

No. 17-1740

In the
United States Court of Appeals
for the
Fourth Circuit

DAMIAN STINNIE, ET AL., *PLAINTIFFS-APPELLANTS*,
v.
RICHARD HOLCOMB, *DEFENDANT-APPELLEE*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

**AMICI CURIAE BRIEF OF THE VIRGINIA STATE CONFERENCE OF
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE AND EIGHTEEN CIVIL RIGHTS AND POVERTY
LAW ORGANIZATIONS IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Virginia State Conference of the National Association for the Advancement of Colored People, the Alabama Appleseed Center for Law and Justice, the American Civil Liberties Union Foundation of Virginia, the Center for Civil Justice, the Center for Justice, the Colorado Center on Law and Policy, Equal Justice Under the Law, Florida Legal Services, Inc., Kansas Appleseed Center for Law and Justice, the Lawyers' Committee for Civil Rights Under Law, the Mississippi Center for Justice, the National Center for Law and Economic Justice, the North Carolina Justice Center, the Public Justice Center, the South Carolina Appleseed Center for Law and Justice, the Texas Appleseed Center for Law and Justice, Tzedek DC, the Washington Lawyers' Committee for Civil Rights and Urban Affairs, and the Western Center on Law and Poverty are tax-exempt nonprofit organizations. None of the *amici* has a corporate parent. No publicly owned company owns 10% or more stock in any of the *amici*.

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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

The *amici curiae* are nonprofit organizations that seek to protect and promote the civil rights of all persons, with a particular focus on economic and racial justice. The lower court's dismissal of this action on procedural grounds prevents the adjudication of the merits of this case, which challenge the constitutionality of Virginia's statutory license for pay scheme, in which one's failure to pay any "fine, costs, forfeitures, restitution, or penalty lawfully assessed" results in the mandatory and automatic suspension of the person's driver's license.

While Appellants have challenged in this appeal the lower court's dismissal of their case on procedural grounds, the *amici curiae* submit this brief to advise the Court regarding the important civil rights issues at stake, and the devastating impact that Virginia's statutory license suspension scheme has had on some of the Commonwealth's poorest citizens, especially its poor black citizens.

The **Virginia State Conference of the NAACP** ("Virginia NAACP") is an affiliate of the national NAACP. Founded in 1909, the NAACP is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

eliminate racial hatred and racial discrimination. Its members throughout the United States and the world are the premier advocates for civil rights in their communities. Throughout its history, the NAACP has used the legal process to champion equality and justice for all persons. The NAACP recognizes the importance of economic stability in advancing an equal opportunity society and advocates for smarter, results-based criminal justice policies to keep our communities safe, including an end to racial disparities at all levels in the system.

The Virginia NAACP is joined in this brief by the eighteen civil rights and poverty law nonprofit organizations identified below.

- **Alabama Appleseed Center for Law and Justice**
- **American Civil Liberties Union Foundation of Virginia**
- **Center for Civil Justice**
- **Center for Justice**
- **Colorado Center on Law and Policy**
- **Equal Justice Under Law**
- **Florida Legal Services, Inc.**
- **Kansas Appleseed Center for Law and Justice**
- **Lawyers' Committee for Civil Rights Under Law**
- **Mississippi Center for Justice**
- **National Center for Law and Economic Justice**

- **North Carolina Justice Center**
- **Public Justice Center**
- **South Carolina Appleseed Center for Law and Justice**
- **Texas Appleseed Center for Law and Justice**
- **Tzedek DC**
- **Washington Lawyers' Committee for Civil Rights and Urban Affairs**
- **Western Center on Law and Poverty**

Further information regarding the mission of each of these organizations has been submitted as an Addendum to this brief.

BACKGROUND FACTS²

Virginia Code § 46.2-395(B) mandates the automatic suspension of a person's driver's license for "fail[ure] or refus[al]" to pay any court-assessed "fine, costs, forfeitures, restitution, or penalty" ("court debt") in full within the required time, typically within 30 days of conviction, or upon default on a court-ordered payment plan. *See also* Dkt. 16 (Appellants' Br.) at 15. If payment in full is not received on time, the court clerk transmits a record of nonpayment to the Virginia Department of Motor Vehicles ("DMV"). *Id.* at 16. Upon receipt of these

² For purposes of this brief, *amici curiae* assume that the facts alleged by the Appellants in their Complaint (JA10-64) and/or presented in their Opening Brief are true.

notifications, Defendant-Appellee Richard Holcomb (“the Commissioner”), sued in his official capacity as the Commissioner of the Virginia DMV, suspends driver’s licenses automatically, without notice to the drivers. *Id.* at 15-16. Neither the Commissioner nor Virginia’s courts conducts any review of an individual’s financial circumstances prior to license suspension for failure to pay court debts pursuant to Va. Code § 46.2-395, or otherwise inquires as to the reasons for default. (JA40 ¶¶294). Once they are suspended for failure to pay, the Commissioner will not reinstate licenses unless the individual either satisfies all outstanding court debts in all jurisdictions, or obtains payment plans from each court to which they are indebted. Dkt. 16 at 7.

Virginia’s automatic suspension scheme has had far-reaching effects on the Commonwealth’s drivers. According to a 2015 DMV report, in each fiscal year between 2010 and 2015, the DMV processed at least 360,000 orders of suspension per year against Virginia drivers under § 46.2-395. (JA45 ¶¶327, 331). In 2015, the DMV issued 366,773 orders of suspension under § 46.2-395; roughly 38% of these orders were for court debts incurred in non-motor vehicle convictions. (JA46 ¶332). Nearly one million Virginians – roughly one sixth of the Commonwealth’s drivers – are currently without a driver’s license due to their unpaid court debts. (JA45 ¶¶327-28). Many individuals carry multiple orders of suspension (including each of the named Plaintiffs-Appellants); as of 2015 there were nearly 2.6 million

orders of suspension in place under § 46.2-395. (JA45 ¶¶329-30). A substantial number of these persons are – like Plaintiffs-Appellants Damian Stinnie, Demetrice Moore, Robert Taylor, and Neil Russo – willing to pay their court debts, but have nonetheless lost their licenses because they cannot afford to pay all that they owe.

INTRODUCTION

Virginia's automatic license suspension scheme is fundamentally unfair to those, like Appellants, who are willing but lack the means to pay their court debts, subjecting them to far harsher punishments than those who can pay. Those who can afford to pay outstanding court costs and fees to either avoid suspension, or restore their license, most often do so. (*See* JA10 ¶3). Those who cannot pay find themselves caught in a cycle of escalating fines and fees that is difficult, if not impossible, to escape – a situation that is exacerbated by their inability to drive legally. (*See* JA49 ¶¶355-56). Loss of a driver's license means the loss of a reliable way of meeting one's basic needs such as transportation to work or to critical medical appointments, taking children to school, and shopping for food and other necessities, particularly in the many areas where public transportation is unavailable or unreliable. Because a driver's license is often so essential to securing and maintaining a livelihood and other critical life tasks, many individuals with a suspended license continue to drive rather than risk losing their job (or the

opportunity to get a job), even though doing so risks additional convictions and fines, and potentially jail time. (*See* JA49 ¶357).

Thus, ironically, although § 46.2-395 suspensions are issued as a penalty for outstanding court debt – not out of concern for public safety or as punishment for an underlying offense – the suspension itself makes it even less likely that debtors like the Appellants will ever be able to pay off their court debts. (*See* JA49 ¶356). And, because black Virginians as a group have a disproportionately higher poverty rate and experience well-documented disparities in charging and sentencing, Virginia’s statutory scheme has a greatly exaggerated effect upon poor black Virginians compared to other racial groups.

Appellant Demetrice Moore is but one example of how Virginia’s license suspension scheme can devastate individuals and families, especially those who are trying to rebuild their lives after being convicted of a criminal offense.³ In 2002, Ms. Moore was convicted of grand larceny, and sentenced to jail and to pay court costs, including the cost of the lawyers appointed to represent her because she was indigent. Ms. Moore served her jail time, but was unable to pay the court costs she owed, which ultimately resulted in the suspension of her ability to obtain a Virginia license. After moving to New York for several years (and holding a valid driver’s license there), Ms. Moore returned to Chesterfield County, Virginia, only

³ Ms. Moore’s story is recounted in Appellants’ Complaint, at JA22-26, ¶¶119-158.

to find that she was ineligible for a Virginia driver's license unless and until she could pay her outstanding court debt in full (which had been accruing interest since 2002) plus a reinstatement fee.

By this time, however, Ms. Moore was the mother of two dependent minor children, and needed to work to support herself and her family. She thus drove to various retail jobs, and also studied for and eventually obtained her certified nursing assistant (CNA) credential (for which she incurred further debt) in hopes of improving her family's circumstances. Ms. Moore's position as an in-home CNA required her to drive extensively throughout Chesterfield County to care for elderly and disabled patients in their homes. Unfortunately, in doing so she was charged and convicted several times for driving on a suspended license – each conviction adding to her court debt – until she was jailed for 23 days in early 2016 for driving while suspended. Ms. Moore stopped driving after her release from jail, because she did not want to risk further incarceration, costs, and fines. But this meant losing her job – she cannot work as a CNA in Chesterfield County (which has only very limited public transportation) without the ability to drive.

So, in a very real sense, Ms. Moore continues to be punished for the crime she committed fifteen years ago because she is poor – even though she served her jail sentence and has since attempted to build a solid life for herself and her family. A defendant with more money could have simply paid the court costs and moved

on with rebuilding her life – but this was never an option for Ms. Moore under the Commonwealth’s automatic suspension scheme.

These are precisely the sort of harms that the Fourteenth Amendment’s due process and equal protection clauses are intended to alleviate. Suspending driver’s licenses for failure to pay without notice or hearing, nor any inquiry into whether that failure was willful or because of an inability to pay, as the Commissioner has done here, unfairly penalizes indigent persons because of their poverty and thus violates the due process and equal protection clauses of the Fourteenth Amendment. These constitutional protections are not merely academic; they exist to protect the liberty interests of citizens who might otherwise be unfairly victimized by government action.

ARGUMENT

I. Virginia’s Automatic License Suspension Scheme Unfairly Traps a Substantial Number of the State’s Most Vulnerable Citizens in a Cycle of Debt and Poverty

The Commissioner’s practice of automatically suspending driver’s licenses for nonpayment of court debt without meaningful notice or hearing and without any consideration of a defendant’s ability to pay not only offends constitutional due process and equal protection requirements – as discussed in Section II, *infra* – but it also has a devastating real-world impact on the lives of many of the Commonwealth’s poorest citizens, in particular its poor citizens of color. For these

persons, even a relatively minor infraction can ultimately lead to loss of license, escalating debts, and potentially jail time if the individual is stopped while driving on a suspended license – as many do, to keep or obtain work, or for other essential travel. Because Virginia’s scheme offers the indigent no meaningful alternatives to payment in full to avoid suspension or reinstate one’s license⁴, it exacerbates the racial and socioeconomic disparities in the incidence of license suspensions, as well as in stops, arrests, and incarceration for driving while suspended. It also calls into serious question the fundamental fairness of using driver’s license suspensions as a mechanism for collection of the Commonwealth’s court debts.

A. License Suspension for Unpaid Court Debts Has Catastrophic Effects on the Lives of Indigent Defendants

The problem of escalating criminal justice debts – the fines, fees, and costs imposed by courts for everything from minor motor vehicle infractions to violent

⁴ Virginia’s scheme allows each jurisdiction to establish payment plans under which an individual may avoid suspension – if they can obtain one from each court to which they are indebted, and can meet one-size-fits-all payment terms that typically do not consider individual financial circumstances. (See JA15 ¶¶40, JA42-43 ¶¶305-09, 312-13). Such payment plans are not widely offered, and even where they are, they often result in default. (See JA43 ¶¶310-11; 313-14). Similar hurdles make obtaining a restricted license extremely cumbersome – and impossible if the individual is unemployed. (See JA41 ¶¶299-301). Finally, Virginia’s courts are not required to offer community service as an option for discharging debt, and many debtors are never informed of or offered this option. (See JA43 ¶¶315-19).

felonies – is widespread in the United States, disproportionately affecting those citizens with the least ability to pay:

Increasingly, people who interact with the courts come away with significant, sometimes crippling debts. For example, defendants charged with low-level misdemeanors or infractions, including traffic offenses, may find themselves burdened with crushing fines, surcharges, and “user fees” related to the costs of policing and adjudicating the offenses. The persistence of that debt can deepen a person’s exposure to the criminal justice system, in some cases leading to incarceration.

Abby Shafroth & Larry Schwartzol, *Confronting Criminal Justice Debt: The*

Urgent Need for Comprehensive Reform (2016), available at

<http://cjpp.law.harvard.edu/assets/Confronting-Criminal-Justice-Debt-The-Urgent-Need-for-Comprehensive-Reform.pdf> (last visited August 15, 2017), at 1-2. Many

jurisdictions impose these fines and fees to raise money, and then “rely on draconian collection practices that can be far more coercive and harmful than those employed by private debt collectors.” *Id.* at 2.

One of the more harmful “draconian collection practices” is the threat of suspension of a driver’s license. Virginia is one of several U.S. jurisdictions that imposes license suspension as a consequence of failing to pay court debts – resulting in crippling consequences for Virginia’s poorest citizens, especially poor citizens of color, including loss of employment and educational opportunities, inability to care for young or ailing family members, and increased risk of

incarceration (for driving while suspended) or for failure to appear for court proceedings due to unreliable transportation.

1. License Suspension Leads to Loss of Employment and Limits Job Opportunities

Increasingly, driver's licenses are prerequisites for many jobs, and individuals with suspended licenses experience great difficulty finding and maintaining steady and sustainable employment. Suspensions become "persistent and ongoing barriers to employment," effectively shutting people out of employment opportunities in multiple ways – the most obvious being the need to travel to and from work, or when driving is part of one's job. Back on the Road California, *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California* (April 2016), available at http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf (last accessed August 15, 2017), at 26-28. The ability to legally drive inherently increases one's job opportunities, particularly for those who live in areas where public transportation is unavailable, sporadic, or unreliable. *Id.* at 26.

For people living in rural areas of Virginia, most jobs are inaccessible without the use of a car – but even in urban areas getting to and from work without the ability to drive can be extremely challenging and time-consuming, if it is possible at all. (JA46 ¶¶338-39). For example, in the Richmond metro area, only an estimated 27% of all jobs are accessible by public transportation within 90

minutes of travel time, and in the Virginia Beach-Newport News metro area, only an estimated 15% of all jobs are accessible by public transportation within 90 minutes of travel time. (JA46-47 ¶¶ 339-40).

A driver's license also greatly expands the sorts of job opportunities available, because many jobs (and job training programs) require driving as part of the job duties, including non-traditional jobs such as home health care worker or Uber driver. *Back on the Road*, p. 10 *supra*, at 27. Even for jobs that do not require driving, many employers ask for a driver's license number on job applications, and screen out applicants who have driver's license issues, wrongly considering this, in itself, to indicate unreliability and irresponsibility. *Id.* at 27-28.

Unemployment can send individuals and families into long cycles of poverty that are extremely difficult to break. The loss a driver's license is thus a serious threat to economic security for impacted drivers and their families. These impacts are most severe in neighborhoods where there are high concentrations of low-income people and people of color. *See id.* at 7-10.

2. License Suspension Leads to Further Entrenchment in the Court System

The ripple effects of losing a driver's license wreak havoc on families and further distort criminal justice outcomes along racial and socioeconomic lines. For someone of modest financial means, even a minor infraction like an expired inspection can lead to a disastrous series of events, including loss of driver's

license, serious criminal consequences, and jail time, whereas a wealthier person need only come into compliance and pay costs to the court.

Low-income people face many barriers to appearing in court, including inflexible work schedules, unreliable transportation, lack of affordable childcare, or simply knowing that the proceeding will only result in more fines and costs that they cannot afford to pay. Consequently, traffic court defendants in particular are often tried in absentia, convicted, fined with only the original traffic stop citation as notice, and issued a bill for fines and costs. However, an absent defendant may not receive actual notice of the debt if the bill is sent to a wrong address or one that is no longer current.

Whether the defendant is aware of the fine or not, if it goes unpaid for thirty days, the DMV is notified of the failure to pay, and the Commissioner automatically suspends the person's license. This may lead to the person being pulled over and charged with driving on a suspended license without ever being aware of the suspension. Although the Virginia Supreme Court has held that a person cannot be convicted of driving while suspended absent actual notice of the suspension, *Bibb v. Commonwealth*, 212 Va. 249 (1971), defendants without means are often unrepresented for this misdemeanor appearance, and courts often convict without inquiring about notice. Even if the individual is not convicted, the license remains suspended until the defendant pays all fines and costs (or obtains a

payment plan from each court in which she owes money), as well as a reinstatement fee. For low-income individuals, this may mean choosing between paying for survival resources for themselves and their families such as food, shelter, and health care, or paying their court debts to restore their licenses. (JA46 ¶335).

Suspended drivers frequently continue to drive – often because they have little choice. A person who loses her license must often choose between losing her job and driving illegally. If she chooses not to drive and has no reliable source of transportation to work, she loses a crucial income source, which puts housing and family stability at risk, and of course makes it even more difficult to satisfy her financial obligations to the courts. If she cannot satisfy these obligations, she cannot reinstate her license. But if she chooses to drive illegally, she risks being stopped, arrested, incarcerated, and fined again. (JA46-48 ¶¶334-348).

Thus, low-income drivers – like Demetrice Moore and thousands of others like her – suffer prolonged periods of punishment in ways that wealthier drivers do not. While wealthier suspended drivers are better able to pay the fees to restore their licenses (or arrange for restricted licenses), impoverished drivers do not have the means to pay the costs, fines, and reinstatement fees required to restore their licenses. As it did with Ms. Moore, this frequently leads to repeated charges for driving with a suspended license – often while traveling to or from work – with

further mandatory license suspensions and a mandatory minimum of ten days in jail for each third or subsequent offense of driving while suspended within a 10-year period. Va. Code § 46.2-301(C).

Each stop for driving while suspended exposes the driver to prolonged police encounters, increasing the likelihood of additional citations (and accompanying fines and costs), searches, and even full custodial arrests. *See Virginia v. Moore*, 553 U.S. 164, 171 (2008) (full custodial arrests for driving while suspended did not offend the Fourth Amendment, even though Virginia law required only issuance of a summons and release upon the promise to appear in court). Even when the driver is not subjected to a warrantless vehicle search or taken into custody, suspended drivers who do not have passengers with valid licenses on board when stopped incur extra fees for towing, storage, and impoundment of their vehicles, which are then subject to warrantless “inventory” searches outside the presence of the driver. *See South Dakota v. Opperman*, 428 U.S. 364, 367-72 (1976).

Suspended licenses can also function much like outstanding arrest warrants in justifying pretextual stops of persons whom law enforcement wish to question or search. *See Utah v. Strieff*, 136 S. Ct. 2056 (2016). Justice Sotomayor’s vigorous dissent in *Strieff* explains how police can use outstanding arrest warrants to justify stopping people without cause:

This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant.

Id. at 2064 (Sotomayor, J. dissenting). Here, a suspended license functions similarly to an outstanding warrant, meaning that hundreds of thousands of Virginia drivers – particularly people of color – are potentially subject to the humiliating and degrading experience of being stopped, questioned, and probed by law enforcement officials for nothing more than being unable to pay their court debts. *See id.* at 2070 (describing the indignity of being targeted for suspected criminal activity, frisked for weapons, handcuffed, fingerprinted, swabbed for DNA, showered with a delousing agent, and being saddled with the “civil death” of an arrest warrant).

B. Virginia’s License-for-Payment Scheme Distorts the Criminal Justice System in Ways that Disproportionately Harm Black People and Their Families

The disparate impact on people of color caused by aggressive court debt collection practices like Virginia’s is well documented.⁵ One reason for this disparity is that, as recent income and employment data suggest, black Virginians

⁵ *See* Shafroth & Schwartzol, p. 9 *supra* (compiling reports by advocates, researchers, and civil rights plaintiffs documenting the injustices wrought by court debt collection practices).

are especially economically vulnerable compared to other racial groups, experiencing poverty at a significantly higher rate than any other major racial group in the Commonwealth – and consequently overrepresented among those unable to pay court debts. The poverty rate for black Virginians (19.1%) is substantially higher than the state average across all racial groups (11.2%) and more than double the rate for white Virginians (8.7%).⁶ Per capita, black Virginians earn less in annual income than white Virginians, receiving only \$24,347 compared to \$40,040, respectively.⁷ Relatedly, the average annual unemployment rate for black Virginians in 2015 (7.9%) substantially exceeded the state average (4.5%), was higher than for any other major racial group in the state, and was more than double that of white Virginians (3.6%).⁸

But disproportionate poverty among blacks as a group tells only part of the story – since the wealth gap is itself the result of entrenched public and private discrimination. A recent joint publication by Harvard Law School and the

⁶ U.S. Census Bureau, American Community Survey 1-Year Estimates, Poverty Status in the Past 12 Months, Virginia (2015).

⁷ U.S. Census Bureau, American Community Survey 1-Year Estimates, Per Capita Income in the Past 12 Months (in 2015 Inflation-Adjusted Dollars), Virginia (2015).

⁸ U.S. Bureau of Labor Statistics, Preliminary 2015 Data on Employment Status by State and Demographic Group, Virginia (2016).

National Consumer Law Center summarizes the harmful ways in which poverty, race, and court practices intersect:

[D]ata from the United States Census suggests that there may be a correlation between the cities that are most dependent on fines and fees for revenue and high African-American populations. Further compounding the impact of heavy fines and fees on African-Americans is the longstanding and well-documented racial wealth gap, caused by deeply entrenched public and private discrimination, including ongoing discrimination in the housing and labor markets. The lack of assets available for many African-American families to draw on means that an unexpected court debt may produce more extreme economic shocks, and inability to pay the debt immediately may result in significant harms, from suspension of a driver's license to incarceration for nonpayment.

Shafroth & Schwartzol, p. 9 *supra*, at 3-4 (citations omitted).

The investigation of the police practices in the city of Ferguson, Missouri by the United States Department of Justice (“DOJ”) illustrates just one example. The DOJ study observed that law enforcement practices in Ferguson were both consciously revenue-driven and purposefully discriminatory against blacks. U.S. Dep’t of Justice, Investigation of the Ferguson Police Department (March 4, 2015), *available at* https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (last visited August 15, 2017). The DOJ found in particular that a Missouri state law mandating driver’s license suspension for unpaid court debt or failure to appear (which was also “unnecessarily prolonged” by local practice) exacerbated and

extended the harms related to an individual's involvement in the criminal justice system. *See id.* at 50-51.

Black Virginians, meanwhile, suffer under Virginia's similar license suspension scheme far out of proportion with their poverty rate and overall numbers in the state. Although black people make up only about 20% of Virginia's population, analysis of recent court records reveals that black people receive nearly half of the orders of suspension for unpaid court debt, and nearly 60% of convictions for driving with a suspended license where the reason for license suspension is unpaid court debt. *See* JA281 (Affidavit of Aaron Bloomfield) ¶¶12, 15, 16.⁹

Thus, poor black Virginians have a double disadvantage – they are both more likely to experience license suspension for failure to pay court debt because of the overlap between race and poverty, and are also especially vulnerable to the long-lasting and far-reaching effects of losing a driver's license. The disparate impact of driver's license suspensions for unpaid court debt on black people is especially troubling given modern trends that disproportionately deprive black people of their right to participate in society on equal footing, including implicit

⁹ Upon information and belief, publicly available DMV data on license suspensions are not broken down by race; however, because past due court debt triggers automatic suspension pursuant to Va. Code § 46.2-395, the incidence of cases coded as “past due” may be a rough proxy for the incidence of § 46.2-395 suspensions.

and explicit bias in policing on our highways,¹⁰ disparate outcomes in sentencing,¹¹ and efforts to use photo identification requirements to deny the right to vote.¹²

All of these outcomes further destabilize families and, importantly, disproportionately destabilize black families, further exaggerating and perpetuating the wealth gap, the cycle of poverty, and the effective disenfranchisement of Virginia's poorest black citizens.

¹⁰ Back on the Road California, p. 10 *supra*, at 21 (discussing research on the role of implicit and explicit bias in traffic stops).

¹¹ See, e.g., Palazzolo, Joe, *Racial Gap in Men's Sentencing*, Wall Street Journal, Feb. 14, 2013 (highlighting analysis by the U.S. Sentencing Commission finding that prison sentences of black men were nearly 20% longer than those of white men for similar crimes in recent years); Colarusso, David, *Uncovering Big Bias with Big Data*, Lawyerist.com, May 31, 2016, available at <https://lawyerist.com/110584/big-bias-big-data/> (last visited August 15, 2017) (analyzing sentencing outcomes in Virginia Circuit Court in criminal cases from 2006-2010 by race and income [using zip code as a proxy for income], and concluding that black men needed to earn an average of \$90,000 more than their white peers to receive comparable sentencing).

¹² See, e.g., *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d. 204, 229-30 (4th Cir. 2016) (racially discriminatory intent could be inferred from legislative history indicating that legislators requested and received data on DMV-issued ID ownership, broken down by race, and that data indicated that blacks disproportionately lacked DMV-issued IDs). Also, because negative encounters with the justice system decreases voter participation, racially biased implementation of fees and fines may help explain why voter turnout is lower among poor minority voters. Sances, Michael W. and Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, Journal of Politics, Vol. 79 (3) (July 2017) at 4.

II. Automatic Suspension of Driver's Licenses for Failure to Pay Court Debt Without Consideration of Ability to Pay or Alternative Means of Punishment Violates the Fourteenth Amendment

A. The Commonwealth May Not Punish Appellants for Their Poverty

The Supreme Court has consistently held that the Fourteenth Amendment prohibits “punishing a person for his poverty.” *Bearden v. Georgia*, 461 U.S. 660, 671 (1983); *see also, e.g., Griffin v. Illinois*, 351 U.S. 12, 16 (1956) (criminal appellant could not be denied the right to appeal based on an inability to pay a fee); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (state could not incarcerate an indigent individual beyond the statutory maximum term because of missed fine and fee payments, which would constitute “an impermissible discrimination that rests on ability to pay”); *Tate v. Short*, 401 U.S. 395, 397-98 (1971) (state could not convert a defendant’s unpaid traffic fine for a fine-only offense to incarceration because that would subject him “to imprisonment solely because of his indigency”).

Most relevantly here, *Bearden* held that the Fourteenth Amendment prohibits a state from revoking a defendant’s probation for failure to pay a fine and restitution without “inquir[ing] into the reasons for the failure to pay.” *Bearden*, 461 U.S. at 672. In doing so, the Supreme Court recognized the critical distinction between the “willful refusal to pay a fine” and the *inability* to pay. *Bearden*, 461 U.S. at 668-69 (“[Plaintiff’s] lack of fault provides a substantial reason which

justifies or mitigates the violation and makes revocation inappropriate.”) (citation and quotations omitted). “In other words, if the State determines a fine or restitution to be the appropriate and adequate penalty, it may not thereafter imprison a person solely because he lacked the resources to pay it.” *Id.* at 667-68.¹³

This Court, applying *Bearden*, explained 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.” *Alexander v. Johnson*, 742 F.2d 117, 123-24 (4th Cir. 1984). The state “must take cognizance of the individual’s resources, the other demands on his own and his family’s finances, and the hardships he and his family will endure if repayment is required,” and must not penalize the debtor “as long as his default is due to his poverty, not his contumacy.” *Id.* at 124.

Here, Defendants with the means to pay their court debts on time suffer no further punishment. But those who cannot pay not only continue to be liable for

¹³ These principles are not “confined to cases in which imprisonment is at stake.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996). For example, the Supreme Court held that the government could not deny a transcript of a proceeding to an indigent defendant convicted of non-felony offenses needed for purposes of appeal, even though his convictions resulted in fines instead of incarceration. *See Mayer v. Chicago*, 404 U.S. 189, 197 (1971) (holding that “the invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed”).

their debts (and further accruing interest and fees), but also automatically lose their driver's licenses, which, as discussed in Section I, *supra*, can have catastrophic economic and personal consequences, often trapping individuals in a cycle of escalating fines and penalties, including possible jail time, with little or no hope of eventually paying their debts and restoring their licenses.

B. The Commonwealth's Suspension Process Provides Neither Adequate Notice nor a Meaningful Opportunity to be Heard and Thus Violates the Due Process Clause

When the state revokes a protected property interest – including a driver's license¹⁴ – it *must* meet fundamental due process requirements by providing both “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action,” and the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950) (citations omitted); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). These constitutional protections are intended to ensure that the government upholds its duty to “follow a fair process of

¹⁴ See *Bell v. Burson*, 402 U.S. 535, 539 (1971) (“[L]icenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.”); see also *Scott v. Williams*, 924 F.2d 56, 58 (4th Cir. 1991). For many citizens, the importance of this right cannot be overstated. See *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) (“Losing one's driver's license is more serious for some individuals than a brief stay in jail.”).

decisionmaking . . . to minimize substantively unfair or mistaken deprivations of property[.]”). *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

Although the specific process required under the Fourteenth Amendment depends upon the circumstances, “[t]he essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it.” *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal citation omitted). Because it provides neither meaningful notice nor a right to be heard either before or after the suspension, Virginia’s automatic license suspension scheme cannot be said to offer even the most rudimentary due process protections. This inevitably results in “substantively unfair or mistaken deprivations of property” from individuals like Appellants who are willing but unable to pay their court debts. *See Fuentes*, 407 U.S. at 81.

The Supreme Court precedent is clear. A driver has a substantial interest in continuing to hold a valid driver’s license, in part because of the insufficiency of *post hoc* remediation. *See Mackey v. Montrym*, 443 U.S. 1, 11 (1979) (“interest [in a license] is a substantial one, for the Commonwealth will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through postsuspension review procedures”). Furthermore, the potential length of a defendant’s

deprivation is crucial to assess “the impact of official action on the private interest involved.” *Mackey*, 443 U.S. at 12 (citation omitted); *Mathews*, 424 U.S. at 341.

For individuals who live in rural areas of Virginia, the potential for harm is particularly acute. Public transportation is limited and essential services may be long distances from their homes. Compounding matters, a license suspension for a missed payment endures until the fees or fines are fully paid, along with a reinstatement fee and any interest, so indigent defendants typically suffer a prolonged deprivation. JA41 ¶¶296-97.

Such an enduring deprivation of an important property interest simply cannot be allowed to stand absent meaningful notice and the opportunity to be heard before – or at least shortly after – the suspension of the license. The Commissioner has argued that the proceedings adjudicating Appellants’ underlying traffic and/or criminal offenses afforded them with due process (JA191-93) – but that argument ignores that the Appellants’ license suspensions *were not imposed in their hearings on the underlying offenses*, but only afterward – and then solely because they did not pay their court debts. Thus, any appeal of the underlying charges – which must be noticed 10 days after conviction, before any suspension for nonpayment even occurs – would not address the Appellants’ complaints here. *See Bell*, 402 U.S. at 541-42 (“The hearing required by the Due Process Clause must be meaningful and appropriate to the nature of the case. It is a proposition

which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.”) (citations omitted).

C. Virginia’s Relevant Interests and Potential Burdens of Meeting Rudimentary Due Process Requirements Do Not Outweigh the Importance of Providing Procedural Protections

The Commonwealth’s putative interests must yield in the face of the substantial interference with Appellants’ vested property rights. Although Virginia presumably has an interest in enforcing the fines and fees imposed by its courts, it is not as compelling as the state’s interest in protecting public safety and it cannot justify the heavy burdens placed on Virginia’s poorest citizens by the challenged automatic license suspension scheme. *Compare Bell*, 402 U.S. at 540 (noting that the “additional expense occasioned by the expanded hearing” was insufficient “to withstand the constitutional requirement” of a pre-determination hearing) *with Dixon v. Love*, 431 U.S. 105, 113-14 (1977) (“the important public interest in safety on the roads and highways fully distinguishes” the case from *Bell v. Burson*, where the purpose “was to obtain security from which to pay any judgments against the licensee”) (citations omitted) *and Mackey*, 443 U.S. at 13-17 (1979) (“the paramount interest the Commonwealth has in preserving the safety of its public highways, standing alone, fully distinguishes this case from *Bell*,” as courts have “accorded the states great leeway in adopting summary procedures to

protect public health and safety”) (citations omitted). Notably, in both *Dixon* and *Mackey*, the state provided a post-suspension hearing “as soon as practicable” after the suspension. The compelling state interest of public safety merely permitted the state to *postpone* a meaningful hearing – not eliminate it entirely.

But here there is no rational argument that failure to pay court fees somehow implicates highway safety. Whatever the strength of Virginia’s interest in compelling the payment of outstanding court debt, there is no indication that this interest would be compromised by a meaningful pre-deprivation hearing.¹⁵ *Cf. Mackey*, 443 U.S. at 18 (finding that a “presuspension hearing would substantially undermine the state interest in public safety by giving drivers significant incentive to refuse the breath-analysis test”).

CONCLUSION

The Commissioner’s execution of Virginia’s statutory scheme of mandatory license suspension for nonpayment of court debt is both unconstitutional and fundamentally unfair because it imposes substantially more severe punishment upon those who are unable to pay. Because the poverty rate of black Virginians is

¹⁵ Insofar as Virginia’s automatic driver’s license suspension scheme furthers Virginia’s interests at all, that logic particularly fails with respect to indigent defendants, who cannot pay court-ordered fines and fees before their suspension – let alone *after* their suspension, when the lack of a license may adversely impact their employment and their lives.

disproportionately high, and because blacks face well-documented bias in charging and sentencing, the statutory scheme also has a disparate impact on black Virginians. For those unable to pay court debts, Virginia's license suspension scheme perpetuates a cycle of poverty and continued entrenchment in the justice system that devastates individual lives while doing nothing to further Virginia's interest in collecting its court debts.

Given the gravity of the constitutional issues at stake and the disparate impact of the Commissioner's practices on Virginia's poorest citizens, especially its poor citizens of color, the Virginia NAACP and its fellow *amici curiae* respectfully request this Court to reverse the district court's dismissal and permit this case to proceed to a hearing on the merits.

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Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman style, with 14-point font.

DATED: August 16, 2017

/s/ Cynthia Cook Robertson

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CERTIFICATE OF SERVICE

I hereby certify that, on August 16, 2017, I filed the foregoing *Amici Curiae* Brief of The Virginia Conference of the NAACP and Eighteen Civil Rights and Poverty Law Organizations in Support of Appellants with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

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