UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Linquista White, *et al.*, Plaintiffs, v. Kevin Shwedo, *et al.*, Defendants.	Civil Action No. 2:19-cv-03083-RMG (CLASS ACTION) **Expedited Ruling Requested**

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

In the three years before this litigation commenced, the South Carolina Department of Motor Vehicles ("DMV" or "agency") automatically suspended the driver's licenses of 132,913 people for failure to pay traffic tickets ("FTPTT"), and 68,498 of these people remain absolutely and indefinitely barred from driving, including Plaintiffs Janice Carter and Emily Bellamy. There is no dispute about the gravamen of Plaintiffs' complaint: the DMV elects to continue these suspensions without *ever* determining that nonpayment was willful—whether before or after suspension is imposed—in violation of *Bearden v. Georgia*, 461 U.S. 660 (1983).

The DMV admits this conduct, but its main defense is to attack Plaintiffs' standing and the merits of their *Bearden* claim on the theory that Plaintiffs caused their own injury through nonappearance in traffic court due to the existence of S.C. Code § 17-25-350 ("Section 17-25-350"). But that statute is irrelevant: it governs the sentencing decisions of *South Carolina courts*—not the DMV's suspension decisions, which occur long after court hearings and cause the loss of Plaintiffs' driver's licenses. The DMV's theory is also illogical because that statute does not apply to out-of-state traffic fines that give rise to more than a quarter of the DMV's FTPTT suspensions. And as discussed below, the DMV's additional arguments fare no better.

Plaintiffs thus have standing and meet the requirements for preliminary relief.

I. Plaintiffs have Article III standing to challenge the DMV's automatic and indefinite suspension of their driver's licenses for failure to pay traffic tickets.

Article III standing requires showing a "concrete, particularized, and actual" injury that is "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013). Where a single plaintiff has standing, the court need not separately address standing for others seeking identical relief. *See Horne v. Flores*, 557 U.S. 433, 445 (2009); *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 216–17 (4th Cir. 2017).

The DMV does not dispute that Plaintiffs meet the personal injury requirement. *See* ECF

No. 46 at 13–15.[1] Instead, the DMV contends that Plaintiffs fail to show a causal connection between their injury and the agency's conduct based on the theory that Plaintiffs injured themselves by not appearing in traffic court.[2] The DMV also asserts that Ms. Bellamy fails to satisfy redressability. These arguments are unavailing.

A. The DMV caused Plaintiffs' injuries by engaging in the automatic and indefinite suspension of driver's licenses for failure to pay traffic tickets.

South Carolina law and the undisputed record demonstrate a clear causal link between the DMV's automatic and indefinite suspension of driver's licenses for failure to pay traffic tickets and Plaintiffs' injuries—the inability to legally drive to earn income and care for themselves and their families. Plaintiffs' inability to legally drive directly stems from the DMV's continued suspension of licenses under S.C. Code § 56-25-20 ("Section 56-25-20"), which vests the agency with exclusive power to suspend for failure to comply with traffic tickets.[3] The statute does not define "failure to comply" or mandate FTPTT suspension; rather, the plain text grants the DMV full discretion to determine whether and how to suspend licenses.

The undisputed facts establish the required causal connection between the DMV's conduct and Plaintiffs' injuries. The DMV concedes that it exercises Section 56-25-20 power by *choosing* to automatically suspend driver's licenses for failure to pay.[4] The DMV also concedes

[1] The DMV's incorrect claim that Plaintiffs' suspensions are not for inability to pay is a merits issue. *See infra* at 8. Injury-in-fact is met because there is no dispute that Plaintiffs' driver's licenses are suspended. *See Robinson v. Purkey*, 326 F.R.D. 105, 129–30 (M.D. Tenn. 2018).
[2] The DMV's suggestion that Plaintiffs were solely at fault for nonappearance in traffic court is belied by the record. *See* ECF No. 46 at 15–17. Ms. Carter and Ms. White could not travel to court because of their suspended licenses. ECF No. 11 ¶ 38; ECF No. 9 ¶ 26. And Ms. Bellamy was informed she would get a continuance but was not given a date. ECF No. 10 ¶¶ 12–13.
[3] *See* S.C. Code § 56-25-20 (upon notification of a "fail[ure] to comply with the terms of a traffic citation . . . the [DMV] may suspend or refuse to renew the person's driver's license").
[4] *See* ECF No. 46 at 7 ("DMV does not dispute that it suspends the licenses of all person[s] for whom [the] DMV receives 'Notices of Suspension'"). The notices to the DMV do not indicate a finding of willful failure to pay, much less show willful nonpayment. *See* ECF No. 12-3.

the agency does not provide hearings to ensure that only those who willfully failed to pay tickets suffer the absolute loss of a driver's license. *See* ECF No. 46 at 5 ("[I]t is true that [the] DMV does not provide hearings on claims of indigency . . . ."). And the DMV does not dispute that it automatically suspended Plaintiffs' driver's licenses and continues to absolutely and indefinitely suspend Ms. Carter and Ms. Bellamy's licenses until they pay all traffic fines and reinstatement fees. *See id*. at 10–11. Nor has the DMV provided evidence to dispute Plaintiffs' indigence.

The DMV ignores these facts. Instead the agency attacks Plaintiffs' standing based on Section 17-25-350, which requires South Carolina courts to provide payment plans at sentencing upon a finding that a defendant is indigent. According to the DMV, a causal connection can only be shown by a plaintiff who appears in a South Carolina court, proves indigence, secures a payment plan under Section 17-25-350, defaults due to indigence, and *then* is suspended by the DMV for FTPTT. ECF No. 46 at 4. While that fact pattern would *also* give rise to standing, the DMV's argument is irrelevant to Plaintiffs' standing for two principal reasons.

First, Section 17-25-350 does not alter the causal connection between Plaintiffs' injuries and their source: Plaintiffs' injuries are the loss of their licenses, and the source is the DMV's own undisputed policy and practice of automatically and indefinitely suspending driver's licenses for FTPTT upon a report of nonpayment pursuant to Section 56-25-20. Section 17-25-350 governs the *sentencing decisions* of *South Carolina courts*, which did not impose the FTPTT suspensions that harm Plaintiffs and which do not possess the authority to remove those suspensions.[5] The DMV's reliance on Section 17-25-350 is also illogical because Ms. Carter could not have appeared in South Carolina court to respond to the Florida ticket that led to one of

[5] For this same reason, the DMV's effort to distinguish cases where courts found that plaintiffs had standing to challenge driver's license suspension based on the lack of statutes identical to Section 17-25-350 in those states is unpersuasive. *See* ECF No. 46 at 14 & n.14.

her FTPTT suspensions,[6] and Section 17-25-350 does not require a Florida court to provide a payment plan.[7] Thus, Section 17-25-350 is inapposite.[8]

Second, Plaintiffs' failure to appear in traffic court did not cause their FTPTT suspensions. Plaintiffs were reported to the DMV for "failure to pay traffic tickets"—not failure to appear in court—as shown by DMV documents.[9] The record establishes that the DMV's goal in suspending Plaintiffs' licenses for FTPTT is to collect fines and fees, not to ensure court appearance. If the latter were true, the DMV's Official Notices would have instructed Plaintiffs to appear for court hearings rather than informing Plaintiffs that the only way to prevent, or secure removal of, FTPTT suspensions is to pay in full. *See, e.g.*, ECF No. 11-6. The Court should thus find that Plaintiffs satisfy the causal connection requirement for standing.[10]

B. Ms. Bellamy's claim against the DMV is redressable.

Redressability is met by "show[ing] an injury . . . that is likely to be redressed by a favorable decision." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). "The removal of even one obstacle to the exercise of one's rights, even if other barriers remain, is sufficient . . . ." *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 285 (4th Cir. 2018). Courts have found claims against failure-to-pay suspensions to satisfy redressability when they seek

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[6] The DMV concedes that Ms. Carter's driver's license is suspended for an unpaid Florida traffic ticket, which must be resolved for her to regain the ability to legally drive. ECF No. 46 at 8 n.7.
[7] Review of DMV data shows that 26% of all FTPTT suspensions arise from tickets issued outside of South Carolina in 42 states and the District of Columbia, where Section 17-25-350 does not apply. *See* ECF No. 35-7 at 29; ECF No. 35-9.
[8] *Swann v. Secretary of State of Georgia* is distinguishable. There, a former jail inmate lacked standing to sue officials for failure to mail him an absentee ballot because he failed to provide the jail address on his ballot request. 668 F.3d 1285, 1289 (11th Cir. 2012). By contrast, Plaintiffs did not fail to provide information so that the DMV could afford them ability-to-pay hearings. Rather, the DMV concedes that it refuses to provide hearings. *See* ECF No. 46 at 5.
[9] *See, e.g.*, ECF No. 10-3 (Ten Year Driver Records); ECF No. 11-6 (Official Notice).
[10] Because Plaintiffs have standing, Plaintiffs do not rely on any unidentified individuals to satisfy the standing requirements, as the DMV contends. *See* ECF No. 46 at 14.

"the elimination of one substantial obstacle" to regaining a license. *Fowler v. Benson*, 924 F.3d 247, 254 (6th Cir. 2019); *see also Robinson v. Purkey*, 326 F.R.D. 105, 132 (M.D. Tenn. 2018).

Ms. Bellamy's claim against the DMV seeks relief that would "lift all current [FTPTT] suspensions," "strike" related reinstatement fees, and "reinstate licenses that are subject to no other basis for suspension." ECF No. 1 at 93. This claim is redressable because a favorable decision will eliminate a substantial financial barrier to Ms. Bellamy's ability to legally drive—three FTPTT suspensions and fees that make license reinstatement prohibitively expensive. The relief sought would permit Ms. Bellamy, an indigent person, to focus her limited resources on paying to remove other obstacles to driving. *See* ECF No. 10 ¶ 63 (noting relief would permit her to use tax refund to eliminate final barriers to driving); *Robinson*, 326 F.R.D. at 129, 132 (finding that a claim seeking to reduce the price of license reinstatement is redressable).

The DMV's argument misconstrues the relief sought as *full* license reinstatement. *Compare* ECF No. 46 at 11, *with* ECF No. 1 at 93 (seeking only the lifting of FTPTT suspensions). Ms. Bellamy satisfies redressability because relief would eliminate a "substantial obstacle" to her ability to drive. *Fowler*, 924 F.3d at 254.[11]

C. Ms. White may pursue her claim against the DMV for injunctive and declaratory relief on behalf of the proposed Classes under the *Gerstein* rule.

The DMV fails to address Ms. White's ability to pursue relief on behalf of the proposed Classes under the exception to mootness for inherently transitory claims. ECF No. 35-1 at 2 n.3; ECF No. 46 at 11–12. The Supreme Court recognized in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that some "claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest

[11] *Cook v. Taylor* is distinguishable because it relied on authority outside the Fourth Circuit to conclude redressability required showing entitlement to *full license reinstatement*, which is not sought here. No. 2:18-CV-977-WKW, 2019 WL 1938794, at *9 (M.D. Ala. May 1, 2019).

expires." *Cty. of Riverside*, 500 U.S. 44, 52 (1991) (discussing *Gerstein*). The *Gerstein* rule applies if "(1) it is uncertain that a claim will remain live for any individual who could be named as a plaintiff long enough to certify the class; and (2) there will be a constant class of persons suffering the deprivation complained of in the complaint." *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010); *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537–38 (2018).

Ms. White meets both requirements. The first requirement—uncertainty as to the length of time a claim will remain live—is established by the record. Ms. White faced a substantial risk of imminent harm when she filed this case due to pending tickets likely to lead to fines she would have been unable to pay and thus, FTPTT suspension. The dismissal of all three tickets after the filing of this lawsuit is highly unusual.[12] Ms. White's claim was thus live for a period of uncertain duration, dependent on the timing of her hearing and the resolution of each ticket.[13]

Ms. White easily satisfies the second prong of the *Gerstein* rule, which requires showing "that the claim is likely to recur with regard to the class, not that the claim is likely to recur with regard to [her]." *Olson*, 594 F.3d at 584. Tens of thousands of people suffer from FTPTT suspensions. ECF No. 46-1 ¶ 14. Because Plaintiffs have standing and Ms. White's claim falls within the *Gerstein* rule, this Court has jurisdiction to certify the Classes and rule on the merits.

II. Plaintiffs are likely to prevail on their claim that the DMV violates the right against state punishment for inability to pay.

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

Plaintiffs' opening brief provides five reasons why *Bearden*'s hybrid due process/equal

[12] If one ticket had resulted in conviction and a fine, Ms. White would today face imminent FTPTT suspension due to her indigence. *See* ECF No. 9 ¶¶ 54–56.

[13] Ultimately, her claim was resolved in three months, which is comparable to time periods in cases applying *Gerstein*. *See, e.g.*, *Olson*, 594 F.3d at 579 (139 days); *Brown v. Lexington Cty.*, No. 3:17-cv-1426-MBS, 2018 WL 3359019 at *5–6 (D.S.C. July 10, 2018) (eight weeks).

protection analysis is the proper standard for evaluating their wealth-based punishment claim against the DMV. *See* ECF No. 35-1 at 20–23. The DMV fails to address these points. Instead, the agency argues that Plaintiffs are not punished for inability to pay and that *Bearden* applies only to cases involving incarceration or access to courts in the criminal process and termination of parental rights. *See* ECF No. 46 at 20–24. The DMV's arguments fail for four reasons.

First, the record shows that the DMV sanctions Plaintiffs because of their inability to pay. There is no dispute that the DMV automatically suspended Plaintiffs' driver's licenses for nonpayment of tickets and that these suspensions continue until Plaintiffs pay traffic fines and reinstatement fees in full. Nor is there any dispute that the DMV has *never* determined that Plaintiffs willfully failed to pay. *See* ECF No. 46 at 5, 7; ECF No. 12-3. Moreover, the DMV has failed to raise a question of fact as to Plaintiffs' indigence. The record thus establishes that under the DMV's undisputed policy and practice, people with resources can prevent and cure FTPTT suspensions when they choose, while the DMV absolutely and indefinitely bars Plaintiffs from legally driving because they cannot pay. This is punishment for inability to pay.

Second, the DMV's effort to cabin the *Bearden/Griffin* line of cases to the contexts of incarceration and access to courts boils down to the unpersuasive claim that these cases are limited to their facts and only apply to fundamental rights. *See* ECF No. 46 at 22. In its consideration of the right against state sanctions based on wealth, the Supreme Court explicitly refused to limit this right to the facts of previously-decided cases, which all "confront[] 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). The DMV's reliance on *Mendoza v. Garrett*, 358 F. Supp. 3d, 1145, 1171 (D. Or. 2018), *appeal docketed*, No. 19-35506 (9th Cir. June 11, 2019), fails to address the arguments in Plaintiffs' opening brief that the

Bearden/*Griffin* line has never been limited to deprivations of fundamental rights and that the logic of *Bearden* itself shows no such limitation. *See* ECF No. 35-1 at 20–21, 23 n.23.

Third, the crux of the *Bearden/Griffin* line of cases is that state sanctions premised on inability to pay are subjected to heightened scrutiny. *See* ECF No. 35-1 at 21–22. *M.L.B.* applied heightened scrutiny *not* because the case 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.[14] The DMV misses this point when it incorrectly suggests that Plaintiffs call for heightened scrutiny solely because of their indigence. *See* ECF No. 46 at 23. Far from asserting that "poverty, standing alone" is a suspect classification, *Harris v. McRae*, 448 U.S. 297, 323 (1980), Plaintiffs argue that *Bearden* applies because the DMV imposes on them the additional *punishment* of absolute and indefinite license suspension solely because of their inability to pay. *See supra* at 7; ECF No. 35-1 at 21.

San Antonio Independent School District v. Rodriguez made this distinction. 411 U.S. 1, 25 & n.60, 29 (1973). It rejected a call for heightened scrutiny of Texas' public-school financing system based solely on poverty but explicitly recognized that *Griffin* and other "wealth discrimination" cases would apply if the state "absolutely precluded" from public education those who could not pay. *Id.*; *see also* ECF No. 35-1 at 21. The DMV fails to address this.[15]

Fourth, the DMV's claim that no federal appellate decision has applied *Bearden* outside the context of a fundamental right ignores the import of *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984). ECF No. 46 at 23; *see* ECF No. 35-1 at 20–21 & n.53 (discussing *Alexander* and

[14] Plaintiffs similarly "seek[] to be spared from . . . adverse action" in the form of suspensions that absolutely bar them from driving because of inability to pay. *See M.L.B.*, 519 U.S. at 125.
[15] The district court's decision in *Johnson v. Jessup*, 381 F. Supp. 3d 619, 630 (M.D.N.C. 2019), *appeal docketed*, No. 19-1421 (4th Cir. Apr. 18, 2019), was wrongly decided for this reason.

noting there is no fundamental right to parole). The DMV contends *Alexander* relied on *Bearden* only for the notion that a probationer cannot be incarcerated for poverty alone. ECF No. 46 at 23 n.21. But the DMV ignores the Fourth Circuit's explicit recognition that it would have analyzed the challenged attorney-fee recoupment scheme under the *Bearden* factors had there not been a similar but more specific test assessing comparable concerns. *Alexander*, 742 F.2d at 123 n.8.

Bearden thus provides the test for evaluating Plaintiffs' claim against the DMV.

B. The DMV's automatic and indefinite suspension of driver's licenses for failure to pay traffic tickets without a hearing and determination of willfulness does not survive *Bearden*.

Plaintiffs show that under *Bearden*'s multi-factor analysis, they are likely to succeed on the merits of the claim that the DMV violates due process and equal protection by automatically and indefinitely suspending driver's licenses for FTPTT without a hearing to ensure that only those who willfully failed to pay are absolutely barred from driving. *See* ECF No. 35-1 at 24–30. In response, the DMV addresses only the first *Bearden* factor, asserting that Plaintiffs have no property interest in their driver's licenses, and claims that Plaintiffs waived their *Bearden* rights. Both arguments contradict established law and undisputed facts in the record.

i. The DMV's absolute and indefinite suspension of driver's licenses substantially impairs Plaintiffs' property interest in a driver's license.

Plaintiffs demonstrate a property interest in their driver's licenses. *See* ECF No. 35-1 at 24–25. The DMV counters that driving is not a "right," but a "privilege" in South Carolina. ECF No. 46. at 25–26. This argument is foreclosed by controlling precedent. *See Bell v. Burson*, 402 U.S. 535, 539–40 (1971) (due process applies to driver's license suspension because "constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'"); *Dixon v. Love*, 431 U.S. 105, 112 (1977).

The DMV relies on a passage from *Fowler* that conflated the property interest at issue

with the license suspension procedures that the plaintiffs challenged. *See Fowler*, 924 F.3d at 257–59 (concluding there is no property interest because state law does not establish "a right of the indigent . . . to be exempt from driver's license suspension on the basis of unpaid court debt"). That reasoning is wrong because where a plaintiff challenges the loss of a license, "the private interest affected is the granted license to operate a motor vehicle[,]" regardless of the applicable suspension procedures. *Mackey v. Montrym*, 443 U.S. 1, 10 (1979).[16]

ii. Plaintiffs did not waive their *Bearden* right to an ability-to-pay hearing, willfulness determination, and consideration of alternatives.

Bearden requires an "inquir[y] into the reasons for the failure to pay," a determination that failure to pay was "willful[]," and a finding that "alternat[ives]" are inadequate before the imposition of a sanction for nonpayment. 461 U.S. at 672–73. The waiver of constitutional rights in criminal proceedings must be knowing, voluntary, and intelligent based on a totality of the circumstances. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *United States v. Robinson*, 744 F.3d 293, 298 (4th Cir. 2014). This is true even if the right at issue is not fundamental. *See United States v. Wessells*, 936 F.2d 165, 167 (4th Cir. 1991). "[W]aiver of constitutional rights in any context must, at the very least, be clear." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

The record does not establish that Plaintiffs knowingly, voluntarily, and intelligently waived their right to an ability-to-pay hearing, willfulness determination, and consideration of alternatives before license suspension. The DMV's waiver argument fails for five reasons.

First, the DMV incorrectly suggests it was Plaintiffs' duty to raise indigence to the agency through appearance in South Carolina courts, which is contrary to the text of *Bearden.* The entity seeking to punish nonpayment "must inquire" into ability to pay and, if the person

[16] *Accord Dixon*, 431 U.S. at 113. The DMV's invocation of Section 17-25-350 is irrelevant because the statute does not address license suspension.

cannot pay, "must consider alternate measures of punishment" before imposing a sanction. 461 U.S. at 672. It is thus impermissible to put the onus on the defendant to seek out an ability-to-pay hearing. *See Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 652 (E.D. La. 2017) ("[T]here is no authority for the proposition that a criminal defendant must raise the issue of her inability to pay . . . . [A] contrary rule . . . would undermine *Bearden*'s command that a criminal defendant not be [punished] solely because of her indigence."); *West v. City of Santa Fe, Tex.*, No. 3:16-CV-0309, 2018 WL 4047115, at *9 (S.D. Tex. Aug. 16, 2018) ("The Court strongly disagrees that the burden rests with [defendants] to bring the inability to pay issue to the Court's attention."); *De Luna v. Hidalgo Cty., Tex.*, 853 F. Supp. 2d 623, 648 (S.D. Tex. 2012) (court must consider ability to pay because "some indigent persons will not directly raise" the issue).

Second, Plaintiffs did not and could not have knowingly, voluntarily, and intelligently waived their *Bearden* rights—*whether or not* they purportedly waived their statutory right to a payment plan at sentencing under Section 17-25-350.[17] The record does not show that Plaintiffs knew they had any of these pre-deprivation rights concerning suspension of their driver's licenses for failure to pay. It is undisputed that Plaintiffs' traffic tickets do not address these *Bearden* rights, and there is no evidence Plaintiffs were ever informed of these rights before the DMV suspended their licenses. Plaintiffs' purported waiver of any statutory rights through nonappearance in court thus did not waive their *Bearden* rights. *See, e.g.*, *De Luna*, 853 F. Supp.

[17] Although this Court need not resolve this issue, Plaintiffs' nonappearance in court did not constitute a knowing, voluntary, and intelligent waiver of Section 17-25-350 rights of which they were entirely unaware. Uniform traffic tickets indicate only that court appearance will result in a trial and do not address the possibility of payment plans due to indigency. *See* ECF No. 46-13. Plaintiffs were not afforded the notice needed to choose "whether to . . . default" their right. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see Grayden v. Rhodes*, 345 F.3d 1225, 1244 (11th Cir. 2003) (*West Covina v. Perkins*, 525 U.S. 234 (1999), "does not stand for the . . . proposition that statutory notice is always sufficient to satisfy due process.").

2d at 649 (no waiver of "right to an affirmative indigency determination" before incarceration for failure to pay fines based on waiver of right to counsel at arraignment).

Third, Plaintiffs could not and did not knowingly, voluntarily, and intelligently waive their *future* right to an ability-to-pay hearing before the DMV through nonappearance at traffic court hearings months before the DMV suspended their driver's licenses. The inquiry into ability to pay mandated by *Bearden* "must come at the time of the collection action or sanction." *Rucker v. Spokane Cty.*, No. CV-12-5157-LRS, 2013 WL 6181258, at *5 (E.D. Wash. Nov. 26, 2013). Courts have thus held that a person cannot waive a *future right* to an ability-to-pay hearing. *See id* at *5–6; *Stephens v. State*, 630 So.2d 1090, 1091 (Fla. 1994).

Fourth, the DMV's insistence that Section 17-25-350 condemns Plaintiffs' *Bearden* claim ignores critical facts. More than a quarter of the challenged FTPTT suspensions—including one of Ms. Carter's suspensions—arise from out-of-state traffic fines to which Section 17-25-350 does not apply. *See supra* at 4–5. The DMV also paints a misleading picture of traffic court sentencing in South Carolina, where Section 17-25-350 is routinely flouted as shown by litigation in this Court against incarceration for unpaid fines without ability-to-pay hearings.[18]

Finally, the DMV's reliance on *Garcia v. City of Abilene*, 890 F.2d 773 (5th Cir. 1989), and *Sorrells v. Warner*, 21 F.3d 1109 (5th Cir. 1994), is misplaced. In both cases, courts sought to arrest and incarcerate people for failure to pay *after* first attempting to secure their appearance. Here, there is no evidence the DMV sought to obtain Plaintiffs' appearance before suspending

[18] *See Brown v. Reinhart*, 760 Fed. Appx. 175, 177 (4th Cir. 2019). The suit exposes how South Carolina courts impose unaffordable payment plans on indigent people. After Twanda Marshinda Brown explained that she could not pay $100 a month toward traffic fines totaling nearly $2400, a magistrate stated, "I don't care if you have to get five jobs to pay my tickets off." Joseph Cranney, *These SC Judges Can Have Less Training Than Barbers But Still Decide Thousands of Cases Each Year*, The Post and Courier (Nov. 27, 2019), https://bit.ly/2TRDpcp.

their licenses for FTPTT.[19] Rather, the DMV's Official Notices simply demand payment, ECF No. 11-6, and the DMV concedes it never provides ability-to-pay hearings, ECF No. 46 at 5.

For all of these reasons, this Court should squarely reject the DMV's waiver argument.

C. The DMV's automatic and indefinite suspension of driver's licenses for failure to pay traffic tickets does not satisfy rational basis.

The DMV does not contest that FTPTT suspensions without an ability-to-pay hearing and willfulness determination establishes a classification based on inability to pay. *See* ECF No. 35-1 at 30–31. Instead, it relies on *Fowler*, 942 F.3d at 262, and *Jessup*, 381 F. Supp. 3d at 631, to argue that FTPTT suspensions promote traffic fine collection, "compliance with court orders," and "a general interest in compliance with traffic laws." ECF No. 46 at 24–25. But there is no logical connection between these interests and discrimination against people who cannot pay.

As a threshold matter, the DMV incorrectly asserts that the application of rational basis review is a pure question of law. *See* ECF No. 46 at 24 n.22. The Supreme Court relies on evidence when applying the rational basis test. *See Romer v. Evans*, 517 U.S. 620, 632 (1996); ECF No. 35-1 at 32–33. The DMV fails to address the extensive record, which shows no logical connection between the differential treatment between those who can and cannot pay tickets and the state's interests in collecting fines or fostering compliance with court orders. *Compare* ECF No. 46 at 24–25, *with* ECF No. 35-1 at 32–34 (detailing evidence that suspension for people who cannot pay fails to elicit payment and is counterproductive, and that collections increase when people can drive). The DMV's own declaration shows that 68,498 out of 132,913 people with

[19] When Plaintiffs learned of their FTPTT suspensions, they tried to raise their inability to pay with the DMV. Ms. Carter and Ms. White asked the DMV for help and requested hearings. ECF No. 11 ¶¶ 37, 51; ECF No. 9 ¶¶ 31, 38. Ms. White also called the traffic court. ECF No. 11 ¶ 28. Ms. Bellamy called the DMV. ECF No. 10 ¶ 45. These facts support a finding of no waiver. *See Texas Faculty Ass'n v. University of Tex. at Dallas*, 946 F.2d 379, 389 (5th Cir. 1991) (no waiver where plaintiffs "actively sought to invoke the procedures").

FTPTT suspensions in the three years before the filing of this lawsuit did not pay to get their licenses back. *See* ECF No. 46-1 ¶¶ 11–14.[20] When 52% of the FTPTT population cannot be coerced into payment, the DMV's classification is not rationally related to collections or compliance with court orders. *See Robinson v. Purkey*, No. 3:17-cv-01263, 2018 WL 5023330, at *11 (M.D. Tenn. Oct. 16, 2018), *appeal docketed*, No. 18-6121 (6th Cir. Oct. 24, 2018).

Nor does the record show a logical connection between the DMV's classification based on inability to pay and the state interest in fostering compliance with traffic laws. There is no dispute that the DMV suspends licenses for FTPTT regardless of whether the underlying tickets are for dangerous driving. *See* ECF No. 12-2. Several South Carolina statutes permit or require suspension for dangerous conduct, such as driving under the influence. *See, e.g.*, S.C. Code § 56-5-2990. By contrast, the DMV imposes FTPTT suspensions only for nonpayment, regardless of the nature or severity of the underlying ticket. Dangerous drivers who pay traffic tickets can still legally drive, while safe drivers who are unable to pay cannot. This is illogical.[21]

III. Plaintiffs demonstrate irreparable harm and satisfy the other requirements for a preliminary injunction.

The DMV's arguments on irreparable harm are contradicted by the record. *See* ECF No. 46 at 29–30. First, the record shows FTPTT suspensions continue to cost Ms. Carter a job and needed income, and she was diligent in bringing this suit within a little more than one year after discovering her suspension in August 2018. *See* ECF No. 11 ¶¶ 27, 30, 55. Second, the DMV

[20] The DMV's declaration indicates these figures concern suspensions imposed in the three years before the filing of this suit, but Defendants' brief in opposition to Plaintiffs' class certification motion states these suspension figures only go back to October 30, 2017. ECF No. 47 at 4.
[21] *Fowler* and *Jessup* are distinguishable because this Court must consider the record in *this case* when evaluating rational basis. ECF No. 35-1 at 32–33. Contrary to the DMV's contention, the decisions striking down Tennessee's wealth-based suspensions applied rational basis—not a higher-level of scrutiny. *See* ECF No. 46 at 25; *see, e.g.*, *Purkey*, 2018 WL 5023330, at *6–7.

fails to address Ms. Bellamy's irreparable harm. Without an injunction lifting FTPTT suspensions, Ms. Bellamy will be forced to divert scarce resources to pay for removal of FTPTT suspensions rather than to secure insurance and remove other suspensions. ECF No. 10 ¶ 63.

Finally, the balance of equities and the public interest are served by granting preliminary relief, which is only *prohibitory* in nature—not mandatory. *See* ECF No. 35-1 at 35.[22] This relief would not excuse compliance with Section 17-25-350 or criminal laws, as the DMV claims, because Plaintiffs do not challenge their convictions or fines but only the DMV's failure to determine willfulness before absolute and indefinite license suspension. ECF No. 35-1 at 2. Moreover, preliminary class-wide relief is warranted because, like Plaintiffs, more than 190,000 people will suffer irreparable harm from the loss of their licenses if relief is not granted.[23]

IV. This Court should rule on Plaintiffs' motion for a preliminary injunction notwithstanding the pending appeal in *Johnson v. Jessup*.

Plaintiffs respectfully request a ruling on the present motion, notwithstanding the Fourth Circuit's pending hearing in *Jessup*. The DMV's desire to "avoid[] superfluous work" and its invocation of judicial economy, ECF No. 46 at 19–20, does not show "clear and convincing circumstances" that justify the additional irreparable harm to Plaintiffs that will result from delay. *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124, 127 (4th Cir. 1983).

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court enter the preliminary injunction detailed in Plaintiffs' opening brief in support of this motion. *See* ECF No. 35-1 at 2.

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[22] The injunction lifting FTPTT suspensions is prohibitory because it will restore the "last uncontested status between the parties which preceded the controversy." *Aggarao v. MOL Ship Mgmt Co., Ltd*, 675 F.3d 355, 378 (4th Cir. 2012).

[23] *See* ECF No. 14 ¶ 9. This Court has wide discretion to fashion preliminary relief for those similarly situated to Plaintiffs. *See Roe v. Dep't of Defense*, --F.3d--, 2020 WL 110826, *17–18 (4th Cir. Jan. 10, 2020).

DATED the 24th day of January 2020.

Respectfully submitted by,

s/ Susan K. Dunn

SUSAN K. DUNN (Fed. Bar # 647)
American Civil Liberties Union Foundation
of South Carolina
P.O. Box 20998
Charleston, South Carolina 29413-0998
Telephone: (843) 282-7953
Facsimile: (843) 720-1428
Email: sdunn@aclusc.org

TOBY J. MARSHALL*
ERIC R. NUSSER*
Terrell Marshall Law Group PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450
Email: tmarshall@terrellmarshall.com
Email: eric@terrellmarshall.com

ADAM PROTHEROE (Fed. Bar # 11033)
South Carolina Appleseed Legal Justice Center
1518 Washington Street
Columbia, SC 29201
Telephone: (803) 779-1113
Facsimile: (803) 779-5951
Email: adam@scjustice.org

NUSRAT J. CHOUDHURY*
OLGA AKSELROD**
AMREETA S. MATHAI*
ROBERT HUNTER*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 519-7876
Facsimile: (212) 549-2651
Email: nchoudhury@aclu.org
Email: nchoudhury@aclu-il.org
Email: oakselrod@aclu.org
Email: amathai@aclu.org
Email: rwhunter@aclu.org

SAMUEL BROOKE*
EMILY EARLY*
DANIELLE DAVIS*
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Telephone: (334) 956-8200
Facsimile: (334) 956-8481
Email: samuel.brooke@splcenter.org
Email: emily.early@splcenter.org
Email: danielle.davis@splcenter.org

Attorneys for Plaintiffs

* Admitted pro hac vice
** Application for pro hac vice admission filed.