SC97604

IN THE SUPREME COURT OF MISSOURI

GEORGE RICHEY
Appellant,

vs.

STATE OF MISSOURI
Respondent.

Circuit Court of St. Clair County
No. 14SR-CR00320
The Honorable Jerry Rellihan, Circuit Judge

BRIEF OF *AMICUS CURIAE* THE MISSOURI ATTORNEY GENERAL

ERIC S. SCHMITT
Attorney General

D. John Sauer, #58721
State Solicitor
Michael Martinich-Sauter, #66605
Deputy Attorney General
Peter T. Reed, #70756
Deputy Solicitor
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-9456 (Facsimile)
John.Sauer@ago.mo.gov

Counsel for Amicus Curiae *Missouri Attorney General*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTEREST OF *AMICUS CURIAE*

The Attorney General of Missouri is the chief legal officer of the State and represents the interests of all six million Missourians. The Attorney General has constitutional and common-law authority to direct litigation on behalf of the State and to take legal positions in litigation and on appeal. Under deeply rooted principles of Missouri law, "the attorney general is charged with the duty to enforce the rights of the state," and "[i]t is for the attorney general to decide where and how to litigate issues involving public rights and duties and to prevent injury to the public welfare." *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 347 (Mo. App. W.D. 1980). Moreover, Attorney General Eric S. Schmitt has a unique interest and experience in matters relating to municipal court reform and the use and abuse of court procedures to collect revenues for counties and municipalities. This Court's Rules recognize the interest and right of the Missouri Attorney General to participate as amicus curiae. Sup. Ct. R. 84.05(f)(4). The Attorney General asks for five minutes of argument time to present these points.

ARGUMENT

The practice of taxing an inmate's jail debt as "court costs," and then seeking to collect it through repeated show-cause hearings under threat of incarceration, is unauthorized by law and must end. No statute authorizes

the practice, and it lends itself to abuses that threaten the constitutional rights of Missouri citizens.

Missouri law does not authorize the taxation of debt incurred under § 221.070, RSMo, as "court costs." Under longstanding precedent, such debt cannot be assessed as court costs without clear statutory authorization. But the statutory definition of "court costs" contains no such unambiguous authorization. The closest that definition gets is to authorize taxation of "services" rendered to the defendant, but imprisonment is not a "service" in any ordinary sense. Incarceration punishes, deters, and incapacitates; it is not meant as a service or benefit.

Context confirms this conclusion. Section 488.5028 expressly distinguishes between the collection of court costs and incarceration costs. Section 221.070 provides that incarceration costs are collected differently than court costs. And statutes like § 488.010(1) show the General Assembly clearly indicates its intent for debt to be collected as court costs when it means to do so.

Chapter 550 does not say otherwise. The General Assembly would not hide such an authorization in a different Chapter far away from the provisions expressly addressing the collection of court costs and of jail debt. And indeed, a careful reading shows that Chapter 550's provisions address only an "exception to an exception" that does not apply here.

Third, the General Assembly's decision not to categorize jail debt as a "court cost" makes good policy sense and prevents abusive collection practices that threaten Missourians' constitutional rights. It does little good, and potentially much harm, to threaten indigent persons with more jail time and debt when they are unable to pay.

Standard of Review. The question whether debt for the cost of incarceration incurred under § 221.070, RSMo, may be taxed as "court costs" presents a question of law that this Court reviews *de novo*. *See Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804, 808 (Mo. banc 2017).

I. Clear and Unambiguous Statutory Authorization Is Required to Tax Jail Debt as Court Costs.

Under venerable principles of interpretation, this Court requires a clear and unambiguous statement in a statute to authorize charging any financial liability as "court costs." As the Western District observed in the recent *Wright* decision, "[a]t common law costs as such in a criminal case were unknown. . . . [N]o right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in nature, and are to be strictly construed." *State v. Wright*, No. WD81666, 2018 WL 6492719 (Mo. App. W.D. Dec. 11, 2018), Slip op. at 4 (quoting *State v. D.S.*, 606 S.W.2d 653, 654 (Mo. banc 1980)). "[T]he officer or other person claiming costs, which are contested, must be able to put his finger on the statute authorizing their

taxation." *Id.* at 4-5 (quoting *Ring v. Charles Vogel Paint & Glass Co.*, 46 Mo. App. 374, 377 (1891)).

As Appellant Richey argues, App. Br. 17-18, this Court has recently reaffirmed these longstanding principles of interpretation. "'Costs' are a creature of statute, and courts have 'no inherent authority to award costs, which can only be granted by virtue of express statutory authority.'" *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 800 (Mo. banc 2017) (quoting *Gene Kauffman Scholarship Found., Inc. v. Payne*, 183 S.W.3d 620, 627 (Mo. App. W.D. 2006)). "Statutes allowing the taxation of costs are strictly construed." *Id.* (quoting *Payne*, 183 S.W.3d at 627). Thus, Missouri courts have consistently held for at least 125 years that "the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; [and] that all such statutes must be strictly construed." *Ring*, 46 Mo. App. at 377.

Because court costs can only be awarded pursuant to express statutory authorization, and because statutes authorizing court costs must be strictly construed, this Court should search for a clear and unambiguous statement in the statute before permitting jail debt to be taxed as court costs.

II. No Missouri Statute Provides a Clear and Unambiguous Statement Authorizing the Taxation of Jail Debt as Court Costs.

No Missouri statute provides a clear and unambiguous statement authorizing the taxation of jail debt as court costs. On the contrary, several

well-established principles of statutory interpretation confirm that jail debt does not constitute a "court cost." This Court should conclude that taxing jail debt as court costs is unauthorized by law.

A. The statutory definition of "court costs" in Section 488.010 does not clearly and unambiguously include jail debt.

To identify the meaning of a statute, this Court looks first to the statute's plain language and examines its ordinary meaning. *Parktown Imports, Inc. v. Audi of America, Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). Plain and ordinary meaning comes first from statutory definitions, then from the dictionary. *State v. Jones*, 479 S.W.3d 100, 107 (Mo. banc 2016).

Thus, this Court's analysis of whether jail debt is taxable as a court cost should begin with the plain language of the statutory definition of "court costs," which is found in § 488.010, RSMo. Chapter 488 of the Missouri Revised Statutes addresses "Court Costs." Section 488.010(1) defines "court costs" as "the total of fees, miscellaneous charges and surcharges, imposed in a particular case." § 488.010(1), RSMo. Section 488.010(2) defines "fees" as "the amount charged for services to be performed by the court." § 488.010(2), RSMo. Section 488.010(4) defines "surcharges" as "additional charges allowed by law which are allowed for specific purposes designated by law." § 488.010(4), RSMo. And Section 488.010(3) defines "miscellaneous charges"

as "the amounts allowed by law for *services provided by individuals or entities other than the court*." § 488.010(3), RSMo (emphasis added).

This statutory definition of "court costs" does not clearly and unambiguously include jail debt assessed under § 221.070, RSMo. Such debt does not constitute "fees" because incarceration in the county jail does not constitute a "service[] to be performed by the court." § 488.010(2), RSMo. Such debt does not constitute a "surcharge" because it is not "allowed by law" as a court cost for all the reasons discussed herein. § 488.010(4), RSMo. And such debt does not constitute a "miscellaneous charge" because it is not incurred for "*services* provided by individuals or entities other than the court." § 488.010(3), RSMo (emphasis added).

In reaching the opposite conclusion, a recent unpublished decision of the Eastern District reasoned that jail debt constitutes a "miscellaneous charge" because it is incurred for "services provided by individuals or entities other than the court." *State v. Comparato*, No. ED106589 (Oct. 16, 2018), Slip op. at 5. The Eastern District panel held: "The 'service' provided in this case was Defendant's room and board while in jail, the entity providing the service was the county jail, and the law that expressly allows the county jail to charge a defendant for the costs of his or her incarceration is Section 221.070." *Id.* Thus, the Eastern District concluded that "under the plain language of the statutes, the court had statutory authority to tax the

Defendant's bill as a 'miscellaneous charge,' which is one of the three statutorily defined categories of court costs the court is authorized to impose under Section 488.010." *Id.* (citing *In re G.F.*, 276 S.W.3d 327, 330 (Mo. App. E.D. 2009)).

The Eastern District's analysis correctly focused on the plain language of the statutory definition of "court costs" in § 488.010. But the Attorney General respectfully submits that its analysis stretched the meaning of the word "services" in that statutory definition beyond its ordinary and natural meaning, as found in the dictionary. *Jones*, 479 S.W.3d at 107 (relying on Webster's Third New International Dictionary). Under its ordinary and natural meaning, the word "service" means "conduct or performance that assists or benefits someone or something," WEBSTER'S THIRD NEW INT'L DICTIONARY 2075 (1986); or "an act of helpful activity; help; aid." Service, Dictionary.com. One ordinarily would not say that the county provides "an act of helpful activity," "help," or "aid" to an inmate by incarcerating him or her in the county jail. *Id.* And one would not ordinarily say that the county is performing conduct that "assists or benefits" an inmate by restricting his or her liberty in the county jail. WEBSTER'S THIRD, at 2075.

For these reasons, in ordinary parlance, one typically would not say that incarceration in the county jail is a "service" to the inmate. *See MCI Telecommunications Corp. v. Am. Tel. & Telegraph Co.*, 515 U.S. 218, 228

(1994) ("It might be good English to say that the French Revolution 'modified' the status of the French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm."). Though rehabilitation is one traditional purpose of punishment, the principal purpose of incarceration is not to benefit the inmate, but to punish, deter, and incapacitate the inmate (and others who may consider similar crimes) for the benefit of the rest of the community. To characterize jail debt as payment for "services" to an inmate, therefore, stretches the word "services" beyond its ordinary and natural meaning.

At the very least, the word "services" does not provide a clear and unambiguous statement that jail debt constitutes a "miscellaneous charge" under § 488.010(3). In plain English, to describe jail debt as money owed for a "service" to the inmate would be (at best) an ambiguous, awkward, and indirect method of specifying that jail debt may be taxed as court costs. But this Court's cases require a clear and unambiguous statement to that effect. *See State ex rel. Merrell*, 518 S.W.3d at 800.

The case cited in the Eastern District's unpublished opinion, *In re G.F.*, actually confirms that jail debt does not constitute "court costs," because incarceration is not a "service" rendered by a third party to the inmate. *See Comparato*, Slip op. at 5 (citing *In re G.F.*, 276 S.W.3d 327, 330 (Mo. App. E.D. 2009)). *In re G.F.* concluded that guardian ad litem fees are taxable as

court costs because they meet the definition of "miscellaneous charge" in § 488.010(3). *In re G.F.*, 276 S.W.3d at 330. Unlike incarceration, the services provided by the guardian ad litem are expressly provided to advance the best interest of the person served, and thus they constitute "helpful activity," "help," and "aid" under the dictionary definition of "service."

B. Other provisions of Chapter 488 confirm that jail debt does not constitute "court costs."

Other provisions within Chapter 488 also confirm that jail debt does not constitute "court costs." Because Chapter 488 is the statutory chapter that directly addresses "court costs," these provisions within Chapter 488 are the most persuasive indicators of statutory meaning in the definition of "court costs." *See Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458, 461 (Mo. banc 2003) (noting that statutes "must be considered in context").

First, as the Western District observed in *Wright*, "the statute specifying the measures OSCA may take to collect on this liability [for jail debt and court costs], § 488.5028, quite plainly distinguishes between court costs on the one hand and the costs of incarceration under section 221.070 on the other." *Wright*, Slip op. at 7-8. Section 488.5028 provides that liability for "court costs, fines, fees, or other sums ordered by the court" shall be collectible only if such liability is "in excess of twenty-five dollars," and shall be collectible by "seek[ing] a setoff of an income tax refund." § 488.5028.1,

RSMo. By contrast, jail debt under section 221.070 is collectible without regard to amount, and it may be collected *both* through "a setoff of any income tax refund" and through setting off any "lottery prize payouts." *Wright*, Slip op. at 8. In the very same subsection, the same statutory provision creates different collection methods for "court costs" and for debt owed under section 221.070: "The office of state courts administrator *also* shall seek a setoff of any income tax refund and lottery prize payouts made to a person whose name has been reported to the office as being delinquent pursuant to section 221.070." *Id.* (emphasis added); *see also* § 488.5028.2(1)-(2), RSMo. This section—which is found in the same chapter as the statutory definition of "court costs," *i.e.* Chapter 488—provides strong evidence that the legislature did not consider jail debt to be "court costs."

The very next section of Chapter 488 also indicates that jail debt is not a species of "court costs." Section 488.5029 provides an additional method of collection for jail debt alone, which does not apply to court costs: "the office of state courts administrator shall notify the department of conservation of the full name, date of birth, and address of any person reported by a circuit court as being delinquent in the payment of money to a county jail under section 221.070," and "the conservation commission shall refuse to issue or suspend a hunting or fishing license for any person based on the reasons specified in section 221.070." § 488.5029.1, .2, RSMo. "Such suspension shall remain in

effect until the department is notified by the office of state courts administrator that such suspension should be stayed or terminated because the individual is now in compliance with delinquent payments of money to the county jail." § 488.5029.2, RSMo. As the Western District noted, section 488.5029 "never refers to this 'board bill' liability as a 'cost,' and provides this additional remedy solely with respect to the 'board bill' liability, and not with respect to any item denominated as a 'court cost.'" *Wright*, Slip op. at 9. Again, this provision of Chapter 488 treats debt incurred under section 221.070 differently than it treats "court costs."

Section 488.012 provides another example of this differential treatment of jail debt and "court costs" in Chapter 488. Section 488.012.1 authorizes the Clerk of the Court in each county to "collect the court costs authorized by statute, in such amounts as are authorized by supreme court rule adopted pursuant to sections 488.010 to 488.020." § 488.012.1, RSMo. The statute grants this Court the authority to set a schedule for court costs: "The supreme court shall set the amount of court costs authorized by statute, at levels to produce revenue which shall not substantially exceed the total of the proportion of the costs associated with administration of the judicial system defrayed by fees, miscellaneous charges and surcharges." § 488.012.2, RSMo. Subsection 3 of the statute sets forth a baseline schedule for forty-one different kinds of court costs (counting sub-parts) in specific dollar amounts,

which are effective "[p]rior to adjustment by the supreme court." § 488.012.3(1)-(23). This specific, detailed statutory schedule does not include jail debt as "court costs." *Id.*; *see also Wright*, Slip op. at 9 ("The 'board bill' is not included in this schedule."). "Nor do 'board bill' charges appear in Supreme Court Operating Rule 21.01, which sets forth updated amounts for various types of court costs." *Id.* This Court's Operating Rule 21.01 explicitly references section 488.012 and sets forth updated dollar amounts for the court costs included in the detailed schedule of section 488.012.3. *See* Mo. Sup. Ct. Operating R. 21.01(a)(1)-(22). Like section 488.012.3, this Court's Operating Rule 21.01 does not mention jail debt as "court costs." To be sure, there might be instances where another statute clearly authorizes taxing a financial liability as "court costs" even though it is excluded from these schedules. Yet the schedules set forth in section 488.012.3 and Operating Rule 21.01 are intended to be as comprehensive as possible. Thus, the omission of jail debt from these schedules provides further statutory evidence that Chapter 488 does not contemplate taxing jail debt as "court costs."

C. By providing a specific method for collection of jail debt, § 221.070 indicates that jail debt is not taxable as court costs.

In addition to these provisions of Chapter 488, section 221.070 itself implies that jail debt does not constitute a "court cost." That statute, which imposes liability for board bills in the first place, provides for its own specific,

detailed methods of collection that do not involve taxing the liability as a court cost.

Section 221.070 unambiguously imposes liability on inmates in county jails for the cost of incarceration: "Every person who shall be committed to the common jail within any county in this state, by lawful authority, for any offense or misdemeanor, upon a plea of guilty or a finding of guilt for such offense, shall bear the expense of carrying him or her to said jail, and also his or her support while in jail, before he or she shall be discharged." § 221.070.1, RSMo. But the statute then provides specific, detailed instructions on how such debt should be collected. First, "[i]f a person has not paid all money owed to the county jail upon release from custody and has failed to enter into or honor an agreement with the sheriff to make payments toward such debt according to a repayment plan, the sheriff may certify the amount of the outstanding debt to the clerk of the court in which the case was determined." § 221.070.2, RSMo. If the sheriff makes such a report, "[t]he circuit clerk shall report to the office of state courts administrator the debtor's full name, date of birth, and address, and the amount the debtor owes to the county jail." *Id.* OSCA may then pursue collection remedies set forth in section 488.5028, which (as discussed above) provides distinct procedures and remedies for the collection of jail debt and the collection of "court costs." § 488.5028.1, .2, RSMo. By setting up its own method of

collection for jail debt without characterizing jail debt as "court costs," section 221.070 implies that jail debt is not included as "court costs." *MFA Petroleum Co. v. Dir. of Revenue*, 279 S.W.3d 177, 178 (Mo. 2009) ("When two statutes cover the same subject matter, the more specific statute governs over the more general statute.").

To be sure, this negative inference from section 221.070's text is not alone dispositive of the interpretive question, because this Court has stated that the negative-inference rule in statutory interpretation should be employed "with great caution." *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266, 270 (Mo. banc 2005) (citation omitted). But section 221.070's provision of an entirely separate method of collection confirms and supports the conclusion, already evident from the text of Chapter 488, that jail debt is not taxable as court costs.

D. Section 221.070 does not include the language that the Legislature typically uses to clearly state that charges are taxable as "court costs."

Other statutes unambiguously specify that certain liabilities are taxable as court costs, and these clear statutory statements confirm that jail debt under section 221.070 is not taxable as a court cost. These statutes—most located in Chapter 488, along with the definition of "court costs"—demonstrate that the General Assembly knows how to speak clearly, and in fact does speak clearly, when it wishes to classify some liability as a court

cost. The legislature's failure to provide a similarly clear statement with respect to jail debt indicates that jail debt is not taxable as a court cost. *See Hardt v. Reliance Std. Ins. Co.*, 560 U.S. 242, 252 (2010) ("The contrast between these two paragraphs makes clear that Congress knows how to impose express limits on the availability of attorney's fees in ERISA cases.").

The Revised Statutes contain many examples of clear statements authorizing charges to be taxed as court costs. Several provisions in Chapter 488 do so by classifying a liability as a "surcharge," which directly tracks the language of the statutory definition of "court costs" provided in section 488.010. *See* § 488.010(1) (defining "court costs" as "the total of fees, miscellaneous charges and *surcharges*, imposed in a particular case") (emphasis added). For example, section 488.026 imposes "a *surcharge* of four dollars in all criminal cases filed in the courts of this state, including violations of any county ordinance, any violation of criminal or traffic laws of this state, including infractions, or against any person who has pled guilty of a violation and paid a fine through a fine collection center." § 488.026, RSMo (emphasis added). Section 488.029 imposes "a *surcharge* of one hundred fifty dollars in all criminal cases for any violation of chapter 195 in which a crime laboratory makes analysis of a controlled substance, but no such surcharge shall be assessed when the costs are waived or are to be paid by the state or when a criminal proceeding or the defendant has been dismissed by the

court." § 488.029, RSMo (emphasis added). Section 488.607 authorizes counties or cities that have domestic violence shelters to "provide for an additional *surcharge* in an amount of up to four dollars per case for each criminal case, including violations of any county or municipal ordinance," to support the shelter. § 488.607, RSMo (emphasis added). The Revised Statutes contain numerous other provisions in which the legislature specified that certain liabilities are taxable as "court costs" by defining them as "surcharges." *See, e.g.,* § 488.031.2, RSMo (describing civil and criminal filing fees as "court filing surcharges"); § 488.305.2, RSMo (authorizing the collection of a ten-dollar "surcharge" in garnishment actions); § 488.315, RSMo (authorizing a "surcharge" of $3.50 in civil actions for the juvenile justice preservation fund); § 488.650, RSMo (authorizing a "surcharge" of $250.00 in expungement actions); § 595.045.1, RSMo (authorizing a "surcharge" of $7.50 "to be assessed as costs" in criminal cases and paid to the Crime Victims' Compensation Fund).

The General Assembly also provides a clear statement that a charge is taxable as court costs when it does not use the word "surcharge," often by specifying that charges are taxable as "court costs." For example, section 488.2215 authorizes the City of St. Louis to impose fees up to five dollars for municipal ordinance violations, and the statute describes the fees as "additional *court costs* in an amount up to five dollars per case for each

municipal ordinance violation case." § 488.2215, RSMo. Similarly, section 488.2253 provides that "[i]n every contested case, or case in which the evidence is to be preserved . . . when an official court reporter is appointed, the clerk of said court shall *tax* up the sum of fifteen dollars, *to be collected as other costs*, and paid by said clerk to the director of revenue of the state." § 488.2253, RSMo (emphases added).

E. The provisions of Chapter 550 do not provide a clear and unambiguous statement that jail debt is taxable as court costs.

In *Wright*, the Western District "recognize[d] that sections 550.010 and 550.030 appear to contemplate that costs of incarceration may be taxable as 'costs,'" but concluded that these provisions in Chapter 550 do not authorize taxing jail debt as court costs. *Wright*, Slip op. at 7. This conclusion was correct, for at least three reasons.

First, as noted above, the two provisions are located in Chapter 550, not Chapter 488, which directly addresses "Court Costs." More direct evidence of the meaning of "court costs" is found in the Chapter that specifically addresses "Court Costs." If the General Assembly meant to change the definition of "court costs," it would have done so directly, not hidden it in a different chapter away from the relevant provisions. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (explaining that legislatures do "not alter the fundamental details of a regulatory scheme in

vague terms or ancillary provisions—[they do] not, one might say, hide elephants in mouseholes").

Second, neither statutory provision provides direct authorization to tax jail debt as "court costs." As the Western District noted, these provisions address jail debt indirectly "in the context of an 'exception to an exception.'" *Wright*, Slip op. at 7. Section 550.010 provides that "[w]henever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs," and that "no costs incurred on his part . . . shall be paid by the state or county," "*except* fees for the cost of incarceration, including a reasonable sum to cover occupancy costs." § 550.010, RSMo (emphasis added). In other words, section 550.010 does not authorize taxing jail debt as court costs against the defendant, because that section states that the state or county, not the defendant, shall pay "fees for the cost of incarceration." *Id.* Likewise, section 550.030 does not directly authorize taxing jail debt as court costs. That section provides that the county shall be liable for costs in criminal cases except for costs incurred on the part of the defendant: "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant." § 550.030, RSMo. Section 550.030 is fully consistent with the conclusion that "costs . . . incurred on the

part of the defendant" include both jail debt and other charges that are taxable as court costs.

Third, even if sections 550.010 and 550.030 provided some indirect support for the conclusion that jail debt is taxable as court costs, that indirect support would be much weaker and less clear than the direct evidence from Chapter 488 and section 221.070, discussed above, that jail debt is *not* taxable as "court costs." At most, these provisions in Chapter 550 might interject some limited ambiguity into the question. But, under this Court's cases, limited ambiguity is not nearly enough. This Court's cases require a clear and unambiguous statement that jail debt is taxable as "court costs," which Chapter 550 does not provide. *See State ex rel. Merrell*, 518 S.W.3d at 800; *D.S.*, 606 S.W.2d at 654; *see also Charles Vogel Paint & Glass Co.*, 46 Mo. App. at 377.

III. The Legislature's Exclusion of Jail Debt from "Court Costs" Reflects a Reasonable Policy Decision Regarding the Collection of Inmate Debt.

The General Assembly's failure to classify jail debt as "court costs" reflects a reasonable policy decision regarding methods of collection for jail debt. No one disputes that an inmate incarcerated in the county jail incurs jail debt under Missouri law, and that this debt is actually owed and may be collected by appropriate methods. *See* § 221.070.1, RSMo. And no one disputes that robust methods of collection, other than taxing jail debt as court

costs, are available to seek recovery of delinquent jail debt. *See* §§ 221.070.2, 488.5028, 488.5029, RSMo. Indeed, in the analogous context of prison debt owed to the State under the Missouri Incarceration Reimbursement Act, Section 217.825, *et seq*., the Attorney General's Office engages in debt-collection actions through other effective means to satisfy liabilities to the State. *See* § 217.837, RSMo.

In contrast to these methods of collection, authorizing jail debt to be taxed as court costs leads to the harsher method of collection by threatening re-incarceration as a consequence for delinquency. The facts of this case provide one example of such harsh methods of collection. Richey was originally assessed a Board Bill of $3,150 after serving a 90-day sentence for violating a protective order, spent additional time in custody on a failure to pay warrant, and then was assessed an additional Board Bill of $2,275 for his second stay in custody. *See* App. Br. 9-11. Several other highly publicized examples are also available. *See, e.g.*, Tony Messenger, *Jailed for Being Poor is a Missouri Epidemic*, ST. LOUIS POST-DISPATCH (Oct. 3, 2018); Tony Messenger, *Five-year old warrant has St. Francois County man in stand-off with prosecutor*, ST. LOUIS POST-DISPATCH (Oct. 27, 2018); Tony Messenger, *From Hamilton to homeless*, ST. LOUIS POST-DISPATCH (Nov. 6, 2018); Tony Messenger, *She was late to a hearing, so a Dent County judge tossed her in jail. Then she got the bill*, ST. LOUIS POST-DISPATCH (Nov. 15, 2018); Tony

Messenger, *Missouri teen stole a lawnmower in high school—11 years later he's still going to court*, ST. LOUIS POST-DISPATCH (Nov. 16, 2018); Tony Messenger, *St. Louis woman did 20 days in jail for speeding; now rural Missouri judge wants her for 6 more months*, ST. LOUIS POST-DISPATCH (Nov. 25, 2018); Tony Messenger, *St. Louis woman had a bad break up in 2006. Camden County still keeps putting her in jail because of it*, ST. LOUIS POST-DISPATCH (Dec. 5, 2018).

The General Assembly could reasonably conclude that such cases reflect excessively harsh attempts to extract jail debt from inmates of limited means, and that taxing jail debt as court costs in such cases is ultimately self-defeating as a policy matter. Notably, as the facts of this case reflect, the "board bill" frequently involves a much greater financial liability than all the authorized "court costs" combined, sometimes by orders of magnitude, and the inmate has much greater difficulty making prompt full payment of the jail debt. Authorizing a method of collection that may lead to serial incarceration for a relatively larger debt like the "board bill" can have perverse consequences. Incarceration may make it more difficult, not less, for the inmate to pay his or her debts to the State, including the "board bill" itself. *See Tate v. Short*, 401 U.S. 395, 399 (1971) (noting that imprisonment for inability to pay a fine does nothing to aid in the "collection of the revenue" and in fact "saddles the State with the cost of feeding and housing him for the

period of his imprisonment"). Incarceration may also make it more difficult for the offender to pay other important debts, such as family or child support obligations, or debts to private creditors. Repeat incarceration undoubtedly makes it more difficult for the offender to retain a full-time job and a permanent housing situation, both of which are important elements of successful re-entry and future financial stability. Incarceration also makes it harder overall to reintegrate into society successfully, thus potentially increasing the risk of recidivism, including the commission of more serious crimes. *See Bearden v. Georgia*, 461 U.S. 660, 670-71 (1983) ("[Incarcerating] someone who through no fault of his own is unable to [pay a fine] will not make [payment] suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means. . . .").

Finally, the characterization of jail debt as "court costs" can lead to abusive debt collection practices that infringe upon Missourians' constitutional rights. Under *Bearden*, the Fourteenth Amendment prohibits depriving a defendant of liberty simply because he or she lacks financial resources to pay a fine or debt, despite good-faith efforts to pay. *Id.* at 671. This Court recently reaffirmed that, prior to depriving a defendant of liberty, "a court *must* inquire as to the reasons for failure to pay outstanding court costs and, if the failure to pay was not willful, *must* consider whether the probation conditions already completed or other alternative measures of

punishment besides imprisonment adequately satisfy the state's interests in punishment and deterrence." *State ex rel. Fleming v. Missouri Board of Probation and Parole*, 515 S.W.3d 224, 230 (Mo. Banc 2017) (emphases in original). A system of taxing jail debt as "court costs," and then seeking to collect it through an interminable series of show-cause hearings under the ever-present threat of incarceration, raises a grave threat to the constitutional rights recognized by the U.S. Supreme Court in *Bearden* and reaffirmed by this Court in *Fleming*. This Court should avoid an interpretation of Missouri law that would raise grave and recurring constitutional questions. *See Reproductive Health Services of Planned Parenthood of St. Louis Region v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2007) ("If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted.").

For these reasons, the General Assembly's failure to classify jail debt as "court costs" reflects a reasonable exercise in line-drawing on a policy question that lies within the legislature's purview. Indeed, this conclusion avoids an interpretation of Missouri statutes that could raise grave constitutional questions and threaten the rights of Missouri citizens. Absent a clear statement to the contrary in the Revised Statutes, this Court should

give effect to the plain language of the statutes enacted by the legislature and conclude that jail debt is not taxable as "court costs."

CONCLUSION

For the reasons stated, this Court should hold that debt incurred under section 221.070, RSMo, is not taxable as "court costs."

January 7, 2019

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ D. John Sauer
D. John Sauer, #58721
State Solicitor
Michael Martinich-Sauter, #66605
Deputy Attorney General
Peter T. Reed, #70756
Deputy Solicitor
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
(573) 751-9456 (Facsimile)
John.Sauer@ago.mo.gov

Counsel for Amicus Curiae *Missouri Attorney General*

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on January 7, 2019, to all counsel of record. The undersigned further certifies that the foregoing brief complies with the limitations contained in Rules 84.05(f)(5) and 84.06(b) and that the brief contains 6,242 words.

/s/ *D. John Sauer*
State Solicitor