

IN THE FLORIDA SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

REGINALD B. FOSTER,

Plaintiff,

v.

Case No.: 37 2013 CA 002558

FLORIDA DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,

Defendant.

/

FOSTER'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fla.R.Civ.P. 1.510, Plaintiff REGINALD B. FOSTER ("Foster")
moves the Court for summary judgment against Defendant FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("DMV")
and states as follows in support of this motion:

TABLE OF CONTENTS

I. INTRODUCTION 3

II. BACKGROUND 4

III. STATEMENT OF FACTS 6

 A. Foster Has a Property Interest in a Driver’s License 6

 B. Reason for Suspension: Unpaid Legal Financial Obligations (LFOs) 6

 C. DMV’s Practice & Policy—Suspend without Inquiry into Ability to Pay..... 8

 D. Notice of Suspension 9

 E. Opportunity to Be Heard..... 9

 F. Foster’s Inability to Pay the LFOs 11

 G. Convicted Felons’ General Inability to Pay Felony LFOs 13

 H. Suspending a Driver’s License for Failure to Pay LFOs is Dangerous and Ineffective..... 16

IV. SUMMARY JUDGMENT STANDARD 19

V. ARGUMENT 20

 A. The DMV’s Suspension of Foster’s Driver’s License for Failure to Pay LFOs When Foster Lacks the Ability to Pay Them Violates His Substantive Due Process .. 21

 B. The DMV Denies Foster Equal Protection by Suspending the Driver’s License of Persons, Like Foster, too Poor to Pay the LFOs 25

 C. The DMV Deprived Foster of Federal Procedural Due Process By Failing To Provide Him Notice and an Opportunity To Be Heard On His Inability to Pay the Felony LFOs *Before* Suspending His Driver’s License For Failing To Pay Them 28

 1. A Driver’s License is Property..... 29

 2. The DMV Failed to Provide Adequate Process 32

 a. The DMV Failed to Provide Adequate Notice..... 32

 b. The DMV Failed to Provide an Adequate Opportunity to be Heard on Inability to Pay the LFOs..... 34

 i. “Opportunities” Exclude any Consideration of Driver’s Ability to Pay the LFOs..... 34

 ii. Hearings Occur Only After the Suspension 36

 D. Foster Has No Adequate Remedy at Law..... 41

 E. Irreparable Harm will Arise Absent Injunctive Relief..... 42

VI. CONCLUSION..... 43

I. INTRODUCTION

The DMV suspended Foster's driver's license for failure to pay court costs and fines (legal financial obligations or "LFOs") imposed after five felony convictions. The DMV made no advance inquiry into whether he willfully decided not to pay the LFOs or simply lacked the ability to pay them. The DMV failed to provide notice of the impending suspension or an opportunity to explain his circumstances. Yet, Foster, like most of the other criminal defendants whose license was similarly suspended, simply lacked the ability to pay the LFOs and lost his driver's license as a consequence.

As set forth below, the DMV's suspension of a driver's license for failure to pay the LFOs when the driver presently lacks the ability to pay them violates basic fairness guaranteed by the Florida and U.S. Constitutions. Moreover, DMV's suspension is counterproductive, as suspending a driver's license reduces the person's job opportunities and earning potential and thus his ability to pay the LFOs.

Importantly, the money owed in this case has nothing to do with the activity of driving, but is an outgrowth and collateral consequence of a criminal conviction for non-driving offenses. Accordingly, collecting these LFOs will not defray the DMV's costs of regulating drivers or insulate other motorists from the financial risks of a roadway accident. Although there may be a rational and direct basis for

the DMV to require drivers pay—*without regard to a driver’s ability to pay*—for driving insurance or administrative fees to defray the state’s costs of licensing drivers, no similar nexus justifies the DMV demands of payment of the *unrelated* LFOs. The nonpayment of the LFOs will not subsidize Foster’s driving or transfer any costs or alter of the activity of driving in Florida.

II. BACKGROUND

The 1998 revision to the Florida Constitution changed the means for funding Florida’s clerks of court. The clerks’ court-related functions previously funded by the general appropriations of the counties are now funded first through LFOs with state general appropriations shoring up any deficiency. Art. 5, § 14, FLA. CONST. To reduce any deficiency, the Florida legislature increasingly imposes so-called “user fees” and surcharges on criminal defendants to underwrite criminal justice costs. See Rebekah Diller, Brennan Center For Justice, *Hidden Costs of Florida’s Criminal Justice Fees* (2010)¹ (hereinafter “*Hidden Costs*”), at 1 (pdf p. 156), attached to the Parties’ Stipulation (hereinafter “Stipulation”) and incorporated herein as Ex. 9:

Since 1996, Florida added more than 20 new categories of financial obligations for criminal defendants and, at the same time, eliminated most exemptions for those who cannot pay. The fee increases have not been accompanied by any evident consideration

¹ Available at <http://www.brennancenter.org/page/-/Justice/FloridaF%26F.pdf>

of their hidden costs: the cumulative impacts on those required to pay, the ways in which the debt can lead to new offenses, and the costs to counties, clerks and courts of collection mechanisms that fail to exempt those unable to pay.

Id.

In an apparent effort to coerce criminal defendants to pay these LFOs, since 2004 the DMV can suspend their driver's license. *See* Ch. 2004-265, § 64, Laws of Fla. (creating § 322.245(5)(a), Fla. Stat.) However, suspending a driver's license for failure to pay the LFOs can lead to devastating consequences. It restricts a driver's autonomy, increases the likelihood of recidivism, and diminishes job opportunities and earning potential—the very means by which the driver might have paid the LFOs. It can also lead to a vicious cycle: a driver's license is suspended, he continues to drive out of necessity, is ticketed for driving with a suspended license, ordered to pay more LFOs, fails to pay these, and continues to drive. This cycle can end in incarceration. *See Hidden Costs.*

Yet, for all the horrible consequences for Florida drivers, the State reaps few, if any, benefits. Suspending a driver's license for failure to pay LFOs diminishes highway safety by diluting enforcement against dangerous, unlicensed drivers; is an ineffective collection tool for outstanding LFOs, as the state collects a mere 7% of these LFOs; and obstructs individuals' ability to earn the money to pay the LFOs because not having a driver's license diminishes earning potential and job prospects.

Ultimately, this ill-conceived system to fund the Florida clerks that results in an ineffective and counter-productive suspension of thousands of drivers' licenses is unconstitutional.

III. STATEMENT OF FACTS

A. Foster Has a Property Interest in a Driver's License

1. Foster has an important property interest in a driving license and legally driving. Answer, ¶ 19.

B. Reason for Suspension: Unpaid Legal Financial Obligations (LFOs)

2. The DMV suspended and continues to suspend Foster's driver's license because Foster failed to pay the court costs and fines (legal financial obligations or "LFOs") in five felony cases ("the Five Felony Cases"):

(a) The DMV suspended Foster's driver's license as a result of \$400.51 in unpaid LFOs in *State v. Foster*, 2003-CF-008525 (Fla. 9th Cir. (Orange Cnty.)).²

(b) The DMV suspended Foster's driver's license as a result of \$425.49 in unpaid LFOs in *State v. Foster*, 2003-CF- 014129 (Fla. 9th Cir. (Orange

² The court docket is available at <http://myclerk.myorangeclerk.com/CaseDetail.aspx?CaseID=5571290>

Cnty.)).³

(c) The DMV suspended Foster's driver's license as a result of \$992.49 in unpaid LFOs in *State v. Foster*, 2005-CF- 011371 (Fla. 9th Cir. (Orange Cnty.)).⁴ The outstanding LFOs (including a 40% collection fee) total.

(d) The DMV suspended Foster's driver's license as a result of \$1,307.50 in unpaid LFOs in *State v. Foster*, 2006-CF- 000677 (Fla. 9th Cir. (Orange Cnty.)).⁵

(e) The DMV suspended Foster's driver's license as a result of \$767.36 in unpaid LFOs in *State v. Foster*, 2007-CF-009637 (Fla. 9th Cir. (Orange Cnty.)).⁶

See Stipulation, ¶ 1; *see also* Clerk's *Register of Actions*, attached to the Stipulation and incorporated as composite Ex. 1. The clerk in each of the criminal cases assigned the collection of the LFOs to a collection agency pursuant to

³ The court docket is available at <http://myclerk.myorangeclerk.com/CaseDetail.aspx?CaseID=5605831>

⁴ The court docket is available at <http://myclerk.myorangeclerk.com/CaseDetail.aspx?CaseID=5796127>

⁵ The court docket is available at <http://myclerk.myorangeclerk.com/CaseDetail.aspx?CaseID=5838101>

⁶ The court docket is available at <http://myclerk.myorangeclerk.com/CaseDetail.aspx?CaseID=6025011>

§ 28.246(6), Fla. Stat., and now Foster owes an additional 40% collection fee.

Stipulation, ¶ 1. Therefore, the total outstanding LFOs owned for all of these five felony cases is \$5,450.69. *Id.*

3. The DMV's suspension of Foster's driver's license has nothing to do with his driving skills or capabilities. Answer, ¶ 17. The crimes involved in the Five Felony Cases crimes were all unrelated to any driving offense or facility to drive. Stipulation, ¶ 2, *see also* Clerk's Register of Actions, Ex. 1

4. Other than the five suspensions for failure to pay the LFOs related to the Five Felony Cases, no other substantive reason prevents Foster from obtaining his driver's license and Foster's driver's license would be reinstated (from the suspensions for the September 2009 tickets, now paid) upon payment of reinstatement fees of \$108 (or \$114.25, if paid through a county tax collector, which would charge an additional \$6.25 service fee). Stipulation, ¶ 4; Foster Aff., ¶ 19 (Foster would pay reinstatement fees), incorporated by reference.

C. DMV's Practice & Policy—Suspend without Inquiry into Ability to Pay

5. The DMV's practice and policy is to suspend a driver's license pursuant to § 322.245(5)(a), Fla. Stat., upon notice from the clerk of court that the driver has failed to pay LFOs related to a felony conviction. Stipulation, ¶ 5. The DMV automatically suspends the license without inquiring about the driver's

present ability to pay the LFOs, providing adequate notice to the driver, or ensuring a meaningful opportunity to be heard before the suspension is imposed. *Id.*, ¶¶ 5 (no inquiry), 10-11 (no assured opportunity to contest suspension before it is imposed). The DMV suspended Foster's driver's license pursuant to this practice and policy. *Id.*, ¶¶ 5, 10-11.

6. The DMV will not accept Foster's payment of the LFOs to it directly. *Id.*, ¶ 6. The DMV will not reinstate Foster's driver's license upon a partial payment from Foster. *Id.*

D. Notice of Suspension

7. Foster never received a notice from the DMV that it would suspend his driver's license. Foster's Aff., ¶ 18.

8. Any notice that the DMV might have mailed to Foster was sent to an old address and the suspension became effective 20 days after it was mailed. *Id.*; Stipulation, ¶¶ 7-8; § 322.251(2), Fla. Stat. The DMV's notice would have been like the blank exemplar attached to the Parties' Stipulation as Exhibit 3. Stipulation, ¶ 9. The law assumes the suspension will be delivered 5 days after it was mail. § 322.251(2), Fla. Stat.; *see also* Fla.R.Civ.P. 1.090(e).

E. Opportunity to Be Heard

9. The DMV does not ensure that drivers, and did not ensure that Foster

in particular, was provided with an opportunity to be heard *before* a driver's license is suspended. *Id.*, ¶¶ 10-11. Although the DMV often accommodates requests for administrative hearings the same day, it refuses to stay the imposition of the suspension when the hearing cannot be held before the suspension becomes effective. *Id.*, ¶ 11.

10. The Department provides a driver, like Foster, whose license has been suspended for failure to pay LFOs, only one administrative procedure to contest the suspension: A driver can apply for an “administrative hearing to review [the driver's] record.” Stipulation, ¶ 10; *see also* Order of License Suspension, Ex. 3; Fla. Admin. Code r. 15A-1.0195.⁷ However, during this administrative hearing, DMV will not consider a driver's ability to pay. Stipulation, ¶ 10. Therefore, even if Foster had received notice of the impending suspension, he would not have had a meaningful opportunity to be heard on his inability to pay the LFOs.

11. In addition to an administrative hearing, the DMV permits a driver, like Foster, whose license has been suspended for failure to pay LFOs, to contest the suspension in circuit court. Stipulation, ¶ 10. The DMV contends a driver may

⁷ Although these administrative hearings are held pursuant to Fla. Admin. Code r. 15A-1.0195, *see* Stipulation, ¶ 10, the actual rule provides for review only *after* the suspension: “Any person whose driving privilege *has been* cancelled, suspended or revoked.” *Id.* (emphasis added)). The rule's restriction to hearings only after the suspension appears intentional as the rule aids the administration of § 322.27, Fla. Stat., which permits the DMV to suspend a license for various highway safety reasons “without [a] preliminary hearing.”

only appeal to a circuit court by petition for certiorari review as provided in § 322.31, Fla. Stat. *See* DMV’s Mot. to Dismiss, ¶ 2. As a matter of practice, however, no driver, including Foster, could expect to be heard by a circuit court on his inability to pay the LFOs within 20 days of the DMV mailing the notice and before suspension becomes effective. *See, e.g., Vichich v. Dep’t of Highway Safety & Motor Vehicles*, 799 So. 2d 1069, 1073 (Fla. 2d DCA 2001) (“The circuit court’s review [pursuant to § 322.31, Fla. Stat.] is governed by Florida Rule of Appellate Procedure 9.190.”). An opportunity to be heard about an inability to pay the LFOs in a certiorari procedure in circuit court comes only after the receipt of the order of the suspension, the preparation of the petition, the court’s order to show cause, the service of the DMV, the DMV’s preparation and filing of a response, and the scheduling of a hearing. Thus, in a certiorari procedure, no driver could be heard within 20 of the DMV mailing the order of suspension. And the “filing of a petition for certiorari to the circuit court does not itself say the enforcement of the suspension.” § 322.272, Fla. Stat.

F. Foster’s Inability to Pay the LFOs

12. Since the DMV first suspended his driver’s license, Foster has continuously lacked the ability to pay the outstanding LFOs despite all reasonable efforts. Foster Aff., ¶ 12. When he was employed in 2009, he made periodic, partial payments toward the amounts owed in each of the Five Felony Cases. *See*

Clerk's *Register of Actions*, Ex. 1, pdf pp. 16, 22, 26-27, 31, 37. However, by the time that he was arrested on September 18, 2013, he had fallen on hard times and had to rely on the indigent defense system for legal counsel. Foster Aff., ¶¶8-9. He then spent the next two years detained in jail or prison where he had no income. *Id.*, ¶ 8. After his release, his income was \$6,200 in 2011 and \$8,963 in 2012. Stipulation, ¶ 13.

13. Foster continues to lack the ability to pay the outstanding LFOs that now total \$5,450.69. Foster Aff., ¶ 12 (inability); Stipulation, ¶ 1 (amount of LFOs). Through the end of November 2013, he has taken home only \$6,500 from work as a laborer-longshoreman at Port Everglades, Fort Lauderdale, through the International Longshoreman's Association. *Id.*, ¶¶ 3, 6. He has earned roughly another \$1,100 from odd jobs. *Id.*, ¶ 7. This equates to roughly \$650 per month. *Id.*, ¶¶ 6-7. From this income, he pays \$450 per month for rent and the remainder for basic necessities. *Id.*, ¶ 10. Although he receives SNAP (food stamps), he will soon lose this benefit. *Id.* He has no significant assets. *Id.*, ¶ 11.

14. Not having a driver's license limits the jobs Foster can keep and the amount of money he can earn. Foster Aff., ¶¶ 13, 15; Stipulation, ¶ I. When Foster has had to rely on public transportation, he has lost jobs because he lacked

reliable transportation to get to those jobs. Foster Aff., ¶ 13. He lost income and autonomy because he lacks a driver's license. *Id.*, ¶¶ 13, 15.

15. Furthermore, Foster cannot assist his elderly parents by driving them to doctors' appointments and other places as he had previously done. Foster Aff., ¶ 14.

G. Convicted Felons' General Inability to Pay Felony LFOs

16. Suspending a driver's license generally reduces the person's job opportunities and earning potential and prospects that the person will be able to pay the LFOs. Stipulation, ¶ H.

17. Eighty to ninety percent of criminal defendants in Florida are represented by an attorney appointed by the court at the state's expense. Stipulation, ¶ G; *see also* Caroline Wolf Harlow, Bureau Of Justice Statistics, U.S. Dep't Of Justice, *Defense Counsel in Criminal Cases* (2000)⁸, p. 1 (pdf p. 314) (finding 82% of people charged with a felony in state courts in 1996 in the 75 largest counties⁹ are represented by public defenders), attached to the Stipulation and incorporated as Ex. 16; U.S. House of Representatives Subcomm. Hearing, *Representation Of Indigent Defendants In Criminal Cases: A Constitutional Crisis*

⁸ Available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>

⁹ There are approximately 3,100 counties and independent cities in the United States, and the 100 most populous accounted for 42% of the population in 1999. *Id.* at 2.

in Michigan and Other States? (Mar. 26, 2009),¹⁰ p. 3, 84, 101 (pdf p. 332, 335, 341), selected pages attached to the Stipulation and incorporated as Ex. 17.

18. Therefore, the 80-90% of criminal defendants in Florida who rely on the indigent defense system have an income “equal to or below 200 percent of the then-current federal poverty guidelines,” § 27.52, Fla. Stat. Stipulation, ¶ G. Before a felony defendant may be appointed counsel at the state’s expense, the defendant must provide financial information on a standard application to the clerk of court. *See* § 27.52(1), Fla. Stat.; Fla.R.Crim.P. 3.111; Fla.R.Crim.P. 3.984 (Florida’s form *Application for Criminal Indigent Status* (rev. June 18, 2010)). The applicant must “attest[] to the truthfulness of the information provided” under penalty of perjury. § 27.52(1)(a), Fla. Stat.; Fla.R.Crim.P. 3.984 (“A person who knowingly provides false information to the clerk or the court in seeking a determination of indigent status under s. 27.52, F.S. commits a misdemeanor of the first degree”). The clerk should find a criminal defendant is indigent if his income is “equal to or below 200 percent of the then-current federal poverty guidelines” and his net assets are less than \$2,500 (excluding one vehicle whose value is no more than \$5,000). § 27.52(2), Fla. Stat. For an unmarried person like Foster, with no dependents, the indigent threshold is currently \$1,862 per month. Annual

¹⁰ Available at judiciary.house.gov/hearings/printers/111th/111-20_48233.pdf

Update of the HHS Poverty Guidelines, 78 FR 5182-01 (reporting the 100% of the poverty guidelines at income of \$11,490 per year for one person in a household).

Therefore, if a single felony defendant is eligible for a state-paid attorney, he must make less than \$1,862 per month.

19. Generally, felony LFOs exceed \$500 per case. *See Florida Court Clerks & Comptrollers, 2013 Distribution Schedule (2013)*¹¹ pp. 35-45 (pdf pp. 58-59), attached to the Stipulation and incorporated as Ex. 6.

20. A felon's inability to pay the LFOs is unsurprising given that a felony conviction has a substantial negative impact on future job prospects and earning potential. *See John Schmitt and Kris Warner, Center for Economic and Policy Research, Ex-offenders and the Labor Market (Nov. 2010)*¹², attached to the Stipulation and incorporated as Ex. 10.

21. It may be inferred from a convicted felon's typical indigency and lack of financial resources, *supra*, ¶ 18, the high costs for LFOs, *supra*, ¶ 19, and the diminished job and earning prospects, *supra*, ¶ 20, that vast majority of felons who did not timely pay the LFOs lacked the ability to pay them.

¹¹ Available at http://www.flclerks.com/Pub_info/2013_Pub_Info/2013_Distribution_Schedule_final_with_codes.pdf

¹² Available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>

22. The Florida legislature created the Florida Clerks of Court Operations Corporation (“Florida CCOC”) and tasked it with setting minimum performance standards for a Florida clerk of court. § 28.35(2)(d), Fla. Stat. Florida CCOC also evaluates each clerk to measure whether the clerk met the minimum performance standards, which varies by court division. *Id.* The minimum performance standard for collection of circuit criminal (felony) LFOs is 9% of the amount assessed. *See* Fla. CCOC Collection Report (FY2011-12), attached to the Stipulation and incorporated as Ex. 5 (pdf p. 54). Florida clerks fell short of this minimum aspirational performance standard of 9% in state fiscal year 2011-2012 by collecting only 7.1% of circuit criminal (felony) LFOs.¹³ *Id.* Said another way, Florida only *hopes* that clerks can collect 9% of the assessed felony LFOs; but nearly 93% of those assessed last year were not collected. Convicted felons by and large lack the ability to pay the LFOs and thus did not pay them.

H. Suspending a Driver’s License for Failure to Pay LFOs is Dangerous and Ineffective

23. Drivers, like Foster, whose license is suspended for failure to pay an LFO, which is unrelated to highway safety, present no greater public safety risk as a motorist than *licensed* drivers. On average, drivers whose license was suspended

¹³ By comparison, the performance standard for collection of circuit civil LFOs is 90% of the amount assessed. Florida clerks exceeded this minimum performance standard in state fiscal year 2011-2012 by collecting 98.7% of circuit civil LFOs.

for failure to pay LFOs are involved in no more crashes and commit no more traffic violations than *licensed* drivers. Eger Aff., ¶ 13, incorporated by reference.

24. Suspending a driver's license for reasons unrelated to highway safety, like failure to pay LFOs, decreases public safety on the highways and roads. Drivers whose license has been suspended for a *highway* safety reason are involved in more crashes and commit more traffic violations and thus pose a greater public safety hazard than drivers whose license was suspended for a *non-highway* safety reason. To maximize public safety on the roadways, efforts to detect and end unlicensed driving must be focused on drivers whose license was suspended for a highway-safety reason. Enforcement efforts against drivers whose license is suspended for a non-highway safety reason dilute efforts to remove dangerous drivers from the road. Furthermore, with the suspension of driver's licenses for non-highway-safety reasons, unlicensed driving is perceived as less serious an offense and therefore becomes more prevalent. Eger Aff., ¶ 14. For this reason and adopting Dr. Robert Eger's research, the American Association of Motor Vehicles Administrators recently recommended that state "legislatures repeal state laws requiring the suspension of driving privileges for non-highway safety related violations." *See* Am. Assoc. of Motor Vehicle Admin., *Best*

Practices Guide to Reducing Suspended Drivers (Feb. 2013)¹⁴ (hereinafter “AAMVA, *Best Practices*”) pp. 3, 32-54 (pdf. p. 228, 257-279), attached to the Stipulation and incorporated as Ex. 11.

25. The threat of suspending a driver’s license for failure to pay LFOs has no demonstrated impact on the state’s ability to collect the LFOs. *See* OPPAGA, *Clerks of Court Generally Are Meeting the System’s Collections Performance Standards*, Report No. 07-21 (Mar. 2007),¹⁵ (hereinafter “OPPAGA, *Collections Performance*”)p. 4 (pdf p. 72) (concluding that “there was no meaningful difference between the average percentage of revenue collected overall and clerks’ use of any particular method,” including driver’s license sanction), attached to the Stipulation and incorporated as Ex. 7. Suspending the driver’s license only results in a minor increase—across all court divisions (e.g., traffic, misdemeanor, and felony)—from 72% to 78%. *Id.*, p. 5, Table 5 (pdf p. 73); *see also* AAMVA, *Best Practices*, p. 4 (pdf p. 229) (“no empirical evidence ... indicates that suspending a person's driving privilege for social non-conformance reasons is effective in gaining compliance with the reason for the original nondriving suspension”).

26. The costs expended to attempt to collect the LFOs—including DMV

¹⁴ Available at www.aamva.org/WorkArea/DownloadAsset.aspx?id=3723

¹⁵ Available at www.oppaga.state.fl.us/reports/pdf/0721rpt.pdf

staff time suspending licenses, law enforcement arresting or ticketing unlicensed drivers, jail costs, and the courts adjudicating charges and tickets—typically exceed the amounts actually collected. *See* Alicia Bannon et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010)¹⁶, pp. 11, 25-26 (pdf p. 97, 111-112) (listing the hidden costs to common collection practices, *id.* at 11) (highlighting collection practices in North Carolina exceed amounts collected, *id.*, 26), attached to the Stipulation and incorporated as Ex. 8.

IV. SUMMARY JUDGMENT STANDARD

“Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.” *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) (citing *Menendez v. Palms West Condominium Ass'n*, 736 So. 2d 58 (Fla. 1st DCA 1999)); *see also* Fla.R.Civ.P. 1.510(c). ““A mere scintilla of evidence is not enough to create an issue, there must be evidence on which a jury might rely.”” *Tucker v. Am. Employers' Ins. Co.*, 218 So. 2d 221, 228 (Fla. 4th DCA 1969) (quoting 3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1234).

¹⁶ Available at <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>

Because Foster seeks a final injunction, he “must ‘establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief.’” *Liberty Counsel v. Florida Bar Bd. Of Governors*, 12 So. 3d 183, 186 n. 7 (Fla. 2009) (quoting *K.W. Brown & Co. v. McCutchen*, 819 So. 2d 977, 979 (Fla. 4th DCA 2002)).

V. ARGUMENT

Plaintiff Foster is entitled to summary judgment. No genuine dispute of material fact exists. Applying the law to the material facts establishes that the DMV has violated Foster’s substantive due process and equal protection rights by suspending his driver’s license for failure to pay LFOs when he lacks the present ability to pay them. Furthermore, a legal application to the facts also establishes that the DMV violated Foster’s procedural due process rights by failing to provide Foster with meaningful notice and an opportunity to contest the suspension *before* the agency imposed it.

By maintaining its suspension of Foster’s driver license for failure to pay the LFOs in the Five Felony Cases, the DMV violates Article I, Sections 2 and 9, of the Florida Constitution as well as the Fourteenth Amendment to the United States Constitution. Based on the following arguments, Foster respectfully requests that

this court grant summary judgment and order the DMV to reinstate Foster’s driver’s license.

A. The DMV’s Suspension of Foster’s Driver’s License for Failure to Pay LFOs When Foster Lacks the Ability to Pay Them Violates His Substantive Due Process

The Florida Constitution mandates due process. Art. I, § 9, FLA. CONST.

Yet, the DMV’s deprivation of Foster’s driver’s license—when he lacks the present ability to pay the LFOs—is not rationally related to any legitimate government interest and thus violates substantive due process rights.

The suspension and deprivation of Foster’s driver’s license for failure to pay LFOs when he lacks the present ability to pay them contravenes the substantive rights and “fundamental fairness” established in a line of binding precedent beginning with *Bearden v. Georgia*, 461 U.S. 660, 673 (1983). In *Bearden*, the U.S. Supreme Court held that the state cannot imprison a defendant for failure to pay a fine and make restitution “absent evidence and findings that the defendant was somehow responsible for the failure.” *Id.* at 665. The Court focused on the *reason* for failure and concluded it was “fundamentally unfair” to imprison a person for failing to pay a fine through no fault of his own. *Id.* at 668 (citing *Tate v. Short*, 401 U.S. 395 (1971) and *Williams v. Illinois*, 399 U.S. 235 (1970)). In so ruling, *Bearden* rejected the government’s argument that a sanction like

imprisonment would further the state's interest in recovering the fine and restitution. *Bearden*, 461 U.S. at 670-71. The Court explained:

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.

Id., at 670-71.

The Florida Supreme Court adopted the reasoning in *Bearden* in clarifying the timing of when trial courts must inquire into a criminal defendant's ability to pay LFOs. *State v. Beasley*, 580 So. 2d 139 (Fla. 1991). The court held that a trial court need not determine indigency at the time of assessing the LFOs. *Id.* at 142. However, when "the state seeks to enforce collection of the costs" and the criminal defendant "could suffer some loss of liberty or property," then due process requires an inquiry into a defendant's present ability to pay LFOs. *Id.*, at 142-43 (citing *Bearden*, 461 U.S. 660); *see also Jenkins v. State*, 444 So. 2d 947, 950 (Fla. 1984) ("any enforcement of the collection of those costs must occur only after a judicial finding that the indigent defendant has the ability to pay in accordance with the principles enunciated in *Fuller v. Oregon*"¹⁷), *followed by Mays v. State*, 519

¹⁷ *Fuller v. Oregon*, 417 U.S. 40, 44-46 (1974) (approving as compliant with due process Oregon's conditions for when a person must pay public defender costs—when the defendant had the ability to pay them).

So. 2d 618, 619 (Fla. 1988). The Florida Supreme Court continues to hold that due process requires a determination of ability to pay before the state may impose a sanction for the failure to pay LFOs. *See Del Valle v. State*, 80 So. 3d 999, 1005 (Fla. 2011) (ruling “*Bearden* clearly mandates that ‘a sentencing court *must inquire* into the reasons for the failure to pay’”) (quoting *Bearden*, 461 U.S. at 672); *Stephens v. State*, 630 So. 2d 1090, 1091 (Fla. 1994) (“before a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay but has willfully refused to do so”).

The same principle in *Bearden* and *Beasley* applies here. Although the sanction of a suspended license, like imprisonment, may spur those individuals who have the financial ability to pay their LFOs to do so, this sanction cannot motivate those individuals like Foster who cannot *choose* to pay the LFOs because they simply lack the means to pay them. *Bearden* and *Beasley* make clear that no government interest can be advanced by holding accountable a person for doing (or not doing) an involuntary act (or inaction). *See, e.g., Robinson v. California*, 370 U.S. 660 (1962) (ruling the state cannot sanction a person for certain conditions, either arising from his own acts or contracted involuntarily, or acts that he is powerless to avoid). With all of his minimal income going to basic necessities,

Foster simply lacks ability to pay the LFOs totaling \$5,450.69.¹⁸ And the DMV’s sanction of suspending a driver’s license will not make his payment of the LFOs “suddenly forthcoming.” *See Bearden*, 461 U.S. at 670. Therefore, the DMV’s suspension of Foster’s license does not *advance* a legitimate government interest.¹⁹

In practice, moreover, suspending the license of a driver, like Foster, for failure to pay LFOs impedes, rather than advances, the government interest in collecting the LFOs for three reasons. First, suspending the license is counterproductive as it diminishes—not improves—his earning potential and job prospects and thus his capacity to pay the LFOs. *See* Stipulation, ¶ I; Foster Aff. ¶¶ 13, 15. Second, as expert Dr. Eger and the AAMVA concluded, suspending these drivers’ licenses decreases public safety by diluting enforcement efforts of unlicensed driving against those who pose the greatest threats: Dangerous drivers, not indigent drivers. *See* Eger Aff., ¶ 14; AAMVA, *Best Practices*, Ex. 11. For this reason, the AAMVA recommends the repeal of any law suspending a driver’s license for reasons unrelated to driving, like failure to pay LFOs. Third,

¹⁸ *See Hoey v. State*, 965 So. 2d 360, 361 (Fla. 4th DCA 2007) (ruling that “the state must provide the *defendant* [personally] has as the present ability to pay restitution before probation can be revoked for a failure to pay” and \$1,467 in social security benefits does not provide any extra money to pay restitution).

¹⁹ Indeed, the DMV avoids the typical means of enforcing a civil lien for the LFOs and the due process protections that come with it and suspends a driver’s license without considering the driver’s ability to pay. *Bull v. State*, 548 So.2d 1103, 1105 (Fla.1989) (“enforcement of the lien will require a civil action during which petitioner may show an inability to repay the debt”).

suspending a driver's license for failure to pay LFOs has no demonstrated impact on the state's ability to collect the LFOs. *See* OPPAGA, *Collections Performance*, at 4 (pdf p. 72), Ex. 7.

The DMV does not advance any legitimate government interest by suspending the license of a driver, like Foster, for failure to pay the LFOs when he lacks the ability to pay them. The DMV's practice and policy do not make the payment of LFOs "suddenly forthcoming." And in practice, it is counterproductive, dangerous, and ineffective.

B. The DMV Denies Foster Equal Protection by Suspending the Driver's License of Persons, Like Foster, too Poor to Pay the LFOs

The DMV's suspension of Foster's driving license for failure to pay non-driving related LFOs violates the Florida Constitution's guarantee of equal protection. DMV's classification of Foster as an individual not entitled to continue driving lawfully in Florida bears no rational relationship either to the felonies he committed *or* his inability to pay the assessed LFOs. For example, if Foster had been repeatedly convicted of driving under the influence, the DMV might be able to establish a sufficient rational basis to strip him of his license, even if he had the ability to pay any related fines.

However, Foster's offenses that gave rise to the LFOs bear no relation to his driving, and the DMV's suspension of his license for financial inability to pay

those LFOs, while *not* suspending the licenses of individuals convicted of similar crimes but who had the current ability to pay their related LFOs and did, violates Foster’s right to equal protection under the law.²⁰ Similarly situated persons—those who are assessed LFOs related to non-driving-related offenses, must be treated equally under the law.

The Supreme Court of Florida has repeatedly held that where the right at stake is not recognized as a fundamental right,²¹ “equal protection demands that only a distinction which results in unequal treatment bear some rational relationship to a legitimate state purpose.” *D.M.T. v. T.M.H.*, -- So. 3d --, 2013 WL 5942278 (Fla. November 7, 2013) (finding no rational basis for Florida’s assisted reproductive technology statute’s classification between heterosexual and same-sex couples), citing *Duncan v. Moore*, 754 So. 2d 708, 712 (Fla. 2000). *See also Ostendorf v. Turner*, 426 So. 2d 539, 545 (Fla. 1982) (finding no rational basis “for distinguishing between bona fide residents of more than five consecutive years

²⁰ Foster’s equal protection claim is independent of his procedural due process argument. *All* individuals against whom LFOs have been assessed, regardless of their financial status, are entitled to prior notice and meaningful opportunity to establish their current ability, or lack of ability, to pay pending LFOs. Foster’s equal protection argument is grounded on the disparate treatment afforded to those who have the current ability to pay their LFOs and pay them and those who lack that ability and are not financially able to pay them.

²¹ Foster does not concede that the right to drive is not a fundamental right. However, for purposes of this analysis, Foster admits that it has not yet been explicitly recognized as such.

and bona fide residents of less than five consecutive years in the payment of taxes on their homes”).

The Court’s goal is not to determine whether the agency’s policy “achieves its intended goal in the best manner possible, but only whether the goal is legitimate *and the means to achieve it are rationally related to the goal.*” *Samples v. Florida Birth-Related Neurological Injury Comp. Ass’n*, 114 So. 3d 912, 917 (Fla. 2013) (citations omitted, emphasis added) (finding that limiting parental damage awards to \$100,000 per claim rather than per parent is rationally related to the actuarial soundness of the statute’s framework). The classification must be “based on a *real difference* which is reasonably related to the subject and purpose of the regulation.” *State v. Leicht*, 402 So. 2d 1153, 1155 (Fla.1981) (emphasis added) (finding a rational basis in legislature’s identification of escalating mandatory minimum sentences for various controlled substances).

Here, there is no “real difference” between persons with LFOs arising from non-driving-related offenses, who have the current ability to pay them and retain their driving license, and Foster, who also has non-driving-related LFOs but lacks the current ability to pay them, does not pay them, and had his license suspended. If the State’s interest in payment of LFOs is to raise revenue and make Foster responsible for partial reimbursement of the costs and fees arising from his

prosecution, then the suspension of Foster’s license is antithetical to that goal: as he has attested, without a driving license he cannot find regular, well-paying jobs; he has difficulty maintaining employment because public transportation is not always reliable, and he cannot advance in his current position because operating machinery on the docks requires a driving license.

C. The DMV Deprived Foster of Federal Procedural Due Process By Failing To Provide Him Notice and an Opportunity To Be Heard On His Inability to Pay the Felony LFOs *Before* Suspending His Driver’s License For Failing To Pay Them

The Fourteenth Amendment to the United States Constitution prohibits Florida from “depriv[ing] any person of life, liberty, or property, without due process of law.” *Id.*, § 1. The DMV violates this constitutional safeguard when (1) it deprives a person of a property interest and (2) without sufficient process. *Ross v. Clayton County, Ga.*, 173 F.3d 1305, 1307 (11th Cir.1999) (“There are two questions in the analysis of a procedural due process claim. Did the plaintiff have a property interest of which he was deprived by state action? If so, did the plaintiff receive sufficient process regarding that deprivation?”); *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) (“In this circuit, a § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process.”) (citation omitted); *see also Bradsheer v.*

Florida Dept. of Highway Safety & Motor Vehicles, 20 So. 3d 915, 918 (Fla. 1st DCA 2009). The DMV deprived Foster of a property interest by suspending his driver's license and did so without sufficient process. The DMV deprived Foster of procedural due process.

1. A Driver's License is Property

The DMV's deprivation of Foster's driver's license is a deprivation of a property interest. The DMV admits that "Foster has an important property interest in a driving license and legally driving." Answer, ¶ 19. This admission that a driver has a property right to his license is supported by case law.

Under Florida state law,²² a driver's license constitutes "property" necessitating procedural due process. *See Florida Dept. of Highway Safety and Motor Vehicles v. Hernandez*, 74 So.3d 1070, 1073 (Fla. 2011). In *Hernandez*, the Florida Supreme Court considered whether procedural due process was afforded by a statute governing the scope of review during a suspension hearing for driving under the influence. After interpreting the statute to permit the hearing office to review the lawfulness of the arrest, the Court concluded that this construction was

²² The property interest is determined by state law. *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894 (11th Cir. 1989) ("State law creates and defines the parameters of a plaintiff's property interest for section 1983 purposes.") (citing *Paul v. Davis*, 424 U.S. 693, 709 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *see also Bradsheer*, 20 So. 3d at 918 ("State law defines the parameters of a plaintiff's property interest for purposes of section 1983.")

necessary to avoid “render[ing] the statutory scheme constitutionally infirm.” *Id.*, at 1079. Without this construction, the Court reasoned, the statute would have deprived persons of procedural due process. Because “driving has become an increasingly important part of American life and a near necessity in obtaining and maintaining employment,” the state could not suspend the licenses ““without that procedural due process required by the Fourteenth Amendment.”” *Id.* (quoting with emphasis *Bell v. Burson*, 402 U.S. 535, 539 (1971)); see also *Souter v. Department of Highway Safety and Motor Vehicles*, 310 So. 2d 314, 315 (Fla. 1st DCA 1975) (ruling that the suspension of a driver’s license necessitates procedural due process).

However, the statutory scheme could only violate procedural due process if a driver’s license is recognized as a property right. *Hernandez*, 74 So.3d at 1078-79 (ruling that procedural due process guarantees prevent the state from depriving a person of “life, liberty or property, without due process of law”) (quoting Amend. 14, U.S. CONST.). Therefore, inherent in the *Hernandez* ruling is the recognition that a driving license is property that triggers the protections of procedural due process. Other courts have reached this conclusion more directly. See, e.g., *Bell*, 402 U.S. at 539 (“Once licenses are issued ... their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the

licensees.”); *Bradsheer*, 20 So. 3d at 919 (discussing cases supporting a property interest in a driver’s license); *id.* at 922-927 (Benton, J., dissenting) (arguing that property interests are a matter of law and a suspension of a driver’s license is a property interest that requires due process); *but see Lite v. State*, 617 So. 2d 1058, 1060 (Fla.1993) (holding driving is a privilege and not a right, which can be “taken away or encumbered as a means of meeting a legitimate legislative goal” as “there is no property interest in possessing a driver’s license.”); *Bradsheer*, 20 So. 3d at 918-919 (providing a string citation of cases supporting no property interest in a driver’s license).²³

Nevertheless, it does not ultimately matter if a driver’s license is denominated a *right* or a *privilege*. *See, e.g., Lite*, 617 So. 2d at 1060. As the U.S. Supreme Court has observed, regardless of state’s nomenclature, the state must afford the procedural due process required by the Fourteenth Amendment before suspending a license. *Bell*, 402 U.S. at 539; *see also Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (rejecting the South Carolina’s argument that calling

²³ *Bradsheer* found the question of whether a driver’s license was “property” deserving of federal procedural due process was a matter of fact and remanded the case back to the trial court for a determination. *Id.*, 20 So. 3d at 919. However, this ruling is both irrelevant and erroneous. It is irrelevant because here, as opposed to *Bradsheer*, the DMV has admitted as a matter of fact that a driver’s license is “important property interest.” Answer, ¶ 19. It is erroneous because whether a something qualifies as a property right is a question of law, not fact. *See Morley's Auto Body, Inc. v. Hunter*, 70 F.3d 1209, 1212 (11th Cir. 1995) (“[w]hether state law has created a property interest is a legal question for the court to decide.”)

unemployment compensation a *privilege* changes the constitutional analysis); *Souter*, 310 So. 2d at 315 (following *Bell*). The ultimate legal analysis of this case does not vary based on these descriptive terms.

Therefore, Foster has the requisite property interest (no matter how is characterized) in his driver's license such that the DMV cannot suspend it without affording procedural due process.

2. The DMV Failed to Provide Adequate Process

The Fourteenth Amendment's mandate that a state provide procedural due process requires at a minimum (i) notice and (ii) an opportunity to be heard. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) ("There can be no doubt that, at a minimum, the Due Process Clause requires notice and the opportunity to be heard incident to the deprivation of life, liberty or property at the hands of the government.") (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The DMV provided Foster neither constitutionally sufficient notice nor an opportunity to be heard.

a. The DMV Failed to Provide Adequate Notice

Foster did not receive any notice from the DMV that it would suspend his driver's license for failure to pay the LFOs. Foster's Aff., ¶ 18. Nevertheless, the DMV argues it provided all the notice required by § 322.251, Fla. Stat. *See*

DMV's Mot. to Dismiss, ¶ 12; *see also Anderson v. State*, 87 So. 3d 774, 780 (Fla. 2012). However, even assuming the DMV mailed its "notice" to Foster at his current address, the DMV's notice, though all that is required by statute, is still constitutionally inadequate.

"An 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*, 339 U.S. at 314. Often, this requires more than a bare-bone language of the opportunity to be heard. *Grayden*, 345 F.3d at 1243. The DMV's standard notice fails to alert drivers of how and where to properly contest the suspension and therefore is constitutionally insufficient.

The DMV's order of suspension of a driver's license includes the following "in fine print at the bottom," *see Vichich v. Dep't of Highway Safety & Motor Vehicles*, 799 So. 2d 1069, 1071 (Fla. 2d DCA 2001) (actual font size shown):

HOW TO APPLY FOR ADMINISTRATIVE HEARING TO REVIEW YOUR RECORD: If you believe that you have any legal basis to show cause why this action is unjustified, you may request a RECORD REVIEW at which time any argument, other than the validity of a conviction, may be presented to a hearing officer for review. A request for a record review shall not toll the time in which to file a writ of certiorari in accordance with S. 322.31 F.S.

See also standard Order of License Suspension, Ex. 3. However, the "notice" is illegible and moreover, fails to explain any particulars of where and how to contest the suspension by applying for an administrative hearing. *Id.* It provides no

address to send the request and specifies no format. *Id.* It is constitutionally insufficient to predicate the deprivation of such a driving license. *See Mullane*, 339 U.S. at 314 (“right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest”).

Therefore, the DMV failed to provide actual and meaningful notice to Foster of its suspension and how Foster could contest it.

b. The DMV Failed to Provide an Adequate Opportunity to be Heard on Inability to Pay the LFOs

Before suspending a driver’s license for failure to pay LFOs, the DMV must provide the driver with an opportunity to be heard. However, the available “opportunities” to be heard preclude any consideration of a driver’s inability to pay the LFOs and take place only after the suspension becomes effective. These two features make the DMV’s practice and procedure unconstitutional.

i. “Opportunities” Exclude any Consideration of Driver’s Ability to Pay the LFOs

The DMV contends that it provides two opportunities for drivers to challenge a driver’s license suspension. Neither provides a driver like Foster with the opportunity to contest the suspension based on an inability to pay the LFOs

In the first alleged opportunity, drivers may petition for review of the suspension through certiorari review as outlined in § 322.31, Fla. Stat. However, for reasons more fully explained in Foster’s Response to the DMV’s Motion to Dismiss, a circuit court’s review procedure, which is limited to the “record” on review, cannot reach Foster’s claim that he lacks the present ability to pay the LFOs. *See id.* The review procedure does not provide Foster with any opportunity to submit evidence and make his argument. *See id.* It does not provide Foster with an opportunity to be heard that he simply lacks the present ability to pay the LFOs. *See id.*

Alternatively, a driver, like Foster, whose license has been suspended for failure to pay LFOs, may contest the suspension through an administrative procedure outlined in Fla. Admin. Code r. 15A-1.0195.²⁴ *See* Stipulation, ¶ 10. However, through this procedure, again Foster cannot challenge the suspension and be heard on his present inability to pay the LFOs. Stipulation, ¶ 10.

Ultimately, the DMV provides no mechanism for a driver like Foster, whose driver’s license was suspended for failure to pay LFOs, to challenge the suspension

²⁴ This procedure is not well-defined. It is neither the one discussed in § 322.271(1), Fla. Stat. (hardship license), *see* Fla. Admin. Code Ann. r. 15A-1.019(5)(h) (excluding drivers suspended pursuant to § 322.245, Fla. Stat.), nor the procedure discussed in Ch. 15A-6, entitled “Administrative Suspension Review Hearings”, *see* Fla. Admin. Code, 15A-6.001 (limiting Ch. 15A-6 to review of a suspension for driving under the influence).

because he lacked the present ability to pay them. Foster's defense cannot be heard.

ii. Hearings Occur Only After the Suspension

Due process requires the DMV to provide drivers like Foster with an opportunity to be heard that *precedes* the suspension. However, through neither avenue may drivers like Foster be assured a pre-deprivation hearing, i.e., before the suspension is imposed 20 days after the mailing of the Order of Suspension. *See* § 322.251(2), Fla. Stat. This delay violates the federal procedural due process rights.

“The Due Process Clause of the Fourteenth Amendment requires that a private citizen be given notice and an opportunity to be heard *before* a government official seizes his or her property.” *Quik Cash Pawn & Jewelry, Inc. v. Sheriff of Broward County*, 279 F.3d 1316, 1322 (11th Cir. 2002) (emphasis added) (citing *generally, Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972)). Although courts tolerate some exceptions to allow post-deprivation process, the exceptions are rare. *Id.* (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993)) *followed by Reams v. Irvin*, 561 F.3d 1258, 1264 (11th Cir. 2009).

Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its

monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes, 407 U.S. at 90-91 (footnotes omitted), *followed by Grayden*, 345 F.3d at 1236-37 (“[T]he government must provide the requisite notice and opportunity for a hearing “at a meaningful time and in a meaningful manner,” although in “extraordinary situations” the provision of notice and a hearing may be postponed until after the deprivation has occurred.”). None of these “extraordinary situations” exist to justify the DMV’s pre-hearing suspension of Foster’s license for failure to pay felony LFOs.

The *Mathews* balancing test establishes when a hearing must precede the deprivation of a driver’s license. *Dixon v. Love*, 431 U.S. 105, 112 (1977) (applying the *Mathews* factors to determine whether an opportunity for a hearing must precede the suspension of a driver’s license); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Following *Mathews*, the U.S. Supreme Court in *Dixon* reviewed three factors that inform when a hearing may occur after a suspension:

[1] the private interest that will be affected by the official action; [2], the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Dixon, 431 U.S. at 112-113 (quoting *Mathews*). Based on these factors, the *Dixon* Court upheld the state’s provision of procedural safeguards *after* the driving

suspension for numerous driving infractions. *Id.*, at 112 (noting Love did not challenge the post-deprivation procedures and thus “[t]he only question is one of timing.”).

Yet, these same factors applied to Foster’s case result in the opposite conclusion. Although [1] the private interest—a license to drive legally—is no different here as it was in *Dixon*, the other two factors weigh in favor of requiring a hearing *before* the suspension. First, [2] the “risk of an erroneous deprivation” is high. Most drivers whose license was suspended for failure to pay felony LFOs, like Foster, simply lacked the ability to pay the LFOs and lost their licenses as a consequence. Both the high percentage of felony defendants in Florida that require an attorney at public expense, which reflects the defendants’ indigency, and the extremely low repayment of felon LFOs (notwithstanding the severe penalty of a suspended driver’s license) as measured by the Florida CCOC support this finding.

This situation for Foster and other drivers whose license was suspended for failure to pay LFOs is quite different from the context in which the U.S. Supreme Court upheld a post-suspension hearing. As opposed to *Dixon* (repeated convictions for traffic offenses) and *Mackey v. Montrym*, 443 U.S. 1 (1979) (refused to submit to a breath-analysis test upon arrest for driving under the influence of alcohol)—where the procedural safeguards largely confirm initial

suspensions—here, the vast majority of suspensions are unwarranted because they are based only on inability to pay the court costs.²⁵

Lastly, the third *Mathews* factor also counsels in favor of the hearing preceding the license suspension: [3] the government interest is minimal. Again as opposed to circumstances in which a driver’s license is suspended because of a dangerous driving record or driving while impaired, the failure to pay court costs does not affect the “important public interest in safety on the roads and highways.” *Dixon*, 431 U.S. at 114 (contrasting the suspension of licenses of drivers with a significant history of traffic offenses with the state’s purpose in ensuring payments from drivers in *Bell v. Burson*, 402 U.S. 535, 540 (1971)); *see also* Eger Aff. ¶ 13 (drivers like Foster present no greater risk to public safety than licensed drivers). Here, the DMV’s suspension of Foster’s driver’s license has nothing to do with his driving skills or capabilities. Answer, ¶ 17.

²⁵ Similarly, the DMV’s suspension for failure to pay LFOs also stands in great contrast to its suspension for failure to pay child support as ordered by the court. *See* § 322.245(2), Fla. Stat. In the child support context, a court determines the amount of child support based on the non-custodial parent’s financial resources and ability to pay. *See* § 61.30, Fla. Stat. Furthermore, courts often revisit this initial determination in ruling that a delinquent parent cannot be sanctioned for failing to pay child support when the parent lacked the ability. *See, e.g., Larsen*, 901 So. 2d at 329. However, criminal courts may assess mandatory LFOs without regard to the defendant’s ability to pay them. *Beasley*, 580 So. 2d 139. Accordingly, the “risk[s] of an erroneous deprivation,” *Dixon*, 431 U.S. at 112-113, would presumptively be lower in a suspension for failure to pay child support (where, at least at one point in time, a court had determined an ability to pay) than in a suspension from failure to pay LFOs, when no similar determination was likely made. As a result, the court’s conclusion that the DMV must provide an opportunity for pre-deprivation hearing on the suspension for failure to pay LFOs would not necessarily apply to a suspension for failure to pay child support.

The balance of the *Mathews* factors applied to the DMV's suspension of Foster's driver's license demonstrates that procedural due process requires the DMV to provide an opportunity for a hearing *before* implementing its suspension. However, the DMV's procedure does not provide for a pre-deprivation hearing.

The DMV does not ensure that its suspension of a driver's license for unpaid LFO occurs only after an opportunity for the driver to be heard on his present ability to pay the LFOs. Although an administrative hearing may occur the same day as the request for the hearing, the DMV will not ensure that the hearing occurs before the suspension is imposed. Stipulation, ¶ 11. A hearing obtained through a petition for writ of certiorari comes only after the receipt of the order, the preparation of the petition, the court's entry of an order to show cause, the service of the DMV, the DMV's preparation and filing of "cause," and the scheduling of a hearing. Common sense suggests that all of this cannot be accomplished in 20 days.

The DMV's failure to provide Foster with notice and an opportunity to be heard before instituting its suspension of his driver's license for failure to pay LFOs violates Foster's procedural due process rights.

D. Foster Has No Adequate Remedy at Law

Foster lacks an adequate remedy at law. The Florida Supreme Court has repeatedly held that the “true test [for whether a plaintiff has an adequate remedy at law] is, could a [damages] judgment be obtained in a proceeding at law. *Stewart v. Manget*, 181 So. 370, 374 (Fla. 1938) (quoting *Tampa & G.C.R. Co. v. Mulhern*, 74 So. 297 (Fla. 1917), followed by *Oxford Intern. Bank & Trust, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 374 So. 2d 54, 56 (Fla. 3d DCA 1979).

The only pertinent inquiry for determining whether a litigant has an adequate remedy of law is whether money could remediate the injury. *Weinstein*, 758 So. 2d at 706 (equating a remedy at law with money damages); *see also Dixon*, 431 U.S. at 113 (“Unlike the social security recipients in *Eldridge*, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated.”) (referencing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

As Foster affirms, the loss of autonomy, employment prospects, earning potential, and ability to care for his parents cannot be compensated with money. Foster Aff., ¶¶ 13-15. Only equitable relief—the restoration of his ability to drive lawfully—will redress these injuries. Therefore, Foster has no adequate remedy at law.

E. Irreparable Harm will Arise Absent Injunctive Relief

Foster is suffering, and will suffer irreparable injury from the continued suspension of his driver's license. The DMV's continued suspension will not only deprive him of the better job opportunities and the ability to drive his parents to medical appointments, but it will also deprive him of autonomy and freedom to travel that cannot be compensated by money damages. *See State Agency for Health Care Admin. v. Cont'l Car Services, Inc.*, 650 So. 2d 173, 175 (Fla. 2d DCA 1995) (availability of money damages to redress injury negates "irreparable injury"); *Florida Dept. of Hernandez*, 74 So. 3d at 1078 ("driving has become an increasingly important part of American life") (citing *Bell*, 402 U.S. at 539); *see also Lawrence v. Texas*, 539 U.S. 558 (2003) ("Liberty presumes an autonomy ...").

VI. CONCLUSION

Foster is entitled to summary judgment and relief from the DMV's unconstitutional suspension of his driver's license.

WHEREFORE, based on the foregoing arguments and authorities, Foster respectfully requests that this Court enter summary judgment on his behalf and grant the relief requested in the First Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have supplied a true and accurate copy of the forgoing on January 21, 2014, to the following via Email at the following address:

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