In the Supreme Court of the State of Idaho

ROXANA BECK, Petitioner, v. ELMORE COUNTY MAGISTRATE COURT; HONORABLE THEODORE FLEMING, Magistrate Judge; HONORABLE BRENT FERGUSON, Magistrate Judge, Respondents.	Supreme Court Docket No. 48475-2020 Elmore County CR-20-19-3224

BRIEF OF THE FINES AND FEES JUSTICE CENTER; THE INSTITUTE FOR JUSTICE; THE UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW POLICY ADVOCACY CLINIC; THE ACLU OF IDAHO; THE AMERICAN CIVIL LIBERTIES UNION; THE CATO INSTITUTE; JUDITH RESNIK; ANNA VANCLEAVE AND BRIAN HIGHSMITH *AMICI CURIAE* IN SUPPORT OF PETITIONER ROXANA BECK

Petition for Writ of Prohibition re: Magistrate Court of the Fourth Judicial District of the State of Idaho, in and for the County of Elmore, Honorable Theodore Fleming, Magistrate Judge, Presiding

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STATEMENT OF THE CASE

Amici[1] are non-profit organizations and legal scholars deeply familiar with issues relating to the criminal legal system's use of court-imposed fines, fees, and costs (collectively, "monetary sanctions") and the legal and social implications of such practices on individuals who lack the means to satisfy them. Amici submit this brief in support of Petitioner Roxana Beck's ("Ms. Beck") argument that issuing an arrest warrant for failure to pay monetary sanctions—without first conducting an ability-to-pay hearing—violates the U.S. Constitution. (Pet. at 8-10.)

Amici submit this brief for two reasons. *First*, Amici expand on the constitutional arguments raised by Ms. Beck. (*See id*.) U.S. Supreme Court precedent unequivocally establishes that the Fourteenth Amendment to the U.S. Constitution prohibits arresting and detaining someone for failing to pay monetary sanctions without first determining that he or she has the ability to pay. Nearly half a century ago in two cases decided just a year apart, the U.S. Supreme Court unanimously recognized that indigent defendants' ability to choose between paying a fine and serving jail time is "illusory" and, therefore, converting those fines into jail sentences only for indigent defendants is unconstitutional. *See Williams v. Illinois*, 399 U.S. 235,

[1] National organizations the Fines and Fees Justice Center, the Institute for Justice, the American Civil Liberties Union ("ACLU"), and the Cato Institute work toward advancing criminal justice reforms through advocacy, research, publications, litigation, and lobbying and represent diverse viewpoints spanning the political spectrum. The ACLU of Idaho is the local affiliate to the national ACLU, based in Boise, Idaho. The Berkeley Law Policy Advocacy Clinic is an interdisciplinary law clinic where students research issues including fines and fees in the juvenile and criminal legal systems, host national convenings and publish reports. Professor Judith Resnik, Anna VanCleave and Brian Highsmith are legal scholars at Yale Law School who have recently authored or contributed to publications about the implications of the criminal legal system's reliance on fines and fees.

242 (1970); *Tate v. Short*, 401 U.S. 395, 671 (1971). In *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), the U.S. Supreme Court extended that reasoning to hold unanimously that courts must inquire into a defendant's ability to pay monetary sanctions before revoking probation. Courts across the nation since have considered whether *Williams* and its progeny prohibit the automatic issuance of arrest warrants based on contempt proceedings for failure to pay monetary sanctions—the precise conduct at issue here—and have found such practices unconstitutional.

Second, Amici emphasize the need to scrutinize enforcement closely when the government itself stands to benefit from collecting monetary sanctions and when aggressive collection practices, including the threat and use of incarceration, disproportionately harm vulnerable communities. Specifically, people with low incomes and people of color are far more likely to have monetary sanctions imposed against them but far less likely to be able to satisfy them. This effectively creates a two-tiered system of justice where the government traps those who cannot pay in a cycle of poverty and punishment while those who can pay can walk away without any additional consequence. The Elmore County Magistrate Court runs afoul of the U.S. Constitution by issuing arrest warrants for failure to pay monetary sanctions without first conducting an ability-to-pay hearing.

ARGUMENT

I. IT IS UNCONSTITUTIONAL TO ISSUE AN ARREST WARRANT FOR FAILURE TO PAY MONETARY SANCTIONS WITHOUT FIRST ANALYZING THE DEFENDANT'S ABILITY TO PAY.

U.S. Supreme Court precedent prohibits incarcerating someone who does not pay monetary sanctions without a finding of ability to pay. These cases apply to the issuance of

arrest warrants where, as here, a defendant misses a payment on court-ordered monetary sanctions.

A. The U.S. Supreme Court Has Repeatedly and Unequivocally Held That the Government May Not Incarcerate Someone Solely Because of Inability to Pay Monetary Sanctions.

More than 50 years ago, in the first of several U.S. Supreme Court decisions directly relevant here—*Williams*, 399 U.S. at 235—the U.S. Supreme Court recognized that individuals cannot face imprisonment beyond the statutory maximum solely by reason of their indigency. In 1967, Willie Williams was convicted of petty theft and received the maximum sentence of one year imprisonment and a $500 fine (as well as $5 in court costs). *Id.* at 236. Because Mr. Williams could not afford to pay the monetary sanctions, the Illinois court ordered Mr. Williams to remain in jail to "work off" the debt at the statutory rate of $5 per day—a total of 101 days beyond the maximum period of confinement. *Id.* at 236-37.

The U.S. Supreme Court unanimously held that the statute authorizing jail time to "work off" fines and court costs was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because, as a direct result of Mr. Williams's inability to pay, he was imprisoned beyond the statutory maximum sentence. The U.S. Supreme Court recognized that imprisonment for "involuntary nonpayment of a fine or court costs" resulted in "impermissible discrimination that rest[ed] on ability to pay." *Id.* at 241. Having "defined the outer limits of incarceration necessary to satisfy its penological interests and policies" (the one-year sentence), the state "may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their

indigency." *Id.* at 241-42. The Illinois statute made incarceration in excess of the statutory maximum possible only for those unable to pay their fines and court costs. *Id.* at 242. The U.S. Supreme Court noted that its decision applied equally to fines and court costs, because "the purpose of incarceration appears to be the same in both instances: ensuring compliance with a judgment." 399 U.S. at 244 n.20. For those without the funds to pay, the choice to limit jail time to the maximum sentence was, as the U.S. Supreme Court put it, "illusory." *Id.* at 242. While the Court acknowledged the state's interest in collecting revenues, the Court held that the state may not imprison individuals beyond the statutory maximum solely by reason of their indigency. *Id.* at 238, 242.

Less than a year later, the U.S. Supreme Court reiterated its holding in *Williams* that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Tate*, 401 U.S. at 398-99 (emphasis added) (quoting *Williams*, 399 U.S. at 244). Preston Tate, who was unable to pay $425 in traffic fines, was imprisoned to pay off the fines at a rate of $5 per day pursuant to a Texas statute and a municipal ordinance. *Id.* at 396-97. The U.S. Supreme Court held that because state law authorized traffic violations to be punished only by a fine, the court could not convert those fines into jail time for indigent defendants without the resources to pay. *Id.* at 399. The unconstitutional discrimination in *Tate* was "precisely the same" as in *Williams*, the U.S. Supreme Court held, because Mr. Tate was imprisoned "solely because of his indigency." *Id.* at 398.

After *Williams* and *Tate*, the U.S. Supreme Court confronted the issue of whether the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failing to pay court-ordered monetary sanctions. *See Bearden*, 461 U.S. at 672. Danny Bearden pleaded guilty to charges of burglary and theft and was sentenced to probation on the condition that he pay a $500 fine and $250 in restitution. *Id.* at 662. When Mr. Bearden lost his job and was unable to continue to pay, his probation was revoked and he was sentenced to serve the remaining portion of his probation in prison. *Id.* at 662-63. The U.S. Supreme Court rejected all of the justifications the state proffered to justify the challenged practices under the U.S. Constitution, *id.* at 670-72, and while Respondents here do not appear to offer any alleged justifications for the challenged practices, *Bearden* makes clear that a general interest in deterrence will not suffice, *id.* at 671-72.

The U.S. Supreme Court held that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." *Id.* at 672 (emphasis added). In *Bearden*, the U.S. Supreme Court synthesized its prior precedent, explaining, "[d]ue process and equal protection principles converge" when someone is jailed for inability to pay: The Due Process Clause guards against practices that are "fundamentally unfair or arbitrary," and the Equal Protection Clause protects people from being "invidiously denied" liberty that would be available to those with the financial resources to pay. *Id.* at 665-66. A probationer unable to pay despite making bona fide efforts may not be imprisoned if there are alternative measures adequate to meet the state's interests. *Id.* at 673. The U.S. Supreme Court pronounced that "[t]o do otherwise would deprive the probationer of his conditional freedom

simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 673.[2]

Williams, *Tate*, and *Bearden* impose an unequivocal procedural requirement: The Fourteenth Amendment prohibits imprisonment for failure to pay monetary sanctions without a prior hearing inquiring into the reasons for the failure to pay and considering alternatives to imprisonment where the failure to pay is not willful.

B. The U.S. Supreme Court Decisions in *Williams*, *Tate*, and *Bearden* Apply with Equal Force to the Issuance of Arrest Warrants Based on Contempt Proceedings Without an Ability-to-Pay Determination.

Ms. Beck's arrest and imprisonment for failure to pay monetary sanctions without any examination of her ability to pay is unconstitutional for precisely the same reasons as the revocation of the petitioner's probation in *Bearden* and the imprisonment of the defendants in *Williams* and *Tate*.[3] The U.S. Supreme Court in *Bearden* was clear that the constitutional

[2] More recently, the U.S. Supreme Court reinforced these principles in holding that a father's incarceration for failure to make child support payments after a civil contempt hearing violated the Due Process Clause. *Turner v. Rogers*, 564 U.S. 431, 436-38, 449 (2011). The U.S. Supreme Court emphasized the significance of an indigent defendant's interest in preventing the "loss of personal liberty through imprisonment," and found that the civil contempt proceedings at issue did not have sufficient procedural safeguards, such as notice that the defendant's ability to pay would be a central issue in the proceedings, a standard method of eliciting financial information, or an express finding regarding his ability to pay. *Id.* at 449.

[3] Ms. Beck was detained for seven days, two days longer than the statutory maximum sentence for contempt of court, before appearing before Magistrate Judge Fleming. (Pet. at 2-3.) The court credited Ms. Beck for her time served, with the two additional days credited toward her outstanding balance owed to the court. *Id.* That Ms. Beck received credit for the two additional days toward her outstanding balance underscores that her initial punishment, the fine imposed for the charge of frequenting, was simply converted into jail time (via the contempt

violation stemmed from "sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons" for nonpayment, or alternatives to imprisonment. *Bearden*, 461 U.S. at 674. The U.S. Supreme Court framed its holding in *Bearden* broadly, in terms that apply directly here. *See id.* ("But this is no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate*.").[4] And courts applying *Bearden* agree that the opinion is not limited to probation revocation. *See United States v. Payan*, 992 F.2d 1387, 1396 (5th Cir. 1993) ("Nothing in the language of the *Bearden* opinion prevents its application to any given enforcement mechanism.").

As in *Bearden*, neither the state's interest in ensuring payment nor in rehabilitation are furthered by the arrest and imprisonment of someone whose failure to pay is not willful. Respondents have offered no valid justification for the challenged practices, nor could they—jailing "someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming." *Bearden*, 461 U.S. at 670. On the contrary, research shows that monetary sanctions can have devastating financial and other consequences for those who cannot afford to pay them. (*See infra* Section II.)

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charge) solely because of her inability to pay—the precise practice expressly prohibited over half a century ago in *Tate*. 401 U.S. at 399.

[4] Moreover, the *Bearden* Court noted that "[i]n both *Williams* and *Tate*, the Court emphasized the availability of alternate forms of punishment in holding that indigents could not be subjected automatically to imprisonment." *Bearden*, 461 U.S. at 673 n.12.

The application of *Bearden* also is consistent with Idaho law on contempt of court, which requires a finding of willfulness.[5] Indeed, this Court has recognized that "contempt is an extraordinary proceeding" and "[t]his inherent power must be exercised with great caution." *In re Weick*, 142 Idaho 275, 281 (2005). Accordingly, "one's violation of a court order must be willful to justify an order of contempt." *Id.* at 280. A defendant who is unable to make court-ordered payments does not act willfully and is not guilty of contempt.[6] The Magistrate Court's practice of automatically issuing arrest warrants for contempt charges without inquiring into the

[5] Respondents note that "Beck later admitted her violation was willful by entry of an *Alford* plea." (Resp'ts Br. at 9.) *First*, regardless of the collateral consequences of an *Alford* plea, it is clear that such a plea does not constitute an admission that the accused committed the charged offense. *See State v. Birrueta*, 98 Idaho 631, 633 (1977) ("*Alford* makes it clear that a person can plead guilty while maintaining his innocence"). Respondents cannot use Petitioner's *Alford* plea to prove what an *Alford* plea by definition does not. *Second*, even if Ms. Beck had pleaded guilty, that would not render the Magistrate Court's practices constitutional. The conduct prohibited by *Bearden* is the automatic imprisonment of the defendant, depriving her of her liberty, without first analyzing her inability to pay. *See West v. City of Santa Fe*, No. 3:16-CV-0309, 2018 WL 4047115, at *9 (S.D. Tex. Aug. 16, 2018) (explaining that the detention of defendant, even overnight, because he could not afford to pay a fine is contrary to *Bearden*, where defendant pleaded guilty to all charges), *report and recommendation adopted*, 2018 WL 5276264, at *1 (S.D. Tex. Sept. 19, 2018); *Teagan v. City of McDonough*, 949 F.3d 670, 674, 682 (11th Cir. 2020) (Jordan, J., concurring) (arrest and detainment for failure to pay fine contrary to *Bearden*, where appellant eventually borrowed money from her brother to pay the fine). Respondents also ignore the pressures on indigent defendants who, like Ms. Beck, have already served jail time and still face outstanding court debt to plead guilty to contempt charges and enter into a deferred payment agreement regardless of their personal circumstances.

[6] *See Lusty v. Lusty*, 70 Idaho 382, 384 (1950) ("If respondent was, without his fault, unable to make the payments required in the decree, he would not be guilty of contempt."), *overruled on other grounds by State of Idaho Dep't of Health & Welfare v. Slane*, 155 Idaho 274 (2013). Similarly, Idaho Code § 20-624 (2021) recognizes the prerequisite of willfulness. The statute provides that "[w]henever any defendant is confined solely for willful non-payment of any fine," the court may instead confine the defendant at a rate of $35 per day to satisfy the fine.

reasons for the defendant's failure to pay eviscerates these explicit protections aimed at limiting the punishment of imprisonment to situations involving willful noncompliance.

Importantly, this Court is not the first to confront the issue of arresting and incarcerating defendants after they fail to meet a monetary sanction—courts across the country have applied *Bearden* to prohibit the precise practices at issue here. The U.S. Court of Appeals for the Fifth Circuit, for example, consistently has interpreted *Bearden* to prohibit automatic incarceration when a defendant fails to pay a monetary sanction. *See Payan*, 992 F.2d at 1396; *United States v. Scales*, 639 F. App'x 233, 240 (5th Cir. 2016) ("[E]nforcing the obligation [to pay restitution] requires proof of an ability to pay. A district court may not revoke supervised release simply because the person does not make the final balloon payment. Instead, the court must first determine whether there was a willful refusal to pay.").[7]

Similarly, in *West v. City of Santa Fe*, a Texas federal district court agreed that the plaintiff stated a claim for unconstitutional deprivation of his liberty when he was incarcerated for failing to make a monthly payment to satisfy a court fine, without an ability-to-pay hearing. 2018 WL 4047115, at *9 (S.D. Tex. Aug. 16, 2018), *report and recommendation adopted*, 2018 WL 5276264, at *1 (S.D. Tex. Sept. 19, 2018). The court explained:

> When, as here, an individual fails to pay a fine that has been previously imposed by the sentencing court, *Bearden* requires some form of pre-deprivation procedure for determining whether the person is indigent and the reasons the individual has

[7] Similarly, the U.S. Court of Appeals for the Ninth Circuit has held that, when assessing criminal history for purposes of sentencing, the practice of adding "criminal history points" for outstanding monetary sanctions without a finding of willful nonpayment violates due process. *See United States v. Parks*, 89 F.3d 570, 572 (9th Cir. 1996) (noting that there is no "meaningful difference" between having one's sentence extended and having probation revoked).

> failed to pay the fine. . . . To allow [the city] to detain an individual—even just overnight—without providing an ability to pay hearing beforehand would, in effect, often result in individuals being jailed solely because they cannot afford to pay the fine. That is something the Supreme Court has expressly held is not permitted.

West, 2018 WL4047115, at *9 (emphasis added). The city argued that the plaintiff's failure to raise his inability to pay with the court thwarted his constitutional claim, *id.*, as Respondents suggest here (Resp'ts Br. at 9). But the court in *West* explicitly rejected this argument as inconsistent with *Bearden*:

> The Court strongly disagrees that the burden rests with [the plaintiff] to bring the inability to pay issue to the Court's attention. 'No court has held that indigent debtors are required to initiate proceedings to request a modification of their financial obligations or otherwise risk imprisonment for nonpayment.' To the contrary, the Supreme Court in *Bearden* emphatically stated that before a person is incarcerated for failing to pay a fine, a court '*must* inquire' into a defendant's reasons for nonpayment . . . .

West, 2018 WL 4047115, at *9 (citations omitted).

In *Doe v. Angelina County*, 733 F. Supp. 245, 255 (E.D. Tex. 1990), another Texas federal district court applied the *Bearden* line of cases to hold unconstitutional an individual's incarceration for his failure to pay a fine where he "was never taken before a judge, . . . no factual determination was ever made concerning the reasons for his failure to pay it, and . . . no consideration was given to alternatives to incarceration;" his imprisonment therefore violated the Fourteenth Amendment. *See also Rodriguez v. Providence Cmty. Corrs., Inc.*, 155 F. Supp. 3d 758, 770 (M.D. Tenn. 2015) ("Arresting and detaining probationers solely for failure to pay, without conducting an inquiry into whether the nonpayment is willful rather than due to an inability to pay, is precisely the conduct the Supreme Court rejected in [*Bearden*].").

And in *Teagan v. City of McDonough*, 949 F.3d 670, 682 (11th Cir. 2020) (Jordan, J., concurring), Judge Adalberto Jordan wrote separately to emphasize that the appellant's arrest and detainment without a hearing to determine whether her failure to pay a fine was willful "directly contravened the Supreme Court's holding in *Bearden* that imprisoning a defendant for failure to pay a fine, without inquiring into the reasons for the failure to pay or considering alternative measures, violates the 'fundamental fairness required by the Fourteenth Amendment.'" Like Ms. Beck here, Ziahonna Teagan was unable to pay a fine, a warrant was issued for her arrest, and she was subsequently arrested and detained for 10 days before appearing before a municipal court, all without an ability-to-pay determination. *Id.* at 673 (majority opinion).

Amici respectfully submit that this Court should follow the reasoning of these decisions and hold that the automatic issuance and enforcement of arrest warrants based on contempt proceedings without an ability-to-pay determination is unconstitutional.

II. THE USE OF COURT-IMPOSED MONETARY SANCTIONS TO FUND GOVERNMENT UNDERSCORES THE NEED FOR CONSTITUTIONAL PROTECTION AGAINST OVERREACH.

State and local governments derive revenue from monetary sanctions assessed against criminal defendants, including court costs, fines, fees and other charges. The impact of these monetary sanctions on people with limited financial means and communities of color is especially harsh and effectively creates a two-tiered system of justice where the government traps those who cannot pay in a cycle of poverty and punishment. The constitutional protections established by the U.S. Supreme Court in *Williams*, *Tate* and *Bearden* are critical in this context:

they prevent government overreach and the use of incarceration as a punishment simply for being poor.

A. Government Reliance on Monetary Sanctions Creates Incentives for Abuse.

Like many other states, Idaho imposes a range of monetary sanctions through its criminal and juvenile legal systems to fund government services, including its courts.[8] In 2019, the Idaho Legislature's Office of Performance Evaluations ("OPE") conducted an evaluation related to court-ordered fines and fees and found that "Idaho relies on filing fees from civil lawsuits and on fines, fees, and court costs from juvenile and criminal cases" to "help offset the costs of operating its justice system."[9] The OPE determined that many other government services, unrelated to the justice system, also were funded by fines and fees, including highways and schools.[10] In 2017 alone, Idaho collected and distributed $53 million in fines and fees from civil and criminal cases.[11] And while the OPE found that at least $195 million in fines and fees

[8] *See, e.g.*, Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. Miami Race & Soc. Just. L. Rev. 1, 3 (2020) (explaining that while originally intended to fund the justice system, fines and fees have become increasingly popular as a general revenue source for various other government services).

[9] Office of Performance Evaluations, Idaho Legislature, *Court-Ordered Fines and Fees* 5 (2019), https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1903.pdf [hereinafter *OPE Evaluation Report*].

[10] *Id.* at 23.

[11] *Id.* at 5.

remain unpaid, it noted, "[t]here will always be a group that cannot or will not pay, regardless of what additional sanctions are applied."[12]

Government reliance on monetary sanctions raises conflict of interest concerns.[13] The case for constitutional liberties is heightened when court-ordered monetary sanctions are a source of revenue for the state. In *Cain v. White*, the U.S. Court of Appeals for the Fifth Circuit found that due process precluded judges from enforcing fines and fees paid into a general fund administered by the judges that funded court expenses. 937 F.3d 446, 448, 454 (5th Cir. 2019). The Fifth Circuit found "the temptation is too great" because judges have "exclusive authority over how the [fund] is spent . . . and the fines and fees make up a significant portion of their annual budget."[14] *Id.* at 454. The U.S. Supreme Court recently expressed a similar view in *Timbs v. Indiana*, which held that the Excessive Fines Clause of the Eighth Amendment applies

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[12] *Id.* at 8.

[13] *See* Alicia Bannon et al., Brennan Ctr. for Just., *Criminal Justice Debt: A Barrier to Reentry* 30 (2010), https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf.

[14] *See also Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (holding that the defendant's due process rights are violated when the circumstances "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused"); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (finding that impermissible temptation exists when the mayor-as-judge's "executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court"); *Harper v. Prof. Probation Servs. Inc.*, 976 F.3d 1236, 1244 (11th Cir. 2020) (holding that a non-profit agency, acting in a judicial capacity, "was not impartial because its revenue depended directly and materially on whether and how it made sentencing decisions," and did not afford due process).

to the states: "[I]t makes sense [for courts] to scrutinize governmental action more closely when the State stands to benefit" by imposing monetary sanctions on individuals. 139 S. Ct. 682, 689 (2019) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)). And, as noted above, state and local governments in Idaho, and particularly Idaho courts, directly benefit from—and often rely on—revenue collected from court-imposed fines and fees.

This reliance can create powerful incentives for abuse, a phenomenon that received national attention in 2015 when the U.S. Department of Justice ("DOJ") released a report following its investigation of policing practices in Ferguson, Missouri.[15] The DOJ concluded that the Ferguson Municipal Court issued arrest warrants based on a failure to pay fines and fees in order "to coerce payment" and not "for public safety purposes."[16] The DOJ determined that the Ferguson Municipal Court's primary goal was not "administering justice or protecting the rights of the accused, but . . . maximizing revenue," and that "[t]he impact that revenue concerns have on court operations undermines the court's role as a fair and impartial judicial body."[17]

The Idaho OPE recognized that "[g]rowing pressures on court and county resources have increased attention on court funding. Over the past few years, the Idaho Legislature has looked for ways to meet the rising strain on these resources. Some legislators have pointed to collection

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[15] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the Ferguson Police Department* (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter *Ferguson Investigation*].

[16] *Ferguson Investigation*, *supra* note 15, at 56.

[17] *Id.* at 42.

practices as an opportunity for improving resources. The courts have indicated that collection resources are already stretched thin."[18] For example, in 2010 the Idaho Legislature passed a law creating an "emergency surcharge to be paid by persons who commit crimes and infractions" (eventually codified at Idaho Code § 31-3201H (2021)); the Statement of Purpose explained that the measure "would enable the Judicial Branch, during the current financial crisis, to continue to fulfill its constitutional responsibilities and to provide services that benefit the people of the State of Idaho and help to reduce the burden on the state budget."[19] When fines and fees do not sufficiently cover program costs, government relies on other sources of revenue, such as property tax or general fund dollars: "Elected clerks acknowledged that collection practices affected the amount of fines and fees available to offset program costs. However, elected clerks also expressed concern that judicial decisions on fines and fees had an equally important effect on the amount of fines and fees available to offset program costs."[20] "No matter how neutral and detached a judge may be, the burden of taxing criminal defendants to finance the operations of his court, coupled with the intense pressures from local funding units (and perhaps even from the electorate), could create at least the appearance of impropriety." *People v. Cameron*, 929 N.W.2d 785, 786 (Mich. 2019) (McCormack, C.J., concurring in denial of certiorari). The

[18] *OPE Evaluation Report*, *supra* note 9, at 13.

[19] Statement of Purpose, H.B. 687, 2010 Leg. (Idaho 2010), https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2010/legislation/H0687SOP.pdf.

[20] *OPE Evaluation Report*, *supra* note 9, at 24.

constitutional prohibition against incarcerating people simply because they cannot afford to pay monetary sanctions is meant to ensure that judicial decisions are made fairly and impartially.[21]

B. Monetary Sanctions Create Two Systems of Justice Where Those Who Cannot Pay Become Stuck in a Cycle of Poverty and Punishment.

Fines and fees in the criminal legal system, and the punishments attached to their non-payment, have a disproportionate impact on people with limited financial means and communities of color in Idaho and nationwide. "[N]ational inmate survey and court data" suggest that "millions of mainly poor people living in the United States have been assessed monetary sanctions by the courts."[22] These practices are especially concerning because they

[21] In addition to the potential conflicts of interest, OPE recognized that fines and fees as "currently applied are not likely achieving their potential as a deterrent." *OPE Evaluation Report*, *supra* note 9, at 27. Arresting and incarcerating people also is expensive—often costing Idaho more to house someone in jail than the unpaid fines and fees themselves. *See* Bannon et al., *supra* note 13, at 2; *see also* Idaho Dep't of Corr., *FAQ*, https://www.idoc.idaho.gov/content/prisons/faq (last accessed Mar. 31, 2021) (noting that "average cost per day to house a prison resident in Idaho prisons was $74.34 for fiscal year 2020"). Further, when public safety officers are responsible for enforcing fine and fee payment, it diverts resources away from their more important public safety duties. Bannon, et al., *supra* note 13, at 31. One study found that "in cities where a relatively higher share of revenue is collected through fines, fees, and asset forfeitures, violent crimes are cleared at a relatively lower rate." Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service* 3-4 (2017), http://www.law.nyu.edu/sites/default/files/upload_documents/YOU_policing.pdf. Another study found that monetary sanctions correlate with increased recidivism among youth, which further undermines community safety and well-being. *See* Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 Youth Violence & Juv. Just. 325, 344 (2017), https://journals.sagepub.com/doi/abs/10.1177/1541204016669213.

[22] Alexes Harris et al., *Drawing Blood From Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. of Socio. 1753, 1770-71 (2010). In 2017 alone, researchers estimate that 10 million people owed more than $50 billion in criminal fines, fees and forfeitures assessed through the criminal legal system nationwide. Karin D. Martin et al.,

place "large burdens on poor offenders who are unable to pay criminal justice debts."[23] The impact of monetary sanctions can spread across entire communities, as in *Teagan*, where the defendant's "brother drew from the government benefits of Ms. Teagan's daughter, his own government benefits, and their rent money" in order to "satisfy the fine." 949 F.3d at 674. In 2015, as many as 63% of criminal defendants "reported that family members were primarily responsible for covering conviction-related costs."[24] Criminal fines and fees also disproportionately affect people of color.[25]

Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create, New Thinking in Cmty. Corrs., Jan. 2017, No. 4, at 5, https://www.ncjrs.gov/pdffiles1/nij/249976.pdf.

[23] Council of Econ. Advisors, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* 1 (Dec. 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf; *see also* Bannon et al., *supra* note 13, at 8.

[24] Ella Baker Ctr. for Human Rts. et al., *Who Pays? The True Cost of Incarceration on Families* 13 (Sept. 2015), http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf. Nearly half of defendants reported "that their families could not afford to pay these fees and fines" and many family members were forced "to take out loans or fall into financial dire straits as a result." *Id.* at 13-14.

[25] ABA Presidential Task Force on Building Pub. Trust in the Am. Just. Sys., *Ten Guidelines on Court Fines and Fees* 3 (Aug. 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf [hereinafter *ABA Guidelines*]. People of color face higher rates of poverty and unemployment; the poverty rate for non-Hispanic white people in the United States in 2019 was 7.3%, while it was 15.7% for Hispanic people of any race, and 18.8% for Black people. John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. Census Bureau (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html. The significant racial and ethnic wealth gap compounds inequality around court fines and fees. *See* Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession,*

The COVID-19 pandemic has exacerbated these disparities, creating even greater hardships for Idahoans with limited financial means against whom monetary sanctions are assessed. One month into the crisis, Idaho's "jobless rate reached a record high 11.8%[, and m]ore than 103,000 Idaho workers were jobless at one point."[26] A United Ways of Idaho survey found that "three-fifths of Southeast Idaho residents have experienced some degree of financial distress" during the pandemic and "area families earning less than $50,000 per year . . . have been especially hard hit by the pandemic."[27] That is consistent with the findings across the country, where "[t]he majority of jobs lost in the crisis have been in industries that pay low average wages."[28] Individuals and families with limited financial means—starved for income

by Race, Ethnicity and Income, Pew Rsch. Ctr. (Nov. 1, 2017), https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/.

[26] David Staats, *Idaho Employers Catch Break on Taxes To Support Workers Who Lost Jobs from Pandemic*, Idaho Statesman (Dec. 18, 2020, 8:20 PM), https://www.idahostatesman.com/article247962880.html.

[27] *Survey Finds Idaho's Poor Hardest Hit by COVID-19*, Idaho State J. (Aug. 3, 2020), https://www.idahostatejournal.com/news/local/survey-finds-idahos-poor-hardest-hit-by-covid-19/article_d0d60feb-fbaa-58de-b687-868662c1b4b1.html.

[28] Ctr. On Budget & Pol'y Priorities, *Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships*, https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and (last updated Apr. 8, 2021).

and already burdened by debt associated with necessities like food and shelter—are most likely to be assessed court fines and fees, yet are also the least likely to be able to pay them.[29]

In 2019, the Idaho OPE found that "Idaho would benefit from a statewide system of accountability for the assessment and collection of fines and fees. Such a system must include a formal process for measuring performance and improving policy and practice."[30] The Idaho Legislature has already granted Idaho judges significant discretion to waive general court fees and fees related to peace officers, community service, drug court and mental health court, compensation for crime victims, an officers' temporary disability fund, pretrial supervision and victim notification.[31] This Court can further the administration of justice by enforcing the constitutional requirement for Idaho judges to conduct ability-to-pay hearings and exercise their discretion to waive monetary sanctions when appropriate.

Imposing jail time for defendants who are unable to pay monetary sanctions creates a cycle of debt and imprisonment. In this case, Ms. Beck was jailed after the Magistrate Court initiated contempt proceedings for her failure to pay fines and fees associated with the misdemeanor charge of "frequenting." (Pet. Exh. F; Pet. Exh. G; Pet. Exh. I; Pet. Exh. J.)

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[29] The Federal Reserve's most recent annual survey found that 37% of adults did not have enough cash to cover an unexpected $400 expense in a financial emergency. Bd. of Governors of the Fed. Rsrv. Sys., *Report on the Economic Well-Being of U.S. Households in 2019* (May 2020), https://www.federalreserve.gov/publications/2020-economic-well-being-of-us-households-in-2019-dealing-with-unexpected-expenses.htm.

[30] *OPE Evaluation Report*, *supra* note 9, at 3.

[31] *See* Idaho Code §§ 31-3201A, 31-3201B, 31-3201C, 31-3201E, 72-1025, 72-1105, 31-3201J, 31-3204 (2021).

Ms. Beck was released after seven days, with a credit of $70 towards her outstanding balance ($35 for each of the two days served beyond the maximum five-day sentence for contempt). (Pet. Exh. K; Pet. Exh. N; Pet. Exh. O.) The remainder of her outstanding balance—$580.64, only $150 of which was in the form of a fine intended to punish Ms. Beck's misdemeanor conviction—was reimposed pursuant to a new deferred payment agreement requiring the same monthly payments and under the same threat of contempt and therefore incarceration for failure to make timely payments. (Pet. Exh. K; Pet. Exh. N.)

Imposing jail time without first establishing willfulness punishes people for their indigence, leaving them in a cycle of debt and imprisonment. It is not only unconstitutional, it is profoundly counterproductive. The "collateral consequences that derive from even short periods of incarceration, such as loss of employment, loss of stable housing, or disruption of family ties," are harmful and make it less likely that a person will ever be able to pay.[32] Idahoans of limited means can face years of punishment for the same offense that their wealthy counterparts immediately pay and walk free, effectively creating a two-tiered system of justice.

While the OPE's mandate from the Idaho Legislature was limited to recommendations for increasing court revenue from fines and fees, the OPE identified the "overall sentiment" expressed below by an Idaho judge as representative of its survey:

> The fines, fees, costs, or other financial obligations are staggeringly high. On a weekly basis, in criminal cases, I order people who make $9/hour to pay over $250 in court costs alone. That is without restitution, without a fine, without a

[32] Don Stemen, Vera Inst. of Just., *The Prison Paradox: More Incarceration Will Not Make Us Safer* 2 (July 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

> civil penalty, without restitution [for] the victim, without public defender reimbursement, without the costs of probation supervision, with the pre-sentence investigation fee, etc. There is no way to get blood from a turnip. The greatest single challenge is the blood from a turnip problem. Often, the cost for collections [is more] than the order to pay. If the fees were lower, compliance would go up, because people do that which appears manageable or doable. Right now, the costs just defeat the person from the very beginning.[33]

C. Idaho Should Focus on Alternatives to Arrest Warrants to Collect Monetary Sanctions.

As the U.S. Supreme Court recognized in *Williams* decades ago, there are "numerous alternatives" to enforce court-ordered monetary sanctions that do not include incarceration. *Williams*, 399 U.S. at 244. Idaho courts can begin to secure more equitable and efficient administration of monetary sanctions by mandating that judges conduct ability-to-pay hearings at sentencing, when sanctions are first ordered.[34] As set forth above, Idaho law already allows courts to inquire into a defendant's ability to pay.[35] But the U.S. Constitution also requires an ability-to-pay hearing before the issuance of arrest warrants or imprisonment for nonpayment, where a judge determines that a defendant has a *current* ability to pay the amount imposed.[36]

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[33] *OPE Evaluation Report*, *supra* note 9, at 36.

[34] *See* Fines & Fees Just. Ctr., *First Steps Toward More Equitable Fines and Fees Practices* 3-5 (2020), https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC_Policy_Guidance_Ability_to_Pay_Payment_Plan_Community_Service_Final_2.pdf.

[35] *See supra* note 31. *See also* Idaho Code § 19-854 (2021).

[36] *E.g.*, *OPE Evaluation Report*, *supra* note 9, at 37 ("Ability to pay is an important consideration statewide and is at the center of a number of constitutional limitations on imposing and collecting fines and fees. For example, court must determine a defendant's ability to pay before revoking probation or incarcerating the defendant for nonpayment." (emphasis added)).

The American Bar Association ("ABA") recommends mandatory ability-to-pay hearings before arrest or imprisonment, where "[c]ourts should apply a clear and consistent standard to determine an individual's ability to pay court fines and fees."[37] Idaho law already establishes objective standards to assist courts in ability-to-pay hearings.[38]

The ABA has also recommended alternatives to incarceration if a defendant is unable to pay.[39] The Conference of State Court Administrators and the Conference of Chief Judges convened a National Task Force on Fines, Fees and Bail Practices and recommended community service, day fines and non-financial compliance as alternatives.[40] The National Council of

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[37] *ABA Guidelines*, *supra* note 25, at 4, 6-7. In March of 2020 the ABA issued a formal opinion holding the Model Code of Judicial Conduct, Rules 1.1 and 2.6 require "a meaningful inquiry into a litigant's ability to pay court fines, fees, restitution, other charges, bail, or civil debt before using incarceration as punishment for failure to pay, as inducement to pay or appear, or as a method of purging a financial obligation whenever state or federal law so provides." ABA Comm. on Ethics & Pro. Resp., Formal Op. 490 (2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_490.pdf.

[38] Idaho Code § 19-854(2) (2021).

[39] *ABA Guidelines*, *supra* note 25, at 6 ("Reasonable alternatives include: an extension of time to pay; reduction in the amount owed; and waiver of the amount owed" and "[a]ny non-monetary alternatives should be reasonable and proportional in light of the individual's financial, mental, and physical capacity, any impact on the individual's dependents, and any other limitations, such as access to transportation, school, and responsibilities for caregiving and employment.").

[40] Nat'l Task Force on Fines, Fees & Bail Practices, *Principles on Fines, Fees and Bail Practices* (Dec. 2017), https://www.ncsc.org/__data/assets/pdf_file/0021/61590/Principles-on-Fines-Fees-and-Bail-Practices-Rev.-Feb-2021.pdf; *see also* Conf. of Chief Justices and Conf. of State Ct. Adm'rs, Resolution 4, *In Support of the Principles of the National Task Force on Fines, Fees, and Bail Practices* (2018), https://www.ncsc.org/__data/assets/pdf_file/0016/28042/01312018-support-principles-national-task-force-fines-fees-bail.pdf; Conf. of State Adm'rs, *The End of Debtor's Prisons: Effective Court Policies for Successful Compliance with Legal*

Juvenile and Family Court Judges has resolved that courts should "work towards reducing and eliminating fines, fees, and costs by considering a youth and their family's ability to pay prior to imposing such financial obligations."[41] The American Probation and Parole Association "supports and encourages" agencies to conduct and take into consideration an ability-to-pay analysis before imposing monetary sanctions, and to "[n]ot recommend incarceration for any individual solely as a result of inability to pay."[42] In recent years, "several states and local jurisdictions have taken affirmative steps to remedy the issues these jurisdictions have found in the collection of fines and fees," including "several Chief Justices appointing working groups . . . which in some cases[] has led to the introduction of new . . . court rules."[43]

Financial Obligations 20-22 (2015-2016), https://cosca.ncsc.org/__data/assets/pdf_file/0014/26330/end-of-debtors-prisons-2016.pdf (a "day fine" is a fine based on the offender's daily income and the gravity of the offense, and "non-financial compliance" includes non-monetary efforts that improve a defendant's financial situation, such as work-skills training).

[41] Nat'l Council of Juv. & Fam. Ct. Judges, *Resolution Addressing Fines, Fees, and Costs in Juvenile Courts* 2 (Mar. 17, 2018), https://www.ncjfcj.org/wp-content/uploads/2019/08/resolution-addressing-fines-fees-and-costs-in-juvenile-courts.pdf. Law Enforcement Leaders to Reduce Crime & Incarceration also support ending fines and fees in the juvenile justice system. L. Enf't Leaders to Reduce Crime & Incarceration, *Ensuring Justice and Public Safety: Federal Criminal Justice Priorities for 2020 and Beyond* 17 (Apr. 15, 2020), http://lawenforcementleaders.org/wp-content/uploads/2020/04/2020_04_LEL_Policy_Report_Final.pdf.

[42] Am. Probation & Parole Ass'n, *Use of Monetary Judgments for Justice-Involved Individuals* (Mar. 2017), https://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IB_Resolution&wps_key=d7b47532-7ae7-4464-b8bb-d667fb2f3d10.

[43] U.S. Comm'n on Civ. Rts., *Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications* 74 (Sept. 2017), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2017.pdf.

Indeed, halting incarceration for failure to pay monetary sanctions may lead to an increase in court revenue. After the San Antonio Municipal Court decided to "stop sentencing people to sit out their unpaid fines in jail for fine-only offenses," court revenue actually *increased*; "[f]our years after ending jail commitments . . . revenue was up 74 percent."[44] Beyond reducing incarceration, and recognizing the harm of monetary sanctions and the importance of government funding for courts and other public services meant to benefit us all, many state and local jurisdictions have begun repealing certain fees and fines altogether, including in both juvenile[45] and criminal cases.[46]

CONCLUSION

The Fourteenth Amendment to the U.S. Constitution prohibits arresting and detaining a person for failure to pay monetary sanctions without first evaluating his or her ability to pay. In particular, U.S. Supreme Court precedent prohibits the practice at issue in this case: initiating contempt proceedings and issuing a warrant for Ms. Beck's arrest without any inquiry into whether her failure to pay was willful. Given the potential for government abuse and overreach when local courts impose monetary sanctions that fund the legal system and other public services, and the documented deleterious effects of monetary sanctions on vulnerable

[44] Texas Appleseed, *Pay or Stay: The High Cost of Jailing Texans for Fines & Fees* 32 (Feb. 2017), https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf.

[45] *See* Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. Rev. 401, 412-16 (2020).

[46] Criminal Fees, A.B. 1869, 2019-2020 Assemb. (Cal. 2020) (abolishing 23 fees for criminal defendants and discharging billions in outstanding debt).

communities, this Court should—consistent with the demands of the U.S. Constitution—prohibit Idaho courts from issuing an arrest warrant for nonpayment of monetary sanctions without a prior determination of ability to pay.

DATED this 9th day of April, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 9th day of April, 2021, I caused a true and correct copy of the foregoing to be served electronically through the iCourt system, which caused the following parties or counsel to be served by electronic means, as more fully reflected below:

Attorney General, State of Idaho Kenneth K. Jorgensen Deputy Attorney General	☒ iCourt/Email: ecf@ag.idaho.gov ☐ U.S. Mail ☐ Fax ☐ Hand Delivery
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/s/ Debora K . Grasham
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