

No. 21-5031

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARLY GRAFF, et al.,

Plaintiffs-Appellants,

v.

ABERDEEN ENTERPRIZES II, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Oklahoma
Civil Action No. 4:17-cv-00606-TCK-JFJ
Hon. Terence C. Kern

BRIEF OF AMICI CURIAE OKLAHOMA POLICY INSTITUTE AND PUBLIC
JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici Oklahoma Policy Institute and Public Justice certify that neither organization has a parent corporation and that neither organization issues stock.

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STATEMENT OF AMICI CURIAE¹

Oklahoma Policy Institute is a nonprofit think tank based in Tulsa, Oklahoma, that seeks to advance equitable and fiscally responsible policies that expand opportunity for all Oklahomans through nonpartisan research and advocacy. Oklahoma Policy Institute has analyzed the administration of court fines and fees for years, and compiled a database of millions of court records to identify trends in debt and collection. It has worked in bipartisan coalitions to enact policies that move the state towards a comprehensive system that promotes accountability and rehabilitation.

Public Justice is a national legal advocacy organization focused on impact litigation, education, and policy advocacy. Public Justice's Debtors' Prison Project uses strategic litigation to combat the criminalization of poverty and compel governments and their for-profit partners to abandon predatory fine and fee collection practices.

INTRODUCTION

The imposition of criminal fines and fees on people who cannot afford to pay them—and aggressive measures government and private debt collectors employ to collect that money—criminalize poverty, trap people in years-long

¹ No party's counsel authored this brief in whole or in part, and no person other than the amici curiae contributed money to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4).

cycles of increasing debt and repeated contacts with the criminal legal system, and further entrench wealth disparity.

Plaintiffs in this case challenge a core feature of a pernicious fine and fee collection scheme operating in many Oklahoma counties: the issuance of warrants for failure to pay alone, followed by relentless threats of arrest by private debt collector Aberdeen Enterprizes II, and then actual arrest for failure to pay whatever amount Aberdeen unilaterally decides is sufficient to avoid jail. Aberdeen profits only when court debtors pay, so its employees give debtors an ultimatum—pay the company or go to jail—and they actively block debtors from seeking the ability-to-pay determinations to which they are entitled under Oklahoma law. This process subjects many of the poorest Oklahomans to years of financial turmoil, stress over the possibility of arrest, and eventual jailing without resolving the underlying issue: that the fines and fees imposed far exceed what they can ever pay.

As a matter of public policy, this scheme is indefensible. It is also unconstitutional under *Bearden v. Georgia*, 461 U.S. 660 (1983), which forbids jailing court debtors for failure to pay absent a determination that the failure to pay was willful. But rather than directly engaging with the glaring constitutional deprivations at issue here, the district court dismissed the case by applying *Rooker-Feldman*, the *Heck* Doctrine, and *Younger* abstention in a manner that stretched the three doctrines beyond all known bounds.

Amici submit this brief for three reasons. *First*, amici place the Aberdeen scheme in context by examining the steep rise in fines and fees in recent years, harsh consequences for debtors, the futility of threatening and jailing people who cannot pay, and available alternatives to this approach. *Second*, amici address the district court's failure to consider *Bearden*'s requirements when discussing how arrest for nonpayment and ability-to-pay determinations work under state law. This omission must be corrected to avoid future errors in this case and other cases. And *third*, amici briefly discuss how *Rooker-Feldman*, *Heck*, and *Younger* do not apply here.

Amici urge this Court to reverse the district court's order and remand the case for further litigation of Plaintiffs' claims on the merits.

ARGUMENT

- I. **Defendants' system of threatening and jailing people who cannot pay criminal justice debt compounds the harm of Oklahoma's reliance on fines and fees to fund government.**
 - A. **Imposing substantial fines and fees on Oklahomans, along with surcharges for nonpayment, creates a two-tiered justice system that traps people in poverty.**

Nationwide, budget shortfalls have prompted states and municipalities to increase the number of fines and fees imposed on defendants in criminal cases.²

² See Harvard Law School Criminal Justice Policy Program, *Confronting Criminal Justice Debt: A Guide for Policy Reform*, 1–3 (September 2016), <http://cjpp.law.harvard.edu/publications/confrontingcjdebt>; Matt Ford, *The*

Some fees aim to make the justice system self-funding. Others seek to raise general government revenue. In many jurisdictions, it has become easier to impose fines and fees on criminal defendants than to raise revenue through taxation, creating a strong motivation for lawmakers to impose fines and fees that far exceed defendants' underlying culpability—or those defendants' ability to pay.

Oklahoma is among the starkest examples of this national trend. In 1992, a ballot measure amended the state constitution, making it impossible to raise revenue through tax increases without either three quarters of the legislature voting in favor or a statewide referendum.³ Since then, tax revenue fell and court funding was cut drastically, spurring significant increases in fines and fees as courts were forced to self-fund most of their operations.⁴ Oklahoma Supreme Court Justice Doug Combs explained that “[a]s we had budget cuts from the Legislature, it

Problem with Funding Government through Fines and Fees, The Atlantic (April 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-problem-with-funding-government-through-fines/389387/>.

³ Okla. Const. art. V, § 33.

⁴ Ryan Gentzler, *The Cost Trap: How Excessive Fees Lock Oklahomans into the Criminal Justice System Without Boosting State Revenue*, Oklahoma Policy Institute, 2–3, 14–15 (February 2017), <https://okpolicy.org/wp-content/uploads/The-Cost-Trap-How-Excessive-Fees-Lock-Oklahomans-Into-the-Criminal-Justice-System-without-Boosting-State-Revenue-updated.pdf?x69990>; Lawyers' Committee for Civil Rights, *Enforcing Poverty: Oklahoma's Reliance on Fines & Fees Fuels the State's Incarceration Crisis*, 5 (2019) <https://www.lawyerscommittee.org/enforcing-poverty-oklahomas-reliance-on-fines-fees/>.

forced us to try and collect as much as we could from those we could in order to fund the judiciary.”⁵

In Oklahoma, there are now over 103 statutory fines and fees at the state level, with many more at the municipal level.⁶ Fees are often unrelated to the underlying offense.⁷ And when multiple charges are brought in a single case, courts assess fees for each charge, not the case as a whole, multiplying the total balance severalfold.⁸ This leaves many defendants with hundreds of dollars in fees even in simple traffic cases, and several thousand dollars or more in more serious cases.⁹

Such penalties put “large burdens on poor offenders who are unable to pay criminal justice debts.”¹⁰ One survey of over 900 court debtors found that to get

⁵ M. Scott Carter and Clifton Adcock, *Prisoners of Debt: Justice System Imposes Steep Fines, Fees*, Oklahoma Watch (Jan. 31, 2015), <http://oklahomawatch.org/2015/01/31/justice-system-steeps-many-offenders-in-debt/>.

⁶ Nancy Fishman et al., *Report to the Greater Oklahoma City Chamber Criminal Justice Task Force*, Vera Institute of Justice, 9 (December 2016), <https://www.vera.org/publications/oklahoma-city-chamber-criminal-justice-task-force-report>.

⁷ Gentzler, *supra* note 4, at 4.

⁸ *Id.*

⁹ *Id.* at 3–5; *see also* Oklahoma Watch, *A Journey Into Debt* (January 31, 2015, updated February 4, 2020), <https://oklahomawatch.org/2015/01/31/list-journey-into-debt/> (listing dozens of Oklahoma fees).

¹⁰ Council of Economic Advisors, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* 1 (Dec. 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

money to pay their court debt, more than eight in ten gave up necessities like rent, food, medical bills, car payments, and child support; almost half of them used payday or title loans; and some were driven to commit crimes involving drug sales, stealing, or sex work.¹¹

Predictably, piling hundreds or thousands of dollars in court debt on a person can drive them to desperation. Nationally, the Federal Reserve recently found that 37% of adults would have difficulty using cash savings to cover an unexpected \$400 emergency expense.¹² And the U.S. Census determined that one in six Oklahomans lives in poverty—with a higher poverty rate for women, children, and people of color.¹³ In another survey, one in seven Oklahomans reported having either no savings or negative net worth.¹⁴ Criminal defendants generally have even

¹¹ Alabama Appleseed et al., *Under Pressure: How fines and fees hurt people, undermine public safety, and drive Alabama's racial wealth divide* 4 (2018), <https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf>; see also Carter and Adcock, *supra* note 5 (quoting Oklahoma woman who owed thousands in criminal justice debt, could not find employment, and was “one day away” from selling drugs to pay down her fees when she finally landed a job).

¹² Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2019* (May 2020), <https://www.federalreserve.gov/publications/2020-economic-well-being-of-us-households-in-2019-dealing-with-unexpected-expenses.htm>.

¹³ Paul Shinn and Kenneth Kickham, *Plateaus and Cliff Effects in Oklahoma*, Oklahoma Policy Institute 7 (December 2020), <https://okpolicy.org/wp-content/uploads/Plateaus-and-Cliff-Effects-in-Oklahoma-FINAL.pdf?x69990&x92698#page=7>

¹⁴ Prosperity Now Scorecard *Oklahoma: Outcome, Prosperity Now* (2016), <https://scorecard.prosperitynow.org/data-by-location#state/ok>.

less wealth than the population at large. About 80% qualify for a public defender because of indigence.¹⁵ The cost of even a single encounter with the criminal legal system exceeds what many people can hope to afford.

An Oklahoma Policy Institute analysis of Tulsa County shows that court debt per adult resident increases dramatically in proportion to the percentage of people in that zip code living in poverty. In zip codes where the poverty rate is under 10%, the debt was \$46 per adult resident, while in zip codes where the poverty rate is over 30%, the debt was \$439 per adult resident.¹⁶ This debt—funding both the justice system and unrelated government services—is a regressive tax on people least able to afford it. And the government’s decision to fund itself in this manner rather than through general taxation has dire consequences for the poorest Oklahomans.

Criminal fines and fees also disproportionately affect people of color.¹⁷

Oklahoma Policy Institute’s analysis of Tulsa County determined that while the

¹⁵ Bureau of Justice Statistics, *Defense Counsel in Criminal Cases*, 1 (November 2000), <http://www.bjs.gov/content/pub/pdf/dccc.pdf>.

¹⁶ Ryan Gentzler, *Millions of dollars in court debt hang over residents of Oklahoma’s poorest neighborhoods*, Oklahoma Policy Institute (2017), <https://okpolicy.org/millions-of-dollars-in-court-debt-hangs-over-oklahomas-poorest-zip-codes/>

¹⁷ See Presidential Task Force on Building Pub. Trust in the Am. Just. Sys., *Ten Guidelines on Court Fines and Fees*, American Bar Association, 3 (Aug. 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf.

average court debt per adult resident citywide was \$219, it was well over \$300 in areas of North Tulsa with a higher percentage of black residents, topping out at \$590 in Turley, an area where 57% of residents are black and 38% of residents live below the poverty line.¹⁸ One factor contributing to this racial disparity is that often even where black and white people commit an offense at a similar rate, increased police focus on black communities results in far more black people being prosecuted for that offense.¹⁹ A second contributing factor is the persistent, substantial racial wealth gap: even at the lowest income levels, white families hold several times the wealth of black families on average.²⁰ Heightened enforcement contributes to fines and fees being imposed on black people at a higher rate. And wealth disparity means they are more likely to face difficulties paying off those fees once they are in place. Law enforcement involvement in fee collection and the

¹⁸ Gentzler, *supra* note 16.

¹⁹ See, e.g., Richard V. Reeves, *Trump Won White Voters but Serious Inequalities Remain for Black Americans*, The Brookings Institution (Jan. 13, 2017) (racial disparities in marijuana arrests despite similar use), <https://www.brookings.edu/blog/social-mobility-memos/2017/01/13/trump-won-white-voters-but-serious-inequities-remain-for-black-americans/>.
https://www.hrw.org/sites/default/files/report_pdf/us0919_tulsa_web.pdf.

²⁰ Rakesh Kochhar and Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, Pew Research Center (Nov. 1, 2017), <https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/>.

extraction of the fees then itself contributes to over-enforcement in black communities and the racial wealth gap, a vicious cycle.

In addition to trapping individual defendants in poverty, fines and fees siphon wealth from whole communities. In one survey of court debtors, over 60% of debtors reported that family members rather than debtors themselves paid the debt.²¹ And many of those debtors said their family members could not afford to pay these fines and fees and therefore had to take out loans or fall into financial distress as a result.²²

When a fine or fee is imposed at sentencing, Oklahoma Criminal Court of Appeals Rule 8.1 requires that a judicial hearing be conducted to determine whether the defendant is able to satisfy the fine and costs.²³ Defendants who cannot pay must be relieved of the fines or costs or be given an opportunity to report back to explore whether a change in condition enables them to pay.²⁴ But in practice, many courts fail to hold these Rule 8 hearings.²⁵

²¹ Ella Baker Center for Human Rights. et al., *Who Pays? The True Cost of Incarceration on Families* 9 (Sept. 2015), <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

²² *Id.* at 8–9; Other surveys reached similar conclusions. *See, e.g.*, Alabama Appleseed, *supra* note 11, at 37 (of those helping another person pay, 37% had taken out a high-cost payday or title loan to do so, and 49% had to cut back on necessities like food, payment of medical bills, or payment of rent).

²³ Okla. R. Crim. App. 8.1.

²⁴ Okla. R. Crim. App. 8.5.

²⁵ Gentzler, *supra* note 4, at 9.

When, as often happens, a defendant cannot keep up with payments, their case is referred to private debt collectors such as Aberdeen, and to pay the company a 30% surcharge is added to their balance.²⁶ The poorest Oklahomans always owe more than wealthier people in relative terms—fines and fees constitute a far greater percentage of their wealth. And the 30% surcharge ensures they are charged the most in absolute terms as well.

Many thousands of indigent defendants are burdened with enormous financial obligations to courts each year.²⁷ Wealthier people pay at once and suffer no further consequences. But people who cannot immediately pay a traffic ticket—which can carry fines and fees that equal most of a monthly disability check—have their cases drag on indefinitely, with the balance increasing. Equal treatment under law is impossible where one’s poverty dictates the severity of one’s punishment.

B. The practices challenged in this case—illegal warrants for failure to pay, arrest and jailing on those warrants, and related threats—inflict grave harm on debtors who cannot pay.

In the jurisdictions at issue here, debtors’ trouble does not end with the imposition of steep fines and fees or even with Aberdeen’s 30% surcharge on those unable to pay. In addition to those harms, warrants are issued for debtors’ arrest based solely on their failure to pay.²⁸ Each warrant adds a \$50 to \$80 fee to a

²⁶ Second Amended Complaint (“SAC”) ¶ 5; Gentzler, *supra* note 4, at 9.

²⁷ Gentzler, *supra* note 4, at 10.

²⁸ SAC ¶ 1; Gentzler, *supra* note 4, at 9.

debtor's balance.²⁹ And they cause debtors to be jailed for being poor. Jailed debtors are kept from caring for their families. And they are pushed closer to the financial abyss when confinement puts their jobs at risk or interferes with a job search.

A staggering number of failure-to-pay warrants have been issued in Oklahoma. For cases filed in 2008, in Rogers County, 55% of all felony cases and 49% of all misdemeanor cases eventually resulted in the issuance of at least one failure-to-pay warrant, often years later as people couldn't keep up with payment plans.³⁰ And in Tulsa County, those numbers increase to 65% of felony cases and 53% of misdemeanor cases.³¹ Between the two counties, a majority of criminal justice debtors could not pay their court fines and fees and therefore faced arrest.³²

Data covering a longer period shows the shocking scale of court debt and debtors' prisons in Tulsa County. Of the approximately 72,000 felony and misdemeanor cases resulting in court debt filed from 2008 through 2015, 43% eventually had at least one failure-to-pay warrant.³³ That's over 31,000 warrants in

²⁹ SAC ¶ 19; Gentzler, *supra* note 4, at 9.

³⁰ Ryan Gentzler, *Oklahoma's Debtors' Prisons Aren't Just a Nuisance—They're an Epidemic*, Oklahoma Policy Institute (January 30, 2018, updated May 2, 2019), <https://okpolicy.org/oklahomas-debtors-prisons-arent-just-nuisance-theyre-epidemic/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

Tulsa County alone.³⁴ Those cases imposed about \$154 million in court fines and fees, of which less than a quarter—about 23%—was collected as of fall 2017.³⁵ Failure-to-pay warrants are a massive contributor to jail admissions in Oklahoma. In Tulsa, 29% of all jail bookings involved failure to pay in July 2013, and failure to pay court costs was the fourth most common offense for Tulsa jail admissions in 2016.³⁶ In 2016 and 2017, 1,124 women booked into the Tulsa County Jail were there for failure to pay.³⁷

In the many Oklahoma counties where it operates, Aberdeen tells debtors a warrant was issued because they failed to pay court debt and that if they do not pay, the warrant will be executed and they will be jailed.³⁸ Aberdeen determines the payment amount sufficient to recall the warrant, keeping the debtor out of jail at least temporarily.³⁹

When people cannot pay, Aberdeen offers no relief—the company provides no option to set a court date and voluntarily appear before the judge to explain the

³⁴ *Id.*

³⁵ *Id.*

³⁶ Gentzler, *supra* note 4, at 9; Nancy Fishman et al., *Report to Tulsa County Stakeholders on Jail Reduction Strategies*, Vera Institute of Justice 14 (August 2017), <https://www.vera.org/downloads/publications/Vera-report-to-Tulsa.pdf#page=14>.

³⁷ Human Rights Watch, *You Miss So Much When You're Gone* 28 (2018), https://www.hrw.org/sites/default/files/report_pdf/us0918_web_0.pdf.

³⁸ SAC ¶ 2, 7, 82.

³⁹ SAC ¶ 72, 73, 77.

reasons for nonpayment. And its employees do not mention Rule 8’s protections.⁴⁰ Aberdeen employees instead prevent debtors from accessing these court procedures: they are instructed to never tell debtors they can call court clerks, and they are trained to “overcome” objections to payment based on inability to pay, including situations when a person cannot find a job or is on fixed income.⁴¹ The lower court opinion states that Rules 8.4 and 8.5 enable Oklahoma courts to alter defendants’ fines and fees any time, but fails to address Aberdeen’s policy of blocking people from seeking relief from the court in any context other than following jailing on a warrant.⁴²

Aberdeen gives debtors the stark choice of paying what its employees demand or being jailed following insufficient payment. And when, as is common, debtors explain to Aberdeen employees that they cannot keep up with payments, Aberdeen contacts court clerks to request a new warrant—providing no information about indigence or ability to pay—leaving debtors with no notice or ability to be heard prior to the issuance of the warrant.⁴³

Debtors arrested on a failure-to-pay warrant wait in jail until the court’s next available hearing date, called a “cost docket” in many jurisdictions, at which time

⁴⁰ SAC ¶ 82.

⁴¹ SAC ¶¶ 83, 86.

⁴² Op. at 6.

⁴³ SAC ¶¶ 89, 93.

the judge often releases the debtor with instructions to keep paying.⁴⁴ Instead of resolving the matter, a defendant's appearance at a cost docket is just another step in a cycle of arrest and the piling on of additional debt. One judge compared managing the cost docket to "babysitting," saying that he repeatedly sees the same people for failure to pay.⁴⁵

The experiences of the named plaintiffs in this case, as well as other indigent defendants trapped in this system highlight the cruelty and futility of the enterprise. When this case was filed, plaintiff Carly Graff was 40 years old, indigent, unemployed, and dependent on food stamps to feed her two young children.⁴⁶ Ms. Graff struggled to afford food, medicine, rent, and clothing, and feared her electricity would be shut off because she could not pay her bill.⁴⁷ In 2017, Ms. Graff was assessed over \$250 for a traffic ticket, which she could not pay.⁴⁸ Solely because she had not paid, the Rogers Clerk obtained a warrant for her arrest.⁴⁹ The clerk then transferred her case to Aberdeen for collection, adding Aberdeen's 30% surcharge, \$100.58.⁵⁰ Aberdeen repeatedly demanded payment from Ms. Graff and

⁴⁴ SAC ¶¶ 129, 130.

⁴⁵ Genzler, *supra* note 4, at 10.

⁴⁶ SAC ¶ 156.

⁴⁷ *Id.*

⁴⁸ *Id.* at ¶ 158.

⁴⁹ *Id.*

⁵⁰ *Id.*

threatened arrest for noncompliance.⁵¹ Terrified, Ms. Graff removed herself from the outside world—leaving home only to take her children to their school bus stop.⁵² She had no option to explain her circumstances to the court without first being arrested and jailed, and Aberdeen’s threats coupled with the illegal warrant for a debt she could not hope to pay drastically diminished her quality of life.

Similar feelings of hopelessness and fear abound in accounts of other Oklahomans subjected to Aberdeen’s practices. Plaintiff Melanie Holmes was “scared to death” of being arrested for nonpayment and therefore paid Aberdeen for years even as she struggled to afford necessities.⁵³ Her Aberdeen payments came at the expense of purchasing food for her family, but when she explained to Aberdeen she could not keep paying, they refused to adjust her payment plan.⁵⁴ After years of struggling to comply, Ms. Holmes lost her job and had to live out of her car and friends’ homes.⁵⁵ She could not care for her youngest daughter and had to leave her in the care of the daughter’s father.⁵⁶ Even then, Aberdeen called her on a near-daily basis to demand payment and threaten arrest.⁵⁷ Eventually Ms.

⁵¹ *Id.* at ¶ 159.

⁵² *Id.* at ¶ 160.

⁵³ *Id.* at ¶ 203.

⁵⁴ *Id.* at ¶ 203–04.

⁵⁵ *Id.* at ¶ 205.

⁵⁶ *Id.*

⁵⁷ *Id.*

Holmes was jailed for six days for failure to pay before seeing a judge.⁵⁸ The judge released Holmes with no inquiry concerning the reasons for her nonpayment, directing her to contact Aberdeen and set up another payment plan.⁵⁹ But Aberdeen demanded that Holmes pay hundreds of dollars to have a separate failure-to-pay warrant cleared despite her demonstrable inability to pay.⁶⁰ Again fearing arrest and powerless to comply, Holmes took a bus to Oregon with her youngest daughter and her husband, where they now live with family.⁶¹ Ms. Holmes's other family members still live in Oklahoma, but her failure-to-pay warrants make her afraid to return.⁶²

Other plaintiffs' accounts provide further details about the company's methods. In one case, Aberdeen refused to accept two successive payments of \$125 rather than a lump sum of \$250 to have a disabled man's failure-to-pay warrant recalled, then contacted his daughter to say that if the money was not paid, her father would be arrested.⁶³ Another indigent debtor lost the right to see his son after Aberdeen's threats compelled him to pay Aberdeen rather than child support.⁶⁴ In a third case, Aberdeen demanded \$1,000 to recall warrants for a

⁵⁸ *Id.* at ¶ 209.

⁵⁹ *Id.* at ¶ 210.

⁶⁰ *Id.* at ¶ 211.

⁶¹ *Id.* at ¶ 212.

⁶² *Id.* at ¶ 213.

⁶³ SAC ¶ 162–67.

⁶⁴ *Id.* at ¶ 173.

woman whose only income was a \$543 monthly disability benefit she received to care for her intellectually disabled adult son.⁶⁵

As Ms. Holmes's story shows, even after being arrested on a failure-to-pay warrant, jailed, and brought before a judge, court debtors remain subject to re-arrest. New York Times editorial columnist Nicholas Kristof reported the same.⁶⁶ He recounts visiting Tulsa County Jail and meeting Rosalind Hill, a woman struggling with mental illness, who was incarcerated a total of 18 months in "short stints" for failing to pay fines and fees related to petty crimes.⁶⁷ Kristoff also encountered Amanda Coleman, a single mother struggling to pay old fines while raising three children.⁶⁸ Coleman was jailed four times for being behind on payments, creating havoc with her children and challenging her ability to keep a job.⁶⁹ For Holmes, Hill, Coleman, and countless others who cannot afford to pay, the cycle of fear, spiraling debt, and jail repeats without end. The day Kristof visited Tulsa County Jail, 23 people were held there for failure to pay fines and fees.⁷⁰ That's one day in just one of many Oklahoma counties that contracted with

⁶⁵ *Id.* at ¶ 182–84.

⁶⁶ Nicholas Kristof, *Is It a Crime to Be Poor?*, New York Times (June 11, 2016), <http://www.nytimes.com/2016/06/12/opinion/sunday/is-it-a-crime-to-be-poor.html>

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

Aberdeen and rely on failure-to-pay warrants to collect. This system creates misery on a vast scale, and in many counties the process continues unabated.

C. Oklahoma courts should employ alternatives to private bounties, warrants, and relentless threats of arrest to collect outstanding monetary sanctions.

A system that taxes the poor with unpayable fines and then arrests them for failure to pay keeps people in poverty, breeds distrust of government, and sometimes even drives people to break the law to keep up with payments and avoid jail. As the Supreme Court noted, though the government has an interest in punishment and deterrence, that interest can “often be served by alternative means” rather than jailing for nonpayment. *Bearden*, 461 U.S. at 672.

Under Rule 8, Oklahoma already requires courts to assess defendants’ ability to pay when imposing fines, and Oklahoma courts can improve the process for imposing and collecting monetary sanctions by following existing requirements. Proper use of Rule 8 procedures to avoid imposing unpayable debt would do much to protect debtors from harsh consequences they are powerless to avoid.

Proper Rule 8 proceedings would also spare the government the substantial expense of using law enforcement and jails to chase money that does not exist. Though Aberdeen’s monthly revenue has grown over tenfold since it contracted to do this work in 2010, fine and fee revenue in multiple courts actually declined

several percent between 2003 and 2015.⁷¹ The Legislature repeatedly added new fees to raise revenue but people cannot pay what they don't have.

National organizations with a variety of vantage points into the criminal legal system stress the importance of not taxing defendants with fines and fees they cannot pay, and in not jailing people unable to pay the fines and fees assessed. The American Bar Association recommends mandatory ability-to-pay hearings before arrest, where “[c]ourts should apply a clear and consistent standard to determine an individual’s ability to pay fines and court fees.”⁷² And it recommends alternatives to incarceration such as extension of time to pay, reduction in the amount owed, or proportional alternative sanctions that consider the debtor’s capacity to comply and impact on the debtor’s dependents.⁷³ The Conference of State Court Administrators and the Conference of Chief Judges created a National Task Force on Fines, Fees and Bail Practices, which recommended community service, fines tied to offenders’ income, and non-financial compliance as alternative sanctions.⁷⁴

⁷¹ SAC ¶¶ 29, 107 (Aberdeen revenue); Gentzler, *supra* note 4, at 16–17 (court revenue).

⁷² Task force on Building Public Trust in the American Justice System, *Ten Guidelines on Court Fines and Fees*, American Bar Association, 4, 6–7 (January 25, 2017), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-ten-guidelines_.pdf.

⁷³ *Id.* at 6.

⁷⁴ National Task Force on Fines, Fees and Bail Practices, *Principles on Fines, Fees and Bail Practices*, 6 (Dec. 2017),

Likewise, the American Probation and Parole Association endorses consideration of ability to pay before imposing monetary sanctions, and is committed to “[n]ot recommend[ing] incarceration for any individual solely as a result of inability to pay.”⁷⁵ In addition, some state and local jurisdictions have revisited their procedures for imposing and collecting fines and fees, adopting new rules to protect defendants.⁷⁶

Some jurisdictions that ended incarceration for failure to pay fines and fees even discovered their reforms increased court revenue: Four years after ending jail commitments for failure to pay, the San Antonio Municipal Court found revenue had increased 74%.⁷⁷ When defendants believe the alternatives are paying an impossible sum or being jailed, they avoid the court at all costs and live in fear. When they believe they will retain their freedom and dignity and that the court will

https://www.ncsc.org/__data/assets/pdf_file/0021/61590/Principles-on-Fines-Fees-and-Bail-Practices-Rev.-Feb-2021.pdf

⁷⁵ American Probation & Parole Association, *Use of Monetary Judgments for Justice-Involved Individuals* (Mar. 2017), https://www.appa-net.org/eweb/Dynamicpage.aspx?webcode=IB_Resolution&wps_key=d7b47532-7ae7-4464-b8bb-d667fb2f3d10.

⁷⁶ U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications* 74 (Sept. 2017), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2017.pdf.

⁷⁷ Texas Appleseed, *Pay or Stay: The High Cost of Jailing Texans for Fines & Fees* 32 (Feb. 2017), https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf.

allow them to pay what they can reasonably afford, they often engage in the process.⁷⁸

Defendants’ system of using jail and the threat of jail to extract payments from even the poorest court debtors exacerbates the harm created by Oklahoma’s reliance on fines and fees to fund government. Transitioning to available, far more humane alternatives would better serve debtors, their families, and all Oklahomans.

II. Defendants’ use of failure-to-pay warrants and jail to coerce payment is unconstitutional absent a prior judicial determination that the failure to pay was willful.

In addition to being against the interests of debtors and the public at large, Defendants’ use of failure-to-pay warrants and threats of arrest to coerce payment is unconstitutional. Decades ago, the Supreme Court held that “in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for failure to pay,” and that a probationer who is unable to pay despite making bona fide efforts to do so may not be imprisoned if there are

⁷⁸ In 2017, the Oklahoma Justice Reform Task Force recommended further consideration of incentivizing “continual and consistent payments” by releasing debtors from their outstanding debt once a threshold had been paid. Oklahoma Justice Reform Task Force, *Final Report* 36 (February 2017), https://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=29119. The Task Force’s suggestion has not yet been implemented.

alternative measures to meet the state’s interest in punishment. *Bearden*, 461 U.S. at 673.

The Justices framed the constitutional violation broadly, as “imprisoning a person solely because he lacks funds to pay the fine,” *Id.* at 674, the core conduct at issue here. Accordingly, courts have held that *Bearden* prohibits the issuance of a warrant, arrest, and jailing for failure to pay alone, even where the debtor was given an ability-to-pay determination soon after the warrant was executed or where one purported purpose of jailing was to bring the person before the court. One court found that a system where probationers were arrested on warrants alleging failure to pay, then held in jail pending a formal probation revocation hearing was “precisely the conduct the Supreme Court rejected in [*Bearden*]”: probationers had no opportunity to assert inability to pay before the hearing and the only way to secure immediate release was through payment of a preset amount they could not afford. *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 768–70 (M.D. Tenn. 2015). The fact that probationers could raise inability to pay in a future revocation hearing couldn’t rescue the program from unconstitutionality. *Id.*

Likewise, another court held that the plaintiff stated a claim for unconstitutional liberty deprivation when he was jailed overnight on a warrant issued for failure to pay without a prior ability-to-pay determination, though he was brought before a judge and released the following morning. *West v. City of*

Santa Fe, Texas, 3:16-CV-0309, 2018 WL 4047115, at *2, *7 (S.D. Tex. Aug. 16, 2018), *report and recommendation adopted*, 2018 WL 5276264 (S.D. Tex. Sept. 19, 2018). The *West* court explained:

When, as here, an individual fails to pay a fine that has been previously imposed by the sentencing court, *Bearden* requires some form of pre-deprivation procedure for determining whether the person is indigent and the reasons the individual has failed to pay the fine ... To allow [the municipality] to detain an individual—even just overnight—without providing an ability to pay hearing beforehand would, in effect, often result in individuals being jailed solely because they cannot afford to pay the fine. That is something the Supreme Court has expressly held is not permitted.

Id. at *9 (emphasis added).

Most recently, the Idaho Supreme Court reversed a trial court that jailed a criminal defendant on a warrant issued for failure to pay fines and fees alone, holding that “under *Bearden*, a court must inquire into an individual’s ability and efforts to pay a court-ordered fine before issuing a warrant of attachment against the individual for failing to pay.” *Re Petition for Writ of Prohibition, Beck v Elmore County Magistrate Court*, 489 P.3d 820, 836 (Idaho 2021).

These rulings do not undermine courts’ ability to enforce orders to pay fines and fees: if a defendant is not paying, courts can issue a notice to

appear and require defendants to explain why. And if defendants fail to appear, courts can take further measures to compel appearance.

Despite *Bearden* and multiple cases applying its pivotal holding to circumstances akin to those here, the lower court insists it is permissible to issue a warrant for failure to pay alone and that “a defendant’s arrest on an active bench warrant is not tantamount to incarceration of the indigent without a court finding that their failure to pay costs, fines and fees was willful.”⁷⁹ But the arrests at issue here are exactly that: people spend days in jail solely because they cannot pay the sum Aberdeen deems sufficient to recall their warrant.⁸⁰ *Bearden* does not permit that result, as courts have repeatedly recognized in cases such as *West*, *Rodriguez*, and *Beck*.⁸¹

The district court also concluded that Defendants had no obligation to determine ability to pay before issuing the warrant because debtors have the burden to prove inability to pay and the “inquiry is in the nature of an

⁷⁹ Op. at 8.

⁸⁰ See, e.g., SAC ¶ 24 (Plaintiff Holmes spent 6 nights in jail), ¶¶ 165–167 (Aberdeen threatened to arrest disabled man for nonpayment alone), ¶ 96 (Aberdeen negotiating payment required for release of people arrested on failure to pay warrants).

⁸¹ In addition to finding that failure to pay alone is sufficient to issue a warrant and jail Plaintiffs, the district court concludes without explanation that Plaintiffs’ warrants were for failure to appear. Op. at 7 n.6. Appellants’ Opening Brief shows the court is mistaken. Appellants’ Opening Br. at 7, 29–30, 30 n.14.

affirmative defense and comes when a hearing on the issue on noncompliance is held.”⁸²

The district court is incorrect. The Supreme Court directed that before incarcerating a person for failure to pay a fine, a court “*must inquire*” into the reasons for nonpayment and, if the defendant cannot pay despite sufficient good faith efforts, the court “*must consider* alternate measures of punishment other than imprisonment.” *Bearden*, 461 U.S. at 672–73 (emphasis added). Accordingly, until now, “[n]o court has held that indigent debtors are required to initiate proceedings to request a modification of their financial obligations or otherwise risk imprisonment for nonpayment.” *Cain v. City of New Orleans*, CV 15-4479, 2016 WL 2962912, at *5 (E.D. La. May 23, 2016).

Under the district court’s reasoning, courts and debt collectors could ignore criminal justice debtors’ assertions of inability to pay, deny debtors the ability to initiate court proceedings required to determine ability to pay, issue warrants authorizing debtors’ arrest for failure to pay alone, jail debtors for days following arrest, release debtors from custody following a court hearing giving them more time to pay, and then initiate the same cycle weeks or months later, again pressuring friends and family to pay on

⁸² Op. at 6.

debtors' behalf. Such a system makes a mockery of *Bearden* and a long line of cases confirming this is not the law.

III. The district court's failure to reach the merits of the case and consider the constitutional questions was in error.

Though the district court engaged in a flawed analysis of several components of Plaintiffs' claims, it ultimately failed to reach the merits of those claims, instead dismissing the case under *Rooker-Feldman*, the *Heck* Doctrine, and *Younger* abstention. Amici strongly agree with the detailed arguments raised in Appellants' Opening Brief concerning the district court's succession of errors in applying these three doctrines. Here amici just briefly highlight several of the district court's most egregious misunderstandings about Plaintiffs' claims and these doctrines.

A. *Rooker-Feldman* does not apply.

The district court's *Rooker-Feldman* analysis shows confusion about what Plaintiffs' claims entail. The district court acknowledges that for the doctrine to apply, "the federal plaintiff must complain of an injury caused by a state-court judgment," then asserts that "Plaintiff's claimed injuries are the direct result of their state court sentences and judgments," and that "Plaintiffs seek money damages in an effort to put themselves in the same position they would have been

in had they never received their state court judgments.”⁸³ But Plaintiffs’ claims are not challenging their judgments or sentences: nothing in the claims presented or the prayer for relief seeks to either undo the state court’s determination of guilt or alter the fine imposed, or seeks damages based on the imposition of the sentence itself. If plaintiffs prevailed on all claims, they would remain guilty of the underlying infractions and they would owe the amount of money indicated in their sentencing orders.

Plaintiffs have made it abundantly clear they are targeting the *manner* in which Aberdeen and others enforce judgments, not the judgments or sentences themselves. And a challenge to the aggressive manner in which a third party enforces a court order is distinct from a challenge to the court order itself and is not subject to *Rooker-Feldman*. See, e.g., *Renneke v. Florence Cty., Wis.*, 594 F. App’x 878, 880 (7th Cir. 2014) (“To the extent that [plaintiff] challenges the manner in which the [defendant] enforced the contempt order—an injury distinct from the state-court judgment itself—he clears the jurisdictional hurdle [*Rooker-Feldman*].”); *West*, 2018 WL 4047115, at *6 (“the *Rooker-Feldman* doctrine does not preclude a claim, such as the one raised in this case, concerning the constitutionality of customs or practices utilized to enforce judgments”). There is no *Rooker-Feldman* issue here whatsoever.

⁸³ Op. at 13, 17–18.

B. *Heck* does not apply.

The district court rightly notes that *Heck* bars claims that “would render a conviction or sentence invalid.”⁸⁴ But the court then finds that *Heck* bars Plaintiffs’ claims here because their “§1983 claims are premised on the argument that Defendants have a ‘policy and practice of arresting and confining individuals on debt-collection arrest warrants issued based on unsworn statements, without inquiry into the individuals’ ability to pay or other pre-deprivation process, and on warrant applications that no reasonable person could believe were sufficient to justify arrest.’”⁸⁵ This is a challenge to the manner in which Aberdeen and others enforce the sentences, *not* a challenge to the convictions or sentences themselves. *Heck* therefore doesn’t apply.

C. *Younger* abstention does not apply.

The district court acknowledged that for *Younger* abstention to apply, the state court must offer an adequate forum to hear the federal plaintiff’s claims from the federal lawsuit.⁸⁶ But its assertion that Plaintiffs can make “any and all constitutional arguments to the state court” and then appeal adverse Rule 8 determinations concerning ability to pay ignores two key facts.⁸⁷ First, Plaintiffs

⁸⁴ Op. at 21.

⁸⁵ Op. at 21.

⁸⁶ Op. at 19.

⁸⁷ Op. at 20.

allege that Aberdeen is *actively preventing* debtors from accessing Rule 8 proceedings pre-deprivation by telling them they cannot reach out to courts directly and that they only have a choice of paying or being jailed on a warrant before being brought before the court.⁸⁸ And second, any court proceedings debtors interacting with Aberdeen do get are after they have already suffered the constitutional harm of being jailed. In *Gerstein v. Pugh*, 420 U.S. 103, 107 n.9 (1975), the Supreme Court confirmed that *Younger* is inapplicable when arrestees bring a claim concerning the legality of a detention that occurs before the arrestee is brought before the court. The district court here ignored this binding authority and cases Plaintiffs cited showing its application.

* * *

The district court's expansion of *Rooker*, *Heck*, and *Younger* has no grounding in precedent. Letting the district court's ruling stand would be an injustice in this case and would encourage other courts to abdicate their responsibility to reach the merits of constitutional questions under similar circumstances.

CONCLUSION

This Court should reverse the district court and remand the case for further proceedings.

⁸⁸ SAC ¶¶ 73, 82, 83.

August 9, 2021

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This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5), and Tenth Circuit Rule 32 because this brief contains 6495 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as calculated by Microsoft Word 2016. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a) because it has been prepared in proportionally spaced typeface using 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on August 9, 2021, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

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