



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Kimberly A. Gaab, Presiding Judge  
Superior Court of Fresno County  
1100 Van Ness Avenue  
Fresno, CA 93724  
Fax: (559) 457-1624

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Kimberly A. Gaab:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Fresno County alone, as of the end of 2015,

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

there were approximately 59,000 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is over 6% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

<sup>3</sup> *See also* Cal Veh. Code § 38392 ("'Willfully' as used in this section has the same meaning as the meaning of that word prescribed in Section 7 of the Penal Code."). Under the Penal Code's definition, "willfully" implies a "purpose or willingness to commit the act or make the omission[.]" *See* Cal. Penal Code § 7.

(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of installment plans, community service, or bail reduction. The absence of local rules, notices, or forms in Fresno County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears the Court has a form TR-105 titled "Petition to Waive Deposit of Bail for FTA Traffic Court Trial or Civil Assessment," in which a defendant may ask the court to waive his or her deposit of bail if they are unable to pay, it is not clear when and how this form is given to defendants. It does not appear to be included in materials mailed to defendants. In addition, the Court's cover letter responding to our PRA request refers to the availability of payment plans for defendants, but it is not clear if and how defendants are

notified of this potential option, nor what standards govern the Court's decision to grant or deny a defendant's request for such a plan.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 "Dear Colleague" letter, the federal Department of Justice warned that "automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process."<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver's license suspensions as a debt collection tool—a practice that doesn't work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn't pay the fines or fees, the person's driver's license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has "willfully" failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual's financial means and circumstances in deciding whether a person has "willfully" failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or csun@aclunc.org.

Sincerely,



Christine P. Sun, Esq.  
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[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Steven D. Barnes, Presiding Judge  
Superior Court of Kings County  
1426 South Drive  
Hanford, CA 93230  
Fax: (559) 585-3260

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Barnes:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Kings County, as of the end of 2015, there

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were over 7,500 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also* *Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See* *Burson*, 402 U.S. at 539

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(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

We have not received your response to our request for records concerning license suspension policies and ability to pay determinations. However, given the responses we have received from other courts around the state, we are concerned that the Court's practices may also not comply with the law. If there are no local rules, notices, or forms in Kings County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), that would not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. See *Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the

serious constitutional issues raised by license suspensions. In its March 2016 “Dear Colleague” letter, the federal Department of Justice warned that “automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.”<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver’s license suspensions as a debt collection tool—a practice that doesn’t work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn’t pay the fines or fees, the person’s driver’s license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has “willfully” failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual’s financial means and circumstances in deciding whether a person has “willfully” failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

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Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Rebekah Evenson, Esq.  
Director of Litigation and Advocacy  
Bay Area Legal Aid

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Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Ernest J. LiCalsi, Presiding Judge  
Superior Court of Madera County  
209 West Yosemite Avenue  
Madera, CA 93637  
Fax: (559) 675-6565

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Ernest J. LiCalsi:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

there were nearly 7,800 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is approximately 5% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

<sup>3</sup> *See also* Cal Veh. Code § 38392 ("'Willfully' as used in this section has the same meaning as the meaning of that word prescribed in Section 7 of the Penal Code."). Under the Penal Code's definition, "willfully" implies a "purpose or willingness to commit the act or make the omission[.]" *See* Cal. Penal Code § 7.

(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of community service or bail reduction. The absence of local rules, notices, or forms in Madera County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears as though the Court offers a one-time one-month extension of time in which to pay and also offers to defendants a declaration form by which a defendant can request an installment payment plan, these accommodations are nonetheless insufficient. It is not clear, for example, when and how the installment payment form is made available to defendants. It is also not clear what standards would govern the Court's decision on whether to grant the request as the Court states that it "does not have to allow" defendants to make installment payments. In addition, although in the failure to appear notice the Court states

that defendants may ask the Court to vacate the Civil Assessment imposed after a failure to pay or appear with good cause, the “good cause reasons” do not include a defendant’s inability to pay. Moreover, as noted above, there does not appear to be a similar opportunity for defendants to reduce the underlying bail amount based on an inability to pay.

To the extent that the Court is suspending of driver’s licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates “fundamental fairness” component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant “works an invidious discrimination solely because he is unable to pay the fine.”). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 “Dear Colleague” letter, the federal Department of Justice warned that “automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.”<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver’s license suspensions as a debt collection tool—a practice that doesn’t work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn’t pay the fines or fees, the person’s driver’s license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has “willfully” failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual’s financial means and circumstances in deciding whether a person has “willfully” failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Brittany Stonesifer, Esq.  
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Rebekah Evenson, Esq.  
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Elisa Della-Piana, Esq.  
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Bay Area

Theresa Zhen, Esq.  
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Andrew Bluth, Esq.  
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Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Dana F. Walton, Presiding Judge  
Superior Court of Mariposa County  
P.O. Box 28  
Mariposa, CA 95338  
Fax: (209) 742-6860

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Walton:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Mariposa County, as of the end of 2015, there

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

were over 800 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

<sup>3</sup> *See also* Cal Veh. Code § 38392 ("'Willfully' as used in this section has the same meaning as the meaning of that word prescribed in Section 7 of the Penal Code."). Under the Penal Code's definition, "willfully" implies a "purpose or willingness to commit the act or make the omission[.]" *See* Cal. Penal Code § 7.

(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

We have not received your response to our request for records concerning license suspension policies and ability to pay determinations. However, given the responses we have received from other courts around the state, we are concerned that the Court's practices may also not comply with the law. If there are no local rules, notices, or forms in Mariposa County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), that would not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. See *Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the

serious constitutional issues raised by license suspensions. In its March 2016 “Dear Colleague” letter, the federal Department of Justice warned that “automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.”<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver’s license suspensions as a debt collection tool—a practice that doesn’t work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn’t pay the fines or fees, the person’s driver’s license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has “willfully” failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual’s financial means and circumstances in deciding whether a person has “willfully” failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.,* Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how

Page 6 of 6

Hon. Dana F. Walton, Presiding Judge

June 15, 2016

the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Rebekah Evenson, Esq.  
Director of Litigation and Advocacy  
Bay Area Legal Aid

Elisa Della-Piana, Esq.  
Legal Director  
Lawyers' Committee for Civil Rights of the  
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Brittany Stonesifer, Esq.  
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Antionette Dozier, Esq.  
Senior Attorney  
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Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S Mail and Facsimile**

June 15, 2016

Hon. Brian L. McCabe, Presiding Judge  
Superior Court of Merced County  
627 West 21<sup>st</sup> Street  
Merced, CA 95340  
Fax: (209) 725-4110

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Brian L. McCabe:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

### **License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Merced County alone, as of the end of 2015,

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<sup>1</sup> *Available at:* <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

there were over 16,000 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is more than 6% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

<sup>3</sup> *See also* Cal Veh. Code § 38392 ("'Willfully' as used in this section has the same meaning as the meaning of that word prescribed in Section 7 of the Penal Code."). Under the Penal Code's definition, "willfully" implies a "purpose or willingness to commit the act or make the omission[.]" *See* Cal. Penal Code § 7.

(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of community service or bail reduction. The absence of local rules, notices, or forms in Merced County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears the Court has a process by which a defendant can seek to vacate the civil assessment for failure to pay for good cause shown, there does not appear to be a process by which a defendant can seek to reduce the underlying fine or perform community service in lieu of the underlying fine. In addition, an inability to pay the assessment is not one of the "good cause reasons" listed in the failure to pay notice.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 "Dear Colleague" letter, the federal Department of Justice warned that "automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process."<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver's license suspensions as a debt collection tool—a practice that doesn't work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn't pay the fines or fees, the person's driver's license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has "willfully" failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual's financial means and circumstances in deciding whether a person has "willfully" failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to

entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.,* Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example,

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pay, and also must be adequately informed of that right.

June 15, 2016

Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or csun@aclunc.org.

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Brittany Stonesifer, Esq.  
Staff Attorney  
Legal Services for Prisoners with Children

Rebekah Evenson, Esq.  
Director of Litigation and Advocacy  
Bay Area Legal Aid

Antionette Dozier, Esq.  
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Western Center on Law and Poverty

Elisa Della-Piana, Esq.  
Legal Director  
Lawyers' Committee for Civil Rights of the  
Bay Area

Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Mark E. Hood, Presiding Judge  
Superior Court of Monterey County  
3180 Del Monte Boulevard, 3<sup>rd</sup> Floor  
Dept 1A  
Marina, CA 93933  
Fax: (831) 775-5499

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Hood:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Monterey County alone, as of the end of

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<sup>1</sup> *Available at:* <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

2015, there were over 13,900 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

We have not received your response to our request for records concerning license suspension policies and ability to pay determinations. However, given the responses we have received from other courts around the state, we are concerned that the Court's practices may also not comply with the law. If there are no local rules, notices, or forms in Monterey County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), that would not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. See *Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the

serious constitutional issues raised by license suspensions. In its March 2016 “Dear Colleague” letter, the federal Department of Justice warned that “automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.”<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver’s license suspensions as a debt collection tool—a practice that doesn’t work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn’t pay the fines or fees, the person’s driver’s license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has “willfully” failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual’s financial means and circumstances in deciding whether a person has “willfully” failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.,* Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how

Page 6 of 6  
Hon. Mark E. Hood, Presiding Judge  
June 15, 2016

the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Rebekah Evenson, Esq.  
Director of Litigation and Advocacy  
Bay Area Legal Aid

Elisa Della-Piana, Esq.  
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Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Harold Hopp, Presiding Judge  
Superior Court of Riverside County  
4050 Main Street  
Riverside, CA 92501  
Fax: (951) 777-3164

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Harold Hopp:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Riverside County alone, as of the end of

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2015, there were nearly 123,000 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is over 5% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

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In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of community service or bail reduction. The absence of local rules, notices, or forms in Riverside County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears the Court has procedures by which defendants can request and receive community service in lieu of paying the underlying fine if they demonstrate an inability to pay, it is not clear if and how defendants are notified of this option. For example, it does not appear to be included in materials mailed to defendants. In addition, the Court states in its failure to appear and failure to pay notices that defendants may file a Request to Address the Civil Assessment if they had "good cause" for failing to appear or

pay, but it is not clear what the Court considers “good cause” (beyond medical incapacitation, incarceration, and military service), and whether an inability to pay would qualify.

To the extent that the Court is suspending of driver’s licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates “fundamental fairness” component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant “works an invidious discrimination solely because he is unable to pay the fine.”). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 “Dear Colleague” letter, the federal Department of Justice warned that “automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.”<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver’s license suspensions as a debt collection tool—a practice that doesn’t work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn’t pay the fines or fees, the person’s driver’s license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has “willfully” failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual’s financial means and circumstances in deciding whether a person has “willfully” failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Adrienna Wong, Esq.  
Staff Attorney  
ACLU Foundation of Southern California,  
Inland Empire Office

Rebekah Evenson, Esq.  
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Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman L



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Harry J. Tobias, Presiding Judge  
Superior Court of San Benito County  
450 Fourth Street  
Hollister, CA 95023  
Fax: (831) 636-2046

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Harry J. Tobias:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in San Benito County alone, as of the end of

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

2015, there were more than 2,600 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is about 4.5% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

<sup>3</sup> *See also* Cal Veh. Code § 38392 ("'Willfully' as used in this section has the same meaning as the meaning of that word prescribed in Section 7 of the Penal Code."). Under the Penal Code's definition, "willfully" implies a "purpose or willingness to commit the act or make the omission[.]" *See* Cal. Penal Code § 7.

(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of community service or bail reduction. The absence of local rules, notices, or forms in San Benito County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears the Court has a process by which a defendant can file a petition to show good cause for a failure to pay and request that the civil assessment be vacated, there does not appear to be a form or process by which a defendant can seek to reduce the underlying fine or perform community service in lieu of the underlying fine. It is also not clear what standards would govern the Court's decision on whether to grant the petition.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 "Dear Colleague" letter, the federal Department of Justice warned that "automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process."<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver's license suspensions as a debt collection tool—a practice that doesn't work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn't pay the fines or fees, the person's driver's license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has "willfully" failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual's financial means and circumstances in deciding whether a person has "willfully" failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to

entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

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pay, and also must be adequately informed of that right.

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We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Brittany Stonesifer, Esq.  
Staff Attorney  
Legal Services for Prisoners with Children

Rebekah Evenson, Esq.  
Director of Litigation and Advocacy  
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Antionette Dozier, Esq.  
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Elisa Della-Piana, Esq.  
Legal Director  
Lawyers' Committee for Civil Rights of the  
Bay Area

Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Raymond L. Haight III, Presiding Judge  
Superior Court of San Bernardino County  
247 West 3<sup>rd</sup> Street, 11<sup>th</sup> Floor  
San Bernardino, CA 92415  
Fax: (909) 708-8784

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Raymond L. Haight III:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in San Bernardino County alone, as of the end of 2015, there were approximately 95,000 suspended licenses for a combination of failure to

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

pay and failure to appear on a traffic citation, which is about 4.5% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. Neither the courtesy notices nor the failure to appear or pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of installment plans, community service, or bail reduction. The absence of local rules, notices, or forms in San Bernardino County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although the Court states in its failure to appear and/or pay notice that defendants may file a Request to Address the Civil Assessment if they had "good cause" for failing to appear, it is not clear what the Court considers "good cause" and whether an inability to pay would qualify. Moreover, this same Request form appears to provide an option for "payment arrangements," which presumably include payment plans, but nowhere in the failure to appear and/or pay notice are defendants notified of this option or directed to this Request form to request payment plans.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 "Dear Colleague" letter, the federal Department of Justice warned that "automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process."<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver's license suspensions as a debt collection tool—a practice that doesn't work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn't pay the fines or fees, the person's driver's license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has "willfully" failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual's financial means and circumstances in deciding whether a person has "willfully" failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to

entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example,

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pay, and also must be adequately informed of that right.

June 15, 2016

Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Adrienna Wong, Esq.  
Staff Attorney  
ACLU Foundation of Southern California,  
Inland Empire Office

Rebekah Evenson, Esq.  
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Andrew Bluth, Esq.  
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cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Jose J. Alva, Presiding Judge  
Superior Court of San Joaquin County  
222 East Weber Avenue  
Stockton, CA 95202  
Fax: (209) 992-5554

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Jose J. Alva:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in San Joaquin County alone, as of the end of

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

2015, there were over 40,000 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is nearly 6% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

<sup>3</sup> *See also* Cal Veh. Code § 38392 ("'Willfully' as used in this section has the same meaning as the meaning of that word prescribed in Section 7 of the Penal Code."). Under the Penal Code's definition, "willfully" implies a "purpose or willingness to commit the act or make the omission[.]" *See* Cal. Penal Code § 7.

(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of installment plans, community service, or bail reduction. The absence of local rules, notices, or forms in San Joaquin County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears the Court has a process by which a defendant can request a reduction in the civil assessment for failure to appear or pay, there does not appear to be a process by which a defendant can seek to reduce the underlying fine or perform community service in lieu of the underlying fine. It is also not clear what standards would govern the Court's decision on whether to grant such a request.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 "Dear Colleague" letter, the federal Department of Justice warned that "automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process."<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver's license suspensions as a debt collection tool—a practice that doesn't work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn't pay the fines or fees, the person's driver's license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has "willfully" failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual's financial means and circumstances in deciding whether a person has "willfully" failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are

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entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.,* Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

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Page 6 of 6  
Hon. Jose J. Alva, Presiding Judge  
June 15, 2016

Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or csun@aclunc.org.

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Brittany Stonesifer, Esq.  
Staff Attorney  
Legal Services for Prisoners with Children

Rebekah Evenson, Esq.  
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Lawyers' Committee for Civil Rights of the  
Bay Area

Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Barry T. LaBarbera, Presiding Judge  
Superior Court of San Luis Obispo County  
1035 Palm Street, Room 385  
San Luis Obispo, CA 93408  
Fax: (805) 781-1159

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Barry T. LaBarbera:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in San Luis Obispo County alone, as of the end

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

of 2015, there were more approximately 8,400 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of community service or bail reduction. The absence of local rules, notices, or forms in San Luis Obispo County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears the Court will entertain "payment alternatives," including community work service in lieu of paying the fine, a one-time 90 day extension, and monthly payment plans, it is not clear if and how defendants are notified of all of these options beyond the posting of them on the Court's website. For example, this information does not appear to be included in materials mailed to defendants, other than the option for installment payments which appears in the Court's courtesy notices. It is also not clear what standards would govern the Court's decision on whether to grant any of these alternative payment requests. In

addition, it appears as though the Court has a Financial Declaration – Traffic Petition form in which a defendant may provide information concerning its inability to pay. However, this form appears to only be available to defendants who are requesting to appear in Court without posting bail and does not apply to reduce the underlying fine.

To the extent that the Court is suspending of driver’s licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates “fundamental fairness” component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant “works an invidious discrimination solely because he is unable to pay the fine.”). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 “Dear Colleague” letter, the federal Department of Justice warned that “automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.”<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver’s license suspensions as a debt collection tool—a practice that doesn’t work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn’t pay the fines or fees, the person’s driver’s license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has “willfully” failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual’s financial means and circumstances in deciding whether a person has “willfully” failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

June 15, 2016

using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Brittany Stonesifer, Esq.  
Staff Attorney  
Legal Services for Prisoners with Children

Rebekah Evenson, Esq.  
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Theresa Zhen, Esq.  
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Andrew Bluth, Esq.  
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Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. James E. Herman, Presiding Judge  
Superior Court of Santa Barbara County  
1100 Anacapa Street  
Santa Barbara, CA 93121  
Fax: (805) 882-4519

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge James E. Herman:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Santa Barbara County alone, as of the end of

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

2015, there were close to 16,000 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

<sup>3</sup> *See also* Cal Veh. Code § 38392 ("'Willfully' as used in this section has the same meaning as the meaning of that word prescribed in Section 7 of the Penal Code."). Under the Penal Code's definition, "willfully" implies a "purpose or willingness to commit the act or make the omission[.]" *See* Cal. Penal Code § 7.

(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. Neither the courtesy/warning notice nor the Notice of Decision upon a Trial by Written Declaration sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of bail reduction. The absence of local rules, notices, or forms in Santa Barbara County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. See *Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state

criminal statute as applied to defendant “works an invidious discrimination solely because he is unable to pay the fine.”). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 “Dear Colleague” letter, the federal Department of Justice warned that “automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.”<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver’s license suspensions as a debt collection tool—a practice that doesn’t work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn’t pay the fines or fees, the person’s driver’s license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has “willfully” failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual’s financial means and circumstances in deciding whether a person has “willfully” failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

Page 6 of 6

Hon. James E. Herman, Presiding Judge

June 15, 2016

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Brittany Stonesifer, Esq.  
Staff Attorney  
Legal Services for Prisoners with Children

Rebekah Evenson, Esq.  
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Lawyers' Committee for Civil Rights of the  
Bay Area

Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Denine Guy, Presiding Judge  
Superior Court of Santa Cruz County  
701 Ocean Street  
Santa Cruz, CA 95060  
Fax: (831) 420-2260

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Guy:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Santa Cruz County alone, as of the end of

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2015, there were over 9,900 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

We have not received your response to our request for records concerning license suspension policies and ability to pay determinations. However, given the responses we have received from other courts around the state, we are concerned that the Court's practices may also not comply with the law. If there are no local rules, notices, or forms in Santa Cruz County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), that would not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. See *Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the

serious constitutional issues raised by license suspensions. In its March 2016 “Dear Colleague” letter, the federal Department of Justice warned that “automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.”<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver’s license suspensions as a debt collection tool—a practice that doesn’t work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn’t pay the fines or fees, the person’s driver’s license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has “willfully” failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual’s financial means and circumstances in deciding whether a person has “willfully” failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.,* Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how

Page 6 of 6  
Hon. Denine Guy, Presiding Judge  
June 15, 2016

the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Rebekah Evenson, Esq.  
Director of Litigation and Advocacy  
Bay Area Legal Aid

Elisa Della-Piana, Esq.  
Legal Director  
Lawyers' Committee for Civil Rights of the  
Bay Area

Brittany Stonesifer, Esq.  
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Legal Services for Prisoners with Children

Antionette Dozier, Esq.  
Senior Attorney  
Western Center on Law and Poverty

Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Jeffrey B. Barton, Presiding Judge  
Superior Court of San Diego County  
220 West Broadway, Third Floor  
San Diego, CA 92101  
Fax: (619) 450-5135

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Jeffrey B. Barton:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in San Diego County alone, as of the end of

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<sup>1</sup> *Available at:* <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

2015, there were more than 130,000 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is about 4% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

<sup>3</sup> *See also* Cal Veh. Code § 38392 ("'Willfully' as used in this section has the same meaning as the meaning of that word prescribed in Section 7 of the Penal Code."). Under the Penal Code's definition, "willfully" implies a "purpose or willingness to commit the act or make the omission[.]" *See* Cal. Penal Code § 7.

(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or delinquent notices for failure to appear or failure to pay sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of installment plans, community service, or bail reduction. The absence of local rules, notices, or forms in San Diego County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears the Court has procedures in place whereby defendants may pay their bail in installments or perform community service in lieu of fines or fees, it is not clear when and how defendants are notified of these options. For example, this information does not appear to be included in materials mailed to defendants. In addition, the Court states in its delinquent notices for failure to appear or pay that defendants may appear in Court to present written proof of "good cause" for their failure to appear or pay, in order to waive their civil assessment, but it is not clear what the Court considers "good cause" (beyond

hospitalization, incarceration, and military service), and whether an inability to pay would qualify.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 "Dear Colleague" letter, the federal Department of Justice warned that "automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process."<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver's license suspensions as a debt collection tool—a practice that doesn't work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn't pay the fines or fees, the person's driver's license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has "willfully" failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual's financial means and circumstances in deciding whether a person has "willfully" failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Margaret Dooley-Sammuli  
Criminal Justice & Drug Policy Director  
ACLU of California

Rebekah Evenson, Esq.  
Director of Litigation and Advocacy  
Bay Area Legal Aid

Elisa Della-Piana, Esq.  
Legal Director  
Lawyers' Committee for Civil Rights of the Bay Area

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Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Raima Ballinger, Presiding Judge  
Superior Court of Sonoma County  
600 Administration Drive  
Santa Rosa, CA 95403  
Fax: (707) 521-6750

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Raima Ballinger:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Sonoma County alone, as of the end of 2015,

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

there were approximately 24,000 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is nearly 5% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of community service or bail reduction. The absence of local rules, notices, or forms in Sonoma County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears the Court has a form that a defendant found guilty in absentia may submit containing an agreement to pay a court fine in installments, it is not clear when and how this form is made available to defendants. Moreover, based on the Guidelines for Installment Payments document, it appears as though the installment payment program is rigid and cannot be tailored to an individual defendant's circumstances, *i.e.*, defendants must put at least 10% down and the minimum monthly payment can be no less than \$35.

It also appears as though a defendant may request to complete volunteer hours in lieu of paying a fine, but it is not clear if this option is publicized and/or made available to all defendants. It does not appear as though defendants are made aware of this option as part of the courtesy notice or failure to pay or appear notices that the Court sends.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 "Dear Colleague" letter, the federal Department of Justice warned that "automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process."<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver's license suspensions as a debt collection tool—a practice that doesn't work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn't pay the fines or fees, the person's driver's license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

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installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to pay, and also must be adequately informed of that right.

using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example, Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Brittany Stonesifer, Esq.  
Staff Attorney  
Legal Services for Prisoners with Children

Rebekah Evenson, Esq.  
Director of Litigation and Advocacy  
Bay Area Legal Aid

Antionette Dozier, Esq.  
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Elisa Della-Piana, Esq.  
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Lawyers' Committee for Civil Rights of the  
Bay Area

Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Timothy W. Salter, Presiding Judge  
Superior Court of Stanislaus County  
801 10<sup>th</sup> Street  
Modesto, CA 95354  
Fax: (209) 236-7794

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Timothy W. Salter:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Stanislaus County alone, as of the end of

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

2015, there were more than 33,000 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is over 6% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

<sup>3</sup> *See also* Cal Veh. Code § 38392 ("'Willfully' as used in this section has the same meaning as the meaning of that word prescribed in Section 7 of the Penal Code."). Under the Penal Code's definition, "willfully" implies a "purpose or willingness to commit the act or make the omission[.]" *See* Cal. Penal Code § 7.

(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. None of the courtesy notices or failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of installment plans, community service, or bail reduction. The absence of local rules, notices, or forms in Stanislaus County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears the Court has a process by which a defendant can file a petition to show good cause for a failure to appear or pay and request that the corresponding civil assessment be vacated, there does not appear to be a form or process by which a defendant can seek to reduce the underlying fine or perform community service in lieu of the underlying fine. Moreover, an inability to pay is not one of the listed reasons a defendant may have for asking the Court to remove the Civil Assessment. In addition, although installment plans appear to be available, it is not clear if and how defendants are notified of this option.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 "Dear Colleague" letter, the federal Department of Justice warned that "automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process."<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver's license suspensions as a debt collection tool—a practice that doesn't work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn't pay the fines or fees, the person's driver's license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has "willfully" failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual's financial means and circumstances in deciding whether a person has "willfully" failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are

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<sup>4</sup> Available at: <https://www.justice.gov/crt/file/832461/download>.

<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to

entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.*, Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

Numerous courts in which we have conducted advocacy have agreed that the license suspension practices are problematic and have begun implementing changes. For example,

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pay, and also must be adequately informed of that right.

June 15, 2016

Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or csun@aclunc.org.

Sincerely,



Christine P. Sun, Esq.  
Legal and Policy Director  
ACLU Foundation of Northern California

Brittany Stonesifer, Esq.  
Staff Attorney  
Legal Services for Prisoners with Children

Rebekah Evenson, Esq.  
Director of Litigation and Advocacy  
Bay Area Legal Aid

Antionette Dozier, Esq.  
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Western Center on Law and Poverty

Elisa Della-Piana, Esq.  
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Bay Area

Theresa Zhen, Esq.  
Skadden Fellow  
A New Way of Life Reentry Project

Andrew Bluth, Esq.  
Counsel  
Pillsbury Winthrop Shaw Pittman LLP

cc: Judicial Council  
[FuturesCommission@jud.ca.gov](mailto:FuturesCommission@jud.ca.gov)



**Via U.S. Mail and Facsimile**

June 15, 2016

Hon. Gary L. Paden, Presiding Judge  
Superior Court of Tulare County  
221 South Mooney Blvd, Room 201  
Visalia, CA 93291  
Fax: (559) 737-4547

**Re: Traffic Court Practices and Driver's License Suspensions**

Dear Honorable Judge Gary L. Paden:

I write on behalf of Bay Area Legal Aid, Lawyers' Committee for Civil Rights, Legal Services for Prisoners with Children, the Western Center on Law and Poverty, A New Way of Life, Pillsbury Winthrop Shaw Pittman and the American Civil Liberties Union of Northern California. Our coalition has been working in a number of Bay Area counties and Los Angeles in order to encourage courts to change their unlawful practices of suspending driver's licenses of low income individuals for failure to appear on or failure to pay traffic citations. It is our understanding that this Court may have similar problematic practices and we write to bring the issue to the Court's attention and outline what the Court can do to comply with its statutory and constitutional duties.

**License Suspensions for Failure to Pay and Failure to Appear Disproportionately Impact Indigent Individuals**

As outlined in a series of reports authored by many of the signatories to this letter, low income and indigent Californians are increasingly unable to afford minor traffic citations, the cost of which are exorbitant due to numerous fees tacked on to generate revenue for the operation of the state courts and other basic functions of state government. *See* "Not Just a Ferguson Problem: How Traffic Court is Driving Inequality" (2015).<sup>1</sup> When people do not pay the citations on time, courts routinely refer the drivers to the Department of Motor Vehicles ("DMV") to have their licenses suspended. As a result of these practices, as of the end of 2015, over 1.9 million Californians, many of whom are unemployed, disabled or homeless, had suspended licenses for failure to appear or failure to pay on citations. Based on DMV records, it is our understanding that in Tulare County alone, as of the end of 2015,

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<sup>1</sup> Available at: <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf>.

there were more than 35,000 suspended licenses for a combination of failure to pay and failure to appear on a traffic citation, which is almost 8% of the county's total population.

These non-safety related suspensions make it harder for people to get and keep jobs, harm credit ratings, increase county financial burdens in support of health and welfare, and make it less likely that the court fines and fees will ever get paid. For low-income and indigent drivers, fines and fees create an insurmountable obstacle to the reinstatement of a driver's license. Moreover, communities of color are disproportionately impacted by the license suspension policies and attendant disproportionate arrests for driving on a suspended license due to racial profiling by law enforcement and other biases built into the system. *See* "Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California" (2016).<sup>2</sup> The practice of license suspensions for failure to pay and appear has also been an economic failure, resulting in billions of dollars in court-debt that realistically will never be paid.

### **License Suspension Without an Ability to Pay Determination Violates Statutory and Constitutional Law**

The Vehicle Code expressly states that the Court may only act to suspend a license for failure to pay if the person "willfully" failed to do so. *See* Cal. Veh. Code §§ 40509(b), 40509.5(b). Under basic statutory construction principles and the plain meaning of the word, "willfully" must be interpreted to mean an intentional act—an affirmative decision made that was not due to a person's indigence or financial circumstances. *See* Merriam Webster Collegiate Dictionary, 10<sup>th</sup> Ed. (defining "willful" as "obstinately and perversely self-willed," or "done deliberately: intentional"); *People v. Hagedorn*, 127 Cal. App. 4th 734, 744 n.6 (2005) ("The word 'willfully' as generally used in the law is a synonym for 'intentionally,' i.e., the defendant intended to do the act proscribed by the penal statute.") (internal quotations omitted).<sup>3</sup> Accordingly, in interpreting and enforcing sections 40509(b) and 40509.5(b), the Court may not act to suspend a license for failure to pay if the nonpayment occurred because of an *inability* to pay. *Id.*; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971) (due process requires that a state consider essential statutory elements for driver's license suspension before suspending the license).

Moreover, both the United States and the California Supreme Courts have held that suspending a driver's license triggers due process protection. *See Burson*, 402 U.S. at 539

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<sup>2</sup> Available at: <http://ebclc.org/backontheroad/problem/>.

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(noting that a driver's license may be "essential in the pursuit of a livelihood"); *Rios v. Cozen*, 7 Cal. 3d 792, 795-6 (1972). Because continued possession of a driver's license is protected by the constitutional guarantees of due process, individuals must be given notice and a meaningful opportunity to be heard on the element of "willfulness" and on their ability to pay. Adequate notice requires that the individual be apprised of the action in such a way that they are able to defend themselves against the potential consequences. See *Memphis Light, Gas, & Water Division v. Craft*, 436 U.S. 1, 13 (1978) ("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.") (citation omitted); *Turner v. Rogers*, 546 U.S. 2507, 2519 (2011) (notice for contempt proceedings in child support case must inform defendants that "ability to pay" is a critical issue).

In addition, the law requires that these statutory and constitutional protections regarding notice and opportunity to be heard occur prior to license suspension. See *Burson*, 402 U.S. at 542 (rejecting state's argument that post-suspension liability hearings would satisfy due process). The need for a pre-suspension determination on liability is even greater for indigent persons who have a strong interest in uninterrupted access to the statutory entitlement at issue. See *Mathews v. Eldridge*, 424 U.S. 319, 341-42 (1976).

### **The Court Does Not Provide Adequate Procedural Protections Prior to Referring an Individual to the DMV for License Suspension**

Based on records we have received from you pursuant to a request for judicial administrative records, we are concerned that the Court's practices do not comply with the law. Neither the courtesy notice nor the failure to appear or failure to pay notices sent by the Court contain any information about the defendant's right to an ability to pay determination, the process through which a defendant may access that determination, or about the availability of installment plans, community service, or bail reduction. The absence of local rules, notices, or forms in Tulare County Superior Court informing a defendant that he or she is entitled to a meaningful ability to pay evaluation prior to the Court finding that he or she has "willfully" failed to pay under Vehicle Code sections 40509(b) or 40509.5(b), do not comply with the right to due process. See *Bell v. Burson*, 402 U.S. at 542; *Memphis Light*, 436 U.S. at 13; *Turner*, 546 U.S. at 2519.

Although it appears as though the Court offers a one-time sixty (60) day extension of time in which to pay and also offers to defendants a declaration form by which a defendant can request an installment payment plan, these accommodations are nonetheless insufficient. It is not clear, for example, when and how the installment payment form is made available to defendants. It is also not clear what standards would govern the Court's decision on whether to grant the request as the Court states that it "does not have to allow" defendants to make installment payments.

To the extent that the Court is suspending of driver's licenses of those who are unable to make payments or failing to appear without determining that the non-payment or failure to appear was willful, rather than due to an inability to pay, it is violating the express terms of Vehicle Code sections 40508, 40509 and 40509.5 and the constitutional guarantee of substantive due process. *See Bearden v. Georgia*, 461 U.S. 660, 673-74 (1983) (revoking probation where defendant lacks resources to pay fine violates "fundamental fairness" component of due process); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (holding that state criminal statute as applied to defendant "works an invidious discrimination solely because he is unable to pay the fine."). Notably, the Department of Justice recently recognized the serious constitutional issues raised by license suspensions. In its March 2016 "Dear Colleague" letter, the federal Department of Justice warned that "automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process."<sup>4</sup>

## Remedies

We urge the Court to cease referring individuals to the DMV for driver's license suspensions as a debt collection tool—a practice that doesn't work and disproportionately harms people of color and those who are low-income. If the Court chooses to continue this practice, at a minimum, we urge the Court in its notices to inform the defendant of: i) the total amount of fines and fees due; ii) the right to a judicial determination on his or her ability to pay the fines and fees; iii) the options available to the defendant if he or she cannot afford to pay, such as the possibility of an installment plan; and iv) a warning that if the individual doesn't pay the fines or fees, the person's driver's license may be suspended unless the Court determines that the person does not have the ability to pay the fines and fees. In order to constitute adequate notice, the above information must be included in the initial courtesy notice as well as all subsequent notices sent to individuals prior to the Court acting to suspend a license for failure to pay or failure to appear.

In determining whether an individual has "willfully" failed to pay, we urge the Court to provide a meaningful *pre-deprivation* opportunity to be heard on that essential element. The Court must also properly evaluate an individual's financial means and circumstances in deciding whether a person has "willfully" failed to pay, and must further refrain from acting to suspend a license if the person has demonstrated an inability to pay the imposed fine in whole or on any installment plan that the Court offers.<sup>5</sup> Because there is inadequate notice that individuals are

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<sup>5</sup> To minimize the burden on the Court, the Court could consider adopting a form similar to the civil fee waiver form. However, although we believe that meaningful consideration of the information on the form would address many of the problems we have identified, we believe that defendants also must have the right to present argument and evidence to a judge or commissioner on the issue of ability to

entitled to an ability to pay determination and because they cannot pay the imposed fines and fees, many indigent and low-income individuals believe that it is futile to appear or otherwise contact the Court. Accordingly, we urge that the Court also cease referring individuals for license suspensions for failure to appear until it ensures that the proper procedural protections are in place. Appropriate training and guidance to traffic commissioners and all other personnel who handle traffic and other infractions are necessary to ensure consistent and legally-compliant implementation.

The obligation to provide notice of and an opportunity for an ability to pay determination does not end with its prospective implementation. This legal obligation also applies to those whose licenses have already been suspended under Vehicle Code sections 40509(b) or 40509.5(b) without having first been provided with an opportunity for an ability to pay determination. Although the amnesty program provides an opportunity for reinstatement of licenses for those who learn about the program and can afford installment payments, if the Court has not done so, we urge the Court to conduct a mass mailing to all persons whose licenses have been suspended pursuant to Vehicle Code sections 40509(b) or 40509.5(b) and provide an opportunity for an ability to pay determination and license reinstatement for those who cannot afford to pay. As mentioned above, offering fixed installment plans or extensions that are not based on a meaningful and individualized assessment of a defendant's ability to pay does not comply with due process or Vehicle Code sections 40508, 40509, 40509.5 or 42003.

To be clear, it is our view that, regardless of the procedural safeguards it may implement, the Court should *not* refer individuals for driver's license suspension as a means to generate and collect revenue. Sections 40509(b) and 40509.5(b) expressly state that the Court "may" refer persons to the DMV for license suspension for willful failure to pay or failure to appear; there is no mandate to do so. Of course, there are numerous other statutes available to the Court to suspend licenses for public safety reasons if the Court has reason to do so. *See, e.g.,* Cal. Veh. Code § 13200 (permitting suspension for speeding or reckless driving); § 13203 (permitting suspension for driver who commits "road rage"); § 13382 (requiring confiscation and suspension of license for driving under the influence); § 12810.5 (permitting suspension for receiving four "points" in a 12 month period and being designated as a "negligent operator"). The Court also has available to it less-punitive options to collect any outstanding debt, such as wage garnishment or tax interception. Nonetheless, if the Court continues this ineffective practice of using license suspensions to collect court debt, it must at a minimum comply with its statutory and constitutional obligations in doing so.

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pay, and also must be adequately informed of that right.

Contra Costa County Superior Court has stopped altogether its practice of referring persons for license suspension for failure to appear and has put a moratorium in license suspensions for failure to pay. San Francisco Superior Court has also put a moratorium on suspensions for failure to pay and failure to appear. San Mateo County Superior Court has revised its notices and website to include information on the right to an ability to pay determination and courts such as Alameda County, Contra Costa County and Napa County have agreed to work on revising their notices and practices.

We urge this Court to follow the law and other courts' examples by putting a moratorium on license suspension and adopting proper ability to pay notices and procedures. We request that the Court respond to our letter in writing by July 15, 2016 and confirm how the Court will implement the changes outlined in this letter or explain its practices and how they comport with the law. Please direct any communication or questions to Christine Sun at 415.621.2493, ex. 360 or [csun@aclunc.org](mailto:csun@aclunc.org).

Sincerely,



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