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

DAMIAN STINNIE, DEMETRICE MOORE, ROBERT TAYLOR, 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-44

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Nearly one million Virginians are currently without a driver's license because of unpaid court costs and fines. This equates to roughly 1 in 6 drivers in the Commonwealth who cannot legally drive to work, medical appointments, the grocery store, or anywhere else. Plaintiffs Damian Stinnie, Demetrice Moore, Robert Taylor, and Neil Russo represent a class of persons whose licenses were suspended by Defendant automatically—without notice, without a hearing, and without consideration of their inability to pay—when they failed to meet their payment deadlines. These Plaintiffs, and thousands of others like them, lost their licenses for the simple reason that they could not afford the costs and fines imposed on them.[1] They allege that punishing them for their poverty offends the Fourteenth Amendment guarantees of due process and equal protection under the law.

The Virginia license-for-payment scheme violates the Constitution in at least five ways. First, it violates due process and fundamental fairness by setting up a justice system that punishes those who owe money to the state for sheer inability to pay. Second, it strips Plaintiffs of a constitutionally protected property interest—their driver's licenses—without the guaranteed safeguards of notice and a hearing. Third, it violates equal protection by treating those who are *willing but unable* to pay more harshly than those who are willing and able to pay, when the only difference between them is the

[1] Defendant characterizes Plaintiffs as "unable or unwilling to meet the financial obligations imposed upon them." Defendant's Memorandum in Support of Motion to Dismiss, ECF No. 10 ("Mot.") at 1. To the contrary, Plaintiffs represent a class of persons ***willing but unable*** to pay the court debt that has been imposed upon them. Compl. ¶ 44. One of Plaintiffs' major contentions is that they are unfairly and unconstitutionally punished as though they were *unwilling* to pay, rather than *unable* to pay. Defendant's brief repeats—and underscores—the Commonwealth's indifference to this distinction.

amount of money they have. Fourth, suspending licenses for court debt fails even the most minimum constitutional standards because it is not rationally related to legitimate state interests—indeed, by siphoning away law enforcement resources and preventing debtors from earning a living, it *undermines* the state's asserted interests in advancing highway safety and prompting repayment. Finally, the license-for-payment scheme subjects Plaintiffs to harsher collection practices than those for civil debtors, in violation of equal protection.

Defendant argues that each of these allegations should be dismissed. In doing so, Defendant replicates the indifference to due process and equal protection embodied in the license-for-payment scheme. As Defendant acknowledges, a driver's license is a constitutionally protected property interest. Defendant's Memorandum in Support of Motion to Dismiss, ECF No. 10 ("Mot.") at 31. Deprivation of such an interest requires notice and a hearing. There is no exception for license suspensions for failure to pay court debt. Yet Defendant routinely and automatically suspends driver's licenses for unpaid debt, with no notice or hearing. This is in flagrant violation of due process.

The Supreme Court has held that states may only punish willful non-compliance with a court order to pay monetary penalties, and that schemes punishing people who are *unable* to pay violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Bearden v. Georgia*, 461 U.S. 660, 668 (1983). The Virginia license-for-payment system is just such a scheme. By its own terms, Virginia law is indifferent to the crucial distinction between "failure" and "refusal" to pay. Deprivation occurs automatically upon a driver's "fail[ure] or refus[al]" to pay court debt. Va. Code § 46.2-395(B).

Defendant's procedural claims are unavailing. Their common theme is to attempt to recast this Complaint as an attack on court procedures and the court orders imposing fines and costs. That is not the Complaint Plaintiffs filed. The Plaintiffs are not challenging their convictions, sentences, or the court's imposition of fines and costs. They are not challenging the courts' or clerks' authority. They are simply asking this Court to order Defendant to stop engaging in an unconstitutional practice—the automatic suspension of driver's licenses without notice, without a hearing, and without regard for inability to pay.

To the extent that this Court wishes to consider court procedures at the time of sentencing—which in no way resolve the constitutional deficiencies identified by the Plaintiffs—they do not improve the picture. The ugly truth is that, in practice, debtors do not have the opportunities Defendant claims they do. Indeed, as Plaintiffs allege, debtors are not informed about the availability of installment or deferred payment plans; such plans are rarely approved and, when available, are often one-size-fits-all and do not take into account ability to pay. Alternative penalties such as community service are almost unheard of and are virtually never presented to debtors as a repayment option.

Most importantly, Plaintiffs allege the incontrovertible fact that nearly one million Virginia drivers currently have their licenses suspended for court debt. That fact alone refutes Defendant's suggestion that drivers simply do not lose their license because of inability to pay. Viewed in the light most favorable to the Plaintiffs, the Complaint contains more than enough facts demonstrating that Virginia's automatic license-for-payment system exposes hundreds of thousands of people to loss of license, increased debt, and potential incarceration for driving while suspended without adequately

safeguarding their rights under the Fourteenth Amendment to avoid being punished for their poverty.

STATEMENT OF FACTS

The facts are as set forth in the Complaint. To state them briefly, Plaintiffs Damian Stinnie, Demetrice Moore, Robert Taylor, and Neil Russo are indigent Virginia residents whose driver's licenses were automatically and indefinitely suspended by Defendant for failure to pay court costs and fines that they could not afford.

Under Va. Code § 46.2-395(B), license suspension by the Department of Motor Vehicles ("DMV") is automatic and mandatory for "failure or refusal" to pay within the specified period (within 30 days of conviction or according to the terms of any court-ordered payment plan).[2]

Suspension occurs automatically, without a hearing and without any inquiry into the reasons for nonpayment or the debtor's financial circumstances. The court transmits a record of nonpayment to the DMV electronically via the Court Automated Interface System (CAIS) or manually via an amended abstract of conviction. *See* Compl. ¶ 286. For individuals who owe in courts using the CAIS, the system defaults to suspending the license whenever a payment is due and no payment is entered. *See* Compl. ¶ 287. In other words, the court clerk must enter payment before the due date in order to prevent the system from telling DMV to suspend the individual's license. *See* Compl. ¶ 288.

[2] Defendant correctly points out that, under Va. Code § 46.2-395, it is the court that issues the order of suspension. As discussed *infra*, however, Plaintiffs have alleged (Compl. ¶¶ 286-89) that the "order of suspension" is nothing more than a transmittal of a record of non-payment and that it is the Defendant who actually suspends the license, which only he has the authority to do under § 46.2-200.

When the suspension is "received" from the court, the DMV employee follows data entry protocols to issue the order of suspension. *See* Compl. ¶ 289. Virginia law does not require the DMV to give any notice prior to suspending a person's license for nonpayment. *See* Va. Code § 46.2-395. The information that may or may not be provided at the time of trial is generic and prospective. *See* Compl. ¶ 292. It does not advise the defendant of a pending suspension of his or her driver's license for nonpayment of court debt, or the right to have indigency or the reasons for nonpayment considered in determining whether or not his or her license should be suspended for nonpayment; under current statutory law, these rights do not exist. *See* Compl. ¶ 293. Defendant does not conduct a review of a person's financial condition prior to—or indeed at any point related to—suspending a person's license for failure to pay, or otherwise inquire as to the reasons for the default. *See* Compl. ¶ 294.

Under Va. Code § 46.2-395, Defendant will not reinstate the Plaintiffs' licenses unless they satisfy all their court debt in all jurisdictions or they obtain payment plans from each court to which they are indebted. Reinstatement of a suspended license also requires an additional reinstatement fee of at least $145 payable to the DMV. Depending on the length of the suspension, the driver might have to retake the driver's exam and pay any associated fees. *See* Compl. ¶¶ 296-98.

While Va. Code § 46.2-395(E) allows some debtors to obtain a restricted license for traveling to and from work or for other limited purposes, this process is cumbersome and not widely available. First, it requires that the debtor seek and receive permission from every court to which money is owed. Second, a restricted license is only valid for six months, making it nearly impossible for those who owe in multiple jurisdictions to

qualify by stringing together enough overlapping periods of approval from each court. Third, a restricted license is not available to those who are unemployed, including job-seekers, people whose disabilities prevent them from working, and people who are home caring for young children. *See* Compl. ¶¶ 299-301.

While Va. Code § 19.2-354 addresses installment or deferred payment plans for court debt, as well as possible alternatives such as community service, these options are not consistently available and do not take ability to pay into account. Va. Code § 19.2-354(C) states that the court "shall establish" a community service program, but it does not require the court to actually give anyone the opportunity to participate in it ("may provide an option"). Indeed, Plaintiffs allege that debtors are rarely informed of or offered community service as a payment alternative. *See* Compl. ¶¶ 315-319.

Meanwhile, nothing in Va. Code § 19.2-354 requires that debtors be informed of installment and deferred payment plans, and they often are not. According to Virginia's Auditor of Public Accounts, from 2008 to 2012, 55% of all cases resulted in timely payment without a payment plan, while 4% resulted in a payment plan. Thus 41% of all cases resulted in default—and automatic license suspension—without a payment plan. *See* Compl. ¶¶ 310-11. Also, payment plans under Va. Code § 19.2-354, where offered, often do not take into account the debtor's ability to pay. *See* Compl. ¶¶ 303-308.

Thus, for example, the Plaintiffs in this case are not able to enter into or maintain payment plans with each court they owe because they cannot afford the one-size-fits-all terms that do not take into account their individual financial circumstances. Plaintiffs were not offered community service or any other alternatives that would enable them to

keep or reinstate their licenses, and they are not eligible for restricted licenses. *See* Compl. ¶¶ 42, 118, 139-40, 172-73, 192, 201, 255.

Because of the suspension of licenses under Va. Code § 46.2-395(B), hundreds of thousands of Virginians have lost their licenses simply because they lack the financial means to pay.[3] This deprives them of reliable, lawful transportation necessary to get to and from work, take children to school, keep medical appointments, care for ill or disabled family members, and, paradoxically, to meet their financial obligations to the courts. *See, e.g.*, Compl. ¶¶ 31, 37, 157, 196, 212, 256-58, 327-28, 336-41, 347, 355-56.

Virginia's license-for-payment scheme violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Plaintiffs filed suit under 42 U.S.C. § 1983 on behalf of themselves and others similarly situated. They seek injunctive and declaratory relief against Defendant Richard D. Holcomb in his official capacity for his actions in suspending their licenses pursuant to Va. Code § 46.2-395(B).

STANDARDS OF REVIEW

Rule 12(b)(1): Dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) may occur "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). While Plaintiffs bear the burden of proof, a court must accept their factual allegations as true and draw all reasonable inferences in their favor. *Khoury v. Meserve*, 268 F. Supp. 2d 600, 606 (D. Md. 2003).

[3] The DMV recently estimated that around 914,450 Virginians currently had their licenses suspended for court debt. *See* Compl. ¶¶ 327, 377. Paragraph 33 of the Complaint mistakenly put the number at "more than 940,000," and Plaintiffs herewith retract this error.

Rule 12(b)(6): A motion to dismiss under Rule 12(b)(6) should only be granted if the Complaint does not "contain sufficient factual matter, accepted as true," to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court must accept the allegations of the Complaint as true and construe them in the light most favorable to the Plaintiffs. *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 109 (1979).

Rule 12(b)(7): Rule 12(b)(7) permits dismissal for failure to join a party. "To determine whether a party should be joined, Rule 19 of the Federal Rules of Civil Procedure sets forth a two-step inquiry, examining: (1) whether the party is 'necessary' to the action under Rule 19(a); and (2) whether the party is 'indispensable' under Rule 19(b). . . . The burden of proof rests on the party raising the defense." *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005).

ARGUMENT

I. The Complaint is Procedurally Proper

A. The DMV Commissioner Is the Only Defendant Who Can Provide the Relief That Plaintiffs Seek

Despite his suggestions to the contrary, the DMV Commissioner is the proper defendant in this case.

Defendant argues that, because he cannot "refuse to carry out" the suspension orders mandated by Va. Code § 46.2-395, he is unable to provide Plaintiffs with the injunctive relief they seek. Mot. at 14-17. Yet, state officials—including local courts and their clerks—*never* have authority to defy the commands of a statute. This so-called lack of authority is irrelevant. When the constitutionality of a state statute is challenged in federal court, it is the state official's *enforcement* of the statute that matters for purposes

of determining the proper defendants. *See S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008). A state official simply must have "'some connection with the enforcement of the [challenged] act'" to be a proper party to the suit. *Lytle v. Griffith*, 240 F.3d 404, 409 (4th Cir. 2001) (quoting *Ex Parte Young*, 209 U.S. 153, 157 (1908)).

Here, Plaintiffs' Complaint sets forth numerous ways in which Defendant is connected to the enforcement of Va. Code § 46.2-395. *See, e.g.*, Compl. ¶¶ 289-94 (suspending licenses without inquiry into ability to pay), ¶ 297 (imposing license reinstatement fees). The Defendant himself admits to "carry[ing] out" the license-for-payment scheme by "implement[ing] the suspension orders." *See* Mot. at 14, 17. Indeed, his main argument is that he cannot refuse to do so. *Id.* at 14.

Accordingly, the DMV's act in suspending a license is the "immediate cause" of Plaintiffs' injury, and thus the Commissioner is a proper defendant to a constitutional challenge to the validity of the driver's license suspension where the plaintiff is seeking prospective relief. *See Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980) (allowing case to proceed against sheriff for enforcing garnishment order because "effect" of sheriff's exercise of his duty was to violate plaintiff's rights); *Chaloux v. Killeen*, 886 F.2d 247, 251-52 (9th Cir. 1989) (same); *see also Haddad v. California*, 64 F. Supp. 2d 930, 936-37 (C.D. Cal. 1999) (allowing injunctive and declaratory relief claim against police officer who sought to enforce allegedly unconstitutional court order). This conclusion is not altered by the fact that the DMV's duty to suspend a license upon notice from the court is entirely ministerial. *Finberg*, 634 F.2d at 54 (noting that "courts often have allowed suits to enjoin the performance of ministerial duties in connection with allegedly unconstitutional laws" and citing cases); *see also id.* (holding that defendant relying on

authority conferred by challenged procedures "may not disclaim interest in the constitutionality of the procedures").

Defendant attempts to downplay his enforcement responsibilities by focusing on the duties of non-parties—particularly courts and their clerks. *See* Mot. at 15-17. Yet Plaintiffs' Complaint does not challenge the courts' imposition of fines or costs, or their decisions to authorize restricted licenses. Nor do Plaintiffs take issue with the courts' authority to develop payment plans or community service schemes, though Plaintiffs do allege that Defendant is not entitled to rely on alternatives that do not actually exist and would not, in any case, cure the constitutional infirmity at the heart of Plaintiffs' case. Rather, Plaintiffs challenge as unconstitutional Va. Code § 46.2-395's automatic and mandatory suspension of driver's licenses. *See, e.g.*, Compl. ¶¶ 4, 29, 403, 405, 418.

Under Virginia law, the DMV is the sole agency charged with administering the state's motor vehicle license program. *See* Va. Code § 46.2-200. Such administration expressly includes the issuance, suspension, and revocation of driver's licenses. *Id.* ("The Department [of Motor Vehicles] shall be responsible for the … issuance, suspension, and revocation of driver's licenses."). The challenged statute itself refers to the transmission of payment records to the DMV, presumably so that the DMV can execute the suspensions. *See* Va. Code § 46.2-395(C) (discussing transmission of court records to DMV for execution of license suspensions for failure to pay). The statute also makes clear that license reinstatement fees must be paid directly to the DMV, and that the "Commissioner shall return the license" to any person who pays the fees assessed against him. § 46.2-395(B), (D). Likewise, the DMV's public website states that, as alleged by Plaintiffs, it is the DMV that actually reinstates driver's licenses. *See* Compl. ¶¶ 40, 43,

240; Virginia Department of Motor Vehicles, Reinstating Driving Privileges, https://www.dmv.virginia.gov/drivers/#reinstate.asp.

Accordingly, if this Court agrees that Va. Code § 46.2-395 is unconstitutional, Defendant, as Commissioner of the DMV, is the only person who can provide Plaintiffs with their requested relief—prohibition of the unlawful automatic suspension of driver's licenses and reinstatement of their licenses. *See* Compl. ¶ Requested Relief (d), (e).

B. The DMV Commissioner Is Not Entitled to Eleventh Amendment Immunity

The DMV Commissioner also is not entitled to Eleventh Amendment immunity. Defendant yet again focuses on unchallenged actions of courts and their clerks (Mot. 22), while ignoring the gravamen of Plaintiffs' Complaint—Va. Code § 46.2-395's automatic suspension of driver's licenses. As the leader of the sole agency responsible for the administration of motor vehicle licenses and the "issuance, suspension, and revocation of driver's licenses," Defendant undoubtedly possesses sufficient connections to the contested statute to prevent immunity. *See* Va. Code § 46.2-200.

In *Ex Parte Young*—the seminal decision regarding suits to restrain the administration of laws alleged to be unconstitutional—the Supreme Court held that a state official is properly named as a defendant when the official "by virtue of his office has some connection with the enforcement of the act." 209 U.S. 123, 157 (1908); *see also Limehouse*, 549 F.3d at 332. The official must have a "special relation" to the challenged statute, as opposed to "general authority to enforce the laws of the state." *Id.* at 333. However, the official need not be the primary authority to 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).

For example, in *Summers v. Adams*, religious leaders sued South Carolina's Director of the Department of Corrections ("DOC"), challenging the state's "I Believe" Act, which authorized the DMV to issue religiously themed license plates. 669 F. Supp. 2d 637 (D.S.C. 2009). The DOC Director argued that the DOC's duty to manufacture plates ordered by the DMV was insufficient to make him a proper party under *Ex Parte Young*. *Id.* at 653-54. The federal court disagreed, holding that the Director's involvement with the execution of the challenged law—as the leader of the only agency actually manufacturing the contested license plates—created a sufficient relationship with the "I Believe" Act to support naming him as a defendant. *Id.* at 655. The court reached this conclusion even though, unlike here, the challenged statute did not mention the DOC.

Similarly, in *Finberg v. Sullivan*, the plaintiff sued the county sheriff and clerk of court, seeking a declaratory judgment that Pennsylvania's post-judgment garnishment procedures violated her due process rights. 634 F.2d 50. The sheriff and clerk argued that they were not the proper defendants, since other state officials were more closely connected to the post-judgment garnishment procedures and thus could defend the constitutionality of such procedures more rigorously. *Id.* at 53. The appellate court disagreed, finding that the clerk and sheriff's respective duties of issuing the writ of execution and serving it on the garnishee were sufficient connections under *Ex Parte Young*. *Id.* at 54. Specifically, the court stated that serving the writ of execution was "the immediate cause of the attachment and freezing of [the plaintiff]'s bank accounts" and if "the rules that [the sheriff and clerk] were executing were unconstitutional, their actions caused an injury to [the plaintiff]'s legal rights." *Id.*; *see also Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007) (holding that defendant state

officials were properly named because they "clearly have assisted or currently assist in giving effect to the [challenged] law").

Here, the DMV Commissioner's connections to the enforcement of Va. Code § 46.2-395 are just as strong as—perhaps even stronger than—the defendants' connections to the statutes in *Summers* and *Finberg*. As discussed, Va. Code § 46.2-395 mandates the automatic suspension of driver's licenses, and it is the DMV (and the Commissioner as the head of the agency) that is statutorily responsible for such action. *See supra* Part I.A. While courts and/or their clerks issue ministerial "suspension orders," it is the DMV that by Defendant's own admission "implements [such] order[s]." Mot. at 17. Implementation of the orders alone is sufficient to satisfy the *Ex Parte Young* standard. *See Summers*, 669 F. Supp. 2d at 655; *Sabo v. Casey*, 757 F. Supp. 587, 591 (E.D. Pa. 1991) ("The inquiry is not on the nature of an official's duties but … the effect of the official's performance of his duties on the plaintiff's rights."). When Defendant executes suspensions, he clearly "assist[s] in giving effect to" and has "a special relation" with the challenged statute. *Limehouse*, 549 F.3d at 333; *Wagnon*, 476 F.3d at 828. Further, the DMV's execution of the license suspensions is an "immediate cause" of Plaintiffs' injuries—the loss of their licenses—and enjoining Defendant from taking such action clearly would provide redress for Plaintiffs' claims.

Consequently, Defendant cannot avail himself of immunity under the Eleventh Amendment.

C. Court Clerks Are Not Necessary and Indispensable Parties

Defendant's argument that court clerks are necessary and indispensable parties to the case, who cannot be joined, is without merit. The issue of joinder is not strictly jurisdictional but rather involves whether the interest of an absent party requires that

party's participation. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 122 (1968); *Finberg*, 634 F.2d at 55. "Courts are loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result." *Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 441 (4th Cir. 1999). Moreover, "[t]he burden of proof rests on the party raising the defense." *Wood*, 429 F.3d at 92. Defendant has failed to prove that court clerks are necessary, let alone indispensable, to this action.

First, Defendant fails to show how court clerks are necessary parties under Fed. R. Civ. P. 19(a)(1)(A) or (B). Under Rule 19(a)(1)(A), a necessary party is someone in whose absence "the court cannot accord complete relief among existing parties." Here, the clerks' role is unrelated to Plaintiffs' requested relief, namely enjoining the Defendant from suspending driver's licenses automatically under Va. Code § 46.2-395 and ordering Defendant to reinstate suspended driver's licenses without a fee. Compl. ¶¶ Requested Relief (d), (e). *See Finberg*, 634 F.2d at 54-55 (holding that state Supreme Court justices were not necessary parties because they were not needed to afford declaratory and injunctive relief against unconstitutional post-judgment garnishment rules).

Under Rule 19(a)(1)(B), a necessary party is someone who claims an interest in the action such that "disposing of the action in the person's absence" may impede his or her ability to protect it, or "leave an existing party subject to a substantial risk" of multiple or inconsistent obligations. Defendant has not articulated an "interest" that court clerks need to defend, nor has he claimed that there is a risk of incurring multiple or inconsistent obligations without the clerks' joinder to the case.

Defendant argues that court clerks are "necessary" parties under Rule 19 because they are tasked under the challenged statute with "providing notice of a license suspension" and "establishing individual payment plans, including community service options, based on ability to pay." Mot. at 18-19. At the outset, it is important to note that Defendant misstates the law in several important ways. First, the court's duty to order payment in deferred or installment plans is triggered when the defendant is "unable to make payment" within thirty days of sentencing; however, nowhere does Va. Code § 19.2-354—or any other statutory provision—require that such payment plans be based on ability to pay. Indeed, Plaintiffs allege that they rarely take into account a defendant's financial circumstances. *See* Compl. ¶¶ 303-308. Similarly, Va. Code § 19.2-354 requires the court (not the clerk) to establish a program of community service, but explicitly does not require the court (or the clerk) to provide a community service option to anyone. Indeed, Plaintiffs allege that community service is rarely offered as an alternative. *See* Compl. at ¶¶ 315-317. Finally, clerks do not provide defendants "notice of a license suspension." Mot. at 18-19. At most, they are charged with providing generic information about the possibility of a future suspension. Va. Code § 46.2-395.

Plaintiffs have not asked this Court to "adopt a uniform scheme across all courts in the state to impose fines and costs …" Mot. at 21. Plaintiffs do not ask this Court to revise payment plans, void any sentencing orders, or determine the constitutionality of any fines or costs imposed by the courts or court clerks. The requested relief does not require courts or clerks to do or refrain from doing anything. Plaintiffs simply ask that Defendant cease suspending driver's licenses and reinstate those licenses that were unconstitutionally suspended. *See* Compl. ¶ Requested Relief (d), (e). For all of these

reasons, Defendant has failed to demonstrate that court clerks are "necessary" parties under Rule 19.

Defendant also incorrectly claims that court clerks are *indispensable* parties. Even if this Court were to find that clerks were necessary parties (which Plaintiffs do not concede), determining whether a party is indispensable requires consideration of whether the plaintiff "would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b).

Here, Plaintiffs have no other remedy. Defendant's argument in a nutshell is that court clerks are indispensable parties, but joinder of court clerks is infeasible. Defendant claims that Plaintiffs have an adequate remedy "by challenging, at the time of conviction, the court orders imposing fines and costs." Mot. at 19. Yet Plaintiffs simply do not challenge their sentencing orders, or the costs and fines imposed; therefore, appealing those orders would not afford them the relief they request. Nor could they raise issues concerning the constitutionality of Va. Code § 46.2-395's mandatory and automatic license suspension provisions in such an appeal because their licenses would not have been suspended by the time they note their appeal. Also, in 2000, the Attorney General ruled that defendants may not appeal a clerk's denial of additional time to pay, or a decision regarding deferred or installment payments. Opinion of Attorney General to The Honorable George W. Harris, Jr., Judge, Twenty-Third Judicial District, 00-063 (12/28/00). Thus, if this case is dismissed, the Plaintiffs have no alternative remedy.[4]

[4] Some courts have held that *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) created a public rights carve-out, whereby Rule 19 does not preclude litigation that seeks to enforce "what are essentially public rights, based upon a failure to join indispensable parties." *Nat. Res. Def. Council, Inc. v. Berklund*, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979); *see also Jeffries v. Ga. Residential Fin. Auth.*, 678 F.2d 919, 929 (11th Cir. 1982) (finding action challenging constitutionality of eviction proceedings subject to public right exception).

"[D]ismissal will be ordered ***only*** when the resulting defect cannot be remedied and prejudice or inefficiency will ***certainly*** result." *Owens-Illinois*, 186 F.3d at 441 (emphasis added). Defendant has failed to demonstrate that here.

D. Plaintiffs Challenge Defendant's Automatic Suspension of Their Driver's Licenses, Not the Underlying Convictions

Continuing on his theme of recasting the claims and allegations in the Complaint to exclude his involvement, Defendant contends that the Plaintiffs' claims challenge the underlying state court orders of conviction and thus are barred by the *Rooker-Feldman* doctrine. *Rooker-Feldman* holds that "lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, 546 U.S. 459, 463 (2006) (per curiam); *Thana v. Bd. of License Comm'rs for Charles Cty.*, 827 F.3d 314, 319 (4th Cir. 2016). Thus, the *Rooker-Feldman* doctrine is narrow and focused, confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court 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*"). Essentially, the doctrine is invoked in the limited circumstance where a federal district court is "called upon … to overturn an injurious state-court judgment." *Id.* at 291-92. However, "[i]f a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party …, then there is jurisdiction." *Id.* at 293 (internal alterations and quotations omitted).

The Fourth Circuit has not addressed this exception. If Court were to apply it here, then the case should not be dismissed, and the above Rule 19 analysis would be unnecessary.

Recently, the Fourth Circuit provided a thorough review of the *Rooker-Feldman* doctrine in *Thana*, 827 F.3d 314. In emphasizing the "narrow role" of the doctrine, the Court noted that since the decisions in *Rooker* and *Feldman*, the Supreme Court "has never applied the doctrine to deprive a district court of subject matter jurisdiction" and "since *Exxon*, [the Fourth Circuit] ha[s] never, in a published opinion, held that a district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine." *Thana*, 827 F.3d at 320 (citing *Skinner v. Switzer*, 562 U.S. 521, 531 (2011); *Lance*, 546 U.S. at 464; *Exxon*, 544 U.S. at 287).

In summing up the doctrine, the Court explained that "if a plaintiff in federal court does not seek review of the state court judgment itself but instead 'presents an independent claim, it is not an impediment to the exercise of federal jurisdiction that the same or a related question was earlier aired between the parties in state court.'" *Id.* (quoting *Skinner*, 562 U.S. at 532) (emphasis in original). In addition, "[c]onsistent with this narrow articulation of the *Rooker-Feldman* doctrine, the Supreme Court has also recognized that state administrative and executive actions are not covered by the doctrine." *Id.* (citing *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002) ("[T]he [*Rooker-Feldman*] doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency").

In *Thana*, a restaurant brought a federal action challenging a state agency's revocation of its alcoholic beverage license under the First Amendment. *Id.* at 316. The restaurant had challenged the liquor board's actions through appeals to the lower and intermediate state courts, raising the same constitutional arguments. *Id.* However, the Fourth Circuit held that the federal challenge was not barred by the *Rooker-Feldman*

doctrine because, among other reasons, the restaurant's federal "action was, and is, challenging the ***action of a state administrative agency***, rather than alleging injury caused by a state court judgment." *Id.* at 321 (emphasis added); *see Id.* ("Nowhere in its complaint did [the plaintiff] seek review of the judgment of the Circuit Court for Charles County. Instead, as the district court acknowledged, its claims are premised on injuries allegedly caused by the Board."). In addition, the court held that "because [the plaintiff] challenges state administrative actions, the *Rooker-Feldman* doctrine does not apply as a categorical matter." *Id.* (citing *Exxon*, 544 U.S. at 287; *Verizon Md.*, 535 U.S. at 614 n.3); *see also Jordahl v. Democratic Party.*, 122 F.3d 192, 199 (4th Cir. 1997) ("The *Rooker-Feldman* doctrine only applies to 'adjudications' not 'legislative acts.'").

Here, Plaintiffs' claims fall outside the narrow focus of the *Rooker-Feldman* doctrine. Plaintiffs are not challenging either the underlying orders of conviction or the assessment of costs. Plaintiffs simply challenge the suspension of their licenses with no notice, no hearing, and no determination of their ability to pay. The steps taken (the suspension of the driver's license) and not taken (the failure to provide notice, a hearing, or any pre-deprivation assessment of the ability to pay) by Defendant (the administrative agency) form the basis of this independent claim. Defendant receives a list of defaulted debtors and suspends their licenses without providing any post-default notice or hearing regarding their ability to pay the fines and costs. It is this administrative act that forms the basis of the claims.

Contrary to Defendant's assertion, the decision in *Smalley v. Shapiro & Burson, LLP*, 526 F. App'x 231 (4th Cir. 2013), does not support application of the "narrow" reach of *Rooker-Feldman* to this case. As an initial matter, *Smalley* appears undercut by

the *Thana* Court's remark that no *published* decision by the Fourth Circuit has applied *Rooker-Feldman* since the decision in *Exxon*. *Thana*, 827 F.3d at 320. Therefore, any reliance upon *Smalley* should be limited, if permitted at all. In addition, the injury complained of in *Smalley* was the direct result of the state court judgment, not subsequent conduct collateral to the judgment. *Smalley*, 526 F. App'x. at 238 (holding that "[t]he injur[ies] alleged by [Appellants] in all of these allegations [are] a direct result of the judicial order and fail to assert an 'independent claim'"). In that case, the plaintiffs alleged that the submission of false affidavits to the state court in connection with their home foreclosures along with the imposition of excessive and unearned fees based on those "robo-signing" affidavits, violated their federal rights. *Id.* at 234–35. The Court explained that "permitting [the plaintiffs'] case to go forward would, in essence, hold that the state court judgments which affirmed the legal fees and commissions and held the allegedly false affidavits sufficient to warrant foreclosure was in error." *Id.* at 236. Notably, the Court highlighted the precise distinction that is present in this case, noting that "the state court judgment was the source of [the plaintiffs'] harm, *as no relevant conduct occurred after the judgments were entered*." *Id.* at 237 (emphasis added). By contrast, in this case, the harm results from Defendant's independent act of suspending the driver's license without providing any notice or hearing on the ability to pay; all of these acts and omissions occur after judgments giving rise to court debt are entered.[5] This conduct is the source of Plaintiffs' independent claim.

[5] The fact that the conditions required for suspension occur after conviction and could not be addressed during the state court action is addressed further in regard to Defendant's procedural due process contentions. *See infra* Part II. B.

Defendant also cites to the unreported district court decision in *Mobley v. City of Chesapeake*, Civ. A. No. 2:06CV139, 2006 WL 4738661 (E.D. Va. Aug. 30, 2006), to contend that a challenge to a driver's license suspension is a collateral consequence to the underlying conviction. However, in *Mobley*, the court never discussed the *Rooker-Feldman* doctrine or attempted to apply it to the case. Ironically, the court did hold that the plaintiff's constitutional challenges would not constitute a collateral attack on the underlying conviction, supporting Plaintiffs' position. *Id.* at *7 ("As plaintiff is prohibited from using this forum in an attempt to collaterally attack his drug conviction, he may only argue that the Virginia statute revoking his commercial license violates the U.S. Constitution."). In addition, in *Mobley*, the suspension was automatic upon the finding of conviction—not based on the unrelated and contingent post-judgment failure to pay court fines and costs. Thus, in both *Smalley* and *Mobley*, the alleged injuries arose as a direct result of the state court judgment.

In contrast, the instant case involves independent post-conviction processes and is thus far more like cases where other courts have held *Rooker-Feldman* inapplicable. The Sixth Circuit held that the doctrine did not apply to a class action suit challenging the county public defender's policy of failing to seek indigency hearings on behalf of criminal defendants facing jail time for unpaid fines. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592 (6th Cir. 2007). The court concluded that "[t]he *Rooker-Feldman* doctrine has no bearing on Powers's claims because he does not allege that he was deprived of his constitutional rights by the state-court judgment, but rather by the Public Defender's conduct in failing to ask for an indigency hearing as a prerequisite to his incarceration." *Id.* at 606. *See also Fant v. City of Ferguson*, 107 F. Supp. 3d 1016, 1030

(E.D. Mo. 2015) ("Because Plaintiffs do not complain of injuries caused by the state court judgment, but rather by the post-judgment procedures employed to incarcerate persons who are unable to pay fines, *Rooker-Feldman* is also inapplicable."); *Ray v. Judicial Corr. Servs.*, No. 2:12-CV-02819, 2013 WL 5428360, at *9 (N.D. Ala. Sept. 26, 2013) (holding that *Rooker-Feldman* was inapplicable to the plaintiffs' § 1983 claims against the municipality for jailing indigent persons unable to pay traffic fines because "Plaintiffs' suit does not challenge the merits of the municipal court's decisions," or "call into question any of the bases on which those judgments were reached," but only "challenge[s] the post-judgment probationary program"). Likewise, Plaintiffs challenge the post-judgment treatment of indigent defendants unable to pay fines or costs, not the underlying convictions. As in these other cases, *Rooker-Feldman* does not apply here.

E. Plaintiffs' Claims Are Timely

Plaintiffs' claim for declaratory relief is not barred by the statute of limitations.[6] Defendant's suspension of licenses pursuant to Va. Code § 46.2-395(B) constitutes a continuing constitutional violation, and thus Plaintiffs' challenge is not barred by the statute of limitations. "For decades, the Fourth Circuit has recognized, both within and outside the context of § 1983 litigation, that claims premised upon allegations concerning

[6] In a footnote, Defendant also asserts that Plaintiffs' claims for equitable relief "may" be barred by the doctrine of laches. Mot. at 29 n.161. "Laches imposes on the defendant the ultimate burden of proving '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). Defendant's bare assertion that laches "may" apply hardly discharges this burden. Moreover, laches is inapplicable for reasons similar to those explained in relation to the statute of limitations, *infra*. Plaintiffs can hardly be said to have shown lack of diligence when they are challenging an ongoing and continual constitutional deprivation. It would be nonsensical to claim that the Commonwealth may continue to enforce an unconstitutional statute because it has done so up to this point with impunity. Finally, Defendant has made no claim of prejudice arising from the timing of Plaintiffs' suit. For all of these reasons, laches, even if properly raised, would be inapplicable.

a continuing pattern of unlawful conduct that remains in effect when a lawsuit is filed are not barred by the statute of limitations." *Scott v. Clarke,* 64 F. Supp. 3d 813, 826 (W.D. Va. 2014). Indeed, "the ***continued enforcement of an unconstitutional statute*** cannot be insulated by the statute of limitations." *Virginia Hospital Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989) (emphasis added).

"In general, to establish a continuing violation, the plaintiff must establish that the unconstitutional or illegal act was a fixed and continuing practice. In other words, if the plaintiff can show that an illegal act did not occur just once, but rather in a series of separate acts, and the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation." *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011) (citation and internal quotation marks omitted).

Thus, in *Baliles*, 868 F.2d 653, the Fourth Circuit rejected a statute-of-limitations defense to a § 1983 challenge to Virginia's Medicaid reimbursement procedures. The Commonwealth contended that the two-year statute of limitations began to run when the reimbursement scheme was enacted. *Id.* at 663. The Fourth Circuit rejected this argument and approved the reasoning of the district court, which had concluded that the ongoing practice of reimbursing hospitals under the scheme constituted "an ongoing constitutional violation, and that the statute [of limitations] would not have begun to run until the violation ended." *Id.*

Similarly, in *Scott*, 64 F. Supp. 3d 813, the Court found that plaintiffs had successfully alleged a continuing constitutional violation in claiming that Virginia's provision of medical care to prisoners violated the Eighth Amendment. 64 F. Supp. 3d at

827-28. Where the Plaintiffs "identified a continuing sequence of instances" of substandard care, "reflecting an ongoing pattern of deliberate indifference to serious medical needs," a continuing constitutional violation existed. *Id.* Thus, Plaintiffs' action was not limited to specific incidents occurring within the relevant statute of limitations. *Id.* at 825. Rather, "the examples of alleged sub-standard care set forth in Plaintiffs' pleadings … are offered as corroboration for Plaintiffs' assertion that [Defendant] has engaged in an ongoing pattern and practice of wrongful, unconstitutional acts and omissions"—an ongoing pattern that Plaintiffs were entitled to challenge. *Id.* at 826.

In this case, the ongoing enforcement of Va. Code § 46.2-395(B) creates a continuing constitutional violation. Just as, in *Baliles*, the ongoing reimbursement of hospitals according to the statutory scheme created a continuing constitutional violation, so Defendant's ongoing practice of suspending driver's licenses with no notice, no hearing, and no consideration of ability to pay likewise creates a continuing constitutional violation. As in *Scott*, Plaintiffs offer plentiful corroboration of "an ongoing pattern and practice of wrongful, unconstitutional acts and omissions." 64 F. Supp. 3d at 826. But at issue is not any particular instance of deprivation, but rather the continued enforcement of an unconstitutional statute. As in *Baliles*, "'the continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.'" 868 F.2d at 663 (citation omitted).

In any case, if this Court concludes that the two-year statute of limitations is relevant to Plaintiffs' claims, all four Plaintiffs have had their licenses suspended by Defendant within two years of the filing of the Complaint on July 6, 2016. *See* Compl. ¶¶ 101-03 (Mr. Damian Stinnie); Compl. ¶¶ 152-54 (Ms. Demetrice Moore); Compl. ¶¶

168-79 (Mr. Robert Taylor); Compl. ¶ 251 (Mr. Neil Russo). Their claims are thus timely under any definition.

In arguing that three Plaintiffs' claims are time-barred, Defendant implies that Plaintiffs cannot contest their recent driver's license suspensions because they had earlier suspensions. Mot. at 28-29. Again, Plaintiffs contend that Va. Code § 46.2-395(B) creates a continuing constitutional violation. But if only suspensions within the last two years may be challenged, it would be incredible for the clock to have started running on those suspensions—indeed, on *all* future suspensions—at the time of Plaintiffs' very first ones. On any understanding of the relevant statute of limitations, Plaintiffs' claims are timely.

II. Plaintiffs State Valid Due Process and Equal Protection Claims and Are Entitled to Establish These Claims at Trial

Suspension of a driver's license implicates the Due Process Clause's guarantee that the state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV s. 1. As the Supreme Court has held and the Fourth Circuit has recognized, "[i]t is well settled that a driver's license is a property interest that may not be suspended or revoked without due process." *Plumer v. Maryland*, 915 F.2d 927, 931 (4th Cir. 1990) (citing *Bell v. Burson*, 402 U.S. 535 (1971)). The fact that a driver's license is a protected property interest is sufficient to support Plaintiffs' due process and equal protection claims.

But a driver's license is not only a protected property interest. In modern society, it is essential to the exercise of several fundamental rights. For one, it implicates "the right … to engage in any of the common occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Indeed, as the Supreme Court has recognized, "[o]nce [driver's]

licenses are issued … their continued possession may become ***essential in the pursuit of a livelihood***." *Bell v. Burson*, 402 U.S. 525, 539 (1971) (emphasis added).

In addition, for most Virginians, exercise of "the fundamental right of interstate movement," realistically speaking, requires a driver's license. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). As the Supreme Court of Virginia has said:

> The right of a citizen to travel upon the public highways and to transport his property thereon in the ordinary course of life and business is a common right which he has under his right to enjoy life and liberty, to acquire and possess property, and to pursue happiness and safety. It includes the right in so doing to use the ordinary and usual conveyances of the day; and under the existing modes of travel includes the right … to operate an automobile thereon, for the usual and ordinary purposes of life and business. It is not a mere privilege … which a city may permit or prohibit at will.

Thompson v. Smith, 154 S.E. 579, 583 (Va. 1930).

Finally, for many voters around the Commonwealth, the "fundamental matter" of "the right to exercise the franchise" turns on the ability to drive to the polls. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). Given that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard," it would be sad indeed if access to the vote could effectively be denied by suspending driver's licenses on the same basis. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

Considerations like these compelled Justice Powell to observe, "Serious consequences also may result from convictions not punishable by imprisonment. … Losing one's driver's license is more serious for some individuals than a brief stay in jail." *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) (Powell, J., concurring).

In light of these facts, it is not surprising that the U.S. Supreme Court has held that "[s]uspension of issued licenses thus involves state action that adjudicates important

interests"—plural—"of the licensees." *Bell*, 402 U.S. at 539. It matters not that a driver's license has sometimes been characterized as a "privilege." *Walton v. Commonwealth*, 497 S.E.2d 869, 873 (Va. 1998). The Supreme Court has rejected the distinction in the driver's license context: "relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" *Bell*, 402 U.S. at 539. The fact is that a state seeking to deprive an individual of a driver's license must comport with the requirements of the Fourteenth Amendment. The Commonwealth's license-for-payment scheme fails to do this in several respects, each one sufficient to invalidate the scheme as applied to Plaintiffs, and all of them sufficiently alleged to survive Defendant's motion to dismiss.

A. Plaintiffs Have Properly Alleged Violations of Due Process and Fundamental Fairness

Defendant suggests that this is a rational basis case. Plaintiffs contend that the Commonwealth's license-for-payment scheme fails rational basis review, but they allege more than that. "Fundamental fairness" in the administration of justice is "the touchstone of due process." *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). When a state applies its justice system to its citizens, it must ensure that that system comports with the principles of due process and fundamental fairness. The Supreme Court has repeatedly held that it offends due process and fundamental fairness for the state to penalize people for failing to pay state-imposed fines or costs that they are unable to pay. *See, e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956); *Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

For example, in *Bearden v. Georgia*, the Supreme Court held that "if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it

may not thereafter imprison a person solely because he lacked the resources to pay it." 461 U.S. at 667-68. Thus, when the state in *Bearden* revoked defendant's probation for failure to pay a fine—with no inquiry into whether he was financially capable of paying the fine and no inquiry into alternative means of punishment—the Court found a violation of due process. *Id.* at 668-69. *See also Williams*, 399 U.S. at 241-42 (imprisoning the defendant past the statutory maximum for failure to pay a fine violates due process); *Tate*, 401 U.S. at 398 (converting a fine into a prison sentence for those unable to pay violates due process).

Meanwhile, in *Mayer v. City of Chicago*, the Court held that it violated due process to require an "impecunious medical student" to pay for a court transcript in the context of prosecution for non-felony charges punishable only by fine. 404 U.S. 189, 196-97 (1971). The Court said that it was "arbitrary" and fundamentally unjust for treatment by the justice system to hinge on ability to pay:

> The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. ***A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious***, as when (as was apparently a possibility in this case) the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds.

Id. at 197 (emphasis added). The "practical effects" of the state's penalties are noteworthy, and subjecting citizens to penalties—and their practical effects—simply because they lack the ability to pay is fundamentally unfair and offends due process.

In such cases, the distinction between "willful refusal to pay a fine" and inability to pay is "of critical importance." *Bearden*, 461 U.S. at 668. Where there is willful refusal, the state may impose punishment. "But," the Court said in the context of *Bearden*, "if the probationer has made all reasonable efforts to pay the fine or restitution,

and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." *Id.* at 668-69. The logic of these cases is clear: state penalties should not turn on how much money a person has in her pocketbook.

The Fourth Circuit has recognized this. In *Alexander v. Johnson*, the Court acknowledged that *Bearden* set the standard for penalties for state-imposed debt. 742 F.2d 117 (4th Cir. 1984). The Court held that "[t]he state's initiatives in this area naturally must be ***narrowly drawn*** to avoid … creating discriminating terms of repayment based solely on the defendant's poverty." *Id.* at 123-24 (emphasis added); *see also id.* at 123 n.8, 125 (requiring "narrowly drawn" policy). In defining the standard for a "constitutionally acceptable attorney's fees reimbursement program," the Court said the state "must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required," and that the state may not penalize the debtor "as long as his default is attributable to his poverty, not his contumacy." *Id.* at 124.[7]

Virginia's license-for-payment scheme is *not* narrowly drawn to this standard. Va. Code § 46.2-395(B) requires that a person's driver's license be automatically

[7] Other courts have ruled to similar effect. *See, e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (holding that a fixed bond schedule with no consideration of ability to pay or other alternatives "infringes on both due process and equal protection requirements"); *Walker v. City of Calhoun*, Civ. A. No. 4:15-CV-0170-HLM, 2016 WL 361612, at *11 (N.D. Ga. Jan 28, 2016) (same); *Jones v. City of Clanton*, Civ. A. No. 2:15cv34-MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) (same); *Cooper v. City of Dothan*, Case No. 1:15-CV-425-WKW[WO], 2015 WL 10013003, at *2 (M.D. Ala. June 18, 2015) (same); *United States v. Flowers*, 946 F. Supp. 2d 1295, 1301 (M.D. Ala. 2013) (same for revocation of probation); *State v. Johnson*, 315 P.3d 1090, 1099, *as amended* Mar. 13, 2014, *cert. denied*, 135 S. Ct. 139 (2014) (same for suspension of driver's license); *State, Dep't of Revenue, Child Support Enf't Div. v. Beans*, 965 P.2d 725, 729 (Alaska 1998) (same for suspension of driver's license).

suspended when a person fails to pay fines and costs within the requisite time period (usually 30 days after the traffic or criminal conviction, or after missing a single payment on an installment plan). Suspension occurs automatically, with no inquiry into the individual's ability to pay. Compl. ¶ 285. Because there is no inquiry into ability to pay, there is also no consideration of alternatives other than driver's license suspension. Automatically suspending driver's licenses for outstanding court debt, with no consideration of ability to pay, violates principles of due process and fundamental fairness.

The cases cited by Defendant are inapposite. *City of Milwaukee v. Kilgore*, 532 N.W.2d 690 (Wis. 1995), rejected a challenge to a law suspending licenses for unpaid costs for non-traffic offenses. But Plaintiffs are not mounting a wholesale challenge to the Commonwealth's power to suspend licenses for court debt. Plaintiffs claim that Va. Code § 46.2-395(B) is unconstitutional as applied to defendants unable to pay. Similarly, *In re M.E.G.*, No. 13-01-117-CV, 2002 WL 407802, at *2 (Tex. App. Mar. 14, 2002), appears to have been a challenge to the state's power to revoke driver's licenses for child support arrearages, not a claim about ability to pay.[8]

At issue here is the Commonwealth's own justice system. The machinery of justice must comport with the requirements of due process. The Commonwealth imposes

[8] The child support comparison is inapt for other reasons. First, enforcing payments to minor children involves state interests different from those involved in enforcing fines and costs owed to the Commonwealth itself. Second, child support is a situation in which the obligor's financial means are taken into account in the initial imposition of the obligation. *See, e.g.*, Va. Code § 20-108.2. Even so, punishment for inability to pay in this context might raise constitutional issues. *See State, Dep't of Revenue, Child Support Enf't Div. v. Beans*, 965 P.2d 725, 729 (Alaska 1998) (stating that a driver's license suspension provision "would be unconstitutional as applied if used to revoke the license of an individual incapable of paying the demanded support.").

costs and fines and then punishes people who cannot pay them by indefinitely suspending their driver's licenses. This offends principles of due process and fundamental fairness.

B. Plaintiffs Have Properly Alleged Violations of Procedural Due Process

The U.S. Supreme Court has held driver's licenses are protected property interests and "are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell*, 402 U.S. at 539; *see also Scott v. Williams*, 924 F.2d 56, 58 (4th Cir. 1991) ("[A] driver's license is a property interest protected by the fourteenth amendment and, once issued, a driver's license may not be taken away without affording a licensee procedural due process."); *Plumer*, 915 F.2d at 931.

"The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (internal quotation marks omitted). When suspension of a driver's license is at stake, the state "must afford 'notice and opportunity for hearing.'" *Bell*, 402 U.S. at 542 (citation omitted). Likewise, the Fourth Circuit has recognized that revocation or suspension of a driver's license requires "notice and an opportunity to be heard." *Plumer*, 915 F.2d at 931. Va. Code § 46.2-395 fails to provide either notice or a hearing.

As to notice, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice ***reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action*** and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). Thus, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be

such as one desirous of actually informing [the recipient] might reasonably adopt to accomplish it." *Id.* at 315.

In this case, Plaintiffs received no notice about an impending license suspension; instead, their licenses were suspended automatically upon default. At most, at the time of trial on the underlying traffic or criminal offense, Plaintiffs *might* receive generic information from the clerk indicating that future nonpayment would result in automatic suspension, which is merely a statement of the law. *See* Compl. ¶¶ 275, 278, 291. General language about the possibility of a suspension in the event of a hypothetical future default is not "reasonably calculated … to apprise interested parties of the pendency of the action." *Mullane*, 339 U.S. at 314. Indeed, at that stage there is no action pending of which Plaintiffs could be apprised. Similarly, the requirement of notice is closely related to requirement of a hearing. Not only should notice "apprise interested parties of the pendency of the action," but it also helps "afford them an opportunity to present their objections." *Id.*; *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). It is logically impossible for Plaintiffs to receive notice that is sufficient in this regard, because, as explained below, they are also denied a hearing.

Due process in these circumstances also requires a hearing prior to deprivation. In *Bell v. Burson*, where a driver's license was suspended in order to encourage posting of monetary security, the Supreme Court concluded that "except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford notice and opportunity for hearing appropriate to the nature of the case ***before*** the termination becomes effective." 402 U.S. at 542 (emphasis added; internal quotation marks omitted); *see also Dixon v. Love*, 431 U.S.

105, 114 (1977) (stating that a pre-deprivation hearing is required when the "only purpose" of license suspension is to obtain monetary security); *Zinermon v. Burch,* 494 U.S. 113, 127 (1990) (stating that "the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property.").

In this case, Va. Code § 46.2-395 does not provide for a hearing of any kind. Suspensions are automatic upon default, with no "opportunity to be heard," *Plumer* 915 F.2d at 931. This lack of a hearing is in flagrant violation of the requirements laid down by the Supreme Court in *Bell* and adhered to by the Fourth Circuit.

Plumer v. Maryland, 915 F.2d 927 (4th Cir. 1990), is instructive by comparison. There, the Fourth Circuit upheld a Maryland suspension scheme against a challenge by a plaintiff whose license was suspended after a drunk driving conviction and refusal to take a breathalyzer test. *Id.* at 928. The Court held that due process requires "that a licensee be informed of the evidence on which the agency is relying, and be given a chance to rebut such evidence." *Id. at* 932. The Court concluded that due process was satisfied because:

> [The Motor Vehicle Administration] cannot suspend any license without ***first*** making available a hearing prior to the suspension. Such a hearing is held only after written notice is given to the licensee setting forth the time and place of the hearing, and the factual basis for the suspension action. Finally, the licensee has the right to inspect and copy all evidence, as well as call witnesses and present rebuttal evidence.

Id. (internal citations omitted) (emphasis added).

Here, none of these protections exist. There is no hearing prior to suspension—indeed, none at all. There is no written notice "setting forth the time and place" of the non-existent hearing. *Id.* And the licensee has no rights of inspection and rebuttal, because again there is no hearing. It is true that the Fourth Circuit said that these

procedures "more than satisfy the constitutional requirements." *Id.* But given that Va. Code § 46.2-395 includes *none* of the protections the Court found relevant, it is difficult to imagine how it could meet the minimum requirements of due process.

Although Defendant acknowledges that a driver's license is a protected property right that cannot be taken away without the due process required by the Fourteenth Amendment, Mot. at 31, he ignores *what* due process requires—"notice and an opportunity to be heard." *Plumer*, 915 F.2d at 931. In fact, Defendant declares that *no hearing* is required, eliminating due process altogether. Mot. at 32.[9]

Next, Defendant contends that Plaintiffs had "several opportunities" to be heard, pointing to appeals of their underlying convictions and post-conviction show cause hearings. *Id.* Not only is Defendant improperly attempting to have this Court resolve the merits of the claim at this preliminary stage, but neither of these provides Plaintiffs with an opportunity to be heard ***prior to*** the deprivation of their driver's licenses—indeed, neither addresses the suspension of driver's licenses at all.

First, as to the appeal of underlying convictions, Plaintiffs are not challenging either the underlying convictions or the assessment of fines and costs. They are challenging the automatic suspension of their driver's licenses by Defendant for being unable to pay. Driver's license suspension is not reviewable on appeal of the underlying conviction. The suspension of the driver's license occurs at the same time as, or after, the

[9] Defendant relies upon an unreported, *per curiam* decision to imply that the Fourth Circuit has ruled on the constitutionality of Va. Code § 46.2-395; however, the decision has no analysis of due process and simply states that the statute does not have a hearing provision—not that the Constitution does not require one. If anything, this piece of statutory interpretation confirms Plaintiffs' factual premise: that Va. Code § 46.2-395 does not provide for any kind of hearing. This lack of a hearing violates due process.

deadline to appeal the underlying conviction has passed.[10] A suspension that has not yet occurred—and that certainly could not have occurred at the time of trial—is not and logically could not be grounds for appealing an underlying conviction. Essentially, Defendant is proposing a scheme that would require individuals to appeal their convictions solely to enable them to defend against the hypothetical inability to pay fines and costs and the subsequent suspension of their driver's licenses, all while incurring more fees and costs from the appeal.

Second, the show cause hearing that Defendant references occurs ***after*** a driver's license has been suspended; occurs only upon a motion of the Court or Commonwealth's Attorney; and by its terms does not include consideration of driver's license suspension within its scope. *See* Va. Code § 19.2-358. The individuals are not able to invoke any pre-deprivation hearing on their ability to pay; instead, this procedure provides, at most, a post-deprivation hearing at the whim of the Court addressing only the assessment of fines and costs—not the suspension of their licenses. Thus, none of the procedures Defendant relies upon afford a pre-deprivation hearing as required by the Fourteenth Amendment.

Further, Defendant asserts that the underlying criminal or traffic trials "self-supply any procedural due process required." Mot. at 33. This statement appears to contemplate that the Commonwealth's criminal and traffic trials are geared toward determining whether defendants will at some future time be able to afford any fines and costs that may be imposed after conviction, and thus whether at some future time they may be deprived of their driver's licenses. Of course, these proceedings are instead

[10] In General District Court, where all traffic and misdemeanor violations are handled, appeals must be noted within ten days. Va. Code Ann. § 16.1-132. In circuit court, appeals must be noted within thirty days. Va. Code Ann. § 8.01-675.3

directed at determining the guilt or innocence of the defendant as to the offense in question. They do not provide procedural due process as to the deprivation of the license.

Defendant's reliance on *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 7 (2003), is misplaced. In *Doe*, the plaintiff's placement on the sex offender registry turned on his underlying conviction—"[n]o other fact is relevant to the disclosure of the registrants' information." *Id.* at 7. Here, the suspensions do not "turn on" the underlying convictions, but rather on the failure to pay post-conviction fines and costs because of inability to pay. "Inability to pay" is not a defense to the underlying convictions. Moreover, the failure to pay fines and costs cannot be raised at trial, because it has not occurred yet, and the trial judge certainly cannot resolve whether a hypothetical future default is willful or instead based on inability to pay. Thus, any proceedings occurring in connection with the underlying conviction do not afford any opportunity to be heard on the deprivation of the license.

Because the "opportunities" identified by Defendant are illusory, they do not constitute state court remedies that Plaintiffs must pursue before bringing a procedural due process challenge. Mot. at 34.

As the Fourth Circuit has recognized, procedural due process in the context of the suspension of a driver's license requires "notice and an opportunity to be heard." *Plumer*, 915 F.2d at 931. Here, Plaintiffs have adequately alleged that their protected property interests—their driver's licenses—were taken away without any notice or hearing regarding their ability to pay the court costs and fees. The Court must reject Defendant's attempts to distort the allegations as challenges to the underlying convictions. Plaintiffs do not challenge their underlying convictions or even the

assessment of costs and fines. Instead, they challenge Defendant's acts of indefinitely suspending their licenses upon default without providing any post-default notice or hearing. As such, Defendant's actions deprived Plaintiffs of their constitutional right to due process. Accordingly, Defendant's motion to dismiss on this point must be denied.

C. Plaintiffs Have Properly Alleged Violations of Equal Protection through Punishing Poverty

Defendant's argument that Plaintiffs have failed to allege differential treatment and intentional discrimination misunderstands Plaintiffs' equal protection claim. Mot. at 36. Plaintiffs have successfully alleged differential treatment, and they need not allege intentional discrimination to state a valid claim. In point of fact, however, they have successfully alleged intentional discrimination as well.

1. The license-for-payment scheme fails the requirements of equal justice. The Supreme Court has made clear that penalizing individuals because they are unable to pay state-imposed financial obligations violates the Equal Protection Clause. *See, e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956) (holding unconstitutional the denial of a criminal appeal for inability to pay associated costs); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (same for imprisonment for inability to pay criminal fines and court costs); *Tate v. Short*, 401 U.S. 395, 399 (1971) (same for imprisonment for inability to pay traffic fines); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (same for appeal of non-felony charges punishable by fine); *Bearden v. Georgia*, 461 U.S. 660, 662 (1983) (same for revoking probation for failure to pay fines and restitution).[11]

[11] As apparent from Plaintiffs' arguments, these cases rest on both due process and equal protection. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) ("As we said in *Bearden v. Georgia*, in the Court's *Griffin*-line cases, 'due process and equal protection principles converge.'") (internal citation omitted); *Alexander*, 742 F.2d at 123 n.8 ("Traditional principles of equal protection and due process converge in cases such as this.").

Likewise, the Fourth Circuit has stated that punishing people for inability to pay court debt violates equal protection. In *Alexander v. Johnson,* the Court held that "[t]he state's initiatives in this area naturally must be ***narrowly drawn*** to avoid … creating ***discriminating terms of repayment based solely on the defendant's poverty***." 742 F.2d at 123-24 (emphasis added). See also *United States v. Boyd*, 935 F.2d 1288 (4th Cir. 1991) (holding that punishment is inappropriate "if the default results from a condition beyond [defendant's] control such as poverty.") (citing *Bearden*, 461 U.S. at 668-69 (1983); *United States v. Taylor*, 321 F.2d 339, 341 (4th Cir. 1963)) (unpublished opinion).

Defendant's equal protection analysis ignores the *Alexander* standard of review and disregards these cases altogether. Defendant contends that Plaintiffs have been treated no differently from similarly situated individuals because the relevant comparison is between those who have "complied with the court order" and those who have not. According to Defendant, all people who default are treated similarly, and thus Plaintiffs have no equal protection claim. Mot. at 37-38. But in the controlling cases, as here, the relevant comparison is between those who *can* pay fines and costs and those who *cannot*. *See, e.g.*, *Bearden*, 461 U.S. at 665 (stating that the relevant comparison is between those able and unable to pay). Here, Plaintiffs are willing but unable to pay, and they are treated differently from those who are willing and able. *See, e.g.*, Compl. ¶ 1, 3, 5, 44.

Defendant defends his comparison (those who satisfy courts orders versus those who do not) by arguing that a court's treatment of an individual "is premised only on whether the individual[] pays the fees imposed, not on whether the individual is indigent." Mot. at 38. But the schemes struck down in *Bearden*, *Mayer*, *Tate*, *Williams*,

Griffin, and other similar cases also did not target indigency. To the contrary, each involved a facially neutral scheme, and the Supreme Court nevertheless invalidated all of them under the Equal Protection Clause. In *Williams*, for example, the Court noted that the statutory scheme imposing imprisonment for failure to pay criminal court fines and costs did "not distinguish between defendants on the basis of ability to pay fines." 399 U.S. at 242. Yet while the statute "[o]n its face" extended "an apparently equal opportunity for limiting confinement … by satisfying a money judgment," the Court found that the choice was "illusory" for any defendant without funds. *Id.* In operation, the facially neutral statute worked "an invidious discrimination" on the petitioner solely because of his inability to pay. *Id.* The same is true here: Plaintiffs' "equal opportunity" to avoid license suspension under the statute is illusory.

Defendant essentially claims that a violation of the Equal Protection Clause requires purposeful discrimination. Mot. at 36. While some equal protection doctrine requires such a showing, the *Griffin* line of cases does not. In fact, the Supreme Court has flatly rejected the claim that later cases requiring discriminatory intent (such as *Washington v. Davis*, 426 U.S. 229 (1976)) have had any impact whatsoever on the *Griffin* line of cases. *M.L.B.*, 519 U.S. at 126-27. Stating that "*Washington v. Davis* … does not have the sweeping effect respondents attribute to it," the Court reiterated the concern of *Williams* and *Griffin* that the justice system not be "grossly discriminatory in its operation." *Id.* (citing *Griffin*, 351 U.S. at 17, n.11). The Court noted that *Bearden*, a post-*Washington v. Davis* case, "adher[ed] in 1983 to *Griffin*'s principle of equal justice." *Id.* at 127 (citing *Bearden*, 461 U.S. at 664–665) (internal quotation marks omitted). The Court thus roundly rejected any discriminatory intent requirement in the equal justice

arena: "this Court has not so conceived the meaning and effect of our 1976 'disproportionate impact' precedent." *Id.* *See also Alexander*, 742 F.2d at 125 (analyzing whether the state scheme is "narrowly drawn to avoid unfairness and discriminatory ***effects***") (emphasis added).

Plaintiffs' challenge to the Virginia justice system is controlled by *Alexander* and related Supreme Court cases. Under these precedents, Plaintiffs have alleged more than sufficient facts to overcome a motion to dismiss.

2. **Plaintiffs have alleged sufficient facts to state a claim of discriminatory intent.** For the aforesaid reasons, a showing of discriminatory intent is not necessary to Plaintiffs' equal protection claim. To the extent that this Court disagrees, however, Plaintiffs have also successfully alleged discriminatory intent.

Legislative history and historical background are relevant considerations to "whether discriminatory intent motivates a facially neutral law." *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016). Here, Plaintiffs allege that the historical background of Virginia's license-for-payment scheme shows that the Commonwealth enacted the current statute knowing that many defendants were unable to pay their debt and nonetheless imposing additional punishment on them for failure to do so. Specifically, Plaintiffs allege that:

- In 1987, an interagency team recommended driver's license suspension as a means to improve collection of court debt, unless the defendant is "truly indigent and/or unable to make necessary payments" (Compl. ¶ 321);
- In 1993, the Office of the Executive Secretary of the Supreme Court of Virginia recommended to the General Assembly in a report that it expand "the use of driver's license suspension for failure to pay outstanding fines and costs related to criminal convictions" (Compl. ¶ 322);
- The report also found that many offenders "[we]re poor and without obvious means to satisfy court judgments" (Compl. ¶ 323);

- In 1994, the General Assembly expanded the use of driver's license suspension to all kinds of court debt with no carve-out for indigents (Compl. ¶ 324); and

- In fact, the legislation ***removed*** language from the existing Virginia Code requiring investigation into the reasons for nonpayment and permitting collection only if the investigation suggested that the debtor might be able to pay. (Compl. ¶ 325).

In addition to this historical background, Plaintiffs allege disparate impact, as Defendant acknowledges at the outset of his brief. *See* Mot. at 3. The Fourth Circuit has held that the disproportionate impact of an action is relevant to whether discriminatory intent exists. *McCrory*, 831 F.3d at 220-21. Accordingly, Plaintiffs have sufficiently alleged discriminatory intent.

For all of these reasons, Plaintiffs have stated a valid claim under the Equal Protection Clause.

D. Plaintiffs Have Properly Alleged that the Commonwealth's License-for-Payment Scheme Fails Rational Basis Review

Plaintiffs contend that the license-for-payment scheme embeds inequality and lack of due process into the Commonwealth's justice system. Because it punishes people for their inability to pay, it violates equal protection and due process. Decisions applying deferential rational basis review are no more relevant to the current case than they were to *Gideon v. Wainwright*, 372 U.S. 335 (1963), or to the numerous cases cited above addressing the fundamental fairness and equality of the state's own system of justice.

Nevertheless, the Commonwealth's license-for-payment scheme cannot survive even rational basis review. At a minimum, due process requires that a challenged law "be rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). Meanwhile, rational basis analysis in the equal protection context requires "a rational relationship between the disparity of treatment and some

legitimate governmental purpose." *King v. Rubenstein*, 825 F.3d 206, 221 (4th Cir. 2016). Va. Code § 46.2-395(B) fails these standards, because taking away an individual's driver's license because he or she is unable to pay court debt is, at bottom, flatly irrational. There is simply not a rational relation between the ability to pay court debt and Plaintiffs' constitutionally protected property interests in their driver's licenses and the attendant liberty interests in being able to drive. At the least, Plaintiffs are entitled to establish the irrationality of this scheme at trial.

Defendant offers two state interests in support of Va. Code § 46.2-395(B): (1) promoting highway safety and (2) enforcing court orders. Mot. at 39. The Complaint alleges sufficient facts to discredit both. First, suspensions under Va. Code § 46.2-395(B) are wholly unrelated to the Commonwealth's interest in promoting highway safety. Defendant suspends driver's licenses not as a result of traffic offenses, but ***as a result of unpaid court debt***. Even in cases where the underlying conviction was traffic-related, the suspension arises not from that conviction but from subsequent default.[12] And of course, a person with a perfect driving record can have his license suspended for unpaid debt for a non-traffic conviction, while anyone who pays can continue to drive, regardless of his or her driving record.[13] Promoting highway safety is thus not a credible

[12] Thus Defendant's argument that three Plaintiffs' licenses were suspended due to traffic-related convictions is incorrect. Mot. at 39. While these plaintiffs have been convicted of traffic violations, in every case, Plaintiff's license was suspended because he or she could not pay the costs assessed after conviction; suspension did not occur *because* of conviction.

[13] Indeed, suspensions for court debt are wholly out of proportion with the penalties imposed for traffic offenses. A person convicted of reckless driving risks no more than a six-month suspension of his or her license. *See* Va. Code § 46.2-393. If a driver kills someone as a result of reckless driving, his or her license may be suspended for up to twelve months. *See* Va. Code § 46.2-396. In contrast, failure to pay court costs and fines requires the Defendant to suspend a debtor's license indefinitely, for as long as he or she is in arrears by any amount up to ten years for General District Court and twenty years for Circuit Court. Va. Code § 46.2-395. It is common for such suspensions to last for years. Such a system is plainly unreasonable.

interest in this case, let alone one rationally advanced by the statute's operation.[14] Defendant's "highway safety" interest cannot possibly support a Rule 12(b)(6) dismissal.

Second, Defendant contends that the DMV "revokes driver's licenses in an effort to compel future compliance with a court order." Mot. at 36. As applied to Plaintiffs and others unable to pay, Va. Code § 46.2-395(B) has no rational relation to this objective. For low-income debtors, driver's license suspension does not operate as an incentive to pay. Compl. ¶ 366. The whole problem is that Plaintiffs are willing but unable to pay. Compl. ¶ 44. They fail to meet their obligations because they are choosing between paying the court and paying rent, buying medications, putting food on the table, and meeting other necessary expenses. Compl. ¶ 335. Driver's license suspension does not make those other obligations any less urgent or non-negotiable, and therefore it does not make payment likely. *See Bearden*, 461 U.S. at 670-71 ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming.").

Plaintiffs have thus sufficiently alleged that Va. Code § 46.2-395(B) is not rationally related to a legitimate state interest. Plaintiffs have, in fact, alleged more: that Va. Code § 46.2-395(B) actually *undermines* the state's stated objectives and is fundamentally perverse. *See* Compl. ¶ 336-48. First, driver's license suspension *inhibits* ability to pay. The loss of a license often means the loss of reliable transportation to and from work. This can lead to job loss. *See, e.g.*, Compl. ¶ 157. For those who are

[14] Perhaps for this reason, Defendant at times does not rely on highway safety at all and instead attempts to justify the law entirely on the basis of enforcement of court orders. *See* Mot. at 36. This provides additional support for Plaintiffs' allegation that the motivation for expanding the driver's license suspension scheme was not highway safety but "improving collection of court debt." Compl. ¶ 321.

unemployed or who lose their job, the inability to drive makes the job search exponentially harder. In many parts of the Commonwealth, public transportation options are limited or non-existent. Compl. ¶¶ 135, 337. All of this makes it less likely—not more likely—that the debtor will be able to pay the court.

Second, the license-for-payment scheme is counterproductive to the goal of successful reentry after incarceration. *See* Compl. ¶ 432. For people returning to their communities from jails and prisons, finding a job is a crucial element to successful reentry. But the challenges of finding work and getting reestablished put those individuals at high risk for not meeting court debt obligations. When their licenses are suspended for court debt, their ability to obtain or maintain stable employment is greatly reduced, and with it their chances of successful reentry. Compl. ¶ 436. This cycle undermines the Commonwealth's own reentry, rehabilitation, and safety objectives.

Finally, suspending driver's licenses for nonpayment of court debt actually makes highways less safe. Compl. ¶ 432. The purpose of licensing drivers is to promote safety on Virginia's roads and highways. Compl. ¶ 434. As alleged, the American Association of Motor Vehicles (AAMVA) has concluded that enforcing debt-related suspensions strains state budgets and diverts limited law enforcement resources away from dangerous drivers. The AAMVA has thus concluded that suspension of driver's licenses for non-traffic related reasons actually ***increases*** the threat to public safety and has recommended the repeal of such suspension policies. *See* Compl. ¶¶ 349-364.

Defendant suggests that Plaintiffs' argument is "persuasive" but is, "at its heart, a policy argument." Mot. 40. But the suitability of state policies is precisely what is at

issue in rational basis analysis. Va. Code § 46.2-395(B) is not rationally related to the Commonwealth's objectives. It in fact undermines them.

E. Plaintiffs Have Properly Alleged Violations of Equal Protection through Extraordinary Collection Efforts

Plaintiffs sufficiently allege a claim for violation of the Equal Protection Clause with respect to the Commonwealth's extraordinary collection efforts. With respect to debt collection, the Equal Protection Clause ensures two things: (1) that debtors to the state are not treated differently from civil debtors and (2) that they are afforded protection for basic necessities and the means of making a living. Virginia's license-for-payment scheme fails in both these regards.

Defendant ignores the primary case on this issue—*James v. Strange*, 407 U.S. 128 (1972). In *James*, the Supreme Court struck down a Kansas statutory scheme for recouping the costs of providing court-appointed counsel to indigent defendants. Under the statute, an indigent defendant for whom counsel was appointed became obligated to repay the state for this expense within 60 days. The Court explained:

> If the sum remains unpaid after the 60-day period, a judgment is docketed against defendant for the unpaid amount. Six percent annual interest runs on the debt from the date the expenditure was made. The debt becomes a lien on the real estate of defendant and may be executed by garnishment or in any other manner provided by the Kansas Code of Civil Procedure. The indigent defendant is not, however, accorded any of the exemptions provided by that code for other judgment debtors except the homestead exemption.

Id. at 131. The list of exemptions denied to indigent defendants included "restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor's personal clothing, books, and tools of trade." *Id.* at 135.

Because the statute stripped indigent defendants of the "array of protective exemptions … erected for other civil judgment debtors," the Court held that it violated the Equal Protection Clause. *Id.* While recognizing that "state recoupment statutes may betoken legitimate state interests," the Supreme Court explicitly held that "these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors … State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect." *Id.* at 142-43. The Court noted that it is particularly egregious—and unconstitutional—when the state "strips the indigent defendant of the very exemptions designed primarily to benefit debtors of low and marginal incomes." *Id.* at 139. *See also Fuller v. Oregon*, 417 U.S. 40, 46 (1974) (upholding state recoupment scheme under *James* because "[d]efendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so.").

In *Alexander v. Johnson*, the Fourth Circuit held, in accordance with *James*, that "the [indigent] defendant cannot be exposed to more severe collection practices than the ordinary civil debtor," 742 F.2d at 124. The Court adopted a standard of review requiring that enforcement policies for state-imposed debt must be "narrowly drawn to avoid unfairness and discriminatory effects." *Id.* at 125.

The Commonwealth's license-for-payment scheme fails this standard. It does precisely what this line of cases protects against: (1) it subjects indigent court debtors to "more severe collection practices than the ordinary civil debtor," *Alexander*, 742 F.2d at 124, and, in the process, (2) it denies these debtors the procedural and substantive safeguards they would receive if this were a civil debt. Compl. ¶¶ 447-48.

First, Va. Code § 46.2-395 automatically suspends Plaintiffs' driver's licenses for unpaid court debt. This is a penalty to which the vast majority of civil debtors are simply not exposed.[15] Given that, under *James* and its progeny, the indigent defendant "cannot be exposed to more severe collection practices than the ordinary civil debtor," *Alexander*, 742 F.2d at 124, the application of Va. Code § 46.2-395 is unconstitutional.

Second, driver's license suspension, much like the scheme in *James*, fails to afford the indigent defendant basic protections for necessities and livelihood. In Virginia, the "Poor Debtor's Exemption" shields civil debtors from creditors' attempts to claim certain basic belongings. Va. Code § 34-26. These belongings include clothing, home furnishings, firearms, pets, medically prescribed health aids, ***motor vehicles***, and "***[t]ools, books, instruments, implements, equipment, and machines, including motor vehicles, vessels, and aircraft, which are necessary for use in the course of the householder's occupation or trade not exceeding $10,000 in value***." Va. Code § 34-26(4)-(8) (emphasis added). The purpose of these exemptions is to allow the debtor "to provide for herself and her family." *See* Doug Rendleman, *Enforcement of Judgments and Liens in Virginia* § 3.3[B].

This is precisely what Va. Code § 46.2-395 fails to do. By suspending Plaintiffs' driver's licenses, it deprives them of the means to provide for themselves and their families as surely as repossession of a car or of the tools of their trade. "Once [driver's] licenses are issued … their continued possession may become ***essential in the pursuit of***

[15] It appears that the only civil judgments for which driver's licenses may be suspended are unpaid judgments relating to traffic accidents for which the defendant was at fault and uninsured. See Va. Code Ann. § 46.2-417 (providing for "Suspension for failure to satisfy motor vehicle accident judgment"). This rule for a specific subvariety of civil debtor does not alter the fact that Va. Code § 46.2-395 exposes the indigent debtor to "more severe collection practices than the ***ordinary civil debtor***." *Alexander*, 742 F.2d at 124 (emphasis added).

a livelihood." *Bell*, 402 U.S. at 539 (emphasis added). As civil debtors, Plaintiffs would be entitled to keep a motor vehicle of modest value, but as debtors to the Commonwealth they automatically lose the license required to drive the vehicle in the first place. Such a scheme "strips the indigent defendant of the very exemptions designed primarily to benefit debtors of low and marginal incomes," *James*, 407 U.S. at 139, and "blight[s] … the hopes of indigents for self-sufficiency and self-respect," *Id.* at 142-43.

The license-for-payment scheme "fails to afford the indigent defendant basic protections for necessities and livelihood" in an additional way. Civil garnishees in Virginia can count on at least two key protections against garnishment of minimal income. Va. Code § 34-29(a) provides that at least $290 per week in income (or roughly $1256 in monthly income) is completely protected against garnishment by creditors. In addition, federal law (the so-called anti-alienation provision of the Social Security Act, at 42 U.S.C. § 407(a)) provides that "none of the moneys paid" under the Social Security Act can be "subject to execution, levy, attachment, garnishment, or other legal process." The aim of this law is to ensure that people surviving on Social Security benefits cannot see those benefits captured to repay debts. These crucial protections of a minimum financial existence are impliedly stripped from debtors facing driver's license suspension for unpaid court debt, in violation of *James* and subsequent cases. Whereas civil debtors receive notice, can mark these and other protections on a Virginia court form (DC-454), and receive a hearing, the driver's license suspension scheme provides no statutory floor against collection, no notice, and no hearing. Even the poorest Virginia citizens are told to pay or lose their licenses.

When analyzed in accordance with *James* and its progeny, Plaintiffs' Complaint is more than sufficient to survive a motion to dismiss.

CONCLUSION

Plaintiffs' challenge is procedurally proper. It sets out five distinct constitutional defects with Virginia's license-for-payment scheme, all of which are sufficiently alleged and any one of which, if proven, would be sufficient to support their claims for relief. For the foregoing reasons, Defendant's motion to dismiss must be denied.

DATED: November 3, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Virginia using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the system.

Additionally, a courtesy copy of the foregoing was sent via First Class U.S. Mail to the Chambers of Judge Norman K. Moon, 1101 Court Street, Room 390, Lynchburg, VA 24504.

Dated: November 3, 2016 /s/ Jonathan T. Blank