

No. 19-35506

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CINDY MENDOZA; GLORIA BERMUDEZ; LORI SPANO;
CEKAIS TONI GANUELAS; REBECCA HEATH; AND KARL
WADE ROBERTS, on behalf of themselves and all others similarly situated,
Plaintiff-Appellants

v.

KRIS STRICKLER, in his official capacity as Director of the Oregon Department of
Transportation; and TOM MCCLELLAN, in his official capacity as Administrator
of Driver and Motor Vehicles Division, Oregon Department of Transportation,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 3:18-cv-01634-HZ
Hon. Marco A. Hernandez

**BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION OF
OREGON, INC., PUBLIC JUSTICE, THE NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., AND THE AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON FOUNDATION IN SUPPORT OF PLAINTIFF-
APPELLANTS' MOTION FOR RECONSIDERATION *EN BANC***

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Dated: December 8, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state that they are non-profit organizations, with no parent corporation or publicly traded stock, and no publicly held company has 10% or greater ownership in *amici*.

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INTERESTS OF *AMICI CURIAE*¹

Five civil rights and poverty law nonprofit organizations from across the country join this brief. *Amici* have direct experience working with and advocating on behalf of indigent people, particularly people of color, who suffer the harms of debt-based driving restrictions. *Amici* have a strong interest in protecting and enforcing the civil rights of those facing state-imposed fines and fees, especially where such penalties disproportionately impact people of color.

Amici include: the American Civil Liberties Union Foundation, the American Civil Liberties Union of Oregon, Inc., Public Justice, the NAACP Legal Defense and Educational Fund, Inc., and the American Civil Liberties Union of Washington Foundation. Further information regarding the mission of each of these organizations has been submitted as an addendum to this brief.

SUMMARY OF THE ARGUMENT

Oregon’s wealth-based driver’s license suspension scheme established a two-tiered justice system in which wealthy people and people living in poverty with otherwise identical records received different punishments solely because of their inability to pay court debt. *See* Or. Rev. Stat. §§ 809.210, 809.416. If a driver did

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

not pay their traffic ticket, Oregon suspended their driver’s license even if they could not afford to pay the ticket. Although the legislature repealed the statute in 2020 that had provided for driver’s license suspensions for failure to pay traffic debt, there are thousands of people like Appellant whose licenses remain suspended under the former law because they cannot afford to pay. Those suspensions create significant barriers to employment, travel, health care, and food access—without any corresponding benefit in debt collection or street safety for Oregon. The lasting effects of the former law deprive affected residents of the opportunity to participate in Oregon’s full economic and social life. And, because of enduring racial discrimination in traffic enforcement and economic opportunity, those affected are disproportionately people of color.

Rehearing *en banc* is appropriate in this case because (1) the proceeding presents a question of “exceptional importance,” as it implicates a state law that violates important constitutional rights in a racially discriminatory manner, Fed. R. App. P. 35(a)(2); and (2) the panel decision upholding Oregon’s wealth-based punishment scheme directly contravenes Supreme Court precedent, under Fed. R. App. P. 35(a)(1). The panel’s opinion improperly restricted the applicability of the due process and equal protection principles recognized in *Bearden v. Georgia*, 461 U.S. 660 (1983), and *Griffin v. Illinois*, 351 U.S. 12 (1956)), and thus *en banc*

rehearing is “necessary to secure and maintain uniformity of the court’s decisions.”

See Fed. R. App. P. 35(b)(1)(A); 35(a)(1).

ARGUMENT

I. THIS CASE CONCERNS A QUESTION OF EXCEPTIONAL IMPORTANCE BECAUSE THE UNCONSTITUTIONAL LICENSE SUSPENSION SCHEME DISPROPORTIONATELY IMPACTS COMMUNITIES OF COLOR

This Court should not ignore the racial implications of the poverty-based punishment scheme at issue. People of color are disproportionately targeted in traffic enforcement, which means they are more likely to be ticketed and thus more likely to incur a traffic fine.² And, because of widespread and persistent racial discrimination in public and private life, people of color are also overrepresented among low-income populations, which means they are more likely to have a driver’s license suspension for being unable to pay a ticket. Indeed, Oregon’s wealth-based license suspension scheme was so egregiously burdensome to poor Oregonians of color that the state legislature repealed it in 2020 as part of a special session called to address racial inequality.³

² See Wendy C. Regoeczi & Stephanie L. Kent, *Race, Poverty, and the Traffic Ticket Cycle: Exploring the Situational Context of the Application of Police Discretion*, Socio. & Criminology Fac. Publ’ns (2014), https://engagedscholarship.csuohio.edu/clsoc_crim_facpub/128/.

³ K. Rambo, *Lawmakers pass bill to prevent Oregonians from losing driver’s licenses if they can’t afford to pay fines*, Oregonian (June 26, 2020), <https://www.oregonlive.com/politics/2020/06/lawmakers-pass-bill-to-prevent-oregonians-from-losing-drivers-licenses-if-they-cant-afford-to-pay-fines.html>.

The Ninth Circuit has found a question of exceptional importance where, as here, a vested property right to a public benefit was threatened by state action and the case had practical implications for the financial situations of both the affected citizens and the local governments' budgets. *Doyle v. City of Medford*, 565 F.3d 536, 543 (9th Cir. 2009), *certified question accepted*, 210 P.3d 907 (Or. 2009), and *certified question answered*, 227 P.3d 683 (Or. 2010). Moreover, the racially discriminatory nature of Oregon's scheme also makes this proceeding a matter of exceptional importance. *See* Fed. R. App. P. 35(a)(2). As Judge Tjoflat of the Eleventh Circuit noted, "the objective importance of adjudicating a potential racial injustice cannot be gainsaid. Careful consideration of racial discrimination charges are always of 'exceptional importance,' not only to the parties involved, but to society at large." *Williams v. Consol. City of Jacksonville*, 381 F.3d 1298, 1307 (11th Cir. 2004) (dissenting from denial of rehearing *en banc*). Similarly, this case is exceptionally important because Oregon's now-repealed license suspension scheme for failure to pay tickets continues to unconstitutionally deprive residents with low incomes of their driver's licenses, a vested property right. In so doing, it pushes those residents, who are disproportionately people of color, further into poverty.

A. Racial Discrimination in Traffic Stops Leads to Communities of Color Carrying a Disproportionate Burden of Traffic Fines

The license suspension scheme at issue in this case cannot be divorced from the fact that motorists of color, and Black motorists even more so, in Oregon are

disproportionately targeted in traffic enforcement. For example, Black drivers in Portland—which has the highest percentage of Black people in the state—were 3.7 times more likely to be stopped by police than white drivers in 2021.⁴ Latinx drivers in Portland were 1.5 times more likely to be stopped than white drivers.⁵ This gap has increased over time; in fact, in 2021, Black and Latinx people in Portland had their highest share of stops on record, while the share of stops of white people reached record lows.⁶ Furthermore, a 2021 study found that the Oregon State Police issue traffic tickets to Black, Latinx, and Indigenous drivers more frequently than white drivers.⁷

Oregon’s discriminatory pattern of traffic enforcement matches the national trend, further demonstrating the exceptional importance of this case. Black and Latinx drivers nationwide are, on average, stopped more frequently than white

⁴ Catalina Gaitán & David Cansler, *See which drivers Portland police are more likely to stop*, Oregonian (July 27, 2022), <https://www.oregonlive.com/data/2022/07/see-which-drivers-portland-police-are-more-likely-to-stop.html>.

⁵ *Id.*

⁶ *Id.*

⁷ *See Statistical Transparency of Policing Report*, Or. Crim. Just. Comm’n, 22-23 (2021), https://www.oregon.gov/cjc/CJC%20Document%20Library/STOP_REPORT_2021_FINAL.pdf.

drivers.⁸ When they are stopped, Black people are over 20 percent more likely to receive a ticket than white people.⁹

Broad police discretion during traffic stops worsens these disparities. Police have more discretion during “economic stops” (involving expired registration, lack of insurance, or equipment malfunctions) and “investigatory stops” (involving investigating crime or discretionary seatbelt enforcement), as compared to “safety stops” (involving violations of speed limits, stop lights, driving while impaired, etc.).¹⁰ One recent study suggests, in addition to being subjected to outright racial bias, Black and Latinx drivers may be at higher risk for economic stops because they are overrepresented in low-income populations, and, due to residential segregation, are more likely to live in communities where investigatory stops are more prevalent.¹¹ Consequently, traffic enforcement schemes, which commonly use investigatory and economic stops to impose fines, can be “a direct form of

⁸ Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 *Nature Hum. Behavior* 736, 736 (July 2020), <https://www.nature.com/articles/s41562-020-0858-1>.

⁹ Regoeczi & Kent, *supra* note 2.

¹⁰ Mike Dolan Friss et al., *Re-prioritizing traffic stops to reduce motor vehicle crash outcomes and racial disparities*, 7 *Injury Epidemiology* (Jan. 20, 2020), <https://injepijournal.biomedcentral.com/articles/10.1186/s40621-019-0227-6#Abs1>.

¹¹ *Id.*

criminalizing individual and community economic poverty” that disproportionately harm people of color.¹²

B. Driver’s License Suspensions Exacerbate Already Existing Forms of State-Driven Economic Discrimination

The state of Oregon has historically deprived people of color of wealth-building opportunities and economic security, resulting in extreme racial wealth gaps in the state. For example, Oregon’s founding Constitution prohibited Black people from owning land—a primary means of building wealth.¹³ And, as discussed further below, state and local redlining and gentrification efforts in Black neighborhoods stripped other wealth-building opportunities from Black families.¹⁴ Today, race and gender discrimination, as well as “historical and current racist structures [that] often relegate Black and brown workers to lower-paying jobs [and] workplace discrimination [that] denies them better job opportunities,”¹⁵ perpetuate the racial wealth gap. Indeed, “[i]f average Black family wealth continues to grow at the same pace it has over the past three decades, it would take Black families 228

¹² *See id.*

¹³ Tyler Mac Innis & Juan Carlos Ordóñez, *Wealth Inequality in Oregon Is Extreme*, Or. Ctr. Pub. Pol’y (Nov. 3, 2022), <https://www.ocpp.org/2022/11/03/wealth-inequality-oregon-extreme/>.

¹⁴ *Id.*

¹⁵ *Most jobs in Oregon are poor-quality jobs*, Or. Ctr. Pub. Pol’y (Sept. 1, 2021), <https://www.ocpp.org/2021/09/01/most-jobs-poor-quality/>.

years to amass the same amount of wealth white families have today.”¹⁶ There are consistent disparities in the poverty rate nationally, resulting in a larger percentage of Black Americans and Latinx Americans living in poverty (19.5 and 17 percent respectively), as compared to non-Hispanic white Americans (8 percent).¹⁷ Those poverty disparities are even larger in Oregon, where 28 percent of Black Oregonians and 23 percent of Latinx Oregonians live in poverty.¹⁸ The license suspension scheme is yet another state policy that drives these economic disparities, as communities of color are less likely to be able to afford traffic fines, and more likely to face license suspension.

Worse, the challenge of paying court debt is greater for racial minorities in Oregon because residents of color pay higher fine amounts than white residents.¹⁹ A review of all cases where a fine was issued in Multnomah County, Oregon found that in the period from 2005-2017, Black defendants paid about \$21.5 million more than they would have if their fines had been equal to those levied on white

¹⁶ Chuck Collins et al., *Ever-Growing Gap: Without Change, African-American and Latino Families Won't Match White Wealth for Centuries*, Inst. Pol’y Stud. (Aug. 8, 2016), <https://ips-dc.org/report-ever-growing-gap/>.

¹⁷ *Id.*

¹⁸ Audrey Mechling, *A Portrait of Poverty in Oregon*, Or. Ctr. Pub. Pol’y (Aug. 7, 2020), <https://www.ocpp.org/2020/08/07/poverty-oregon/>.

¹⁹ Nick Budnick, *The High Costs of Disparities for People of Color in Multnomah County*, InvestigateWest (Feb. 2, 2017), <https://www.invw.org/2017/02/02/being-black-in-multnomah-county/>.

defendants.²⁰ During the same period, in cases with a single violation of law, white defendants in the county paid a median fine of \$181, while Black defendants paid \$261.²¹

This racially discriminatory ticketing scheme is intensified by the fact that people with low incomes are often unable to pay traffic tickets because they lack sufficient savings to cover an unexpected expense. The Federal Reserve has observed that 32 percent of Americans cannot afford to pay a \$400 emergency cost or would only be able to do so by selling their belongings or borrowing money.²² For many people with low incomes, fines are impossible to pay without sacrificing basic necessities. For example, an Alabama survey showed that 82 percent of people with outstanding financial obligations from a non-felony conviction had deferred paying for a necessity (rent, food, medical bill, car payment, or child support) to make a payment on their debt.²³ Half had given up three or more of these necessities.²⁴

²⁰ *Id.*

²¹ *Id.*

²² *Economic Well-Being of U.S. Households in 2021*, Bd. Governors Fed. Rsrv. Sys., 35 (2022), <https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf>.

²³ *Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama's Racial Wealth Divide*, Ala. Appleseed Ctr. for L. & Just., 31 (Oct. 2018), <https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf>.

²⁴ *Id.*

Likewise, fines are simply unpayable for many in Oregon, where 84 percent of all criminal debt is estimated to be uncollectable.²⁵ And for people who cannot afford to pay a fine immediately after it is assessed, the costs grow exponentially through tack-ons such as default judgment penalties, interest, payment plan fees, or collection fees, making debt payment ever more insurmountable.²⁶ The sheer unaffordability of fines assigned low-income residents the most severe penalty in the enforcement scheme—the long-term suspension of their driver’s license, which can last up to twenty years. *See* Or. Rev. Stat. § 809.416(2)(b).

Ultimately, Oregon’s wealth-based license suspension scheme targeted people living with low incomes and its continued enforcement exacerbates economic disparities along racial lines. When, as here, a case implicates a “potent source of racial and ethnic discrimination” that “exacerbat[es] geographic, . . . ethnic and class divisions,” the proceeding raises a question of exceptional importance warranting *en banc* review. *See Gutierrez v. Mun. Ct. of Se. Jud. Dist.*, 861 F.2d 1187, 1192 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing *en banc*).

²⁵ *Report on Liquidated and Delinquent Accounts Receivable*, Legis. Fiscal Off. 55 (2021), <https://www.oregonlegislature.gov/lfo/Documents/2021%20Accts%20Rec%20Report.pdf>.

²⁶ Emily Green, *Unpaid fine? The poorer you are, the more you owe*, Street Roots (Nov. 9, 2018), <https://www.streetroots.org/news/2018/11/09/unpaid-fine-poorer-you-are-more-you-owe>; Ray Khalfani, *Unjust Revenue from an Imbalanced Criminal Legal System: How Georgia’s Fines and Fees Worsen Racial Inequity*, Ga. Budget Pol’y Inst. (Dec. 16, 2021), <https://gbpi.org/unjust-revenue-from-an-imbalanced-criminal-legal-system/>.

II. THE PANEL DECISION UPHOLDING OREGON'S POVERTY-BASED PUNISHMENT SCHEME DIRECTLY CONTRAVENES SUPREME COURT PRECEDENT

The panel majority contravened Supreme Court precedent when it failed to apply the *Bearden* factors to this case, especially as to the groups most impacted by Oregon's law: communities of color. *Bearden* established a heightened scrutiny test to be applied when reviewing a sanction imposed for an indigent person's failure to pay a fine. 461 U.S. at 666-67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)). This "careful inquiry" requires the court to consider factors such as: (1) the nature of the individual interest affected; (2) the extent to which that interest is affected; (3) the rationality of the connection between the legislative means and purpose; and (4) whether alternative means exist for effectuating that purpose. *Id.* In failing to apply *Bearden*'s "careful inquiry" test to Oregon's wealth-based punishment scheme, the panel upheld an enforcement mechanism that severely undermines the ability of Oregon residents with low incomes, disproportionately residents of color, to find or maintain employment, care for their families, or meet basic needs. Had the panel majority faithfully applied these factors, it would have determined that Oregon's wealth-based license suspension scheme is an unconstitutional violation of the Due Process and Equal Protection Clauses. *En banc* rehearing is necessary due to the panel majority's contravention of binding precedent.

A. For People of Color with Low Incomes, Possession of a Driver’s License Is a Critical Interest that Is Essential for Meeting Life’s Basic and Most Fundamental Necessities

The individual interest in maintaining a driver’s license is substantial under *Bearden*’s first factor. The Supreme Court has long recognized that an individual’s driver’s license is an “important” and protectible property interest. *Bell v. Burson*, 402 U.S. 535, 539 (1971). The Court has further noted that once a license is issued, its possession “may become essential in the pursuit of a livelihood.” *Id.* Indeed, 84 percent of Americans, and 80 percent of Oregonians, drive to work.²⁷ Only 4 percent of Oregonians commute to work on public transportation.²⁸ Further, many jobs require applicants to have a valid driver’s license as a condition of employment.²⁹ In one survey, 80 percent of respondents reported not having access to, or being disqualified from, job opportunities due to license suspensions.³⁰ Individuals who are able to legally drive are more likely to have stable employment.³¹ In contrast,

²⁷ U.S. Census Bureau, *American Community Survey: Means of Transportation to Work by Place of Work—State and County Level*, tbl. B08130 (2021), <https://data.census.gov/table?q=b08130&g=0400000US41&tid=ACSDT1Y2021.B08130>. These statistics reflect data from 2020. In 2021, only 1.7 percent of Oregonians commuted to work via public transportation. *Id.*

²⁸ *Id.*

²⁹ Danielle Conley & Ariel Levinson-Waldman, *Discriminatory Driver’s License Suspension Schemes*, 4-5, *Am. Const. Soc’y* (Mar. 2019), <https://www.acslaw.org/wp-content/uploads/2019/03/License-Suspension-Issue-Brief-Final.pdf>.

³⁰ *Id.*

³¹ *Reducing Suspended Drivers and Alternative Reinstatement: Best Practices*, 6-7, *Am. Ass’n Motor Vehicle Adm’rs* (3d ed. May 2021), <https://www.>

many individuals with suspended licenses lose their job or income due to increased travel time.³² Such barriers to employment serve to further heighten existing inequities from systemic discrimination in employment. For example, from 2015 to 2019, Black Oregonians' unemployment rate was 9 percent compared to the overall rate of 5.5 percent for all Oregonians.³³

Beyond being essential for employment, the ability to legally drive is fundamental to maintaining one's health. First, accessing quality health care services often requires driving, leaving individuals with suspended driver's licenses no other choice but to drive illegally to attend health-related appointments and address emergencies, or to forego care altogether. For example, when someone is ill or injured, taking public transportation to seek treatment may be impossible, and paying for a taxi or ride-hail service may be prohibitively expensive. Second, having a suspended license limits a person's ability to access healthy food. This is especially true for people with low incomes due to the prevalence of food deserts in high-poverty areas.³⁴ Studies have consistently found that neighborhoods with higher

aamva.org/getmedia/b92cc79d-560f-4def-879c-6d6e430e4f4d/Reducing-Suspended-Drivers-and-Alternative-Reinstatement-Best-Practices-Edition-3.pdf.

³² *Id.*

³³ Sarah Cunningham, *African Americans in Oregon: A Labor Market Perspective*, Or. Emp. Dep't (Feb. 17, 2021), <https://www.qualityinfo.org/-/african-americans-in-oregon-a-labor-market-perspective>.

³⁴ *Food Deserts in the United States*, Annie E. Casey Found. (Feb. 13, 2021), <https://www.aecf.org/blog/exploring-americas-food-deserts>.

proportions of Black residents have longer distances to supermarkets, a disparity that researchers have linked to racial segregation.³⁵

Driver's licenses are especially critical in light of state-driven social isolation that limits the ability of people in under-resourced neighborhoods to travel to better schools, jobs, hospitals, and other resources outside of their immediate geographic location without a car. In Oregon, the geographic isolation of Black neighborhoods exists by design. The state has historically engaged in extensive efforts to displace Black residents from areas with relatively good access to downtown Portland, public transit, and economic resources to areas farther away from social infrastructure.³⁶ In Portland's Albina neighborhood, for example, Black residents once operated their own shops, restaurants, and clubs to serve their community within the highly segregated state of Oregon.³⁷ But over the course of two decades, the state forcibly removed Black residents there by exercising eminent domain and building the Veteran's Memorial Coliseum and Highways I-5 and I-99 in the 1950s, the Rose Quarter in the 1960s, and the expansion of Emmanuel Hospital in the 1970s.³⁸ Black

³⁵ See, e.g., Kelly Bower et al., *The Intersection of Neighborhood Racial Segregation, Poverty, and Urbanicity and its Impact on Food Store Availability in the United States*, 58 Preventative Med. 33 (Jan. 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3970577/>.

³⁶ See Lauren Ackerman, *Albina, Portland, Oregon (1870-)*, Blackpast.org (Mar. 19, 2016), <https://www.blackpast.org/african-american-history/albina-portland-1870/>.

³⁷ *Id.*

³⁸ *Id.*

displacement continued into the 2000s, as the Portland Development Commission priced remaining Black residents out of Albina through intentional gentrification efforts.³⁹ This forced Black residents away from vital community resources near Downtown Portland to less accessible neighborhoods with fewer resources.⁴⁰ Government efforts to forcibly displace Black residents and gentrify Black neighborhoods have, therefore, increased Black residents' reliance on driving in Oregon,⁴¹ and their reliance on driving cannot be overstated.

In sum, the individual interest that residents—particularly Black and other racial minority residents—have in their driver's licenses is essential to maintain a livelihood, care for themselves and their family, and meet basic needs. A license suspension presents onerous challenges for anyone who depends on driving to meet their needs; however, the systems of oppression people of color already experience amplify the severity of this deprivation.

B. Oregon's Wealth-Based Suspension Scheme Substantially Impacts the Individual Interest in a Driver's License

³⁹ Aubrey Carlsen et al., *Reclamation Towards the Futurity of Central Albina: Dreamworld Urbanism*, FutureLab at Portland State Univ., 71 (2021), https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1182&context=usp_murp.

⁴⁰ *Id.*

⁴¹ Brian S. McKenzie, *Neighborhood Access to Transit by Race, Ethnicity, and Poverty in Portland, OR*, 12 City & Cmty. 134, 151-52 (June 2013), <https://www.asanet.org/sites/default/files/savvy/journals/CC/Jun13CCFeature.pdf>.

With respect to *Bearden*'s second factor, the individual interest in maintaining a driver's license is substantially impacted by Oregon's suspension scheme, with a heightened impact on people of color. From 2007 to 2017, 334,000 Oregon drivers had their licenses suspended due to nonpayment of traffic fines.⁴² Many of those drivers were people with low incomes.⁴³ In this case, Oregon's law punishes people with low incomes for their indigency, especially communities of color, because Oregonians of color are more likely to face higher rates of ticketing and higher fines due to racial profiling and discriminatory patterns of traffic enforcement and less likely to have the disposable income to pay the onerous fines associated with disproportionate traffic enforcement. Furthermore, even if racial disparities in policing in Oregon diminish in the future, the twenty-year license suspensions at issue here lock in the effects of discrimination for decades.

As a result of these disparities, drivers of color are also overrepresented in secondary violations relating to non-payment of fines, such as violations for driving-while-suspended. For example, Black and Indigenous drivers receive 26 percent of all driving-while-suspended charges in Oregon, even though they only make up a combined 4 percent of the state's population.⁴⁴ The disparate effect of these wealth-based license suspension policies was criticized at a 2020 legislative hearing, by

⁴² Green, *supra* note 26.

⁴³ *Id.*

⁴⁴ K. Rambo, *supra* note 3.

then-Police Superintendent, Travis Hampton, who noted the high rate of Black motorists with suspended licenses: “I fear as a profession, now as a system, we may be unwittingly ushering citizens into the criminal justice system, into long-term economic hardship.”⁴⁵ The disparate rates of those charged demonstrates that Oregon’s scheme has a deeply damaging and racially disproportionate effect on low-income people’s critical interest in having a driver’s license, hindering their ability to participate in social and economic life without facing potential criminal consequences for doing so.

C. There Is No Rational Connection Between License Suspensions and Debt Collection Since License Suspensions Make It More Difficult for People with Low Incomes to Pay Off Their Debt

With respect to *Bearden*’s third factor, the purported purpose behind Oregon’s license suspension regime was to increase compliance with traffic laws in order to promote road safety. But suspension for failure to pay tickets is an irrational way to effectuate traffic safety because it treats drivers differently based on whether or not they have paid their debt even if they have the same record of traffic violations. Indeed, since Oregon’s scheme only imposed the license suspension after a driver defaulted on their debt for failing to pay a traffic ticket, the scheme’s true purpose was to promote debt collection rather than road safety. And suspending an indigent

⁴⁵ Dirk VanderHart, *Oregon Considers Ditching Driving Suspensions For Unpaid Tickets*, Or. Pub. Broad. (Feb. 5, 2020), <https://www.opb.org/news/article/driving-suspension-unpaid-ticket-oregon/>.

person’s driver’s license for failure to pay a ticket does not have a rational connection to debt collection. As the panel dissent notes, “[t]he driver’s failure to pay provides no information about her responsiveness to other deterrents or punishment. . . . Indigent individuals do not *choose* not to pay; they *cannot* pay.” *Mendoza III* at 36 (Berzon, J., dissenting). Suspension is an irrational means by which to effectuate debt collection because its imposition actively inhibits the impacted individual’s ability to earn the money necessary to reduce outstanding debt.

For the reasons described above, many individuals with low incomes—particularly people of color—may need to continue driving, despite a license suspension, in order to access employment, educational programs, health care services, and food, thereby increasing the risk of new citations and escalating debt. For many Oregonians, court debt due to traffic violations increases over time due to high interest rates, penalties, and administrative fees.⁴⁶ As a result, even those who immediately set up a payment plan and make timely monthly payments may end up paying exponentially more than the original fine amount.⁴⁷ This problem is compounded for those, like Appellant Mendoza, who lose their license because they cannot afford to make even an initial payment. The resulting sinkhole of debt creates

⁴⁶ Green, *supra* note 26.

⁴⁷ *Id.*

an ongoing burden with severe consequences for family budgets, credit access, and ability to meet basic financial needs—consequences that are disproportionately borne by people of color. By making it more difficult for impacted individuals to access employment opportunities, license suspensions actually impede the law’s true purpose of debt collection.

D. There are Alternative Means for Effectuating the Law’s Purpose that Would Not Violate the Constitutional Rights of People with Low Incomes

There are alternatives to license suspension that would more effectively promote Oregon’s goals—alternatives that do not violate the constitutional rights of residents with low incomes. For example, the courts could ensure that Oregonians convicted of traffic infractions are offered payment plans and fines that meaningfully consider ability to pay. The Oregon legislature recognized the ineffectuality and racially discriminatory results of the license suspension scheme in 2020, when it chose to repeal the regime after finding that it disproportionately targeted people of color.⁴⁸ Despite this, the legislature failed to retroactively address the thousands of people whose licenses remain suspended under the former scheme.

Given the availability of alternative enforcement mechanisms, Oregon’s license suspension scheme cannot survive constitutional scrutiny under *Bearden*,

⁴⁸ K. Rambo, *supra* note 3.

particularly given the racially disparate consequences of Oregon continuing to punish people with driver's license suspensions for their inability to pay traffic debt.

CONCLUSION

For the reasons above, an *en banc* rehearing in this matter should be granted.

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I, Brian R. Blais, hereby certify that on December 8, 2022, I electronically filed the foregoing document by using the CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

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/s/Brian R. Blais

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ADDENDUM: MISSION OF AMICI

Amicus curie, the American Civil Liberties Union Foundation (“ACLU”) is a nationwide, non-profit, non-partisan organization of more than 1.6 million members dedicated to defending the principles of liberty and equality embodied in the U.S. Constitution and our nation’s civil rights laws. Through its Racial Justice Program, the ACLU engages in nationwide litigation and advocacy to enforce and protect the constitutional rights of people living in poverty against unlawful fine, fee, forfeiture, and suspension practices, including serving as counsel of record or *amicus curiae* in *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Gruver, et al. v. Barton, et al.*, No. 4:19-CV-302 (N.D. Fla. 2020); *Johnson v. Goodwin*, No. 1:18-CV-467 (M.D. N.C. 2022); and *White v. Shwedo*, No. 2:19-CV-3083 (D. S.C. 2020).

Amicus curiae, the American Civil Liberties Union of Oregon, Inc. (“ACLU of Oregon”) is a nonprofit and nonpartisan organization with over 28,000 members statewide. The ACLU of Oregon is dedicated to defending and advancing civil rights and civil liberties for Oregonians, including the fundamental civil rights protected in the Oregon Constitution and United States Constitution. The ACLU of Oregon has engaged in public education campaigns, legislative advocacy, and litigation touching almost every aspect of the Oregon criminal justice system, including issues that particularly affect defendants living in poverty, such as expanding access to public defenders and combating the criminalization of homelessness. The ACLU of Oregon

also writes frequent *amicus curiae* briefs to draw attention to civil rights issues in Oregon and federal courts. *See, e.g.*, Brief for ACLU of Oregon et al. as *Amici Curiae* Supporting Plaintiffs, *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022) (Nos. 20-35752, 20-35881).

Amicus curie, Public Justice is a national legal advocacy organization that specializes in precedent-setting, socially significant litigation. Through its Debtors' Prison Project, Public Justice combats the criminalization of poverty by litigating cases designed to compel governments and their for-profit partners to abandon predatory fine and fee collection practices. Public Justice has represented hundreds of individuals harmed by harsh consequences imposed on them solely because they were unable to pay fines and fees.

Amicus curiae, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") was founded in 1940 under the leadership of Thurgood Marshall and is non-profit law organization that focuses on advancing civil rights in economic justice, criminal justice, education, and political participation. In line with that mission, LDF employs litigation, advocacy, public education, and outreach to secure equal justice under the law for all Americans and break down barriers that prevent Black people from enjoying their basic civil and human rights.

LDF has a strong interest in ensuring the Fourteenth Amendment rights of those facing state-imposed fines and fees, particularly where (as here) those

exactions have a disproportionate impact on Black people. Accordingly, LDF has represented litigants and/or served as *amicus curiae* in numerous such cases including *Timbs v. Indiana*, 139 S. Ct. 682 (2019), *Ross et al. v. Honorable Chief Judge of Michigan's 36th Dist. Ct., et al.*, No. 2:19-CV-11076 (E.D. Mich. 2022); *Gruver, et al. v. Barton, et al.*, No. 4:19-CV-302 (N.D. Fla. 2020); and *State v. Taylor*, 163 N.E.3d 486 (Ohio 2020).

Amicus curiae, the American Civil Liberties Union of Washington Foundation (ACLU-WA) is a statewide, nonpartisan, nonprofit organization with over 420,000 members and supporters, dedicated to the principles of liberty and equality embodied in the Constitution and federal and state civil rights laws. It has long advocated for the rights of indigent persons subject to the imposition of legal financial obligations and the harms of drivers' license suspension. The ACLU-WA has long advocated for reform of drivers' license suspension in Washington and for reform of the state's legal financial obligations ("LFO") system. The ACLU-WA frequently participates in direct representation and amicus cases involving civil liberties issues, including through addressing the harms of additional punishment imposed by LFO's and license suspension on indigent people, and in other contexts where there is lack of consideration of ability to pay before the imposition of additional punishment.