Supreme Court of Ohio Clerk of Court - Filed March 16, 2022 - Case No. 2021-1163

IN THE SUPREME COURT OF OHIO

BONITA STEWART,	:	
	:	
Plaintiffs-Appellant,	:	
	:	Case No. 2021-1163
v.	:	
	:	On Appeal from the Warren County
SOLUTIONS COMMUNITY	:	Court of Appeals, Twelfth Appellate
COUNSELING AND RECOVERY	:	District, Case No. CA2021-01-008
CENTERS, INC., ET AL.,	:	
	:	
Defendants-Appellees.	:	

BRIEF OF *AMICI CURIAE* CINCINNATI BLACK UNITED FRONT, THE OHIO JUSTICE AND POLICY CENTER, AND RIGHTS BEHIND BARS IN SUPPORT OF PLAINTIFF-APPELLEE BONITA STEWART

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IDENTIFICATION OF AMICI CURIAE

The Cincinnati Black United Front, the Ohio Justice and Policy Center, and Rights Behind Bars respectfully ask to present this Court with an important perspective relevant to its determination whether to allow immunity under R.C. 2305.51 to mental health providers for the suicide of a jailed patient.

The Cincinnati Black United Front (CBUF) is a grass roots advocacy organization that seeks to promote equality for African Americans in all respects. CBUF was an original plaintiff in the federal class action lawsuit that resulted in the Collaborative Agreement (CA), which has remained a model for police reform these past 20 years. *In re Cincinnati Policing*, 209 F.R.D. 395 (S.D. OH. 2002). As part of its advocacy, CBUF promotes policies, procedures, practices, and training geared toward reducing the risk of harm to all vulnerable citizens, including the mentally ill, when they are in the custody of law enforcement. CBUF believes that suicide prevention is a duty that all mental health providers must meet when working with individuals experiencing a mental health crisis. CBUF believes that one tool of maintaining appropriate service to those at risk of self-harm is accountability of those tasked with their care. No one should be free of all responsibility to act consistent with professional standards when caring for this vulnerable population.

The Ohio Justice & Policy Center (OJPC) is a non-profit law firm dedicated to providing legal services for the advancement of social justice. Its mission is to create fair, intelligent, redemptive criminal justice systems through zealous client-centered advocacy, innovative policy reform, and cross-sector community education. It works to preserve the dignity and human rights of every person incarcerated in Ohio, including by pushing for access to adequate medical care.

Rights Behind Bars (RBB) legally advocates for people in prison to live in humane conditions and contributes to a legal ecosystem in which such advocacy is more effective. RBB seeks to create a world in which people in prison do not face large structural obstacles to effectively advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively and, through such advocacy, push towards a world in which people in prison are treated humanely. RBB has litigated a number of cases in which incarcerated people were denied basic mental health care, including cases such as *Crane v. Utah DOC*, 10th Cir. Case No. 20-4032, and *Payne v. Sutterfield*, 5th Cir. Case No. 20-10988, in which the patient ultimately died by suicide.

INTRODUCTION

This Court is asked to decide whether mental health providers are entitled to immunity from liability under R.C. 2305.51 when a patient takes their own life. This question arises with disturbing frequency in the correctional setting: People in jail are more than three times as likely than their non-incarcerated counterparts to die by suicide.[1] Even short jail stays can be life threatening; one-quarter of suicides occur within the first three days of confinement.[2] In Ohio's ten largest jails, suicides account for over 50% of deaths.[3]

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[1] *Compare* E. Ann Carson, *Suicide in Local Jails and State and Federal Prisons, 2000–2019 – Statistical Tables* at Figure 2, Bureau of Justice Statistics (Oct. 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf with *Suicide*, Nat'l Inst. of Mental of Health (Mar. 2022), https://www.nimh.nih.gov/health/statistics/suicide.

[2] Dana Liebelson & Ryan J. Reilly, *Sandra Bland Died One Year Ago and Since Then, At Least 810 People Have Lost Their Lives in Jail*, Huffington Post (July 13, 2016), https://highline.huffingtonpost.com/articles/en/sandra-bland-jail-deaths/.

[3] Jason Szep, Ned Parker, Linda So, Peter Eisler, & Grant Smith, *Dying Inside: The Hidden Crisis in America's Jails – Focus on Ohio*, Reuters at 2 (Oct. 16, 2020), (hereinafter "Reuters, *Dying Inside: Focus on Ohio*"), https://www.reuters.com/investigates/special-report/usa-jails-graphic/.

The prevalence of suicide in Ohio's jails reflects a failure to provide adequate mental health care in these facilities. This failure is driven by the structure of correctional mental health systems, which is plagued by perverse incentives, market failures, and accountability gaps unique to the correctional context. But unlike non-incarcerated patients, jailed people cannot switch to a more competent provider in response to subpar care. As a group of former correctional officials put the point, jailed people "are at the mercy of jails to provide competent medical care during their stays."[4]

Providing immunity for patient suicides to those in charge of providing mental health care would exacerbate the suicide crisis in Ohio's jails. It would also leave the most marginalized Ohioans with no effective way to push for accountability for inadequate mental health care. *Amici curiae* thus ask this Court to take into account the disturbing realities of the mental health care provided to incarcerated people—and, especially, to those at risk of suicide—and to affirm the decision below.

STATEMENT OF FACTS

In 2014, Bonita Stewart's son Justin experienced a mental health crisis.[5] Ms. Stewart contacted authorities, believing "the system could help" stop his mental health issues from leading to "something worse."[6] She thought that having him arrested would allow him to get the mental health care he badly needed.[7]

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[4] Brief of Former Corrections Officials as *Amici Curiae* in Support of Petitioner at 3, *Strain v. Regalado*, 142 S.Ct. 312 (2021) (No. 20-1562).
[5] *Stewart v. Warren Cnty. Bd. of Commissioners*, 821 F. App'x 564, 565 (6th Cir. 2020).
[6] *Id*.
[7] *Id*.

Following his arrest, Justin was sentenced to three years of community control and was required to undergo mental health treatment.[8] In April 2016, he was re-arrested for failing to comply with his mental health treatment.[9] He refused to be medically screened in jail and was sent to an inpatient psychiatric facility.[10]

After determining that Justin was competent to stand trial, the psychiatric facility discharged Justin to Warren County Jail.[11] A judge ordered a forensic evaluation, which concluded that Justin suffered from "serious and chronic mental illness, … and need[ed] to undergo a period of hospital-based treatment."[12] The report further noted that Justin exhibited "delusions for more than one month involving beliefs that he [was] being conspired against, spied on, maliciously maligned, harassed, or obstructed in the pursuit of long term goals," and concluded that he posed a threat.[13] Following an August 2016 hearing, a judge ruled that Justin should be transferred back to an inpatient treatment facility.[14] Justin was returned to the jail until he could be placed in a treatment facility.[15]

While in the jail, Justin grew increasingly anxious and depressed about how long he would be confined.[16] He displayed disruptive, bizarre, and troubling behavior.[17] He screamed in his cell, refused most recreation time, refused meals, and made what jail officials concluded were

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[8] *Stewart v. Sols. Cmty. Counseling & Recovery Centers, Inc.*, 2021-Ohio-2635 ¶¶ 3-7, 165 Ohio St. 3d 1477 N.E.3d 992 (2021).
[9] *Id*.
[10] *Id*.
[11] *Stewart*, 821 F. App'x at 565.
[12] *Stewart*, 2021-Ohio-2635 at ¶¶ 3-7.
[13] *Id*.
[14] *Id*.
[15] *Stewart*, 821 F. App'x at 566.
[16] *Id*.
[17] *Stewart*, 2021-Ohio-2635 at ¶¶ 3-7.

false medical reports.[18] On a call with his parents, his father testified, he "started talking about how he loved us in sort of a final sounding voice, like somebody saying good-bye."[19] Jail staff documented these behaviors, but mental health staff failed to review the notes.[20] Mental health staff also failed to review the forensic report in its entirety.[21]

In mid-August 2016, Justin was moved to administrative segregation because staff deemed him unsafe in the general population.[22] Warren County Jail policy requires daily interaction for people held in administrative segregation.[23] Yet, for two weeks, from August 15, 2016 until his death on August 30, 2016, mental health staff only visited Justin on a single occasion.[24] During this occasion, a nurse approached Justin's cell and asked if he had any mental health needs.[25] Justin said "no," and the nurse left.[26] The nurse had not reviewed any medical or jail records about Justin, and mental health providers in the jail never conducted a full evaluation.[27] On August 30, 2016, Justin died by suicide.[28]

Ms. Stewart sued the entity contracted to provide mental health services to the jail, Solutions Community Counseling, and the nurse in charge of Justin's care. Defendants claimed immunity for Justin's suicide under R.C. 2305.51. Both the trial court and the court of appeals rejected that argument, ruling that Ms. Stewart's claims could go forward.

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[18] *Id*.
[19] *Stewart*, 821 F. App'x at 566.
[20] *Stewart*, 2021-Ohio-2635 at ¶¶ 3-7.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.

ARGUMENT

The courts below reached the correct outcome. Although they based their decisions on statutory interpretation, they are also right as a matter of logic, morality, and public policy. As *amici* explain below, allowing for immunity for jail suicides would have deadly results for jailed Ohioans.

I. Suicide Risk Is Disproportionately High Among Incarcerated People.

Suicide rates in correctional facilities are at disturbing heights across the United States.[29] Despite the unique ability of prisons and jails to monitor patients with mental illness and prevent access to tools of self-harm, the suicide rate among incarcerated people is much higher than that of the general population, and jail detainees like Mr. Stewart are at higher risk still compared to those in prisons.[30] In 2019, the suicide rate was 49 per 100,000 for people in local jails, 27 per 100,000 for those in state prisons,[31] and 13.9 per 100,000 for all Americans.[32] Reliable data on

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[29] Alan Greenblatt, *America Has a Health-Care Crisis—in Prisons*, Governing Magazine (July 29, 2019), https://www.governing.com/archive/gov-prison-health-care.html#:~:text=Privatization%20and%20years%20of%20inadequate,population%20with%20abysmal%20medical%20care.&text=Prison%20is%20no%20place%20to,the%20start%20of%20this%20century; Steve Coll, *The Jail Health-Care Crisis*, The New Yorker (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis; Paul von Zielbauer*, As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, N.Y. Times (Feb. 27, 2005); Katie Rose Quandt, *America's Rural Jail Death Problem*, The Atlantic (Mar. 2021), https://www.theatlantic.com/politics/archive/2021/03/americas-rural-jail-death-problem/618292/; E. Ann Carson, *Mortality in Local Jails, 2000-2018 – Statistical Tables 1*, Bureau of Justice Statistics (Apr. 2021), https://www.bjs.gov/content/pub/pdf/mlj0018st.pdf; Grant Smith, *Jail Deaths in America: Data and Key Findings of Dying Inside*, Reuters (Oct. 16, 2020), https://www.reuters.com/investigates/special-report/usa-jailsgraphic/.

[30] Alexi Jones, *New BJS Report Reveals Staggering Number of Preventable Deaths in Local Jails*, Prison Policy Initiative (Feb. 13, 2020), https://www.prisonpolicy.org/blog/2020/02/13/jaildeaths/; Bernadette Rabuy, *The Life-Threatening Reality of Short Jail Stays*, Prison Policy Initiative (Dec. 22, 2016), https://www.prisonpolicy.org/blog/2016/12/22/bjs_jail_suicide_2016/.

[31] Carson, *supra* note 1, at Figure 2

[32] *Suicide*, Nat'l Inst. of Mental of Health, *supra* note 1.

causes of death in jails goes back to 2000, and suicide has been the leading cause of death every year since.[33]

The story in Ohio is much the same. In Ohio's ten largest jails, suicides account for over 50% of deaths.[34] Warren County Jail, where Mr. Stewart died, had a long history of suicides among detainees even before Mr. Stewart's death.[35]

The crisis shows no signs of slowing. Driven by suicide, per capita deaths (from all causes) in state prisons rose 42% between 2001 and 2018, increasing almost every year.[36] In local jails, mortality rates increased steadily between 2008 and 2018, with a more than 25% increase over the period.[37] A 2019 study of more than 500 of the largest jails in the United States documented a 35% increase in mortality rate among people in custody over a ten-year period.[38] In Ohio, the jail death rate is even higher than the U.S. average.[39] And it is worth underscoring that many of those losing their lives are presumed innocent. About two-thirds of all people who

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[33] Margaret Noonan, Harley Rohloff & Scott Ginder, *Mortality in Local Jails and State Prisons, 2000-2013 – Statistical Tables 3*, Bureau of Justice Statistics (Aug. 2015), https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf; *see also* E. Ann Carson & Mary P. Cowhig, *Mortality in Local Jails, 2000-2016 – Statistical Tables 1*, Bureau of Justice Statistics (Feb. 2020), https://www.bjs.gov/content/pub/pdf/mlj0016st.pdf?utm_content=mci&utm_medium=email&utm_source=govdelivery.
[34] *Id*.
[35] Ed Richter, *Prisoner committed suicide in Warren County jail*, Dayton Daily News, (Oct. 1, 2010), https://www.daytondailynews.com/news/crime--law/prisoner-committed-suicide-warren-county-jail/a1YtpTrHbyoqvlpCmq26QJ/ (noting that five people had killed themselves in this jail in ten years before publication).
[36] Carson, *supra* note 33, at tbl. 9.
[37] *Id*. at tbl. 3.
[38] Jason Szep, Ned Parker, Linda So, Peter Eisler & Grant Smith, *Dying Inside: The Hidden Crisis in America's Jails – Public Jails, Private Care*, Reuters (Oct. 26, 2020), https://www.reuters.com/investigates/special-report/usa-jails-privatization/ (hereinafter Reuters, *Dying Inside: Public Jails*).
[39] Reuters, *Dying Inside: Focus on Ohio*, *supra* note 3 at 2 (showing that the death rate in Ohio jails from 2009 to 2019 was higher than the national death rate among incarcerated people).

died in local jails across the United States between 2009 and 2019 were not convicted at the time of their death.[40]

Pre-existing mental health issues—which, like in Mr. Stewart's case, are often a proximate cause of arrest—increase the risk of suicide in jails.[41] Indeed, pretrial detainees are prone to severe mental health conditions at much higher rates than the non-incarcerated population.[42] Almost half the people held in U.S. jails at any moment have been diagnosed with a mental illness,[43] compared to less than one in five non-incarcerated adults.[44] A quarter of pretrial detainees with diagnosed mental health conditions are classified as having "serious psychological distress"—five times higher than in the general population.[45]

High rates of alcohol and drug dependence amongst jailed people (and subsequent withdrawal) also exacerbate suicide risk.[46] Two-thirds of people held in local jails struggle with

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[40] *See* Peter Eisler, Linda So, Jason Szep, Grant Smith, & Ned Parker, *Dying Inside: The Hidden Crisis in America's Jails – Death Sentence*, Reuters (Oct. 16, 2020), https://www.reuters.com/investigates/special-report/usa-jails-deaths/ (hereinafter Reuters, *Dying Inside: Death Sentence*) ("At least two-thirds of the dead inmates identified by Reuters, 4,998 people, were never convicted of the charges on which they were being held.").

[41] *See* Lindsay M. Hayes, U.S. Dep't of Just., Nat'l Inst. of Corr., *National Study of Jail Suicide 20 Years Later* 1-2 (Apr. 2010), https://s3.amazonaws.com/static.nicic.gov/Library/024308.pdf.

[42] *See* James S. Marks & Nicholas Turner, *The Critical Link Between Health Care and Jails*, 33 Health Affs. 443, 443-44 (2014).

[43] Jennifer Bronson & Marcus Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*, at 1, Bureau of Justice Statistics (June 2017), https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf

[44] *Mental Illness*, Nat'l Inst. of Mental of Health (Jan. 2021), https://www.nimh.nih.gov/health/statistics/mental-illness#part_154788.

[45] Bronson & Berzofsky, *supra* note 43, at 3 & fig.2.

[46] *See* Hayes, *supra* note 41.

addiction[47]—more than ten times the rate of substance addiction among the general population.[48] At the time of intake, over 60% of those arriving in local jails have participated in substance abuse treatment programs in the past.[49] Once in jail, people who live with substance dependence are forced into withdrawal.[50] Withdrawal from frequent substance use can be brutal under the best of circumstances; the risk of self-harm during withdrawal is particularly high for those who are also struggling with the shock of pretrial detainment, the stress of uncertainty surrounding potential charges and conviction, and the adjustment to the discomfort of a jail cell.[51]

II. Incarcerated People at Risk of Suicide Have No Choice but to Rely on an Inadequate Correctional Mental Health Care System.

Correctional mental health care systems have proven unwilling or incapable of curbing this suicide crisis. This is largely due to the trend toward privatization of correctional health care systems.[52] As municipalities and states outsource their obligations to provide quality health care to incarcerated people, market forces take over, incentivizing poor care.[53] The dynamics of

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[47] *Drug Facts: Criminal Justice*, Nat'l Insts. of Health, Nat'l Inst. on Drug Abuse (June 2020), https://www.drugabuse.gov/sites/default/files/drugfacts-criminal-justice.pdf; Jennifer C. Karberg & Doris J. James, *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002*, Bureau of Justice Statistics (July 2005), https://www.bjs.gov/content/pub/pdf/sdatji02.pdf.

[48] Jennifer Bronson, Jessica Stroop, Stephanie Zimmer & Marcus Berzofsky, *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007–2009*, at 4-5, Bureau of Justice Statistics (rev. Aug. 10, 2020), https://www.bjs.gov/content/pub/pdf/dudaspji0709.pdf.

[49] Karberg & James, *supra* note 47, at 8 & tbl.9

[50] *See* Brief of *Amici Curiae* Disability Rights Oregon, et al. in Support of Plaintiff-Appellant Andrew Abraham, *Abraham v. Corizon*, Or. Sup. Ct. Case No. S068265 (describing multiple instances of horrific withdrawal in jails around the country).

[51] Bronson & Berzofsky, *supra* note 43, at 3 & fig.2; *see also* Brief of *Amici Curiae*, *Abraham*, *supra* note 50.

[52] *See generally* Reuters, *Dying Inside: Public Jails*, *supra* note 38; Dan Weiss, *Privatization and Its Discontents: The Troubling Record of Privatized Prison Health Care*, 86 U. Colo. L. Rev. 725 at 748 (Feb. 12, 2015); von Zielbauer, *supra* note 29.

[53] *The Prison Industry: How it Started. How it Works. How it Harms.,* Worth Rises 76 (Dec. 2020), https://tinyurl.com/x497hmyp (hereinafter Worth Rises, *The Prison Industry*); Kil Huh, Alexander Boucher, Frances McGaffey, Matt McKillop, & Maria Schif, *Jails: Inadvertent Health Care Providers*, *How county correctional facilities are playing a role in the safety net*,

competing for contracts, the cost-cutting incentives contained in those contracts, the dearth of mandatory oversight standards or health care provider accountability, and the reality of patients without choice or political clout combine to accelerate suicide rates behind bars.

The majority of correctional health care (including mental health care) is now handled by private entities. This category includes correctional health care firms, community physicians, and nonprofits like Solutions Community Counseling, the Defendant-Appellant in this case.[54] In addition to contracting with nonprofits, Ohio counties have frequently hired mega-corporations like Wellpath, Corizon, and NaphCare to provide jail health care. Of Ohio's ten largest jails, seven contracted with for-profit health care firms at some point between 2009 and 2019.[55] While Defendant-Appellant Solutions Community Counseling is a nonprofit, the outcome of this case will impact all correctional mental health care providers in Ohio, including the for-profit corporations that provide much of the mental health care jailed Ohioans receive.

Large correctional healthcare firms, in particular, have faced "constant accusations of abhorrently substandard care."[56] For example, the care provided by Wellpath—which provides correctional medical and mental health care in multiple Ohio counties, including Mahoning, Stark, Defiance, Fulton, Henry, Lucas, and Williams—has been called "morally reprehensible."[57] One county accused it of turning a jail into a "sinking submarine," and former employees have described how "constitutional rights were violated when a nurse stuffed their unanswered

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The Pew Charitable Trusts (Jan. 2018), https://www.pewtrusts.org/-/media/assets/2018/01/sfh_jails_inadvertent_health_care_providers.pdf.

[54] Huh, et al., *supra* note 53.

[55] *See* Reuters, *Dying Inside: Focus on Ohio*, *supra* note 3.

[56] *Strain* Brief of Former Corrections Officials, *supra* note 4 at 16 (citing Steve Coll, *The Jail Health-Care Crisis*, New Yorker (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis).

[57] Blake Ellis & Melanie Hicken, *CNN Investigates: 'Please Help Me Before It's Too Late*,' CNN (June 25, 2019), https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccsinvs/.

medical requests into a shredder box."[58] The data shows that these problems extend to all for-profit correctional health providers: The most comprehensive study to date of jail mortality found that risk of death was consistently higher in jails where for-profit contractors provided medical and mental health care.[59] Specifically, mortality rates in jails serviced by the five leading private contractors are up to 58% higher than in jails where government employees provide healthcare.[60]

At the heart of these disproportionately deadly outcomes is a troubling mix of incentives and accountability failures unique to privately provided correctional health care. From the process of bidding for contracts with jails and prisons to the cost-cutting incentives contained in those contracts, the interests of private correctional healthcare providers are at odds with the well-being of patients. And in contrast to the free-world healthcare market where consumer-choice abounds and political accountability mechanisms exist, in the correctional care context there are no such checks. This is true whether a provider is a for-profit correctional health care firm or a nonprofit organization.

Starting with the bidding process, cost-reduction goals are baked into the contracting process in ways that disincentivize quality care.[61] An entity interested in providing health care to people in jail must bid on contracts through a Request For Proposal (RFP) process.[62] Through

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[58] *Id*.

[59] Reuters, *Dying Inside: Death Sentence*, *supra* note 40; Reuters, *Dying Inside: Public Jails*, *supra* note 38.

[60] Reuters, *Dying Inside: Death Sentence*, *supra* note 40; Reuters, *Dying Inside: Public Jails*, *supra* note 38.

[61] *See* Micaela Gelman, *Mismanaged Care: Exploring the Costs and Benefits of Private vs. Public Healthcare in Correctional Facilities*, 95 N.Y.U. L. Rev. 1386, 1404 (2020).

[62] Huh, et al., *supra* note 53, at 10.

this process, entities compete to offer jail health services for the best value.[63] Contracts for jail health care contain a range of payment models, but "[p]ayment models can be broadly grouped into two categories: those in which the contractor bears at least some financial risk for costly medical care (risk sharing), and those in which the county assumes the entire risk (no risk sharing)."[64] Both models incentivize cost-cutting.

Under a risk-sharing model, the provider receives a predetermined fee for providing care, losing money if the cost of providing care exceeds this price.[65] If the cost of care is less than the predetermined fee, the provider retains the leftover money.[66] Care denied to detainees translates into a windfall for the provider.[67]

Where there is no risk sharing, the county pays the provider either for services provided or by the hour for medical personnel staffed in the jail.[68] Under such arrangements, bidders must submit pricing per service per month or proposed hourly wages for nurses, doctors, and other medical staff. In a competitive bidding process, a provider almost always earns a contract by agreeing to provide care for less money than any other provider.[69] The necessity to guard against being underbid effectively guarantees that substandard care will follow.[70]

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[63] *Id*. ("According to the National Academy for State Health Policy, a request for such services "'is best thought of as a problem statement, for which [a government] is seeking the best solution for the best value.'").
[64] *Id*. at 12.
[65] *Id*.
[66] *Id*.
[67] *See id.* ("This provides an incentive for the contractor to control utilization.").
[68] *Id*. at 13, Tbl. 1.
[69] *See* Joseph I. Hallinan, Going Up The River: Travels In A Prison Nation 167 (2001).
[70] *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L. J. 437, 475 (2005) (explaining how the incentives on contractors to cut costs lead inexorably "to inhumane conditions of confinement").

Once a provider wins a contract, cost-cutting is the name of the game. One way private correctional care providers keep expenses low is by skimping on the quality of medical personnel.[71] Unsurprisingly, assessments of privatized correctional healthcare have consistently faulted it for hiring unqualified staff.[72] For example, an examination of one of the entities that merged to form Corizon, Prison Health Services, described nurses doing tasks "beyond their training" and doctors who were "underqualified."[73] An investigation of the other half of the Corizon merger, Correctional Medical Services, found that they regularly hired medical personnel whose licenses had been suspended or revoked by state boards.[74] And after Corizon lost a jail contract, an audit by the government resulted in the dismissal of more than 15% of medical staff originally hired by Corizon after a determination that they "presented a potential risk to patient safety."[75]

Correctional health care providers also commonly strive to cut costs by understaffing jail and prison medical units. For instance, in *Parsons v. Ryan*—a class action brought against a correctional health care company in Arizona for lapses in care—the reviewing federal court

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[71] *See* Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 Am. Crim. L. Rev. 111, 143 (2001); Roland Zullo, *An Input Adjustment Method for Challenging Privatization: A Case from Michigan Prison Health Services*, 42 Lab. Stud. J. 85, 95 (Dec. 17, 2016).
[72] *See infra*, notes 73-75.
[73] von Zielbauer, *supra* note 29.
[74] Andrew Skolnick, *Prison Deaths Spotlight How Boards Handle Impaired, Disciplined Physicians,* 280 JAMA 1387, 1387 (Oct. 28, 1998).
[75] Caroline Lewis, *Restructuring health care delivery at New York City jails*, Crain's N.Y. Bus., (May 26, 2016) (on file with authors); *see also* N.Y.C. Dep't of Investigation, *Report on Corizon Health Inc. in New York City Jails*, at 1-2 (2015) (finding a lack of proper oversight by New York City government entities, including the failure to conduct background checks and to adequately screen the hiring of Corizon staff); *see also* Michael Winerip & Michael Schwirtz, *New York City to End Contract With Rikers Health Care Provider*, N. Y. Times (June 10, 2015), https://www.nytimes.com/2015/06/11/nyregion/report-details-failings-of-corizon-rikers-island-health-provider.html.

identified, among other systemic deficiencies, "[i]nadequate staffing levels" that created "inappropriate scheduling gaps in on-site medical coverage" and forced staff to work "excessive hours, creating fatigue risks."[76] A 2015 U.S. Department of Justice audit of a jail serviced by Wellpath was even more blunt, identifying a "potential financial incentive to leave positions vacant . . . because [Wellpath] was paid more for the required positions than it was forced to pay back for each one it left unfilled."[77]

Outside jail walls, patients could respond to such lapses by changing health care providers. In the typical marketplace for services, consumer choice is a potent incentive to deliver quality care—when a psychiatrist neglects a patient's mental health needs, he or she is very likely to lose that patient to a more attentive, competent doctor. But "prisoners have absolutely no consumer choice."[78] People receiving mental health care in jail are captive consumers in a monopoly market.[79] As a group of former correctional officials told the U.S. Supreme Court last year: "[T]his population has no choice but to rely on medical care provided by jail officials."[80]

In the jail context, mental health care providers are simply not accountable to the patients they serve. Their "customers" are counties and, by extension, the facilities in which they work. And where a provider is a for-profit firm—as in 70% of Ohio's largest jails—it must also answer

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[76] *Parsons v. Ryan*, 754 F.3d 657, 668 (9th Cir. 2014).
[77] Marsha McLeod, *Private Equity's Grip on Jail Health Care,* The Atlantic (Sept. 12, 2019), https://www.theatlantic.com/politics/archive/2019/09/private-equitys-grip-on-jail-health-care/597871/.
[78] Coll, *supra* note 29.
[79] *See generally* Stephen Raher*, The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails,* 17 Hastings Race & Poverty L.J. 3 (2020).
[80] *Strain* Brief of Former Corrections Officials, *supra* note 4 at 12-13 (citing World Health Org. & Int'l Ass'n for Suicide Prevention, *Preventing Suicide in Jails and Prisons* 9 (2007), https://www.who.int/mental_health/prevention/suicide/resource_jails_prisons.pdf).

to investors, not to patients. For-profit correctional healthcare, in particular, is a $4 billion industry on a mission to deliver enticing returns to investors.[81] Corizon, for example, is solely owned by Miami-based hedge fund Flacks Group.[82] In 2018, H.I.G. Capital, a private-equity firm with more than $34 billion in equity capital under management, acquired Wellpath.[83] As a result, traditional free-world incentives to provide quality health care are wholly absent in the correctional health market.[84]

The failures of correctional health care are exacerbated by lack of oversight and political will to find a fix. A report by the bipartisan Commission on Safety and Abuse in America's Prisons concluded that "monitoring systems" are "generally under-resourced and lacking in real power."[85] The National Commission on Correctional Health Care, which accredits private prison

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[81] Worth Rises, *The Prison Industry, supra* note 53, at 76.
[82] Matt Clarke, *Investment Firm Buys Corizon*, Prison Legal News (Nov. 1, 2020), https://www.prisonlegalnews.org/news/2020/nov/1/investment-firm-buys-corizon/.
[83] McLeod, *supra* note 77.
[84] While the impact of private equity on health care in prisons has not been studied, its effect on the delivery of care in nursing homes—another congregate setting with, arguably, a comparably "captive market"—has been. *See e.g.*, Atul Gupta, Sabrina T. Howell, Constantine Yannelis, & Abhinav Gupta, *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes,* U. Chi. Working Paper No. 2021-20, NYU Stern School of Business Forthcoming (Feb. 13, 2021), https://ssrn.com/abstract=3785329*;* Rohit Pradhan, Robert Weech-Maldonado, Jeffrey S. Harman, & Kathryn Hyer, *Private Equity Ownership of Nursing Homes: Implications for Quality,* 42 J. Health Care Fin. 1 (2014), http:/lbealthfmancejournal.com/index.php/johcf/article/view/12. In 2019, U.S. senators voiced concerns, writing in a letter to the Carlyle Group, "[w]e are particularly concerned about your firm's investment in large for-profit nursing home chains, which research has shown often provide worse care than not-for-profit facilities." Letters from Elizabeth Warren, Mark Poca, & Sherrod Brown, *Letters to Private Equity Firms* (Nov. 15, 2019) https://www.warren.senate.gov/imo/media/doc/2019-11-15%20Letters%20to%20PE%20Firms%20re%20Nursing%20Homes.pdf. One recent study estimates that private-equity involvement in nursing homes "increases the short-term mortality of Medicare patients by 10%, implying 20,150 lives lost due to PE ownership over our twelve-year sample period." Gupta, *supra*, at 2-3.
[85] David Fathi, *No Equal Justice US: The Prison Litigation Reform Act in the United States*, Human Rights Watch (June 16, 2009), https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states.

health care providers, could ostensibly fill this gap. But experts have noted that NCCHC accreditation provides a convenient rubber stamp, but little real oversight.[86] And incarcerated people are politically disfavored and lack political clout, leaving them "especially vulnerable" to abuses.[87]

In short, correctional mental health care falls woefully short of the incarcerated population's needs. And one of the most common and serious results of that deficiency is jail suicides. Indeed, the concern voiced by the dissent below about the "asymmetrical" consequences of mental health providers enjoying immunity for murders committed by their patients but not for suicides[88] has virtually no applicability in the jail setting: While over half of Ohio's jail deaths are by suicide, *not a single death* in Ohio's ten largest jails was attributed to homicide between 2009 and 2019.[89] Should this Court reverse the lower court, then, correctional mental health officials will, for effectively the first time, receive immunity from suit for ignoring suicide risk in people who rely on them—and them alone—for life-saving care.

III. **Immunity for Suicide Behind Bars Would Lead to More Death.**

Given the high risk of suicide in jail, the cost-cutting incentives inherent to the carceral mental health system, and the utter lack of patient choice for jailed populations, granting immunity to mental health providers following a jailed person's death by suicide would only lead to more needless death. Upholding the lower courts' decisions, meanwhile, would be a step toward much needed accountability and, ultimately, better suicide prevention.

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[86] Gelman, *supra* note 61, at 1406-1409.
[87] Dolovich, *supra* note 70, at 480 n.153 (quoting Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 631 (2000)).
[88] *See Stewart v. Sols. Cmty. Counseling & Recovery Centers, Inc.*, 2021-Ohio-2635, ¶ 46.
[89] Reuters, *Dying Inside: Focus on Ohio*, *supra* note 3, at 2.

The need for effective suicide prevention behind bars has never been more urgent. Over the past 50 years, shifts in policing and punishment policies—broadly referred to as "the criminalization of poverty," the "war on drugs," and "mass incarceration"—have brought about an explosion in jail and prison populations.[90] At the same time, the disappearance of state institutions to treat people with serious mental illness has turned jails into "de facto mental hospitals."[91] Today, there are more Americans suffering from mental illness in jails and prisons than in hospitals.[92]

Ohio is no exception, experiencing a 181% expansion of jail and prison populations between 1983 and 2015.[93] Jails, in particular, have seen a sharp increase in the number of Ohioans who cycle through them every year.[94] Since 1970, the total jail population in Ohio has increased 209%.[95] And Ohioans with mental illness are four times more likely to be incarcerated than hospitalized, a rate worse than about 80% of states.[96] Of those in Ohio's jails, 62% are pretrial detainees[97]—meaning they have not been convicted of any crime.

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[90] *See generally* Huh, et al., *supra* note 53.
[91] Ram Subramanian, Ruth Delaney, Stephen Roberts, Nancy Fishman, & Peggy McGarry, *Incarceration's Front Door: The Misuse of Jails in America*, at 7-12, Vera Institute of Justice (July 2015); *see also* Huh, et al., *supra* note 53; Timothy Williams, *A Psychologist as Warden? Jail and Mental Illness Intersect in Chicago*, N.Y. Times (July 30, 2015), https://www.nytimes.com/2015/07/31/us/a-psychologist-as-warden-jail-andmental-illness-intersect-in-chicago.html; Matt Ford, *America's Largest Mental Hospital Is a Jail*, The Atlantic (June 8, 2015), https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/; E. Fuller Torrey, Aaron D. Kennard, Don Eslinger, Richard Lamb, & James Pavle, *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States*, Treatment Advocacy Center (May 2010), https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf.
[92] Torrey, et al., *supra* note 91.
[93] *See Incarceration Trends in Ohio*, Vera Institute of Justice at 1 (Dec. 2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-ohio.pdf.
[94] *Id*.
[95] *Id*.
[96] Torrey, et al., *supra* note 91, at 8.
[97] *Id*.

It is no secret to those providing mental health care in jails that suicide is a significant—and increasing—problem. As former correctional officials put it, "jail administrators have known that suicide is a major problem for years."[98] And they know what to do to curb the devastating rate of suicide in jails: "Better mental health treatment and staff training can be highly effective in preventing suicide among [jailed people]."[99] This includes simple measures, like monitoring, which Defendants-Appellants in this case failed to provide for Mr. Stewart. "[N]inety-one percent of jails reported that seriously mentally ill detainees must be watched more closely for possible suicide."[100] Yet many jails fail to implement life-saving standards or draw on existing preventative resources.[101] Former correctional officials report that, due to the prevalence of mental illness in jails, those tasked with providing care "become conditioned to treat detainees with . . . indifference."[102] It is not uncommon for those working in jails to "display indifference toward incarcerated people's lives," wrote former correctional officials, "often refusing to take their health concerns seriously and cutting off access to healthcare—with fatal consequences."[103]

Jail staff—and especially mental health providers—are the only lifeline a suicidal detainee has. In the non-incarcerated population, social connections prevent suicide.[104] But

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[98] *Strain* Brief of Former Corrections Officials, *supra* note 4, at 15.
[99] *Id*.
[100] *Id*. at 7-8 (citing 4 Azza AbuDagga et al., Pub. Citizen & Treatment Advoc. Ctr., *Individuals With Serious Mental Illnesses in County Jails: A Survey of Jail Staff's Perspectives* 12 (July 14, 2016), https://www.citizen.org/wp-content/uploads/migration/2330.pdf).
[101] *Id*. at 15-16.
[102] *Id*. (citing Michael Winerip & Michael Schwirtz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. Times (July 14, 2014), https://www.nytimes.com/2014/07/14/nyregion/rikers-studyfinds-prisoners-injured-by-employees.html.)
[103] *Id*. at 14-15.
[104] U.S. Department of Veteran Affairs, Veterans' Health Administration, Office of Mental Health and Suicide Prevention, *From Science to Practice: Loneliness – A Risk Factor for Suicide* (Mar. 15, 2019) https://www.mentalhealth.va.gov/suicide_prevention/docs/Literature-Review-Loneliness-CLEARED-3-5-19.pdf.

people in jail have been removed from their families, friends, and communities. The resulting social isolation is "arguably the strongest and most reliable predictor of suicidal ideation, [suicide] attempts, and lethal suicidal behavior."[105] Because carceral mental health providers are often the only people in a position to intervene when a detainee is at risk of suicide, incentivizing accountability is crucial to curbing suicide behind bars.

Immunity from litigation would remove one of the only avenues through which a correctional mental health provider who does not act with reasonable skill and care can be held accountable. "The only de facto oversight system we have is litigation," said Dr. Carolyn Sufrin, a doctor at Johns Hopkins University and the author of *Jailcare*, a book based on her research and experience as a physician in a San Francisco county jail.[106] After all, the knowledge that one might be sued incentivizes diligence and proper care. Studies have found that, in the qualified immunity context, "a substantial percentage of [police] officers believe law suits deter unlawful misbehavior."[107] Former correctional officials agree. In an *amicus* brief to the U.S. Supreme Court in a case considering whether it should be easier for pre-trial detainees to sue for inadequate medical care in jails, they told the Court: "In light of these realities, the standards governing medical care claims should not discourage diligence among jail personnel that could otherwise facilitate potentially life-saving interventions."[108]

This Court should decline Appellants' invitation to magnify the crisis unfolding in Ohio's jails.

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[105] *Id.*
[106] McLeod, *supra* note 77.
[107] Joanna Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1811-12 (2018).
[108] *Strain* Brief of Former Corrections Officials, *supra* note 4, at 13.

CONCLUSION

For the aforementioned reasons, this Court should affirm the decision below.

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CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amici Curiae Cincinnati Black United Front, The Ohio Justice and Policy Center, and Rights Behind Bars in Support of Plaintiff-Appellee Bonita Stewart* was served upon the following counsel of record by electronic mail pursuant to Sup. Court Rule of Practice 3.11(C):

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