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 CLASS CERTIFICATION

Defendant does not dispute that the proposed Classes meet the requirements of Fed. R. Civ. Pro. 23(a)(4), (b)(2), and (g). Rather, he argues that Plaintiffs have failed to meet Rule 23's numerosity, commonality, and typicality requirements. As explained below, these arguments are misplaced.

A. Rule 23(a)(1) Is Satisfied Because Joinder Is Impracticable.

The numerosity requirement is not a high standard. Indeed, as noted in Plaintiffs' opening brief, and which Defendant did not dispute, as few as 25 class members creates a presumption that joinder is impracticable, and a reasonable estimate of numerosity is sufficient. *See* Memorandum of Law in Support of Plaintiffs' Second Motion for Class

Certification ("Opening Br."), DE 37, at 11-12. Moreover, the Court may make reasonable inferences regarding the number of individuals affected. *See United States v. Miller*, 478 F.3d 48, 52 (1st Cir. 2007) (noting "an inquiring court has the right to draw reasonable inferences from the evidence" and "is not required either to wear blinders or to leave common sense out of the equation").

Defendant nevertheless makes two arguments against impracticality of joinder. First, he argues that certification is inappropriate because an email from the Division of Motor Vehicles ("DMV") cited by Plaintiffs—which describes the scope of driver's license suspensions by stating, "[t]he total number of Failure to Pay is 436,050"[1]—is purportedly ambiguous. *See* Defendant's Opposition to Plaintiffs' Second Motion for Class Certification ("Def. Br."), DE 48, at 7 (asserting that "[s]peculation based exclusively on this email" is unwarranted). Second, Defendant argues that numerosity is not satisfied because Plaintiffs have failed to establish that each and every member of the proposed classes is a low-income individual. *See* Def. Br. 7, 9–10. Both arguments are erroneous.

As a threshold matter, the Court can, and should, easily infer from the DMV's email that well over 25 individuals are within the proposed **Revoked Class** and **Future Revocation Class**. Even if it is unclear whether the 436,050 number provided by a DMV employee refers to the number of suspended licenses rather than the number of people with licenses suspended under the statute, Defendant clarified in his Answer that "[a]s of

[1] Email from DMV (Sept. 26, 2017), attached as Exhibit I to Declaration of Samuel Brooke ("Brooke Decl."), DE 6-9.

the time of the filing of the original Complaint, the driver's licenses and/or privileges of approximately 264,000 people had been suspended pursuant to the statute."[2] *See* Defendant's Answer to First Amended Complaint ("Answer"), DE 43, ¶ 5. Plaintiffs respectfully submit that with this admission, the Court can and should infer that both the number of individuals whose licenses have been revoked by the DMV due to their failure to pay fines, penalties, or court costs ("fines and costs"), and the number who will face this penalty in the future, are far in excess of what would be practicable for joinder. *Scott v. Clarke*, 61 F.Supp.3d 569, 584 (W.D. Va. 2014) ("Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.") (quoting Newberg on Class Actions § 3:3 (4th ed. 2002)); *see also Rodger v. Elec. Data Sys. Corp.*, 160 F.R.D. 532, 535 (E.D.N.C. 1995) ("[A] class of as few as twenty-five to thirty members raises a presumption that joinder would be impracticable.") (citations omitted).

For the **Future Revocation Class**, the impracticability of counting the number of class members makes certification more, not less, likely, contrary to Defendant's contention. "In fact, difficulty in immediately identifying all class members makes joinder more impractical and certification more desirable." *Haywood v. Barnes*, 109

[2] Defendant does qualify this admission by denying "that 264,000 people's driver's license or privilege were suspended solely for failure to pay traffic fines and or costs," Answer ¶ 5, but if multiple grounds for suspension exist, that does not change Plaintiffs' claim that suspension *for nonpayment* is improper. He further qualifies this admission by observing that "[m]any of the 264,000 suspensions were instituted on drivers from out of state who committed infractions in North Carolina, and many of the suspensions were issued against drivers who never even possessed a North Carolina driver's license," *id.*, but for class certification purposes, the residency of the driver is immaterial.

F.R.D. 568, 576 (E.D.N.C. 1986) (citation omitted). And given the magnitude of the size of the **Revoked Class**, it is reasonable to infer that the **Future Revocation Class** also is too numerous to permit easy joinder.

Finally, as Plaintiffs note in their opening brief, the proposed Classes' geographic disbursement and the reasonable assumption that most individuals who cannot pay their fines and costs are low-income also strongly support a finding that joinder would be impracticable. *See* Opening Br. 13-14. Defendant does not dispute this point.

Thus, while Defendant questions the reliability of the email sent by his own employee, given his admission that more than 200,000 individuals have been suspended pursuant to the statute, and the other facially obvious characteristics of the putative Classes, there can be little doubt that the numerosity requirement is satisfied here.

Second, Defendant contends that numerosity is not met because Plaintiffs have failed to establish that every proposed class member is low income. This is erroneous, for indigency is not an element of Plaintiffs' proposed class definitions. *See* Plaintiffs' Second Motion for Class Certification, DE 36, ¶¶ 1-2. Although it is reasonable to infer that individuals who have lost their licenses due to court debt were unable to pay, this is not central to Plaintiffs' request for certification from a numerosity perspective. *See also* discussion *infra* Part B (discussing low economic status in relation to Plaintiffs' claims).

B. Plaintiffs Have Satisfied the Test for Typicality, Which Does Not Require That Plaintiffs and All Members of the Proposed Classes Share Identical Factual Claims.

Defendant contests typicality in four ways: that not all class members are low income; that some members' claims accrued more than three years ago; that some may have other bases for suspension; and that some may have had a hearing in state court. Each is discussed below, but before turning to the specifics, it is worth reiterating that "the class representatives and the class members need not have identical factual and legal claims in all respects." *Fisher v. Va. Elec. and Power Co.*, 217 F.R.D. 201, 212 (E.D. Va. 2003) (citing *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) ("We also do not suggest that the commonality and typicality elements of Rule 23 require that members of the class have identical factual and legal claims in all respects.")). "The inherent logic of the typicality requirement is that a class representative will adequately pursue her own claims, and if those claims are 'typical' of those of the rest of the class, then her pursuit of her own interest will necessarily benefit the class as well." Newberg § 3:28. Thus, where the representative party's "interest in prosecuting [her] own case . . . simultaneously tend[s] to advance the interests of the absent class members," the typicality standard is satisfied. *Soutter v. Equifax Info. Servs., LLC*, 498 Fed. Appx. 260, 264 (4th Cir. 2012) (alteration in original) (quoting *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006)).

Economic Status

Defendant argues that typicality is not met because not all class members are low income. Yet, Plaintiffs' claims do not require this showing. Plaintiffs' first claim, premised on *Bearden v. Georgia*, 461 U.S. 660 (1983) and related cases, is concerned with challenging the disproportionate punishment of the poor, but the remedy commanded by *Bearden* is to grant a pre-deprivation process to everyone facing suspension—well to do or low income—with the goal of determining whether the particular individual has the ability to pay. *See* Memorandum in Support of Plaintiffs' Second Motion for a Preliminary Injunction, DE 39, at 11–15. The same is true of Plaintiffs' second and third claims, which are process-based, again, to permit the opportunity for all class members to make an argument that they should not face suspension, and to be given adequate notice of their alternatives to avoid revocation. *See id.* at 15–22. In other words, even if the deprivation was in fact justified for some putative class members, such that they did not suffer any "other actual injury," "the fact remains that they were deprived of their right to procedural due process." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). This lack of process is clearly typical across both proposed Classes; and where, as here, the claim arises from the same event, practice, or course of conduct and is based on the same legal theory, the typicality requirement is satisfied. *See Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993) ("When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor

variations in the fact patterns underlying individual claims.") (citations omitted).

Statute of Limitations

Defendant further argues that that certification is inappropriate because some of the **Revoked Class** members' claims may be time barred. This argument fails to defeat typicality for two reasons.

First, "[t]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations." *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989) (alteration in original, citations omitted); *see also A Society Without A Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011) (emphasizing challenge to "fixed and continuing practice"); *Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d 1158, 1167 (4th Cir. 1991); *see also Robinson v. Purkey*, No. 3:17-CV-01263, 2018 WL 2862772, at *31 (M.D. Tenn. June 11, 2018) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)) (finding same for equal protection challenge to statute suspending licenses for nonpayment). Plaintiffs and putative class members were not subjected to a singular injury. Once a license has been revoked for nonpayment, the revocation continues indefinitely until the licensee pays the underlying fine or otherwise satisfies Section 20-24.1(b). Putative class members cannot simply apply again for a driver's license—they have to satisfy Section 20-24.1(b).

The purely procedural errors are also ongoing. Particularly given that Plaintiffs' third claim emphasizes that the only notice Defendant ever gives to putative class members is erroneous and creates the false impression that the only remedy available to

putative class members under North Carolina law is to pay in full, it is significant that Defendant never corrects this misimpression. Even today, the DMV's website continues to instruct drivers that if their license has been suspended for a failure to pay, they must "compl[y] with the case" to get their license restored,[3] which merely reinforces the originally errant notice. In other words, Defendant is continuing to enforce this illegal statute and practice, and thus, statutes of limitations should not apply. *Va. Hosp. Ass'n*, 868 F.2d at 663; *but see Robinson*, No. 3:17-CV-01263, 2018 WL 2862772, at *33 (noting that if a due process claim is not continuing, statute of limitations would apply).

Second, even if the Court disagrees, this issue can be easily solved. The Court can create a sub-class of the **Revoked Class** that would be limited to those whose licenses were revoked on or after May 31, 2015 (three years before the initiation of this lawsuit), to cure this problem. *See, e.g.*, *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 558 (E.D. Va. 2000) (court authorized to modify definitions) (citing *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993)); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 618 (6th Cir. 2007) (modifying the class definition); *Jackson v. Nat'l Action Fin.*

[3] N.C.D.M.V., *Frequently Asked Questions*, https://www.ncdot.gov/dmv/license-id/license-suspension/Pages/license-suspension-faq.aspx (last accessed September 8, 2018), stating:

> **What do I do if I receive a letter from the N.C. Division of Motor Vehicles for "Failure to Appear" or "Failure to Pay?"**
> If you have failed to appear to court or failed to pay the court, the N.C. Division of Motor Vehicles will suspend your driving privileges indefinitely until you have complied with the case.
> You will need to contact the court in the county that you received the citation or where you failed to pay your fines.
> Upon compliance, contact NCDMV to determine if you are eligible to reinstate your license.

Servs., Inc., 227 F.R.D. 284, 286 (N.D. Ill. 2005) ("[T]he Court may modify the definition of a proposed class if such modification will remedy an inadequacy in the plaintiff's definition.") (citation omitted).

Other Bases for Suspension

Defendant also argues typicality is not satisfied because the court would purportedly be required to engage in individualized inquiries as to each proposed member's factual claims. Not so. Defendant focuses on the relief requested (arguing, for example, that someone will have to check to see if licenses are suspended for both failure to pay and another independent reason). Def. Br. 12. But this is not a concern of typicality—it is, at most, a concern over the scope of relief to be granted. As noted above, typicality simply seeks to confirm that if "a class representative will adequately pursue her own claims, and if those claims are 'typical' of those of the rest of the class, then her pursuit of her own interest will necessarily benefit the class as well." Newberg § 3:28. The answer to this is "yes." Plaintiffs were or will be suspended for failure to pay, as were or will be all class members. Plaintiffs are or were subjected to a statutory scheme that does not require a hearing before revocation for nonpayment, as was or will be each putative class member. Plaintiffs received a misleading and false notice, as each putative class member did or will. In this context, if Plaintiffs pursue their claims, the class will also benefit.

The Court can grant the requested injunction. It can order the lifting of all past revocations for non-payment. If, in turn, this means a person's license will be reinstated

because there is no other basis to suspend, the Court can enjoin DMV from charging a reinstatement fee. To be sure, Defendant will have to implement such an injunction. But the terms of the proposed injunction are objective, and the answers are entirely within Defendant's own possession, as he maintains records of who is suspended for what, and why. *See, e.g.*, Answer ¶ 5.

State Court Hearings

Defendant next suggests that an individualized inquiry is necessary to determine whether other individuals may have received an ability-to-pay hearing by the state court. Def. Br. 13–14. This is irrelevant speculation. Plaintiffs bring a facial challenge to Sections 20-24.1 and 20-24.2, and neither section envisions a court conducting such an inquiry before sending notice to the DMV. Assuming *arguendo* that some judge provided such an advance hearing to someone—a proposition for which there is no evidence—the statute would still fail. *Cf. United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Especially where, as here, Defendant admits that (1) he does not mandate a hearing or inquire into individuals' ability to pay prior to sending license revocation notices; and (2) he does not know what courts do before sending the DMV notice. *See* Answer ¶¶ 4, 39. To state the obvious, it is clear his decision to revoke is not tied to the occurrence of such a hearing.

C. Plaintiffs Satisfy the Test for Commonality, Which Does Not Require That Plaintiffs and All Members of the Proposed Classes Suffer the Same Injury Effects.

Defendant does not dispute that Plaintiffs have met Rule 23(a)(2)'s commonality requirement by establishing common questions of law or fact. Rather, Defendant contends that not all individuals who have suffered the loss of their driving privileges suffer from the identical harms of being rendered unable to get food for their family, go to church, attend medical appointments, or take their kids to school. Def. Br. 17–18. The commonality requirement, however, "does not simply call for the court to list all of the traits that can be ascribed to the various class members and tally up the differences. 'Commonality' refers to commonality with regard to the specific claims asserted." *Robinson*, 2018 WL 2862772, at *51; *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 (4th Cir. 2014) (what matters to class certification is the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation) (internal quotations and citations omitted).

Here, Plaintiffs allege claims based on several common questions of law and fact. First Amended Class Action Complaint for Declaratory and Injunctive Relief, DE 35, ¶¶ 104, 124-125, 141, 150; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) ("for purposes of Rule 23(a)(2), 'even a single common question will do'") (citations omitted). Moreover, Plaintiffs complain of a specific, common injury: the revocation of a person's driver's license for nonpayment of fines and costs without adequate notice, a pre-revocation hearing, or a determination that they willfully refused to pay. That injury is

common throughout the proposed Classes, as are the questions of law and fact underlying it. *See Robinson*, 2018 WL 2862772, at *52; *Dukes*, 564 U.S. at 349-350 (to satisfy the commonality requirement, the plaintiff must demonstrate that the class members have suffered the same injury and that the claims depend on a common contention that is capable of class-wide resolution). For these reasons, Rule 23(a)(2)'s commonality requirement is met. *See Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 332-33 (4th Cir. 1983) ("[c]ertification is only concerned with the commonality (not the apparent merit) of the claims and the existence of a sufficiently numerous group of persons who may assert those claims").

CONCLUSION

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

Dated: 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/ Danielle E. Davis
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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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Dated this September 11, 2018.

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