

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Appellee,

v.

KENNETH MARION DUNHAM,

Appellant.

Washington County Circuit Court Nos.
C083014CR, D082487V, C040376CR,
and D043244M

Court of Appeals Nos. A178148,
A178153, A178154, A178155

**BRIEF OF AMICI CURIAE LEWIS & CLARK LAW SCHOOL
CRIMINAL JUSTICE REFORM CLINIC, AMERICAN CIVIL LIBERTIES
UNION OF OREGON, OREGON TRADESWOMAN, OREGON
CONSUMER JUSTICE, FINES & FEES JUSTICE CENTER, and
NATIONAL CONSUMER LAW CENTER
IN SUPPORT OF APPELLANT KENNETH MARION DUNHAM**

Appeal from Orders of the Circuit Court for Washington County,
Honorable Oscar Garcia
C083014CR, D082487V, C040376CR, D043244M

Aliza B. Kaplan, OSB NO. 135523
LEWIS & CLARK LAW SCHOOL
10101 S. Terwilliger Blvd.
Portland, OR 97219
Telephone: (503) 768-6721

Robert Le, OSB NO. 094167
Telephone: (503) 734-2099
Leland Baxter-Neal, OSB NO. 155347
Telephone: (971) 421-4028
OREGON CONSUMER JUSTICE
3055 NW Yeon Ave.
Portland, OR 97210

Jessica Lynn Battle, OSB NO. 222514
Rachel Dallal Gale, OSB NO. 221284
Kelly Simon, OSB NO. 154213
ACLU OF OREGON
506 SW 6th Ave., Ste. 700
Portland, OR 97204
Telephone: (971) 322-0869

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF AMICI CURIAE	1
INTRODUCTION.....	5
ARGUMENT	6
I. People with criminal records struggle to find employment.....	6
II. Court debt creates additional barriers to reentry.....	11
A. <i>Court debt compounds the negative effects of a criminal record.</i>	13
B. <i>Much court debt is unpayable.</i>	18
III. Without relief from unpayable court debt—debt that is waivable under ORS 161.665(5) and ORS 161.685(5)—expungement is out of reach for the poorest Oregonians, undermining the state’s goal in creating an expungement remedy.....	21
CONCLUSION	26

TABLE OF AUTHORITIES

Constitutional Provisions

Or Const, Art I, § 15	20
-----------------------------	----

Statutes

Michigan Revised Criminal Code § 1525 (1967).....	25
ORS 1.202	18
ORS 137.225	21, 22
ORS 161.645	24
ORS 161.665	23, 24
ORS 161.685	23
ORS 293.250(5)(b)	13
ORS 659A.360	9
ORS 82.010	19

Reports and Scholarship

Alabama Appleseed Center for Law & Justice, <i>Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama’s Racial Wealth Divide</i> (2018), available at https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf	15, 16
American Civil Liberties Union, <i>A Pound of Flesh: The Criminalization of Private Debt</i> (2018), available at https://www.aclu.org/sites/default/files/field_document/022118-debtreport.pdf	14
Augustine, Dallas et al., UCLA Institute for Research on Labor & Employment, <i>Why Do Employers Discriminate Against People with Records? Stigma and the Case for Ban the Box</i> (2020), available at https://irle.ucla.edu/wp-content/uploads/2020/07/Criminal-Records-Final-6.pdf	9

Bannon, Alicia et al., Brennan Center for Justice, <i>Criminal Justice Debt: A Barrier to Reentry</i> (2010), available at http://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry	7, 24
Blumstein, Alfred & Kiminori Nakamura, <i>Redemption in the Presence of Widespread Criminal Background Checks</i> , 263 Nat’l Inst Just J 10 (2009)	21
Boches, Daniel J. et al., <i>Monetary Sanctions and Symbiotic Harms</i> , 8 Russell Sage Found J Soc Sci 98 (2022).....	16
Couloute, Lucius & Daniel Kopf, Prison Policy Initiative, <i>Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People</i> (2018), available at https://www.prisonpolicy.org/reports/outofwork.html	7
DeFina, Robert H. & Lance Hannon, <i>The Impact of Mass Incarceration on Poverty</i> , 59 Crime & Delinq 562 (2013), available at https://doi.org/10.1177/00111287083288	11
Diller, Rebekah et al., Brennan Center for Justice, <i>Criminal Justice Debt: A Barrier to Reentry</i> (2010), available at https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf	13
Diller, Rebekah, Brennan Center for Justice, <i>The Hidden Costs of Florida’s Criminal Justice Fees</i> (2010), available at http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf (accessed Oct 11, 2022)	18
Hammons, Briana, Fines & Fees Justice Center, <i>Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?</i> (2021), available at https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf	5, 12, 20
Harris, Alexes et al., <i>Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States</i> , 115 Am J Soc 1753 (2010)	19
Jacobs, Leah A. & Aaron Gottlieb, <i>The Effect of Housing Circumstance on Recidivism: Evidence from a Sample of People on Probation in San Francisco</i> , 47 Crim Just Behav 1097 (2020)	6

Kaiser, Joshua, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 Harv L & Pol’y Rev 123 (2016) 6, 8

Kleiner, Morris M. & Evgeny F. Vorotnikov, Institute for Justice, *At What Cost, State and National Estimates of the Economic Costs of Occupational Licensing* (2018), available at https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf..... 8

Link, Nathan et al., *Monetary Sanctions, Legal and Collateral Consequences, and Probation & Parole: Where Do We Go from Here?*, 200 Crim J L Rev 199 (2020)..... 12, 13, 14, 16

Link, Nathan W., *Is There a Link Between Criminal Debt and Recidivism in Reentry?*, 34 Fed Sent’g Rep 188 (2022)..... 16

Love, Margaret Colgate, Collateral Consequences Resource Center, *The Many Roads from Reentry to Reintegration: A National Survey of Laws Restoring Rights and Opportunities After Arrest or Conviction* (2022), available at https://ccresourcecenter.org/wp-content/uploads/2022/08/MRFRTTR_8.24.22.pdf 7, 8

Martin, Karin D. et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, 4 New Thinking Comty Corr Bull 1, NCJ 249976 (2017), available at <https://www.ojp.gov/pdffiles1/nij/249976.pdf> 12, 17, 18

Nelson, Ariel, National Consumer Law Center, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing* (2019), available at <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf>..... 9

Pew Charitable Trusts, *Collateral Costs: Incarceration’s Effect on Economic Mobility* (2010), available at https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/CollateralCosts1pdf.pdf?la=en 7

Piquero, Alex R. & Wesley G. Jennings, *Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 Youth Violence & Juv J 325 (2017) 16

Pleggenkuhle, Breanne, <i>The Financial Cost of a Criminal Conviction: Context and Consequences</i> , 45 <i>Crim Just & Behav</i> 121 (2018)	17
Prescott, J.J. & Sonja B. Starr, <i>Expungement of Criminal Convictions: An Empirical Study</i> , 133 <i>Harv L Rev</i> 2460 (2020)	9, 21
Rafael, Maria Katarina E. & Chris Mai, <i>Understanding the Burden of Legal Financial Obligations on Indigent Washingtonians</i> , 11 <i>Soc Sci</i> 17 (2022)	19
Schmitt, John & Kris Warner, Center for Economic & Policy Research, <i>Ex-Offenders and the Labor Market</i> (2010), available at http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf	10
Selbin, Jeffrey et al., <i>Unmarked? Criminal Record Clearing and Employment Outcomes</i> , 108 <i>J Crim L & Criminology</i> 1 (2018)	10
Stark, Andrea Bopp & Geoff Walsh, <i>Sentenced to a Life of Debt: It is Time for a Reassessment of How Bankruptcy Law Intersects with Fines and Fees to Keep People in Debt?</i> , 34 <i>Fed Sent’g Rep</i> 128 (2022), available at https://www.nclc.org/wp-content/uploads/2022/09/sentenced-to-life-of-debt.pdf	13
U.S. Commission on Civil Rights, <i>Collateral Consequences: The Crossroads of Punishment</i> (2019), available at https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf	10
U.S. Government & Accountability Office, GAO-18-203, <i>Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved</i> (2018).....	18
Ward, Jeffrey T. & Nathan W. Link, <i>Financial Sanctions in Pennsylvania: An Examination of Assessed Amounts and Repayment by Indigent Status</i> , 34 <i>Fed Sent’g Rep</i> 166 (2022)	18, 19, 20

Other Authorities

Board of Governors of the Federal Reserve System, <i>Economic Well-Being of U.S. Households in 2020 - May 2021</i> (June 12, 2022), available at https://bit.ly/3Csj8z7	17
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

Fox, Emily Teplin, Oregon Law Center, Public Records Request to the Oregon
Judicial Department (June 12, 2019), *dataset on file with Oregon Law Center*. 20

HB 4210 (2020)..... 13

Iboshi, Kyle, *Oregon Garnishes Millions in Tax Refunds to Collect Old, Unpaid
Parking Tickets and Court Fees*, KGW8 (2022), available at
[https://www.kgw.com/article/news/investigations/oregon-garnishes-millions-old-
unpaid-parking-tickets-fees/283-ad91318f-a1c1-4dd6-afbf-0dbe1454bb31](https://www.kgw.com/article/news/investigations/oregon-garnishes-millions-old-unpaid-parking-tickets-fees/283-ad91318f-a1c1-4dd6-afbf-0dbe1454bb31) 14

Legislative Fiscal Office, *Report on Liquidated and Delinquent Accounts
Receivable* (2021), available at
[https://www.oregonlegislature.gov/lfo/Documents/2021%20Accts%20Rec%20R
eport.pdf](https://www.oregonlegislature.gov/lfo/Documents/2021%20Accts%20Rec%20Report.pdf)..... 18

Proposed Oregon Criminal Code: Final Draft and Report cmt. (1970) 25

Wright, Phil, *Pendleton No Longer Can Jail Poor for Court Debt*, East Oregonian
(2019), available at [https://www.eastoregonian.com/news/local/pendleton-no-
longer-can-jail-poor-for-court-debt/article_e04dfc3a-8ee4-11e9-ba6a-
5bef666f6b7f.html](https://www.eastoregonian.com/news/local/pendleton-no-longer-can-jail-poor-for-court-debt/article_e04dfc3a-8ee4-11e9-ba6a-5bef666f6b7f.html) 14

STATEMENT OF AMICI CURIAE

Amici curiae, Lewis & Clark Law School’s Criminal Justice Reform Clinic (“CJRC”), the American Civil Liberties Union, Inc. of Oregon and the ACLU Foundation of Oregon, Inc. (collectively, “the ACLU of Oregon”), the Oregon Tradeswoman, Oregon Consumer Justice (“OCJ”), the Fines and Fees Justice Center (“FFJC”), and the National Consumer Law Center (“NCLC”) are organizations with a shared mission advocating for the economic inclusion of those with criminal records. The Oregon Tradeswoman works with Oregon jobseekers in pursuit of economic justice, including those impacted by criminal records and criminal debt. CJRC, the ACLU of Oregon, OCJ, FFJC, and NCLC are criminal justice research and reform organizations who advocate for the protection of the poorest defendants. Amici together seek to ensure that all people with a criminal record are given the best opportunities to successfully reintegrate and move forward with their lives.

Amicus curiae CJRC is a legal clinic dedicated to students receiving hands-on legal experience while engaging in a critical examination of and participation in important issues in Oregon’s criminal justice system. Under the supervision of Lewis & Clark Law School faculty, clinic students work on a variety of cases and projects including representing low-income Oregonians in circuit and municipal

courts on matters such as criminal record expungement, waiving court fines and fees, and driver's license reinstatement.

Amicus curiae the ACLU of Oregon is a nonprofit and nonpartisan organization with over 28,000 members statewide. The ACLU of Oregon is dedicated to defending and advancing civil rights and civil liberties for Oregonians, including the fundamental civil rights protected in the Oregon Constitution and United States Constitution. The ACLU of Oregon has engaged in public education campaigns, legislative advocacy, and litigation touching almost every aspect of the Oregon criminal justice system, including issues that particularly affect defendants living in poverty, such as expanding access to public defenders and combating the criminalization of homelessness. The ACLU of Oregon also writes frequent amicus curiae briefs to draw attention to civil rights issues in Oregon courts.

Amicus curiae Oregon Tradeswoman is a Portland-based nonprofit organization that works with adult jobseekers across Oregon to provide employment training and placement to support economic justice and security for historically under-represented workers in the skilled trades, including very low-income persons and those disproportionately impacted by criminal records, criminal debt, and incarceration.

Amicus curiae OCJ is a nonprofit consumer advocacy organization located in Portland. OCJ provides consumer protection to Oregonians through advocacy, litigation, education, and research targeted at creating an equitable and inclusive consumer marketplace that reflects the needs and experiences of everyone who lives in Oregon.

Amicus curiae 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. FFJC also provides amicus curiae assistance at the state and federal level in cases where issues of economic justice intersect with state and constitutional law.

Amicus curiae NCLC is a nonprofit organization that engages in research, education, advocacy, and litigation to advance economic justice for low-income and other disadvantaged people, including people of color and older adults. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, federal and state governments, and courts across the nation to protect low-income people from harmful lending and debt collection practices,

help financially stressed families build and retain wealth, and advance economic fairness. Through its Criminal Justice Debt Project, NCLC uses advocacy, litigation, and education to challenge harmful practices at the intersection of criminal and consumer law. Its work addresses fines-and-fees policies that criminalize poverty and strip wealth from communities of color, as well as criminal background check policies that prevent consumers with criminal records from securing jobs and housing. In a 2021 report, [The High Cost of a Fresh Start: A State-by-State Analysis of Court Debt as a Bar to Record Clearing](#), NCLC examined how restricting access to record clearing based on outstanding fines, fees, costs, and restitution prevents poor and low-income people from achieving financial stability and economic mobility.

Amici CJRC, the ACLU of Oregon, Oregon Tradeswoman, OCJ, FFJC, and NCLC submit this brief to highlight how criminal records and outstanding court debt serve as a barrier to reentry for criminal defendants. We emphasize the importance of courts' ability to waive fines and costs in statutory proceedings under ORS 161.665(5) and ORS 161.685(5) as part of Oregon's broader statutory scheme to reduce unintended collateral consequences of criminal conviction.

INTRODUCTION

Kenneth Marion Dunham is caught in a debt trap. Without expungement of his criminal record, he cannot secure employment. Without employment, he cannot pay his court debt. And without paying his court debt, he cannot expunge his criminal record.

Mr. Dunham’s situation is neither unique nor rare. Criminal justice researchers and reform organizations—including amici¹—have long documented the troubling twin consequences of court debt that cannot possibly be repaid and criminal records that prevent employment and financial security. The Oregon Legislature created a system of expungement to mitigate the severe financial consequences of a criminal record. But if the people most affected by those consequences are prevented from expunging their criminal records because of their poverty, the very purpose of the remedy is defeated.

Criminal records and court debt both have devastating and destabilizing effects on the lives of defendants. The goal of Oregon’s criminal justice system is

¹ National Consumer Law Center & Collateral Consequences Resource Center, *The High Cost of a Fresh Start: A State-by-State Analysis of Court Debt as a Bar to Record Clearing* (2020), available at <https://www.nclc.org/wp-content/uploads/2022/08/Report-High-Cost-of-Fresh-Start.pdf> (accessed Oct 6, 2022); Briana Hammons, Fines & Fees Justice Center, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?* (2021), available at https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf (accessed Oct 11, 2022).

not to inhibit social and economic mobility, destabilize families, and penalize poverty. To avoid these consequences, the state requires its procedures both for expungement of records and for relief from court debt to be implemented effectively and efficiently.

We agree with Mr. Dunham that the trial court abused its discretion when it declined to consider the Excessive Fines Clause and the factors outlined under ORS 161.665(5) and ORS 161.685(5) when denying his motion to waive his outstanding court debt. The effect of the trial court's decision is to condition his access to expungement on the payment of a debt that—without expungement—is impossible to pay. That is not what the Oregon Legislature intended when it created procedures to allow people like Mr. Dunham to obtain relief.

ARGUMENT

I. People with criminal records struggle to find employment.²

Mr. Dunham is far from unique in finding that his criminal record poses barriers to his employment. Around 60 percent of formerly incarcerated people fail

² Because unemployment is the primary barrier preventing Mr. Dunham from meeting his court debt obligations and moving on with his life, we focus on employment consequences here. However, criminal records interfere with nearly every aspect of life, including housing security, access to educational opportunities and job-training programs, vehicle insurance, and future police interactions. *See generally* Leah A Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstance on Recidivism: Evidence from a Sample of People on Probation in San Francisco*,

to secure employment within one year of their release. Alicia Bannon et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 9 (2010), available at <http://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry> (accessed Oct 6, 2022), (citing 42 USC § 17501(b)(18)). Long after release, the unemployment rate among formerly incarcerated people is five times higher than that of the general population. Lucius Couloute & Daniel Kopf, Prison Policy Initiative, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People* (2018), available at <https://www.prisonpolicy.org/reports/outofwork.html> (accessed Oct 10, 2022). When men with an incarceration history do find work, their annual wages are around 40 percent lower than those of men with comparable education and skills but no criminal record. Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 4 (2010), available at https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf?la=en (accessed Oct 10, 2022).

Some of these difficulties are caused by the narrower set of employment opportunities legally available to those with criminal records. Close to 25 percent of jobs require an occupational license from a government agency. Margaret Colgate Love, Collateral Consequences Resource Center, *The Many Roads from*

47 Crim Just Behav 1097 (2020); Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy*, 10 Harv L & Pol'y Rev 123, 132-33 (2016).

Reentry to Reintegration: A National Survey of Laws Restoring Rights and Opportunities After Arrest or Conviction 110 (2022), available at https://ccresourcecenter.org/wp-content/uploads/2022/08/MRFRTTR_8.24.22.pdf (accessed Oct 7, 2022); see also Morris M. Kleiner & Evgeny F. Vorotnikov, Institute for Justice, *At What Cost, State and National Estimates of the Economic Costs of Occupational Licensing* 9 (2018), available at https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf (accessed Oct 10, 2022); Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 Harv L & Pol’y Rev 123, 133–34 (2016) (explaining how licenses can pose a barrier to those with criminal records who seek a career as a barber, bus driver, plumber, or aesthetician). Many of these licenses directly exclude those with criminal records, and most impose a vague and inconsistent “good moral character standard” that can operate arbitrarily to deny licenses to criminal record-holders. Love, *supra*, at 121–22. Oregon, notably, is among the twelve states with the fewest protections for those with criminal records who seek state occupational licenses. *Id.* People with criminal records may also be indirectly barred from certain forms of employment by restrictions on firearms possession, government contracting, and business licensing or grants. Kaiser, *supra* at 134–36.

When seeking employment in the narrower set of jobs legally available to them, people with criminal records face widespread discrimination. Research indicates that much of this discrimination reflects stigma rather than appropriate risk management. Dallas Augustine et al., UCLA Institute for Research on Labor & Employment, *Why Do Employers Discriminate Against People with Records? Stigma and the Case for Ban the Box* 4–7 (2020), available at <https://irle.ucla.edu/wp-content/uploads/2020/07/Criminal-Records-Final-6.pdf> (accessed Oct 10, 2022) (finding that people with criminal records are less likely to be hired than those who engaged in the same illegal conduct but who have no criminal record). While Ban the Box laws have gained steam in many jurisdictions, including Oregon, ORS 659A.360, these laws impact only the timing of an employer’s access to criminal record information. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv L Rev 2460, 2475 (2020). They cannot remove the stigma of a criminal record altogether, and the internet has made criminal records searches easier and more common across all forms of employment in recent years. *Id.* See ORS 659A.360(3) (“[N]othing in this section prevents an employer from considering an applicant’s conviction history when making a hiring decision.”).

Today, more than 90 percent of all employers conduct background checks to evaluate applicants at some point in the hiring process. Ariel Nelson, National

Consumer Law Center, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing* 3 (2019), available at <https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf> (accessed Oct 9, 2022). Thus, even in jurisdictions like Oregon with laws prohibiting discrimination against people with criminal records at the first interview stage, expungement has pronounced positive effects on employment and earnings. Jeffrey Selbin et al., *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J Crim L & Criminology 1, 9 (2018).

People with disabilities and criminal convictions, like Mr. Dunham, face even sharper effects due to the still more limited range of employment available to them. U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment* 21–22 (2019), available at <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf> (accessed Oct 9, 2022). Mr. Dunham’s employment opportunities are limited by state licensing review, stigma, and his physical restrictions. It is unsurprising that he is unable to find work in his current circumstances.

The aggregate effects of this unemployment and underemployment among those with criminal records are stark. These employment losses reduce the national gross domestic product by as much as \$65 billion per year. John Schmitt & Kris

Warner, Center for Economic & Policy Research, *Ex-Offenders and the Labor Market* 1 (2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf> (accessed Oct 10, 2022). One analysis found that the poverty rate would have been 20 percent lower between 1980 and 2004 had it not been for the increasing number of Americans carrying a criminal record. Robert H. DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, 59 *Crime & Delinq* 562, 581 (2013), available at <https://doi.org/10.1177/00111287083288> (accessed Oct 8, 2022). The employment consequences of criminal records deprive the state of valuable human capital—and deprive people with criminal records of the means to support their families, contribute to their communities, and determine their own futures. These effects can be permanent and lifelong, even for minor offenses that carried little or no jail time, like Mr. Dunham’s.

Expungement provides a crucial pathway out of the employment barriers and resultant poverty described above, but only if the process is available and accessible.

II. Court debt creates additional barriers to reentry.

Court debt, like a criminal record, can extend temporary punishment into a lifelong status. Legal financial obligations exacerbate the financial challenges

created by criminal records for as long as they remain unpaid—which, for many defendants, is forever.

Court debt is also growing. The percentage of defendants who exit the system with court debt, the raw number of those defendants, and the dollar amounts of individual fines and fees have all risen in the 21st century. Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*, 4 *New Thinking Comty Corr Bull* 1, 4–5, NCJ 249976 (2017), available at <https://www.ojp.gov/pdffiles1/nij/249976.pdf>.

Meanwhile, wages for the poorest Americans—those most likely to be impacted by court debt—have stagnated. National Consumer Law Center & Collateral Consequences Resource Center, *The High Cost of a Fresh Start: A State-by-State Analysis of Court Debt as a Bar to Record Clearing* 12 (2020), available at <https://www.nclc.org/wp-content/uploads/2022/08/Report-High-Cost-of-Fresh-Start.pdf> (accessed Oct 6, 2022).

On a per-capita basis, Oregon has one of the highest levels of court debt in the nation. Briana Hammons, Fines & Fees Justice Center, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?* 5 (2021), available at https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf (accessed Oct 11, 2022).

A. *Court debt compounds the negative effects of a criminal record.*

Debt from legal financial obligations can reduce access to housing, public assistance, credit, education, and employment. Nathan Link et al., *Monetary Sanctions, Legal and Collateral Consequences, and Probation & Parole: Where Do We Go from Here?*, 200 Crim J L Rev 199, 203 (2020); Rebekah Diller et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), available at https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf (accessed Oct 6, 2022).

Court debt is different in kind from other forms of debt and financial hardship. It can be difficult, if not impossible, to discharge by bankruptcy and cannot be offset by the value of services or property provided. Link et al., *Monetary Sanctions* at 203; Andrea Bopp Stark & Geoff Walsh, *Sentenced to a Life of Debt: It is Time for a Reassessment of How Bankruptcy Law Intersects with Fines and Fees to Keep People in Debt?*, 34 Fed Sent'g Rep 128 (2022), available at <https://www.nclc.org/wp-content/uploads/2022/09/sentenced-to-life-of-debt.pdf>. Until October 2020, court debtors in Oregon faced suspension of their driver's licenses for nonpayment, a sanction not available to private creditors like credit card companies. *See* HB 4210 (2020) (repealing ORS 809.210). Similarly, government debt is uniquely collectible by intercepting and reducing or

eliminating payments from other government sources, like a tax refund. *See* ORS 293.250(5)(b). Between 2019 and 2021, \$8 million in tax refunds were intercepted annually to repay court debt. Kyle Iboshi, *Oregon Garnishes Millions in Tax Refunds to Collect Old, Unpaid Parking Tickets and Court Fees*, KGW8 (2022), available at <https://www.kgw.com/article/news/investigations/oregon-garnishes-millions-old-unpaid-parking-tickets-fees/283-ad91318f-a1c1-4dd6-afbf-0dbe1454bb31> (accessed Oct 18, 2022). In Multnomah County, one-third of these intercepted tax refunds were bound for residents of the five ZIP codes with the lowest median incomes and highest non-white populations. *Id.*

And the consequences for falling behind on payments often include increased interaction with the criminal justice system—an extension in supervision or, as in Mr. Dunham’s case, an extended period hobbled by a criminal record. Link et al., *Monetary Sanctions* at 203. In many jurisdictions, including Oregon, people can be arrested for failing to make payments or failing to appear at hearings to answer for their failure to make payments. American Civil Liberties Union, *A Pound of Flesh: The Criminalization of Private Debt* 14–15 (2018), available at https://www.aclu.org/sites/default/files/field_document/022118-debtreport.pdf (accessed Oct 18, 2022); *see also* Phil Wright, *Pendleton No Longer Can Jail Poor for Court Debt*, *East Oregonian* (2019), available at <https://www.eastoregonian.com/news/local/pendleton-no-longer-can-jail-poor-for->

court-debt/article_e04dfc3a-8ee4-11e9-ba6a-5bef666f6b7f.html (accessed Oct 18 2022) (“Angela Minthorn in 2017 spent 55 days in jail for owing little more than \$1,000 to the Pendleton Municipal Court.”). These debt-based arrests create new criminal records and new legal financial obligations while interfering with employment, family duties and relationships, and any community reintegration progress that a defendant has made.

Court debt takes away defendants’ control over their post-conviction lives and constrains their choices within the already-constrained web of options available to those with criminal records. Now, not only might they not earn sufficient wages, but any wages they do earn cannot be spent on their own families’ basic necessities.

Research shows that these basic necessities *do* suffer in the face of court debt. In one study in Alabama, 82 percent of people with outstanding legal financial obligations from a non-felony conviction had declined to pay for a necessity (rent, food, medical bill, car payment, or child support) to make a payment on their court debt. Alabama Appleseed Center for Law & Justice, *Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama’s Racial Wealth Divide* 31 (2018), available at <https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf> (accessed Oct 7, 2022). Half had given up three or

more of these necessities. *Id.* Forty-four percent had taken out an extraordinarily expensive payday loan in order to make a court debt payment—including many who had no employment to help pay it back because of their criminal records. *Id.*

This debt affects the communities around defendants, as well. Sixty percent took charity assistance from a faith-based organization to make a payment on a legal financial obligation, and 80 percent reported borrowing money from a family member or friend. *Id.* Among those family members and friends, 50 percent reported that *they* had given up a basic necessity in order to pay their loved one's loan. *Id.* at 35. Unsurprisingly, court debt compounds and aggravates stress and conflict among family members during the critical and high-stress time of assisting a loved one after their conviction or incarceration. Nathan W. Link, *Is There a Link Between Criminal Debt and Recidivism in Reentry?*, 34 Fed Sent'g Rep 188, 190 (2022); Daniel J. Boches et al., *Monetary Sanctions and Symbiotic Harms*, 8 Russell Sage Found J Soc Sci 98 (2022).

The stress of keeping up with court debt payments combined with the severe consequences for failing to do so can have a counterproductive effect—court debt is often criminogenic. Link et al., *Monetary Sanctions* at 204; Alex R. Piquero & Wesley G. Jennings, *Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 Youth Violence & Juv J 325 (2017). In the Alabama study, almost 30 percent of people who were

struggling to pay off court debt from a misdemeanor or traffic violation admitted to engaging in at least one criminal activity in order to make a payment—including drug sales, theft, passing bad checks, and sex work. Alabama Appleseed, *Under Pressure* at 32. In other words, people with non-felony convictions admitted to feeling pushed into committing felonies by their legal financial obligations.

These effects hold for even very small debts. Breanne Pleggenkuhle, *The Financial Cost of a Criminal Conviction: Context and Consequences*, 45 *Crim Just & Behav* 121 (2018). Thirty-five percent of Americans could not cover an unexpected \$400 expense without relying on a credit card. Board of Governors of the Federal Reserve System, *Economic Well-Being of U.S. Households in 2020 - May 2021* (June 12, 2022), available at <https://bit.ly/3CsJ8z7> (accessed Oct 11, 2022). Criminal defendants—who are disproportionately poor and have little access to credit—can experience life-altering financial struggle as a result of a \$200 fine or fee.

For families with a low take-home pay—like the Dunham family’s \$2,060 per month for five people (only \$800 of it in cash)—even a small monthly payment can be the difference between homelessness or hunger and basic stability. And the constancy of that small monthly payment for a family already living in poverty, over the course of years or even decades, “undermines the goal of finality in

punishment and poses significant obstacles to achieving stability.” Martin et al., *supra*, at 9.

B. Much court debt is unpayable.

Most defendants cannot and will not pay off their outstanding court debt, no matter how long they continue to try. U.S. Government & Accountability Office, GAO-18-203, *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved* 25 (2018) (finding 91 percent of federal restitution debt uncollectible because of the defendant’s inability to pay); Rebekah Diller, Brennan Center for Justice, *The Hidden Costs of Florida’s Criminal Justice Fees* (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf> (accessed Oct 11, 2022) (finding same number in study of Florida felony fees).

In Oregon, 84 percent of all criminal debt on the state’s books is estimated to be uncollectible. Legislative Fiscal Office, *Report on Liquidated and Delinquent Accounts Receivable* 55 (2021), available at <https://www.oregonlegislature.gov/lfo/Documents/2021%20Accts%20Rec%20Report.pdf> (accessed Oct 17, 2022). The lowest-income defendants are the least likely to be able to pay their court debt—one recent study found that, after ten years, the state of Pennsylvania had collected only 28 cents for every dollar assessed against a public defender client.

Jeffrey T. Ward & Nathan W. Link, *Financial Sanctions in Pennsylvania: An Examination of Assessed Amounts and Repayment by Indigent Status*, 34 Fed Sent’g Rep 166, 171 (2022).

This is especially true when the debt continues to grow over time. “Poverty penalties” accrue on court debt in the form of late fees, payment plan fees, or fees for debt delinquency hearings. ORS 1.202; Martin et al., *supra*, at 14. Moreover, most states charge interest on court debt—in Oregon, a whopping nine percent annually, ORS 82.010—which can mean low-income people making regular payments never make progress on the principal of their debt. For example, a study based on the median felony debt of \$7,234 in Washington state found that defendants had to make monthly payments of \$100—between 11 and 15 percent of their expected monthly earnings—to clear their debt, in about 11 years. Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am J Soc 1753, 1776–77 (2010). A smaller monthly payment of \$50 would be more feasible for those defendants to pay, but their debt would *increase* over time because of monthly interest and never be cleared. *Id.*

Indigent defendants consistently carry more criminal debt for longer periods than wealthier defendants, even in states where indigent defendants are assessed lower fines and fees in the first place. Maria Katarina E. Rafael & Chris Mai,

Understanding the Burden of Legal Financial Obligations on Indigent

Washingtonians, 11 Soc Sci 17 (2022). In Pennsylvania, the median defendant who qualified for a public defender still carries a court debt balance after ten years, while the median defendant with a private attorney pays off their much larger balance within three years. Ward & Link, *supra*, at 168. Notably, at very small amounts (<\$100), indigent defendants pay their debt at the same rate as wealthier ones, while at amounts as high as Mr. Dunham's debt (>\$3,000), even the median defendant with a private attorney has not fully paid their balance after six years. *Id.* at 170. And, as noted above, Oregon has one of the *highest* rates of per capita court debt in the nation. Hammons, *supra*, at 5.

Outstanding court debt is particularly unlikely to be payable for defendants who, like Mr. Dunham, have reached eligibility for expungement because their sentence is more than three years old. In Oregon, 73 percent of judicial collections happen in the first year after a debt is assessed, and 91 percent of all money that will ever be paid is paid within three years. Emily Teplin Fox, Oregon Law Center, Public Records Request to the Oregon Judicial Department (June 12, 2019), *dataset on file with Oregon Law Center*. After three years, the likelihood of full repayment becomes vanishingly small, as those with the means to repay already have, and those who still carry debt simply lack the means to repay. Hammons, *supra*, at 9.

III. Without relief from unpayable court debt—debt that is waivable under ORS 161.665(5) and ORS 161.685(5)—expungement is out of reach for the poorest Oregonians, undermining the state’s goal in creating an expungement remedy.

The Oregon Constitution declares that the purpose of the criminal justice system is the “protection of society, personal responsibility, accountability for one’s actions and reformation.” Or Const, Art I, § 15. In line with these values, the Oregon Legislature established a statutory mechanism to enable people to move on from most convictions after three years, leaving behind stigma that could otherwise interfere with the state’s goals. *See, e.g., State v. McVein*, 305 Or App 525, 529, 471 P3d 796 (2020) (“The legislature intended ORS 137.225 to combat the stigma associated with the public nature of a record of arrest or conviction by providing individuals with such a record the opportunity to purge it and start fresh.”)

States with expungement remedies experience improved outcomes in individuals’ lives, Prescott & Starr, *supra*, at 2467, with no additional risk of recidivism, *id.* at 2511. People with criminal records who avoid arrest for three to four years generally have no greater risk of arrest going forward than anyone else.

Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 263 Nat’l Inst Just J 10, 13 (2009).

Employers, landlords, credit bureaus, and other institutions all rely on a flawed assumption about people with criminal records—that they are more likely to

commit criminal conduct in the future—that ceases to be true by the time a person becomes eligible for expungement of that record in most states.

Oregon law neatly aligns with this research by opening expungement relief after three arrest-free years. ORS 137.225(1)(a). Given the data, it makes good sense to bar consideration of criminal records in employment, housing, credit, custody, or other contexts after this period.

The expungement remedy provided by ORS 137.225 is therefore fundamental to the state’s criminal justice policy. And the state procedure for waiving or mitigating excessive court debt—debt that creates a manifest hardship and which a defendant has not left willfully unpaid—is its necessary twin. In Oregon, eligibility for expungement is currently tied to compliance with and performance of one’s sentence, including payment of penalties.³

ORS 137.225(1)(a). But to make expungement realistically accessible to low-income people like Mr. Dunham, the Oregon Legislature created ORS 161.665(5) and ORS 161.685(5) to eliminate debt that a defendant simply cannot afford to repay. The three statutes work together to prevent a two-tiered system of justice

³ Oregon is one of only 13 states to condition expungement on full payment of all court debt associated with a case or sentence. Thirty states and the District of Columbia allow charges to be expunged even when some debt is outstanding, including Washington, California, Nevada, and Colorado. National Consumer Law Center & Collateral Consequences Resource Center, *The High Cost of a Fresh Start*, *supra*, at 14–19.

whereby the wealthy are permitted to move on with their lives and secure a second chance while the poor remain trapped with their record and all its consequences.

In recognition of the importance of expungement, Oregon courts have policed the boundaries of ORS 137.225, ensuring that factors outside of those listed in the statute are not considered or relied upon by the courts. *See State v. Kindred*, 314 Or App 280, 282, 499 P3d 835, 837 (2021) (overturning a denial of expungement where the trial court considered it “disrespect[ful]” that the defendant had outstanding fines and fees on a separate charge); *State v. Langan*, 301 Or 1, 718 P2d 719 (1986) (overturning a denial where the trial court had considered a defendant’s continuation of legal conduct after being advised by a police officer that the conduct was illegal).

Because of the close relationship between court debt and a criminal record, the statutes governing waiver of debt should be similarly strictly construed. It is true that, unlike expungement, waiver of fees is a discretionary matter—but that does not mean that the trial court has discretion to think about the fees however it chooses. The statutes direct the court’s attention to only two inquiries: the “manifest hardship” created by the debt (ORS 161.665(5)) and whether the defendant’s default was intentional contempt (both ORS 161.665(5) and ORS 161.685(5)). The trial court erred in Mr. Dunham’s case when it failed to consider

these two factors, substituting its own judgment of what makes a debt waivable for the Legislature's.

It is particularly important that this inquiry be focused on the defendant's financial situation at the time of the waiver motion, even if it had been previously considered when the debt was imposed. Because fees are added at various points in adjudication and post-adjudication, even courts that are attentive to defendants' ability to pay⁴ may unwittingly saddle defendants with excessive and unpayable debt. *Bannon et al., supra*, at 10–11 (finding that a lack of transparency about debt totals makes it “impossible * * * to make informed judgments about what fee amounts are appropriate and how a new or increased fee will impact total debt burdens”).

Moreover, defendants' lives and financial circumstances change. Court debt can balloon over time, and defendants' financial situations are detrimentally

⁴ While Oregon does require an ability to pay determination before assessing fines, ORS 161.645, and certain fees, ORS 161.665(4), Oregon does not have a codified standard or partial standard for what courts should consider when evaluating ability to pay. Thirteen states, including Washington and California, do, and advocates argue that these standards are a necessary best practice. *Fines and Fees: State Scores and Rankings*, National Center for Access to Justice (2020), available at <https://ncaj.org/state-rankings/2020/fines-and-fees> (accessed Oct 11, 2022); Fines & Fees Justice Center, *First Steps Toward More Equitable Fines and Fees Practices: Policy Guidance on Ability-to-Pay Assessments, Payment Plans, and Community Service* (2020), available at https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC_Policy_Guidance_Ability_to_Pay_Payment_Plan_Community_Service_Final_2.pdf (accessed Oct 16, 2022).

changed by the fact of conviction. They may not have the same resources ten years after sentencing as before. *Id.* at 14 (arguing that “these post-sentencing [waiver] options are vital to address changed circumstances such as job loss, disability, or changing family commitments”). The Oregon Legislature considered these concerns in enacting ORS 161.665(5) and 161.685(5), which were based on the 1967 proposed Michigan Revised Criminal Code. *See Proposed Oregon Criminal Code: Final Draft and Report* §§ 81-82 cmt. (1970); *see also State v. Ferman-Velasco*, 333 Or 422, 443, 41 P3d 404 (2002) (considering the commentary of the Michigan Revised Criminal Code in construing Oregon law). The drafters of the Michigan code expressly recognized the need for “discretion to consider changed circumstances,” such as the disability that prevents Mr. Dunham from returning to his prior trade. Michigan Revised Criminal Code § 1525 (1967).

Criminal records and court debt both have long-lasting detrimental effects. They undermine both the state’s goals of reformation and of accountability—transforming minor crimes into something that can never be moved past or fully atoned for, and which are forever limiting. They create and exacerbate “the civil death of discrimination” experienced by so many Americans with criminal records. *Utah v. Strieff*, 579 U.S. 232, 253 (2016) (Sotomayor, J., dissenting).

With ORS 137.225, Oregon allows people who have completed their sentences to move on. And with ORS 161.665(5) and 161.685(5), Oregon allows

people like Mr. Dunham, who are too poor to pay thousands of dollars, to complete their sentences. Both are key to the state's ability to ensure that criminal sentences are not more severe and longer lasting than intended or merited, and both need to be applied with regularity and fairness. The trial court did not do so in Mr. Dunham's case.

CONCLUSION

For the reasons discussed above, CJRC, the ACLU of Oregon, Oregon Tradeswoman, OCJ, FFJC, and NCLC urge this Court to reverse the circuit court's denial of Mr. Dunham's motion to waive fines and costs.

Date: October 19, 2022

Respectfully submitted,

/s/Aliza B. Kaplan

Aliza B. Kaplan, OSB NO. 135523
LEWIS & CLARK LAW SCHOOL
10101 W. Terwilliger Blvd.
Portland, OR 97219
Telephone: (503) 768-6721

Robert Le, OSB NO. 094167
Telephone: (503) 734-2099
Leland Baxter-Neal, OSB NO.
155347
Telephone: (971) 421-4028
OREGON CONSUMER JUSTICE
3055 NW Yeon Ave.
Portland, OR 97210

Jessica Lynn Battle, OSB NO. 222514
Rachel Dallal Gale, OSB NO. 221284
Kelly Simon, OSB NO. 154213
ACLU OF OREGON
506 SW 6th Ave., Ste. 700
Portland, OR 97204
Telephone: (971) 322-0869

**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE
SIZE REQUIREMENTS**

I certify that (1) this brief complies with the word-count limitation set forth in ORAP 5.05(1)(b)(ii)(A) and that (2) the word-count of this brief, as described in ORAP 5.05(1)(a) is 5,858 words.

I further certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(ii).

Date: October 19, 2022

Respectfully submitted,

/s/Aliza B. Kaplan

Aliza B. Kaplan, OSB NO. 135523

LEWIS & CLARK LAW SCHOOL

10101 W. Terwilliger Blvd.

Portland, OR 97219

Telephone: (503) 768-6721

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 19th day of October 2022, I filed the original BRIEF OF AMICI CURIAE LEWIS & CLARK LAW SCHOOL CRIMINAL JUSTICE REFORM CLINIC ET AL. electronically by using the court's electronic filing system. I certify that service of a copy of this brief will be accomplished on the following participant(s) in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at each participant's email address as recorded this date in the appellate eFiling system, as well as by email:

Benjamin Gutman, OSB No.
160599
Solicitor General
Oregon Department of Justice
1162 Court St NE
Salem, OR 97301
benjamin.gutman@doj.state.or.us

Sonja Good Stefani, OSB No.
161219
METROPOLITAN PUBLIC
DEFENDER
630 SW 5th Ave, Suite 500
Portland, OR 97204
(503) 225-9100
sgstefani@mpdlaw.com

Emily Teplin Fox, OSB No.
121720
Kelsey Heilman, OSB No.
140348
OREGON LAW CENTER
522 Fifth Ave, Suite 812
Portland, OR 97204
(503) 473-8314
efox@oregonlawcenter.org
kheilman@oregonlawcenter.org

John He (admitted pro hac vice)
Brian Hardingham (admitted pro
hac vice)
PUBLIC JUSTICE
475 14th Street, Suite 610
Oakland, CA 94612
(510) 622-8150
jhe@publicjustice.net
bhardingham@publicjustice.net

Date: October 19, 2022

Respectfully submitted,

/s/Aliza B. Kaplan

Aliza B. Kaplan, OSB NO. 135523

LEWIS & CLARK LAW SCHOOL

10101 W. Terwilliger Blvd.

Portland, OR 97219

Telephone: (503) 768-6721