476668-1
No. ~~90607-6~~

The Supreme Court of the State of Washington

Stephen Chriss Johnson,

Appellant,

v.

State of Washington Department of Licensing and **Pat Kohler,** in her official capacity,

Respondents.

Brief of Appellant

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1. Introduction

On June 1, 2013[1], the Department of Licensing lost all authority to suspend driver's licenses for failure to pay traffic fines for non-moving violations. On that date, all *prior* non-moving violation failure to pay suspensions should have ended because these suspensions were no longer authorized. However, the Department has refused to release any prior suspensions until the fines are paid in full.

The Department is acting outside its jurisdiction by maintaining these suspensions. As a result, tens or hundreds of thousands of Washington drivers are suffering under the burden of suspension when they should be free to drive.[2] This is a serious deprivation of liberty in our modern society, where driving has become a necessity. "Losing one's driver's license is more serious for some individuals than a brief stay in jail." *Argersinger v. Hamlin*, 407 U.S. 25, 48, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (Powell, J., concurring).

Suspension takes a terrible toll on these drivers, who are invariably poor.[3] Without a license, they are often left with no way to legally commute

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1 The effective date of ESSB 6284 (Laws of 2012, ch. 82).

2 The number cannot be known without analyzing the Department's records.

3 American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtor's Prisons*, p. 65 (October 2010) available at http://www.aclu.org/files/assets/InForAPenny_web.pdf (last visited March 28, 2014);

Alicia Bannon, et al., *Criminal Justice Debt: a Barrier to Reentry*, Brennan Center for Justice at New York University School of Law, p. 5, 13, 27 (October 2010), available at http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (last visited March 31, 2014);

to their places of employment, particularly in rural and other areas where public transportation is insufficient or nonexistent. Many lose their jobs.[4]

Driving is a requirement for participating in the modern workforce.[5] "For many, if you cannot drive, you cannot work. If you cannot work, you cannot make money. If you cannot make money, more likely than not, you cannot pay fines for tickets."[6] Indigent drivers are left with the dilemma of either 1) accepting the suspension, forgoing employment, joining the welfare rolls, and never being able to pay off their fines or get their license back; or 2) driving while suspended and facing the threat of criminal penalties in order to provide for themselves and their families and possibly manage to pay their fines in full.

Katherine Beckett, et al., *The Assessment and Consequences of Legal Financial Obligations in Washington State*, Washington State Minority and Justice Commission, pp. 3-5 (August 2008) available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf (last visited July 24, 2012);

Alexes Harris, et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, American Journal of Sociology, vol. 115 no. 6, p. 1777 (May 2010) available at http://www.soc.washington.edu/users/yharris/Blood%20from%20Stones%202010%20AJSj%20print.pdf (last visited July 24, 2012).

4 Sandra Gustitus, et al., *Access to Driving and License Suspension Policies for the Twenty-First Century Economy*, The Mobility Agenda, p. 9 (June 2008) available at http://www.mobilityagenda.org/home/file.axd?file=2008%2f9%2fDLPaperforinternet.pdf (last visited March 28, 2014).

5 *Id.*, at 4-5;

John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 Seattle J. Soc. Just. 439, 459 (2005), available at http://digitalcommons.law.seattleu.edu/sjsj/vol4/iss1/44 (last visited March 28, 2014).

6 Mitchell, at 459-60.

Many indigent drivers choose the latter.[7] It is only a matter of time, then, before the indigent driver is arrested for DWLS, convicted, jailed, and saddled with additional fines they will not be able to pay. Upon release from jail, the cycle continues. The indigent driver now has a criminal record, making it even more difficult to find work. Their license is still suspended, leaving them at risk of repeat DWLS offenses. Interest has accrued on top of their fines, which were not cleared or reduced through time in jail. They still need to earn an income, so they take the risk and drive. Repeat offenses generally bring increased penalties. The cycle of debt, suspension, and incarceration continues with little to no hope of escape.

This cycle is exactly what ESSB 6284 (Laws of 2012, ch. 82) was designed to remedy. The bill's primary sponsor and chair of the Judiciary Committee, Senator Adam Kline, explained the purpose of the bill:

> Failure to be able to pay—in my neighborhood we call it "driving while poor"—it's *that* that we're trying to get at. ... We're going to save the taxpayers a bundle and ... make it safe for people who don't have a whole lot of money, to drive. ... People will be able to get to work to earn the money to pay the doggone fine.[8]

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[7] Gustitus, at 9;

Austin Jenkins, Northwest News Network, *Nearly 300,000 Wash. drivers suspended for failure to pay tickets*, KPLU radio broadcast (12:13 p.m., July 23, 2011) available at http://www.kplu.org/post/nearly-300000-wash-drivers-suspended-failure-pay-tickets (last visited March 24, 2014).

[8] Senate Judiciary Committee, Jan. 25, 2012, at 00:25:10, available at http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2012010169#start=1013&stop=2100 (last visited May 9, 2014).

The purpose of the Act was to end nonmoving violation suspensions and get people their licenses back. This purpose could only be accomplished if former suspensions for failure to pay arising from nonmoving violations came to an end on the effective date of the Act.

The Department's refusal to recognize the legislature's purpose and to reinstate the licenses of drivers previously suspended for failure to pay fines arising from non-moving violations is causing significant harm to hundreds of thousands of Washington drivers every day. This case seeks to remedy, through a class action and writ of prohibition, the Department's continuing, unauthorized suspension of driver's licenses for failure to pay after the effective date of the Act.

2. Assignments of Error

1. The superior court erred in granting the Department's motion for summary judgment dismissal of the petition for writ of prohibition.

Issues Pertaining to Assignments of Error

Whether, under Laws of 2012, ch. 82, the Department of Licensing is without jurisdiction to maintain a driver's license suspension for failure to pay a traffic fine for a non-moving violation that was originally imposed prior to the effective date of the Act (assignment of error #1).

Whether the Department of Licensing is without jurisdiction to suspend driver's licenses for failure to pay a criminal traffic fine (assignment of error #1).

3. Statement of the Case

Stephen Johnson's driver's license is subject to two, separate suspensions. The first, initiated November 1, 2007, was for failure to pay a fine for the infraction of no valid license, a nonmoving violation. CP 29-30. The second, initiated November 12, 2009, was for failure to pay a fine for the crime of driving while license suspended, in the third degree. *Id.*

In 2012, the legislature passed ESSB 6284 (Laws of 2012, ch. 82, referred to hereafter as "the Act"), which amended the statutes related to suspension of driver's licenses, with an effective date of June 1, 2013. CP 9-15. The Act removed some or all of the Department of Licensing's former authority to suspend a driver's license for failure to pay a fine. CP 4, 18, 43:25-26. In light of the amendments, Johnson requested the Department of Licensing reinstate his license. CP 7. The Department refused, stating that it would not release any suspensions imposed prior to the effective date of the Act. CP 18.

Johnson petitioned Thurston County Superior Court for a writ of prohibition, on behalf of himself and all similarly situated people, to prohibit the Department from maintaining prior failure to pay suspensions after the Act terminated the Department's authority to suspend. CP 4. Johnson also requested an award of damages under RCW 7.16.260. CP 5.

Johnson moved for certification of a class action under CR 23. *See* VRP, Sept. 13, 2013, at 3. The proposed class would have consisted of all Washington-licensed drivers whose licenses have been in a suspended status at any time after June 1, 2013 (the effective date of the Act), for failure to

respond, appear, comply, or pay for a nonmoving violation or for failure to pay a criminal traffic fine.[9] The class would include drivers whose suspensions were imposed prior to June 1, 2013, if those suspensions were still in effect after June 1, 2013. The size of the class is unknown; it is a subset of the approximately 300,000 Washington drivers whose licenses are currently suspended for failure to pay.

The Department simultaneously moved to stay the case pending this Court's decision in *State v. Johnson*, 179 Wn.2d 534, 315 P.3d 1090 (2014). *See* VRP, Sept. 13, 2013, at 3. The superior court stayed the case and did not address Johnson's motion to certify a class action. VRP, Sept. 13, 2013, at 8-9.

After this Court issued its Opinion in *State v. Johnson*, the Department moved in this case for summary judgment dismissal. CP 37. The Department conceded that the Act ended its authority to suspend for failure to pay a fine for a non-moving violation (*E.g.*, CP 37, 40:3-4), but argued that the Act did not obligate the Department to release suspensions that were originally imposed prior to the effective date of the Act (*E.g.*, CP 37). The Department framed its argument in terms of whether the Act could operate retroactively or only prospectively. CP 45-47. The Department also argued, as alternative

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[9] The details of the proposed class action are part of the superior court record. However, those pleadings were not called to the attention of the court in the Department's motion for summary judgment and, pursuant to RAP 9.12, are not part of the record before this Court. Appellant provides these details as procedural history, to give this Court the full context of the case.

grounds for dismissal, that Johnson was properly suspended for failure to pay his criminal fine for DWLS 3rd. CP 47-48.

In response, Johnson argued that the Act's amendments were remedial and therefore applied retroactively to terminate prior suspensions. CP 102-04. Johnson also argued that, even if the Act were prospective only, the Department could not continue prior, coercive suspensions that it was no longer authorized to initiate; all failure to pay[10] suspensions for non-moving violations should have ended on June 1, 2013, when the Department's authority ended. CP 105. Johnson argued that the Department's alternative grounds failed because the statutory scheme did not authorize suspension of a driver's license for failure to pay a criminal traffic fine. CP 106-08. The parties agreed that there were no material facts in dispute and the issues could be resolved as a matter of law. VRP, April 4, 2014, at 29:10-13.

After hearing oral argument, the superior court continued the hearing and requested additional briefing from the parties on the legislative history of the Act. VRP, April 4, 2014, at 30:10-16. After reviewing the additional briefing, the superior court rendered its decision in open court, without further argument. VRP, June 27, 2014, at 32.

The superior court determined that this was a proper case for a writ of prohibition because Johnson had no other adequate remedy at law. CP 247:25-26; VRP, April 4, 2014, at 29:20-30:3; VRP, June 27, 2014,

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[10] Note that the Department treats failure to respond, appear, comply, or pay as simply different types of failure to pay. *See* CP 38 (referring to them as "categories" of "non-payment issues").

at 32:20-33:7. However, the superior court denied the writ and dismissed the petition, holding that the amendments were prospective only and that Johnson was time-barred from arguing his suspension for failure to pay a criminal fine was unauthorized. CP 248; VRP, June 27, 2014, at 33:19-21, 35:19-24; VRP, April 4, 2014, at 30:7-9.

Johnson appealed as a matter of right, requesting this Court accept direct review. CP 251.

4. Summary of Argument

The superior court erred in dismissing Johnson's petition for writ of prohibition on summary judgment. The Department has acted outside its authority in imposing two separate suspensions of Johnson's license.

Part 5.3 demonstrates that the Act removed the Department's authority to withhold a driver's license or privilege for failure to respond, appear, comply, or pay for a nonmoving violation, effective June 1, 2013. The termination of the Department's authority applies to terminate all such suspensions, whenever initiated. This is a prospective application of the Act. But even if it could be viewed as a retroactive application, it is the correct result because the Act is remedial and termination of prior suspensions furthers the purposes of the Act.

Part 5.4 shows that the Department has no statutory authority to withhold a driver's license or privilege for failure to pay a criminal traffic fine. The reasoning of the court in *State v. Johnson* cannot apply to authorize suspension for failure to pay a fine imposed for conviction of a traffic crime.

Finally, Part 5.5 argues that the superior court did not abuse its discretion when it correctly ruled that Johnson had no other plain, speedy, and adequate remedy at law. The Department has waived any challenge to this ruling by failing to cross-appeal the superior court's ruling.

5. Argument

5.1 Summary Judgment Orders Are Reviewed De Novo.

This Court reviews summary judgment orders *de novo. Schmitt v. Langenour*, 162 Wn. App. 397, 404, 256 P.3d 1235 (2011). The Court engages in the same inquiry as the trial court. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832, 100 P.3d 791 (2004). Summary judgment should be granted when there is no genuine issue as to any material fact and the issues can be resolved as a matter of law. CR 56(c). The court is free to grant summary judgment in favor of the nonmoving party where the nonmoving party would be entitled to judgment as a matter of law on the undisputed facts before the court. *See Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (granting summary judgment in favor of the nonmoving party where material facts were not disputed).

5.2 Review of Petition for Writ of Prohibition

The purpose of a writ of prohibition is "to prohibit judicial, legislative, executive, or administrative acts if the official or body to whom it is directed is acting in excess of its power." *Stafne v. Snohomish County*, 156 Wn. App. 667, 687, 234 P.3d 225 (2010); RCW 7.16.290. A writ of prohibition is proper where (1) the body to whom it is directed is acting or about to act in excess of its jurisdiction and (2) the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law. *Brower v. Charles*, 82 Wn. App. 53, 57, 914 P.2d 1202 (1996). Whether the agency or official has authority to act is a question of law reviewed *de novo;* whether there is no

plain, speedy, and adequate remedy is reviewed for abuse of discretion. *See River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001).

5.3 The Department of Licensing no longer has any authority to maintain prior suspensions for failure to pay a fine for a non-moving violation.

From the very beginning of this conflict, Johnson has asked the Department where is its authority to continue to suspend a driver's license for failure to pay a fine for a non-moving violation? Under the Act, there is none. The Department cannot point to any statutory language that allows it to maintain prior suspensions where it is no longer authorized to impose new suspensions. The Department treats the prior suspensions like criminal sentences, apparently believing that as long as the suspension was proper when it was initially imposed, it continues to be proper regardless of any later change in the law.

As will be shown below, the Department's interpretation of its authority is incorrect. Under accepted principles governing the authority of executive agencies, the Department only has that authority that is granted to it by statute. After the Act, the Department no longer has statutory authority to suspend for failure to pay for a nonmoving violation. That change in statutory authority applies to all suspensions, regardless of when they were initiated. Even if this could be described as producing a retroactive effect, it is proper here because the Act is remedial. Termination of prior suspensions is also consistent with the legislative purpose of the Act.

5.3.1 The Department no longer has statutory authority to withhold the driving privilege through suspension for failure to pay for a nonmoving violation.

Administrative agencies, such as the Department of Licensing, "are creatures of the Legislature." *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). Agencies have no inherent or common-law authority. *Id.*; *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 445, 120 P.3d 46 (2005). They have only those powers expressly granted to them by statute and those necessarily implied from the statutory delegation of authority. *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994). Agencies are not permitted to act outside of their legislatively delegated authority. *Alpine Lakes Prot. Soc'y v. Dep't of Ecology*, 135 Wn. App. 376, 394, 144 P.3d 385 (2006).

The rule of "necessary implication" includes only those powers that are *essential* to the declared purpose of the legislation—not simply convenient, but indispensable to carrying out the legislative purpose. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156 n.10, 60 P.3d 53 (2002). Washington courts have been reluctant to find agency authority to impose a particular remedy where express or implied authority is not clearly set forth in the statutory language. *Skagit Surveyors*, 135 Wn.2d at 565. The courts do not defer to an agency the power to determine the scope of its own authority. *Elec. Lightwave v. Utils. & Transp. Comm'n*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994).

A license to drive is an important and valuable property interest. *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); *State v.*

Dolson, 138 Wn.2d 773, 776-77, 982 P.2d 100 (1999). Suspension of a driver's license is a deprivation that must be authorized by statute and comport with due process. *Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004); *State v. Scheffel*, 82 Wn.2d 872, 880, 514 P.2d 1052 (1973).

The Department's authority to withhold the driving privilege or license through suspension for failure to pay a traffic fine is set forth in RCW 46.20.291:

> The department is authorized to suspend the license of a driver upon a showing by its records or other sufficient evidence that the licensee ... (5) Has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 46.20.289;

Failure to pay the fine for an infraction falls under "failed to comply," by operation of the cross-reference, "as provided in RCW 46.20.289," and that section's cross-reference to RCW 46.63.110(6), which deals with imposition and collection of fines for traffic infractions. *See State v. Johnson*, 179 Wn.2d 534, 546-47, 315 P.3d 1090 (2014) (analyzing identical statutory language in the DWLS statute). Thus, RCW 46.20.291 authorizes the Department to suspend a driver's license for failure to pay a fine for a traffic infraction, subject to any limitations "as provided in RCW 46.20.289."

The Act amended both RCW 46.20.289 and RCW 46.63.110(6), limiting the Department's suspension authority to only those cases involving *moving violations:*

> The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that the person has failed to respond to a notice of traffic infraction **for a moving violation,** failed to appear at a requested hearing **for a moving violation,** violated a written promise to appear in court for a notice of infraction **for a moving violation,** or has failed to comply with the terms of a notice of traffic infraction or citation **for a moving violation...**

RCW 46.20.289.

After the Act, the Department's authority to withhold the driving privilege or license through suspension, set forth in RCW 46.20.291 and modified "as provided in RCW 46.20.289," now extends only to failure to respond, appear, comply, or pay *for a moving violation.* With this change to the Department's authority, it no longer has the power to withhold the driving privilege or license for failure to respond, appear, comply, or pay *for a nonmoving violation.*

The Department acknowledges that it can no longer impose any *new* suspensions for nonmoving violations but fails to recognize that *all* nonmoving violation suspensions imposed prior to June 1, 2013 were immediately rendered invalid because the suspensions themselves are no longer authorized by statute.

5.3.2 The Act's removal of the Department's statutory authority applies immediately to all suspensions, no matter when initiated.

The Act not only changed the criteria for license suspensions moving forward, it reduced the scope of the Department's power to withhold the

driving privilege or license by way of a suspension. Because it changed the very *power* of the Department, the Act affects *all suspensions,* no matter when initiated. The Department cannot maintain prior suspensions for failure to respond, appear, comply, or pay for a nonmoving violation when it no longer has the power.

The United States Supreme Court has observed that jurisdictional amendments—those affecting the authority of a court or agency—apply immediately to all actions no matter when initiated **because they speak to the power of the court or agency rather than the rights or obligations of parties.** *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 274, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). "We have always recognized that when jurisdiction is conferred by an Act of Congress and that Act is repealed, the power to exercise such jurisdiction is withdrawn, and all pending actions fall, as the jurisdiction depends entirely upon the act of Congress." *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100, 113 S.Ct. 554, 121 L.Ed.2d 474 (1992) (Thomas, J., concurring). Here, as shown above, the jurisdiction or authority of the Department depends entirely on the statutes enacted by the legislature. When the legislature removed the Department's authority, all then-current nonmoving violation suspensions should have ended. The Department no longer had power to withhold the driving privilege.

The Department has argued that Johnson's nonmoving violation suspension was valid when it was imposed, but this does not resolve the issue. The question remains: On June 1, 2013, where was the Department's statutory authority to withhold Johnson's driving privilege? It is not enough

to point to a former statute after the Department's authority has changed. When the Act became effective, the Department immediately lost all power to withhold the driving privilege through suspension for failure to respond, appear, comply, or pay for a nonmoving violation. The Department could not continue a suspension that it was no longer authorized to make.

The Department's argument incorrectly treats a Section 289 suspension as if it were a criminal sentence. In the criminal law, a sentence remains valid even if the sentencing law is subsequently changed. However, a suspension under RCW 46.20.289 is not like a criminal sentence. It is not intended to punish or deter unlawful conduct. It is not a penalty for a crime or infraction. It is not imposed for purposes of public safety. It does not have a set time period. Rather, it is a coercive sanction of indefinite duration. *See* RCW 46.20.289 (a suspension under this section remains in effect until the person resolves the matter with the court and pays all fines). It is imposed to promote "the efficient administration of traffic regulations," by coercing drivers to pay their fines. *See Redmond v. Moore*, 151 Wn.2d 664, 677, 91 P.3d 875 (2004). The Department cannot save these unauthorized suspensions by analogy to the criminal law.

Section 289 suspensions are much more akin to civil contempt, a coercive sanction imposed to convince a person to comply with a court order. The suspension is not imposed once and left to expire. Every day—in fact, every moment—the driver has a new opportunity to comply by paying the fine. The driver holds the key to the "prison" of suspension. In effect, the suspension is renewed every day the driver fails to pay. When Johnson

failed to pay on June 1, 2013, the Department no longer had the authority to renew or continue that suspension. By maintaining the suspension every day since then, the Department has acted outside its statutory authority.

The Department has argued that terminating all prior nonmoving violation suspensions would be an improper retroactive effect. This is incorrect. A law is retroactive only when it attaches new legal consequences to conduct that occurred prior to the effective date of the law. *Landgraf*, 511 U.S. at 269-70; *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992). The critical first step in determining whether a law is operating retroactively is to identify the relevant activity that the law regulates. *Id.* at 291 (Scalia, J., concurring); *Belgarde*, 119 Wn.2d at 722. When the event triggering application of a statute occurs after the effective date of the statute, the statute is operating prospectively, even though the precipitating event may have had its origin in a situation existing prior to the enactment of the statute. *Belgarde*, 119 Wn.2d at 722.

Here, the triggering event is the driver's *present* failure to pay. To be clear, using Johnson as an example, Johnson's suspension today is not based on the fact that he failed to pay in 2007; it is based on the fact that he failed to pay *yesterday*. If Johnson had paid yesterday, his suspension would be over today, regardless of any failure to pay prior to the effective date of the amendments. Johnson's initial failure to pay is simply an antecedent fact, not the triggering event. Thus, when Johnson failed to pay his fine for a non-moving violation on June 1, 2013, *prospective* application of the Act left the Department with no authority to continue the suspension.

An informative application of this analysis is found in *Heidgerken v. Dep't of Nat. Res.*, 99 Wn. App. 380, 993 P.2d 934 (2000). In *Heidgerken*, DNR imposed on Heidgerken a civil penalty of $10,000 for failure to reforest his property after harvesting. *Id.* at 382. Heidgerken argued that the $10,000 penalty was an invalid retroactive application of a 1994 amendment to RCW 76.09.170 to his 1990 harvest (the former penalty was $500). *Id.* at 387. The Court of Appeals first sought to determine the precipitating event for imposition of the penalty. *Id.* at 388. Heidgerken violated the Forest Practices Act when he failed to reforest his property by June 1993, when the $500 penalty was in effect. *Id.* In February, 1994, after the amended penalty took effect, DNR served Heidgerken with a notice to comply. *Id.* The court held that it was Heidgerken's failure to reforest in response to the notice to comply that precipitated the $10,000 penalty. *Id.* at 388-89. Because the precipitating event took place after the amendment took effect, the amendment was applied prospectively. *Id.* at 389.

Heidgerken's original failure occurred before the amendments. At that time, DNR had the authority to impose a $500 penalty. But Heidgerken continued to fail to reforest until after the statute was amended. As soon as the amendment became effective, DNR had authority to impose a $10,000 penalty. DNR's new authority applied, prospectively, to Heidgerken's continued failure to reforest.

The same is true here. Johnson's original failure to pay occurred before the effective date of the Act. At that time, the Department had the authority to suspend his driving privilege. But Johnson continued to fail to

pay until after the effective date of the Act. As soon as the Act became effective, the Department no longer had authority to suspend Johnson's driving privilege. Even though the situation originated in conduct prior to the effective date of the Act, the triggering event—Johnson's continued failure to pay—took place *after* the effective date of the Act. Applying the Act prospectively to Johnson's continued failure to pay, the Department was without authority to continue Johnson's suspension after June 1, 2013.

5.3.3 The Act is remedial and, therefore, properly applies retroactively to suspensions that were initiated before its effective date.

Even if termination on June 1, 2013, of all prior suspensions for failure to respond, appear, comply, or pay for a nonmoving violation could be properly characterized as a retroactive application of the Act, it is still the correct result. Remedial or curative amendments are given retroactive effect even if not expressly stated in the amendment. *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983).

The amendments made by the Act are remedial. "A remedial statute is one which relates to practice, procedures and remedies and is applied retroactively when it does not affect a substantive or vested right." *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997). An amendment that changes a remedy is presumed to apply to all remedies—not only those which might accrue in the future, but also those which already accrued prior to the amendment. *Pape v. Department of Labor & Industries*, 43 Wn.2d 736, 741, 264 P.2d 241 (1953). Administrative licensing proceedings such as

suspension have long been considered remedial. *McClendon*, 131 Wn.2d at 868.

The Act relates to practice, procedures, and remedies. "A 'right' is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a right." *McClendon*, 131 Wn.2d at 861. The only substantive right at issue here is the State's right to receive payment of a properly imposed fine. *See* RCW 46.63.110 ("Whenever a monetary penalty, fee, cost, assessment, or other monetary obligation is imposed by a court under this chapter, it is immediately payable"). If the person fails to pay, the State then has various *remedies*—procedures by which the State can enforce its right to payment. *See* RCW 46.63.110 ("enforceable as a civil judgment"; "payment plan"; "community restitution program"; "civil enforcement"; "collections agency"). Suspension of a driver's license by the Department is one of these remedies.

The Department concedes that suspensions under RCW 46.20.289 are a coercive procedure or remedy to enforce the State's right to collect a fine. Answer of Defendants to Statement of Grounds for Direct Review ("Answer") at 11. The Act changed the procedure or remedy available to the State. Therefore the Act "relates to practice, procedures and remedies" and is remedial.

The Department has incorrectly argued that the Act is not remedial because it does not create a new remedy or procedure *for Johnson*. While an act that did create a new remedy or procedure would certainly be remedial, such is not required. "A remedial statute is one which **relates to** practice,

procedures and remedies." *McClendon*, 131 Wn.2d at 861 (emphasis added). The Act **relates to** practice, procedures, and remedies by changing the procedures and remedies for driver's license suspension under RCW 46.20.289 and by changing the Department's authority to suspend. That is sufficient to make the Act remedial.

The Act does not affect any substantive or vested right. For purposes of retroactivity analysis, a vested right "must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another." *In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 811, 272 P.3d 209 (2012). As noted above, the only substantive or vested right involved here is the State's right to collect a validly imposed fine. The Department does not have a "right" to suspend the license of a driver who fails to pay. Failure to pay is not an offense. Suspension is not a punishment. *State v. Scheffel*, 82 Wn.2d 872, 879, 514 P.2d 1052 (1973). Suspension under RCW 46.20.289 does not protect public safety. *See Redmond v. Moore*, 151 Wn.2d 664, 677, 91 P.3d 875 (2004). These suspensions are, as the Department concedes, only "a coercive mechanism for enforcing [the State's] right to payment of a penalty or fine"—in other words, a remedy. Answer at 11. At most, the Department had an *expectation* that suspensions would continue to be available. This is not enough to transform it into a vested right. The Act does not impair any substantive or vested right.

Because the Act deals with remedies and does not impair any substantive right, it is remedial and can properly have retroactive effect. *See Bayless v. Cmty. Coll. Dist. No. XIX*, 84 Wn. App. 309, 314, 927 P.2d 254 (1996). On the effective date of the Act, even prior suspensions for failure to respond, appear, comply, or pay for a nonmoving violation should have been terminated.

5.3.4 Termination of all nonmoving violation failure to pay suspensions on the effective date of the Act furthers the legislative purpose of the Act.

"It is not necessary that a statute expressly state that it is intended to operate retrospectively if such an intention can be obtained by viewing its purpose and the method of its [e]nactment." *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972). The general presumption is that statutes are given prospective effect only. "Where a statute is remedial, however, and would be furthered by retroactive application, **this presumption is reversed.**" *State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975) (emphasis added). As demonstrated above, the Act is remedial. "The presumption of retroactivity therefore applies." *Id.*

The result of a presumption of retroactivity, like any presumption, is that the burden of proof rests on the party seeking to overcome the presumption. In the statutory interpretation context, that means that the statute should be given retroactive effect unless there exists in the statutory language or legislative history sufficient indication that the legislature intended the act *not* have retroactive effect. *See McClendon*, 131 Wn.2d at 861.

Here, there is no indication that the legislature intended that prior suspensions for failure to respond, appear, comply, or pay for a nonmoving violation should survive the effective date of the Act. In the absence of such evidence, the presumption of retroactive effect wins out. Prior suspensions should have terminated on the effective date of the Act.

In fact, termination of **all suspensions** for failure to respond, appear, comply, or pay for a nonmoving violation, whenever initiated, furthers the legislative purpose of the Act. The Act was specifically designed to get people's licenses back so they could earn the money to pay their fines. The bill's primary sponsor and chair of the Judiciary Committee, Senator Adam Kline, explained some of the problems the bill was designed to solve: "We have a large population suspended, and thereby uninsured—a problem here—because they did not appear or pay."[11]

> Failure to be able to pay—in my neighborhood we call it "driving while poor"—it's that that we're trying to get at. ... We're going to save the taxpayers a bundle and ... make it safe for people who don't have a whole lot of money, to drive. ... People will be able to get to work to earn the money to pay the doggone fine.[12]

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[11] Senate Judiciary Committee, Feb. 1, 2012, at 01:14:45, available at http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2012021017#start=4355&stop=5100 (last visited May 9, 2014).

[12] Senate Judiciary Committee, Jan. 25, 2012, at 00:25:10, available at http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2012010169#start=1013&stop=2100 (last visited May 9, 2014).

Ending prior suspensions on the effective date of the Act would have significantly reduced the "large population" of suspended drivers, enabling them to hold valid driver's licenses and "be able to get to work to earn the money" to pay their fines and "save the taxpayers a bundle," thus furthering the primary purposes of the Act.[13]

Whether prospective or retroactive, the Act terminated the Department's statutory authority to withhold the driving privilege or license through suspension for failure to respond, appear, comply, or pay for a nonmoving violation, effective June 1, 2013. As a result, all such suspensions should have ended that day. The Department has improperly maintained all prior suspensions, without authority, since that time. This Court should reverse and grant partial summary judgment in Johnson's favor.

5.4 The Department of Licensing does not have authority to suspend a driver's license for failure to pay a criminal traffic fine.

Johnson also challenges the Department's authority to suspend a driver's license for failure to pay a *criminal* traffic fine, even for a moving violation. The Department, on the other hand, argues that Johnson's entire petition can be denied because even if Johnson is correct about nonmoving

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[13] The Administrative Office of the Courts appears to have agreed that prior suspensions would be terminated by the Act. In the fiscal note for the Act, AOC referred to *Redmond v. Moore*, which invalidated automatic suspension for failure to respond, appear, comply, or pay on due process grounds, which resulted in the mass-termination of prior suspensions by the Department. AOC expected "a similar result" from the Act. CP 185.

violation suspensions, he would still be suspended for failure to pay the criminal fine for his DWLS 3rd conviction. This argument misunderstands the nature of a writ of prohibition and again misinterprets the Department's authority to suspend.

The purpose of a writ of prohibition is "to prohibit judicial, legislative, executive, or administrative acts if the official or body to whom it is directed is acting in excess of its power." *Stafne v. Snohomish County*, 156 Wn. App. 667, 687, 234 P.3d 225 (2010); RCW 7.16.290. Thus, the court's inquiry is focused on the acts and the authority of the *defendant* agency or official, not on the status of the petitioner. If the Department has acted without authority, as demonstrated above, Johnson is entitled to a writ of prohibition ordering the Department to terminate all suspensions for failure to respond, appear, comply, or pay for a nonmoving violation, whenever initiated, including Johnson's suspension for failure to pay the fine for the infraction of no valid license. That suspension must end, regardless of whether Johnson has any other valid suspension on his record. The suspensions are separate. This Court must separately analyze the Department's authority for each and separately order that any unauthorized suspension be terminated.

Contrary to the Department's arguments, it does not have statutory authority to suspend a driver's license for failure to pay a criminal traffic fine. The Department's authority to suspend for failure to pay extends only to failure to pay a fine imposed by a court for an *infraction*. *See State v. Johnson*, 179 Wn.2d at 546-47. The cross-reference that supported the *Johnson* court's

conclusion regarding failure to pay an infraction cannot authorize suspension for failure to pay a *criminal* traffic fine. Similarly, the *Johnson* court's alternative reasoning—that an infraction fine is a part of the terms of the notice of infraction—cannot apply to a fine imposed as a criminal sentence.

5.4.1 The statutes do not expressly grant the Department authority to suspend a driver's license for failure to pay a criminal traffic fine.

There is no clear, express statutory grant of authority to the Department to suspend a driver's license or privilege for failure to pay a criminal traffic fine, such as the fine imposed on Johnson after he was convicted of the traffic misdemeanor of DWLS 3rd. RCW 46.20.291, which enumerates the Department's authority to suspend, is silent on failure to pay a criminal traffic fine.

The Department has argued that the statutory grant is found in RCW 46.20.291(5), by way of "failed to comply" and the cross-reference to RCW 46.20.289, similar to the reasoning in *State v. Johnson* for failure to pay an infraction fine. However, the *Johnson* court's reasoning on the cross-reference cannot apply to failure to pay a criminal traffic fine.

In *Johnson*, the court held that the cross-reference to RCW 46.63.110(6) found in RCW 46.20.289 brought failure to pay an infraction fine within the meaning of "failed to comply" because the referenced section, RCW 46.63.110(6), "addresses situations in which a person fails to pay a fine imposed by a court" for an infraction. *Johnson*, 179 Wn.2d at 546. That section is found in Chapter 46.63 RCW, titled

"Disposition of traffic infractions" and deals exclusively with fines imposed by a court for a traffic infraction. It has nothing to do with criminal traffic fines. Therefore, consistent with the *Johnson* court's reasoning, the cross-reference to RCW 46.63.110(6) can *only* draw failure to pay an *infraction fine* within the meaning of "failed to comply." The cross-reference cannot incorporate failure to pay a criminal traffic fine because Section 110 has nothing to do with criminal traffic fines.

RCW 46.20.289 also contains a cross-reference to RCW 46.64.025, which deals with failure to appear in court in response to a criminal traffic citation. RCW 46.64.025 states,

> Whenever any person served with a traffic citation willfully **fails to appear** at a requested hearing for a moving violation or fails to comply with the terms of a notice of traffic citation for a moving violation, the court in which the defendant **failed to appear** shall promptly give notice of such fact to the department of licensing. Whenever thereafter the case in which the defendant **failed to appear** is adjudicated, the court hearing the case shall promptly file with the department a certificate showing that the case has been adjudicated. For the purposes of this section, "moving violation" is defined by rule pursuant to RCW 46.20.2891.

RCW 46.64.025 (emphasis added). The section is clearly directed at failure to *appear*, which is consistent with the language in RCW 46.20.291(5) and RCW 46.20.289 that the Department should suspend a driver's license when the driver "failed to appear at a requested hearing for a moving violation, [or] violated a written promise to appear in court for a notice of infraction for a moving violation." *Accord Johnson*, 179 Wn.2d at 545-46 (noting that

RCW 46.64.025 applies to failure to appear). This is consistent with the nature of a criminal traffic citation, which only require a person to respond and appear in court, not pay a fine. CP 93-94; RCW 46.64.015. Thus, the cross-reference to RCW 46.64.025 can only support suspension for failure to appear; it does not authorize suspension for failure to pay.

5.4.2 Failure to pay a criminal traffic fine is not failure to comply with the terms of the citation under the alternative reasoning of *State v. Johnson.*

Similarly, the *Johnson* court's alternative rationale—that the fine imposed by a court after a contested infraction hearing is a part of the terms of the notice of infraction—cannot apply to failure to pay a criminal fine. A criminal citation is very different from a notice of infraction. A notice of infraction represents a determination that the person committed the infraction. RCW 46.63.060. Significantly, the fine for the infraction is imposed on the face of the notice of infraction when it is first delivered to the driver. *Id.* The driver has the option to either pay the fine or contest it in court. RCW 46.63.070. The *Johnson* court reasoned that because a person "who contests a notice of infraction may eliminate the duty to pay the fine imposed only if he or she succeeds in contesting the infraction," a person who fails to pay the fine imposed after the hearing has also failed to comply with the terms of the notice of infraction. *Johnson*, 179 Wn.2d at 547-48. The same logic cannot apply to a criminal citation.

The numerous and significant differences between a notice of infraction and a criminal traffic citation, including the full panoply of

constitutional protections afforded to a criminal defendant, bar any application of the *Johnson* court's reasoning to the terms of a citation. A notice of infraction is a determination that the person committed the infraction; but a criminal citation is only a finding of *probable cause*, which initiates a full criminal proceeding. *Compare* RCW 46.63.060 *with* CrRLJ 2.1(b) and RCW 46.64.015. The burden of proof in an infraction hearing is preponderance of evidence; but in a criminal trial following a citation the state must prove every element of the charged crime beyond a reasonable doubt. *Compare* RCW 46.63.090 *with, e.g., State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). A notice of infraction imposes the fine and requires the driver to pay or request a hearing; but a citation imposes no fine and requires the driver to appear in court. *Compare* RCW 46.63.060 and RCW 46.63.070 *with* RCW 46.64.015 and CP 93-94.[14] A criminal penalty is imposed only if the State is able to achieve a "guilty" result. The fine is a part of the criminal sentence, *e.g.*, CP 95-97, not a term of the citation, which merely hailed the defendant into court. Since the citation is not a determination of guilt and no fine is imposed on the citation itself, failure to pay the criminal sentence *cannot be failure to comply with the terms of the citation.* As pointed out above, the

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14 A citation may include a monetary amount for "bail forfeiture," but bail is not a fine for the charged crime. A criminal penalty cannot be imposed until there is a finding of guilt. *E.g.*, RCW 9A.04.100. The "bail forfeiture" amount is designed to secure the defendant's appearance in court. *E.g.*, CrRLJ 3.2(*o*). In Johnson's case, even though a bail forfeiture amount was specified, Johnson could not exercise that option because he was arrested, imprisoned for four days, and taken before a judge to enter a plea before he ever received the citation. CP 92-94.

only way a person can fail to comply with a citation is to fail to appear in court. *See* RCW 46.64.025.

The reasoning of *State v. Johnson* cannot apply to bring failure to pay a criminal traffic fine within the Department's statutory authority to suspend a driver's license or privilege. The Department has been acting without authority in suspending drivers, including Johnson, for failure to pay a fine imposed as a sentence for a traffic crime. This Court should reverse the superior court and grant partial summary judgment in Johnson's favor.

5.4.3 Johnson's challenge to the Department's authority to suspend for failure to pay a criminal traffic fine is not time-barred.

The superior court based its decision, at least in part, on the theory that Johnson's challenge on this issue was time-barred. VRP, April 4, 2014, at 30:7-9 ("if he had a challenge to that suspension, it needed to be brought prior to June of 2013"). Neither the court nor the Department has pointed to any statute of limitations for a petition for writ of prohibition, and Johnson can find none. In any event, the Department's ongoing, unauthorized suspension of Johnson's license for failure to pay a criminal traffic fine is of the same nature as a continuing trespass; a statute of limitations serves only to limit the damages that can be claimed, not to bar the claim entirely. *See, e.g., Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 120, 123-26, 977 P.2d 1265 (1999).

There should be no bar to an action to prohibit a State actor from exceeding its statutory authority. To place a time-bar on a petition for writ of

prohibition would allow any State actor to usurp authority that has not been granted by the legislature, so long as their *ultra vires* acts remain unchallenged for the full limitation period. Such a result would be unjust and contrary to principles of constitutional government. So long as a State actor continues to exceed his or her authority, an affected party must have the right to seek a writ of prohibition. The superior court erred in holding that Johnson's challenge was time-barred. Because, as shown above, the Department does not have statutory authority to suspend a driver's license or privilege for failure to pay a fine imposed for conviction of a traffic crime, this Court should reverse and grant summary judgment in Johnson's favor.

5.5 The superior court did not abuse its discretion when it determined that Johnson had no other adequate remedy at law.

The superior court correctly determined that a writ of prohibition was the appropriate procedure for Johnson to seek relief from the Department's *ultra vires* acts because he had no other adequate remedy at law. The superior court denied that portion of the Department's summary judgment motion. VRP, April 4, 2014, at 29:20-30:3. The Department did not cross-appeal that ruling. The issue, therefore, is not properly before this Court. The superior court's ruling on this issue must stand.

However, in the event the Court determines it can hear this issue, Johnson provides the following analysis in support of the superior court's ruling.

This Court reviews the superior court's determination as to the availability of an adequate remedy at law for abuse of discretion. *Stafne v. Snohomish Cnty.*, 156 Wn. App. 667, 687, 234 P.3d 225 (2010). The purpose of a writ of prohibition is "to prohibit judicial, legislative, executive, or administrative acts if the official or body to whom it is directed is acting in excess of its power." *Stafne v. Snohomish County*, 156 Wn. App. 667, 687, 234 P.3d 225 (2010); RCW 7.16.290. "What constitutes a plain, speedy, and adequate remedy depends on the facts of the case and rests within the sound discretion of the court in which the writ is sought." *City of Olympia v. Bd. of Comm'rs*, 131 Wn. App. 85, 96, 125 P.3d 997 (2005).

This is a proper case for issuance of a writ of prohibition. Every day since June 1, 2013, the Department has acted in excess of its jurisdiction by continuing to suspend drivers' licenses for failure to pay traffic fines for nonmoving violations, despite the fact that it has no statutory authority for such suspensions. The Department also acted in excess of its jurisdiction by suspending Johnson's license for failure to pay his criminal sentence for DWLS 3rd. Johnson has no other plain, speedy, and adequate remedy at law to obtain relief from the Department's unauthorized license suspensions.

The superior court explained its ruling:

> It is clear to the Court that there is not another plain, speedy and adequate remedy available to Mr. Johnson to raise this type of challenge, and the challenge is that the Department of Licensing is acting in excess of its jurisdiction by suspending driver's licenses.

VRP, April 4, 2014, at 29:21-30:2.

The Department has argued that Johnson has an adequate remedy by requesting the district court enter a finding that the case has been adjudicated. This is not an adequate remedy to the Department's unauthorized actions. The question is not, as the Department seems to suggest, whether Johnson has some other way to get his license back. The question is whether Johnson has no other adequate remedy at law for the Department acting outside its authority. In other words, is there some way, other than the writ, to prohibit the Department from acting outside its authority and to obtain redress for damages? In this case, there is not.

Johnson has no other forum in which to raise the issue of the Department's lack of statutory authority. Asking the district court for a finding of compliance would not address the issue of the Department's authority. There is no administrative proceeding available through the Department that would enable Johnson to raise the issue of the Department's authority.

The Department has also argued that Johnson should have sought an "administrative review" under RCW 46.20.245. However, the "administrative review" is nothing more than a paper exercise, available only within 15 days of notice of the suspension, to ensure that the Department's records identify the correct person and accurately describe the action taken by the court or other reporting agency. RCW 46.20.245(2). The driver *cannot raise any other challenge* to the validity of the suspension. *Id.*; *Bellevue v. Lee*, 166 Wn.2d 581, 586, 210 P.3d 1011 (2009); *Lee*, 166 Wn.2d at 591 (Sanders, J., dissenting). Johnson cannot raise a challenge to the Department's statutory authority

through an administrative review. Johnson has no other plain, speedy, and adequate remedy at law. This court should issue the requested writ of prohibition.

The superior court did not abuse its discretion when it rejected the Department's arguments and held that Johnson has no other plain, speedy, and adequate remedy at law. The superior court explained,

> I find that a writ of prohibition is the correct legal forum to bring the matters before the Court. It is the action at law needed to determine whether or not the Department of Licensing is acting outside of its authority and to redress damages if there were those if the Court was to find that Department of Licensing was acting outside of its authority. There is no administrative proceeding available through the Department of Licensing which would have enabled the petitioner to raise these issues, as well as I don't find that the Department of Licensing's argument that Mr. Johnson could have just gone to Lewis County and somehow addressed his issue there, that that was viable for him either.

VRP, June 27, 2014, at 32:20-33:7. This Court should affirm the superior court's ruling that Johnson had no other plain, speedy, and adequate remedy at law.

6. Conclusion

For the reasons stated above, this Court should reverse the superior court's summary judgment order and grant summary judgment in Johnson's favor. The Department has acted without statutory authority. Johnson has no other plain, speedy, and adequate remedy at law. This Court should remand to the superior court for further proceedings, including issuance of an

appropriate writ of prohibition, a decision on Johnson's motion to certify a class action, and a jury trial on damages pursuant to RCW 7.16.260.

Respectfully submitted this 22nd day of December, 2014.

/s/ Kevin Hochhalter
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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on December 22, 2014, I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

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DATED this 22nd day of December, 2014

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant

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Dear Supreme Court: Please accept the attached Brief of Appellant for filing today.

Thank you,

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