No. 22-AP-000581
Regular Calendar

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

SHAWN K. BRUST, et al.,
Plaintiffs-Appellants,

v.

OHIO PAROLE BOARD, et al.
Defendants-Appellees.

On Appeal from the Franklin County Court of Common Pleas
Case No. 21CV003015

BRIEF OF *AMICI CURIAE* DUE PROCESS INSTITUTE, CINCINNATI BLACK UNITED FRONT, ABOLITIONIST LAW CENTER, AND RODERICK & SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF APPELLANTS SHAWN K. BRUST AND MELISSA GRASA

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INTRODUCTION[1]

Shawn Brust, Melissa Grasa, and countless other Ohioans are caught in a surreal nightmare. They are languishing in prison for years after they become eligible—and *fit*—for release, because of information they can never review or contest.

The Ohio Parole Board's refusal to allow parole-eligible people access to the very information on which parole decisions are based is, simply put, profoundly unfair. It runs afoul of the due process guarantee enshrined in the Ohio Constitution and announced by the Supreme Court of Ohio in *State ex rel. Keith v. Ohio Adult Parole Auth.*, 2014-Ohio-4270, 141 Ohio St.3d 375 (2014). Indeed, failing to give notice of the substance of victim statements—the barest of due process protections—renders the parole process a sham.

But this case is about more than the boundaries of legal due process. It is about the real people who are profoundly impacted by the Parole Board's blanket decision to deny access to victim statements. People who

[1] All parties to this appeal consented in writing for amici to file this brief, pursuant to Appellate Rule 17. *See Exhibit 1*.

have spent years preparing for their chance to show their growth and rehabilitation; people with families waiting for them at home who suffer alongside their incarcerated loved ones; people who trust the system to give them a fair shot at release. When they realize they have no opportunity to rebut adverse information presented against them—especially when that information may well be false—the psychological and emotional fallout is devastating.

The Plaintiff-Appellants' proposed remedy would cure the Parole Board's due process failings. However, this Court need not accept that remedy wholesale to align the Parole Board's procedures with the due process rights guaranteed to parole-eligible people by the Ohio Constitution. After all, as long as procedures provide for notice and a meaningful opportunity to be heard, due process is flexible. Alternative procedures short of handing over the statements in their entirety in every case would satisfy notice requirements while simultaneously balancing the rights afforded to victims. *Amici* proposes some in this brief. *Amici* agree with Plaintiff-Appellants, however, that the status quo—in which

written victim statements are kept secret—fails to meet even the most minimal due process guarantees.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Due Process Institute is a bipartisan nonprofit that works to honor, preserve, and restore principles of fairness in the criminal legal system. Because procedural due process concerns transcend liberal/conservative labels, Due Process Institute's mission advances core principles and values that are shared by all Americans. Guided by bipartisanship, it creates and supports achievable solutions for challenging criminal legal policy concerns through advocacy, litigation, and education. Due Process Institute has filed *amicus* briefs in both federal and state courts aimed at increasing access to due process, and thereby instilling more fairness in the criminal legal system.

The Cincinnati Black United Front (CBUF) is a grass roots advocacy organization that seeks to promote equality for African Americans in all respects, frequently through litigation. As part of its advocacy, CBUF promotes policies, procedures, and practices geared toward reducing the risk of harm to those ensnared in the criminal legal

system. CBUF believes the criminal legal system should be transparent, free of bias, and fundamentally fair at all stages, including in the consideration of parole.

The Abolitionist Law Center (ALC) litigates on behalf of people whose human rights have been violated in prison, educates the general public about the evils of mass incarceration, and works to develop a mass movement against the American punishment system by building alliances and nurturing solidarity across social divisions. Advocating for due process protections is a core component of ALC's work to advance the human rights of incarcerated people.

The Roderick & Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC attorneys have advocated for the due process rights of people at every stage of the criminal legal system. RSMJC has served as merits counsel, *amicus* counsel, or *amicus curiae* in numerous cases around the country related to due process and/or parole, in both state and federal courts.

Together, *amici* have a shared interest in ensuring that the due process rights of parole-eligible Ohioans are respected, and that the procedures for determining whether someone will return home to their family are fair and transparent.

ARGUMENT

I. The Parole Board's Practices Run Afoul of the Ohio Constitution.

The Parole Board's reliance on secret, sometimes-inaccurate information in making parole decisions offends the basic notions of fairness at the heart of due process and falls well short of the due process guarantees contained in the Ohio Constitution.

A. Due Process Is About Fundamental Fairness.

At its core, procedural due process is about "fundamental fairness." *In re W.Z.*, 194 Ohio App.3d 610, 2011-Ohio-3238, 957 N.E.2d 367, ¶ 18 (2011) (citing *Lassiter v. Dept. of Social Servs. of Durham Cnty., North Carolina*, 452 U.S. 18, 24 (1981)). The concept originated with English interpretations of the Magna Carta and then "absorbed several concepts from the Bill of Rights in an effort to ensure the meaningfulness of an

accused party's legal response." Vince Genevieve, *With Liberty and Justice for Some: Denial of Meaningful Due Process in School Disciplinary Actions in Ohio*, 65 Clev. State L. Rev. 259, 261 (2017) (citation omitted). But even as the concept evolved, the underlying purpose remained the same: "to protect citizens generally against unjust and arbitrary government action." *W.Z.*, ¶ 19; *see also In re Adoption of H.N.R.*, 145 Ohio St.3d 144, 2015-Ohio-5476, 47 N.E.3d 803, ¶ 25 (2015) (methods "must not be unreasonable, arbitrary, or capricious").

The fairness guaranteed by due process requires "that a party has been heard and understood in a forum free from bias, dishonesty, or injustice." Christopher B. McNeil, *Due Process and Ohio Administrative Procedure Act: The Central Panel Proposal*, 23 Ohio N. U. L. Rev. 783, 783-84 (1997) (citing Random House Dictionary of the English Language 692 (2d ed. 1987)). This requirement demands two things. First, objective structures must be in place to guard against overreaching, trickery by adverse parties, or misuse of proceedings. *Id.* at 784. Second, people must have a subjective sense that they were heard at a time and manner that are meaningful. *Id.* (citing *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)).

The Parole Board's procedures provide neither. A proceeding based on secret information—information unavailable to the person whose freedom hangs in the balance—is fundamentally unfair.

B. At Minimum, The Broad Due Process Protections Of Article I, Section 16 Require Notice Of Victim Statements.

The Supreme Court of Ohio has recognized a "minimal due-process" expectation for parole applicants. *Keith*, ¶ 25. The Parole Board's refusal to share victim statements with the person being considered for release, despite basing its parole decisions on those statements, falls short of this guarantee.[2]

[2] The Parole Board operates under contradictory directives. It is both required to consider secret, sometimes-inaccurate information, and forbidden from relying on incorrect information. *Compare* Ohio Admin. Code 5120:1-1-07(B) (7) (the Parole Board "shall" consider "any communications from a victim or victim's representative" when making its decision) *with State ex rel. Keith v. Ohio Adult Parole Auth.*, 2014-Ohio-4270, 141 Ohio St.3d 375 (2014) (The Parole Board may not "rely on incorrect, and therefore irrelevant, information about a particular candidate."). Any proceeding governed by rules that cannot possibly be followed is a sham. *See, e.g., Ryan v. Ill. Dep't of Children & Family Servs.*, 185 F.3d 751, 762 (7th Cir. 1999) (citing *Palko v. Connecticut*, 302 U.S. 319 (1937) ("To satisfy due process, a hearing 'must be a real one, not a sham or a pretense.'")).

1. Ohio Courts Should Interpret Article I, Section 16 As Requiring More Due Process Protections Than Required by the Fourteenth Amendment.

Ohio courts need not, and should not, construe Article 1, Section 16 synonymously with the Fourteenth Amendment to the U.S. Constitution. After all, "the Ohio Constitution is a document of independent force," as the Supreme Court of Ohio firmly pronounced in *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 35, 616 N.E.2d 163 (1993). The *Arnold* court correctly recognized that state courts have unfettered ability to provide greater protections than provided by the U.S. Constitution, and noted that interpreting the state constitution "merely as a restatement of the Federal Constitution, [] both insults the dignity of the state charter and denies citizens the fullest protection of their rights." *Id.* at 42 (citing *Davenport v. Garcia*, 834 S.W.2d 4, 12 (Tex. 1992)).

In fact, state courts don't just have discretion to interpret their state constitutions separately; they are duty-bound to do so, to realize the full spectrum of individual constitutional rights. This duty stems from the function that state constitutions are meant to perform, which is fundamentally different from the Federal Constitution. Robert F.

Williams, The Law of American State Constitutions, 20 (Oxford U.P. 2009). While the U.S. Constitution "is a negative restriction on the states' power to act in certain ways," a state's constitution "is an affirmative grant of rights and liberties to be effectuated to the fullest." Alan B. Handler, *Expounding the State Constitution*, 35 Rutgers L. Rev. 202, 205 (1983); *see also Arnold* at 42. Indeed, even the rights embedded in the U.S. Constitution were initiated by the states. Jeffrey S. Sutton, *What Does—And Does Not—Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 708 & n. 159 (2017) (explaining that provisions in the Bill of Rights flowed from guarantees already embedded in state constitutions).

State courts may, of course, consider analogous federal constitutional provisions in interpreting their own constitutions. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1315 (2017). However, "state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*." *Id.*; *see also State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21 (2016) ("Federal opinions do not control our independent analyses in interpreting

the Ohio Constitution, even when we look to federal precedent for guidance."); Sutton, 59 U. Kan. L. Rev. at 687 ("There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same."). Accordingly, to the extent that Ohio courts interpret the due process clause of Article 1, Section 16 congruently with that of the Fourteenth Amendment to the U.S. Constitution, *see, e.g.*, *State v. Anderson*, 148 Ohio St.3d 74, 2016-Ohio-5791, 68 N.E.3d 790, ¶ 21 (2016), they unduly limit the protections afforded in this State.

In construing the Ohio Constitution, this Court has announced, "the intent of the framers is controlling" and "[t]o determine intent, we must begin by looking at the language of the provision itself." *Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E. 3d 950, ¶ 16 (2016); *see also State v. Hipp*, 38 Ohio St. 199, 224-25 (1882) (citation omitted) ("The constitution . . . must be interpreted and effect given to it as the paramount law of the land . . . accord[ing] to the spirit and intent of its framers, as indicated by its

terms.").[3] In conducting this textual analysis, "[w]ords used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning." *Toledo City School Dist.*, ¶ 16.

Article 1, Section 16 is textually broader than the Fourteenth Amendment, protecting Ohio citizens from an "injury done him in his lands, goods, person, or reputation." Ohio Const. art. I, § 16. In contrast, the Fourteenth Amendment's Due Process Clause only limits the deprivation of "life, liberty, and property." U.S. Const. amend. XIV. The framers of the Ohio Constitution plainly intended broader protections under Article I, Section 16. First, they chose to limit any "injury," not just

[3] Some scholars and jurists maintain that the ideal interpretive lens for evaluating state constitutional provisions is the primacy model, i.e., engage with questions of the state constitution first, and only analyze the federal constitution if state law does not protect the interest in question. *See, e.g.* Pierre H. Bergeron, *A Tipping Point in Ohio: The Primacy Model as a Path to a Consistent Application of Judicial Federalism,* 90 U. Cin. L. Rev. 1061, 1065 (2022) (explaining the primacy approach and noting its proponents). Under this model, textual differences alone can provide a basis for reaching a different result under the state constitution than under the federal constitution. *Id.* at 1084-86 (discussing the factors considered by other courts that employ the primacy model for comparing state and federal constitutional provisions).

the depravation of a specifically enumerated interest.[4] Second, they afforded an array of "inalienable rights" not included in the U.S. Constitution, including "enjoying and defending" life and liberty, and "seeking and obtaining happiness and safety." Ohio Const. art. I, § 1.

The textual differences between the Fourteenth Amendment and Article I, Section 16 are particularly significant here because parole-eligible people risk ongoing injury to their persons or reputations, if not other covered interests during the parole process. Thus, as explained below, only the opportunity to receive and respond to victim statements and other information provided outside the hearing ensures that parole-eligible people receive a fair hearing that comports with state due-process expectations.

[4] To deprive is "to take something away from" or "to withhold something from." Merriam-Webster Online Dictionary, Definition of *deprive*, https://www.merriam-webster.com/dictionary/deprive (last visited Dec. 19, 2022). This word suggests the loss of some vested interest. *See id.* (example: "*deprived* a citizen of her rights"). "Injure," on the other hand, subsumes the definition of "deprive." To injure is "to inflict bodily harm on," "to impair the soundness of," or "to inflict material damage or loss on." Merriam-Webster Online Dictionary, Definition of *injure*, https://www.merriam-webster.com/dictionary/injure (last visited Dec. 19, 2021).

2. Even Minimal Due Process Requires Notice, And No Such Notice Is Present In Parole Application Proceedings.

Whether or not the Ohio Constitution provides greater due process protections than the U.S. Constitution, both the Ohio Supreme Court and the U.S. Supreme Court agree that minimum procedural due process guarantees notice. *See, e.g., Christiana Trust as Trustee of Normandy Mortgage Loan Trust, Series 2013-13 v. Berter*, 2020-Ohio-727, 151 N.E.3d 831, ¶ 20 (2020) (counting "notice" among the "essential components of due process"); *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 264 (1987) (explaining that "minimum due process" requires both "notice of the . . . allegations" and "notice of the substance of the relevant supporting evidence"). Put simply, "minimum procedural safeguards" must include "some form of notice." *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (concurring in part, J., Powell).

Courts have confirmed this again and again, in situations ranging from parole revocation to prison discipline to employment disputes.[5] And

[5] *State v. Kernall*, 2019-Ohio-3070, 132 N.E.3d 758, ¶ 23 (2019) (minimum due-process requirements in community-control revocation

the notice requirement extends to circumstances where, as here, an adverse decision risks the denial of an applied-for benefit.

Consider this analogy. The U.S. Supreme Court and numerous state high courts hold that an individual applying for a state license is entitled to notice of the grounds for rejection of an attorney license to practice law on character and fitness grounds. *See Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103-05 (1963) (collecting state cases). For example, in *Willner*, a person's application for the New York State Bar was rejected, with no reason given. *Id*. Although the applicant could not be said to have lost anything—after the rejection, he simply continued to not be a lawyer, just as before—the Court found his due process rights were

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hearings include, inter alia, written notice of alleged violations and disclosure of evidence against the parolee); *Wolff v. McDonnell*, 418 U.S. 539, 558, 563 (1974) (in the prison disciplinary context, "minimum . . . procedural due process" requires "advance written notice of the claimed violation"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (holding in the employment context that one "essential requirement[] of due process" that an employee must receive before termination is "notice of the charges against him" and "an explanation of the employer's evidence."); *Moxley v. Bd. of Educ. of the Trotwood Madison City*, 2003-Ohio-3402, ¶ 13 (notice satisfied for due process by sending "an explanation of the board of education's evidence, and an opportunity to present his side of the story").

violated because he was not "informed of and allowed to rebut the bases for . . . [the] failure to find his good character." *Id*. at 104-05; *see also Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) ("[T]he function of notice is to give the charged party a chance to marshal the facts in his defense.").

So too here. Just as a rejected Bar applicant experiences no changed circumstances following the rejection, a parole-eligible person remains incarcerated following a parole denial. Yet both the person applying for the Bar and the person up for parole have a right to fairness in the procedures on which the adverse decision is based. And, more specifically, this fairness must include notice of any information that may form the basis of an adverse decision.

II. Lack of Fairness In Parole Proceedings Takes A Heavy Human Toll.

Due process is more than an abstract legal concept: it has tangible, real-world importance for those to which it is denied. Due process exists because the lack of fairness in any proceeding upon which one's future circumstances hinge can be maddening. This is true whether the

proceeding will determine one's continued employment,[6] one's admission to practice law,[7] or one's eligibility for a government benefit.[8] But where the consequences are a person's very freedom, an arbitrary and dishonest process inflicts particularly profound psychological trauma. "[E]ach parole hearing is an exceptional episode in the life of the prisoner, invested with intense feelings of hope and optimism." Richard Rivera, *Traumatized to Death: The Cumulative Effects of Serial Parole Denials*, 23 CUNY L. Rev. F. 25, 26 (2020). The realization that the promise upon which one's most fervent hopes were based was a sham is deeply painful.[9]

Discussions of parole tend to focus on release rates, recidivism risk, and parolee demographics, *see id.* at 27, in a way that dehumanizes the

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[6] *Sohi v. Ohio State Dental Bd.*, 130 Ohio App.3d 414, 422, 720 N.E.2d 187 (1998).

[7] *Willner*, 373 U.S. 96 (1963).

[8] *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

[9] As Nietzsche said, hope "is, in truth, the greatest of all evils for it lengthens the ordeals of man." Friedrich Wilhelm Nietzsche, Human, All Too Human, A Book For Free Spirits 71, (Alexander Harvey, translator) (Charles H. Kerr & Co. 1908) (1878), *available at* https://wiki.chadnet.org/files/human-all-too-human-a-book-for-free-spirits-by-friedrich-nietzsche.pdf.

individuals about whom parole decisions are made. To the extent the human toll of the sometimes-arbitrary process is considered, it is largely from the perspective of the survivor of crime, or a victim's family. These perspectives are important, and must be given proper weight and consideration. Indeed, in parole proceedings the Ohio Constitution affords victims protections that are "no less vigorous than the rights afforded to the accused." Ohio Const. art. I, § 10a(A)(3). Notably, it does not afford victims *more* protections than those afforded to the accused. Yet in accepting victim statements outside of full-board hearings, but not providing notice of those statements to the parole applicant, the Parole Board procedures does just that.

Congruent protections for the accused are essential because parole-eligible people and their families are also human beings who experience deleterious consequences as a result of a hearing that does not result in parole. *See id.* To acknowledge this reality does not devalue survivors' and victims' emotional turmoil, but merely acknowledges the humanity in those subject to the hearing as well as their communities. Indeed, "prisoners are totally and completely invested in their scheduled

appearances before the Board of Parole." *Id*. at 34. To a person up for parole—as well as for that person's children, parents, spouses, siblings, and other loved ones—an appearance is "the culmination of their sentence[]." *Id*. It is what each prisoner has "been preparing for since entering the system." *Id*. "As such, one's parole date acquires both real and symbolic meaning over time, representing not only the real possibility of freedom but an affirmation of one's readiness for society." *Id*.

But if, when the time finally comes, prisoners realize that the event for which they have been preparing for so many years is a mere sham, the result is a special kind of anguish. People who have been through multiple parole hearings describe them as "disrupting the individual's self-conception and culminating in a state of existential despair." *Id*. at 27. As Richard Rivera, Associate Director of Academic Reentry at Cornell University's Prison Education Program (and a formerly incarcerated person), explains:

> No one is ever caught off guard by their parole interview date. It is an anticipated and long-awaited event. The date of appearance is set at the moment of sentencing and endowed with meaning and significance in the imagination of the convict. Despite the fact that you have been sentenced to what

> seems like a lifetime, you enter the system resolved to make some changes, to survive and leave prison a better person than you were before coming to prison. You accept and take responsibility for your crimes. You are genuinely remorseful. You try to do all the right things: to participate in all the required programs, take advantage of all the educational opportunities, stay out of trouble, and become an agent of change and a role model to others. The person you were ten, twenty, or thirty years ago no longer exists. You become, by the choices you make, a different person. Ten, twenty, or thirty years later, you are ready to make your appearance before the Board. You have a demonstrated history of positive change. You are ready: it is your time. . . .You make the best case possible for release, and you are denied. . . . .
>
> Before you have had the opportunity to process the news, you are on the telephone trying to comfort and reassure your family and friends, telling them that it is going to be alright, that it is only another two years, that they should not worry. Back in the solitude of the cell, you deal with your feelings of confusion, uncertainty, and self-doubt; you begin to second-guess yourself, wondering where the interview went wrong, what you could have done differently, trying to guess what the Board wanted you to do, and on and on and on . . . .
>
> Now imagine going through this process over and over and over again. I do not have to. When I started writing this article, I was recovering from my fifth denial and preparing for my sixth. John MacKenzie[,] [my friend who took his own life,] went through the process ten times before it broke him. Others have gone through it eight, twelve, even sixteen times. Each "hit" and reappearance becomes more traumatic than the [last].

Id. at 30-33.

But Mr. Rivera and other people who have experienced parole hearings point not just to the denial itself as the root of their trauma. Parole denial after a fair hearing, they say, is significantly less cruel for the person involved than denial after a hearing that, by all appearances, was a sham. As such, they maintain that the "implementation of practices" to protect the fundamental fairness of parole hearings "would lessen the traumatic impact of repetitive parole denials on the individual's mental stability." *Id*. at 26. Such practices would necessarily include notice of the information presented against an individual seeking parole, *see id*., which would, in turn, afford them an opportunity to rebut false information.

Therefore, due process is more than fodder for academic debate. Its absence has a profound impact on people with much at stake in any given proceeding. Requiring disclosure of information relied upon in parole hearings would not only comport with notions of fairness and uphold constitutional guarantees—it would signal respect for our shared humanity.

III. Notice Can Take Many Forms.

To be sure, the notice required by due process can take many forms, and this Court may fashion procedures "according to the interests at stake in [this] particular context." *Brock*, 481 U.S. at 261. But at bottom, *some* notice is required. *See supra* part I.B.2. Here, the applicant receives no notice whatsoever: the applicant does not have access to the written statements themselves; the applicant receives no summary of the content of the statement; and the applicant learns nothing about the statements at the hearing itself. To rise to the level of fairness, notice must give sufficient information about the contents of those statements to allow parole-eligible people to respond and correct factual errors.

Of course, the most straightforward approach, and one that undoubtedly satisfies the notice requirement of due process is full disclosure of victim statements. Oregon does precisely this: all written materials submitted to the Oregon Board of Parole are "considered public documents" and are "provided to the adult-in-custody in advance of the hearing." *Victim Services: Release From Prison – Information Considered by the Board*, Oregon Board of Parole,

https://www.oregon.gov/boppps/Pages/Victim-Services.aspx (last visited Dec. 19, 2022). Indeed, in Oregon, victim statements may even "be disclosed to other members of the public who submit public records requests." *Id*. To the extent there are concerns about a victim's privacy or security, the Court could easily address them by requiring redaction of sensitive data (such as contact information) before disclosure.

Alternatively, this Court could require disclosure, but allow for carefully delineated exceptions in the most sensitive cases. This is the approach taken in Arkansas, where the general rule requires the board to "give the inmate a copy of all impact statements written by the victim," but contains an exception for statements by victims of sex offenses. Ark. Code Ann. § 16-90-1113(b)(1) & (b)(2)(A). Unlike in Ohio, however, this exception is not absolute, and it does not apply where "the interests or welfare of the inmate outweighs the privacy and safety interests of the victim" or provision of the statements would "enhance the accuracy of the board's determination." *Id*. at (b)(2)(B).

Yet another approach consistent with the notice requirement could require disclosure of factual summaries instead of the victim statements

themselves, if the Parole Board articulates a risk of harm from full disclosure. The Vermont Parole Board takes this approach. The Vermont Parole Board Manual, Chapter 7, Section IV: Offender Access to Information Considered by the Board (Jan. 15, 2020) https://humanservices.vermont.gov/sites/ahsnew/files/documents/Parole Board/The%20Vermont%20Parole%20Board%20Manual%20%28Revised%2001-15-2020%29.pdf.; *Id.* at Chapter 8: Victim Notification and Participation, 14-15. There, when the board excludes some material, it is required to identify the withheld material, explain why it was withheld, and provide "a summary of the basic content of the material withheld with as much specificity as possible without revealing the non-disclosable information." *Id.* at 14.

It has often been said that due process "is a flexible concept that varies depending on the importance attached to the interests at stake and the particular circumstances under which the deprivation may occur." *State v. Aalim*, 2016-Ohio-8278, 83 N.E.3d 862, ¶ 13 (2016) (citation omitted); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, the precise contours of the "minimal due process"

protections required by *Keith* may be up for debate. What is not debatable, however, is the need for some type of notice: notice is the floor, and it is so fundamental to the constitutional guarantee that, without it, there would be no due process at all.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to find for Plaintiffs-Appellants.

Respectfully submitted,

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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of *Amici Curiae* was electronically filed on December 19 2022. 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.

/s/ Alphonse A. Gerhardstein
Alphonse A. Gerhardstein (0032053)
FRIEDMAN, GILBERT + GERHARDSTEIN

Exhibit 1

From: Chadd McKitrick <Daniel.McKitrick@OhioAGO.gov>
Sent: Friday, December 9, 2022 11:38 AM
To: Megha Ram
Cc: Andrea Lewis Hartung; Kathrina Szymborski; Jordan Faria
Subject: RE: Amicus Brief in Brust v. Ohio Parole Board

Yes. Thank you.

D. Chadd McKitrick
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Office of Ohio Attorney General Dave Yost
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From: Megha Ram <Megha.Ram@macarthurjustice.org>
Sent: Friday, December 9, 2022 11:35 AM
To: Chadd McKitrick <Daniel.McKitrick@OhioAGO.gov>
Cc: Andrea Lewis Hartung <alewishartung@macarthurjustice.org>; Kathrina Szymborski <Kathrina.Szymborski@macarthurjustice.org>; Jordan Faria <Jordan.Faria@macarthurjustice.org>
Subject: Amicus Brief in Brust v. Ohio Parole Board

Hi Chadd,

We are planning to file an amicus brief in support of plaintiffs-appellants in Brust v. Ohio Parole Board (Case No. 22AP-581). The brief will be filed on behalf of the Roderick & Solange MacArthur Justice Center and possibly other organizations. We aim to file on or around the date that plaintiffs-appellants' brief is due. Do we have your consent to file?

Best,
Megha

Megha Ram
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From: David Carey <dcarey@acluohio.org>
Sent: Friday, December 9, 2022 11:29 AM
To: Megha Ram
Cc: Andrea Lewis Hartung; Kathrina Szymborski; Jordan Faria
Subject: RE: Amicus Brief in Brust v. Ohio Parole Board

Hi Megha,

Appellants consent to your filing an amicus brief in this matter.

David

David J. Carey | Deputy Legal Director
ACLU of Ohio
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From: Megha Ram <Megha.Ram@macarthurjustice.org>
Sent: Friday, December 9, 2022 11:27 AM
To: David Carey <dcarey@acluohio.org>
Cc: Andrea Lewis Hartung <alewishartung@macarthurjustice.org>; Kathrina Szymborski <Kathrina.Szymborski@macarthurjustice.org>; Jordan Faria <Jordan.Faria@macarthurjustice.org>
Subject: Amicus Brief in Brust v. Ohio Parole Board

Hi David,

Ohio Rule of Appellate Procedure 17 requires "written consent of all parties" for amicus briefs. Could you please state your consent here?

Thanks!
Megha

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