

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 20-11688-G

SHARON MOTLEY, on behalf of herself and those similarly situated,
Appellant-Plaintiff

v.

HAL TAYLOR, in his official capacity as Secretary of the Alabama Law
Enforcement Agency,
Appellee-Defendant

On Appeal from the United States District Court for the
Middle District of Alabama
Case No. 2:19-CV-478-WKW-SRW

**BRIEF OF AMICI CURIAE LAW PROFESSORS
IN SUPPORT OF APPELLANT URGING REVERSAL**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3, undersigned counsel certifies that all amici law professors are individuals with no corporate affiliations, and that to her knowledge, the following are the interested persons

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Date: July 20, 2020

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INTEREST AND IDENTITY OF AMICI

This brief is signed by scholars of criminal, constitutional law, poverty law and access to justice. The Appendix includes a listing of all signatories. The signatories have an interest in assuring that states do not unconstitutionally impose sanctions on persons due to their poverty. The brief reflects the views of the signatories and their counsel of record and not any of their respective academic or other institutions to which they belong. Both parties have been contacted and have consented to the filing of this amicus brief.

Amici have studied and published on the topic of the proper application of *Bearden*, see Brandon Garrett, Wealth, Equal Protection, and Due Process, 61 Wm. & Mary L. Rev. 397 (2019); and on the issue of the suspension of driver's licenses. William Crozier & Brandon Garrett, Driven to Failure, An Empirical Analysis of Driver's License Suspension in North Carolina, 69 Duke L. J. 1585 (2020).

An amicus brief regarding the appropriate application of this line of constitutional precedent is desirable and relevant to the disposition of this case. The brief examines the development of a line of constitutional doctrine that requires a unique analysis of claims that a wealth-based sanction, such as the loss of a driver's license for non-payment of court debt, violates the Fourteenth Amendment to the United States Constitution. The *Griffin/Bearden* line of constitutional authority applies a unique analysis under which due process and equal protection principles

converge. *Bearden* made clear that the analysis could not be “resolved by resort to easy slogans or pigeonhole analysis,” but rather requires “careful scrutiny” of four factors, including the availability of alternative sanctions 461 U.S. at 666-67. The issue addressed in this brief is central to one of the significant issues presented in Plaintiff’s complaint; whether *Bearden* requires careful scrutiny of a system under which a driver’s license can be suspended for failing to pay outstanding court debt without regard to the person’s ability to pay.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici certify that no party’s counsel authored the brief in whole or in part; no party or party’s counsel contributed money intended to fund the brief’s preparation or submission, and no person other than amici or their counsel contributed money intended to fund that brief’s preparation or submission. The brief is timely because it is filed within seven days of the filing of Appellant’s brief.

STATEMENT OF ISSUE ON APPEAL

Whether, under *Bearden v. Georgia*, 461 U.S. 660 (1983), the district court erred in finding that the Fourteenth Amendment to the United States Constitution allowed the State of Alabama to indefinitely suspend a driver’s license for nonpayment of a fine without notice and a hearing to determine the driver’s ability to pay.

SUMMARY OF ARGUMENT

Plaintiff Sharon Motley is one of an estimated twenty-three thousand Alabamians whose licenses are suspended for failing to pay traffic tickets. As the district court noted in this case, “She regularly faces difficult choices about how she will secure and retain employment, apply for housing, cash checks, and access medical care.” Doc. 31 – pg. 3

Plaintiff’s license was suspended indefinitely after she was unable to pay a fine imposed for a misdemeanor traffic offense. Plaintiff filed suit, alleging that the suspension of her license without notice and hearing on her ability to pay violated her due process and equal protection rights under the Fourteenth Amendment. Doc 1 - pg. 14. Plaintiff’s claim was based upon the recognition in *Bearden v. Georgia*, 461 U.S. 660 (1983), that in reviewing the sanctions imposed upon someone who is unable to pay court-imposed debt, the principles of due process and equal protection converge, and require a careful analysis of the interest that is affected, the rationale for the sanctions, and consideration of alternatives that can accomplish the state’s interest. Doc. 4 – pg. 8. *Bearden* should be read as protecting persons against, as a matter of fundamental fairness, a state’s imposition of unnecessary, arbitrary, and harsh sanctions that are imposed due to a person’s poverty. The Supreme Court has extended the line of cases, of which *Bearden* is a part, to a range of situations, civil and criminal, in which the state has severely burdened individuals on account of

their poverty, by using unsound and unfair process that does not account for ability to pay.

We write to highlight the importance of a proper *Bearden* analysis because several other recent decisions have also construed *Bearden* in an overly restrictive manner. Courts have applied either due process or equal protection analysis, but not the converging analysis examining both sets of constitutional principles. *See e.g. Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019); *Mendoza v. Garrett*, 358 F.Supp.3d 1145 (D. Or. 2018). Doing so is important in this area and in others in which both inadequate procedure (such as a lack of an inquiry into ability to pay) and disproportionate sanctions impose an unequal burden on indigent persons. This Court has the opportunity to address the proper scope of *Bearden* and ensure that licenses are not suspended without consideration of the person’s ability to pay.

ARGUMENT

I. *Bearden* Requires an “Equal Justice” Analysis of a Wealth-Based Sanction that Extends Punishment or Otherwise Deprives an Indigent Person of an Important Interest.

Plaintiff was convicted of a traffic offense in 2013 in Alabama, and ordered to pay a fine that, because of her poverty, she could not pay. Under Alabama Rule of Criminal Procedure 26.11, which governs fines and restitution orders, a judge imposing a fine may consider the defendant’s indigency in imposing a fine or

considering why a fine has not been paid but is not required to do so. Doc 31 – pg. 8-9. Upon default, the court may notify the Alabama Law Enforcement Agency, which in turn notifies the driver that their license is suspended until the outstanding amount, and a reinstatement fee, is paid. Doc 31 – pg. 9-10. In short, under this system someone convicted of a traffic offense who is too poor to pay a fine may lose their license without a hearing that addresses whether they willfully refused to pay. The district court rejected Plaintiff’s claim that under *Bearden*, the Fourteenth Amendment required a hearing to address ability to pay before a sanction, such as the suspension of a license, can be imposed. The court based its ruling on finding that the suspension of Plaintiff’s license was not punishment, and that *Bearden* did not apply outside the context of certain fundamental rights. Doc 31 – pg. 54-59.

This brief will focus on the constitutional requirement that before a driver’s license may be suspended for failing to pay a fine that was imposed following a traffic conviction, the driver must be given a hearing at which their ability to pay is a critical issue. In a case in which suspension is based solely upon the failure to pay a fine, and in which the state’s interest is solely the collection of a payment and not keeping an unsafe driver off of the road, *Bearden* protects against harsh sanctions imposed because of poverty.

When a sanction is imposed solely upon the basis that a person has not paid court-imposed debt, the sanction must be evaluated under the test articulated in

Bearden v. Georgia, 461 U.S. 660 (1983), which is based both upon due process principles as well as equal protection principles, and is best understood as requiring “equal justice” for indigents in cases in which due process and equal protection converge. Equal justice requires consideration of the person’s ability to pay, and alternative responses to the failure to pay, before the suspension.

In *Bearden*, defendant was placed on probation following his conviction, with a condition that he pay a fine and restitution. Defendant was able to borrow money to make an initial payment, and then lost his job. Unable to find employment, Defendant informed his probation officer that he could not make the remaining payment. The trial court ultimately revoked Defendant’s probation and sentenced him to prison

The Supreme Court ruled that probation could not be revoked based on nonpayment of restitution without a hearing on the reason for the non-payment and a determination whether the failure to pay was willful. If “the probationer has made all reasonable efforts to pay,” and “yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether alternative methods of punishing the defendant are available.” *Id.* at 668–69. The concept that it is fundamentally unfair to punish or impose a burden on someone based on their indigence animates *Bearden* and runs through cases.

The Supreme Court explained in *Bearden* that “[d]ue process and equal protection principles converge in the Court’s analysis” of cases where defendants are treated differently and subject to criminal punishment based on relative wealth. *Id.* at 665. The Court noted that “we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question of whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.” *Id.*

The Court highlighted both the inequality inherent in incarcerating a person due to indigency and also the inadequate procedures used by the trial judge: “Only if alternative measures are not adequate to meet the State’s interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.” *Id.* at 672. The Court noted “the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine.” *Id.*

Bearden’s application of an equal justice analysis to wealth-based discrimination in the justice system was not novel, nor has it been confined to cases in which imprisonment was imposed, or to criminal cases. *Bearden* grew out of *Griffin v. Illinois*, 351 U.S. 12 (1956), which held that the state could not condition access to a felony appeal based upon the defendant’s ability to pay for a transcript

of the trial. The plurality made clear that the decision was based upon due process and equal protection principles. “Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’” *Id.* at 17 quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

Bearden also rested on *Williams v. Illinois*, 399 U.S. 235 (1970), in which the Court held that an indigent defendant could not be imprisoned beyond the statutory maximum term under a statute that required a defendant to “work off” an unpaid fine at the rate of \$5 per day of additional incarceration, and on *Tate v. Short*, 401 U.S. 395 (1971), which concerned a Texas statute that allowed imprisonment for a traffic offense that was otherwise only punishable by a fine when the person was unable to pay the fine. The Court held that imprisonment of someone unable to pay the fine violated the Equal Protection Clause and noted that imprisonment did not serve the intended purpose of collecting fines.

Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.

Id. at 399.

Shortly after deciding *Tate*, the Court held in *Mayer v. Chicago*, 404 U.S. 189, 190 (1971), that a defendant sentenced to pay only a fine was also entitled to a transcript at state expense when necessary for pursuing an appeal. The Court rejected the argument that *Griffin* was limited to cases in which imprisonment was imposed, observing that “[t]he 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.” *Id.* at 197.

The right to equal justice under *Bearden* extends beyond criminal cases. In *M.L.B v. S.L.J.*, 519 U.S. 102 (1996), the Court applied the ruling in *Griffin* to a mother who sought to appeal the termination of her parental rights but could not afford to pay for the required transcript. The opinion in *M.L.B* highlights the breadth of the application of *Griffin* and *Bearden* in cases in which the state is imposing a sanction on an indigent. The Court reinforced the importance of the decision in *Mayer*, recognizing the difference between a case in which the state imposes an adverse action, such as a criminal conviction or the termination of parental rights, and a case in which the state imposes a financial cost to seek a benefit. In *United States v. Kras*, 409 U.S. 434 (1973), the Court held that the Constitution did not require waiver of a filing fee to seek bankruptcy relief, finding that bankruptcy discharge is not fundamental, nor is it the only means for securing debt forgiveness.

Id. At 445-456. *See also Ortwein v. Schwab*, 410 U.S. 656 (1973) (upholding filing fee to seek review of reduction in welfare benefits). In *M.L.B.*, the Court found that *Mayer* controlled the mother's claim: "Like a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action. That is the very reason we have paired her case with *Mayer*, not with *Ortwein* or *Kras*," 519 U.S. at 125.

Bearden made clear that it was relying on a combination of due process and equal protection. The Court explained that it was following *Williams* and *Tate*, which adopted an equal protection analysis, but was also "asking directly the due process question" regarding whether the burden imposed was "fundamentally unfair or arbitrary" given the indigent person's inability to pay the fine.

To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose" *Williams v. Illinois*, *supra*, 399 U.S. at 260, 90 S.Ct. at 20131 (Harlan, J., concurring).

461 U.S. at 666-67.

Bearden, then, rests on the intersection of the fundamental fairness protected by due process, and protection from unwarranted differential treatment protected by equal protection, developing a framework that looks to both due process and equal protection

the Court did not state what level of scrutiny it was applying. The Court did not suggest that it was departing from *Rodriguez* and applying heightened scrutiny to class-based discrimination. Instead, the result followed from the combination of class-based harm and unfair and arbitrary procedures. It was an intersectional and cumulative analysis.

Brandon Garrett, Wealth, Equal Protection, and Due Process, 61 Wm. & Mary L. Rev. 397, 419 (2019).¹

II. This Court Has Recognized that *Bearden* Requires a Hybrid Due Process and Equal Protection Analysis

This Court recently confronted *Bearden* claims involving cash bail and whether felons could be disenfranchised because of their inability to pay outstanding court debt. In *Walker v. City of Calhoun*, 901 F.3d. 1245 (2018), This Court recognized that under *Bearden*, due process and equal protection “converge.” *Id.* at

¹ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 24 (1973) held that wealth-based classifications do not generally require heightened scrutiny, but did note that cases in which “lack of personal resources” results in “an absolute deprivation of the desired benefit” heightened scrutiny may be required. Application of *Bearden*, however, is not dependent on an absolute deprivation; indeed, the *Bearden* test requires consideration of the “extent to which” an interest is affected, rather than an absolute deprivation.

1259. The Court followed *Bearden*'s direction to carefully examine “the nature of individual interest affected, the extent to which it is affected, the rationality of connection between the legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.” *Id.* at 1265. Because the plaintiff's claim focused on the procedure he was due in establishing his indigence, and thus his right to release, the analysis focused on the procedural due process aspect of the *Bearden* claim. This Court found that the plaintiff received the prompt hearing to which he was entitled and reversed the injunction.

In *Jones v Governor of Florida*, 950 F.3d 795 (11th Cir. 2020),² this Court applied heightened scrutiny to disenfranchisement of convicted felons who could not pay outstanding court debt. *Jones* recognized that convicted felons do not have a fundamental right to vote, and that wealth is not a suspect classification. This Court rejected the normal rational basis for reviewing the legislation, however, because “we are faced with a narrow exception to traditional rational basis review: the creation of a wealth classification that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to pay—that is, it punishes more harshly solely on account of wealth—by withholding access to the ballot box.” *Id.* at 809.

² On remand, the district court entered an injunction. *Jones v. DeSantis*, No. 4:19cv300-RH/MJF 2020 WL 2618062 (N.D. Fla. 5/24/2020). That ruling has been appealed and this Court will hear the appeal *en banc*.

The decision in *Jones* is of particular significance as it rejected the overly narrow application of equal justice espoused in *Johnson v. Bredesen*, 624 F.3d 742, 748–49 (6th Cir. 2010). *Johnson* upheld a felon disenfranchisement law that required the payment of restitution and child support. *Johnson* refused to apply *Bearden* because the “re-enfranchisement conditions...merely relate to the restoration of a civil right to which plaintiffs have no legal claim.” *Id.* at 748-49. In rejecting this narrow approach, *Jones* held:

We think the *Griffin-Bearden* principle straightforwardly applies here too, where the State has chosen to continue to punish those felons who are genuinely unable to pay fees, fines, and restitution on account of their indigency, while re-enfranchising all other similarly situated felons who can afford to pay. This is so because continued disenfranchisement is indisputably punitive in nature, and because felons who are unable to pay are subject to continued punishment *solely because of* their inability to pay. Just like in *Bearden* and in *Griffin*, the fact that the State originally was entitled to withhold access to the franchise from felons is immaterial; rather, heightened scrutiny is triggered when the State alleviates punishment for some, but mandates that it continue for others, based solely on account of wealth.

950 F.3d at 819.

III. Fundamental Fairness Counsels in Favor of the Application of *Bearden* to Indefinite Suspension of a Driver’s License.

Bearden focuses on fundamental fairness in examining sanctions imposed because of poverty. The district court, however, declined to apply *Bearden* after finding that *Bearden* was limited to four exceptions to the analysis normally applied to wealth-based classifications; to cases in which a wealth-based classification

punishes an indigent defendant for their inability to pay court imposed debt, cases that restrict access to the courts in criminal actions, cases that intrude on family relationships, and cases that impact access to the political process. Doc. 31 – pgs. 51-54. The court first found that suspension of the driver’s license was not punishment for the underlying misdemeanor conviction, but rather punishment for non-payment of the fine. Doc. 31 – pg. 56. The court then concluded that applying equal justice to the suspension of a driver’s license was an unwarranted extension of *Bearden*:

The continued possession of a driver’s license is unquestionably an important interest for most Alabamians. Plaintiff’s suspended license impairs her ability to secure and retain employment, apply for housing, cash checks, and access medical care. (Doc. # 1, ¶¶ 35–36, at 9.) But the continued possession of a driver’s license is not an “important *constitutional* interest” on the same plane as imprisonment and criminal punishment, disenfranchisement, the inability to access criminal judicial processes, or the deprivation of family rights. Applying heightened scrutiny to Rule 26.11(i)(3) is not warranted.

Doc 31 – pg. 59. The court erred by failing to recognize the scope of *Bearden*. *Bearden*’s protection from wealth-based sanctions for those who are truly unable to pay court debt or costs encompasses the deprivation of Plaintiff’s protected interest in her driver’s license, and requires a hearing to determine her ability to pay and, if she is unable to pay, consideration of alternatives to indefinite suspension of her license.

First, the court erred in concluding that the indefinite suspension of plaintiff's driver's license was not punishment for the underlying misdemeanor conviction, but rather a sanction for not paying the fine imposed for that conviction. Doc. 31 – pg. 56. This analysis ignores reality. For someone able to pay the fine, the conviction carries with it only a financial penalty. For someone in Plaintiff's position, who is unable to pay the fine, the conviction carries with it a fine and indefinite loss of a driver's license. As a practical matter, this system is the same as one in which there is a two-tiered punishment; a fine for those who can pay and a fine and loss of license for those who cannot.

Second, *Bearden* is not limited to cases in which the wealth-based deprivation involves denial of fundamental constitutional rights. *Griffin* requires the provision of a transcript to allow an appeal, although there is no constitutional requirement that the state provide an appeal at all. 351 U.S. at 18. More telling, in *Mayer* the Court recognized that a “fine may bear as heavily on an indigent accused as forced confinement,” and mentioned the loss of a professional license as a collateral consequence that could be “even more serious” than confinement. 404 U.S. at 197.

Finally, *Bearden* itself requires careful inquiry into the “nature of the individual interest affected.” There would be no need for this inquiry if *Bearden* was limited to fundamental rights, as the analysis would always begin with the same answer. Rather, *Bearden* recognizes that equal justice analysis may be required

across an array of interests that may be affected by application of a monetary penalty or cost to one who is indigent. “The constitutional principle reaffirmed by these cases prohibits the imposition of adverse consequences against indigent defendants solely because of their financial circumstances, regardless of whether those adverse consequences take the form of incarceration, reduced access to court procedures, or some other burden.” U.S. Statement of Interest *Stinnie v. Holcomb*, No. 3:16-cv-00044, 2016 WL 6892275 (W.D. Va. Nov 7, 2016).

The district court’s error in reading *Bearden* too narrowly also appears in several recent decisions rejecting challenges to driver’s license suspensions. The only federal appellate court to directly address a *Griffin/Bearden* claim in the context of driver’s license suspensions, *Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019), upheld Michigan’s suspension system in a split decision. The majority held that *Griffin* and later cases applied only to the loss of a constitutionally protected liberty interest, and not a protected property interest. *Id.* at 260–61. Judge Donald, in dissent, criticized the majority for drawing an arbitrary line between protected liberty and property interests. *Id.* at 271. Judge Donald concluded that *Bearden* was applicable, and that there must be an inquiry into the reasons for failing to pay, and consideration of alternatives:

Like the Courts in *Griffin*, *Bearden* and *Mayer*, I find Michigan’s license suspension scheme problematic. It is difficult to rationalize—and, notably, the Secretary does not even attempt to do so—how suspending the driver’s

license of a person who is truly unable to pay makes it any more likely that Michigan will recover the costs it seeks to collect. Surely, suspending the driver's license of "someone who through no fault of his own is unable to [pay]" will not "make [payment] suddenly forthcoming." *Bearden*, 461 U.S. at 670, 103 S.Ct 2064. Indeed, the "reasons for nonpayment [are] of critical importance here." *Id.* at 668, 103. S.Ct. 2064. Thus, like *Bearden*, the high interests at stake warrant that Michigan "inquire into the reasons for [Plaintiffs'] failure to pay" and "consider alterna[tives]" to payment in full before it imposes an automatic suspension of licenses. *Id.* at 673, 103 S.Ct. 2064.

Fowler, 924 F.3d at 272.

Several other courts have also read *Bearden* too narrowly. For example, in *Mendoza v. Garrett*, 358 F.Supp.3d 1145 (D. Or. 2018), the Court refused to apply *Bearden* to driver's license suspensions, finding that *Bearden* was limited to fundamental constitutional rights. *See also Johnson v. Jessup*, 381 F. Supp.3d 619, 630 (M.D.N.C. 2019)(following *Mendoza*). These decisions, as with the district court's decision here, fail to recognize the scope of *Bearden*'s protection.

IV. A Proper *Bearden* Inquiry Requires A More Searching Inquiry into the Fundamental Fairness of Criminal Fines and Fees, and their Consequences

A. *Bearden* Requires Careful Inquiry into Alternatives to Indefinite Suspension

Proper application of *Bearden* starts with recognition of the importance of an individual's continued possession of a driver's license, and that suspension of a license is a loss that requires a careful inquiry of the remaining two *Bearden* factors;

the rationality of the fit between the legislative means and purpose, and the existence of alternative means for achieving the purpose.

Continued possession of a driver's license is an important right, subject to due process protections. Plaintiff alleged that loss of her license has impeded her ability to obtain employment, housing, cash checks and obtain medical care. Consistent with plaintiff's allegations regarding her need for her license, the Supreme Court has recognized a specific protected property interest in the continued possession of a driver's license from the moment it is obtained. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) ("once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood"); *see also 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." (Powell, J., Concurring)). In *Bell*, 402 U.S. 535, the Court recognized that the suspension of licenses is "state action that adjudicates important interests of the licensees," and recognized that "the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* at 539. The second *Bearden* factor is the extent to which the interest is affected. Suspension of a driver's license has an immediate impact on the driver, and weighs in favor of the driver.

Bearden requires careful scrutiny of the rationality of the connection between the legislative purpose and means, and consideration of alternatives to suspension

of plaintiff's license. Careful scrutiny of the rationality between legislative purpose and means, coupled with consideration of alternatives to suspension of the license, is less deferential than the rational basis test used to evaluate equal protection claims that do not fall under *Bearden's* equal justice review. Evaluation under the rational basis standard is highly deferential, although not "toothless." *Schwiker v. Wilson*, 450 U.S. 221, 234 (1981) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). *Bearden*, however, requires consideration of alternative responses to nonpayment of court debt as a component of the examination of the rational connection between the legislative purpose and means.

Indefinitely suspending a driver's license in response to non-payment of a modest fine by someone who is too poor to pay clearly does not survive the more careful inquiry required by *Bearden*. The state's sole interest in suspension of a license for failure to pay is increasing the collection of revenue. There is no public safety rational for suspending the license of someone too poor to pay a fine, and not suspending the license for someone who is convicted of the same offense but who is able to pay the fine. Suspension of someone too poor to pay the fine does not survive the careful scrutiny required by *Bearden*. In *Bearden* the Court rejected a similar argument:

First, the State argues that revoking probation furthers its interest in ensuring that restitution be paid to the victims of crime. A rule that imprisonment may befall the probationer who fails to make sufficient bona fide efforts to pay

restitution may indeed spur probationers to try hard to pay, thereby increasing the number of probationers who make restitution. Such a goal is fully served, however, by revoking probation only for persons who have not made sufficient bona fide efforts to pay. Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming.

461 U.S. at 670. *See also Tate* at 399 (“[imprisonment] is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment”).

Revoking a driver’s license indefinitely for someone who simply cannot pay the fine will not serve the state’s interest in collecting the debt, but rather will prevent plaintiff and others who cannot pay from participating in the economy and impose unnecessary hardship.³ A number of states, some faced with litigation, have

³ See Leah Nelson, Alabama Appleseed, Stalled: How Alabama's Destructive Practice of Suspending Driver's Licenses for Unpaid Traffic Debt Hurts People & Slows Economic Progress (2020): available at <https://www.alabamaappleseed.org/stalled/> (last visited July 15, 2020).

Across Alabama, tens of thousands of people have had their driver’s licenses suspended because they are unable to pay for tickets for violations like driving with a busted headlight or an expired tag. Often, a single unpaid ticket spirals into many, as people who are forced to continue driving – to get to work, get to school, care for their children, and otherwise live life in a state where public transportation is scarce or nonexistent – are ticketed repeatedly for driving with licenses that are suspended or revoked.

Lacking reliable transportation and the most common form of identification, many struggle to find and keep jobs.

recognized that that suspending licenses for non-payment is counter-productive and have ended the practice. For example, Virginia legislatively abandoned suspending driver's licenses for non-payment this year. Va. Code Ann. § 46.2-395 (repealed 2020). This followed the entry of an injunction on suspensions that was based on procedural due process grounds in *Stinnie v. Holcomb*, 355 F.Supp.3d 514 (W D. Va. 2018). Montana recently amended its driver's license suspension statute to carve out an exception for those unable to pay fines and fees. See Mont. Code Ann. § 46-18-201(6) (2019) (saying that a "person's license or driving privilege may not be suspended due to nonpayment of fines, costs, or restitution"). This followed a suit challenging on constitutional grounds the suspension of licenses. *DiFrancesco v. Bullock*, No. 2:17-cv-00066-SEH, 2019 WL 145627 (D. Mont. Aug. 31, 2017) (challenging the original statute for lack of notice and hearing, and for discriminating against those unable to pay). Other states have determined that driver's license suspension is not a productive way to deal with non-payment of court debt. Recently Maryland, Mississippi, California, Virginia, Montana, West Virginia, Idaho, and Washington D.C. have either stopped suspending driver's licenses for unpaid fines and fees or "enacted reforms to end debt-based license suspensions"⁴.

⁴ See *Maryland Enacts New Law Ending Debt-Based Driver's License Suspensions*, Fines & Fees Just. Ctr. (May 7, 2020); available at: <https://finesandfeesjusticecenter.org/2020/05/07/maryland-enacts-new-law-ending-debt-based-drivers-license-suspensions/> (last visited July 16, 2020)

Under *Bearden* the rationale for the suspension is not considered in a vacuum, but must be considered in light of alternatives. The Court noted several alternatives to imprisonment for failing to pay restitution. “For example, the sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine.” *Bearden*, 461 U.S. at 672. Crucially, the consideration of alternatives needs to happen at the time of the ability to pay hearing, which must happen before the license is suspended. In the case of a driver’s license suspension, there are viable alternatives that will serve the state’s interest, such as extending the time to pay, offering the person the opportunity to perform community service.

B. *Bearden* Requires a Hearing on Ability to Pay

The due process component of equal process requires that plaintiff be given a hearing before the suspension of her license, and to have her ability to pay considered at that hearing. As *Bearden* makes clear, the focus of the hearing is whether the failure to pay was willful. Suspension of a driver’s license is state action that affects an important interest, and as such a license may not be taken without the “procedural due process required by the Fourteenth Amendment.” *Bell*, 402 U.S. at 539-42 (requiring notice and hearing before suspension of driver’s license absent an emergency). In determining the process that is due, courts examine the three factors set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): first, the “private interest

that will be affected” by the deprivation; second, the “risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and [third], the Government’s interest, including the “fiscal and administrative burdens” of implementing safeguards.

The district court essentially short-circuited the *Matthews* analysis by finding that there was no right to have ability to pay considered in the license suspension process, and that therefore there was no risk of erroneous deprivation of a driver’s license. Doc 31 – pg. 74-78. The court’s error in finding that Plaintiff was not entitled to consideration of her ability to pay undercuts the remainder of its analysis and requires reversal of the court’s decision.

CONCLUSION

Amici respectfully request that this Court reverse and remand to the district court.

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Respectfully submitted,

s/Martha I. Morgan

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(g), counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5)(A), Fed. R. App. P. 32(a)(7)(B) because it contains 6,094 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft Word.

This brief complies with the typeface requirements as required by Fed. R. App. P. 32(a)(5)(A) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionately spaced typeface using Microsoft Word in 14-Point Times New Roman.

Date: July 20, 2020

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Certificate of Service

Undersigned counsel certifies that she filed this brief electronically with the Court's CM/ECF system, and that all parties are registered users of the CM/ECF system and will receive notice of the filing.

Date July 20, 2020

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