IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

DAMIAN STINNIE, DEMETRICE MOORE, ROBERT TAYLOR, and NEIL RUSSO, Individually, and on behalf of all others similarly situated, Plaintiffs, v. RICHARD D. HOLCOMB, in his official capacity as the Commissioner of the VIRGINIA DEPARTMENT OF MOTOR VEHICLES, Defendant.	Civ. No: 3:16-cv-00044

PLAINTIFFS' MEMORANDUM IN SUPPORT
OF THEIR RULE 59 AND 60 MOTIONS

I. Introduction

Plaintiffs, by counsel, submit this Memorandum in Support of their Motions filed pursuant to Fed. R. Civ. P. 59(e) and 60. The Court's Memorandum Opinion and Order is based on mistakes of fact and law that affect its ultimate conclusions. The corrected essential facts are:

1. There is no self-executing license suspension order entered by a General District Court or Circuit Court, or forwarded to the DMV by the clerk of a General District Court or Circuit Court.

2. Criminal and traffic defendants have no ability to appeal a license suspension for failure to pay court fines and costs because the appeal period (10 or 30 days) passes before the deadline for payment (30 days) and a suspension thereafter occurs.

3. Acting pursuant to Va. Code § 46.2-395, the Commissioner is the official who implements and carries out[1] license suspensions, and will continue to do so in the future.

4. Suspensions issued pursuant to Va. Code § 46.2-395 do not exist separate and apart from the Commissioner's execution of the statute's directives.

The mistakes of law are evidenced by *Plummer v. Commonwealth,* 408 S.E.2d 765 (Va. Ct. App. 1991) and the arguments set forth below. Plaintiffs submit this Motion asking the Court to reconsider its decision with a proper record, correct the factual errors, reinstate the case, and deny Defendant's Motion to Dismiss.

II. Procedural History

The procedural history is only relevant in that the Court had before it an exhibit that sets forth many of the relevant facts. The exhibit is a declaration from the Clerk of the Circuit Court for Charlottesville City, Llezelle A. Dugger ("Dugger Decl."), which was attached to ECF No. 54, Plaintiffs' Opposition to Defendants' Objections to Judge Hoppe's February 8, 2017 Order

[1] *See* Defendant's Memo in Support of Motion to Dismiss at p. 17 (acknowledging that DMV "implements" Va. Code 46.2-395 suspensions and cannot refuse to "carry [suspensions] out.").

denying Defendant's Motion to Stay Discovery. The declaration describes how Va. Code § 46.2-395 works in practice.

III. Statement of Facts

A. The Court's Mistakes of Fact Regarding Virginia's License Suspension System

The Court made and relied on the following mistaken and incorrect statements of facts in its Memorandum Opinion:

1. "[A]t the moment of conviction in a Virginia criminal case, full payment of any assessed fines and costs is due 'immediately.'" ECF No. 56 at 11.

2. "[I]f the defendant does not make immediate payment, his driver's license is suspended 'forthwith'—meaning immediately or without delay. . . . Every conviction involving a fine or costs thus effectively includes the suspension of the person's license . . ." ECF No. 56 at 11.

3. "But the clerk also sends a record 'of the license suspension' to the Commissioner. Va. Code § 46.2-395(C). In other words, the suspension is a legal reality that preexists any involvement whatsoever from the Commissioner." ECF No. 56 at 13.

4. "[T]he suspension is unequivocally and unambiguously ordered *by the court*." ECF No. 56 at 11.

B. Corrected Statements of General Fact About Virginia's Automatic Suspension System

1. Payment of any fines and costs assessed in a criminal or traffic case is ***not*** due "immediately," but rather within 30 days of sentencing. Moreover, it is the failure to pay within 30 days of sentencing, ***not conviction***, that triggers suspension.

Payment of fines and costs is ***not*** due "immediately" for the purpose of suspending a driver's license. Indeed, Virginia Code § 46.2-395 does not expressly define "immediate." However, both Va. Code §§ 19.2-354(A) and 46.2-395(C) reference 30-day periods. In both provisions, 30 days from sentencing is the operative time period within which a defendant must either pay in full, or establish a payment plan, in order to avoid suspension. The Virginia's

Judicial System's own website confirms that suspension does not occur until 30 days have elapsed and no payment is received:

> **Post-Court Payments** (if paying AFTER your court date): Payments must be received within 30-days following your court date ***to prevent the suspension*** of your operator's/driver's license for failure to pay.

See Screenshot attached as **Ex. 1** (emphasis added). Failure to pay "immediately" after sentencing does not cause automatic suspension, as evidenced by the words "***to prevent the suspension*** of your operator's/driver's license[.]" (Emphasis added.) A suspension cannot be "prevented" if it has already occurred, so the fact that a defendant may "prevent" a suspension by paying within 30 days of sentencing means that no suspension occurs before that period expires.

Likewise, the word "immediate" in Va. Code § 46.2-395(B) must be read consistently with other provisions, including Va. Code § 19.2-354(A), which permits payment within 30 days of sentencing or otherwise requires the court to order a payment plan:

> Whenever (i) a defendant, convicted of a traffic infraction or a violation of any criminal law of the Commonwealth . . . is sentenced to pay [costs or fines] and (ii) the defendant is unable to make payment of the fine, restitution, forfeiture, or penalty and costs within 30 days of sentencing, the court shall order the defendant to pay such fine, restitution, forfeiture or penalty and any costs which the defendant may be required to pay in deferred payments or installments."

See also Compl. ¶ 279. If the defendant then fails to pay deferred or installment payments as ordered, "his privilege to operate a motor vehicle ***will be suspended*** pursuant to § 46.2-395." Va. Code § 19.2-354(D) (emphasis added). Thus, if the person is not able to pay immediately and is put on a payment plan, suspension does not occur as long as he or she abides by the plan.

A default on paying a fine or cost, not a conviction, triggers the license suspension. *See, e.g.*, Compl. ¶ 4, 39, 63-65, 102, 138, 144, 151, 178, 205, 250, 284-285, and 404. As Defendant's counsel acknowledged at oral argument:

> I'm talking about at the time of your criminal conviction and the court says, "You owe us $500. Pay us $500. You have 30 days to pay under the statute." ***There is no suspension there at all until the 30 days has lapsed and you haven't paid, and that's when the suspension goes into effect.***

See Hr'g Tr. at 15:2-7 (emphasis added). If Va. Code § 46.2-395(B) were read to require suspension whenever someone does not pay on the day of sentencing, then the second phrase – "fails to make deferred payment or installment payments" – would be meaningless, because payment plans can issue within up to 30 days after sentencing. Virginia Code § 19.2-354(D) indicates that a person can avoid suspension by staying current on a payment plan. But if the suspension occurred by court order on "day one," a person would not be able to avoid suspension even if he or she remained current on a payment plan, because he or she already will have failed to pay immediately and had his or her license suspended.

Lastly, the Court's interpretation of Va. Code § 46.2-395(B) would mean that two different events would create two different kinds of license suspension, even though nothing in the statutory language suggests this. Under the Court's interpretation, the failure to make "immediate" payment would trigger an inchoate, pending suspension, which may or may not become "effective," depending on whether the person pays within 30 days or is put on a payment plan. By contrast, defaulting on a payment plan would trigger an active and actual suspension right away. However, nothing in the statute suggests this dichotomy – indeed, the language of Va. Code § 46.2-395(B) simply says that in ***either*** case, license suspension shall occur "forthwith." In fact, § 46.2-395(B)'s use of "immediate" has been interpreted in practice by the Virginia court system to mean "within thirty days."[2]

[2] The General District Court Clerk's Manual indicates that "[t]he obligation for payment of fines and costs to the court accrues upon conviction and is normally due within thirty days of trial, but deferred or the court [sic] shall establish installment payment agreements for those unable to make immediate payment." *See* **Ex. 2**, General District Court Clerk's Manual, p. 4-2.

2. The suspension is ***not*** "unequivocally and unambiguously ordered by the court," and this statement is contrary to the facts in this case and the law in Virginia.

The Commissioner implements suspensions of driver's licenses after receiving a transmission from the court's computers reflecting a record of non-payment. *See* Compl. ¶¶ 284-289. 39, 66, 67, 103, 129-30, 152-53, 174-75, 179-80, 227-28, 251, 370, 412. The Acknowledgement Forms attached to the Complaint are not court orders. Complaint Exhibits C and D contain the administrative information provided by the court clerk's office to the defendant after sentencing. Both DC-210 (Exhibit C) and CC-1379 (Exhibit D) are broken into two parts. Part I is an "Acknowledgment of Suspension or Revocation of Driver's License." On both forms, Part I contains no reference to an order. Although Part I of CC-1379 contains a signature block to be signed by a judge, clerk, *or notary public*, this signature block is for the purpose of notarizing the defendant's signature, rather than for issuing an order. And Part I of DC-210 has only a signature block for the defendant to sign; there is no block for the judge, clerk, or a notary public to sign.

As to the date of the suspension, DC-210 states that the license "has been suspended . . . . effective thirty days from the date of sentencing . . . ." CC-1379, by contrast, and referencing the same set of laws (*i.e.*, Va. Code §§ 19.2-354, 19.2-358, and 46.2-395), states that the license "***will be suspended*** effective thirty days from the date of sentencing . . . ." (Emphasis added.) Part II of the forms pertains to deferred or installment payments, or (in the case of DC-210) community service. It does not address license suspension. Whereas Part I is an "acknowledgment" regarding license suspension, Part II refers to an "order" regarding ***payment arrangements***, not suspension. There is a signature block to be signed by the clerk or the judge, "order[ing]" the defendant to make installment or deferred payments, or perform community service (in the case of DC-210). This distinction between Part I and Part II of the form is

meaningful; it indicates that the portion addressing license suspension is not an order.

Moreover, *Plummer v. Commonwealth* (*see infra* at 14-15) adjudicated the significance of an acknowledgment form, which stated that the defendant's license would be suspended if he failed to pay within the prescribed period of time after sentencing. *Plummer*, 408 S.E.2d 765 (Va. Ct. App. 1991). Significantly, *Plummer* held that that form was ***not*** a self-executing suspension; the order would be executed only if, and after, the defendant failed to pay within the prescribed period. *Id.* *Plummer* also held that the DMV executes suspensions for non-payment of court debt. *Id.* at 765-766.

3. The clerk does not send a record "of the license suspension" to the Commissioner, nor is the suspension a legal reality before the Commissioner's involvement.

The court computer systems "transmit a person's record of nonpayment to the DMV electronically." Compl. ¶ ¶286, 404, and 412. There is no independent record of a license suspension except that which is maintained by the DMV.[3] The Court has before it the Declaration of the Clerk for the Circuit Court of the City of Charlottesville, who confirms that there is no such order. *See* **Ex. 3**, Dugger Decl. (also filed as ECF No. 54). Because there is no

[3] The Court's opinion cites to the hearing transcript to assert that Plaintiffs concede that an order addressed to the Commissioner to disregard the notices of suspension he receives from the court "would not affect the existence and validity of the state courts' suspension orders under [Va. Code § 46.2-395(B)]. ECF No. 56 at 27 n.34. But a review of the entire exchange shows that Plaintiffs' counsel was referring to the record of default maintained in the court record, not to an order of suspension. *See* Hr'g Tr. at 49. At best, that section of the transcript is ambiguous, and cannot be read as a concession. Moreover, the rest of the transcript is replete with arguments that there is no court order; thus, Plaintiffs' counsel cannot reasonably be understood to have "conceded" that a non-existent court order would nevertheless survive in the court record. *See, e.g.*, Hr'g Tr. at 44:16-17 ("No hearing is conducted, no order is signed by a judge; in fact, the judge never sees the transmission [from the court computer to the DMV computer]."), 57:8-11 ("[T]hey said there's an order, and they say the statute in 395 says 'forthwith shall order.' But there is no order. There is a due date, it comes, the transmission goes to DMV, and then DMV suspends it.").

such order, there is no record of any such order entered, maintained, or transmitted to the DMV by the court.

When a person fails to pay court costs or fines, the Financial Management System ("FMS"), maintained by the Office of the Executive Secretary of the Virginia Supreme Court and used by all the General District Courts and almost all of the 120 Circuit Courts in the Commonwealth, transmits the record of non-payment to the DMV. *See id.* at ¶¶ 5 and 6. No clerk or judge enters an order of license suspension for failure to pay court costs or fines. *Id.* Nothing is maintained in the court file reflecting that a person's license has been suspended for non-payment. *Id.* at ¶ 8. When DMV receives a transmission from FMS that an account is in default, DMV suspends the account holder's license, not the clerk or judge. *Id.* at ¶ 10. If DMV is ordered to reinstate licenses that were suspended pursuant to Va. Code § 46.2-395, it will not conflict with any court-ordered suspension because no such order exists. *Id.* at ¶ 11. By contrast, when a person's license is suspended or revoked pursuant to Va. Code §§ 46.2-393 (reckless driving) or 18.2-259.1 (drug offenses), the judge enters an order suspending or revoking the license after a hearing on the underlying offense, and may offer the defendant an opportunity to request a restricted license. *Id.* at ¶ 12.

In short, the license suspension for unpaid court debt is an administrative action, rather than a judicial order. This fact is underscored by the DC-30 form ("Commonwealth of Virginia Driver's License Reinstatement Form"), which "documents payment of fines and costs after a defendant's driving privileges have been suspended by the court (***or by DMV as an administrative action***) for refusal or failure to pay any fines, costs, restitution, or other monetary penalties." *See* **Ex. 4**, Circuit Court Clerk's Manual, at pp. 6-12 (emphasis added).

C. Corrected Statements of Facts Regarding Plaintiffs

The relevant records from Plaintiffs' convictions in Virginia courts and the DMV likewise demonstrate that the license suspensions do not result from judicial activity in the convicting and sentencing court. In fact, judicial activity was not even required. Rather, Plaintiffs' license suspensions occurred by operation of law, executed by Defendant, requiring no court action except transmissions from the court clerk's offices to the DMV indicating delinquent accounts.

One of Plaintiff Demetrice Moore's convictions illustrates this process. On April 7, 2016, the Chesterfield County General District Court convicted Ms. Moore of driving with a suspended license. *See* **Ex. 5**, Virginia Uniform Summons (GT116006942-00) (Chesterfield County General District Court, Apr. 7, 2016). *See* Complaint ¶ 152. The court marked the box next to the text "DRIVER'S LICENSE SUSPENDED," and hand wrote "90 d[ays]." **Ex. 5.** This suspension arose as a result of her conviction for driving on a suspended license, and is distinct from the indefinite suspension for failure to pay court debt under Va. Code § 46.2-395. *See* Complaint ¶ 170. After sentencing, the clerk's office set costs at $232.

Significantly, the court took ***no action*** respecting her driver's license in the event that she did not pay the $232 in costs. Instead, the form order contains the text, "DRIVER'S LICENSE SUSPENDED EFFECTIVE IN THIRTY (30) DAYS IF FINES/COSTS/FORFEITURE/ PENALTY/RESTITUTION NOT PAID IN THIRTY (30) DAYS § 46.2-395," next to a blank box. **Ex. 5.** (original typeface). The court marked the box for Va. Code § 46.2-301 (to indicate a suspension as part of the sentence for driving on a suspended license), but left the box for Va. Code § 46.2-395 ***blank***.[4] *Id.* Yet, Defendant executed a suspension of Ms. Moore's driver's

[4] Other form conviction/sentencing orders entered against the Plaintiffs feature the same

license for nonpayment under Va. Code § 46.2-395, after Ms. Moore failed to pay the costs within 30 days. **Ex. 8**, Va. Dep't of Motor Vehicles, Transcript of Driver History for Demetrice Moore (July 6, 2016), at 2. Complaint ¶ 152. Notably, Ms. Moore's driver's transcript lists the word "issue" (present tense) to describe that suspension[5] and notes the issuance date as May 13, 2016—six days after the 30-day payment deadline following sentencing, and ostensibly the date that Defendant processed the record of nonpayment from the court. **Ex. 8.**

In sum, whether the trial court marks the box for § 46.2-395 on the form order does not matter for purposes of DMV's execution of a license suspension for nonpayment. Defendant executes a suspension when he receives a record of nonpayment from a clerk's office, without reference to the orders of conviction and sentencing. In Ms. Moore's case, Defendant executed a suspension of her license ***even though the order did not indicate suspension for nonpayment*** under Va. Code § 46.2-395. Complaint ¶ 152.

Plaintiff Neil Russo's convictions in Fairfax County Circuit Court further illustrate the distinction between the court's order at sentencing (after which Mr. Russo became obligated to pay costs) and the subsequent license suspension carried out by Defendant (an independent act). When the court sentenced Mr. Russo for receiving stolen property, for example, the sentencing order lists only, in pertinent part: incarceration, with that incarceration suspended on the following conditions—(1) satisfactorily completing of one year of supervised probation, and (2)

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omission. *See, e.g.*, **Ex. 6**, Virginia Uniform Summons (GT13013697-00) (Henrico County General District Court, July 12, 2013) (ordering a fine and court costs against Damian Stinnie by marking the appropriate boxes and entering amounts in the blank fields, while leaving the § 46.2-395 box unmarked); **Ex. 7**, Virginia Uniform Summons (GT16001430-00) (Chesterfield County General District Court, Feb. 4, 2016) (same, in connection with a conviction entered against Demetrice Moore).

[5] By contrast, the same DMV transcript uses the variation "issued" (past tense) to describe other suspensions (*e.g.*, suspensions under Va. Code § 46.2-301) clearly ordered by courts. **Ex. 8.**

paying "all costs of this case." **Ex. 9**, Sentencing Order (FE-2009-0000189) (Fairfax County Circuit Court, June 12, 2009). Neither the court nor its order made any mention of or reference to his driver's license.

Whereas Mr. Russo's sentencing order contained ***no reference*** to his driver's license, the Clerk's Notice of Costs form for the first time notified him that driver's license suspension ***might*** follow nonpayment in the future. *Compare* **Ex. 9**, Sentencing Order (FE-2009-0000189) (Fairfax County Circuit Court, June 12, 2009) (no mention of Mr. Russo's driver's license or any other enforcement activity respecting costs) *with* **Ex. 10**, Deputy Clerk, Fairfax County Circuit Court, Clerk's Notice of Costs (FE-2009-0000189) (June 12, 2009) ("Your failure to pay . . . costs . . . immediately, or as ordered by the court, **will** result in ***any or all*** of the following: . . . 3. Suspension of your Driver's license and revocation of your automobile registration and tags.") (typeface altered) (emphasis added). The form noted various types of enforcement activity for nonpayment, including "garnishing your wages," "Virginia Lottery winnings . . . seiz[ure]," and "a judgment . . . docketed against you and any property that you own." *Id.* None of these potential measures—which would be imposed only ***after*** nonpayment of costs and fees—constitutes part of, or is included in, the underlying judgment of conviction or sentencing order.

Neither the court nor the clerk's office made any mention of a suspension order, "ineffective" or otherwise, and certainly never presented it as part of the sentencing order. The court in Mr. Russo's case, speaking through the free-form sentencing order, had nothing to say about license suspension at all. Yet, on October 27, 2009, Defendant "issue[d]" a suspension of Mr. Russo's driver's license, after he did not pay his costs on time, and backdated it to render the suspension "effective" September 14, 2009. **Ex. 11**, Va. Dep't of Motor Vehicles, Transcript of Driver History for Neil Russo (Jan 3, 2017) at 5 (of Exhibit).

In short, various sentencing documents are used in traffic and criminal courts, but no matter the form used, nonpayment of court debt leads to license suspension ***whether or not the court makes any such indication upon it.*** Indeed, most of the sentencing documents associated with Plaintiffs either contain no reference to license suspension under Va. Code § 46.2-395, or otherwise contain no indication that the sentencing court actually included a license suspension (effective, ineffective, or otherwise) in rendering a judgment of conviction and imposing a sentence. Rather, suspensions under Va. Code § 46.2-395 happen when Defendant issues the suspension, after the court clerk's offices – almost always using automatic, interfacing computer systems – flag delinquent accounts by transmitting a record of nonpayment to Defendant.

IV. Argument of Law

A. Standard of Review

A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment. Fed. R. Civ. P. 59(e). Grounds for amending the judgment may include that an amendment "is necessary to correct manifest errors of law or fact upon which the judgment is based." 11 Fed. Prac. & Proc. Civ. § 2810.1 (3d ed.). The court may also correct a mistake found in a judgment, order, or other part of the record, and relieve a party from a final judgment "for any . . . reason that justifies relief." Fed. R. Civ. P. 60(a) and (b).

B. Virginia Case Law Confirms That License Suspensions Do Not Occur Until 30 Days After Nonpayment and the Commissioner Executes the Suspension.

Plummer v. Commonwealth, 408 S.E.2d 765 (Va. Ct. App. 1991), makes clear that the DMV, not the sentencing court, suspends driver's licenses, and that the suspension is not self-executing, but occurs when the defendant receives notice of it. *Plummer* involved a defendant's challenge to his conviction for driving with a suspended license. The defendant had been convicted for speeding and signed an acknowledgment form stating that his license would be

suspended if he did not pay his court debt within 10 days. *Plummer*, 408 S.E.2d at 765. The defendant evidently failed to pay, and was later convicted for driving with a suspended license.

The Court of Appeals reversed the conviction, relying on two key points. First, the defendant's license "***remained valid until the DMV order was actually executed***." *Id.* at 766 (emphasis added). Second, the acknowledgment that the defendant had signed did not cause a "self-executing suspension" to occur. *Id.* Thus, the Court of Appeals held that no suspension occurred (nor could a suspension occur) until the DMV itself executed a suspension and delivered a copy to the defendant. Stated differently, the Court of Appeals confirmed that it is the DMV – not the court in which the defendant was convicted and sentenced for the underlying violation – that suspends a driver's license for failure to pay a court debt.

Carew v. Commonwealth, 750 S.E.2d 226 (Va. Ct. App. 2013), reinforces the fact that the DMV is the entity that suspends a defendant's driver's license, and the suspension is not self-executing. Like *Plummer*, *Carew* involved a defendant's challenge to her conviction for driving without a valid license. Citing *Plummer*, the Court of Appeals in *Carew* reversed the defendant's conviction, holding that: "***A license is not suspended until notice of that status is received by the holder.***" *Carew*, 750 S.E.2d at 228 (emphasis added). Thus, the Court of Appeals again held there is no "suspension" of a driver's license until the DMV executes the suspension and notifies the defendant of it.[6]

C. The *Rooker-Feldman* Doctrine Does Not Deprive This Court of Jurisdiction.

Rooker-Feldman is strictly limited to cases that are: (1) brought by state-court losers; (2) complaining of injuries caused by state-court judgments; (3) rendered before the beginning of

[6] "[S]tate courts, not federal courts, have the final word on the interpretation of state statutues." *Expression Hair Design v. Schneiderman*, No. 15-1391, 2017 U.S. LEXIS 2186, at *26, 518 U.S. ___ (2017).

federal proceedings; and (4) inviting review and rejection of those judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (clarifying the "narrow ground occupied by *Rooker-Feldman*"). Here, the Plaintiffs are neither complaining of injuries caused by state-court judgments, nor are they inviting review and rejection of those judgments. Rather, they challenge Defendant's suspension of their licenses pursuant to an unconstitutional law—an independent executive action that could not occur until at least 31 days after conviction, by which point Plaintiffs' time to appeal their judgments had expired.

The Supreme Court has held that *Rooker-Feldman* "has no application" to a case—such as Plaintiffs'—where a federal court is called upon to "review . . . executive action, including determinations made by a state administrative agency." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002). Likewise, the Fourth Circuit recently instructed that when a plaintiff is "challenging the action of a state administrative agency," *Rooker-Feldman* is no obstacle to jurisdiction. *Thana v. Bd. of License Comm'rs for Charles Cty.*, 827 F.3d 314, 321 (4th Cir. 2016).

Here, Plaintiffs' deprivation of their licenses due to inability to pay is not caused by state court judgments, but rather by post-judgment procedures employed to collect debt; payment or non-payment of debt is the distinction that avoids or triggers license suspension. There is no "state court judgment" at issue. A court clerk's transmittal of a record of non-payment to Defendant is a ***ministerial*** act by administrative personnel and computer systems, not a ***judicial*** act—unlike the facts in *Feldman*, where the state court had "adjudicated Feldman's claim… and rejected it," which was "the essence of a judicial proceeding." *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 481 (1983). As in *Thana*, "[n]owhere in [their] complaint" do Plaintiffs "seek review of the judgment[s]" of the state courts that convicted and imposed fines upon them.

827 F.3d at 321. Rather, it is the "injury inflicted by [the] actions of [that] state administrative agency" for which Plaintiffs seek redress. *Id.* at 323. As the Ninth Circuit observed, a federal court "'cannot simply compare the *issues* involved in the state-court proceeding to those raised in the federal-court plaintiff's complaint.'" *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir. 2003) (quoting *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 476 (10th Cir.2002)). Rather, a court "must pay close attention to the *relief* sought by the federal-court plaintiff." *Id.* (quoting *Kenmen).* The relief sought by Plaintiffs is available from Defendant, as it is Defendant who executes the deprivation of their licenses pursuant to an unconstitutional law.

Moreover, *Rooker-Feldman* cannot apply to a case—such as Plaintiffs'—that makes no attempt to circumvent the state appellate hierarchy. Indeed, noting the doctrine's "narrow role," the Fourth Circuit has admonished that *Rooker-Feldman* "assesses only whether the process for appealing a state court judgment . . . has been sidetracked by an action filed in a district court *specifically* to review that state court judgment." *Thana*, 827 F.3d at 320.

Plaintiffs' case has neither "sidetracked" nor "frustrated" the state appellate process, as their suspensions did not occur until after the window to appeal their judgments closed. Suspension does not occur at the time of conviction because the defendant has 30 days to pay; rather, it occurs after that time, based on non-payment. *See Plummer v. Commonwealth*, 408 S.E.2d 765 (Va. Ct. App. 1991). Because the defendant has ten days to appeal from the General District Court, Va. Code § 16.1-132, and 30 days to appeal from the Circuit Court, Va. Code § 8.01-675.3, the appeal period runs before the defendant's license is suspended. Moreover, there is no "record" of that determination by the trial court,[7] nor is there a "ruling" to which error

[7] The Record on Appeal must contain, among other things: each order entered by the trial court; any opinion or memorandum decision rendered by the judge of the trial court; and the transcript

could be assigned. *See* Sup. Ct. Rule 5A:12(c) (requiring the Petition for Appeal to "list, clearly and concisely . . . the specific errors in the rulings below upon which the party intends to rely."). Accordingly, there is no process to appeal a suspension.

Indeed, Va. Code § 46.2-410 states that "[n]o appeal shall lie in any case in which the suspension or revocation of the license or registration was mandatory except to determine the identity of the person concerned when the question of identity is in dispute." As Defendant notes, Va. Code § 46.2-410 limits appeals of "mandatory suspensions" (such as those pursuant to Va. Code § 46.2-395) to questions of cases of mistaken identity.[8] Thus, Plaintiffs had no ability even to ***invoke*** the appeals process with respect to their suspensions, as their claims ripened only after that process became unavailable. This case thus leaves the state appellate chain intact.

Finally, federal jurisdiction is appropriate because Plaintiffs are not asking this Court to review or reject any state-court ruling on the issues presented in this case. Where plaintiffs challenge the constitutionality of a statute under which adverse state-court judgments were entered against them, the federal claim is not a request for "review and reject[ion]" of a prior state-court judgment; rather, it is an independent claim. *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 532 (2011) ("[A] state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action."). Thus, even assuming, *arguendo*, that license suspension under Va. Code § 46.2-395 constitutes a state-court judgment, Plaintiffs are challenging the constitutionality of Va. Code § 46.2-395, and thus are outside the

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of any proceeding or a written statement of facts, testimony, and other incidents of the case. Sup. Ct. Rule 5A:7(a).

[8] See Def's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at page 13, n.36 and accompanying text.

fourth prong of the *Rooker-Feldman* exception to the jurisdiction of federal courts to consider constitutional violations.

Stated differently, Plaintiffs are not saying that the state courts made a wrong judicial determination (in a forum providing for due process) that they now seek to review and reject, but that Va. Code § 46.2-395 itself disclaims any procedural due process whatsoever and, in doing so, violates the Plaintiffs' constitutional rights to due process and equal protection. This "federal action is a concurrent, independent action supported by original jurisdiction conferred by Congress on federal district courts." *Thana*, 827 F.3d at 321. The conclusion that *Rooker-Feldman* is ***not*** a bar to this Court's jurisdiction thus aligns with the decisions of numerous other courts assessing similar cases, including a very recent decision in this district. *See, e.g.*, *Hendrick v. Caldwell*, Civ. A. No. 7:16cv00095, ____ F.Supp. 3d ___, 2017 WL 511924 (W.D. Va. Feb. 8, 2017) (concluding that *Rooker-Feldman* did not apply where the plaintiffs' challenge to the constitutionality of a Virginia statutory scheme criminalizing the possession of alcohol by interdicted individuals was sufficiently independent from the state court judgments of interdiction themselves); *see also* ECF No. 21, Pl's Mem. Opp. to Mot. to Dismiss (listing additional examples).

D. Eleventh Amendment Immunity and *Ex Parte Young*

Given the correct facts regarding the process for license suspension due to unpaid court debts, the exception to Eleventh Amendment immunity set forth in *Ex Parte Young*, 209 U.S. 123 (1908), applies here and permits Plaintiffs' claims against the Commissioner. The DMV does not "merely . . . wait passively" for the court clerk to send it "a record of nonpayment and of the suspension" (Mem. Op. at 33) – in fact, there is no "record of the suspension" kept by the clerk to send to the DMV. Rather, the clerk informs the DMV of the defendant's nonpayment,

and then it is the DMV, under Va. Code § 46.2-395, that "implements" and "carries out"[9] the suspension, and collects a reinstatement fee as a condition of reinstatement.

When viewed in light of these facts, the circuit precedents cited in the Court's Memorandum Opinion are distinguishable. In *McBurney v. Cuccinelli*, 616 F.3d 393 (4th Cir. 2010), for instance, the Fourth Circuit declined to apply the exception in three combined suits against Virginia's Attorney General to enforce the Virginia Freedom of Information Act (VFOIA). The court noted that there must be a "'special relation' between the officer being sued and the challenged statute[.]" *Id.* at 399 (citing *Ex Parte Young*, 209 U.S. at 157, and *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008)). The court further noted that these requirements are not met "when an official merely possesses '[g]eneral authority to enforce the laws of the state[.]'" *Id.* (citing *Limehouse*, 549 F.3d at 331). In *McBurney*, the Virginia Attorney General had no "special relation" to the VFOIA—he was merely the state official charged with "general authority to enforce the law." Thus, the *Ex Parte Young* exception did not apply. Similarly, in *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536 (4th Cir. 2014), the court granted immunity to officials of a public employee retirement account against a challenge by state employees to mandatory paycheck withdrawals. As the court noted, in rejecting an *Ex Parte Young* theory, the officials played "no role" in the mandatory paycheck withdrawals, but merely invested whatever money was deposited into the account. *Id.* at 551.

This case is different. Here, the Commissioner has the necessary "special relation" to the challenged statute, as he certainly has "some connection with the enforcement of the act." *Ex Parte Young*, 209 U.S. 123, 157 (1908).[10] The official need not be the primary authority to

[9] *See supra* footnote 1.

[10] "The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general

enforce the law; it is sufficient that he has some authority to act in its furtherance. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 633 (8th Cir. 2011).[11] Suspensions under Va. Code § 46.2-395 intimately involve the DMV, which implements and carries out those suspensions and collects reinstatement fees. Moreover, the Commissioner is the official whose agency oversees the licensure of drivers and is cited (as the "Department" or "Commissioner") no less than ten times in Va. Code § 46.2-395. Thus, he is an appropriate defendant in this action challenging the constitutionality of Va. Code § 46.2-395, and Eleventh Amendment immunity should not apply.

E. Standing and Redressability

Plaintiffs have standing because they have been grievously injured by Defendant's actions in implementing an unconstitutional statute, and those injuries can be redressed by the relief they seek. "Constitutional standing comprises three elements: (1) the plaintiff is required to have sustained an injury in fact; which (2) must be causally connected to the complained-of conduct undertaken by the defendant; and (3) will be likely to be redressed if the plaintiff prevails." *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013).

At the dismissal stage, the plaintiff's burden in establishing standing is "relatively modest." *Bennett v. Spear*, 520 U.S. 154, 171 (1997). Moreover, "when standing is challenged on the pleadings, we accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party." *David v. Alpin*, 704 F.3d 327, 333 (4th Cir. 2013) (citing *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988)).

The Court's conclusion that Plaintiffs have not established causation and redressability rests on mistakes of fact and law. The Court has focused on Plaintiffs' requested injunctive

law, or is specially created by the act itself, is not material so long as it exists." *Id.*

[11] For additional examples, *see* ECF No. 21, Pl's Mem. Opp. to Mot. To Dismiss at p.12-13.

relief for reinstatement of their licenses (Prayer for Relief (e)). In doing so, the court has overlooked the fact that Plaintiffs also have standing for their requested declaratory relief (*see* Prayer for Relief (c)) and injunctive relief against issuing future suspensions pursuant to Va. Code § 46.2-395 (*see* Prayer for Relief (d)). Indeed, as the Court recognizes (*see, e.g.*, Mem. Op. at p. 9), the requested declaratory relief essentially asks that the court find § 46.2-395 unconstitutional.[12] If Plaintiffs are successful in proving that the statute is unconstitutional, the suspensions under the statute would be invalid. *City of Portsmouth v. Weiss*, 145 Va. 94 (1926).

1. Causation/Traceability

The concept of causation, or traceability, for purposes of Article III standing does not rest on traditional, "stringent" principles of legal or proximate cause that ordinarily operate to assign tort liability. *Libertarian Party of Va.*, 718 F.3d at 315 (citing *Bennett v. Spear*, 520 U.S. 154, 171 (1997). *See also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) ("Thus, the 'fairly traceable' standard is 'not equivalent to a requirement of tort causation.'") (internal citations omitted). Instead, "[t]he 'fairly traceable' requirement ensures that there is a genuine nexus between the plaintiff's injury and a defendant's alleged illegal conduct." *Friends of the Earth*, 204 F.3d at 161 (citing *Lujan*, 504 U.S. at 560).

The Complaint clearly establishes a "genuine nexus" between Plaintiffs' inability to drive legally and Defendant's execution of license suspensions under Va. Code § 46.2-395. Specifically, the Complaint alleges:

- Each year since fiscal year 2010, the DMV issued more than 360,000 orders of suspension for failure to pay court costs and fines (Compl. ¶ 32);
- The computer systems used by the courts and DMV default to suspending driver's licenses whenever a payment is due and no payment is entered (Comp. ¶287);

[12] If the Court feels that Plaintiffs' Prayer for Relief is unclear in this regard, this can easily be clarified by a simple amendment to the Prayer. In that event, Plaintiffs respectfully request leave to amend their Prayer accordingly.

- When the suspension is "received" from the court, the DMV employee follows data entry protocols to issue the order of suspension (Compl. ¶289);
- Plaintiffs' licenses were suspended by Defendant immediately upon their default, without any inquiry into their individual financial circumstances, or the reasons underlying their failure to pay (Compl. ¶ 39)
- Defendant will not reinstate Plaintiffs' licenses until they satisfy their court debt entirely, or obtain payment plans from each court to which they are indebted (Compl. ¶ 40);
- Should Plaintiffs ever become eligible to reinstate their licenses, they would first have to pay Defendant a reinstatement fee of at least $145 (Compl. ¶43); and
- Defendant does not review a person's financial condition before—or indeed at any point related to—suspending a person's license for failure to pay, or otherwise inquire as to the reasons for default (Compl. ¶294).

The Complaint's allegations concerning Defendant's prominent role are supported by the terms of the challenged statute itself, which repeatedly identifies Defendant.

Plaintiffs' injuries are directly traceable to Defendant's conduct regardless of any upstream activity by court personnel. Defendant is the last link in the chain of events that led to Plaintiffs' injuries. Indeed, the suspensions cannot be accomplished without action by the DMV. *See Plummer v. Commonwealth*, 13 Va. App. 13 (1991); *see also* **Ex. 3**, Dugger Decl at ¶10 ("In cases of non-payment, DMV suspends the license, and not the clerk or judge.").

Defendant's actions have a "genuine nexus" to Plaintiffs' injuries. Plaintiffs' licenses would not be suspended but for his actions (*see Plummer*, *supra*). Moreover, recent Fourth Circuit authority suggests that the proper test for traceability is concurrent causation, or whether Defendant's actions are "at least in part responsible" for the Plaintiffs' injuries. *See Libertarian Party of Va.*, 718 F.3d at 316 (noting that the Supreme Court has "recognized the concept of concurrent causation as useful in evaluating whether the pleadings and proof demonstrate a sufficient connection between the plaintiff's injury and the conduct of the defendant, such that a court ought to assert jurisdiction over the dispute."). In challenging a statute's constitutionality, the fact that the defendant "is but one of several persons or entities in charge of implementing [it] is not controlling," so long as there is a causal connection. *LaMar v. Ebert*, No. 15-7668, 2017

WL 1040450, at *5 (4th Cir. Mar. 17, 2017) (concluding that a constitutional challenge to Virginia's DNA testing statute may be brought against a Commonwealth's Attorney for his role in responding, pursuant to state court order, to a petition for DNA testing).

Defendant is far from a disinterested bystander with no involvement in Plaintiffs' injuries. Rather, he is a critical actor in the suspension process, with a carefully delineated role in effecting the unlawful suspensions at the core of Plaintiffs' injuries. Defendant does so pursuant to Va. Code § 46.2-395, the challenged law from which Plaintiffs seek declaratory and injunctive relief. This close relation to Plaintiffs' injuries is more than sufficient to meet their "modest burden" in establishing causation at this stage for purposes of Article III standing.

2. Redressability

An injury is redressable if it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Doe v. Va. Dept. of State Police*, 713 F.3d 745, 755 (2013) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). However, a party need not demonstrate that relief from the injury is guaranteed, *see id.*, or that he will be made completely whole. *See Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (a party "satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.").

In *Doe*, the plaintiff sued the Virginia state police superintendent, among other defendants, for reclassifying her as a sexually violent offender under a new statute. The Fourth Circuit found Doe could demonstrate both traceability and redressability in her constitutional challenge because "the injury she complained of was "directly traceable to [the reclassification

statute]." *Doe*, 713 F.3d at 757-58 (dismissing the case on unrelated grounds).[13] Indeed, in *Doe*, just as here, the plaintiff's injuries were caused by two actors: the court in convicting her of a "carnal knowledge of a minor" and the superintendent in publicly reclassifying her as a "sexually violent offender" under the statute and failing to provide a procedure to challenge the reclassification. The Fourth Circuit understood that the reclassification statute itself caused the plaintiff's injuries, and held that if the plaintiff prevailed, invalidation of the statute would address her injury, presumably by either removing the classification or by providing adequate procedures for her to challenge her classification. *Id.* at 757-58.

In this case, Plaintiffs have requested several forms of relief, including a declaratory judgment that suspensions under Va. Code § 46.2-395 are unconstitutional. Compl. at ¶54. This case presents no "independent rule, policy, or decision that would prevent relief if the court were to render a favorable decision," *Doe* at 756, because Plaintiffs' case is, at its core, a challenge to the validity of a Virginia statute. Mem. Op. at p. 9. Their injuries are "directly traceable" to the challenged statute, and a favorable result would lead to invalidation of the statute and the injuries that flow from it. *See Doe* at 757-58.

The Court mistakenly suggested that an order directing Defendant to disregard the notices of non-payment received from the trial court would result in an incoherent duality in which the suspensions would not appear in DMV databases but the "legal reality" of their suspensions would remain unchanged. Mem Op. at 27-28. In actuality, (1) Plaintiffs' suspensions do not

[13] Doe filed three additional counts based on alleged restrictions to her ability to access school and church property, which were rooted, albeit only in part and indirectly, on her alleged misclassification. The court concluded that these lacked Article III standing. *Id.* at 754-55. The court found Article III standing for her procedural due process claim against the Virginia state police superintendent based on the misclassification itself. The court then held, however, that her claim was not justiciable based on specific Supreme Court precedent that foreclosed procedural due process challenges to inclusion on sexual offender registries without a hearing.

exist as a "legal reality" until Defendant acts pursuant to Va. Code § 46.2-395's directives; and (2) the trial court does not maintain records of suspensions independent of the DMV.

First, Plaintiffs' licenses were suspended irrespective of orders by any court, as evidenced by the fact that DMV suspended Plaintiffs' licenses regardless of whether the judge or clerk ever elected (or did not elect) a suspension under Va. Code § 46.2-395.[14] Moreover, the Acknowledgement Forms are not self-executing orders, and no suspension exists until DMV issues it and sends notice to the driver. *Plummer*, 13 Va. App. at 15-16. The Court hypothesized that an officer knowing the "true state of affairs" could issue a driving-suspended citation based on being in court at the time of sentencing or possessing a copy of the acknowledgment form, but this is simply not the case. The Acknowledgement Forms say nothing about whether the debtor paid monies owed to the courts within 30 days. If the Court's hypothetical were true, then every person who has ever been convicted of a traffic or criminal offense would be subject to a stop, citation, or even arrest for driving while suspended—even if they paid and even if the DMV database does not indicate their license is suspended.

Second, and significantly, the trial court maintains no independent record of suspensions for failure to pay. *See* **Ex. 3**, Dugger Decl. There is no way to know, by examining court records, if a person has a suspended license due to non-payment, unless one uses non-payment as a proxy for suspension. If this Court were to strike down Va. Code § 46.2-395 as unconstitutional, everything on the court side would continue as usual. Clerks would continue to enter payment information into the court computer, which would continue to flag accounts in default. The only thing that would not happen is that DMV would not issue or implement a suspension. Thus, suspensions under Va. Code § 46.2-395 depend on Defendant's actions.

[14] *See* discussion *supra* at pp. 2-11.

Moreover, Plaintiffs can demonstrate that an injunction ordering the DMV to remove the suspensions under Va. Code § 46.2-395 would solve the problem.[15] Pursuant to legislation enacted in 2015, Defendant is working on a system where a debtor can walk into a DMV customer service center, find out how much is owed to the courts, pay in full, and DMV will reinstate his or her license, without any action by the court.[16] If Defendant's customer service representatives can accept payment from court debtors, remove their suspensions under Va. Code § 46.2-395, and reinstate their licenses upon payment of the fee to DMV—all without any action by the convicting court(s)—then certainly Defendant could comply with an order from this Court to remove Plaintiffs' unconstitutional license suspensions.[17]

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[15] Even if the Court is skeptical about standing, it should permit Plaintiffs to develop those facts beyond the pleading stage. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, (1992) (observing as to standing, that, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'") (quoting *Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)).

[16] *See* **Ex. 12**, Progress Report on Implementing a Process for the Collection of Fines and Costs by the Department of Motor Vehicles (Dec. 2015) (http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4832015/$file/RD483.pdf) at p. 1:

> Both DMV and the OES have worked cooperatively over the last five months to establish a framework to provide Virginians with the convenience of paying delinquent court fines and costs at DMV. This service will provide a convenient method for DMV customers to pay fines and costs without going to the local court and then returning to OMV [sic] at a later date to complete the DMV transaction.

[17] As demonstrated above, an order invalidating Va. Code § 46.2-395 and removing Plaintiffs' suspensions from the DMV database would eliminate all vestiges of the constitutional violations, and allow Plaintiffs to drive without fear of being stopped, arrested, charged, convicted, and incarcerated for driving on a suspended license. But even if the Court were correct that "[l]egally, the licenses are still suspended," Plaintiffs have still established redressability. Plaintiffs need not show that the requested relief would provide full redress of ***all*** their injuries. Plaintiffs need only show that the court's decision would "significantly affect" their injuries. *See Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 100–01 (4th Cir. 2011). As the Court avers, an order removing Plaintiffs' unconstitutional license suspensions from the DMV database would "decrease the likelihood Plaintiffs will be charged with driving on suspended licenses." It would also alleviate many other harms suffered by Plaintiffs at Defendant's hands, including avoiding payment of hefty reinstatement fees, avoiding classification as a high-risk driver, and

V. Conclusion

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Court grant their Rule 59 and 60 motions, reinstate the case, deny Defendant's motion to dismiss, and any further relief that the Court deems just and necessary.

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having to retake the driver's exam if their suspensions last more than a year. Plaintiffs therefore have demonstrated that the relief they seek will likely alleviate their injuries.

Date: April 10, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, I electronically filed the foregoing Memorandum in Support of Plaintiffs' Rule 59 and 60 Motions with the Clerk of Court using the CM/ECF System, which will send a notification of such filing to the following CM/ECF participants:

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