

No. 18-809

IN THE
Supreme Court of the United States

CURTIS T. LOVELACE,

—v.—

Petitioner,

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS
FOR THE FOURTH DISTRICT

**MOTION FOR LEAVE TO FILE *AMICI CURIAE*
BRIEF AND BRIEF OF THE FINES AND FEES JUSTICE
CENTER, R STREET INSTITUTE, THE SOUTHERN
POVERTY LAW CENTER, AND THE CATO INSTITUTE
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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**MOTION OF AMICUS CURIAE FOR LEAVE TO
FILE BRIEF IN SUPPORT OF PETITIONER**

Amici curiae the Fines & Fees Justice Center, the R Street Institute, the Southern Law Poverty Center, and the Cato Institute respectfully move for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Counsel for Petitioner has consented to the filing of this brief. The consent of counsel for Respondent was requested but withheld.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Fines & Fees Justice Center (“FFJC”) is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local courts. FFJC’s mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably.

The R Street Institute is a non-profit, nonpartisan, public-policy research organization. R Street’s mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The Southern Poverty Law Center (“SPLC”) has provided pro bono civil rights representation to low-income persons in the Southeast since 1971, with particular focus on combating unlawful discrimination and ending poverty. The SPLC provides educational materials, engages in policy

reform, and develops litigation to minimize the burdens placed on indigent individuals and low income communities, to ensure meaningful access to social safety nets, and to enable upward mobility.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999, and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The petitioner in this case was assessed a \$35,000 bond fee despite his appearance at trial and ultimate acquittal of any wrongdoing. The case provides a stark example of the growing reliance by state and local jurisdictions on court-imposed fees and fines to fund government programs and keep their budgets afloat. Disproportionately affecting society's most vulnerable, many of these fee schemes create an unconstitutional conflict of interest between the state and its citizens, and often keep individuals incarcerated merely because they cannot afford such expenses. Overwhelming fees often cultivate a cycle of debt that leads to other dire consequences, such as homelessness, unemployment, and recidivism.

Amici are committed to addressing the unconstitutional imposition of bond fees and other exactions. To aid the Court, *amici* offer the attached brief (i) cataloguing the bond fee statutes across American jurisdictions; (ii) placing those regimes into the broader context of fees courts impose on defendants; and (iii) explaining why bond fees perpetuate perverse incentives that give rise to constitutional violations.

For these reasons, *amici curiae* respectfully request that the Court grant leave to file this brief.

January 25, 2019.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT	5
I. THE WIDESPREAD USE OF BOND FEES IS PART OF A LARGER TREND OF FEES OVERWHELMING AMERICA’S JUSTICE SYSTEM.	5
A. Bond Fees are Common Throughout the Country.	5
B. The Use of Bond Fees is Part of a Growing Reliance on Criminal Justice Fees to Support General Funding.	11
C. Increased Reliance on Fees Affects Society’s Most Vulnerable.....	16
II. BOND FORFEITURES AND OTHER FEE SCHEMES PERPETUATE PERVERSE INCENTIVES THAT GIVE RISE TO CONSTITUTIONAL VIOLATIONS.....	21
CONCLUSION.....	26

TABLE OF AUTHORITIES

	Page(s)
 CASES	
<i>Cain v. City of New Orleans</i> , No. 2:15-cv-04479-SSV-JCW (E.D. La. Aug. 2, 2018), ECF No. 318	23
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TABLE OF AUTHORITIES – Continued

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INTEREST OF AMICI CURIAE¹

Amici curiae are non-profit organizations that share a common concern that state and local governments pursue criminal and civil fines, fees, and forfeitures at alarmingly high rates. *Amici* have a particular interest in this case because the unprecedented rise in fines, fees, and forfeiture has generated financial incentives for abuse, undermined public safety, and has had devastating impacts on low-income people, their families, and society at large.

The Fines & Fees Justice Center (“FFJC”) is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local courts. FFJC’s mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably.

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¹ Counsel for Petitioner has consented to the filing of this brief. The consent of counsel for Respondent was requested but withheld. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation of submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

that support economic growth and individual liberty.

The Southern Poverty Law Center (“SPLC”) has provided pro bono civil rights representation to low-income persons in the Southeast since 1971, with particular focus on combating unlawful discrimination and ending poverty. The SPLC provides educational materials, engages in policy reform, and develops litigation to minimize the burdens placed on indigent individuals and low-income communities, to ensure meaningful access to social safety nets, and to enable upward mobility.

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SUMMARY OF THE ARGUMENT

Petitioner is an indigent, wrongfully prosecuted, and ultimately acquitted defendant who was nevertheless charged a \$35,000 fee for exercising his right to pretrial release through Illinois’ bail system. The traditional purpose of the centuries-old and constitutionally recognized

practice of bail is to assure appearance at trial without unnecessarily inhibiting a presumptively innocent person's freedom. But Illinois' bail statute withholds a fixed percentage of a defendant's bond irrespective of appearance and irrespective of acquittal. That fee is untethered to the actual costs of administering the state's bail system, is admittedly earmarked to fund the Clerk's office, and is set by judges who will ultimately benefit from its imposition. And despite having statutory discretion to impose a smaller fee—or, as would be appropriate here, no fee at all—the trial judge in Petitioner's case confirmed that Illinois judges never do so, revealing the deep, structural conflicts of interest at the heart of Illinois' bail fee regime.

Illinois is not alone. As state legislatures have sought to increase government revenue without increasing taxes, bond fees have proliferated across the country. That revenue, however, comes at a steep cost: sixty percent (60%) of inmates nationally are incarcerated pretrial merely because they cannot afford bail, and nonrefundable bond fees only serve to further entrench that reality. To the extent a bond payment is made, the corresponding fee can contribute to a growing and often insurmountable financial burden placed on defendants.

Indeed, bond fees² are merely a species of a broader genus of fees overwhelming individuals

² Throughout this brief, *amici* use the term “bond fee” to describe the fees imposed when a defendant posts bail. The fees are called by different names—such as bond

involved in the criminal justice system.³ These fees have skyrocketed since the 1980s, providing a pool of funding for an expanding justice system, as well as other wholly unrelated government services, by collecting money from a ballooning number of defendants. The result has been a distortion and corruption of the administration of justice, where state and local governments rely on an array of fees to compensate for budgetary shortfalls that should be borne by the population at large rather than on the backs of society's most vulnerable. And while the public coffers swell, indigent and low-income people are subjected to accumulating debt that often leads to a host of collateral harms, including wage garnishment, loss of employment and housing, poor credit ratings, driver's license suspension, incarceration, prohibitions on the right to vote, and even family separation.

In light of state and local governments' increasing reliance on court-imposed fees, and the unconstitutional abuses that arise from such practices, this Court should grant certiorari to establish a uniform framework through which lower courts can evaluate the constitutionality of bond fees like those imposed by Illinois. To aid the Court, this

forfeiture, bond forfeiture fees, or bail fees—depending on the jurisdiction.

³ In this brief, the term “fees” includes fees, costs, surcharges, and any other monetary assessment—not including fines—imposed upon individuals in the justice system upon their arrest, being charged with and/or convicted of a crime.

brief will catalogue the bond fee statutes across American jurisdictions and place those regimes into the broader context of fees courts impose on defendants. It will then explain why bond fees perpetuate perverse incentives that give rise to constitutional violations.

ARGUMENT

I. THE WIDESPREAD USE OF BOND FEES IS PART OF A LARGER TREND OF FEES OVERWHELMING AMERICA'S JUSTICE SYSTEM.

A. Bond Fees are Common Throughout the Country.

At the heart of this petition is an Illinois bail bond statute that levies a fee of up to 10% of posted bond upon presumptively innocent defendants.⁴ In this case, after the trial judge set bail at \$3.5 million, Petitioner posted a \$350,000 bond. After Petitioner not only appeared at trial but was ultimately acquitted of any wrongdoing, the trial judge nevertheless denied his motion for a return of the full amount of the bond and assessed a \$35,000 fee,

⁴ 725 ILCS 5/110-7(f) (West 2016). A bail bond is a financial obligation of a defendant to comply with any terms of a conditional release from custody. Forfeiture is the process by which a court can revoke a defendant's bail if such conditions are not met. Peculiarly, in Illinois, the forfeiture fee is not imposed if a defendant posts 100% of the amount of bail imposed. Thus, wealthy defendants who can post bail are not subject to the bond forfeiture fee while low-income defendants who can only afford to post a bond are assessed the fee.

conceding that the fees were necessary to fund the Clerk's office. The trial judge also admitted that he had never seen a fee of less than 10% assessed in his over 30 years on the bench.

The exorbitant fee assessed in this case is an egregious example of a common scenario. Nearly half of all states and countless local jurisdictions have enacted a statute or administrative rule implementing a bond fee program. While the particulars vary, the problematic elements are consistent.

For example, Alabama sets a \$35 filing fee on each bond, plus an additional fee of 3.5% "of the total face value of the bail bond or \$100, whichever amount is greater."⁵ Mississippi authorizes a fee of either \$20 or 2% of the bond face value, whichever is greater.⁶ In Tennessee, courts are authorized to order the clerk to retain a portion of the posted bond even if all conditions have been performed and a defendant is discharged from his or her obligations in the action.⁷ Florida's regime is similar, except the forfeiture is guaranteed and the amount fixed: the clerk retains 25% of the 10% deposit as bail costs, which are then disbursed to the county commission for law enforcement, criminal justice, and criminal court operations.⁸ Pennsylvania authorizes a court or bail agency to set a fee, so long as it is "an amount

⁵ Ala. Code § 12-19-311 (2012).

⁶ Miss. Code Ann. §83-39-31 (2011).

⁷ Tenn. Code Ann. § 40-11-119 (2018).

⁸ Fla. Stat. Ann. § 901.105 (1982).

reasonably related to the cost of administering the cash bail program.”⁹ Texas authorizes counties to set their own bail bond fees to be charged for services rendered by the sheriff and constable.¹⁰ West Virginia allows the clerk to charge \$25 per criminal bond plus an additional \$10 for any services rendered by the clerk for processing bail.¹¹

As with the Illinois regime, states often use bond fee proceeds for purposes that are unrelated to the administration of their bail program. For example, Arkansas sets aside a portion of fees for the Arkansas Counties Alcohol and Drug Abuse and Crime Prevention Program Fund.¹² In Indiana, a \$5 fee attached to each bond or partial deposit is paid to the Public Employee’s Retirement Fund.¹³ Similarly, West Virginia charges a \$10 fee for any services rendered by the clerk for processing bail to be paid into the Courthouse Facilities Improvement Fund.¹⁴ Kentucky submits bond fees to the jail fund of the county in which the prisoner is incarcerated.¹⁵ Nevada attaches a \$50 fee for filing bail bonds which

⁹ Pa.R.Crim.P. 528(3).

¹⁰ Tex. Gov’t Code Ann. § 51.319 (West 2015); Tex. Loc. Gov’t Code Ann. § 118.131 (1995).

¹¹ W. Va. Code § 59-1-11 (2018).

¹² Ark. Code Ann. § 17-19-301 (West 2013).

¹³ Ind. Code Ann. § 35-33-8-3.2 (West 2018).

¹⁴ W. Va. Code Ann. § 59-1-11 (West 2018).

¹⁵ Ky. Rev. Stat. Ann. § 431.5305 (West 2018).

is eventually passed to the State Controller.¹⁶ The Controller then distributes \$5 per collected fee towards the Account for Aid for Victims of Domestic Violence, half of the collected fees towards the Fund for the Compensation of Victims of Crime, and a quarter of the fees into a special account for the county “and maintained for the benefit of each justice court within the county.”¹⁷ Regardless of the purported merits of these programs, they should not be funded by presumptively innocent defendants who exercise their right to bail and fully comply with the terms of their release—and particularly those who are subsequently acquitted.

Bond fees are particularly concerning because they create incentives to set bail in circumstances where bail may be unwarranted. The practice of bail has been under increased scrutiny in recent years, as the bail system in the states has shifted its purpose from assuring appearance at trial to assuring pretrial detention.¹⁸ Today, 60% of jail inmates nationwide are detained solely because they cannot afford bond or bail—a statistic demonstrating just how far from its traditional

¹⁶ Nev. Rev. Stat. Ann. § 4.060 (West 2017).

¹⁷ *Id.*

¹⁸ Harvard Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform* (2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

purpose the practice of bail has deviated.¹⁹ Even in this case, it is difficult to understand how a \$3.5 million bail (reduced from \$5 million) was necessary to ensure Petitioner's appearance at trial, given that he was an indigent defendant who was only able to pay the fractional bond amount after his friends offered to cover the cost. In cases like Petitioner's, judges may well be tempted to structure the bail amount with the statutory bond fee in mind. In others, judges may set bail when release on one's own recognizance would be sufficient in order to collect the bond fee.

While excessive bail keeps presumptively innocent individuals incarcerated because they lack the assets necessary to secure their release, the rise of bond fees entrenches that system further. Such measures guarantee that a significant percentage of posted bond will not be returned even if a defendant appears at trial and is subsequently acquitted—a prospect that makes pretrial release even more elusive for most individuals than it already is. Many defendants are therefore presented with an impossible choice: posting bond and facing permanent forfeiture, satisfying full bail amounts with assets they do not have, or remaining incarcerated due to an inability to pay bail, bond fees, or fines.

To illustrate, in June 2018, Mickey Howard spent an additional five days in custody because he

¹⁹ Zhen Zeng, Bureau of Justice Statistics, *Jail Inmates in 2016*, (Feb. 2018), NCJ 251210, <https://www.bjs.gov/content/pub/pdf/ji16.pdf>.

could not afford to pay both the \$10 cash bond the Denver, Colorado judge set and the \$50 bond fee the City and County of Denver imposed.²⁰ In Tennessee, Jamie Tillman had to sit in jail for approximately 10 days because she could not pay her \$100 fine and \$155 processing fee.²¹ Similarly, Stephen Papa of Grand Rapids, Michigan served 22 days in jail because he could not pay his court fees assessed for drunkenly entering an abandoned building.²² Studies have shown that the average day in jail costs approximately \$130 per day.²³

Recognizing this inherent injustice, some states have spurned the use of bond fees—and even cash bail altogether. California recently abolished cash bail through the California Money Bail Reform Act.²⁴ Kentucky and New Mexico have also diminished the presence of cash bail by diminishing

²⁰Kieran Nicholson, Denver defendant cannot be kept in jail for failure to pay \$50 bail assessment fee, court orders. The Denver Post Oct. 12, 2018.

²¹ Matthew Shaer, *How Cities Make Money by Fining the Poor*. The New York Times Jan. 8, 2019. <https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html/>.

²² Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, National Public Radio (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

²³ Vera Institute of Justice, *The Price of Jails*, (May 2015), <https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration>.

²⁴ Ca. Senate Bill No. 20 (effective Oct. 2019).

the presence of the commercial bail bond industry.²⁵ Washington D.C. utilizes a cashless bail program complemented by a robust pretrial services agency.²⁶ But in most states, cash bail and bond fees remain an unfortunate reality.²⁷ And while some states, including Illinois, have outlawed the operation of commercial bail bondsman,²⁸ state bond and bail practices, left unchecked, still present the same problems that commercial bondsmen do, including abuses of the most vulnerable members of our communities.

B. The Use of Bond Fees is Part of a Growing Reliance on Criminal Justice Fees to Support General Funding.

While this petition concerns a single type of fee, bond fees are only one example of a larger collection of fees overwhelming a growing number of defendants in the criminal justice system. Today, state and local governments assess fees at virtually every stage of a criminal prosecution, including arrest and arraignment, pretrial detention and

²⁵ Ky. Rev. Stat. Ann. § 431.510 (West 1976); N.M. Stat. Ann. § 31-3-5 (West 2018).

²⁶ *Supra*, note 18.

²⁷ Pretrial Justice Institute, *Where Pretrial Improvements are Happening*, October 2018. <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5b4b2659-a1c0-9af9-6ec7-0df7b5e14a1f&forceDialog=0>

²⁸ 8A Am. Jur. 2d Bail and Recognizance § 5 (2018).

release, trial, probation, and incarceration.²⁹ For example, a 2014 investigation revealed that the vast majority of states imposed fees related to electronic monitoring, probation or supervision, and room and board.³⁰ Florida imposes a “prosecution fee” ranging from \$50 to \$100 or more on all criminal cases, which is used to fund State Attorney’s offices.³¹ In other jurisdictions, defendants pay a catalogue of fees supporting their own prosecutions, ranging from DNA testing to community service.³² In fact, fees often attempt to recoup costs tied to the exercise of constitutional rights—such as fees for arrest warrants, public defenders, and jury trials.³³ At least 43 states charge public defender costs that, in some cases, are non-refundable upon acquittal or dismissal.³⁴

²⁹ Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice 8 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.

³⁰ NPR, Brennan Center for Justice & National Center For State Courts, *State-By-State Court Fees*, NPR (May 19, 2014, 4:02 PM).

³¹ *See* Fla. Stat. Ann. § 938.27 (West 2013) (mandating prosecution fee of at least \$50 for misdemeanor and traffic offenses and at least \$100 for felony offenses).

³² *Supra*, note 22.

³³ *Id.*

³⁴ Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L.

Collectively, these fees often dwarf the fine for the underlying offense and are earmarked to support a wide array of general government services for which general revenue falls short.³⁵ Illinois deposits fees collected for traffic violations and crimes related to street gang participation into the Circuit Court Clerk Operation and Administrative Fund. In California, the \$100 fine for a red-light violation carries with it an additional \$390 in fees that is distributed among 18 different state and county funds, ranging from the Fish and Game Preservation Fund to the Emergency Medical Transportation Fund.³⁶ In New Jersey, the offense of simple marijuana possession carries a \$100 fine, but it will ultimately lead to a \$500 fee for the Drug Enforcement and Demand Reduction Fund, a \$50 lab fee, a \$50 fee for Victims of Crime Compensation, a \$75 fee for the Safe Neighborhood Services Fund, and \$33 in court costs.³⁷ In Pennsylvania, a woman convicted of a drug crime was charged nearly \$2,500 in fees—three times larger than her fine and

Rev. 2 (2018); *see, e.g.*, Ala. Code 1975 §15-12-21 (2018); N.H. Rev. Stat. §604-A:9 (2018).

³⁵ Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. Ill. L. Rev. 1175, 1177 (2014).

³⁶ Mac Taylor, *Improving California's Criminal Fine and Fee System*, January 2016 <https://lao.ca.gov/reports/2016/3322/criminal-fine-and-fee-system-010516.pdf>

³⁷ New Jersey Courts, Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees, 12 (June 2018).

restitution combined.³⁸ Amorphous “court costs” are also often assessed for general administrative ends, such as modernizing a court’s hardware and infrastructure.³⁹

These fees stem from a deliberate policy choice to increasingly rely on the criminal justice system as a growing source of public revenue. In 1986, the Conference of State Court Administrators noted the proliferation of “[f]ees and miscellaneous charges . . . as [a] method to meet demands for new programs without diminishing general tax revenues.”⁴⁰ Nearly 30 years later, a 2015 issue brief by the Council of Economic Advisers noted that state and local jurisdictions were pressured to transfer the burden of criminal justice expenditures from taxpayers to defendants.⁴¹ As observed by Walter Olsen, a senior fellow with the Cato Institute, “[t]he cost of incarceration was skyrocketing when the war on crime and the war on drugs led to a tremendous building of new correctional institutions. . . [Yet l]egislators resisted

³⁸ *Supra*, note 28.

³⁹ *Supra*, note 31.

⁴⁰ Conference of State Court Administrators, Standards Relating to Court Costs: Fees, Miscellaneous Charges and Surcharges and a National Survey of Practices, 4-5 (June 1986).

⁴¹ Council of Econ. Advisers, Economic Perspectives on Incarceration and the Criminal Justice System, (2016), [<https://perma.cc/J6GH-DWQA>].

the idea of allocating the money to such an unpopular thing.”⁴²

Between 1980 and 2005, the number of incarcerated people in the United States more than quadrupled, from 500,000 to 2.2 million people.⁴³ Yet many states have nevertheless decreased funding for their court systems—in some cases, by as much as 25%.⁴⁴ These facts are not unrelated. Right on Crime has recognized that incarceration rates are growing due to defendants’ inability to pay criminal justice fees.⁴⁵

The response has been an explosion of fees and fines on individuals in the criminal justice system as a tool to keep budgets afloat. For example, since 2010, 48 states have increased civil and criminal fees.⁴⁶ Arizona, Louisiana, Ohio, and Texas

⁴² Walter Olson, *The Return of Debtor Prison?* Cato Institute, Daily Podcast, June 5, 2014. www.cato.org/multimedia/daily-podcast/return-debtor-prison.

⁴³ Pew Charitable Trust Public Safety Performance Project, *Public Safety, Public Spending: Forecasting America’s Prison Population 2007-2011*, at 2 (2007), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustorg/reports/state-based_policy/psppprisonprojections0207.pdf].

⁴⁴ American Bar Association, Resolution 302 and Report 2 (Aug. 8-9, 2011).

⁴⁵ Right on Crime, *Pretrial, Fines & Fees*, <http://rightoncrime.com/category/priority-issues/pretrial-justice/>.

⁴⁶ Joe Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors’ Prisons*, National Public Radio (May 21, 2014, 5:01 AM), <https://www.npr.org/2014/05/21/>

instituted new fees and raised existing fees to address 2010 budget shortfalls.⁴⁷ In 2012, the Tennessee legislature established a \$450 criminal record expungement fee for the principal purpose of raising revenue for the state general fund.⁴⁸ In some cities, revenues from fines and fees account for over 10% of total municipal income.⁴⁹ And often the biggest expenditures are for court and police services—the same municipal arms responsible for assessing the fines and fees.⁵⁰

C. Increased Reliance on Fees Affects Society's Most Vulnerable.

The disproportionate impact of these fees is shouldered by the indigent, as they constitute the vast majority of people involved in the criminal

313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons (describing results of yearlong investigation).

⁴⁷ Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create*, Harvard Kennedy School & Nat'l Inst. Of Justice 5 (Jan. 2017), <https://www.ncjrs.gov/pdffiles1/nij/249976>.

⁴⁸ Maura Ewing, *Want to Clear Your Record? It will Cost You \$450*, The Marshall Project (June 1, 2016), <https://www.themarshallproject.org/2016/05/31/want-to-clear-your-record-it-ll-cost-you-450#.8JBZ1nHWG>.

⁴⁹ Matthew Shear, *How Cities Make Money by Fining the Poor*, New York Times (January 8, 2018), <https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html>.

⁵⁰ *Id.*

justice system.⁵¹ Indeed, a major reason that state and local governments have resorted to fees (as well as fines and forfeitures) for revenue generation is because low-income communities lack the political power to oppose them.⁵² Given the heavy opposition to broad-based tax increases, politicians simply choose the path of least resistance.

The results are often tragic. Because fees that are manageable for a person of means may be out of reach for an impoverished or low-income person, monetary sanctions have driven people deeper into cycles of poverty, debt, and punishment. Failure to pay fees often leads to additional penalties, courts summons, collection efforts, driver's license suspension, and even incarceration.⁵³

The financial burden itself is often compounded by collection fees, interest, non-payment fees, per-payment fees, payment plan set-up fees, probation fees, and warrant fees that rapidly cause already unmanageable burdens to

⁵¹ See Bureau of Justice Assistance, U.S. Dep't of Justice, *Contracting for Indigent Defense Services: A Special Report* 3 n.1 (2000) (estimating that 60% to 90% of criminal cases nationwide involve indigent defendants); Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 *Criminology & Pub. Pol.* 509, 516 (2011) ("Criminal defendants are overwhelmingly poor . . .").

⁵² See *supra*, notes 41 and 42.

⁵³ Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in U.S. Systems of Justice*, 1 *Annual Review of Criminology* 471 (2018).

multiply into impossible sums.⁵⁴ This inevitably leads to damaged credit scores that directly compromise access to credit, rental housing, mortgages, automobiles, and employment,⁵⁵ as well as civil judgments resulting in liens, wage garnishment, and tax rebate interception that can dissuade employers from hiring people subject to such restrictions.⁵⁶ These consequences can snowball into exclusion from public benefits and other rights and privileges.⁵⁷

In many states, failure to pay fines and fees is a basis for revoking probation or parole,⁵⁸ which under federal law renders a person ineligible for federal Temporary Assistance to Needy Families funds,⁵⁹ as well as Food Stamps,⁶⁰ low-income housing and housing assistance,⁶¹ and Supplemental Security Income for elderly and

⁵⁴ Alexes Harris et al., *Monetary Sanctions in the Criminal Justice System*, Monetary Sanctions 14 (April 2017).

⁵⁵ *Supra*, note 51.

⁵⁶ *Supra*, note 28.

⁵⁷ Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 *Criminology & Pub. Pol.* 509, 516 (2011) (“Criminal defendants are overwhelmingly poor . . .”).

⁵⁸ *Supra*, note 28.

⁵⁹ 42 U.S.C. § 608(a)(9)(A) (2012).

⁶⁰ 7 U.S.C. § 2015(k)(1) (2015).

⁶¹ 42 U.S.C. § 1437d(l)(9) (2013).

disabled people.⁶² The vast majority of states either require or permit driver's license suspension as a sanction for nonpayment, frequently without any advance hearing or opportunity to demonstrate inability to pay.⁶³ And some states withhold or revoke voting rights when fees are outstanding.⁶⁴

Many people caught in this downward spiral often cannot liberate themselves. James Fisher of Colorado, an indigent man who struggled with homelessness and unsteady work, was charged \$1,680 in collection fees stemming from \$678 in fines imposed in 2012 for two open container tickets and a citation for driving without proof of insurance.⁶⁵ Even after Mr. Fisher made 19 separate payments over four years totaling \$1,498—more than double the initial fines—he still owed \$860 in fees.⁶⁶ Similarly, Kenneth Lindsey of Corinth, Mississippi has been trapped in a spiral of court fees and fines

⁶² 42 U.S.C. § 1382(e)(4)(A)(ii) (2018).

⁶³ See Mario Slas & Angela Ciolfi, *Driven By Dollars: A State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, Legal Aid Justice Center 1 (2017).

⁶⁴ *Supra*, note 52.

⁶⁵ Debtors' Prison Settlement: Aurora Cancels Debt, Withdraws Warrants, and Repays James Fisher for Excessive Payments to Municipal Court, ACLU of Colorado (Jan. 13, 2017), <https://aclu-co.org/debtors-prison-settlement-aurora-cancels-debt-withdraws-warrants-repays-james-fisher-excessive-payments-municipal-court/>.

⁶⁶ *Id.*

because he continues to drive to work with an expired license and registration in order to support the costs of his treatment for hepatitis C and liver cancer.⁶⁷

In Georgia, Thomas Barrett, an indigent man, was sentenced to pay \$200 in fines and fees, serve twelve months of probation, wear an ankle monitor, and pay \$360 in monthly monitoring fees—all for stealing a \$2 can of beer.⁶⁸ Mr. Barrett sold his blood plasma each month, skipped meals, and regularly went without laundry detergent and toilet paper, yet could not meet his monthly payment obligations.⁶⁹ These instances expose how low-income people facing such excessive court debt are often forced to make impossible choices between meeting basic needs and making payments towards outstanding court debt.⁷⁰

⁶⁷ *Supra*, note 49.

⁶⁸ Human Rights Watch, *Profiling from Probation: America's "Offender-Funded" Probation Industry* 34 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf.

⁶⁹ *Id.*

⁷⁰ Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?*, *The New Yorker* (Jun. 23, 2014) (noting that in survey of sixty people on private probation, “[t]he vast majority of respondents had forgone rent, groceries, medicine, or all three to pay fees to private-probation firms”).

II. BOND FORFEITURES AND OTHER FEE SCHEMES PERPETUATE PERVERSE INCENTIVES THAT GIVE RISE TO CONSTITUTIONAL VIOLATIONS.

Petitioner’s due process claim stems from the inherent conflict of interest that exists when a judge has a financial, personal, or other incentive to levy fees to fund municipal operations—as was the case in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). The increased reliance on fees for state and local revenue and justice-system funding means that such conflicts of interest abound. Accompanying this need for revenue are powerful incentives to impose and collect excessive monetary penalties—regardless of an individual’s ability to pay or ultimate acquittal. A justice system plagued by such incentives encourages a form of commission-based justice—which, too often, is no justice at all.⁷¹

This petition provides a stark example of perverse incentives and the abuses they encourage. After admitting that the bond fee was necessary to fund the Clerk’s office, the trial judge recognized that he had never seen a court impose less than the maximum 10% permitted by the statute—despite having the statutory discretion to do so “under appropriate circumstances.”⁷² That even an indigent defendant who was acquitted of any wrongdoing did not warrant any reduction in the 10% fee—notwithstanding that the fee was

⁷¹ Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. Ill. L. Rev. 1175, 1177 (2014).

⁷² 725 ILCS 5/110-7(f) (West 2016).

calculated from a high bail amount tied to a first-degree murder charge that the state could not prove—demonstrates that, as a practical matter, officials will be hard-pressed to find any circumstance sufficient to overcome the strong incentives to impose and enforce monetary penalties for revenue. On its face, it is difficult to characterize the seizure of \$35,000 from an indigent and acquitted individual as anything short of abuse. Yet with Illinois’ structural dependence on bond fees for funding, judicial discretion fails to provide an adequate safeguard against such unjust results.

Recent examples further demonstrate that public servants are hardly immune to perverse incentives. The Justice Department’s 2015 report highlighted Ferguson, Missouri’s dependence on fines and fees for municipal revenue, and the resulting misdirection of policing.⁷³ The city’s finance director explicitly urged both the police chief and the city manager to write more tickets to fill municipal coffers.⁷⁴ The Justice Department found that “[t]he City’s emphasis on revenue generation has a profound effect on [the Ferguson Police Department’s] approach to law enforcement,” producing “aggressive enforcement of Ferguson’s

⁷³ Civil Rights Division, U.S. Dep’t of Justice, *Investigation of the Ferguson Police Department* 9 (2015) (hereinafter “Dep’t of Justice Ferguson Report”), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

⁷⁴ *Id.* at 6.

municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation.”⁷⁵ The unchecked focus on revenue generation resulted in chronic violations of First, Fourth, and Fourteenth Amendment rights.⁷⁶

In New Orleans, two-thirds of the criminal court’s general operating budget is funded by criminal justice debt.⁷⁷ A federal court recently ruled that the New Orleans Parish Criminal District Court (“NOPCD”) has “an institutional conflict of interest” in making determinations about defendants ability to pay because fine and fee proceeds are funneled directly into a Judicial Expense Fund controlled by judges.⁷⁸ The court also found that NOPCD had “a policy or practice” of not inquiring into defendants’ ability to pay before imprisonment for nonpayment of court debts.⁷⁹

The increased reliance on fees is constitutionally problematic with respect to all defendants, but the heart of the violation here is Illinois’s insistence on assessing this bond fee

⁷⁵ *Id.* at 2.

⁷⁶ *Id.* at 15-78.

⁷⁷ Neil L. Sobol, Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses, 88 U. Colo. L. Rev. 841, 857-58 (2017).

⁷⁸ Order and Reasons, *Cain v. City of New Orleans*, No. 2:15-cv-04479-SSV-JCW (E.D. La. Aug. 2, 2018), ECF No. 318.

⁷⁹ *Id.* at 23.

irrespective of acquittal. Such a scheme invites a form of gamesmanship designed to maximize revenue at the expense of basic justice. In *Nelson v. Colorado*, this Court held that due process requires that states refund fees, costs and restitution to defendants whose convictions were overturned on appeal. 173 S. Ct. 1249 (2017). Although the fees, costs and restitution were “conviction-related,” the same reasoning applies here. To allow the Illinois Court of Appeals decision to stand would invite legislatures to assess the exorbitant fees currently imposed on defendants upon conviction on all persons simply *charged* with a crime. But for the thousands of individuals cycled through this nation’s criminal justice system, involvement in the criminal justice system is not a service or benefit for which they can constitutionally be asked to pay; it is an involuntary and often life-altering nightmare. The Constitution precludes such exorbitant fees when the government cannot prove beyond a reasonable doubt that the defendant has committed a crime.

Otherwise, these fees begin to closely resemble “fines” for purposes of the Eighth Amendment’s Excessive Fines Clause because they are undoubtedly punitive in nature.⁸⁰ Illinois’ bond fee is calculated as a percentage of the initial bail amount set by the judge, and thus defendants charged with more severe crimes are subject to a higher fee. But a defendant acquitted of murder is no more guilty than a defendant acquitted of theft.

⁸⁰ The question of whether the Excessive Fines Clause is incorporated against the States is currently pending before the Court.

Absent a conviction, there is no justification for an individual to pay a higher bond fee merely because they have been *charged* with a more severe crime—lest the state is seeking to monetarily punish such individuals. By treating what appear to be punitive exactions as “fees,” jurisdictions like Illinois are effectuating an end run around the Eighth Amendment’s preclusions against excessive fines.

When governments depend on fines and fees as critical sources of revenue, the law of incentives dictates that such fines and fees will become greater, more common, and subject to even greater abuse. This is precisely what is transpiring across the country. Absent the Court’s involvement, these unconstitutional practices will continue unabated.

CONCLUSION

In light of the pervasive imposition of bond and forfeiture fees throughout the United States to fund governmental coffers, the Court should grant certiorari to provide a uniform standard for determining their constitutionality and hold that the Illinois bail bond fee violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment or, in the alternative, the Excessive Fines Clause of the Eighth Amendment.

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