Case Nos. 17-2504 & 18-1089

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADRIAN FOWLER, on behalf of herself and other similarly situated;
KITIA HARRIS, on behalf of herself and other similarly situated,
Plaintiffs-Appellees

v.

JOCELYN BENSON, Michigan Secretary of State, in her official capacity
Defendant-Appellant

On Appeal from the U.S. District Court
for the Eastern District of Michigan,
Honorable Linda V. Parker

BRIEF OF *AMICI CURIAE* NATIONAL COUNCIL FOR INCARCERATED & FORMERLY INCARCERATED WOMEN AND GIRLS, AND DĒMOS, IN SUPPORT OF REHEARING EN BANC

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DISCLOSURE STATEMENTS OF *AMICI CURIAE* NATIONAL COUNCIL FOR INCARCERATED AND FORMERLY INCARCERATED WOMEN AND GIRLS, AND DĒMOS

Amici National Council and Dēmos hereby represent that none of the counsel involved in this litigation have authored this brief, in whole or in part. Furthermore, no party, party's counsel, or outside organization has funded the research, writing, preparation, or submission of this brief.

Amici further represent that the National Council and Dēmos are independent non-profit organizations that are not subsidiaries or affiliates of any publicly-owned corporation. Amici are not aware of any publicly-owned corporation that has a financial interest in the outcome of this litigation and have not cooperated with any such corporation.

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II. INTRODUCTION

The panel's majority opinion legitimates the punishment of poverty, contrary to the Supreme Court's *Bearden/Griffin* line of cases and the Fourteenth Amendment. *Bearden v. Georgia*, 461 U.S. 660 (1983); *Griffin v. Illinois*, 351 U.S. 12 (1956). More than half a million people return home from prison every year, many of whom discover that they cannot drive because they owe court debt. The story of P.W., a member of the National Council for Incarcerated and Formerly Incarcerated Women and Girls ("National Council"), shows how driver's license suspensions trap people in a cycle of poverty.[1]

P.W. had no family support when she began ten years of probation after serving her prison sentence. Her driver's license was suspended the first time when she did not respond in a timely way to a summons for a speeding ticket she had received more than a decade earlier, before her incarceration. She was not caught while continuing to drive to her job from the remote area where she could afford to rent a room. She was therefore able to collect enough money to pay the fine.

P.W. was stopped five years later for a moving violation, which was eventually dismissed. Her license was suspended while the case was pending. When she honored the suspension and told her court-ordered therapist she would not be

[1] Interview with P.W. by Catherine Sevcenko, counsel for amicus National Council (notes available from amici should the Court wish to see them).

able to get to her sessions, the therapist informed her probation officer. Federal Marshals arrested her at her workplace, where she was executive director of a social services agency. P.W. lost her job and was not able to work in a professional capacity for a decade. She had to declare bankruptcy and now will never be able to pay her court debt. Her two license suspensions forced her either to break the law or try to abide by the rules and still lose everything. Suspending the driver's license of someone who cannot pay a fine has devastating consequences; it prevents the state from receiving payment and can destroy the livelihood of the indigent driver.

Because of the importance of driver's licenses to formerly incarcerated people, amici write to clarify the *Bearden/Griffin* claim rejected by the panel majority. This claim is rooted in the Supreme Court's commitment to "equal justice for poor and rich" in the criminal system. *Griffin*, 351 U.S. at 16. It involves both due process and equal protection, which together flatly prohibit punishing a person who cannot pay a monetary sanction "solely because of his lack of financial resources," without considering alternative means of effecting the state's purposes. *Bearden*, 461 U.S. at 660, 669, 672. Despite binding Supreme Court precedent, the panel majority erroneously decided that this claim did not apply to deprivation of property interests and applied traditional equal protection analysis. ECF #39-2 in No. 17-2504 ("Panel Op.") at 13-15 & n.8. Properly understood, however, the

Bearden/Griffin line of cases requires striking down Michigan's suspension of driver's licenses for those unable to pay their fines and fees.

III. INTEREST OF AMICI

The National Council for Incarcerated and Formerly Incarcerated Women and Girls ("National Council") is the only national criminal justice reform organization that was founded, and is currently led, by formerly incarcerated women of color. Its 4,000 members include women currently serving time in federal and state prison as well as those who have already been released. Every day, members of the National Council work to bring their sisters home and support them upon release by assisting with housing, employment, overdue medical care, etc. The National Council membership knows how difficult it is to overcome the barriers to re-entry into society and works to ease that process. The panel majority's decision makes that work infinitely more difficult. Without mobility, formerly incarcerated people cannot take full advantage of their release from prison. Although they may no longer be behind actual bars, the loss of a driver's license limits their opportunity for employment, substance abuse treatment, medical care, education, and rebuilding family ties—creating invisible bars to becoming a contributing member of society. If the panel majority's decision is not reconsidered, the National Council's membership, as well as all people in the Sixth Circuit living in poverty who depend on the ability to drive, will be harmed.

Dēmos is a dynamic think-and-do tank that powers the movement for a just, inclusive, multiracial democracy. Founded in 2000, Dēmos deploys litigation, original research, advocacy, and strategic communications to advance economic justice and remove barriers to political participation. The organization's economic justice work focuses on research and policy solutions to overcome racial economic inequality. Dēmos' 2018 policy book, *Everyone's Economy: 25 Policies to Lift Up Working People*[2] identifies the use of government sanctions against those unable to afford criminal justice fines and fees as a central cause of economic inequality. Dēmos thus has a substantial interest in the matters at issue in this case.

IV. ARGUMENT

THE *BEARDEN/GRIFFIN* LINE OF CASES PROHIBITS ALL SANCTIONS, NOT JUST INCARCERATION, FOR INABILITY TO PAY CRIMINAL JUSTICE FINES AND FEES, WHEN ALTERNATIVES ARE AVAILABLE.

A. The *Bearden/Griffin* Line of Cases Applies to Property Interests.

The panel majority pushed aside Supreme Court precedent when it decided that only people facing incarceration are protected from being punished for their poverty. The panel majority incorrectly held that the *Bearden/Griffin* cases do not apply because they did not "concern[] a property interest." Panel Op. at 13. Relying solely on a single-judge concurrence in an out-of-circuit en banc opinion, the

[2] *See* https://www.demos.org/research/everyones-economy-25-policies-lift-working-people, at 75-79 (policy to "De-criminalize Poverty").

majority read a previously unknown distinction between liberty and property interests into the Fourteenth Amendment, concluding that property interests "are not due the same degree of legal protection" as liberty interests. Panel Op. 13-14 (quoting *Markadonatos v. Vill. of Woodridge*, 760 F.3d 545, 554 (7th Cir. 2014) (en banc) (Easterbrook, J., concurring)). The majority then erroneously narrowed *Bearden*'s application to its facts, concluding that "*Bearden* . . . concerns what kind of process is due before a probationer is subject to confinement, not what kind of process is due before a driver's license is subject to suspension." Panel Op. 14-15.

Supreme Court precedent flatly contradicts the panel majority's liberty-property distinction that led it to conclude that consideration of ability to pay and alternative sanctions was not required for driver's license suspensions. In *Griffin v. Illinois* itself, which held that denying indigent defendants a trial transcript for appeal violated the Fourteenth Amendment, the Court specifically named property interests as having constitutional protection in the same breath as liberty interests: "[T]o deny adequate review to the poor means that many of them may lose their life, liberty *or property* because of unjust convictions which appellate courts would set aside." 351 U.S. at 19 (emphasis added).

The Court spelled out the broad requirement for consideration of ability to pay again by applying the rule from *Griffin* to a conviction resulting only in fines. *Mayer v. City of Chicago*, 404 U.S. 189 (1971). The defendant in *Mayer* was an

"impecunious medical student" who could not afford the $300 trial transcript required for an appeal. *Id.* at 197. The Court declined to limit *Griffin*'s reach to individuals facing confinement, reasoning that "[t]he invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." *Id.*

The panel majority tried to get around *Mayer,* despite its clear language and the Supreme Court's later explicit acknowledgment that in *Mayer* "[w]e declined to limit *Griffin* to cases in which the defendant faced incarceration." *M.L.B. v. S.L.J.*, 519 U.S. 102, 112 (1996). The majority distinguished *Mayer* as purportedly involving a liberty interest—"accessing an appeal to challenge a finding of his criminal liability"—an interpretation without authority and contrary to Supreme Court precedent. Panel Op. at 14. In *M.L.B.*, the Supreme Court applied *Griffin*'s concern for a defendant's ability to pay outside of the criminal context to require waiver of costs for an indigent mother's appeal of the termination of her parental rights. 519 U.S. at 125. The *M.L.B.* Court explained that sanctions that are "wholly contingent on one's ability to pay" are unconstitutional because they effectively penalize people for their indigence. *Id.* at 127.

B. The Due Process and Equal Protection Guarantees of the Fourteenth Amendment Prohibit Sanctioning People for their Inability to Pay Criminal Justice Fines and Fees When Alternatives Are Available, as Shown in the *Bearden/Griffin* Line of Cases.

Properly understood, the *Bearden/Griffin* line of cases stands for the proposition that the state may not subject people to penalties for their inability to pay economic sanctions when the state's interest in punishment can "be served fully by alternative means." *Bearden*, 461 U.S. at 671-72; *see also Black v. Romano*, 471 U.S. 606, 611 (1985) (noting that *Bearden* "recognized substantive limits" on penalizing a person for inability to pay outstanding monetary obligations).

The state may not ignore poverty, but instead it "must inquire into the reasons for the failure to pay." *Bearden*, 461 U.S. at 672-73. Imposing sanctions for non-payment of fines and fees that a person cannot pay despite "bona fide efforts" is "fundamentally unfair" when alternatives are available. *Id.* at 668-69; *see also Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (extending imprisonment because a person cannot pay "a fine or court costs" works "an impermissible discrimination"); *Tate v. Short*, 401 U.S. 395, 398 (1971) (imprisoning an indigent person to sit out their court debt by receiving monetary credit for each extra day served because they are unable to pay "constitutes . . . unconstitutional discrimination"). It amounts to punishing people "solely by reason of their indigency." *Williams*, 399 U.S. at 242; *Tate*, 401 U.S. at 397-98.

Protection against punishment for being poor is a bedrock principle of fundamental fairness in which "[d]ue process and equal protection principles converge." *Bearden*, 461 U.S. at 665. *Bearden* deliberately avoided traditional equal protection analysis, declining to ask whether a fundamental right or suspect classification was at issue. It also did not use traditional tiers of scrutiny, rejecting "resort to easy slogans or pigeonhole analysis." *Id.* at 666; *see also id.* at 666 n.8 (explaining that "fitting the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished") (internal quotation marks omitted).

Instead, the Court mandated a "careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose" to determine if imposing sanctions for nonpayment is constitutional. *Id.* at 666-67 (internal quotation marks omitted); *see also M.L.B.*, 519 U.S. at 120-21 ("[W]e inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other"). For a person who reasonably tried to pay court debt yet failed "through no fault of his own," the Court concluded it was "fundamentally unfair to revoke probation" without considering alternate sanctions. *Bearden*, 461 U.S. at 668-69.

The panel majority misunderstood this Supreme Court precedent and incorrectly held these cases inapplicable. Its decision should be reconsidered en banc.

C. Michigan's Regime of Suspending Driver's Licenses Without Regard to Ability to Pay Is Unconstitutional under the *Bearden/Griffin* Line of Cases.

Under the "careful inquiry" required by *Bearden*, Michigan's regime of suspending driver's licenses because of unpaid court debt—without inquiring into ability to pay and without considering alternatives—is unconstitutional.

Without a driver's license, one cannot function in modern society in many parts of the country. For people without access to reliable public transportation who depend on driving to maintain employment, a driver's license is "essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 535, 539–42 (1971); *see also Mackey v. Montrym*, 443 U.S. 1, 11 (1979) (possessing a driver's license is a "substantial" interest). Employers are required to confirm citizenship by examining certain government-issued photo identification, including a driver's license, 8 U.S.C. § 1324a(b)(1)(A), (D)(i). But Michigan requires people to surrender suspended licenses. Mich. Comp. Laws § 257.321. Unlike suspensions of licenses for driving intoxicated,[3] suspensions for non-payment of court debt stay in place

[3] *See Required SOS Licensing Action*, https://www.michigan.gov/documents/REQUIRED_SOS_LICENSING_ACTION

until the debt is paid (potentially forever) and cannot be stayed by a court. Mich. Comp. Laws §§ 257.321a(3), 257.323.

Many Michiganders cannot afford to pay their court debt, yet the state continues to coerce them into payment by taking their driver's licenses. The "rationality of the connection between legislative means and purpose" is nonexistent. *Bearden*, 461 U.S. at 666-67. For individuals too poor to pay fines, suspension cannot induce payment. *See id.* at 670 ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming."); *Tate*, 401 U.S. at 399 (imprisonment for nonpayment of fines "is imposed to augment the State's revenues but obviously does not serve that purpose").

Indeed, suspending driver's licenses of indigent individuals is counter-productive, impeding their ability to work and earn the money to pay their debt. Many of them will continue to drive to stay employed, meaning Michigan's suspension policy has "the perverse effect of inducing the [person] to use illegal means" to survive. *Bearden*, 461 U.S. at 671. A policy that works against the state's goal is not rationally connected to that goal. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring in the result) (holding that

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regulations are not rational when they are "counterproductive" of the state's interests); *Tate*, 401 U.S. at 399 (observing that imprisoning an indigent person for nonpayment of a fine, "rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment").

Finally, Michigan has many potential alternatives to further its interest in collecting court debt, without simultaneously making it virtually impossible for the debtor to pay the outstanding debt. Other jurisdictions provide payment plans tied to the debtor's actual income or convert debt to community service.[4] *Bearden*, 461 U.S. at 672 (discussing extending the deadline for payment, reduction in the fine, and community service as alternatives); *Tate*, 401 U.S. at 400 n.5 (discussing installment plans). If an individual refuses to comply with the tailored sanction, that could be considered willful under *Bearden*, permitting the state to lawfully suspend the person's license.

Michigan's scheme works a total deprivation of indigent persons' substantial interest in the ability to drive legally. Driver's license suspension for these individuals undermines rather than serves the state's goals, and alternative means of enforcement are readily available. Accordingly, this scheme violates the Fourteenth

[4] Letter dated May 27, 2019, from community activist Betty Washington to Catherine Sevcenko, describing the arrangements she has negotiated with local court systems to hold debtors accountable while imposing realistic payment expectations (available from amici should the Court wish to see it).

Amendment's due process and equal protection guarantees under the inquiry required by *Bearden*.

V. CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc to decide the important issues in this case.

Dated: May 29, 2019

Respectfully submitted,

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STATEMENT OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,549 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman 14-point type) using Microsoft Word 2016.

Dated: May 29, 2019

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of *Amici Curiae* National Council for Incarcerated and Formerly Incarcerated Women and Girls, and Dēmos, in Support of Rehearing En Banc was filed with the Court by email this 29th day of May, 2019, consistent with the clerk's instructions, and served by email on the parties as follows:

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