

No. 21-AP-000381  
Accelerated Calendar

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**IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT**

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**KENNETH WOODSON, et al.,**  
*Plaintiffs-Appellants,*

v.

**OHIO DEPARTMENT OF REHABILITATION  
AND CORRECTION, et al.**  
*Defendants-Appellee.*

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On Appeal from the Franklin County Court of Common Pleas

Case No. 21CV002247

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**BRIEF OF *AMICI CURIAE* OHIO ORGANIZING  
COLLABORATIVE AND POLICY MATTERS OHIO IN  
SUPPORT OF APPELLANTS KENNETH WOODSON AND  
LEONARD EVANS**

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## INTRODUCTION

Incarcerated people in Ohio start out poor, get poorer because of their incarceration, and contract COVID-19 at much higher rates than others in Ohio. They and their families desperately need the COVID-19 relief funds provided to them by Congress.

Congress passed the CARES Act to provide relief to “all Americans” reeling from “the health and economic challenges brought on by the COVID-19 pandemic.”<sup>1</sup> Ohio Senator Rob Portman said it would provide “unprecedented economic and health care relief” to “help Ohioans and their families around the state weather the enormous impact of the coronavirus pandemic.”<sup>2</sup> Ohio Congressman Tim Ryan added that the

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<sup>1</sup> Emily Cochrane & Nicholas Fandos, *Senate Approves \$2 Trillion Stimulus After Bipartisan Deal*, N.Y Times (May 5, 2020), <https://www.nytimes.com/2020/03/25/us/politics/coronavirus-senate-deal.html>; Press Release, *Here’s What They’re Saying: Ohio Officials Applaud Brown’s Efforts to Secure Direct Relief to Local Communities in COVID Rescue Package*, Sherrod Brown For Ohio (Mar. 10, 2021), <https://www.brown.senate.gov/newsroom/press/release/ohio-officials-applaud-browns-efforts-direct-relief>.

<sup>2</sup> *How the CARES Act Helps Ohio Individuals and Families*, Rob Portman, U.S. Senator for Ohio (Mar. 30, 2020), <https://www.portman.senate.gov/newsroom/portman-difference/how-cares-act-helps-ohio-individuals-and-families>.

stimulus money was meant to help those Ohioans “who are most in need,” lamenting that “[t]he COVID-19 pandemic has taken a real toll on families.”<sup>3</sup> Senator Sherrod Brown underscored that the money was “for food, medicine, and other necessities, not to [pay] debt collectors.”<sup>4</sup> And the Ohio Attorney General issued clear guidance that “debts owed to the Federal and State governments are not being withheld from the payments.”<sup>5</sup>

But that help was snatched away from some of Ohio’s poorest people, who most acutely felt the pandemic’s devastation: incarcerated people and their families. Contrary to the Congress’s intention and the Ohio Attorney General’s pronouncement, the rescue money owed incarcerated

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<sup>3</sup> *Congressman Ryan Urges Ohioans to use “Get My Payment” Tool from the IRS to Check the Status of their Stimulus Payment*, U.S. Representative Tim Ryan (Mar. 19, 2021), <https://timryan.house.gov/media/press-releases/congressman-ryan-urges-ohioans-use-get-my-payment-tool-irs-check-status-their>.

<sup>4</sup> Neil Haggerty, *Senate passes bill to prevent debt garnishment of CARES Act payments*, Am. Banker (July 24, 2020), <https://www.american-banker.com/news/senate-passes-bill-to-prevent-debt-garnishment-of-cares-act-payments>.

<sup>5</sup> Dave Yost, *Notice of Applicability of State Law Exemption to Payments Under the Federal CARES Act*, Ohio Att’y General (Apr. 13, 2020), [https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/STATE\\_LAW\\_EXEMPTION\\_FOR\\_WEB.aspx](https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/STATE_LAW_EXEMPTION_FOR_WEB.aspx).

Ohioans was instead used to pay outstanding government debts. To withhold COVID-related funds from those most likely to suffer from COVID is perverse.

*Amici curiae* Ohio Organizing Collaborative (“OOC”) and Policy Matters Ohio ask this Court to reverse the lower court’s dismissal of this case.<sup>6</sup>

*Amicus curiae* OOC is an Ohio non-profit organization devoted to racial, social, and economic justice for all Ohioans. It is deeply concerned with the devastation that incarceration wreaks on people, families, and communities. OOC is also disturbed by the unlawful garnishment of COVID-19 relief funds from Ohio’s poorest citizens in their time of greatest need. OOC has deep connections in Ohio’s communities, including those most impacted by incarceration and, in turn, by the pandemic. Since the start of this pandemic, OOC has organized for a people-centered

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<sup>6</sup> The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, nor has made any monetary contribution to the preparation or submission of this brief.

economic recovery for Ohio and pushed Ohio's elected officials to release incarcerated Ohioans from COVID-infested prisons and jails.

*Amicus curiae* Policy Matters Ohio is a non-profit, nonpartisan policy research institute that uses research, strategic communications, coalition building, and policy advocacy to create an economy in which all Ohioans can thrive. Throughout this pandemic, Policy Matters Ohio has focused on ensuring that federal COVID-19 relief provides a just recovery, helps people who are struggling to make ends meet, and positively transforms the lives of all Ohioans. It has been particularly concerned with the ways that COVID-19 shines a light on the deep inequities in our state and our nation. It advocates for smart, compassionate law and policy to support the people and communities most directly affected by the pandemic, including incarcerated Ohioans and their families.

*Amici* write to provide the court with a careful elaboration of the financial burdens and urgent needs of incarcerated Ohioans and their families, and to draw attention to the negative policy implications of the decision below. *Amici* hope that their expertise about myriad ways that the economic, social, and health-related hardships of incarceration have been

magnified during the COVID-19 crisis remind this Court of the high-stakes of this case. *Amici* urge this Court to reverse the lower court’s dismissal and allow the case to proceed to the merits.

## **ARGUMENT**

### **I. Incarcerated Ohioans And Their Families Are Uniquely In Need Of The Emergency Assistance Owed Them Under The CARES Act.**

Incarcerated Ohioans and their families are more in need of the COVID-19 relief funds than average Ohioans. Ohio prisoners overwhelmingly enter the criminal legal system from financially impoverished backgrounds. Incarcerated people have a median annual income of \$19,185 at the time of their arrest—41 percent below the median at the same age.<sup>7</sup> An estimated 80 to 90 percent of criminal defendants in the United States are indigent, up from an estimated 43 percent in the 1960s—suggesting that the disproportionate impact along class lines is the result of policy choices, rather than any inherent relationship between poverty and

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<sup>7</sup> Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned*, Prison Pol’y Initiative (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

criminality.<sup>8</sup> Contact with the criminal legal system compounds poverty and intensifies the need for financial resources.

The well-documented ravages of the COVID-19 pandemic both in prisons and in Ohio's poorest communities multiplied these burdens. For these reasons, incarcerated Ohioans are most in need of COVID-19 relief. There is no rational basis for exempting them from the protections of Ohio law.

#### **a. Ohioans Face Enormous Costs When Incarcerated**

It is little more than a pernicious myth that incarceration provides impoverished people with a free lunch. Indeed, the financial impact of incarceration on prisoners and their families is staggering.

Most immediately, incarcerated people are forced to rely on purchases at the prison commissary to meet their basic needs while in prison. Mr. Woodson and Mr. Evans told the court below “[t]hey badly need this

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<sup>8</sup> Donald J. Farole, Jr., & Lynn Langton, *County-Based and Local Public Defender Offices, 2007*, Bureau of Justice Statistics (Sep. 2010), <http://www.bjs.gov/content/pub/pdf/clpdo07.pdf>; Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 Yale L. J. 2176-2204 at nn. 17–20 (2013).



support, for example, to purchase basic necessities including food, medicine, and hygiene products from prison commissaries, and to communicate with and support their loved ones.”<sup>9</sup> These are not theoretical concerns.

The provision of food, hygiene products, and other essential items is notoriously inadequate in Ohio prisons. There have been food scarcities for nearly a decade, with some prisons “constantly running out of food.”<sup>10</sup> During the pandemic, “daily meals [at some institutions] have dwindled to a hot lunch (now called ‘brunch’) and a bagged dinner (like a bologna sandwich).”<sup>11</sup> Ohio prison inspectors have also found maggots in food, mouse feces in pantries, and “very dirty” serving areas, kitchens, and

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<sup>9</sup> Compl. at ¶¶ 3, 18.

<sup>10</sup> Randy Ludlow, *Meal contractor Aramark below state standards at 7 Ohio prisons*, The Columbus Dispatch (Sep. 8, 2014), <https://www.dispatch.com/content/stories/local/2014/09/08/meal-contractor-below-state-standards-at-7-prisons.html>.

<sup>11</sup> Eric Sandy, *Food Strike Begins at Ohio’s Marion Correctional Institution*, The Cleveland Scene (May 8, 2020), <https://www.clevescene.com/scene-and-heard/archives/2020/05/08/food-strike-begins-at-ohios-marion-correctional-institution-one-of-the-countrys-worst-sources-of-covid-19-cases>.

ovens.<sup>12</sup> And such necessities as a bar of soap—particularly essential during a pandemic—are not provided for free to many.<sup>13</sup>

As a result, an average prisoner is forced to spend almost \$1,000 per year on such essentials at the prison commissary.<sup>14</sup> Commissary goods are typically as expensive or more expensive than comparable goods outside of the prison—in some prisons, basic necessities cost 50 percent more than they do in the free world.<sup>15</sup>

Even where prison administrators purport to provide essential items, lapses are common, and individual needs may vary. For example, for someone dealing with gastrointestinal problems—perhaps due to inadequate or spoiled food—the standard ration of toilet paper may not suffice and commissary items like an antacid tablet may become necessities.<sup>16</sup>

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<sup>12</sup> Ludlow, *supra* note 10.

<sup>13</sup> Conor Friedersdorf, *Can't We at Least Give Prisoners Soap?*, The Atl. Monthly (Apr. 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202/>.

<sup>14</sup> Stephen Rahe, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Pol'y Initiative (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>.

<sup>15</sup> See *id.*; see also Compl. at ¶ 12 n.12.

<sup>16</sup> Rahe, *supra* note 14.

Incarcerated Ohioans are also charged huge sums for every call they make, every stamp they need, and every piece of stationary to write on—an enormous burden for people deprived of nearly all contact with their family and friends. From the moment they are arrested, a 15-minute in-state phone call can cost up to \$5.40; an e-mail starts at \$.30 (and increases depending on length); a video call (billed per 30-minutes) incurs a \$9.90 fee.<sup>17</sup> These means of communicating are essential to the health and well-being not only of incarcerated people, but also their families and loved ones.<sup>18</sup> This has been particularly true during the COVID-19 pandemic, as grieving or concerned loved ones lost the ability to visit in person.

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<sup>17</sup> Peter Wagner & Alexi Jones, *State of Phone Justice: Local jails, state prisons and private phone providers*, Prison Pol’y Initiative (Feb. 2019) [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice.html](https://www.prisonpolicy.org/phones/state_of_phone_justice.html); *Ohio Department of Rehabilitation and Correction, Available JPay Services*, JPay, <https://www.jpays.com/Agency-Details/Ohio-Department-of-Rehabilitation-and-Correction.aspx>.

<sup>18</sup> Creasie Finney Hairston, *Family Ties During Imprisonment: Important to Whom and for What?*, J. of Socio. & Soc. Welfare, 18(1) 87–104 (1991).

Miniscule wages paid for prison jobs—ranging from \$.10 per hour to \$1.23 per hour in Ohio prisons<sup>19</sup>—do little to mitigate these strains. Mr. Woodson and Mr. Evans’s pleadings vividly illustrate this harsh reality. Mr. Woodson alleges that “prisoners at Grafton are routinely not fed enough calories and are still hungry” and that he buys “soup, rice, or coffee to supplement his diet, as well as vitamins to ensure nutrition.”<sup>20</sup> His \$18 per month wage is often inadequate to cover these costs, in addition to “basic hygiene supplies, such as soap and toothpaste.”<sup>21</sup> Mr. Evans’s \$.73 per day does not fare much better.<sup>22</sup>

In a pandemic, the cost of medical co-pays charged for physician visits, medications, dental treatment, and other health services in prison takes on outsized importance. Even before COVID-19 swept through the walls of America’s crammed prisons, they were understood to be

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<sup>19</sup> Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Pol’y Initiative (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

<sup>20</sup> Compl. at ¶ 50–52.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 56.

unhealthy environments—places prone to exacerbating existing medical needs and manifesting new medical needs in the previously healthy.<sup>23</sup> Ohio’s prisons charge a co-pay of \$2 for every visit to the doctor, a charge that requires twenty hours of work at the in-prison minimum wage of ten cents per hour to cover.<sup>24</sup> These charges starve the meagre resources of incarcerated people and their families when there is often no choice but to seek care, and they deter people from seeking important care, when they perceive a “choice” to tough out an ailment or illness.

Finally, all of these costs come on the heels of large court fines and fees, imposed from start to finish of the criminal legal process. As just a sampling of these costs, indigent Ohioans are charged a fee to apply for a public defender;<sup>25</sup> they lose the 10 percent paid on their bail bond; or if they cannot make bail, they could be charged up to \$66 per day for their

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<sup>23</sup> Nick De Viggiani, *Unhealthy prisons: exploring structural determinants of prison health*, Socio. of Health & Illness (Feb. 6, 2007), <https://doi.org/10.1111/j.1467-9566.2007.00474.x>.

<sup>24</sup> Wendy Sawyer, *The steep cost of medical co-pays in prison puts health at risk*, Prison Pol’y Initiative (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays/>.

<sup>25</sup> Ohio Revised Code § 120.36.

“stay” in jail.<sup>26</sup> These fees—on top of a potpourri of “Computerization,” “Restitution,” “Special Project,” and “Merchant Service” fees, among others<sup>27</sup>—quickly add up to crushing debts saddled on the most impoverished Ohioans. In total, one survey found, the average debt incurred for incarceration related costs was more than \$13,000.<sup>28</sup>

**b. Incarceration Costs Wreak Havoc On Family Members, Including Children, Who Have Not Been Convicted of Any Crime**

The costs of incarceration are shouldered by the whole community, in immediate and direct ways, as well as indirectly, by financially crippling former and future members of that community. When a family member is incarcerated, that person often transforms from a breadwinner and source of support into a loved one in need of financial assistance. Families

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<sup>26</sup> Ohio Crim. R. 46(A)(2); Christine Link, et al., *In Jail & In Debt: Ohio’s Pay-to-Stay Fees*, ACLU of Ohio (Nov. 2015), <https://www.acluohio.org/sites/default/files/InJailInDebt.pdf>.

<sup>27</sup> *Criminal Cost Schedule*, Cleveland Municipal Court (Mar. 17, 2018), <https://clevelandmunicipalcourt.org/clerk-of-courts/criminal-traffic-division/criminal-cost-schedule>.

<sup>28</sup> Saneta deVuno-powell et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center for Human Rights, Forward Together, & Research Action Design, at 9 (Sep. 2015), <http://whopaysreport.org/who-pays-full-report/9/>.

must scrape together funds to cover bail bond premiums, court costs, and other fines and fees, or to fill commissary accounts so their loved one can eat an acceptable meal. Mr. Woodson and Mr. Evans echo these challenges, noting that incarcerated people “are often forced to rely on family members, who themselves may be in difficult financial circumstances as a result of the pandemic, for support.”<sup>29</sup>

In a recent survey, two-thirds of families reported difficulties meeting their own basic needs, such as housing and food, because of the financial costs of having an incarcerated loved one.<sup>30</sup> One in five families reported having to take out a loan to cover these costs.<sup>31</sup> In another survey, roughly half of families reported being unable to pay court fines and fees.<sup>32</sup>

Even where families cannot help their incarcerated loved ones financially, incarceration can profoundly affect their finances. They may

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<sup>29</sup> Compl. at ¶ 18.

<sup>30</sup> deVuono-powell, *supra* note 28, at 7–9.

<sup>31</sup> *Id.* at 14.

<sup>32</sup> *Id.*

have lost a breadwinner, or have to grapple with debt collectors garnishing wages or targeting shared assets such as cars and homes.<sup>33</sup> Others may lose access to essential federal benefits like TANF and SNAP.<sup>34</sup>

Fees meant to punish offenders take food from the mouths of children and spouses who did nothing to deserve that pain.<sup>35</sup> This is a major reason for the finding that, for the nearly three million children in America with an incarcerated parent, that incarceration greatly increases their risk of living in poverty or experiencing homelessness and reduces their chances of completing high school.<sup>36</sup>

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<sup>33</sup> deVuomo-powell, *supra* note 28, at 15; Lauren-Brooke Eisen & Jessica Eaglin, *Poverty, Incarceration, and Criminal Justice Debt*, TalkPoverty (Dec. 3, 2014), <https://talkpoverty.org/2014/12/02/criminal-justice-debt/>.

<sup>34</sup> deVuomo-powell, *supra* note 28, at 25; Robyn Cox & Sally Wallace, *The Impact of Incarceration on Food Insecurity among Households with Children*, Univ. of Kentucky Ctr. for Poverty Rsch. Discussion Paper Series, DP2012-14., p.10 n.2 <http://www.ukcpr.org/Publications/DP2012-14.pdf>.

<sup>35</sup> Cox & Wallace, *supra* note 34.

<sup>36</sup> Susan D. Phillips, et al., *Disentangling the risks: Parent criminal justice involvement and children's exposure to family risks*, *Criminology and Pub. Pol'y* 5 (2006) at 677–702; Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, *The ANNALS of the Am. Acad. of Pol. & Soc. Sci.* 651.1



One Ohio man named David left prison with \$21,000 in debts, incurred through a series of arrests for minor offenses associated with his addiction.<sup>37</sup> David explained that the biggest burden he faced in trying to get his life back on track was the toll that collections efforts had on his parents.<sup>38</sup> In his words, “it is mentally, emotionally, and financially devastating.”<sup>39</sup>

### **c. Incarceration Costs Impede Successful Reentry**

Saddling incarcerated people with massive debts also imposes a secondary toll on communities by kneecapping efforts at reentry. After all, the average time served on an Ohio prison sentence is under three years, and nearly everyone in an Ohio prison can expect to get out within about 10 years.<sup>40</sup> The average \$13,000 debts incurred by incarcerated people

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(Jan. 2014) at 74–96; Joseph Murray & David Farrington, *The Effect of Parental Imprisonment on Children*, Crime and Just. (2008) at 133–206.

<sup>37</sup> Link, *supra* note 26.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Average Time Served Among Ohio Prison Releases, Calendar Year 2014\**, Ohio Dep’t. of Rehab. & Corr. (2015), <https://www.drc.ohio.gov/LinkClick.aspx?fileticket=mS-dggY0JOI%3D&portalid=0>.

follow these individuals back to their lives outside of prison, along with new fees for parole or probation monitoring. For individuals who already face enormous challenges and harsh restrictions in finding work, housing, and a modicum of stability, these costs are a heavy burden.

Indeed, formerly incarcerated people are almost ten times more likely to be homeless than the general public—a problem exacerbated by the fact that federal law bars people with certain convictions from participation in the country’s two largest housing assistance programs.<sup>41</sup> Occupational license restrictions and rampant discrimination against people with a criminal record contribute to a persistent unemployment rate close to 30 percent and a rate of nearly 60 percent unemployed in the year after release.<sup>42</sup> For these individuals living in extreme poverty, sizeable debts

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<sup>41</sup> Lucius Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, Prison Pol’y Initiative (Aug. 2018), <https://www.pris-onpolicy.org/reports/housing.html#lf-fnref:12>; Mariah A. Curtis, Sarah Garlington, & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 Cityscape: A J. of Pol. Dev. & Rsch. (Nov. 3, 2013), <https://www.huduser.gov/portal/periodicals/cityscpe/vol15num3/ch2.pdf>.

<sup>42</sup> *Restoration of Rights Project, 50-State Comparison: Criminal Record in Employment, Licensing & Housing*, Collateral Consequences Resource Center (last visited Aug. 27, 2021), <https://ccresourcecenter.org/state->

and post-incarceration fees can spell re-incarceration—either directly through failure-to-pay laws, probation or parole violations, or because they turned to crime as a way to survive.

For the communities these individuals return to, the availability of additional CARES Act assistance would serve precisely the purpose that was intended—to provide a safety net for families impacted by COVID-19.

## **II. Incarcerated Ohioans Have Borne The Brunt Of The Pandemic.**

In addition to being in the direst financial straits of all Ohioans, incarcerated people are also the most likely to fall ill and suffer adverse health consequences from COVID-19.

In the spring of 2020, as most Americans were still coming to terms with the reality that there was a novel and frightening virus in our midst,

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restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/; Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, Prison Pol’y Initiative (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

the disease was already “running rampant” in Ohio’s prisons.<sup>43</sup> The rate of infection in Ohio’s prisons was nine times the rate among non-incarcerated Ohioans.<sup>44</sup> By the end of 2020, Ohio’s prisons accounted for 20 percent of the state’s COVID-19 cases—despite representing just .67 percent of the state’s population.<sup>45</sup> Around the time that the CARES Act was passed, 73 percent of those incarcerated in one Ohio prison tested positive.<sup>46</sup> In fact, Ohio prisons were likely one of the most dangerous places in the world at the start of the pandemic—neither Italy, nor New York City, nor Brazil, nor any other municipality, state, or nation experienced

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<sup>43</sup> John Raphling, *COVID-19 Running Rampant in Ohio Prisons*, Human Rights Watch (May 21, 2020), <https://www.hrw.org/news/2020/05/21/covid-19-running-rampant-ohio-prisons>.

<sup>44</sup> Amber Hunt, *COVID Cases Climb in Ohio Prisons*, The Columbus Dispatch (Aug. 9, 2020), <https://www.dispatch.com/story/news/crime/2020/08/09/covid-cases-climb-in-ohio-prisons/42195563/>.

<sup>45</sup> Gregory Hicks, *COVID-19 spread faster in counties with large prison—and to nearby counties: Marion Correctional Institution (Ohio) is a disturbing example*, Prison Pol’y Initiative (Dec. 2020), [https://www.prison-policy.org/reports/covidspread\\_marion.html](https://www.prison-policy.org/reports/covidspread_marion.html); *Incarceration Trends in Ohio*, Vera Institute of Justice (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-ohio.pdf>.

<sup>46</sup> Hicks, *supra* note 45.

rates of positivity approaching Ohio prisons.<sup>47</sup> Ohio had “by far the highest rate of confirmed COVID-19 cases among people in its prisons of any state, and the highest total numbers.”<sup>48</sup> “One after another, the guys were getting rushed out while the rest of us sat back in our corners, worried and waiting,” one Ohio prisoner recalled.<sup>49</sup> “Out of the windows of our housing unit we were able to see multiple ambulances pull up to the prison’s back gate and pick people up.”<sup>50</sup>

Prison is a particularly harsh place to endure this pandemic. Ohio prisoners describe the last year and half behind bars in stark, terrifying

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<sup>47</sup> *Italy: Coronavirus Pandemic Country Profile*, Our World in Data, <https://ourworldindata.org/coronavirus/country/italy>; *Percentage Positive Results By Region Dashboard*, N.Y. Forward, <https://forward.ny.gov/percentage-positive-results-region-dashboard>; *Brazil: Coronavirus Pandemic Country Profile*, Our World in Data, <https://ourworldindata.org/coronavirus/country/brazil>.

<sup>48</sup> Raphling, *supra* note 43.

<sup>49</sup> Nicole Lewis, *How We Survived COVID-19 in Prison*, The Marshall Project (Apr. 22, 2021), <https://www.themarshallproject.org/2021/04/23/how-we-survived-covid-19-in-prison>.

<sup>50</sup> *Id.*

terms: “Like a toxic gas release.”<sup>51</sup> “Like we were in the basement of a burning house with no way out.”<sup>52</sup> “Like they had left us to die.”<sup>53</sup>

Family visits, recreational activities, and rehabilitative programming were suspended last spring, increasing the sense of fear and isolation felt by Ohio’s incarcerated people.<sup>54</sup> “They’re not even allowed outside [to] at least be able to get away from each other a little bit,” one woman, Melanie, said of the Ohio prison where her nephew was incarcerated last spring.<sup>55</sup> She called it “a lockdown situation,” with men “panicking,” many “[un]able to get ahold of their families.”<sup>56</sup> Another woman, Antonette, also said prisoners in the Ohio prison where her little brother Anthony was held were “on 23-hour lockdown” and had “very minimum phone calls.”<sup>57</sup> She added that they were “not properly being fed” and had

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<sup>51</sup> Gail Ablow, *If Prison Walls Could Talk*, Vera Institute of Justice (June 23, 2021), <https://www.vera.org/covid-19-if-prison-walls-could-talk>.

<sup>52</sup> Lewis, *supra* note 49.

<sup>53</sup> *Id.*

<sup>54</sup> Ablow, *supra* note 51.

<sup>55</sup> Ohio Organizing Collaborative, *Get Involved: Hear Stories*, <https://www.ohorganizing.org/hear-stories>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

“no sanitation.”<sup>58</sup> And after last spring’s outbreaks slowed, some Ohio prisoners noticed a spike in mental illness, calling it “a new sickness [that] has set in.”<sup>59</sup> “Some of the guys are showing signs of mental health issues . . . walking around lost and in a daze[,] doing strange things for attention[,] getting high off anything they can find; they’re smoking paper with bug spray on it.”<sup>60</sup>

Social distancing was—and still is—impossible in Ohio’s prisons. Despite having an overall capacity of less than 40,000, the state’s prisons held 50,000 people at the end of 2019.<sup>61</sup> Those numbers have not meaningfully budged since the pandemic began.<sup>62</sup> “When there are only inches between you and hundreds of others within the same structure, you share

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<sup>58</sup> *Id.*

<sup>59</sup> Lewis, *supra* note 49.

<sup>60</sup> *Id.*

<sup>61</sup> Hicks, *supra* note 45; Raphling, *supra* note 43.

<sup>62</sup> Karen Kasler, *Coronavirus In Ohio: DeWine Won’t Ramp Up Release Of Prison Inmates*, WOSU NPR News (July 20, 2020), <https://news.wosu.org/news/2020-07-20/coronavirus-in-ohio-dewine-wont-ramp-up-release-of-prison-inmates>.

the same space, air, and germs,” said a woman named Melissa, whose brother Dustin was incarcerated in Ohio last spring.<sup>63</sup>

To make matters worse, when a prisoner falls ill with COVID-19, medical care is notoriously inadequate. Some Ohio prisoners with COVID-19 have been warehoused in “an abandoned death row block at Mansfield Correctional Institute with limited electricity, thus forcing sick people into units with no power to run air conditioning or fans.”<sup>64</sup> Prisoners at Pickaway Correctional Institution have reported being forced “to live in a tent outside until the virus blow[s] over.”<sup>65</sup> One prisoner at Pickaway said that after he tested positive for COVID-19, rather than “getting any type of treatment . . . [t]hey threw him in a block with 260 other inmates that had tested positive [and] wait[ed] for them to die.”<sup>66</sup> Some sick prisoners have been “treated in solitary confinement—the same ‘hole’ that’s used for punishment.”<sup>67</sup> “All the inmate[s] there are afraid to speak

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<sup>63</sup> *Get Involved: Hear Stories*, *supra* note 55.

<sup>64</sup> Hunt, *supra* note 44.

<sup>65</sup> *Get Involved: Hear Stories*, *supra* note 55.

<sup>66</sup> *Id.*

<sup>67</sup> Hunt, *supra* note 44.



if they have symptoms because they put them in the hole if they do,” said one woman, Anna, of the Ohio prison where her brother was incarcerated.<sup>68</sup> “They [are] treated like animals [and] locked up with nothing because they are sick.”<sup>69</sup> Another Ohio prisoner confirmed that some men “won’t say anything about their symptoms because it could mean winding up in isolation,” and “[w]hen you’re isolated, you lose a lot of your personal property. No one wants to take that chance.”<sup>70</sup>

During those first terrifying months, the families of incarcerated people tried desperately to get news of their loved ones behind bars.<sup>71</sup> Spouses, children, and parents described sleepless nights and deep fear over the fates of incarcerated family. Family members on the outside sometimes did not learn of a loved one’s illness until after they had died.<sup>72</sup> One Ohio woman described being “very anxious” and “worried to death”

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<sup>68</sup> *Get Involved: Hear Stories*, *supra* note 55.

<sup>69</sup> *Id.*

<sup>70</sup> Lewis, *supra* note 49.

<sup>71</sup> Ablow, *supra* note 51.

<sup>72</sup> Hunt, *supra* note 44.

about her incarcerated husband, Rufus, who has asthma.<sup>73</sup> She “made several calls to the facility” to get information about his condition, and “was just being put in circles.”<sup>74</sup> “It’s like screaming in the middle of a crowd that is quiet, and nobody can hear you,” she said.<sup>75</sup> “[The] [o]nly thing I can do is pray at this point.”<sup>76</sup>

### **III. The Court’s Dismissal Leaves Incarcerated Ohioans Without A Remedy for Constitutional Violations**

For more than a year and a half, the poorest Ohioans have been held in conditions guaranteed to make them sicker, and to make them and their free-world families poorer. And yet the court below now says: Tough luck. It did not decide that ODRC’s garnishment of COVID-relief money paid to those hardest hit by COVID was constitutional. Instead, the court found that it could not even consider Plaintiffs’ claims on the merits because, the court believed, Defendants no longer had the seized money in

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<sup>73</sup> Ablow, *supra* note 51 (Chazidy Bowman recording at 3:14); *see also* Alexander Testa & Chantal Fahmy, *Family member incarceration and coping strategies during the COVID-19 pandemic*, Health & Just. (July 9, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8270238/#>.

<sup>74</sup> Ablow, *supra* note 51 (Chazidy Bowman recording at 3:30).

<sup>75</sup> *Id.* (Chazidy Bowman recording at 5:44)

<sup>76</sup> *Id.* (Chazidy Bowman recording at 4:23)

their possession.<sup>77</sup> Given that incarcerated plaintiffs must complete a long grievance process, during which ODRC had ample time to transfer the funds out of its possession, prisoners will never have a remedy for garnishment of funds—even where that garnishment is undeniably unlawful.

But that is not the way the law works. Indeed, it is not the way the law ever worked. Start with Blackstone, the scholar upon which all American law is built. Blackstone’s “general and indisputable rule” was that “where there is a legal right” there must be “a legal remedy, by suit or action at law, whenever that right is invaded.”<sup>78</sup> Blackstone “was concerned not merely with the physical availability of judicial process but with the substantive opportunity to assert claims to protect absolute rights.”<sup>79</sup> Even if a court ultimately decides that their rights were not violated, Blackstone would insist Plaintiffs’ claims at least be considered.

In line with these foundational principles, Ohio “has a long-embraced notion that its courts should be open to those in need of redress and

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<sup>77</sup> Order Granting Defendants’ Motion to Dismiss (June 30, 2021) at 5–6.

<sup>78</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*23.

<sup>79</sup> Thomas R. Phillips, *The Constitutional Right to A Remedy*, 78 N.Y.U. L. Rev. 1309, 1322 (2003).

those injured by others should have remedy for their injuries.”<sup>80</sup> Article I, Section 16 of the Ohio Constitution proclaims: “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, *shall have remedy by due course of law*[.]”<sup>81</sup> This clause has been relied on over the past two centuries<sup>82</sup> to invalidate statutes of limitations,<sup>83</sup> abolish immunities,<sup>84</sup> and overturn union by-laws prohibiting judicial resolution of disputes.<sup>85</sup> Indeed, the Ohio Supreme Court has repeatedly condemned laws that “effectively prevent individuals from pursuing relief for their injuries” or “foreclose[] their ability to pursue a claim at all.”<sup>86</sup>

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<sup>80</sup> David M. Gareau, *Opening the Courthouse Doors: Allowing A Cause of Action to Arise Directly from A Violation of the Ohio Constitution*, 43 Clev. St. L. Rev. 459, 472 (1995); *see also* *E. W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 171, 125 N.E.2d 896, 905 (Ohio 1955).

<sup>81</sup> Ohio Const. Art. I, § 16 (emphasis added).

<sup>82</sup> Gareau, *supra* note 80.

<sup>83</sup> *Hardy v. VerMeulen*, 512 N.E.2d 626 (Ohio 1987).

<sup>84</sup> *Kintz v. Harringer*, 124 N.E. 168 (Ohio 1919).

<sup>85</sup> *Armstrong v. Duff*, 103 N.E.2d 760 (Ohio Ct. App. 1951).

<sup>86</sup> *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 477 (Ohio 2007); *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 75 N.E.3d 122 (Ohio 2016).

But the lower court here did just that: In dismissing their claims, it foreclosed Plaintiffs’ ability to pursue a claim for constitutional violations. This decision has important practical and philosophical consequences. “[W]hen the courts refuse to provide [a remedy], rights can be reduced to mere lines on paper.”<sup>87</sup> As the U.S. Supreme Court declared in 1803 in *Marbury v. Madison*, the “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>88</sup> In denying Mr. Woodson and Mr. Evans the opportunity to even try to vindicate their constitutional rights, the court reduced those rights to lines on paper.

The lack of a remedy for constitutional violations has the added pernicious effect of deepening the divide between those who have access to justice, and those who do not. “In an era when ‘there is far too much law for those who can afford it and far too little for those who cannot,’” the availability of remedies helps ensure “all citizens secure the promise of

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<sup>87</sup> Pamela S. Karlan, *What’s a Right Without a Remedy?*, Bos. Rev. (Mar. 1, 2012), <https://www.bostonreview.net/pamela-karlan-supreme-court-rights-legal-remedies>.

<sup>88</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

equal justice under the law.”<sup>89</sup> This has particular resonance here, where the poorest and most vulnerable members of our society (who already have fewer rights to begin with by virtue of their incarceration) are told there is no redress for the violation of a right they supposedly have.

More broadly, the unavailability of any remedy for a rights violation erodes the rule of law. The rule of law “means that government in all its actions is bound by rules fixed and announced beforehand[.]”<sup>90</sup> But a government cannot be called a “government of laws . . . if the laws furnish no remedy for the violation of a vested legal right.”<sup>91</sup> When the government violates its contract with its people, trust in government and respect for its authority crumbles.

The erosion of the rule of law—and the accompanying increase in distrust of its authority—has special implications for prison safety and the effective operation of prisons. A significant body of research has found that perceptions of fairness in the decisions and rules made by an authority

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<sup>89</sup> Phillips, *supra* note 79.

<sup>90</sup> Robert Trager, Susan Dente Ross, & Amy Reynolds, *The Law of Journalism and Mass Communication* at 2 (2017).

<sup>91</sup> *Marbury*, 5 U.S. (1 Cranch) at 163.

are among the “strongest and most consistent predictors” of decisional acceptance, rule compliance, and perceptions that institutions or bodies of law are legitimate.<sup>92</sup> This is important not only in the immediate sense of following particular rules or refraining from violence, but because “[w]ithout the active cooperation of most prisoners, most of the time, prisons could not function effectively.”<sup>93</sup> The chance to air constitutional grievances before a court, therefore, can make prisons safer and their operation smoother.

Lastly, the existence of a remedy has an important deterrent effect. If government agencies like ODRC “know that they will be held to account, they will be less likely to commit violations in the first place.”<sup>94</sup>

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<sup>92</sup> Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *Advances in Experimental Social Psych.* 115, 131–32 (1992); *see also* Tom R. Tyler, *Why People Obey The Law* 25 (1990); Jan-Willem van Prooijen et al., *Procedural Justice in Punishment Systems: Inconsistent Punishment Procedures Have Detrimental Effects on Cooperation*, 47 *Brit. J. of Soc. Psych.* 311, 312–13 (2008); Michelle Butler & Shadd Maruna, *The Impact of Disrespect on Prisoners’ Aggression: Outcomes of Experimentally Inducing Violence-Supporting Cognitions*, 15 *Psych., Crime & Law* 235, 242, 246 (2009).

<sup>93</sup> Jonathan Jackson et al., *Legitimacy and Procedural Justice in Prisons*, 191 *Prison Service J.* 4, 4 (2010).

<sup>94</sup> Karlan, *supra* note 87.

This concern carries particular weight where, like here, the decision by the lower court could incentivize bad behavior by state actors. The message is clear: ODRC may take people's funds with impunity, so long as it acts quickly to move the them out of reach.

## CONCLUSION

The dismissal of Mr. Woodson and Mr. Evans's claims regarding the garnishment of their COVID-19 relief funds has grave consequences for the most vulnerable Ohioans, and runs counter to public policy. *Amici* respectfully urge this court to reverse that decision.

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Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Brief of *Amici Curiae* was electronically filed on August 27, 2021. Notice of this filing will be sent to counsel for all parties via the Court's electronic filing system. Parties may access this filing through the Court's system.

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