APL-2018-0797
On Appeal from Montgomery County,
Second District Court of Appeals, Case No. 27539

STATE OF OHIO,	:	Case No. 2018-0797
	:	
Appellant,	:	On Appeal from the
	:	Montgomery County Court of Appeals,
v.	:	Second Appellate District
	:	
DARREN TAYLOR,	:	Court of Appeals
	:	Case No. 27539
Appellee.	:	

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEE DARREN TAYLOR

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

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

LDF has a strong interest in ensuring that state-imposed financial exactions in the area of criminal justice are imposed equitably, particularly where (as here) those exactions may have a disproportionate effect on African Americans. Accordingly, LDF recently submitted an *amicus* brief in the United States Supreme Court's landmark decision in *Timbs v. Indiana*, 139 S. Ct. 682 (2019), which held that the Eighth Amendment's Excessive Fines Clause applies to the states. LDF's interest in ensuring that the Sixth Amendment's promise of a fair trial by jury is upheld has similarly led it to submit *amicus* briefs in a variety of cases, such as *Holland v. Illinois*, 493 U.S. 474 (1990), and *Adams v. Texas*, 448 U.S. 38 (1980). That interest is implicated here, because the State's interpretation of the statutory scheme for cost recoupment risks having a chilling effect on defendants' exercise of their Sixth Amendment rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

On March 23, 2013, the General Assembly amended R.C. 2947.23 (the "Cost-Recoupment Statute") to add R.C. 2947.23(C) (the "Suspension Provision"), which provides that trial courts "retain[] jurisdiction to waive, suspend, or modify the payment of the costs of prosecution" at any time. R.C. 2947.23(C). The legislature acted because it recognized a recurring problem: many defendants who were unable to pay their court costs could not request that these costs be abated post-sentencing.[1] In 2016, Appellee Darren Taylor invoked the Suspension Provision, explaining that his indigence made him unable to pay previously assessed court costs. The trial court rejected his request, but the Court of Appeals reversed on the ground that the trial court failed to consider Mr. Taylor's ability to pay, as the Suspension Provision requires.

Amicus agrees with Appellee that the text of the Suspension Provision requires consideration of a defendant's ability to pay court costs. Further, as this Court has recognized, statutes must, when possible, be interpreted to avoid constitutional problems. Holding that the Suspension Provision does *not* require consideration of ability to pay would raise serious federal and state constitutional issues.

First, if trial courts are not required to consider defendants' ability to pay, the Cost-Recoupment Statute would violate the Sixth Amendment by unnecessarily chilling defendants' exercise of their fundamental rights to a jury trial and compulsory process.

Second, an ability-to-pay consideration is necessary to ensure that application of the Cost-Recoupment Statute is fundamentally fair to indigent defendants pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Without a mandatory ability-to-pay

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[1] *See Report and Recommendations of the Joint Committee to Study Court Costs and Filing Fees* 5 (July 2008), http://www.supremecourt.ohio.gov/publications/jtcommcourtcostsreport.pdf (hereinafter "Joint Committee Court Costs Report").

consideration, attempts to collect unpayable recoupment debts from indigent defendants will not only fail to rationally further the legislature's goal of cost-recoupment, but will also be powerfully counterproductive.

Third, failing to require courts applying the Suspension Provision to consider defendants' ability to pay would render the State's cost-recoupment scheme de facto punitive, and costs under that scheme "fines," for purposes of the Excessive Fines Clauses of the United States and Ohio Constitutions. If those Clauses apply to cost recoupment, recoupment would violate many Ohioans' constitutional rights, which justifies rejecting the State's interpretation.

Moreover, the State's Proposition of Law would encourage results directly contrary to those desired by the General Assembly that passed the Suspension Provision. Unpayable court costs limit access to the tools of post-incarceration social reintegration, like jobs, credit, and housing. And, as a condition of community control, they expose former offenders to more severe community control and can make them ineligible for federal benefits. Offenders—and the family members who depend on them—often end up trapped by this legal debt long after they have paid their debt to society. Because they are disproportionately represented among both the defendant and indigent populations, those sorts of problems disproportionately disadvantage African-American and other minority communities.

LDF respectfully submits that this Court should interpret the Suspension Provision in a manner that avoids these constitutional problems, is consistent with the legislature's purpose, and would not impose significant and unnecessary burdens on indigent offenders. The judgment below should be affirmed.

STATEMENT OF FACTS

Amicus adopts Appellee's Statement of Facts.

ARGUMENT

***AMICUS CURIAE* LDF'S PROPOSITION OF LAW: Trial courts must consider defendants' ability to pay when considering a motion to waive, suspend, or modify court costs.**

I. The Suspension Provision Must Be Construed to Avoid Grave Constitutional Questions.

A. Under the Constitutional Avoidance Canon, this Court Interprets Statutes to Avoid Constitutional Difficulties So Long as It Is "Fairly Possible" to Do So.

A "statute or other rule of law 'must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" *In re Stormer*, 137 Ohio St. 3d 449, 2013-Ohio-4584, 1 N.E.3d 317, ¶ 20 (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)). This interpretive doctrine stems from respect for the people's representatives; in choosing "between competing plausible interpretations of a statutory text," courts presume the legislature "did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *see also* R.C. 1.47(A) (General Assembly intends to enact statutes in "compliance with the constitutions of the state and of the United States"). Thus, "[i]f one [interpretation] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark*, 543 U.S. at 380–81.

This Court has taken that doctrine seriously. For example, *Stormer* concerned a judicial conduct rule that barred judicial candidates from "participat[ing] in or receiv[ing] campaign contributions from a judicial fund raising event that categorizes or identifies participants by the amount of the contribution made to the event[.]" *Stormer* at ¶ 13 n.2. That rule said nothing about what state of mind, if any, was required to find a violation. *See id.* at ¶ 19. But, this Court observed, interpreting the rule to have no *mens rea* requirement—i.e., as a strict liability rule—would force candidates to dramatically constrain their campaign activities to ensure compliance, and thus

would potentially "adversely affect" those hypothetical candidates' "exercise of fundamental First Amendment freedoms." *Id.* Accordingly, it unanimously construed the rule as requiring a *knowing* violation. *See id.* at ¶ 20.

B. It Is More than "Fairly Possible" to Interpret the Suspension Provision as Requiring Consideration of a Defendant's Ability to Pay.

Amicus agrees with Mr. Taylor's statutory analysis and adds only the following.

The Suspension Provision explicitly grants courts power to "waive, suspend, or modify" payment of the relevant costs "at any time[.]" R.C. 2947.23(C). Although it does not explicitly set forth the factors constraining courts' discretion when they consider whether waiver, suspension, or modification is appropriate, that discretion plainly has *some* limits. The General Assembly always intends courts to exercise the power it grants rationally and constitutionally, so the lack of express guideposts could not mean that the legislature meant to permit courts to render whimsical decisions.

To be sure, the Suspension Provision does not enumerate the factors that must guide the courts' discretion. But when the General Assembly acts, it does so "in the light of" this Court's "theretofore declared principles of law," *Goehring v. Dillard*, 145 Ohio St. 41, 47, 60 N.E.2d 704 (1945), e.g., the recognized "purpose" of court costs: a non-punitive means to finance the court system. *State v. Threatt*, 108 Ohio St. 3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 15 (citation omitted). Given those background principles, the Suspension Provision is at least ambiguous regarding how courts must exercise the power the General Assembly expressly granted them to "waive, suspend, or modify" court costs, R.C. 2947.23(C). Thus, courts properly look to "the spirit of the statute and relevant public-policy concerns" to ascertain meaning. *State v. Vanzandt*, 142 Ohio St. 3d 223, 2015-Ohio-236, 28 N.E. 3d 1267, ¶ 12; *see also* R.C. 1.49 (noting that courts construing ambiguous statutes may consider the "object sought to be attained[,]" the "legislative

history[,]" the "circumstances under which the statute was enacted[,]" and the "consequences of a particular construction[.]").

Here, those considerations strongly support Mr. Taylor's interpretation of the statute. In 2008, the General Assembly created a Joint Committee to Study Court Costs and Filing Fees ("Committee").[2] The Committee recommended that the General Assembly amend the State's cost-recoupment laws "to give trial courts the statutory authority to suspend the imposition or payment of costs after the court has imposed sentence."[3] That recommendation explicitly responded to *State v. Clevenger*, in which this Court "held that a trial court does not have authority to either suspend the imposition or payment of court costs after the court has imposed sentence, *even when the offender is indigent*."[4] The recommendation aimed to "rectify th[e] problem" of indigent offenders who could not seek suspension of court costs they could not pay.[5] Similarly, the Judicial Impact Statement prepared by the Ohio Judicial Conference and distributed to aid legislative consideration of the proposed amendment, *see* R.C. 105.911(A)–(B), invoked the Committee's recommendation and reiterated that the Suspension Provision aimed to "authorize courts to waive court costs after sentence has been imposed if the offender is indigent."[6]

There is thus no doubt that indigency was the General Assembly's primary concern when it enacted the Suspension Provision. The statute's purpose therefore strongly favors Mr. Taylor's

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[2] *See* Joint Committee Court Costs Report, *supra* note 1, at 2.
[3] *Id.* at 6.
[4] *Id.* (emphasis added) (citing *State v. Clevenger*, 114 Ohio St. 3d 258, 2007-Ohio-4006, 871 N.E.2d 589); *see also Clevenger* at ¶¶ 2, 7 (focusing on situations where "indigence prevents [a defendant] from paying costs").
[5] *Id.*
[6] Ohio Jud. Conf., *Judicial Impact Statement for House Bill 247, 129th G.A. Assessments & Waivers of Court Costs* 1–2 (July 8, 2011) (citing *Clevenger* and the Committee's recommendation), http://www.ohiojudges.org/Document.ashx?DocGuid=741ceff5-e032-494c-9981-f64101fa3d4a.

view: the Suspension Provision requires courts to engage in some consideration of a defendant's ability to pay.

At a minimum, Mr. Taylor's interpretation is plausible, which means it must be chosen because the State's contrary interpretation raises serious constitutional problems. As explained in Parts II–IV below, under the State's interpretation, Ohio's cost-recoupment scheme would impermissibly chill defendants' exercise of their Sixth Amendment rights to trial by jury and compulsory process; would deprive indigent defendants of fundamental fairness, due process, and equal protection under the Fourteenth Amendment; and would make recouping costs from many offenders a violation of the United States and Ohio Constitutions' Excessive Fines Clauses.

II. The Suspension Provision Would Violate the Sixth Amendment if it Did Not Require Consideration of a Defendant's Ability to Pay.

The Sixth Amendment guarantees criminal defendants the right to a trial by jury. This right is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). It is a "constitutional protection[] of surpassing importance," with a "historical foundation . . . extend[ing] down centuries into the common law." *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000). The jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see also Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.) (The right to trial by an impartial jury is "justly dear to the American people . . . and every encroachment upon it has been watched with great jealousy.").

In addition, the Sixth Amendment ensures defendants' right to "compulsory process for obtaining witnesses in [their] favor," which is likewise "a fundamental element of due process of

law." *Washington v. Texas*, 388 U.S. 14, 18, 19 (1967). The compulsory process right is "in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Id*. "Few rights are more fundamental" than the compulsory process right, which "Chief Justice Marshall described as 'sacred'" and which the United States Supreme Court has described as an "essential attribute of the adversary system itself." *Harris v. Thompson*, 698 F.3d 609, 626 (7th Cir. 2012) (first and third quoting *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); second quoting *United States v. Burr*, 25 F. Cas. 30, 33 (D. Va. Cir. Ct. 1807)).

The Ohio Constitution similarly protects the rights to a jury trial and to compulsory process. Ohio Constitution, Article I, Section 5 ("The right of trial by jury shall be inviolate[.]"); *id.*, Section 10 ("In any trial, in any court, the party accused shall be allowed . . . to have compulsory process to procure the attendance of witnesses in his behalf.").

States cannot "needlessly chill" the exercise of these fundamental rights to a jury trial and compulsory process, even in pursuit of an otherwise legitimate legislative objective. *See United States v. Jackson*, 390 U.S. 570, 582 (1968). For this reason, in *Jackson*, the United States Supreme Court struck down the provisions in the Federal Kidnapping Act that made the death penalty applicable only to those defendants who asserted their jury trial rights. *Id.* at 582–83. Under *Jackson*, the state's policies in this area must be "narrowly drawn" to avoid needlessly chilling the exercise of constitutional rights. *See Alexander v. Johnson*, 742 F.2d 117, 123 (4th Cir. 1984).

In *Fuller v. Oregon*, the United States Supreme Court applied the principles established in *Jackson* to cost-recoupment statutes like R.C. 2947.23. The Court upheld an Oregon recoupment statute that conditioned probation upon an indigent defendant's repayment of court-appointed counsel fees. *Fuller v. Oregon*, 417 U.S. 40, 52 (1974). But *Fuller* also made clear that the

constitutionality of Oregon's statute hinged on the state's tailoring of the legislation to obligate only "those with a foreseeable ability to [pay], and to enforce that obligation only against those who actually become able to meet it without hardship." *Id.* at 54. In other words, the enforcement of recoupment obligations is constitutional only if the trial court considers whether defendants are (or will become) able to pay without hardship. *See id.* at 53 ("The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so. Those who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt.") (footnote omitted).

Most state and federal courts have interpreted *Fuller* to stand for the proposition that Oregon's protections for indigent defendants—including mandatory consideration of ability to pay—were *necessary* to the constitutionality of the cost-recoupment statute. *See Washington v. Blank*, 930 P.2d 1213, 1218–19 (Wash. 1997) (en banc) ("A number of courts have, as this court has, treated the characteristics identified in *Fuller* as constitutionally mandatory guidelines."); *accord Arizona v. Miller*, 535 P.2d 15, 16 (Ariz. 1975) (in banc); *Christie v. Colorado*, 837 P.2d 1237, 1244 (Colo. 1992) (en banc); *Michigan v. Jackson*, 769 N.W.2d 630, 639 (Mich. 2009); *Minnesota v. Tennin*, 674 N.W.2d 403, 410 (Minn. 2004); *Ohree v. Virginia*, 494 S.E.2d 484, 489–90 (Va. Ct. App. 1998); *see also Armstead v. Dale*, 294 S.E.2d 122, 125 (W. Va. 1982) (Repayment of costs and attorney's fees as a probation condition is constitutional only if "it is tuned to the probationer's ability to pay[.]"); *In re Wisconsin v. Helsper*, 2006 WI App 243, ¶¶ 10-11, 297 Wis. 2d 377, 383–84, 724 N.W.2d 414, 417 (same).

Most federal courts of appeal have likewise interpreted *Fuller* to require that recoupment statutes "take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required." *Alexander*, 742

F.2d at 124; *Olson v. James*, 603 F.2d 150, 155 (10th Cir. 1979) (holding Kansas recoupment statute unconstitutional based partially on "its lack of proceedings which would determine the financial condition of the accused and perhaps test the excessiveness of the attorney's fee"); *Hanson v. Passer*, 13 F.3d 275, 279 (8th Cir. 1994) (cited favorably by *United States v. Peck*, 62 F. App'x 561, 568 (6th Cir. 2003)); *United States v. Santarpio*, 560 F.2d 448, 455–56 (1st Cir. 1977); *United States v. Glover*, 588 F.2d 876, 878–79 (2d Cir. 1978)); *see also Simmons v. James*, 467 F. Supp. 1068, 1075 (D. Kan. 1979), *aff'd sub nom.*, *Olson v. James*, 603 F.2d 150 (10th Cir. 1979) (collecting cases); *Fitch v. Belshaw*, 581 F. Supp. 273, 277 (D. Or. 1984). *But see United States v. Palmer*, 809 F.2d 1504, 1507–08 (11th Cir. 1987); *United States v. Wyman*, 724 F.2d 684, 688 (8th Cir. 1984); *United States v. Chavez*, 627 F.2d 953, 957 (9th Cir. 1980).

Without considering ability to pay in the recoupment process, trial courts risk imposing an "impossible debt—one the indigent can never hope to repay";[7] this risk is likely to prompt some indigent defendants to waive their Sixth Amendment rights to a jury trial and compulsory process, as costs associated with both rights are taxed under the Cost-Recoupment Statute. *See State v. Weathers*, 2013-Ohio-1104, 988 N.E.2d 16, ¶ 20 (12th Dist.) (jury costs); *State v. Johnson*, 3d Dist. Allen No. 1–16–41, 2017-Ohio-6930, ¶ 25 (subpoena costs). *See also Pennsylvania v. Opara*, 362 A.2d 305, 313 (Pa. Super. Ct. 1976) ("Where neither the order nor the proceeding out of which it arose contains assurance that only those able to repay will ever be required to there is a real danger that some may choose to forgo their right to appointed counsel."). Furthermore, this burden on indigent defendants' fundamental rights is "unnecessary," as any attempt to collect an "unpayable" fee does not rationally further the state's legitimate interest in recouping costs. *See,*

[7] Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. Mich. J.L. Reform 323, 360 (2009).

e.g., *California v. Dueñas*, 242 Cal. Rptr. 3d 268, 275 (Ct. App. 2019), *review denied* (Mar. 27, 2019) ("Imposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive.").[8]

Fuller specifically dealt with recoupment of attorney's fees, which are not at issue here. *See State v. Young*, 12th Dist. Warren No. CA2005–03–023, 2005-Ohio-5766, ¶ 7 ("In Ohio, a sentencing court's authority to order reimbursement of court-appointed attorney fees is found in R.C. 2941.51(D)."). Instead, the Cost-Recoupment Statute deals with obligations for "costs of prosecution"—a term which includes jury and subpoena fees. Thus, the question here is whether recovery of jury and subpoena fees unnecessarily chills defendants' jury trial and compulsory process rights. These Sixth Amendment rights are no less fundamental than an indigent's right to court-appointed counsel. *See Duncan*, 391 U.S. at 149 ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice."); *Washington*, 388 U.S. at 19 (The compulsory process "right is a fundamental element of due process of law."). Consequently, *Fuller*'s principles must govern recoupment of "costs of prosecution," including attorney's fees, jury fees, and subpoena fees. *See, e.g.*, *Ohree*, 494 S.E.2d at 490 ("The same principles apply" to "recoupment of attorney's fees" and "other costs of prosecution"); *Blank*, 930 P.2d at 1220 (applying *Fuller* to recoupment of appellate costs); *Arizona v. Lopez*, 853 P.2d 1126, 1129 (Ariz. Ct. App. 1993) (applying *Fuller*'s ability-to-pay requirement to "costs of prosecution"); *Iowa v. Haines*, 360 N.W.2d 791, 794 (Iowa 1985) (same); *Montana v. Moore*, 2012 MT 95, ¶ 19, 365 Mont. 13, 17–

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[8] *See also* Joint Committee Court Costs Report, *supra* note 1, at 5 (noting that (1) "additional court costs will result in fewer collections," (2) "an increase in court costs results in more time spent by the court or clerk of court collecting, tracking and disbursing the funds, resulting in increased personnel costs," and (3) "[u]nintended consequences also result from increased court costs and filing fees, including . . . a "cycle of crime" because, for example, offenders cannot afford to have their driver's license reinstated.")

18, 277 P.3d 1212, 1215 ("The District Court needed to investigate further . . . ability to pay, before imposing jury costs."); *Pennsylvania v. Hernandez*, 917 A.2d 332, 333 (Pa. Super. 2007) (upholding recoupment statute because its "procedural safeguards . . . ensure that an indigent defendant will be afforded an opportunity to prove his financial inability to pay the costs of prosecution before being committed to prison"); *see also Zuckerman v. State Bd. of Chiropractic Examiners*, 53 P.3d 119, 127 (Cal. 2002) (applying *Fuller* to recoupment of costs of administrative hearing).

To be sure, this Court has previously noted that *Fuller* did not "speak to the imposition of court costs," and that it "examine[d] the effect of recoupment statutes on the right to counsel, not on the right to a jury trial." *State v. White*, 103 Ohio St. 3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 10; *see also Threatt*, 2006-Ohio-905, ¶ 14. But the Court did not provide any explanation as to why *Fuller*'s principles should apply any differently if recoupment statutes risk chilling the right to jury trial (or compulsory process) rather than the right to counsel. All three rights are fundamental under the Sixth Amendment.

Indeed, *White* focused on a different issue—whether court costs may *ever* be collected from indigent defendants— and the proper application of a different U.S. Supreme Court case, *James v. Strange*, 407 U.S. 128 (1972). In *James*, the U.S. Supreme Court held that a Kansas recoupment statute violated equal protection because it did not provide indigent defendants with the same protective exemptions available to other civil judgment debtors. *Id.* at 138–39. This Court in *White* held that Ohio's cost-recoupment statute (prior to the addition of the Suspension Provision) satisfied *James*—without further addressing *Fuller*—because it did not treat indigent defendants worse than civil judgment debtors. *White* at ¶ 13.

Thus, *White*'s short discussion of *Fuller* is dicta. *White* and this Court's subsequent decision in *Threatt* hold that costs may be collected from indigent criminal defendants. *See Threatt*, 2006-Ohio-905, ¶ 2. But they do not address whether a court may completely disregard evidence that an indigent defendant is, and will be, unable to pay court costs. Indeed, *Threatt* implicitly suggested (in a pre-Suspension Clause decision) that some ability-to-pay procedure is required. *Threatt*, 2006-Ohio-905, ¶ 23 ("[A]n indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard.").

Therefore, although *White* and *Threatt* permit collection of court costs from indigent convicted defendants, they are also consistent with a constitutional rule requiring procedural protections—such as an ability-to-pay determination—in the course of imposing and collecting such costs. In light of the fundamental nature of the Sixth Amendment jury trial and compulsory process rights, this Court should follow the approach endorsed by the majority of its sister jurisdictions, by applying *Fuller*'s procedural requirements to recoupment of other costs beyond just counsel fees.

Under *Fuller*, courts must consider ability to pay at some point in the recoupment process—here, upon a defendant's motion pursuant to the Suspension Provision—to avoid needlessly chilling defendants' Sixth Amendment rights.

III. The Suspension Provision Would Violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment If It Did Not Require Courts to Consider a Defendant's Ability to Pay.

A. Fundamental Fairness Requires Consideration of Ability to Pay.

The United States Supreme Court has long instructed courts to remain "sensitive to the treatment of indigents in our criminal justice system." *Bearden v. Georgia*, 461 U.S. 660, 664 (1983); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion) ("[T]here can be no equal

justice where the kind of trial a man gets depends on the amount of money he has."). "Due process and equal protection . . . converge" when applying this "principle of 'equal justice.'" *Bearden*, 461 U.S. at 664, 665. "The equal protection concern relates to the legitimacy of fencing out [indigents] based solely on their inability to pay core costs," while "[t]he due process concern homes in on the essential fairness of the state-ordered proceedings." *Halbert v. Michigan*, 545 U.S. 605, 610–11 (2005) (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996)).

In *Bearden*, the Court held that due process requires sentencing courts to first consider the reasons—including the probationer's ability to pay and possible "alternatives to imprisonment"—for a failure to pay a fine or restitution before the probationer is imprisoned on those grounds. 461 U.S. at 672. Otherwise, the courts impermissibly risk imprisoning a probationer "simply because, through no fault of his own, he cannot pay the fine." *Id.* at 672–73. "Such imprisonment would not advance any legitimate governmental interest." *Hernandez v. Sessions*, 872 F.3d 976, 992 (9th Cir. 2017); *see also Turner v. Rogers*, 564 U.S. 431, 448–49 (2011) (holding that in civil contempt proceedings for failure to pay child support, state must either provide counsel or give notice and opportunity to be heard on ability to pay before imprisoning individual); *Alkire v. Irving*, 330 F.3d 802, 816 (6th Cir. 2003) ("'[F]undamental fairness' requires that a court inquire into an individual's reasons for failing to pay a fine or courts costs." (quoting *Bearden*, 461 U.S. at 672)); *see also Weatherspoon v. Oldham*, No. 17 Civ. 2535(SHM)(CGC), 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018), *reconsideration denied*, No. 17 Civ. 2535(SHM)(CGC), 2018 WL 1884825 (W.D. Tenn. Apr. 19, 2018) (collecting cases).

Although *Bearden* and its above-cited progeny specifically constrain states' authority to imprison indigents without an ability-to-pay consideration, the "[United States] Supreme Court has rejected the argument that the principles [underlying that decision] . . . are restricted to

instances in which a defendant is subject to imprisonment." *Dueñas*, 242 Cal. Rptr. 3d at 276 (citing *Mayer v. City of Chicago*, 404 U.S. 189, 196–97 (1971)).[9] Therefore, several courts have applied *Bearden*'s blended due process and equal protection analysis to evaluate cost-recoupment statutes. *See id.* (applying *Bearden* to imposition of civil judgment for court costs); *Helsper*, 2006 WI App 243, ¶ 7 ("Constitutional limits on a state's recoupment of attorney fees are grounded in both due process and equal protection principles."); *Washington v. McQuiggin*, No. 2:11-CV-212, 2011 WL 2516292, at *4 (W.D. Mich. June 23, 2011) (ability-to-pay hearing required before restitution is enforced), *aff'd in part, dismissed in part*, 529 F. App'x 766 (6th Cir. 2013) (dismissing on jurisdictional grounds); *Thomas v. Haslam*, 329 F. Supp. 3d 475, 518 (M.D. Tenn. 2018) (applying *Bearden* to revocation of driver's license for failure to pay court costs); *see also Alexander*, 742 F.2d at 124 (explaining *Bearden*'s relevance to attorney's fees reimbursement statute). These "fundamental fairness" principles protect indigents' equal access to criminal process just as much as they prohibit indigents' imprisonment for their poverty. *See Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1169 (D. Or. 2018). And the Sixth Amendment rights at issue here—the rights to a jury trial and compulsory process—are among the most fundamental guarantees of constitutional criminal procedure. *See Duncan*, 391 U.S. at 149; *Washington*, 388 U.S. at 19.

Here, unless courts applying the Suspension Provision must consider ability to pay, the Cost-Recoupment Statute is not sufficiently tailored to avoid unnecessary burdens on defendants' constitutional rights, in violation of *Bearden*'s guarantee of "fundamental fairness." *Bearden*

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[9] *See also* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 Vand. L. Rev. 55, 92 (2019) ("Though some lower courts have suggested that the *Bearden* test only applies if the additional punishment involves a deprivation of liberty, the Court's repeated rejection of penalty-based distinctions appears to belie that restriction.").

requires "a careful inquiry" into (1) the individual interest affected, (2) the nexus between the legislative means and purpose, and (3) whether alternative means for effectuating that purpose exist. 461 U.S. at 666–67. Where—as here—fundamental rights are burdened on the basis of indigency, *see id.*, courts must apply "a heightened standard of review" in scrutinizing these three factors. *Johnson v. Bredesen*, 624 F.3d 742, 748 (6th Cir. 2010); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (striking down "poll tax" and explaining the Court has "long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined"); *New Hampshire v. Cushing*, 399 A.2d 297, 298 (N.H. 1979) (relying on *Harper* to "conclude that a criminal defendant cannot be required to purchase a jury trial even for so nominal a sum as eight dollars").

As to the first *Bearden* factor, the individual interest at stake here is paramount: enforcement of unpayable recoupment obligations threatens to deter the exercise of Sixth Amendment rights to a jury and compulsory process. Such fundamental rights "may not be chilled through fear of subsequent reprisals in the form of monetary penalties," even if the threat ultimately "does not preclude the exercise of that right" in every instance. *Cal. Teachers Ass'n v. California*, 975 P.2d 622, 636 & n.9 (Cal. 1999).

Second, without consideration of ability to pay, R.C. 2947.23 lacks "a real and substantial relation" to its "proper legislative goal" of recouping costs, *Cal. Teachers Ass'n*, 975 P.2d at 631: "Poor people [will] face collection efforts solely because of their financial status, an unfair and unnecessary burden that does not accomplish the goal of collecting money." *Dueñas*, 242 Cal. Rptr. 3d at 275–76 (holding due process requires courts to ascertain a defendant's present ability to pay at a hearing before imposing court facilities and operations fees); *see also Helsper*, 2006

WI App 243, ¶ 7. In other words, without a mandatory ability-to-pay consideration, the Cost-Recoupment Statute is not "tailored to impose an obligation only upon those with a foreseeable ability to meet it." *Fuller*, 417 U.S. at 54.

Third, and finally, an alternative and more effective means of recouping costs is readily available: when evaluating a motion to modify, waive, or suspend costs under R.C. 2947.23(C), Ohio can require trial courts to consider a defendant's financial circumstances. The benefits of this alternative—preventing the needless chilling of constitutional rights—outweigh the minimal administrative costs, if any, to the state. *See Cal. Teachers Ass'n*, 975 P.2d at 639 (describing ability-to-pay procedures as a "minimal burden"). Defendants are already statutorily entitled to move for waiver, modification, or suspension of costs. R.C. 2947.23(C). Judges considering such motions almost certainly consider ability to pay already. This extra procedure only makes such considerations a mandatory factor in their analysis. *Cf. Hernandez*, 872 F.3d at 994 ("All that the preliminary injunction requires of the government is that it make consideration of financial circumstances . . . explicitly, rather than implicitly, required factors.").

For similar reasons, the Cost-Recoupment Statute would be unconstitutional without consideration of ability-to-pay if a more traditional procedural due process analysis were applied. *See Walker v. City of Calhoun*, 901 F.3d 1245, 1265 (11th Cir. 2018) ("*Bearden* and [*Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc)] command that courts should apply something akin to a procedural due process mode of analysis."), *cert. denied*, No. 18-814, 2019 WL 1428955 (U.S. Apr. 1, 2019); *Hernandez*, 872 F.3d at 993–94 (applying procedural due process); *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 649 (E.D. La. 2017) ("[P]laintiffs' [*Bearden*] argument sounds in procedural due process." (internal citation omitted)); *see also Turner*, 564 U.S. at 444 (applying procedural due process to question of "an indigent's right to

paid counsel at . . . a [civil] contempt proceeding."); *Fowler v. Johnson*, No. 17 Civ. 11441, 2017 WL 6379676, at *10 (E.D. Mich. Dec. 14, 2017) (Plaintiffs demonstrated likelihood of success on claim that state procedural due process rights were violated when driver's licenses were suspended without first affording them an "ability-to-pay hearing."); *Stinnie v. Holcomb*, 355 F. Supp. 3d 514, 531 (W.D. Va. 2018) (same).

Procedural due process claims are governed by the three-factor balancing test of *Mathews v. Eldridge*:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976).

Here, under the first factor, defendants' substantial private interests include not only avoiding burdens posed by financial obligations in general, *cf. Shoemaker v. City of Howell*, 795 F.3d 553, 561 (6th Cir. 2015), but also the potential deterrence of their fundamental rights to a jury trial and compulsory process. *Cf. Cal. Teachers Ass'n*, 975 P.2d at 638 (holding plaintiffs have "private interest in meaningful access to the administrative forum so that they may present their side of the case and invoke the discretion of the decision maker").

Second, the risk of erroneous deprivation is also substantial: Without mandatory consideration of ability to pay, the Cost-Recoupment Statute risks deterring indigent defendants from exercising their fundamental Sixth Amendment rights and imposing unpayable debts upon them. *Cf. id.* (statute requiring teachers to pay half the cost of administrative hearing regarding threatened termination or suspension posed substantial risk of erroneous termination by

"deter[ring] teachers with colorable claims from obtaining a hearing and vigorously presenting their side of the case"); *Hernandez*, 872 F.3d at 993 ("[W]hen the government determines what bond to set without considering a detainee's financial circumstances, . . . there is a significant risk that the individual will be needlessly deprived of the fundamental right to liberty."). Moreover, consideration of ability to pay will virtually eliminate these risks by ensuring that any financial obligation will be enforced "*only against* those who actually become able to meet it without hardship." *Fuller*, 417 U.S. at 54 (emphasis added).

Finally, as explained above, although the state has a legitimate interest in recouping prosecution costs, any administrative cost of a mandatory ability-to-pay consideration is minimal. *See, e.g.*, *California Teachers Ass'n*, 975 P.2d at 639.

Given the balance of these factors, Ohio's recoupment procedures would be facially unconstitutional under the due process and equal protection clauses without a mandatory ability-to-pay consideration under the Suspension Provision.

B. R.C. 2947.23's Cost-Recoupment Procedures Are Irrational If Ability to Pay Is Not Considered.

Even if the Court concludes that *Bearden*'s heightened review does not apply to R.C. 2947.23, Ohio's cost-recoupment scheme cannot survive even minimum rationality review without mandatory consideration of defendants' ability to pay under the Suspension Provision. "Although the legislature has no obligation to justify or even state its reasons for making a particular classification, rational-basis review, whether under Ohio constitutional principles or federal ones, does not mean toothless scrutiny." *State v. Mole*, 149 Ohio St. 3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 28 (internal citation omitted). "[T]he rational-basis test requires that the classification must bear a rational relationship to a legitimate government interest or that

reasonable grounds must exist for drawing the distinction." *Id.*; *see also Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 694 (6th Cir. 2014).

In *Thomas v. Haslam*, for example, the court applied rationality review to a Tennessee fee-recoupment scheme. Tennessee "revok[ed] the driver's license of any person who . . . has failed to pay court debt for a year or more, unless that person is granted a form of discretionary relief by a court." 329 F. Supp. 3d at 479. The *Thomas* court concluded that this statute failed rationality review without an indigence exception based on ability to pay. *Id.* at 483, 524. Although "collecting fees, costs, and taxes from those who can actually pay them is, generally speaking, a legitimate government purpose," *id.* at 518, the revocation statute was not rationally related to fee-collection, absent an inability-to-pay exception: "as applied to indigent drivers, the law is not merely ineffective; it is powerfully counterproductive" because "[n]o person can be threatened or coerced into paying money that he does not have and cannot get." *id.* at 483, 518–19; *see also Dueñas*, 242 Cal. Rptr. 3d at 275–76 ("Imposing unpayable fines [for court facilities and operations] on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive."); *see also Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) (O'Connor., J.) ("Perhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass th[e] rational basis test," but declining to reach the question); *Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1332 (M.D. Ala. 2017) (denying motion to dismiss on claim that statute conditioning franchise restoration upon payment of costs by persons formerly convicted of a felony fails rationality review).

In the absence of an ability-to-pay consideration, the Cost-Recoupment Statute fails rationality review for the same reasons. The Ohio legislature's goal of recouping the costs of prosecution is legitimate. *Thomas*, 329 F. Supp. 3d at 518. But unless the statute requires an ability-

to-pay determination, there is no rational relationship between this goal and the legislative means. The statute will not effectively raise money by imposing costs on indigent defendants and then refusing to waive, modify, or suspend those costs based on inability to pay. *See Dueñas*, 242 Cal. Rptr. 3d at 275 ("A fine on indigent people . . . 'is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent[.]'" (quoting *Tate v. Short*, 401 U.S. 395, 399 (1971)); *cf. Harper*, 383 U.S. at 666 ("Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.").[10]

Whether analyzed under rationality review, *Bearden*, or *Mathews*, Ohio's cost-recoupment procedures would be unconstitutional—or at least raise serious constitutional concerns—if defendants' ability to pay costs were not considered in the process of evaluating a motion under the Suspension Provision.

IV. Requiring Courts Applying the Suspension Provision to Examine a Defendant's Ability to Pay Also Avoids Problems Under the Excessive Fines Clauses of the United States and Ohio Constitutions.

Both the United States and Ohio Constitutions provide that "excessive fines [shall not be] imposed." U.S. Constitution, Eighth Amendment; Ohio Constitution, Article I, Section 9. These provisions, at minimum, "limit[] the government's power to extract payments . . . as punishment for some offense." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (internal quotation marks and citation omitted); *State v. Broom*, 146 Ohio St. 3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶ 55 (noting that, although Article I, Section 9 "provides protection independent of the Eighth Amendment," the "United States Constitution provides a floor" (internal quotation marks and citation omitted)). That principle offers further reason to reject the State's statutory reading.

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[10] *See also* Joint Committee Court Costs Report, *supra* note 1, at 5 (noting that administrative costs of increasing fees can be counterproductive and are not justified by a corresponding increase in revenue).

Properly interpreted, Ohio's cost-recoupment scheme does not implicate the federal or state Excessive Fines Clauses because court costs are not supposed to be punitive. Given their stated purpose "of lightening the burden on taxpayers financing the court system," this Court has long described costs as "not punishment, but . . . more akin to a civil judgment for money." *Threatt*, 2006-Ohio-905, ¶ 15; *see also Strattman v. Studt*, 20 Ohio St. 2d 95, 102–03, 253 N.E. 2d 749 (1969) ("[S]tatutory provisions for payment of court costs were not enacted to serve a punitive, retributive, or rehabilitative purpose . . . . [costs are] a civil, not a criminal, obligation[.]").

But simply labeling a cost as non-punitive is not dispositive if in fact it "serv[es]" at least "in part to punish." *Austin v. United States*, 509 U.S. 602, 610 (1993); *see also State v. Gustafson*, 76 Ohio St. 3d 425, 434, 668 N.E. 2d 435 (1996) ("*Austin* . . . held that 'civil' forfeitures can cross a line beyond which [they] become[] . . . a punishment for Eighth Amendment purposes[.]"). While legislative characterization certainly matters, "it makes sense to scrutinize governmental action more closely when the State stands to benefit[,]" *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991)—as it does when it collects court costs. Therefore, the United States Supreme Court has asked not just whether the legislature called the exaction a "fine," but it has also examined whether and to what degree the exaction is justified by or connected to some punishable act of the person sanctioned. *See Austin*, 509 U.S. at 615–18. For example, *Austin* gleaned punitiveness in part from certain exemptions in forfeiture provisions that "focus[ed] the provisions on the *culpability of the owner* in a way that ma[de] them look more like punishment[.]" *Id.* at 619–20 (emphasis added); *see also id.* at 621–22 (observing focus on "culpability"). And in *United States v. Bajakajian*, the Court had "little trouble" holding a forfeiture statute to be *solely* punitive where it was "imposed at the culmination of a criminal proceeding and require[d] conviction of an underlying felony[.]" 524 U.S. 321, 328–29 & n.4 (1998) (citing *Austin*, 509 U.S. at 619). This approach reflects the

"consensus point" among "contemporary legal theorists" that "punishment conveys a judgment of culpability"—that it "necessarily expresses blame."[11]

Treating ability to pay as immaterial to the proper operation of the Suspension Provision would make cost-recoupment effectively punitive, thus qualifying as a "fine" for Excessive Fines purposes. Unmoored from its ostensible non-punitive purpose of "lightening the burden on taxpayers financing the court system," *Threatt*, 2006-Ohio-905, ¶ 15 (citation omitted), it could be explained only as a provision serving, at least in part, to punish offenders for blameworthy behavior.

Indeed, this case amply demonstrates the point. In rejecting Mr. Taylor's motion, the trial court emphasized that Mr. Taylor "made the choices which led to the accrual of the fees at issue, and he must take responsibility for his conduct, as well as the resulting consequences." *State v. Taylor*, 2d Dist. Montgomery No. 27539, 2018 WL 1989584, *2 (Apr. 27, 2018). That sort of offense-focused statement exemplifies the real-world punitive consequences of permitting Suspension-Provision analyses to proceed without consideration of ability to pay.

And, if the statute were in fact punitive, thereby triggering scrutiny under the Excessive Fines Clauses, it would raise serious constitutional questions. Although the United States Supreme Court has not yet addressed whether an individual's ability to pay bears on an Eighth Amendment Excessive Fines analysis, the Court has recognized the interpretive significance of the history underlying that provision. *See Timbs*, 139 S. Ct. at 687–68 (citing historical sources, including Magna Carta and Blackstone, in interpreting the Excessive Fines Clause). Those historical sources,

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[11] *See* Sandra Mayson, *Collateral Consequences & the Preventive State*, 91 Notre Dame L. Rev. 301, 318 (2015) (internal quotation marks and footnote omitted); *see also* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 18 (2018) (we can identify punitive character "where economic sanctions are employed in response to prohibited conduct").

in turn, suggest that economic sanctions must be proportionate to a person's financial status. *See id.* Some courts have already adopted this view. *See, e.g.*, *United States v. Levesque*, 546 F.3d 78, 83 (1st Cir. 2008) (including in the analysis the question of whether the fine "would deprive the defendant of his or her livelihood"). And, regardless of the United States Supreme Court's view, this Court would retain an independent obligation under Article I, Section 9 to evaluate the question. *Amicus* believes that a proper analysis, under any mode of constitutional interpretation, demands the conclusion that ability to pay bears on the excessiveness of a fine. And if it does, the substantial and severe real-world consequences that can flow from inability to pay court costs, *see* Part V, *infra*, strongly suggest that they could be unconstitutionally excessive in many cases. *Cf. Rivera v. Orange Cty. Prob. Dep't*, 832 F.3d 1103, 1112 n.7 (9th Cir. 2016) (observing that "[r]aising money for government through law enforcement[,]" e.g., through "court-imposed fees," can "lead to . . . an ever-expanding financial burden—a cycle as predictable and counterproductive as it is intractable").

For current purposes, this Court need not delve into the particulars of what these potential Excessive Fines violations might look like. "[O]ne of the . . . chief justifications" for constitutional avoidance is that "it allows courts to *avoid* the decision of constitutional questions." *Clark*, 543 U.S. at 381. By adopting Appellee's interpretation, the Court can avoid all these serious constitutional concerns.

V. The Proper Construction of this Statute Will Have Substantial Consequences for Ohioans Generally and the Communities LDF Represents in Particular.

Mr. Taylor's interpretation of the Suspension Provision is better aligned with the statute's purposes. Statutory ambiguity "sets the stage" for this Court's "consideration of '[t]he object sought to be attained' and '[t]he consequences of a particular construction.'" *Int'l Paper Co. v. Testa*, 150 Ohio St. 3d 348, 2016-Ohio-7454, 81 N.E. 3d 1225, ¶ 14 (quoting R.C. 1.49(A), (E)).

Those principles clinch this case. As discussed above and in Mr. Taylor's brief, the Suspension Provision's object supports Mr. Taylor's reading—and the following predictable consequences of the State's reading further underscore why this Court should reject it.

A February 2019 report by the Ohio Development Services Agency found that 14 percent of all Ohioans measured were poor, which exceeds the national rate.[12] The report defines the poverty level as "the minimum income required to avoid inadequate nutrition."[13] The "real" poverty rate is likely higher because this measurement excluded institutionalized persons, almost all of whom have little to no income.[14] As is true throughout this country, poverty in Ohio disproportionately afflicts African Americans and other people of color. The 2019 report observed that the African-American poverty rate was over twice the baseline poverty rate, and nearly three times the white non-Hispanic rate; poverty rates for non-white children were at least twice the rate of white children.[15] Thus, for many Ohioans—especially Black and Latinx people in this State—it does not take much for court costs to be prohibitively expensive.

And the failure to pay court costs can have concrete, devastating effects. To be sure, Ohio's Constitution bars imprisonment for failure to pay court costs. *See* Ohio Constitution, Article I, Section 15; *Strattman*, 20 Ohio St. 2d at 102–03, 252 N.E. 2d 749. But lives can be upended by events short of incarceration, and inability to pay court costs can cause many such events.

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[12] Ohio Dev. Servs. Agency, *The Ohio Poverty Report* 3 (Feb. 2019).
[13] *Id.* at 11.
[14] *Id.* at 47. Of course, almost all, if not all, of these persons will have had court costs assessed.
[15] *See id.* at 39–40. Another 2019 study, this one nationwide, reported that the median African-American family owns just $3600 in wealth, only "2 percent of the $147,000 of wealth the median White family owns." Chuck Collins et al., *Dreams Deferred: How Enriching the 1% Widens the Racial Wealth Divide* 3 (2019), https://ips-dc.org/wp-content/uploads/2019/01/IPS_RWD-Report_FINAL-1.15.19.pdf.

Lower courts often make payment of court costs a condition of community control (formerly known as probation). *See, e.g.*, *State v. Williams*, 5th Dist. Stark No. 2015CA00045, 2015-Ohio-2868, ¶ 2; *State v. Stevens*, 2d Dist. Greene No. 2014-CA-10, 2015-Ohio-1051, ¶ 5; *State v. Estep*, 4th Dist. Gallia No. 03CA22, 2004-Ohio-1747, ¶ 2.[16] While intermediate appellate courts have stressed that no one can be directly imprisoned for violating community control by failing to pay court costs, many have said that such community-control violations "may . . . be considered as a factor in determining whether to modify or revoke community control for other violations." *Stevens* at ¶ 5 n.2; *see also Estep* at ¶ 11. Thus, court costs unpaid because of indigency might tip the scale towards revocation.[17] And, like any community-control violation, a violation based on failure to pay may also expose the defendant to further state penalties short of incarceration, such as longer or more restrictive community control sanctions. *See* R.C. 2929.15(B)(1)(a)–(b); R.C. 2929.25(D)(2)(a)–(b).

Moreover, federal law conditions access to a host of federally funded programs upon compliance with a "condition of probation," such as payment of court costs.[18] *E.g.*, 42 U.S.C.

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[16] *Amicus* takes no position on whether the General Assembly has authorized this practice.

[17] This approach—though generally accepted by lower courts, *see, e.g.*, *Estep* at ¶ 11—arguably contravenes *Bearden*'s safeguards against unnecessary imprisonment based on indigency. *See, e.g.*, *State v. Douthard*, 1st Dist. Hamilton Nos. C-000354, C-000355, 2001 WL 725415, at *5 (June 29, 2001) ("In order to revoke his community control for nonpayment of court costs and fees, Douthard's failure must have been willful and not the result of indigence." (citing, *inter alia*, *Bearden*); *but see Stevens*, at ¶ 5 n.2 (endorsing failure to pay as "factor" in revocation); *State v. Toler*, 2003-Ohio-5129, 154 Ohio App. 3d 590, 592, 798 N.E.2d 64, 65, ¶ 6 (3d Dist.) (same); *State v. Tabb*, 10th Dist. Franklin No. 13AP–142, 2013-Ohio-4059, ¶ 8 (same).

[18] Community control replaced probation in Ohio in 1996. *See Cleveland Bar Ass'n v. Cleary*, 93 Ohio St. 3d 191, 192 n.1, 754 N.E.2d 235 (2001). Thus, community control violations are treated as probation violations for federal-law purposes. *See United States v. DeJournett*, 817 F.3d 479, 484 (6th Cir. 2016) ("[C]ommunity control is the functional equivalent of probation[.]") (quoting *State v. Talty*, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 16) (alterations in

608(a)(9)(A)(ii) (barring states from using certain federal grant money to provide assistance to anyone "violating a condition of probation or parole imposed under Federal or State law"). Those programs include "Temporary Assistance to Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP), formerly food stamps), federal housing assistance programs (including public housing and Section 8), Social Security disability, and Old-Age, Survivor, and Disability Insurance[.]"[19]

Beyond penalties stemming from community control, inability to pay can increase the burden of the court costs themselves. For example, Ohio law contemplates interest on costs. *See* R.C. 2335.19(b) ("An entry of judgment that includes a grant of judgment for costs . . . authorizes the clerk . . . to issue a certificate of judgment for all costs including any interest due[.]"). And it further permits the collection from the debtor of any expense incurred by a "public agency or private vendor" in "collecting the judgment for costs[.]" *Id.* Perversely, then, indigency can mean that those who cannot pay end up with more to pay than those who can pay. Ironically, given their stated purpose, court costs can also burden the state by requiring increased resource expenditure to collect from those who cannot pay. For example, where payment of court costs is a condition of community control, probation officers are necessarily involved, to some degree, in compelling compliance. *See also supra* note 10 and text accompanying.

Inability to pay legal debt also imposes severe social costs by making it more difficult, and sometimes impossible, for those who have paid their debt to society to fully reintegrate into that

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original); *cf. Clevenger*, 2007-Ohio-4006, ¶ 2 (defendant submitted documentation that outstanding court costs barred him from eligibility for certain federally sourced benefits).

[19] Fiona Doherty, *Obey All Laws & Be Good: Probation & the Meaning of Recidivism*, 104 Geo. L.J. 291, 351 & n.310 (2016).

society. Outstanding debt from court costs can hamper individuals' ability to secure "housing, employment, occupational opportunities, and credit on favorable terms."[20] This compounds the lasting financial effects flowing from the fact of incarceration.[21] Common sense accords with the United States Supreme Court's observation that it "is in the interest of society and the State that . . . a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation, and return to useful citizenship." *James v. Strange*, 407 U.S. 128, 139 (1972). When those opportunities are not available, rehabilitation is far more difficult, and the risk of reoffending may be greater.[22]

Finally, failing to consider ability to pay contradicts the principle that we impose consequences on offenders, not their loved ones. Any financial exaction limits individuals' ability to provide for their family and can create "significant financial stress"; "debt represents money owed that cannot be spent elsewhere[.]"[23] It is no exaggeration to say, as one survey of people with legal debt found, that families often must "choose between food, medicine, rent, child support, and legal debt."[24] The obstacles to a former offender's reintegration that court costs create (noted above) further constrain family finances, making those impossible choices all the more devastating. To make matters worse, many of the federal benefits that are at risk as a result of an inability to pay court costs are benefits for families or that directly benefit families, such as TANF,

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[20] Alexes Harris, Heather Evans, & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Soc. 1753, 1780–81 (2010).
[21] *See* Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 12 (2010) (incarceration "eliminates . . . 44 percent of the earnings" an African-American man would have otherwise earned through age 48).
[22] *See* Colgan, *supra* note 11, at 63–66.
[23] Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 Harv. C.R.-C.L.L. Rev. 189, 217 (2016).
[24] *See* Harris, Evans, & Beckett, *supra* note 20, at 1786.

SNAP, and Section 8. For families, it is thus no surprise that legal debt, "like all debt . . . can cause acute emotional distress" and compound the negative effects of poverty (such as susceptibility to illness).[25]

In Ohio, as elsewhere, these problems will fall particularly heavily on African-American families and communities, given both the disproportionate poverty rates of Black Ohioans (discussed above) and the continued distorting effect of racism on the American criminal justice system.[26] Various studies have found that, "compared to Whites," African Americans are "more likely to be stopped and held for questioning, arrested, charged, convicted, and given harsher penalties after conviction."[27] This convergence of inequality means African Americans are disproportionately subject to the problems stemming from inability to pay court costs.

In sum, the failure to consider inability to pay under the Suspension Provision would contribute to the sort of financial precarity that keeps former offenders on society's outskirts long past when they should have been able to reenter. This is what the General Assembly sought to prevent when it created the Suspension Provision. And it is further evidence that any statutory ambiguity should be interpreted to eliminate those possibilities.

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[25] Atkinson, *supra* note 23, at 222.

[26] *See, e.g.*, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (observing that "racial bias" in the justice system is "a familiar and recurring evil"); Br. of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Support of Petitioner, *Flowers v. Mississippi*, No. 17-9572, 2018 WL 6921334, at *13–16 (Dec. 27, 2018) (collecting evidence of present-day jury discrimination).

[27] Lisa Christine Walt & Leonard A. Jason, *Predicting Pathways into Criminal Behavior: The Intersection of Race, Gender, Poverty, Psychological Factors*, 2 ARC J. Addiction 1, 1 (2018) (citing a variety of studies for these points).

CONCLUSION

A statute susceptible of more than one reading should be interpreted to avoid a constitutional problem. Mr. Taylor's view of the Suspension Provision is not only textually sensible and accordant with the General Assembly's purposes in enacting it, but also avoids serious constitutional problems raised by the State's interpretation. Moreover, Mr. Taylor's interpretation reduces the likelihood that court costs will cause the substantial real-world distress flowing from a defendant's inability to pay them. This Court should adopt his reading.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2019 I had served true and correct copies of the following document:

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEE

on the following addressees via certified **mail by** depositing copies thereof, contained in a properly addressed envelope, into a designated drop box:

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