IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

SHAWN BRUST, et al.,	:	
	:	**Case No. 22AP-581**
Plaintiffs-Appellants,	:	**REGULAR CALENDAR**
	:	
v.	:	**On appeal from the Franklin**
	:	**County Court of Common**
OHIO PAROLE BOARD, et al.,	:	**Pleas, Case No. 21-CV-3015**
	:	
Defendants-Appellees.	:	
	:	
	:	

BRIEF OF APPELLANTS SHAWN BRUST AND MELISSA GRASA

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Assignment of Error No. 1: The trial court erred in granting Defendant-Appellees' Civil Rule 12(B)(6) motion to dismiss, as Plaintiff-Appellants' due-process right to parole decisions based on accurate information necessarily includes a right to know the allegations offered against them during the parole process, including allegations offered in writing by victims or victims' representatives. *See* Decision and Entry, filed August 24, 2022.

ISSUES PRESENTED FOR REVIEW

1. May the Ohio Parole Board circumvent prisoners' constitutional right to parole decisions based on accurate information, by impeding their ability to demonstrate that allegations put before the Parole Board are false?

2. May the Ohio Parole Board, contrary to the basic dictates of due process, deny individuals under parole review any notice of the allegations against them, when those allegations are leveled by victims' families and representatives?

3. Do Ohio statutes and rules mandate absolute confidentiality of statements submitted by victims' families and representatives, contrary to text and to constitutional due process rights?

(Issues 1, 2, and 3 pertain to Assignment of Error No. 1.)

INTRODUCTION

As a matter of both routine and policy, the Ohio Parole Board fails to meet the most basic and indispensable requirement of due process: notice, to a person subject to a government proceeding, of the allegations against them. The Supreme Court of Ohio has held that a person under review for parole is entitled to a minimal degree of due process, and has a right to a decision based on accurate information. Neither of those rights is compatible with the Parole Board refusing to disclose factual allegations that are sent to it by outside parties and incorporated into its reviews—but that is its universal practice and policy.

When a person becomes eligible for parole review, victims, their designated representatives, and their family members may submit written statements to the Parole Board. These statements are unrestricted in scope and content, and their function is to influence the Parole Board's decisions. They often contain inaccurate information or disputed characterizations of events. But Appellants, and others like them, are effectively unable to respond—because the Parole Board *never* allows them, or their counsel, to know the contents of these statements. Parole

hearings are thus reduced to groping and guesswork; an individual can easily be denied parole based on misconceptions of which they are wholly unaware. It is infamously impossible to correct, rebut, or contextualize allegations that are kept secret by the government.[1]

Shawn Brust's and Melissa Grasa's cases demonstrate that this is not an abstract concern. Both received the support of a majority of the Parole Board—in Mr. Brust's case, unanimously—at an initial phase of the consideration process. Victims' families then submitted unknown statements to the Parole Board, and subsequently, the Board reversed course and denied both of them parole.

In *State ex rel. Keith v. Ohio Adult Parole Authority*, the Supreme Court of Ohio acknowledged a minimal due process expectation in parole proceedings, expressly including a right to have parole decisions based on accurate information that actually applies to the individual under review. It is black-letter law that upon receipt of credible allegations that a

[1] *Cf.* Franz Kafka, The Trial 14 (1925) ("I can't report that you've been accused of anything, or more accurately, I don't know if you have. You've been arrested, that's true, but that's all I know.")

material piece of information before it is false, the Parole Board must investigate and make corrections.

But the Parole Board's confidentiality policies bury these rights in a Catch-22—one that the trial court fully embraced below. It held that in order to receive relief for false statements submitted by victims' families, Appellants were required to allege a specific piece of false information in *the very statements that Appellees prohibit them from accessing*. This circular logic nullifies *Keith*; the right to corrected information means nothing if it cannot be vindicated. It also defies any semblance of fundamental fairness; even the most bare-bones conception of due process requires notice of the allegations. For both reasons, Appellees' confidentiality policy cannot stand.

Mr. Brust and Ms. Grasa have alleged, upon information and belief, that the statements submitted in their cases contained false information that wrongly influenced the Parole Board's decisions. Of course, they cannot know to an absolute certainty without knowing what the statements contained, but in the trial court's view they were required to somehow do so—even to plead a valid claim and obtain discovery. That

is incompatible with *Keith*, due process, and the constitutional right to access courts.

STATEMENT OF THE CASE AND FACTS

I. The Ohio Parole Board Refuses to Disclose Statements of Fact by Victims, Their Representatives, or Their Families

Parole reviews in Ohio are a multi-step process. At the initial institutional hearing, a person who is eligible for parole meets alone with Parole Board members. If a majority of the Board finds the person suitable for release after that hearing, then they may be released—unless the Office of Victim Services (OVS), a department of Appellee the Ohio Department of Rehabilitation and Correction (ODRC), files a petition for a full board hearing. Compl. ¶¶ 29–30. Full board hearings are conducted publicly; the person being considered for parole may speak, as may their counsel and up to two supporters. Likewise, the county prosecutor and up to two victims' family members or representatives may speak in opposition to parole. *Id.* at ¶ 30.

The mere fact that oral victim statements offered at a full board hearing are made in an open setting ensures a basic degree of fairness as

to those particular statements. They are made within the hearing of the individual under consideration for parole, and their counsel, who may then respond to, dispute, or contextualize any statements of purported fact. *See id.*

Appellees, however, also employ a second conduit for victim statements—one that lacks even these most basic procedural protections. The Office of Victim Services routinely receives written statements from "victims, victims' representatives, and/or family members of victims," which it then provides to the Parole Board for its use in parole considerations, prior to any full board hearing. *Id.* at ¶ 2.[2] Appellants allege that these written statements contain contents that purport to be fact, but that are at times false, misleading, or incomplete. *Id.* The Parole Board

[2] Throughout this brief, as in the proceedings below, Appellants may refer to "victim statements," "written victim statements," "confidential victim statements," or similar terms. Unless specified otherwise, these terms all refer to written statements provided to the Parole Board by victims, victims' designated representatives, and/or victims' family members who are not designated representatives, all of which are subject to Appellees' blanket confidentiality policy. Typically, these statements are received and relayed by the Office of Victim Services. *See* Compl. ¶ 2.

and ODRC, however, do not share their contents under any circumstances: not to the public, not to parole-eligible individuals, and not to their counsel. *Id.*

This universal confidentiality policy has considerable and obvious practical implications. Parole-eligible individuals and their counsel have no opportunity to contest or contextualize any purported statements of fact in confidential victim statements, because they are never made aware of those statements' substance—even if the Parole Board ultimately relies on them to deny parole. *See id.* at ¶¶ 2–3.

II. Appellants Shawn Brust and Melissa Grasa Were Denied Access to Victim Statements

A. The Parole Board Reversed a Unanimous Initial Suitability Finding in Shawn Brust's Favor After Apparent Receipt of Victim Statements

Shawn Brust was convicted of murder in 1998, following the shooting death of Anthony Truss in 1997. Mr. Brust was sentenced to incarceration for 15 years to life, with an additional three years for a firearm specification. *Id.* at ¶ 16–17. The Parole Board first considered him for parole in 2015; it denied parole at that time, noting that he "could

benefit from additional programming to increase his insight into the offense." *Id.* at ¶ 18. When the Board held Mr. Brust's next institutional hearing in May of 2020, it found him suitable for release by 8-0 vote. It observed in particular that he had complied with its instructions from five years earlier, stating: "Offender Brust has utilized his time in prison well and has completed risk relevant programming to abate his risk to re-offend. Additionally, his conduct within the institution has greatly improved over the years and he has a supportive family with a realistic release plan." *Id.* at ¶ 31.

Subsequently, the Office of Victim Services petitioned for a full board hearing. *Id.* at ¶ 33. Mr. Brust alleges upon information and belief that, in the time in between his institutional hearing and the full board hearing, the Truss family submitted letters to Appellees objecting to his release. Per Appellees' confidentiality policy, the contents of those communications were not disclosed to Mr. Brust or his counsel. *Id.* at ¶ 35. As a result, he had no ability to rebut or correct any allegations of purported fact that they contained. Mr. Truss's parents also spoke at the full board hearing, *id.* at ¶ 38, but as a result of Appellees' policy, Mr.

Brust cannot know whether or to what extent their statements at the hearing matched those in their written submissions. Though Mr. Brust has no direct knowledge of whether the Truss family's statements allege that he threatened their safety and security, he has alleged that any such statement would necessarily be false; he poses no risk to the surviving members of the Truss family, and has never threatened any of them. *Id.* at ¶¶ 52–53.

At the conclusion of the full board hearing, the Parole Board voted 6-4 to deny Mr. Brust parole. *Id.* at ¶ 39. Mr. Brust has alleged upon information and belief that this result rests, at least in part, on purported facts that are alleged in the Truss family's confidential written submissions. *Id.* at ¶ 47.

B. The Parole Board Denied Melissa Grasa Access to Any Written Statements by Victim's Family, Even Though Some Family Members Made False Statements at Her Hearing

For approximately six years, Melissa Grasa endured cycles of violent physical abuse, sexual assault, and emotional trauma at the hands of her husband, Mike Grasa, Jr. *See id.* at ¶¶ 56–60. His attacks continued

through numerous cycles of abuse and apology; as with many victims of domestic abuse, Ms. Grasa protected her husband by hiding her injuries or making up stories to account for them. *Id.* at ¶¶ 59–60. When he discovered that Ms. Grasa had finally met with a lawyer to discuss divorce, Mike threatened to kill both her and her son if she proceeded. *Id.* at ¶¶ 56–64. Subsequently, on December 1, 1993, Ms. Grasa assisted a friend in killing Mike Grasa as he slept. *Id.* at ¶¶ 63, 65. Ms. Grasa was convicted of aggravated murder and sentenced to incarceration for 20 years to life. *Id.* at ¶ 66.

Her first parole review was in 2008. Although the Parole Board noted her "superior" institutional conduct and "good" institutional programming, it denied release due to the serious nature of the offense. *Id.* at ¶ 67. It denied release again at her next consideration, in 2014, stating again that release "would demean the seriousness of the offense" and would not "further the interest of justice." *Id.* After her third institutional hearing, in June of 2020, the Parole Board finally found her suitable for release, by a 6-4 vote. *Id.* at ¶ 74. As with Mr. Brust, the Office of Victim Services petitioned for a full board hearing. *Id.* at ¶ 75. Also as

with Mr. Brust, Ms. Grasa has alleged that the victim's family submitted statements objecting to her release, which have been held subject to the Parole Board's policy of absolute confidentiality. *Id.* at ¶ 84.

Ms. Grasa's full board hearing demonstrates how vital it is for parole-eligible individuals to have access to purportedly factual information given to the Parole Board for its consideration. At the hearing, multiple members of the Board stated that they believed the jury had found that Ms. Grasa had *not* been abused by her husband. That belief was erroneous. The Board's misconception appears to have arisen, at least in part, from remarks at the hearing by one of Mike Grasa's relatives, and it appears to have been at least part of the Parole Board's basis for denying Ms. Grasa parole. *Id.* at ¶¶ 81–82, 93–94. It was fortunate for Ms. Grasa that this particular error was raised expressly at her public full board hearing; her counsel was thus aware of at least part of the inaccurate statements, was able to obtain affidavits from two of her trial jurors confirming that the jury believed Ms. Grasa had been abused, and obtained a rehearing from the Board. *Id.* at ¶¶ 95, 99.

At Ms. Grasa's rehearing, members of Mike Grasa's family again made a series of inflammatory, inaccurate statements, including misrepresenting Ms. Grasa's support from other family members, and alleging—falsely, and without corroboration—that Ms. Grasa posed a threat to the surviving family. *Id.* at ¶ 101; *but see id.* at ¶¶ 89–90 (Ms. Grasa poses no risk, and is unaware of any previous allegations to that effect). Ms. Grasa has alleged, upon information and belief, that some or all of these false claims were submitted to the Parole Board in writing prior to the rehearing, but as she was not permitted to access those statements, she and her counsel were prevented from rebutting them. *Id.* at ¶¶ 101–103. The Parole Board again voted to deny her parole, on the basis that "the additional information presented at the hearing was not sufficient to overcome the unique factors of the offense and release at this time would not further the interests of justice nor be consistent with the welfare and security of society." *Id.* at ¶ 104.

Ms. Grasa alleges that the Parole Board's decisions arose, at least in part, from additional false information contained only in the written submissions from Mike Grasa's family members. *See id.* at ¶ 85. Though

she and her counsel have been made aware of some of the false allegations contained in these statements—when parts were repeated or remarked upon at the public hearing—she has not been permitted to access the statements or know the full range of factual allegations in them, and so cannot effectively debunk any of the additional false information that they contain. *See id.* at ¶¶ 97–98, 102–103.

C. Neither Shawn Brust nor Melissa Grasa Is Permitted to Know the Contents of Written Statements

In its order dismissing their claims, the trial court observed that Mr. Brust and Ms. Grasa "provide no credible allegations in their Complaint that the confidential victim statements *actually* contain purported statements of fact submitted as material to the Board for parole review." *See* Dismissal Entry at 12 (emphasis in original). It went on to find that "mere speculation that confidential victim statements considered at their hearings *may* have contained significant errors or false information is insufficient to establish a violation of meaningful [consideration]." *Id.*

Mr. Brust and Ms. Grasa have alleged in good faith that victim statements were submitted containing purported, but false, statements of

fact, and that those communications formed at least part of the basis for the Parole Board's decisions. *See* Compl. ¶¶ 5–6. In Mr. Brust's case, the Parole Board appears to have received no other new factual information about the nature and seriousness of his offense in between voting 8-0 to find him suitable for release, and voting 6-4 to deny him release. *Id.* at ¶¶ 40–41. In Ms. Grasa's case, she is aware that victim's family members made a flurry of false statements that she was able to rebut, and alleges that the written submissions—which are functionally immune from rebuttal—contained those and additional ones. *Id.* at ¶¶ 85–86, 102–103.

It is true, of course, that Appellants' allegations are necessarily the product of inference and deduction. Appellees' confidentiality policy ensures that it could not be otherwise. Indeed, Appellees' refusal to disclose victim statements, and the fact that Appellants are denied permission to know the statements' exact contents, is the entire basis of this lawsuit. *Id.* at ¶¶ 3–4.

III. Appellants' Claims for Declaratory Judgment Were Dismissed, Leading to This Appeal

Appellants filed this action in the Franklin County Court of Common Pleas on May 13, 2021, seeking declaratory and, if necessary, injunctive relief under the Declaratory Judgment Act, R.C. 2721.01 *et seq.* They seek two categories of declaratory judgment. *See generally id.* at ¶¶ 106–123. The first is retrospective: it would establish that Appellees' policy of universal refusal to disclose victim statements denies Appellants and others like them meaningful consideration for parole. Compl. ¶¶ 106–116. The second requested declaration is prospective, to provide that Appellants may review written victim statements submitted in the course of their parole evaluations. Compl. ¶¶ 117–123. As explained below, the requested declarations are necessary implications and corollaries of the Supreme Court of Ohio's ruling in *State ex rel. Keith v. Ohio Adult Parole Auth.*, 141 Ohio St. 3d 375, 2014-Ohio-4270, which recognized a "minimal due process expectation that the factors considered at a parole hearing * * * are to factually and accurately pertain to the prisoner whose parole is being considered. *Keith* at ¶ 25.

Appellees filed a Civil Rule 12(B)(6) motion to dismiss on June 16, 2021. Appellants opposed on June 30, and Appellees replied on July 9, 2021. On July 12, Appellants filed a motion for leave to file a sur-reply. On September 28, 2021, Appellees filed an unopposed motion to consolidate this action with *Wernert v. Ohio Parole Board*, Franklin C.P. Case No. 21-CV-4800.[3] The trial court granted that motion and consolidated the cases on November 23, 2021.

On August 24, 2022, the trial court granted Appellees' motion to dismiss, and terminated as moot all other pending motions, including Appellants' motion to file a sur-reply and two motions to intervene. *See* Decision and Entry, filed August 24, 2022 (the "Dismissal Entry"). Although there was no motion to dismiss filed in *Wernert*, the court also

[3] Although this case and *Wernert* have distinct facts, plaintiffs, and legal theories, they have some superficial similarities: common defendants, common counsel, and claims arising from the Parole Board's duty to provide "meaningful consideration" for parole, albeit in different respects. *See generally* Compl.; *Wernert* Complaint. The motion to consolidate was based on those similarities, with the caveat that the cases "are not merged into a single cause but maintain their individual identities." *See* Unopposed Motion for Consolidation, filed September 28, 2021, at 4.

sua sponte dismissed that case without notice, by issuing an identical copy of the *Brust* Dismissal Entry, which does not mention or discuss *Wernert* outside of the case caption, onto the *Wernert* docket.

This appeal followed, as did an appeal in *Wernert*. *See Wernert v. Ohio Parole Board*, 10th Dist. Case No. 22-AP-000580. On September 28, 2022, this Court sua sponte consolidated the two cases. On September 30, Appellants and the plaintiff-appellants in *Wernert* filed an unopposed joint motion to deconsolidate the two cases, citing their distinct procedural postures. *See* Unopposed Joint Motion of Appellants to Deconsolidate Cases on Appeal, filed September 30, 2022. This Court subsequently deconsolidated the two cases, and sua sponte coordinated them for purposes of panel assignment and oral argument date. *See* October 3, 2022 Journal Entry.

SUMMARY OF THE ARGUMENT

Over the past two decades, the Supreme Court of Ohio has established that prisoners are entitled to meaningful consideration for parole, including some rights to due process. These rights require, expressly, that the information giving rise to the Parole Board's decision

must be accurate and actually pertain to individual under review. *Infra* Section I-A-1. This is a constitutional doctrine, and so cannot be undone by statute or regulation. The exact requirements of due process vary widely by context, but even where the right is minimal in scope, it requires notice and the opportunity to be heard as a matter of fundamental fairness. *Infra* Section I-A-2. Applying due-process rights to the parole context in this manner is consistent with the text, history, and interpretation of Article I, Section 16 of the Ohio Constitution, exceeds the protections of federal due process. *Infra* Section I-A-3.

By holding victim statements absolutely confidential, Appellees violate Appellants' rights to meaningful consideration for parole. Keeping such information secret is incompatible with even the most basic notion of due process. *Infra* Section I-B-1. Further, the right to corrected information in parole reviews necessarily implies a right for parole-eligible individuals to know the contents of victim statements. Such knowledge is essential in order to vindicate their right to have material information corrected before it is relied upon by the Parole Board. *Infra* Section I-B-2.

The trial court erred in upholding Appellees' confidentiality policy. Its decision creates multiple Catch-22s, essentially nullifying Appellants' right to corrected information by requiring them to plead the very information they are barred from possessing—in effect, denying them the ability to challenge their parole proceeding in court. That is tantamount to its own violation of Appellants' constitutional right to access the courts. *Infra* Section I-B-3. The trial court compounded its error by applying an impossible-to-meet causation standard, requiring that Appellants demonstrate that a single false piece of information—which, again, they are barred from accessing—exclusively gave rise to their denials of parole. That is incompatible with Supreme Court of Ohio precedent, and the nature of parole decisions. *Infra* Section I-B-4.

The trial court further erred by finding that Ohio statutes forbid disclosure of victim statements. First, no statute may supersede Appellants' constitutional rights; indeed, statutes must be construed to avoid constitutional conflicts. The trial court failed to observe these principles. *Infra* Section II-A. Second, properly read, the statutes do not preclude the relief Appellants seek. *Infra* Section II-B.

ARGUMENT

"An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review." *Lunsford v. Sterilite of Ohio*, 162 Ohio St.3d 231, 2020-Ohio-4193, 165 NE.3d 245, ¶ 22 (quoting *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5). The reviewing court is to presume the truth of all material factual allegations in the complaint, and to make all reasonable inferences in favor of the nonmoving party. *E.g.*, *State ex rel. Yost v. Rover Pipeline*, 167 Ohio St.3d 223, 2022-Ohio-766, 191 N.E.3d 421, ¶ 6 (internal citations omitted). The trial court's dismissal may only be affirmed if it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Lunsford* at ¶ 22 (internal citation omitted).

I. Meaningful Consideration for Parole Requires That Parole-Eligible Individuals Be Granted Access to Victim Statements

A. The Supreme Court of Ohio Has Recognized a Constitutional Right of Minimal Due Process and Meaningful Consideration for Parole

As discussed below, first, the Supreme Court of Ohio has already recognized that prisoners are entitled to minimal due process rights,

including a right to accurate information in parole review. Second, this right is grounded in constitutional due process principles. Although the demands of due process may vary, any version of it requires notice and opportunity to be heard, which in this case must include notice of allegations submitted in victims' statements. Third, this application of due-process rights arises naturally from Article I, Section 16 of the Ohio Constitution.

1. *Keith* Acknowledges a Right to Meaningful Consideration for Parole, Including a Right to Corrected Information

Although Ohio's parole system is discretionary and affords "no due-process right to *parole itself*," *State ex rel. Keith v. Ohio Adult Parole Auth.*, 141 Ohio St.3d 375, 378, 2014-Ohio-4270, 24 N.E.3d 1132, ¶ 24 (emphasis added), it is equally clear that the Parole Board is not free of legal constraints and requirements. It does have broad discretion over the ultimate decision of whether to grant parole, *id.*, but the process by which it reaches that decision must meet a degree of fundamental fairness.

As the Supreme Court of Ohio has explained, the state has specified circumstances in which a person is "eligible for parole," and those words

"ought to mean something." *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St. 3d 456, 2002-Ohio-6719, 780 N.E.2d 548, ¶ 27. In *Layne*, the Supreme Court held that any parole-eligible person is entitled to "meaningful consideration for parole," which in that case required that an offense scoring system correspond to offenses of conviction, rather than mere allegations. *Id.* at ¶¶ 25–27. The court further explained this right in *Keith*, holding that:

> [H]aving set up the system and defined at least some of the factors to be considered in the parole decision, the state has created *a minimal due-process expectation* that the factors considered at a parole hearing are to be as described in the statute or rule and are to actually and accurately pertain to the prisoner whose parole is being considered

2014-Ohio-4270, at ¶ 25 (emphasis added).

As recognized in *Keith*, *Layne*, and their progeny, a due-process right does not guarantee a favorable *outcome* but does mandate that the *process* leading to the decision satisfies basic principles of fairness. *Keith* rejected the position that the absence of a Fourteenth Amendment liberty interest in parole meant that a parole-eligible petitioner could not invoke due-process rights to require the Parole Board to correct erroneous

records. *See State ex rel. Hattie v. Goldhardt*, 69 Ohio St.3d 123, 125–26, 2014-Ohio-4270, 630 N.E.2d 696. *Keith* expressly overruled *Hattie* to the extent the cases conflict. *Keith* at ¶ 31.

And they do conflict. *Keith* provides specifically that the existence of a formal parole process "rightly gives parolees some expectation that they are to be judged on *their own* substantively correct reports." *Keith* at ¶ 23 (emphasis in original). The process "would not mean anything if the board is permitted to rely on incorrect, and therefore irrelevant, information about a particular candidate." *Id.* The Supreme Court would later summarize *Keith* as providing that "an inmate is not afforded meaningful parole consideration if the parole authority bases its decision on information in an inmate's file that is substantively incorrect." *State ex rel. Bailey v. Ohio Parole Board*, 152 Ohio St.3d 426, 2017-Ohio-9202, 97 N.E.3d 433, ¶ 10.

The trial court construed the doctrine of meaningful consideration, and the minimal due-process expectation in *Keith*, to go no further than those cases' facts. *See* Dismissal Entry at 8. That is wrong. Nothing in *Keith* or *Layne* suggests that the legal principles they espouse are limited

to their particular facts. On the contrary, the Supreme Court has since observed in passing that the rights of parole-eligible prisoners would be violated, "for example," in the particular factual scenarios of *Layne* and *Keith*. *Bailey* at ¶ 10. Nothing in the reasoning of *Layne* or *Keith* limits their application to specific categories of inaccuracy in the parole process.

2. *Keith* Recognizes a Constitutional Due-Process Right to the Correction of False Records

Due process "calls for such procedural safeguards as the particular situation demands." *LTV Steel Co. v. Indus. Comm.*, 140 Ohio App.3d 680, 688–89, 748 N.E.2d 1176 (10th Dist. 2000). But in any context, it "embodies the concept of fundamental fairness." *See, e.g.*, *Sohi v. Ohio State Dental Bd.*, 130 Ohio App.3d 414, 422, 720 N.E.2d 187 (1st Dist. 1998); *In re D.S.*, 146 Ohio St.3d 182, 190, 2016-Ohio-1027, 54 N.E.3d 1184, ¶ 28. The "touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). It is for courts to ascertain what specific process is due in a given case and context. *See In re D.S.* at ¶ 28 ("What process is due

depends on considerations of fundamental fairness in a particular situation.").

The doctrine is frequently invoked to guarantee the fairness of procedures that are, themselves, non-mandatory creations of state law. In *Sohi*, for example, the state dental board violated a dentist's due process rights when the board issued sanctions for misconduct without identifying the complaining patient prior to a hearing. 130 Ohio App. 3d at 422. In other contexts, courts have recognized a tenure-track faculty member's "minimal" interest in a fair tenure review process, entitling the faculty member to "some degree of impartial inquiry into his or her qualifications." *Purisch v. Tennessee Technological Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996).

The Supreme Court of Ohio held in *Keith* that a degree of process is due in a parole review. Contrary to the trial court's holding below, that degree is not zero. With the term "minimal due process," the court invoked a well-recognized constitutional concept. *See, e.g.*, *State v. Bates*, 10th Dist. Franklin No. 98AP-1530, 98AP-1531, 1999 WL 715894, at *1 (Sept. 14, 1999) (discussing constitutional "minimal due process" rights

in parole revocation); *Wilkins v. Wilkinson*, 10th Dist. Franklin No. 01AP–468, 2002 WL 47051, at *2 (Jan. 15, 2002) (similar); *Sigler v. Arvay*, 9th Dist. Summit No. 21099, 2002-Ohio-6762, ¶ 14 (party was not afforded the constitutional "minimal due process guarantees of notice and opportunity to be heard" prior to civil protection order hearing); *Leslie v. Lacy*, 91 F. Supp. 2d 1182, 1188 (S.D. Ohio 2000) ("A debtor has a right to minimal due process (notice and opportunity to be heard) before a state may assist a secured creditor in repossessing the debtor's property") (quoting *Haverstick Enterprises v. Fin. Fed. Credit*, 803 F. Supp. 1251, 1257 (E.D. Mich. 1992)); *State v. Miller*, 42 Ohio St. 2d 102, 102, 326 N.E.2d 259 (1975) (referring to a "denial of the minimum requirements of due process of law required for probation revocation proceedings").

As in many due process cases, the state was not required to afford the underlying benefit at all. Ohio did not *have* to create a parole system, any more than it had to create the statutory scheme for dental licensure at issue in *Sohi*. *See Keith*, 2014-Ohio-4270, at ¶ 24 ("A state may set up a parole system, but it has no duty to do so."). But having done so, it does not have absolute authority to design and implement an arbitrary system.

Its system cannot violate precepts of fundamental fairness. *See id.* at ¶ 25; *cf. Block v. Potter*, 631 F.2d 233, 235 (3d Cir. 1980) (even absent a liberty interest, due process requires parole decisions to be free of arbitrary action).

Keith provides that even a baseline version of due process requires that decisions not be made based on "incorrect, and therefore irrelevant, information about a particular candidate." *Keith* at ¶ 23; *see id.* at ¶¶ 24–25 ("having set up the system * * * the state has created a minimal due-process expectation"); *see LTV Steel Co.*, 140 Ohio App.3d at 688–89 (specific requirements of due process adapts to needs of the context). Indeed, *Keith* not only overruled *Hattie*, *supra* at 22, but reversed this Court's earlier finding that there was "no due-process right to the correction of errors that appear in records used by the OAPA in parole determinations." *Id.* at ¶ 12 (referring to *State ex rel. Keith v. Mausser*, 10th Dist. Franklin No. 12AP–408, 2013-Ohio-2514, ¶ 36).

Keith also specifies a practical framework by which this right is to be protected. Where "there are credible allegations, supported by evidence, that the materials relied on at a parole hearing were

substantively inaccurate," the Parole Board must make necessary corrections. *Id.* at ¶ 28. Should it fail to do so, the person under review may vindicate their rights in court. *See id.* at ¶ 30. So, while the Parole Board is not required to proactively "conduct an extensive investigation" of every factual allegation placed before it, nor must it "credit every unsupported allegation by a prisoner that the information is inaccurate," there must be a mechanism to trigger its obligation to investigate and correct false information. *Id.* at ¶ 27. In other words, the parole process must include an avenue for prisoners to know about the information being offered against them, including victim statements, so that they may have some means of triggering the Parole Board's obligation to investigate that information's accuracy.

The trial court ignored this requirement, repeatedly and improperly narrowing the scope of the right articulated in *Keith*. For example, it stated that *Keith*'s due-process expectation is limited to the requirement "that factors considered at parole hearings" must be accurate and as described in statute or rule. Dismissal Entry at 9. It went on to observe that

Appellants were not deprived of the ability to respond to information presented at the full board hearing itself. *Id.* at 10.

But *Keith*'s holding is not limited to only information offered specifically at the full board hearing. *See, e.g.*, *Keith* at ¶ 26 (Parole Board may not rely on false information "in any parole determination involving indeterminate sentencing"). Further, even under that erroneous reading of *Keith*, the trial court's reasoning does not follow. Victim statements may well be "considered at parole hearings," and thus subject to *Keith*'s protections, without being openly offered there. To be "considered" in a parole determination is the entire purpose of a victim statement. The mere fact that a hearing occurred does not cure Appellants' injury, because that hearing still did not disclose to them the information being considered by the Parole Board. *See Keith* at ¶ 32 (requiring accuracy in "relevant information" considered by the Parole Board).

3. *Keith* Is Consistent with the Text and History of Article I, Section 16 of the Ohio Constitution

The trial court relied, in part, on federal due-process case law in limiting the scope of *Keith*. Dismissal Entry at 9. But the Ohio

Constitution is a document of independent force. The United States Constitution operates as a floor for civil liberties and protections, but the Ohio Constitution provides greater protections, as in *Keith*. *See, e.g.*, *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993). Indeed, the Supreme Court of Ohio has revisited some of its other constitutional precedent in recent decades, finding greater protections in parts of the Ohio Constitution that it had previously deemed coextensive with their federal counterparts. *See State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 26 (Fischer, J., concurring).

Article I, Section 16 of the Ohio Constitution is one such area that has been interpreted as more expansive than its federal counterpart. Though often equated with the Due Process Clause of the Fourteenth Amendment, *see State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 15, it has repeatedly been held to provide broader protections than federal due process. *See, e.g.*, *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156, ¶¶ 23–24 (as to juvenile right to counsel); *State v. Mole*, 149 Ohio St. 3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 20 (clarifying and reiterating *Bode* as grounded in the Ohio

constitution); *Stanton v. State Tax Comm'n*, 114 Ohio St. 658, 671, 151 N.E. 760 (1926) (as to arbitrary action by tax authorities, finding that Article I, Section 16 is "much broader than the due process clause of the Fourteenth Federal Amendment"); *cf. State v. Anderson*, 148 Ohio St.3d 74, 2016-Ohio-5791, 68 N.E.3d 790, ¶ 48 (Lanziger, J., dissenting) ("the Ohio Constitution can indeed provide due-process protection that exceeds that which is provided by the United States Constitution"); *Aalim* at ¶¶ 45–48 (DeWine, J., concurring) (arguing that the court should hesitate to expand substantive due process protections, but that "[f]undamental fairness makes perfect sense as a procedural standard").

The provision's text and history do not suggest absolute congruence with the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment closely tracks the language of the Fifth Amendment, which was ratified in 1791. *See* U.S. Const. Amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); Amend. V ("nor shall any person be * * * deprived of life, liberty, or property, without due process of law"). Most

notably, both require that a person be "deprived" of "life, liberty, or property" to trigger procedural due process protections.

The provision that would become Article I, Section 16 was adopted in 1802—over a decade after the Fifth Amendment was ratified, and sixty-six years before the Fourteenth Amendment—but its drafters chose not to adopt the same limiting language. The contingent language in Section 16 is broader, providing for redress in court for any "injury" rather than a deprivation, and to "him in his … person, or reputation" in general rather than specifically to life and liberty: "All courts shall be open, and every person, *for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law*, and right and justice administered without denial or delay." Ohio Const. Art. I, Sec. 16 (emphasis added); *see E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 171–72 (8th Dist. 1955). The provision was rearranged in 1851, and additional language added in the 1873–74 Constitutional Convention, but no changes were made to adapt the more limited language of federal due process. *See Scripps* at 174.

Keith recognizes due-process protections to people under parole review that may well exceed those of federal law. The necessary consequence and corollary of *Keith*, as discussed below, is to ensure a right to access the information contained in victim statements. In holding otherwise, the trial court rested in part on federal precedent providing that federal prisoners have no comparable constitutional right. *See* Dismissal Entry at 9 (citing *Hall v. Adult Parole Auth.*, N.D. Ohio No. 3:13-cv-0548, 2013 WL 5232785 (Sept. 16, 2013)) (web citation corrected). *Hall*, in turn, rested on federal case law providing that there is no federally protected liberty interest in parole, and so no federal due-process protection. *Id.* at *3–4; *but see Block*, 631 F.2d at 236 (even absent a liberty interest, parole may not be denied arbitrarily).

The history and text of Article I, Section 16 do not suggest that the state must follow the federal approach—and indeed, *Keith* effectively disclaims it. To automatically delegate interpretation of the Ohio Constitution "upward" to the Supreme Court of the United States is "improper under our federal system and unconstitutional under the Ohio Constitution." *Stoltz v. J & B Steel Erectors*, 155 Ohio St. 3d 567, 2018-

Ohio-5088, 122 N.E.3d 1228, ¶ 42 (Fischer, J., concurring) (comparing Article IV, Section 1 of the Ohio Constitution with the Equal Protection Clause of the Fourteenth Amendment).

B. Appellees' Confidentiality Policy Is Irreconcilable with Due Process, and Nullifies the Right to a Corrected Record

1. Due Process Requires a Right to Know Information Presented by Outside Parties

A right to know the contents of victim statements is consistent with—indeed, required by—the basic nature of due process. Even in its most limited form, due process must include "notice and an opportunity to respond" as to why a particular action should not be taken. *Local 4501, Commc'ns Workers of Am. v. Ohio State University*, 49 Ohio St. 1, 3, 550 N.E.2d 164 (1990) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). *See also, e.g.*, *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶ 13 ("Our courts have long recognized that due process requires both notice and an opportunity to be heard"); *Leslie*, 91 F. Supp. 2d at 1188 (noting a right to "minimal due process (notice and opportunity to be heard)"); *United States v. Hayes*,

171 F.3d 389, 392 (6th Cir. 1999) ("Notice and the opportunity to be heard are at the core of due process.").

Appellees' current policy removes half of the essential formula; a full board hearing presents an opportunity to be heard, but only in theory. That opportunity is empty without notice of what allegations have been leveled. As this Court and others have held repeatedly, such notice is indispensable to any degree of due process. *See, e.g.*, *Sohi*, 130 Ohio App.3d at 422; *Hayes*, 171 F.3d at 393 (reliance on undisclosed evidence constitutes a failure of notice under due process principles). "The right to a hearing embraces * * * a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity, otherwise the right may be but a barren one." *Althof v. Ohio State Bd. of Psych.*, 10th Dist. Franklin No. 05AP-1169, 2007-Ohio-1010, ¶ 19 (quoting *Gonzales v. United States*, 348 U.S. 407, 414 (1955)); *Pruneau v. Ohio Dep't of Commerce*, 191 Ohio App.3d 588, 2010-Ohio-6043, 947 N.E.2d 900, ¶ 31 (10th Dist.) (similar).

Notice of allegations requires, in turn, notice of the evidence. *See, e.g.*, *State v. Joyce*, 2022-Ohio-3370, 197 N.E.3d 612, ¶ 29 (11th Dist.)

(noting that parole revocation hearings require "disclosure to the parolee of evidence against him" and "a written statement by the factfinders as to the evidence relied on") (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)); *State v. Colvin*, 10th Dist. Franklin No. 92AP-1256, 1993 WL 128190, at *2-3 (Apr. 22, 1993) (similar, describing such notice as a "minimum due process requirement[]"); *Wolff*, 418 U.S. at 565 (absent a written record of evidence relied on in prison disciplinary actions implicating good time credit, "the inmate will be at a severe disadvantage in propounding his own cause"); *State v. Ratliff*, 2022-Ohio-1372, 190 N.E.3d 684, ¶ 39 (5th Dist.) (similar). Victim statements are not an exception to the indispensable requirements of due process; their disclosure is a necessary component of basic fairness. *See, e.g.*, *State v. Whitmire*, 11th Dist. Lake No. 12-068, 1988 WL 131975, at *3 (Dec. 9, 1988) (confidential submission of unauthenticated victim impact statements at sentencing is "out of tune with fundamental concepts of balanced fairness * * * It is of utmost importance that due process be applied"); *State v. Koch*, 11th Dist. Lake No. 97-L-142, 2001-Ohio-8830, at *2 (Dec. 21, 2001) (at a sexual predator hearing, party had "the right to

be made aware of prejudicial evidence," including victim impact statements that contained material facts), *abrogated on other grounds by State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473.

In holding otherwise, the trial court relied on *State ex rel. Brust v. Chambers-Smith [Brust I]*, 156 Ohio St.3d 331, 2019-Ohio-857, 126 N.E.3d 1099 [redacted]at case, Mr. Brust (then *pro se*) was seeking to review his Ohio Parole Board Information Sheet and Offender Background Investigation. *See* Merits Brief of Relator at 14-17, *Brust I* (No. 2018-0583). The Supreme Court of Ohio found that he had failed to demonstrate "a clear legal right to review his parole record prior to a scheduled parole hearing." *Brust I* at ¶ 21. That is not inconsistent with Appellants' position here, because they do not seek to review internal Parole Board memoranda. *Brust I* pertained to records produced and maintained by ODRC and the Parole Board themselves, not the allegations provided to them by outside parties.

Ohio courts evaluate procedural due process claims under the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See, e.g.*, *Liming v. Damos*, 133 Ohio St.3d 509, 517, 2012-Ohio-4783, 979 N.E.

2d 297, ¶ 28. That test balances (1) the plaintiff's affected interest, (2) the risk of erroneous invasion of that interest through the procedures used, compared to the value of additional safeguards, and (3) the government's interest, including the burden of providing additional or substitute procedural requirements. *Liming* at ¶ 28.

Here, the plaintiff has a "minimal due process expectation" of accurate proceedings, *Keith* at ¶ 25, but the risk of erroneous invasion of that interest is enormous. Victims, family members, and other advocates who are opposed to a prisoner's release will often possess imperfect information, and frequently have a strong interest in offering any negative allegations they can. *See supra* at 10-12 (false statements). Offering them a conduit to do so under a blanket guarantee of confidentiality invites error, particularly where the Parole Board does not have a general obligation to investigate the veracity of each allegation. *See Keith* at ¶ 27. The individuals who are best positioned to investigate—the person under parole review, and their counsel—are barred from doing so. Affording them *any* knowledge of the allegations against them would have a considerable remedial effect.

The government would suffer no administrative burden from making such a modest concession to fundamental fairness. It has asserted a vague, generalized concern about preventing harassment of individuals offering statements. *See* Motion to Dismiss at 13–14; Dismissal Entry at 13–14. First, that is inapplicable to Appellants, who pose no such risk. *See* Compl. ¶¶ 52–53, 89–90 (Appellants pose no risk to victims' families, and have never threatened any of them). Second, any case-specific security concerns could be eliminated easily by (for example) redacting contact information and other sensitive, irrelevant information. In rare situations that demanded it, access to statements might be limited to counsel. *Cf., e.g.*, *Wolff*, 418 U.S. at 565 (in the context of disciplinary proceedings affecting good time credit, "[i]t may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission.").

Appellees also argued below that they have an interest in ensuring that parole hearings are "fair and free from material interference so as to allow incarcerated individuals a meaningful consideration of parole."

Motion to Dismiss at 14. The trial court did not credit that argument, nor should this Court. In fact it is the opposite; concealing victim statements *defeats* the state's interest in preventing interference. Appellants' access to meaningful consideration for parole is harmed, not helped, by Appellees' policy. Indeed, the government should have its own interest in ensuring that parole decisions are not based on falsehoods. *Cf. Hounsell v. Los Angeles City Atty.*, C.D. Cal. No. CV-14-09910, 2015 U.S. Dist. LEXIS 159013, at *25, n.85 (Nov. 23, 2015) ("It is difficult to discern a legitimate government interest in making false statements * * *"). On balance, the government's purported interests in maintaining a fundamentally unfair system that invites error are easily outweighed by Appellants' interests in meaningful consideration for parole.[4]

[4] Alternatively, if this Court finds that *Keith* sounds in substantive due process and the requirement to refrain from arbitrary decisions, rather than procedural due process, *see Block v. Potter*, 631 F.2d 233, 235 (3d Cir. 1980), then rational basis scrutiny may apply. The same reasoning stated for the third *Mathews* factor here dispenses with that inquiry. Appellants do not deny that Appellees have a legitimate *general* security concern, but it does not relate to Appellants, and is not served by a blanket policy that invades fundamental fairness. In analyzing the government's interest, the trial court again applied circular logic: if the

2. *Keith* Necessarily Requires a Right to Know Information Offered to the Parole Board by Outside Parties

Under the Parole Board's confidentiality policies, there is no situation in which it would ever willingly disclose written victim statements' contents to the person who is under review. That includes in the Board's written decision sheets, its members' statements at full board hearings, and any statement of its rationale for denying parole. There is no exception even when victim statements are the basis, in whole or in part, for denial of parole. *See* Compl. ¶¶ 2–3 (alleging universal confidentiality policy). That policy is irreconcilable with the right to a corrected record that was recognized in *Keith*.

Keith presupposes that a person seeking parole has at least some ability to know the contents of factual assertions offered to the Parole

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Parole Board denies parole, then it must have had a legitimate security concern. *See* Dismissal Entry at 14. That is incorrect on its face—not all parole denials are based on security concerns—and moreover, Appellants seek disclosure of victim statements *before* the Parole Board denies parole. Even if denial of parole necessarily implied a security concern, which it does not, that decision would not have been made at the time Appellants were seeking disclosure of the statements.

Board in order to contest any inaccuracies and obtain corrections. And yet, without knowledge of victim statements' contents, a prisoner cannot ascertain whether they are false. Without the ability to identify falsity, they are effectively prohibited from triggering the Parole Board's duty to investigate and correct false information, regardless of what evidence they might be able to offer to disprove them. *See Keith* at ¶¶ 27–28 (requiring "credible allegations, supported by evidence," in order to obtain mandamus relief).

In short, *Keith*'s due-process right to the correction of false information is impossible to vindicate without some right of knowledge. Appellees' policy denies that knowledge, and so effectively nullifies the right to a corrected record in the context of written victim statements. *Cf. Orr v. Bank of U.S.*, 1 Ohio 36, 38 (1822) (one of the "fundamental principles and settled maxims of the law" is that "[e]very right is said to have a remedy[.]"); *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 44 (Article I, Section 16 "prohibit[s] statutes that effectively prevent individuals from pursuing relief for their injuries") (internal citations omitted).

This is not a theoretical concern; it is highly plausible that false information could be conveyed to the Parole Board in exactly that manner. For example, in Ms. Grasa's case, she is aware that multiple false statements were made at her public hearing. *See supra* 10-12. It certainly stands to reason that a person inclined to give false statements—or simply statements based on imperfect information—would be *more* inclined to give them in a format where they can simply be accepted at face value. *Cf. Whitmire*, 1988 WL 131975, at *3 (noting that statements by family members "may not accurately state the victimization," underscoring due process concerns).[5]

3. The Trial Court's Misapplication of *Keith* Results in a Catch-22 That Bars Appellants from Vindicating Their Rights in Court

[5] The trial court may have assumed—wrongly—that because family members testified at Appellants' full board hearings, any false statements made in writing must have been repeated there. *See* Dismissal Entry at 9 ("these specific Plaintiffs were not deprived of the opportunity to contest information they considered to be false at their full parole hearings because victims and families testified at their proceedings"). Any such assumption was unwarranted and impermissible in the Rule 12(B)(6) posture because, as noted above, the opposite inference is equally if not more reasonable. *See, e,g., State ex rel. Yost*, 2022-Ohio-766, ¶ 6 (all reasonable inferences to be drawn in favor of the nonmoving party).

Keith recognized a due-process right to corrected information upon credible allegations. But the trial court's ruling would allow Appellees' confidentiality policy to block prisoners from vindicating this right in the context of victim statements. It does so by requiring Appellants to identify a particular piece of false information in confidential victim statements in order even to *plead* a denial of meaningful consideration. Dismissal Entry at 9, 12. In other words, the trial court required Appellants to allege the precise information that they are not allowed to have. That ruling creates a "needlessly cruel judicial Catch-22" that is impermissible on multiple levels. *Demirzhiu v. Ashcroft*, 96 F. App'x 263, 272 n.2 (6th Cir. 2004) (Aldrich, J., concurring).

First, it stands contrary to pleading standards. Ohio is a notice pleading state. *See, e.g., Legacy Acad. for Leaders v. Mt. Calvary Pentecostal Church*, 10th Dist. Franklin No. 13AP-203, 2013-Ohio-4214, ¶ 15 (parties "need not prove their case at the pleading stage"); *Sacksteder v. Senney*, 2d Dist. Montgomery No. 24993, 2012-Ohio-4452, ¶ 45 (rejecting a standard that would convert a Rule 12(B)(6) motion into "summary-judgment-lite"); *Tuleta v. Med. Mut. of Ohio*, 8th Dist.

Cuyahoga No. 100050, 2014-Ohio-396, ¶¶ 9, 31 (a "plausible entitlement to relief" pleading standard would "[a]bandon[] nearly 40 years of routine standards"). Nothing in *Keith* provides that a party must have all evidence in hand at the outset of its case. On the contrary, *Keith* itself was an appeal from a grant of summary judgment. *See* 2014-Ohio-4270, at ¶ 2. Even at that post-discovery stage, a petitioner for a writ of mandamus was required only to offer "credible allegations, supported by evidence" in order to obtain relief. *Id.* at ¶ 28; *see also id.* at ¶ 32 ("credible allegation of substantive inaccuracies").

Keith contemplates that upon such "credible allegations, supported by evidence," the Parole Board will ultimately be compelled to investigate and correct any false statements. *Id.* It cannot be that in order to trigger that duty—or for that matter, to challenge the Parole Board's confidentiality policy itself—Appellants must plead in their complaint the precise contents of statements that Appellees absolutely bar them from obtaining.

Second, if that Catch-22 pleading requirement were the law, it would only manufacture another due process violation. Requiring

plaintiffs to plead information they are prohibited from knowing, as a condition precedent for them to vindicate a recognized right in court, denies them their fundamental right of access to the courts. *See, e.g.*, *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) (federal due process right of access); *Christopher v. Harbury*, 536 U.S. 403, 413–15 (2002) (plaintiff's right of access is violated where they are shut out of court by official action that frustrates the ability to litigate an underlying claim). A plaintiff pursuing recognized rights in court must have "adequate, effective, and meaningful" access to justice. *Swekel* at 1262; *see also* Ohio Const. Art. I, Sec. 16 ("All courts shall be open, and every person, for an injury done him … shall have remedy by due course of law"); *cf. Mayer v. Bristow*, 91 Ohio St.3d 3, 12, 2000-Ohio-109, 740 N.E. 2d 656 (noting a right of access to courts grounded in that provision).

The government violates that right where it creates or maintains a "frustrating condition standing between the plaintiff and the courthouse door." *Jackson v. City of Cleveland*, 586 F. Supp. 3d 737, 748 (S.D. Ohio 2022). That is the situation embraced by the trial court's ruling; it requires Appellants to plead information that Appellees' confidentiality policy

conceals, effectively making that policy into an insurmountable impediment to court access. *See id.*

4. The Trial Court Erroneously Required a Heightened Causation Showing That Contradicts *Keith* and Creates a Second Catch-22

The petitioner in *Keith* obtained relief upon "a showing that there *may be* substantive errors in his record that *may influence* the OAPA's consideration of his parole." 2014-Ohio-4270, ¶ 30 (emphasis added). The particular error identified in *Keith* was the number of times the petitioner had previously been paroled. *Id.* at ¶¶ 1–2. The Supreme Court did not require him to show that the Parole Board based its decision on that single factor—and indeed, there was no stated reason to believe that it had. It was enough to grant the writ, triggering the Board's duty to investigate, where an error "may influence" the Board's consideration. *Id. See also State ex rel. Keith v. Dep't of Rehab. & Corr.* [*Keith II*], 153 Ohio St.3d 568, 2018-Ohio-3128, 109 N.E.3d 1171, ¶¶ 16–17 (in subsequent litigation, Keith was required to show the information was "material" or "might have adversely affected" the Parole Board's consideration); *Bulatko v. Ohio Dep't of Job & Family Servs.*, 7th Dist. Mahoning No. 07

MA 124, 2008-Ohio-1061, at ¶ 9 (due process required showing of prejudice "unless the procedure employed involves such a probability that prejudice will result that it is deemed inherently lacking in due process") (citing *Estes v. Texas*, 381 U.S. 532, 542-43 (2008)).

That is all that was needed for causation here, and Appellants easily clear that standard. In both Mr. Brust's and Ms. Grasa's case, the Board reversed its initial vote upon receipt of additional information, which they have alleged includes victim statements. *See generally* Statement. Each has alleged that confidential victim statements constituted at least part of the Board's basis for denying parole in their cases. *See* Compl. ¶¶ 5–6.

Keith does not saddle plaintiffs with the near-impossible task of demonstrating that a single, discrete piece of false information caused the Parole Board to deny them parole—a task that becomes *fully* impossible when the false information is withheld from them. Yet that is what the trial court's ruling would require, creating a second Catch-22. Misapplying *Keith*, the trial court held that in order to show denial of meaningful consideration for parole, Appellants were required to somehow identify which particular allegations in confidential victim

statements were not only false and material, but actually held against them by the Parole Board. *See* Dismissal Entry at 13 (stating that Appellants "allege[d] no credible evidence" demonstrating that a specific confidential statement caused denial of parole); *id.* at 11 ("Plaintiffs presented no credible allegations that the Board relies on victim statements containing substantively inaccurate or false information to make the decision denying parole.").

Having stated that purported requirement, which contradicts *Keith*, the trial court explained why it would be impossible for any plaintiff to fulfill: because the Parole Board's written rationale made mention of factors other than confidential statements, *see id.*, and because "the Board weighs several factors, including victim statements, to make their parole decision." *Id.*[6]

[6] There was no discovery below as to the specific facts giving rise to the Board's decision, or how it weighed various factors in these particular cases. The trial court accepted Appellees' bald assertions that Mr. Brust was denied parole based on an "undue risk to public safety," and that Ms. Grasa was denied based on the "unique factors of her offense," both

In other words, even if a plaintiff somehow surmounted the first pleading Catch-22 by offering specific evidence of a false confidential statement, the trial court would still dismiss their claim so long as the Parole Board stated or implied that anything other than confidential victim statements formed part of its basis—even if the Parole Board's stated basis is a general conclusion arising from unidentified facts. *See id.* Again, this ruling would foreclose any *Keith* claim involving false victim statements, *precisely because Appellees do not disclose the statements' contents, even in decisions*. That is the second Catch-22: a plaintiff cannot

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of which supported the conclusion that their release "would not further the interest of justice."

Appellees also asserted in their reply brief, with no citation or supporting evidence, that "OPB would have reached the same conclusion even if the putative victim statements contained false information." Reply in Support of Motion to Dismiss at 7. That is an unfounded presumption; nothing in the Parole Board's rationale supports it. It is also irrelevant, because Appellants need not show a single, exclusive cause for their denial. In any event, as the case was dismissed on the pleadings, no evidence could be presented below as to whether, and to what extent, confidential victim statements provided underlying facts that led the Parole Board to its overarching conclusions.

identify the specific false victim statement that was used against it, when Appellees' policy conceals that very information.

Even worse, the trial court implied that the mere fact that the Board is required to weigh several factors immunizes it from challenge, because the trial court assumed that no single factor would ever predominate. *See* Dismissal Entry at 12; *see also id.* at 12–13 (erroneously stating that "the Board weighs each factor equally"). That is not the law. No relief would be possible in *any* allegation of false facts in the parole process if the Board were simply assumed to have provided meaningful consideration, merely because the statute requires it to consider multiple factors. *Keith* stands for no such thing. *See* 2014-Ohio-4270, ¶ 30 (granting relief upon a showing that false information "may influence" the Board's consideration).

II. Ohio Statutory Law Does Not and Cannot Require That All Victim Statements Be Held Confidential

The trial court held that two statutes, R.C. 5120.21(D)(5) and R.C. 5120.60(G), "mandate" that victim statements be kept confidential during the parole process. *See* Dismissal Entry at 8–11. Neither does, particularly

when construed according to well-established doctrines of constitutional avoidance.

A. The Statutes Relied Upon Below Cannot Ultimately Bar Relief Necessary for Due Process

No statute or government policy may supersede Appellants' constitutional rights. To the extent there is an unavoidable conflict between a statute and the due-process principles of *Keith*, *Keith* prevails. *State ex rel. Hoel v. Brown*, 105 Ohio St. 479, 138 N.E. 230 (1922), paragraph 3 of the syllabus ("What the constitution grants, no statute can take away"). A statute also cannot stand where it "effectively prevent[s] individuals from pursuing relief for their injuries." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 44. If necessary, this Court should excise the unconstitutional portions of statutes that conflict with Appellants' due-process rights. *See, e.g.*, *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141, ¶ 8 (severing portions of statute found incompatible with equal-protection rights).

But this Court need not apply that remedy. By long-established doctrine, courts are to "liberally construe" statutes to avoid constitutional infirmities. *E.g.*, *State ex rel. Thompson v. Spon*, 83 Ohio St.3d 551, 555, 1998-Ohio-298, 700 N.E.2d 1281; *State ex rel. Steffen v. Kraft*, 67 Ohio St.3d 439, 441, 1993-Ohio-32, 619 N.E.2d 688 (construing a judge's notes not to be a "record that is kept by any public office"); *Co-operative Legislative Comm. of Transp. Brotherhoods v. Public Util. Comm'n*, 177 Ohio St. 101, 102, 202 N.E.2d 699 (1964) (construing the term "engine or locomotive" not to encompass a powered vehicle with railroad wheels that towed railroad cars on railroad tracks, and could also move on roads).

Similarly, it is "an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences." *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382, 384, 481 N.E.2d 632 (1985). Here, the trial court's statutory interpretation has left Appellants with a truly absurd situation: rights that have been recognized by the state's highest court, but that can never be vindicated. *See supra* Section I-B-3, I-B-4 (explaining Catch-22s created by the trial court's ruling).

Appellants submit that the statutes relied upon below pose no bar to the relief they request. This is especially so when they are read pursuant to principles of constitutional avoidance.

B. The Statutes Relied Upon by the Trial Court Do Not Require Universal Confidentiality of Victim Statements

1. R.C. 5120.21(D)(5)

R.C. 5120.21(D)(5) provides, in relevant part: ko'

> Except as otherwise provided by a law of this state or the United States, the department and the officers of its institutions shall keep confidential and accessible only to its employees, except by the consent of the department or the order of a judge of a court of record, all of the following:
>
> [* * *]
>
> Victim impact statements and information provided by victims of crimes that the department considers when determining the security level assignment, program participation, and release eligibility of inmates[.]

By its plain language, the statute thus creates at least three exceptions to confidentiality requirements: (1) where another state or federal law conflicts with the confidentiality provision; (2) where Defendants consent to disclosure; and (3) where a court orders disclosure. *See id.* All three exceptions could apply here in at least some respects.

The first exception is met by the constitutional right recognized in *Keith*, which necessarily implies a right to know the contents of victim statements in order to vindicate the right to correct information. *See generally supra* Section I-B. The trial court faulted Appellants for identifying no conflicting "alternative statutes and/or administrative rules[.]" Dismissal Entry at 8. That is not a requirement of R.C. 5120.21(D)(5), but even if it were, the right described in *Keith* arises from Article I, Section 16 of the Ohio Constitution and R.C. 2967.13(A) ("a prisoner * * * becomes eligible for parole as follows"). *See supra* Section I-A; *cf. Layne*, 2002-Ohio-6719 at ¶ 27 (parole eligibility "ought to mean something").

The second exception provides Appellees with express authority to waive any confidentiality. That is flatly contrary to the trial court's holding that they are "mandate[d]" to maintain confidentiality. Dismissal Entry at 11. Appellees have simply decided by policy to universally withhold that consent—even while relying on the confidential statements. Again, that policy cannot survive *Keith*.

The third exception anticipates a court of record ordering victim statements produced, such as by discovery. Appellants have provided credible allegations—to the fullest extent that it is possible to do so while being denied access to the confidential statements by Appellees themselves—that false information was provided to the Parole Board in their cases. They should be entitled to the discovery necessary to prove a *Keith* violation. The "order of a judge of a court of record" may come by an order compelling discovery, or by declaratory judgment that Appellants are entitled to review the statements. *See* Compl. ¶ 118.

The trial court dismissed this exception on the basis that Appellants had "never sought a court order mandating Defendants to release confidential victim statements prior to their parole hearings." Dismissal Entry at 10. That misapprehends the nature of the statute, which says nothing of a timing restriction of that nature, and also of Appellants' claims. Appellants seek declaratory relief for both retrospective and prospective purposes. *See supra* Statement Section III.

2. R.C. 5120.60(G)

R.C. 5120.60(G) exempts certain materials from public records requests:

> Information provided to the office of victim services by victims of crime or a victim representative designated under section 2930.02 of the Revised Code for the purpose of program participation, of receiving services, or to communicate acts of an inmate or person under the supervision of the adult parole authority that threaten the safety and security of the victim shall be confidential and is not a public record under section 149.43 of the Revised Code.

First, the scope of this statute is limited to information provided by "victims of crime or a victim representative." A victim representative must be specifically designated by a court to "exercise the rights of the victim[.]" R.C. 2930.02(A). No more than one person may be so designated. *Id.* ("If more than one person seeks to act as the victim's representative * * * the court * * * shall designate one[.]"). Appellants each alleged that Appellees received multiple communications from victims' family members. *See* Compl. ¶¶ 5–6. Even if R.C. 5120.60(G) applies, it only applies to information received from a court-designated victim representative, and does not authorize withholding any information

received from others, including victims' family members who were not designated as representatives. *See also* R.C. 5120.60(B) (Office of Victim Services created to provide assistance to three distinct categories: "victims of crime, victims' representatives designated under section 2930.02 * * * and members of the victim's family").

Second, the statements in Appellants' case do not communicate "acts of an inmate or person under the supervision of the adult parole authority that threaten the safety and security of the *victim*." *See* R.C. 5120.60(G) (emphasis added). Appellants do not pose any threat, *see* Compl. ¶¶ 53, 90, but certainly no further threat to the victim, and the statute does not encompass victims' family members or representatives.

The trial court held that "victims" who provide statements to the Office of Victim Services are engaged in "program participation" and "receiving services." Dismissal Entry at 10–11. It appears to have expanded the definition of "victims" to include anyone associated with victims; as noted above, that is an incorrect reading of R.C. 5120.60(G). Further, if the statute necessarily encompassed victim statements as "program participation" and "receiving services," then *any* information

provided to the Office of Victim Services would presumably qualify, rendering the limiting language unnecessary. The Office's statutory functions include "assist[ing] victims in contacting staff of the department about problems with offenders" which is a more likely intended application of the confidentiality provision.

Moreover, that interpretation disregards that information in written victim statements is not merely being held by the Office of Victim Services, but is being submitted to the Parole Board for its consideration—and yet kept confidential, in violation of Appellants' due process rights. Appellants submit that in order to avoid a constitutional conflict, this Court should not construe the statute to encompass statements that are submitted for the Parole Board's consideration.

3. Ohio Adm. Code 5120:1-1-36(B)

Appellees argued below that 5120:1-1-36(B) "provides what OPB records are specifically public records, and written victim statements are not listed therein." Motion to Dismiss at 8. The trial court did not rule on this contention, but it is meritless. *See generally* Opposition to Motion to Dismiss at 13–14. As explained below, 5120:1-1-36(B) identifies specific

public records categories that are in addition to the general public records listed elsewhere. *See* Ohio Adm. Code 5120-9-49. 5120-9-49 specifies that records are public unless specifically exempted. *Id.* Even non-public records "shall also be made available" to the public absent foreseeable harm, security risk, or interference with a fair parole proceeding—none of which justify confidentiality here, and the latter of which weighs in *favor* of disclosure. *See* 5120:1-1-36(E)-(F).

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's entry of dismissal and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on December 19, 2022 via this court's electronic filing system, and that a copy was served by email on counsel for appellees:

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