

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

No. 27 EAP 2021

**COMMONWEALTH OF PENNSYLVANIA,
Appellee**

v.

**ALEXIS LOPEZ,
Appellant**

**BRIEF OF *AMICI CURIAE* THE FINES AND FEES JUSTICE CENTER
AND THE CATO INSTITUTE IN SUPPORT OF APPELLANT
ALEXIS LOPEZ**

Appeal from the Order and Opinion of the Superior Court dated March 23, 2021,
in No. 1313 EDA 2018, affirming the Judgment of Sentence of April 27, 2018,
issued by the Court of Common Pleas of Philadelphia County Criminal Division in
No. CP-51-CR-0004377-2015

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STATEMENT OF INTEREST OF AMICI

The Fines and Fees Justice Center (“FFJC”) is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local courts. FFJC’s mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably. As a national hub for information, resources, and technical assistance on fines and fees, FFJC works with impacted communities, researchers, advocates, legislators, justice system stakeholders, and media across the nation. We also provide *amicus curiae* assistance at the state and federal level in cases where issues of economic justice intersect with state and constitutional law.

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

SUMMARY OF ARGUMENT

A system of justice that works differently for those who can afford to pay fines than for those who cannot is no system of justice at all. *See Griffin v. Illinois*, 351

U.S. 12, 19 (1956) (plurality opinion). After all, “indigency [] is itself no threat to the safety or welfare of society.” *Bearden v. Georgia*, 461 U.S. 660, 668 n.9 (1983). Yet, the Superior Court’s interpretation of Rule 706(C), coupled with the Commonwealth’s current bench-warrant system, threatens bedrock principles of fundamental fairness for individuals like Mr. Lopez, whose probation can result in incarceration for failure to pay mandatorily imposed court costs without the slightest inquiry into their ability to pay those costs. In failing to impose an ability-to-pay requirement at sentencing, the Superior Court effectively created a two-tiered system wherein indigent defendants face fundamentally unfair treatment, unreasonable seizures, deprivations of personal liberty without process, and inherently disproportionate sentences. Meanwhile defendants with the means to pay court-imposed fines may avoid any adverse treatment by the Commonwealth. Neither the United States nor Pennsylvania constitution allows such disparity.

Basic constitutional protections clash with the Superior Court’s interpretation of Rule 706(C). To start, the Fourteenth Amendment’s Equal Protection Clause prevents the “invidious discrimination” that arises when courts treat poor defendants differently than well-off defendants. *See Williams v. Illinois*, 399 U.S. 235, 242 (1970); *see also Bearden*, 461 U.S. at 668–69; *Tate v. Short*, 401 U.S. 395, 398 (1971). Likewise, the Fourth Amendment and Article I, § 8 of the Pennsylvania Constitution prevent unreasonable seizures. Absent an ability-to-pay evaluation at

sentencing, however, a court cannot begin to assess whether a defendant's non-payment constitutes a probation violation. Nevertheless, in Pennsylvania a court may issue a warrant and seize an individual for three-days or more without ever assessing ability to pay. The failure to assess an individual's ability to pay runs headlong into the Fourteenth Amendment's due process guarantee.

The United States and Pennsylvania constitutions speak in one voice to prohibit violation of these fundamental rights. Amici respectfully ask the Court to align its interpretation of Rule 706(C) to require an ability-to-pay hearing at sentencing to ensure the constitutional treatment of indigent defendants within the Commonwealth.

ARGUMENT

I. THE SUPERIOR COURT'S INTERPRETATION OF RULE 706 AND THE CURRENT BENCH WARRANT SYSTEM IN PENNSYLVANIA UNCONSTITUTIONALLY ENABLE INCARCERATION WITHOUT A HEARING.

The Superior Court's interpretation of Rule 706, coupled with Pennsylvania's current bench warrant system, allows the unconstitutional seizure and incarceration of indigent defendants whose failure to pay mandatory court costs was non-willful. The Superior Court held that a sentencing court need not perform any inquiry into a defendant's ability to pay before imposing court costs. *Commonwealth v. Lopez*, 248 A.3d 589, 590 (Pa. Super. Ct. 2021). Under Pennsylvania law, when a defendant fails to pay court costs, "the common pleas court judge may issue a bench warrant

for the collection of the fine and costs.” Pa. R. Crim. P. 706 cmt. “When a ‘failure to pay’ bench warrant is issued, it must be executed by a police officer,” and a defendant who is unable to pay must be arrested and taken to court for a hearing. *Id.* (citing Pa. R. Crim. P. 150). The defendant can be jailed for over three days while waiting for an ability-to-pay hearing. *See* Pa. R. Crim. P. 150 (A)(5)(b) (allowing incarceration for “72 hours, or the close of the next business day if the 72 hours expires on a non-business day”). Therefore, a defendant can be incarcerated without any prior hearing to determine whether their non-payment was willful. In other words, a defendant who cannot afford to pay costs, can be arrested and put in jail for days, merely because of his indigency. Without question, the Superior Court’s interpretation of Rule 706 is unconstitutional and must be avoided.

A. Arresting and Incarcerating an Indigent Defendant for Failure to Pay Mandatory Court Costs Violates the Fourteenth Amendment’s Equal Protection Guarantee.

1. The Fourteenth Amendment unambiguously protects indigent defendants from imprisonment based solely on the inability to pay court-ordered fines.

Section one of the Fourteenth Amendment enshrined two fundamental guarantees against government interference in American life. First, no state “shall . . . deprive any person of life, liberty, or property, without due process of law” and

second, no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV, § 1.¹

The Supreme Court has clarified that these protections apply to individuals, like Mr. Lopez, required to pay mandatory court fees under a judgment of conviction. As early as 1970, the Court established that the Fourteenth Amendment does not allow incarceration based solely on a criminal defendant’s inability to pay fines or costs. *See Williams v. Illinois*, 399 U.S. 235 (1970). In *Williams*, the Court considered whether an indigent defendant’s failure to pay the fines and fees of his conviction could support a custodial sentence. Williams was sentenced to one-year in prison—the statutory maximum under Illinois law—and ordered to pay a \$500 fine plus \$5 in court fees. When Williams was unable to satisfy the fines and fees at the end of his prison sentence, the Illinois court re-committed him to prison to “work off” the remaining balance at a rate of \$5 per day. *Id.* at 236. Because Williams’ outstanding balance was \$505 at the time of incarceration, the Illinois law effectively extended his sentence 101 days past the one-year statutory maximum. *Id.* at 237.

¹ The Commonwealth has codified these rights into its own constitution. *See* Pa. Const. art. I, § 26. Pennsylvania has expressly adopted the federal standards for reviewing Fourteenth Amendment claims. *Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. 2000) (citations omitted). This brief, therefore, focuses on Supreme Court precedent.

The Court resoundingly held that Illinois could not imprison non-paying defendants longer than the statutory maximum based solely upon their inability to satisfy fines and court fees as such a system would work an “impermissible discrimination that rests on ability to pay.” *Id.* at 241. The Court’s holding is consistent with both the Constitution and common sense. The Fourteenth Amendment’s Equal Protection Clause does not allow a state to subject a certain class of defendants to greater punishment because they are less able to satisfy financial obligations than more affluent defendants. *Id.* at 242. Although the challenged law facially applied to all criminal defendants, it worked an “invidious discrimination” on a designated class of defendants who were unable to satisfy their financial obligations. *Id.* The Court rejected the argument that defendants could avoid incarceration simply by paying their costs, classifying that purported choice as “illusory” at best. *Id.* Illinois thus violated the Equal Protection Clause when it singled out one group of defendants for imprisonment in excess of the statutory maximum based solely on economic status. *Id.* at 244.

The Supreme Court reinforced *Williams* the next year. *Tate v. Short*, 401 U.S. 395 (1971). In *Tate*, petitioner owed \$425 in traffic fines in Houston, Texas. *Id.* at 396. When petitioner failed to pay the fines, he was committed to a prison farm to satisfy the outstanding balance. *Id.* 396–97. The Court held that equal protection prohibits the state from imprisoning a defendant based on the inability to pay a fine

regardless of “whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine.” *Id.* at 398. *Tate* also clarified the bounds of constitutional protection afforded to defendants who have failed to satisfy court-imposed fines and costs. It held that the Fourteenth Amendment insulates from incarceration all defendants whose failure to pay fines and costs was not willful. *Id.* at 400. This makes sense. Imprisoning indigent defendants is inherently self-defeating, as incarceration does little to promote payment while “saddl[ing] the State with the cost of feeding and housing” the defendants while imprisoned. *Id.* at 399.

Twelve years later, the Court extended *Williams* and *Tate* to probation-revocation proceedings. *Bearden v. Georgia*, 461 U.S. 660 (1983). *Bearden* summarized the rules from *Williams* and *Tate* as, “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.” *Id.* at 667–68. This is especially applicable where, as here, the defendant is on probation, a sentencing decision that “reflects a determination by the sentencing court that the State’s penological interests do not require imprisonment.” *Id.* at 670 (citing *inter alia Williams*, 399 U.S. at 264 (Harlan, J., concurring)).

Bearden reinforced that the Constitution affords greater protection to defendants whose failure to pay court-imposed fines was beyond their control than

it does to defendants who are able, but unwilling, to pay such fines. This constitutional distinction hinges certain rights on the individual defendant's ability to pay. A sentencing court, therefore, cannot know the extent of punishment available to a non-paying defendant without performing some inquiry into the circumstances underlying that non-payment. Put simply, defendants whose failure to pay was beyond their control "lack [the] fault" necessary to violate the terms of their probation, which renders revocation "fundamentally unfair." *Id.* at 668–69 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

2. *Williams, Tate, and Bearden* demonstrate that equal protection demands an ability-to-pay analysis before depriving a defendant of personal liberty.

Given that indigent defendants face arrest for non-payment despite "lack[ing the] fault" necessary to be incarcerated while well-off defendants do not face arrest, it follows that a sentencing court must evaluate each individual defendant's ability to pay court-ordered fines and costs prior to issuing a warrant for arrest. *See id.* At minimum, the court must "consider[] the reasons [for non-payment]" before issuing an arrest warrant. *Id.* at 674. And where the reason for a defendant's non-payment is that he was unable to pay despite making all reasonable efforts to do so, the State cannot seize that defendant without committing "the same constitutional defect condemned in *Williams*." *See id.* at 667 (citing *Tate*, 401 U.S. at 398). Indeed, the

Fourteenth Amendment’s Equal Protection Clause does not allow such distinctions among defendants.

By interpreting Rule 706 to delay any consideration of ability to pay until an actual contempt hearing, the Superior Court’s interpretation has the effect of permitting issuance of a bench warrant for non-payment without determining whether non-payment was willful. This spurns the equal protection mandate. The issuance of a bench warrant for non-payment necessarily results in a seizure and further incarceration² absent any evidence of ability to pay. Pennsylvania’s bench warrant statute provides for a hearing “*after the individual is lodged in the jail of the county of issuance.*” Pa. R. Crim. P. 150(A)(5) (emphasis added). That incarceration could last seventy-two-hours—or more on holidays and weekends—before ending in a hearing. *Id.* All the while, the court is oblivious to whether the individual “has made all reasonable efforts to pay the fine . . . and yet cannot do so through no fault of his own.” *Bearden*, 461 U.S. at 668. Such a practice flies in the face of the Fourteenth Amendment’s Equal Protection guarantee.

Several state and federal courts have come to the same conclusion and apply the Supreme Court’s guidance to prohibit sentencing judges from incarcerating

² Although Pa. R. Crim. P. 150(A)(5) purports to provide a speedy hearing, it does not prevent incarceration prior to assessing a defendant’s ability to pay. At its core, “incarceration” occurs when the state detains the individual. *See Incarceration, Black’s Law Dictionary* (8th ed. 2004) (defining “incarceration” is “the act or process of confining someone). Yet, arresting a defendant for failure to pay does exactly that.

individuals without first assessing their ability to pay. The Supreme Court of Idaho, for example, recently acknowledged the constitutional pitfalls inherent in incarcerating a non-paying defendant pending an ability-to-pay hearing. *See Beck v. Elmore City Magistrate Court*, 489 P.3d 820 (Idaho 2021). In assessing a magistrate judge’s issuance of a warrant for non-payment, the Court aptly recognized that the failure to assess a defendant’s ability to pay violates *Bearden* by “effectively turn[ing] a fine into a prison sentence.” *Id.* at 835–36. The solution to this constitutional pitfall was to require courts to “inquire into an individual’s ability to pay a court-ordered fine before issuing a warrant.” *Id.* at 836.

The Southern District of Texas likewise interprets *Bearden* to require “some form of pre-deprivation procedure” before detaining a defendant for non-payment. *West v. City of Santa Fe*, No. 3:16-cv-0309, 2018 WL 4047115, 2018 U.S. Dist. LEXIS 144012, at *25 (S.D. Tex. Aug. 16, 2018), *report and recommendation adopted by West v. City of Santa Fe*, No. 3:16-cv-0909, 2018 WL 5276264, 2018 U.S. Dist. LEXIS 161130, at *1 (S.D. Tex. Sept. 19, 2018). Detention without an ability-to-pay hearing—“even just overnight”—is what the Supreme Court “has expressly held is not permitted.” *See id.* (citing *Bearden*, 461 U.S. 667–68); *accord United States v. Bichon*, No. 88-6288, 1989 WL 63268, 1989 U.S. App. LEXIS 8557, at *4 (6th Cir. June 14, 1989) (holding “probationer should not be placed in custody merely because he lacks the financial resources to pay a fine”).

B. The Practical Effect of the Superior Court’s Interpretation of Rule 706 is that Defendants are Subject to Arrest without Probable Cause or Due Process in Violation of the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

The interplay between the Superior Court’s interpretation of Rule 706 and the current bench-warrant process necessarily results in the arrest and detention of individuals for whom the court has absolutely no evidence that the failure to pay fines was willful. These deprivations of personal liberty are expressly forbidden by both the Fourteenth Amendment’s Due Process Clause and the Fourth Amendment’s categorical ban on unreasonable seizures. Pennsylvania’s own constitution reinforces the U.S. Constitution’s prohibitions. Thus, the Superior Court’s interpretation of Rule 706 is unconstitutional under any standard.³

³ Amici acknowledge that in *Commonwealth v. Hernandez*, 917 A.2d 332, 333 (Pa. Super. Ct. 2007), the Superior Court held that Rule 706 “ensure[s] that an indigent defendant will be afforded an opportunity to prove his financial inability to pay the costs of prosecution before being committed to prison,” and, thus, meets the constitutional requirements set forth in *Fuller v. Oregon*, 417 U.S. 40 (1974). To state the obvious, this Court is not bound by *Hernandez*, in which amici contend the Superior Court employed a far too narrow interpretation of *Fuller*—a case upholding the constitutionality of a statute that allowed for an ability-to-pay assessment at (1) sentencing, (2) any point after sentencing, and (3) after a failure to pay. *See Fuller*, 417 U.S. at 45–46. Moreover, *Hernandez* did not address the constitutional arguments raised herein; it did not even mention *Williams*, *Tate*, or *Bearden*. And, crucially, it did not consider how Rule 706 interacts with Pennsylvania’s bench warrant system, which allows for a defendant to be seized and imprisoned for three days before having his first ability-to-pay hearing.

1. Failure to hold a pre-arrest ability-to-pay hearing necessarily results in unreasonable seizures.

The Fourth Amendment to the United States Constitution, as applied against the States through the Due Process Clause of the Fourteenth Amendment, protects all Pennsylvanians from “unreasonable searches and seizures.” U.S. Const. amends. IV, XIV. To that end, both constitutional provisions require that no warrant issue without probable cause, supported by oath or affirmation. *Id.* The Superior Court’s interpretation of Rule 706, coupled with the Commonwealth’s current bench-warrant process, however, creates an unreasonable process by which any indigent defendant may be arrested for failing to pay mandatory court fees regardless of whether the failure to pay was willful.

The Superior Court’s holding allows judges to unconstitutionally issue warrants for nonpayment without any evidence of probable cause. Under the Superior Court’s interpretation, a defendant may be ordered to pay fees he cannot pay, and when he fails to pay them, the court may issue a bench warrant without any further finding. Pa. R. Crim. P. 706 cmt. Pursuant to that warrant, a police officer must arrest the defendant. *Id.* (citing Pa. R. Crim. P. 150). This means courts would be unconstitutionally authorizing seizures without probable cause that nonpayment was willful, because there has been no inquiry, at any prior stage, as to whether a defendant had an ability to pay. Indeed, the comment to Rule 706 explicitly provides for seizures of defendants, even when the defendant has no ability to pay. *Id.* This is

exactly the type of unreasonable seizure the constitutional provisions were designed to eliminate.

Probable cause exists when “the facts and circumstances within [an individual’s] knowledge and of which he has trustworthy information are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed.” *Commonwealth v. Melendez*, 676 A.2d 226, 228 n.4 (Pa. 1996). This means probable cause must exist for each element of the offense. *United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013). But an individual who has not paid fees because of an inability to pay has committed no legal offense. See 42 Pa.C.S. § 9730(b)(2) (allowing *inter alia* incarceration for nonpayment only if the defendant is “financially able to pay the costs, restitution or fine”); Pa. R. Crim. P. 706 (stating that unless a defendant is financially able, the court “shall not” imprison a defendant for failure to pay fines or fees); *Commonwealth v. Smetana*, 191 A.3d 867, 873 (Pa. Super. Ct. 2018) (vacating a contempt order and remanding for a hearing on defendant’s ability to pay fines and to determine whether he willfully failed to pay). Courts in Pennsylvania, in line with United States Supreme Court mandates, have made clear that refusal to pay must be willful, meaning that “[i]f one’s effort to secure the funds owed was made in good faith, any nonpayment is excused.” *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018).

The lack of an ability-to-pay determination at sentencing guarantees that the judge issuing a “failure to pay” warrant under Pa. R. Crim. P. 706 has no basis to believe that a defendant’s non-payment was willful. The court, thus, lacks probable cause to support the warrant. This alone violates the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution.

This Court should not adopt an interpretation of Rule 706 that allows judges to issue warrants without probable cause. When faced with two interpretations of a rule or statute, only one of which implicates constitutional questions, the canon of constitutional avoidance directs courts to adopt the interpretation that does not result in constitutional concerns. *See Wolf v. Scarnati*, 233 A.3d 679, 696 (Pa. 2020) (citing *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017)). Likewise, Pa. R. Crim. P. 101(C) instructs courts to construe the Rules of Criminal Procedure “in consonance with the rules of statutory construction,” and to assume that “the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth,” 1 Pa.C.S. § 1922(3). Nevertheless, the Superior Court’s interpretation of Rule 706 implicates serious constitutional questions despite there being a reasonable interpretation that could help avoid constitutional pitfalls. If there is an ability-to-pay hearing at sentencing, and if the judge ultimately sentences the

defendant to pay fees, the court would have some evidence that the defendant was able to pay, at least at the time of sentencing.⁴

For Mr. Lopez and others, the practical effect of the Superior Court's decision is telling. For example, should Mr. Lopez miss a payment, the only data points at the court's disposal concerning his ability to pay would be (1) his request at resentencing to waive costs due to an inability to pay and (2) his sentencing-era indigency determination, reflected by his receiving court-appointed counsel. Both facts argue strongly that he has no ability pay. Yet, under the Superior Court's interpretation, he remains under threat of arrest and detention if he fails to pay any court-ordered fees, even though the evidence strongly suggests it may not be willful. This court should not read Rule 706 so as to open the door to such constitutional violations.⁵

2. The Due Process Clause likewise requires ability-to-pay hearings at sentencing.

In addition to the obvious Fourth Amendment issues that arise from the Superior Court's interpretation of Rule 706, the Fourteenth Amendment's Due

⁴ Whether more evidence of willfulness at the time of the actual nonpayment must also be gathered before a court can constitutionally issue a warrant for nonpayment may depend on the underlying facts and record in an individual case.

⁵ In addition to the Fourth and Fourteenth Amendment concerns addressed at length herein, the Superior Court's interpretation of Rule 706 raises other constitutional concerns, as it would result in indigent defendants subject to bench warrants being labeled as "fugitives from justice," with all the attendant consequences. *See, e.g., Commonwealth v. Smith*, 234 A.3d 576, 579 (Pa. 2020).

Process Clause independently prohibits arresting an indigent defendant for failure to pay absent an ability-to-pay hearing. As the United States Supreme Court recognized nearly forty years ago, “[d]ue process and equal protection principles converge in the Court’s analysis” of revocation proceedings arising out of the failure to pay court-imposed fines and costs. *Bearden*, 461 U.S. at 665. While equal protection evaluates the government’s treatment of similarly situated individuals, due process focuses on the “fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated.” *Ross v. Moffit*, 417 U.S. 600, 609 (1974).⁶ At its most basic, due process protects against the arbitrary deprivation of one’s life, liberty, and property. *Dent v. West Virginia*, 129 U.S. 114, 124 (1889). Inherent in that guarantee is that every individual will receive due process protection that is commensurate to their threatened liberty interests. For that reason, due process rights are flexible and must account for the personal rights at stake. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)⁷; *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970).

⁶ Justice Harlan urged a due process-based evaluation of incarceration based on an individual’s inability to pay fines and restitution. *See Williams*, 399 U.S. at 260 (Harlan, J., concurring) (stating that the due process framework is more “conducive” to these cases by virtue of its focus on the relationship between the individual rights at stake and the rationality of the government action); *Griffin*, 351 U.S. at 29 (Harlan, J., dissenting).

⁷ Though *Morrissey* seems to suggest that a post-deprivation hearing may provide sufficient process in the parole-revocation arena, 408 U.S. at 485, the case is readily distinguishable. Whereas the parole officers in *Morrissey* had probable cause to believe parolees had violated the

It is against that constitutional backdrop that *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), introduced the now-common three-factor analysis to determine the extent of process due to an individual facing a government deprivation of liberty: (1) the private interest affected by the state action; (2) the risk of erroneous deprivation; and (3) the probable value of available procedural safeguards. These factors overwhelmingly favor ability-to-pay hearings at sentencing.

First, there is no dispute that an individual's liberty from unreasonable seizures is a fundamental right enshrined by the Fourth Amendment. *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (recognizing arrest as the “quintessential seizure” of a person) (internal quotation marks omitted).⁸ Second, and despite that universally recognized liberty interest, the Superior Court's interpretation of Rule 706 creates a quantifiable risk of erroneous deprivation because it lacks a mechanism for a neutral magistrate to assess probable cause before a deprivation of liberty. This risk of erroneous deprivation can only be categorized as fundamentally unfair unless it occurs at sentencing. In essence, the current system allows the magistrate to issue a warrant for nonpayment of fees and assess probable cause after the fact, which is

terms of parole based on interviews with the parolees, here it is impossible to know whether a defendant's failure to pay has been willful without a pre-arrest ability-to-pay hearing.

⁸ Admittedly, probationer's Fourth Amendment right against warrantless searches is more limited than that of the general public. See *United States v. Knights*, 534 U.S. 112, 118–19 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 878 (1987). However, no court has held that a probationer may be seized at any time absent probable cause.

specifically prohibited by Supreme Court precedent. *See, e.g., United States v. Di Re*, 332 U.S. 581, 595 (1948) (an otherwise-unreasonable search cannot be justified “by what it turns up”); *Johnson v. United States*, 333 U.S. 10, 16–17 (1948). Finally, for the reasons set forth above, the Superior Court’s interpretation of Rule 706 to permit withholding an ability-to-pay analysis until the failure to pay occurs provides insufficient procedural safeguards to let stand.

II. THE SUPERIOR COURT’S INTERPRETATION OF RULE 706 CREATES INCENTIVES FOR ABUSE AND DISPROPORTIONATELY AFFECTS THE POOR AND PEOPLE OF COLOR.

State and local governments derive revenue from monetary sanctions assessed against criminal defendants, including court fines, fees, and other charges. The impact of these monetary sanctions on people with limited financial means and communities of color is especially harsh and effectively creates a two-tiered system of justice where the government traps those who cannot pay in a cycle of poverty and punishment.

A. Government Reliance on Monetary Sanctions Creates Incentives for Abuse.

Like many other states, Pennsylvania imposes a range of monetary sanctions through its criminal and juvenile legal systems to fund government services,

including its courts.⁹ Over the past ten years, the Pennsylvania judiciary has collected over \$4.6 billion in court-imposed costs, collecting \$403.3 million in 2020 alone.¹⁰ And fee revenue funds approximately 14% of the judiciary’s annual budget.¹¹

The United States Supreme Court has long recognized the appearance of a conflict of interest when court-ordered monetary sanctions are a source of revenue for the state. In *Tumey v. State of Ohio*, the U.S. Supreme Court held that a defendant is denied due process if the judge deciding his case has a “direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.” 273 U.S. 510, 523, 531–33 (1927) (finding a due process violation where the judge, prosecutor, and police investigators all received a portion of the costs collected directly from the defendant upon conviction); *see also Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (The due process right to a neutral decision maker is violated when mayor, who exercises substantial control of village financial

⁹ *See, e.g.,* Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. Miami Race & Soc. Just. L. Rev. 1, 3 (2020) (explaining that while originally intended to fund the justice system, fines and court costs have become an increasingly popular general-revenue source for various other government services).

¹⁰ Budget, Unified Judicial System of Pa., <https://www.pacourts.us/judicial-administration/budget> (last visited October 14, 2021).

¹¹ *Id.*

affairs, also serves as judge in traffic and municipal code cases and a major portion of village revenue is derived from those fines and costs.)

More recently, in *Cain v. White*, the U.S. Court of Appeals for the Fifth Circuit found that due process precluded judges from enforcing fines and costs paid into a general fund administered by the judges that funded court expenses. 937 F.3d 446, 448, 454 (5th Cir. 2019). The Fifth Circuit found “the temptation is too great” because judges have “authority over how the [fund] is spent . . . and the fines and fees make up a significant portion of their annual budget.” *Id.* at 454 (internal quotation marks omitted). The Fifth Circuit, in separate case, held that the due process right to a neutral decision maker is also violated when a judge decides whether a bail bond must be secured by a commercial company, and a portion of that bond goes to fund judicial expenses. *Caliste v. Cantrell*, 937 F.3d 525, 526, 533 (5th Cir. 2019). It is precisely these kinds of appearances of impropriety the U.S. Supreme Court was concerned with when it recognized that government action must be scrutinized “more closely when the [government] stands to benefit.” *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)). And, as stated above, state and local governments in Pennsylvania, particularly Pennsylvania courts, directly benefit from—and often rely on—revenue collected from court-imposed fines and costs.

This reliance can create powerful incentives for abuse, a phenomenon that received national attention in 2015 when the U.S. Department of Justice (“DOJ”) released a report following its investigation of policing practices in Ferguson, Missouri.¹² The DOJ concluded that the Ferguson Municipal Court issued arrest warrants based on a failure to pay fines and costs “to coerce payment” and not “for public safety purposes.”¹³ The DOJ determined that the Ferguson Municipal Court’s primary goal was not “administering justice or protecting the rights of the accused, but . . . maximizing revenue,” and that “[t]he impact that revenue concerns have on court operations undermines the court’s role as a fair and impartial judicial body.”¹⁴

Pennsylvania courts are not wholly immune to these issues. For example, earlier this year, the ACLU filed a lawsuit alleging more than ten thousand defendants have been overbilled for court fees by the Court of Common Pleas of Montgomery County alone.¹⁵ Moreover, as stated by this Court’s own Committee on Racial and Gender Bias in the Justice System, “in courtrooms across the

¹² Civ. Rts. Div., U.S. Dep’t of Just., *Investigation of the Ferguson Police Department* 56 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter *Ferguson Investigation*].

¹³ *Id.*

¹⁴ *Id.* at 42.

¹⁵ *ACLU Sues County Court Officials, Alleging Double Billing*, Associated Press (Jan. 5, 2021), <https://www.usnews.com/news/best-states/pennsylvania/articles/2021-01-05/aclu-sues-county-court-officials-alleging-double-billing>.

Commonwealth . . . the quality of justice for poor defendants is being compromised by the premium some judges have placed on the speedy disposition of cases.”¹⁶ While the vast majority of judges in the Commonwealth are motivated simply by the desire for justice, there is still too great a risk for abuse in a system that allows judges to assess fees on individuals who are unable to pay them.

B. The Unconstitutional Arrests and Incarcerations Stemming from the Superior Court’s Interpretation of Rule 706 Will Disproportionately Affect the Poor and People of Color.

The Superior Court’s interpretation of 706 will result in indigent defendants being arrested and incarcerated despite their non-payment being non-willful, and these dire consequences will disproportionately affect the poor and communities of color. It is common knowledge that fines and costs in the criminal legal system, and the punishments attached to their non-payment, have a disproportionate impact on people with limited financial means and communities of color in Pennsylvania and nationwide. “[N]ational inmate survey and court data” suggest that “millions of mainly poor people living in the United States have been assessed monetary sanctions by the courts.”¹⁷ These practices place “large burdens on poor offenders

¹⁶ *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, 196 n.56, http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf (last visited Oct. 28, 2021).

¹⁷ *See, e.g.*, Alexes Harris et al., *Drawing Blood From Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 *Am. J. of Socio.* 1753, 1770–71 (2010).

who are unable to pay criminal justice debts.”¹⁸ And these burdens extend to the families of poor offenders, leading people who have committed no criminal offense “to take out loans” and “fall into financial dire straits” in order to help their loved ones.¹⁹ The Superior Court’s interpretation of Rule 706 allows judges to charge fees defendants cannot afford, thus perpetuating a vicious cycle that often results in “significant debt that deepens poverty and keep[s] people tethered to the criminal justice system.”²⁰

Fines, fees, costs, and surcharges have been shown to exacerbate racial disparities in the justice system.²¹ In a report from 2016, this Court’s Committee on Racial and Gender Bias in the Justice System recognized that “[i]n Pennsylvania, racial and ethnic minorities account for 66 percent of the state prison population but only 12 percent of the Commonwealth’s population. Pennsylvania ranks sixth

¹⁸ Council of Econ. 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.

¹⁹ Ella Baker Ctr. for Human Rts. et al., *Who Pays? The True Cost of Incarceration on Families*, 13–14 (Sept. 2015), <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

²⁰ Phil Hernandez, Laura Goren, & Chris Wodicka, The Commonwealth Institute, *Set Up to Fail: How Court Fines & Fees Punish Poverty and Harm Black Communities in Virginia*, 1 (Jan. 2021). While this article covers Virginia, the issues it raises are prevalent nationwide.

²¹ See, e.g., Center on Budget and Policy Priorities, “Step One to an Antiracist State Revenue Policy: Eliminate Criminal Justice Fees and Reform Fines,” <https://www.cbpp.org/research/state-budget-and-tax/step-one-to-an-antiracist-state-revenue-policy-eliminate-criminal>

highest in the nation in the racial disproportionality of its rate of incarceration, with an incarceration ratio of 18.4 African American citizens for every one white citizen per 100,000 population.”²² In the years since, that disproportionality has increased.²³ For 2019, the total number of black prisoners in Pennsylvania exceeded the number of white prisoners,²⁴ despite population estimates showing black Pennsylvania’s made up only 12% of the state’s population, while white people who are not of Hispanic or Latino descent accounted for nearly 76%.²⁵ As people of color face legal proceedings at rates far in excess of their percentage of the population, they are disproportionately burdened by the imposition of criminal fines and costs. In Pennsylvania, black people owe more in fines and fees as compared to their white counterparts.²⁶ Accordingly, of the individuals who, under

²² *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, 126 http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf (last visited Oct. 28, 2021).

²³ Bureau of Justice Statistics, *Percent of sentenced prisoners under jurisdiction of state or federal correctional authorities, by sex, race, Hispanic origin, and age*, generated using the Corrections Statistical Analysis Tool at www.bjs.gov (finding that in 2019, non-white prisoners made up 69% of Pennsylvania’s prison population).

²⁴ *Id.* App’x Table 2.

²⁵ U.S. Census Bureau, Quick Facts: Pennsylvania, July 2019 <https://www.census.gov/quickfacts/PA>.

²⁶ See Jeffrey T. Ward, Ph.D., Temple University, Nathan W. Link, Ph.D., Rutgers University-Camden, Andrew Christy, ACLU Of Pennsylvania, *Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts: Research in Brief*, https://aclupa.org/sites/default/files/field_documents/fines_and_costs_report_updated_march_2021.pdf (last visited Nov. 2, 2021).

the Superior Court’s interpretation of Rule 706, are subject to arrest and detention for three or more days without any determination that their non-payment was willful, a disproportionately large number of them will be people of color. These individuals will be forcibly taken from their families and responsibilities, merely because they cannot afford mandatory court fees.

This Court has a choice between two interpretations of Rule 706: one that is reasonable and protects citizens’ constitutional rights, and one that results in constitutional violations and, if chosen, will perpetuate poverty and disproportionately harm people of color—many of whom are already suffering from constitutionally infirm representation.²⁷ *Amici* request that this Court choose the former.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court overturn the Superior Court and hold that Rule 706 at least requires an ability-to-pay evaluation at sentencing.

Dated: November 2, 2021

Respectfully submitted,

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²⁷ *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, 126, http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 531 AND 2135

I hereby certify that this brief contains fewer than 7,000 words and therefore complies with the word count limits of Pa. R.A.P. 531 and Pa. R.A.P. 2135.

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CERTIFICATE OF PUBLIC ACCESS COMPLIANCE
PURSUANT TO PA. R.A.P. 127

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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