro se* litigant. The plaintiff was challenging Fla. Stat. § 322.245, which does not incorporate a substantive standard of willfulness as North Carolina's legislature did in Section 20-24.1, minimizing the risk of error. *See supra* 7–8 (discussing willfulness requirement). The *Evans* court also failed to address the three factors articulated in *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972), and *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1307 (4th Cir. 1992), that "must be satisfied" to justify denial of a pre-deprivation hearing, *Richmond Tenants Org.*, 956 F.2d at 1307. Because the collection of unpaid fines and costs cannot satisfy a "special need for very prompt action," *id.*, Section 20-24.1 cannot be squared with the mandates of due process.

C. The DMV Violates Procedural Due Process By Revoking Licenses For Non-Payment Without Adequate Notice Of Legal Rights Under Section 20-24.1.

Defendant does not respond to Plaintiffs' argument that the notice used is fatally misleading, other than to suggest that notice is not even required, Opp. 21, and that because the notice given contains the citation number and instructions to "contact the court above to comply with this citation," the notice does all that is required, *id.* at 22. Respectfully, this is error.

Defendant admits that the sample notice Plaintiffs proffered is a standard revocation notice used by DMV. *See* FAC ¶¶ 32–38; Answer, DE 43, ¶¶ 32–38. As explained in Plaintiffs' opening brief, by affirmatively telling drivers that,

"unfortunately," the DMV "cannot accept payments," and advising that they must instead contact the court to "comply with the citation" without making any reference to the alternatives to payment specified in N.C.G.S. § 20-24.1(b), the notice erroneously leads readers to believe their only option is to pay in full. *See* Opening 20–22. This is false, and violates due process. *See id.*

The Court therefore should find that Plaintiffs are likely to succeed on this claim, and at minimum enter an order enjoining use of this notice going forward, and lifting license revocations previously entered for nonpayment pursuant to this notice, as well as waiving reinstatement fees if there is no other basis for suspension.

D. Plaintiffs Will Suffer Immediate, Irreparable Injury Without A Preliminary Injunction.

Defendant does not meaningfully dispute that Plaintiffs will suffer irreparable injury if the Motion is denied. Understandably so. Plaintiffs are facing or already suffering from a constitutional injury, which is presumptively irreparable. *See* Opening 22–23.

Defendant does represent that Plaintiff Johnson's revocation has been "stayed pending the outcome of the instant litigation," Opp. 3 (emphasis added), but in fact Defendant agreed to stay the revocation only through consideration of the preliminary injunction motion. *See* DE 24 ¶ 8. Thus, revocation would occur if the instant Motion is denied. Moreover, Defendant has not extended the same courtesy to the putative members of the Future Revocation Class, and Ms. Bonhomme-Dicks will have her license suspended under Section 20-24.1 in a little over two months. Finally, because

Defendant's decision to stay action on Mr. Johnson's license is limited to him and is a "voluntar[y]" action of Defendant, Opp. 2, it is his "heavy burden" to show that "there is no reasonable expectation that the wrong will be repeated" before an injunction may be denied. *See Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 800 (4th Cir. 2001); *see also United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("the court's power to grant injunctive relief survives discontinuance of the illegal conduct"). Defendant cannot meet this burden, for he is continuing to suspend licenses for nonpayment for others, notwithstanding his temporarily limited exception for Mr. Johnson.

Plaintiffs Smoot and Yarborough also are facing ongoing irreparable injury. Defendant does not contest this. He argues instead that an injunction is not warranted since they waited over eighteen months to bring this case. Opp. 9. But this was hardly a strategic choice by Smoot and Yarborough—they are both low-income individuals who could not even afford to pay off their traffic tickets, much less hire an attorney to challenge the suspension of their licenses; their prior inability to retain *pro bono* counsel does not change the fact that, each day, they and thousands of others must face the dilemma of either driving unlawfully or failing to provide essential support for themselves and their families.

Defendant also argues that an injunction would give Smoot and Yarborough "full relief" and would not restore the status quo. Opp. 9. Not so. An injunction is "prohibitory" if it restores the parties to "the 'last uncontested status between the parties

which preceded the controversy.'" *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) (citation omitted). That is what Smoot and Yarborough seek: restoration to the point prior to Defendant having suspended their licenses for nonpayment. Nor is this full relief. If the Court later decides in favor of Defendant, he will enforce Section 20-24.1 against Smoot and Yarborough again.

E. An Injunction Serves The Public Interest.

Defendant argues that a preliminary injunction is counter to the public interest, repeating concern over safety from both "serial violators" and the "chronically uninsured." Opp. 26. But state law already prohibits driving without insurance, N.C.G.S. § 20-313, and specifies when a license should be suspended for serial violations (including for driving without insurance), *id.* § 20-16. Section 20-24.1 has no rational relationship to these safety concerns, *see supra* at 4–6, and thus, enjoining revocations for nonpayment should not be disfavored on this basis. Moreover, the public interest favors upholding constitutional rights, so Plaintiffs' likelihood of success on the merits means that the public interest also favors an injunction. *See* Opening 24.

CONCLUSION

For the foregoing reasons, and for the reasons articulated in Plaintiffs' opening brief, Plaintiffs respectfully request that the Court enter an injunction: (1) to enjoin Section 20-24.1(a)(2) and (b)(3)-(4); (2) to bar the DMV from revoking licenses for nonpayment under Section 20-24.1(a)(2); and (3) to lift current license revocations entered under Section 20-24.1(a)(2) and reinstate those licenses without charging a

reinstatement fee if there are no other bases for the revocation—pending the ultimate determination of the merits of Plaintiffs' claims.

Dated: September 11, 2018.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), I certify that the body of this memorandum, including headings and footnotes but excluding the caption, signature lines, certificates, and any cover pages or indices, does not exceed 3,125 words.

s/ Samuel Brooke
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CERTIFICATE OF SERVICE

I certify that arrangements have been made to this day deliver a true and correct copy of the foregoing by this Court's CM/ECF system to the following attorney(s) of record for Defendant:

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