

No. S257844

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE,

Plaintiffs and Respondents,

v.

KOPP,

Defendants and Petitioners.

Ct. of Appeal No. D072464

Sup. Ct. No. SCN327213

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After Decision by the Court of Appeal, Fourth Appellate District

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**APPLICATION TO FILE AMICUS CURIAE BRIEF and  
PROPOSED BRIEF of ECONOMIC JUSTICE ORGANIZATIONS  
PUBLIC COUNSEL, WESTERN CENTER ON LAW AND POVERTY,  
FINES AND FEES JUSTICE CENTER, CENTER FOR RESPONSIBLE  
LENDING, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO,  
THE INSIGHT CENTER, and LEGAL SERVICES FOR PRISONERS  
WITH CHILDREN IN SUPPORT OF PETITIONERS**

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## APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 8.200(c) of the California Rules of Court, civil rights and economic justice organizations Public Counsel, Western Center on Law and Poverty, the Fines and Fees Justice Center, Center for Responsible Lending, Community Legal Services in East Palo Alto, The Insight Center, Legal Services for Prisoners with Children (LSPC) (“Economic Justice Organizations”) respectfully apply for permission to file the Amicus Curiae brief in support of Petitioner contained herein. On November 13, 2019, this Court granted review on two issues: 1) whether a court must consider a defendant’s ability to pay before imposing or executing fines, fees, and assessments, and 2) if so, which party bears the burden of proof regarding the defendant’s ability to pay. Economic Justice Organizations’ missions are to assist low-income clients in matters involving economic and racial justice and to remedy the systemic inequalities that create and perpetuate poverty. The imposition of unaffordable fines and fees contravenes these missions. Additionally, proposed amicus Public Counsel represented an indigent defendant in the landmark Court of Appeal case *People v. Dueñas* (2019) 30 Cal.App.5th 1157, which confirmed that due process and equal protection protect indigent defendants from unpayable fines and fees.

As the proposed brief explains, and contrary to the State’s brief, criminal fines and fees serve both as punishment and as a regressive financing mechanism for the court system, and individual fines and fees cannot be divided into one function or another. The

California and federal constitutions' due process and equal protection clauses protect indigent people from fines and fees. As organizations that are based in California and/or working on criminal justice and economic justice issues that affect Californians, Economic Justice Organizations have a particular interest and expertise in ensuring that indigent defendants are neither punished due to their poverty nor exploited in an attempt to fund public services.

**Public Counsel** is a Los Angeles-based legal services organization that represents low-income people in civil and criminal matters that implicate economic and racial justice. Public Counsel's attorneys have successfully challenged the imposition of fines and fees on indigent criminal defendants, including as counsel for the indigent defendant in *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

**Western Center on Law and Poverty** advocates on behalf of low-income Californians in every branch of government – from the courts to the Legislature. Through the lens of economic and racial justice, we litigate, educate and advocate around health care, housing, public benefits and economic justice. Western Center has sued to challenge the implementation of laws that impose different and more severe penalties on people who cannot afford California's high fines and fees, including *Freeman v. Riverside County*, Riverside Sup. Ct. No. RIC2001772, *Hernandez v. CA Dep't of Motor Vehicles*, Alameda Sup. Ct. No. RG16836460, *Rubicon Programs v. Superior Court*, Solano Sup. Ct. No. FCS047212, and *Alvarado v. Superior Court*, L.A. Sup. Ct. No. BC628849. Western Center has also been a co-author in several reports demonstrating that using fines and fees to

fund state and local governments yields little revenue in comparison with the harm borne by low income and communities of color that are disproportionately ticketed and arrested, including *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California*; and *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California*. Ensuring that low-income Californians are not burdened by debt that prevents them from meeting their basic needs and living with economic dignity is critical to Western Center's anti-poverty mission.

**The Fines and Fees Justice Center ("FFJC")** is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees by state and local governments. FFJC's mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably.

**The Center for Responsible Lending** is a national advocacy and research non-profit organization dedicated to ensuring that consumers have access to fair financial products, with an emphasis on consumers who may be marginalized or underserved in the existing financial marketplace. This includes people of color, women, seniors, veterans, rural residents, and low-wealth families and communities. The Center has long advocated against both abusive and predatory debt collection practices, as well as lending made without consideration for a consumer's ability to repay. The Center also acknowledges that the imposition and collection of unaffordable fines and fees result in unfair criminal legal system debt, disproportionately impacting Black and brown communities,

which are over-policed and over-incarcerated. The Center ultimately seeks to abolish criminal fees and reduce the impact of criminal fines made without regard to an individual's ability to pay.

**Community Legal Services in East Palo Alto ("CLSEPA")** provides free legal services that improve the lives of low-income families throughout the region specializing in immigration, housing, workers' rights, reentry and criminal records dismissal, and consumer protection. CLSEPA's team of attorneys, paralegals and social worker work side-by-side with low-income communities and partner with community-based organizations, churches, and schools to bring about lasting change. CLSEPA trains and supports community members to navigate the legal system and exercise their rights. CLSEPA achieves its mission using multiple, innovative strategies, including community education, individual legal advice and representation, legal assistance to community groups, policy advocacy, and impact litigation.

**The Insight Center** is a national research and economic justice organization working to ensure that all people become and remain economically secure. Throughout the Bay Area, the State of California, and nationwide, Insight's policy and research advocates identify and implement solutions to address the intentional disinvestment, dehumanization, and exclusion of people of color from economic policy and opportunity.

**Legal Services for Prisoners with Children (LSPC)** organizes communities impacted by the criminal justice system and has seen that incarceration very often starts with the inability to pay court-ordered debt. When assisting clients attempting to clean up their

records after re-entering society, we regularly must inform the unemployed that they may not be able to access expungement – which would improve their chances of finding a job – because they cannot pay for “mandatory” court fees. This catch-22 unjustly increases their risk of reincarceration. To address the criminalization of California’s most vulnerable residents, LSPC is involved with policy, litigation, and public education work aimed at reducing the collateral consequences of fines and fees.

The Proposed Brief will help the Court contextualize the due process and equal protection precedents that prohibit the imposition of fines and fees on indigent defendants without considering their ability to pay. Economic Justice Organizations contribute their experience litigating the *Dueñas* case as well as their deep knowledge of the systemic racial and economic justice issues at play in California’s fines and fees regime.

Amici and their counsel are the sole authors of this amici curiae brief. No person or entity other than Amici or their counsel made a monetary contribution to fund the preparation or submission of this brief.

Dated: March 1, 2021

Respectfully submitted,

*/s/ Jesselyn Friley*

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Jesselyn Friley

Public Counsel

## INTRODUCTION

California's criminal justice system is unfair and unequal, not least in its administration of court fines and fees. Local and state governments over-police Black and brown communities, disproportionately subjecting their members to prosecutions. Judges and legislatures set harsh punishments that bear no rational connection to public safety or rehabilitation. And though most criminal defendants are too poor to ever pay their debts in full, the system extracts whatever money it can from these individuals and their families, even at great cost to itself.<sup>1</sup> Sometimes that money comes from defendants' labor, for which they earn between eight cents and one dollar an hour if they are in prison.<sup>2</sup> Otherwise, it comes from the wages earned by defendants' parents, spouses, friends, and community members.<sup>3</sup> For those in prison, outstanding court debt becomes a barrier to parole, while for those on probation, debt subjects them to continuous oversight from the penal system.<sup>4</sup> In either case, fines and fees keep them locked in the system, under state control, and limiting their opportunities to advance in their lives or in society.

Aside from their role in over-punishment, California's fines and fees are a regressive and inequitable solution to a public finance

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<sup>1</sup> Matthew Menendez et al., *The Steep Cost of Criminal Justice Fees and Fines*, Brennan Center for Justice (Nov. 2019) at 5.

<sup>2</sup> Senate Concurrent Resolution 69 (August 14, 2019), <[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200SCR69](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SCR69).

<sup>3</sup> Stephanie Campos-Bui and Jeffrey Selbin, "Making Families Pay: The Harmful, Unlawful, and Costly Practice of Charging Juvenile Administrative Fees in California," (2017) at 38, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2937534](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937534).

<sup>4</sup> Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern Day Debtors' Prisons*, 75 Md. L. Rev. 486, 504 (2016).

problem of the State's own making. Due to its taxation and spending choices, the State does not allocate the judiciary enough funding to keep up with the volume of civil and criminal cases.<sup>5</sup> It attempts to make up for this shortfall by recouping costs from people convicted of crimes, as well as their families, dependents, and communities – the very people who are most harmed by the judicial system's failings and who can least afford to fund it.<sup>6</sup> This is not an inevitable choice: California could reallocate funding, raise taxes, make smarter prosecutorial decisions, shorten sentences, and invest in community resources that prevent crime and increase economic opportunities.

The State's Answering Brief acknowledges the futility and unfairness of using criminal fines and fees as a source of funding. But it also argues that it is possible to separate the public finance function of fines and fees from their role as punishment. The State argues that individual fines and fees are *either* punishments *or* "user fees." But it is impossible to make this distinction, either from the State's or the defendant's perspective.

This Court must take the necessary step of holding that due process and equal protection principles prohibit the State from burdening indigent defendants with fines and fees that they cannot pay. It must also provide guiding principles that will operationalize these constitutional protections and minimize the risk that they will be undermined by overburdened judges or procedural hurdles.

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<sup>5</sup> See, e.g., Merrill Balassone, "What's in the Judicial Branch Budget?" Jud. Branch of Cal. (Jun. 27, 2018), <https://newsroom.courts.ca.gov/news/whats-judicial-branch-budget>.

<sup>6</sup> See *Improving California's Criminal Fine and Fee System*, Leg. Analyst's Office (Jan. 5, 2016), <https://lao.ca.gov/Publications/Report/3322>.

This brief describes the constitutional principles that require the recognition of due process and equal protection rights in this context. It then explains why the State’s Answering Brief is at odds with these constitutional antecedents. Finally, it argues that the burden of proving ability to pay should fall on the State.

## BACKGROUND

In January 2019, the Second District Court of Appeal held that “using the criminal process to collect a fine [that a defendant] cannot pay is unconstitutional.” (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1160.) The landmark decision upheld a challenge to the imposition of court fees and fines without consideration of ability to pay on due process grounds. (*Id.* at 1164.) The court considered the way in which the longstanding practice of imposing unpayable fees on indigent persons creates a spiral of mounting court debt, impoverishment, and incarceration. (*Id.* at 1163-1164.)

Because of her poverty, Velia Dueñas was unable to pay \$1,088 in fines assessed for three juvenile citations. (*Id.* at 1161.) As a result, her driver’s license was suspended and she could not afford to reinstate it. (*Id.*) Over several years, Ms. Dueñas was convicted three times for driving with a suspended license. (*Id.*) She spent a total of 141 days in jail for driving with a license “that had been suspended because she had been unable to pay her juvenile citations.” (*Id.*) Ms. Dueñas pleaded no contest to a fourth misdemeanor charge of driving with a suspended license in 2015. (*Id.*) She was sentenced to 30 days imprisonment and spent an additional 9 days in jail because she could not pay a \$300 penalty

assessment. (*Id.* at 1162.) She produced uncontested evidence that she had cerebral palsy, was unemployed and lacked a high school education, received public assistance and food stamps, and had no home, bank account, or credit cards. (*Id.* at 1160–1161, 1163.) She could not afford basic necessities to care for herself and her children. (*Id.* at 1161.) Yet despite her demonstrated and uncontested inability to pay, the trial court imposed on her a \$30 court facilities fee, a \$40 court operations fee, and a \$150 restitution fine. (*Id.* at 1163.)

The *Dueñas* court relied on state and federal due process and equal protection—including *Griffin v. Illinois* (1956) 351 U.S. 12, *In re Antazo* (1970) 3 Cal.3d 100, and *Bearden v. Georgia* (1983) 461 U.S. 660—that stand for the principle that “a state may not inflict punishment on indigent convicted criminal defendants solely on the basis of their poverty.” (*Dueñas*, 30 Cal.App.5th at 1166–1167.) Because the “additional, potentially devastating consequences” of failure to pay court fees “in effect transform a funding mechanism for the courts into additional punishment” for indigent people who are unable to pay, the court held that court fees and fines intended to raise revenue may be imposed “only on those with the means to pay them.” (*Id.* at 1168–1169.) Because Penal Code section 1202.4, establishing a restitution fine, “bars consideration of a defendant’s ability to pay unless the judge is considering increasing the fee over the statutory minimum,” the court held that the execution of the restitution fine “must be stayed unless and until the trial court holds

an ability to pay hearing and concludes that the defendant has the present ability to pay.” (*Id* at 1164).<sup>7</sup>

The ruling had an instant impact on thousands of indigent criminal defendants. (See, e.g., Megan Cassidy, *California court ruling could change the culture of fining defendants who can't pay*, S.F. Chronicle (Apr. 22, 2019).) Many California courts followed *Dueñas* in declining to impose unpayable fines on indigent people. (See, e.g., *People v. Castellano* (2019) 33 Cal.App.5th 485, 491; *People v. Santos* (2019) 38 Cal.App.5th 923, 934–935.) But others disagreed to varying extents with *Dueñas*'s interpretation of constitutional principles, suggested an alternative constitutional framework, or limited the opinion's holding to its facts. (See, e.g., *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060 (holding that a constitutional challenge to fines and fees “should be based on the Excessive Fines Clause of the Eighth Amendment”); *People v. Caceres* (2019) 39 Cal.App.5th 917, 926–927 (limiting *Dueñas* to its facts). To resolve the conflict, this Court granted review of *People v. Kopp* (2019) 38 Cal.App.5th 47,<sup>8</sup> in which the Court of Appeal had held that an ability to pay hearing was required under the Excessive Fines Clause, not the Due Process or Equal Protection Clauses.

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<sup>7</sup> The court also held that the fees imposed on Ms. Dueñas did not pass muster under an excessive fines analysis. (*See id.* at 1171, fn. 8.) The excessive fines clause is a separate source of constitutional protection that in no way diminishes due process or equal protection.

<sup>8</sup> The political process has failed to protect these critical rights. Both houses of the legislature attempted to codify the protections afforded by the *Dueñas* decision by passing A.B. 927, but the bill was vetoed. Protecting individual constitutional rights—particularly the rights of marginalized groups such as the indigent and criminal defendants—is a core obligation of the judiciary.

Imposing unpayable court fees has profound impacts on the lives of indigent people (*People v. Neal* (2018) 29 Cal.App.5th 820, 827–828), creating an ever-deepening cycle of poverty and court involvement that courts have called a “debt trap for the poor.” (*Dueñas*, 30 Cal.App.5th at 1163 (quoting *Rivera v. Orange County Probation Dept.* (9th Cir. 2016) 832 F.3d 1103, 1112, fn.7).) Unpaid court debt balloons over time as fines and the costs of collection accrue; low-income people risk wage garnishment, asset forfeiture, loss of credit, and even incarceration as collateral consequences of their continued entanglement with the criminal justice system. These burdens fall most heavily on people of color, who are arrested and placed on probation at disproportionate rates compared to white people. (M. Lofstrom et al., *Racial Disparities in California Arrests* (2019) Pub. Policy Inst. of Cal.; Viet Nguyen et al., *California Probation in the Era of Reform* (2017) Pub. Policy Inst. of Cal. And any meager funds extracted from the poor through this scheme go towards court funding and operations – putting trial courts in the position of generating their own revenue through sentencing decisions, a practice which “undermines the credibility of government and the perceived integrity of the legal process.” (*Rivera*, 832 F.3d at 1112.)

The stakes could not be higher for millions of Californians – not only indigent defendants and probationers, but their families and other dependents, employers, and the judiciary itself. The principle that a person’s livelihood should be taken into account when setting his punishment dates back to the Magna Carta. (*Dueñas*, 30 Cal.App.5th at 1170.) This Court and the federal

Supreme Court have repeatedly upheld defendants' rights to equal treatment under the judicial process regardless of their wealth or indigence. (*See infra* Section I and II.) The State's narrow interpretation of due process and equal protection would impair the rights and livelihoods of indigent defendants. This Court's intervention is necessary to protect these fundamental rights.

## ARGUMENT

At stake are two related issues that implicate constitutional protections: the relationship between indigent criminal defendants and the state (due process); and the treatment of indigent defendants compared to wealthier ones (equal protection). This Court should hold that both kinds of protection apply to the imposition of criminal fines and fees, and prohibit the imposition of such fees without consideration of ability to pay.

### **I. Federal due process and equal protection guarantees protect indigent defendants.**

The Fourteenth Amendment's equal protection and due process protections prohibit "punishing a person for his poverty." (*Bearden v. Georgia* (1983) 461 U.S. 660, 661.) The U.S. Supreme Court has held that determining the precise protections required in a given situation for indigent defendants "requires a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.'" (*Id.* at 666-67 [quoting *Williams v. Illinois* (1970) 399 U.S. 235, 260].) While due

process involves “the fairness of relations between the criminal defendant and the State,” and equal protection asks “whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants,” in questions regarding indigent defendants, “[d]ue process and equal protection principles converge.” (*Bearden*, 461 U.S. at 665.)

The Supreme Court has articulated the key principles concerning the constitutional protections for indigent defendants in *Bearden*, where the Court prohibited penalizing indigent defendants with imprisonment solely for inability to pay a fine and restitution, especially where no alternative measures were considered. (461 U.S. at 661-62; see also *Tate v. Short* (1971) 401 U.S. 396, 397-8; *Williams*, 399 U.S. at 240-41.) The Court acknowledged that “[t]he State clearly has an interest in punishment and deterrence” but found that “this interest can often be served fully by alternative means” and concluded that “a sentencing court must inquire into the reasons for the failure to pay.” (*Bearden*, 461 U.S. at 672.) The *Bearden* line of cases has established two core principles: First, that a court’s scrutiny of a challenged law must be “sensitive to the treatment of indigents.” (*Id.* at 664.) Second, “deprivation” of certain basic liberties “simply because, through no fault of his own, [an indigent defendant] cannot pay [a] fine” is wholly impermissible. (*Id.* at 672-73; see *Tate*, 401 U.S. at 397-98; *Williams*, 399 U.S. at 241-242.)

The U.S. Supreme Court has also made clear that this principle of “equal justice” for indigent defendants is not limited to cases involving incarceration, but applies to all aspects of “administration of . . . criminal law[.]” (*Griffin v. Illinois* (1956) 351

U.S. 12, 19.) Under Supreme Court precedent, equal justice and fundamental fairness require that indigent defendants not be penalized for their poverty (*id.* at 19), and courts must carefully scrutinize statutes that deprive indigent defendants of basic liberties, including the “hope[] . . . for self-sufficiency and self-respect” without consideration of the hardship that they face due to their inability to pay. (*James v. Strange* (1972) 407 U.S. 128, 141-42 (invalidating statute that excluded criminal debtors from protections offered to civil debtors).)

In *Griffin*, the Court considered the due process and equal protection challenge of an indigent defendant who was unable to pay the fee for a transcript needed for his appeal, and held that, even though a state is not required to provide appellate review, “a State that does grant appellate review can[not] do so in a way that discriminates against some convicted defendants on account of their poverty.” (351 U.S. at 18.) Doing so would be “invidious discrimination,” the Court reasoned, because in the same way that “the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence,” so too, ability to pay for transcripts has no bearing on the appropriateness of appellate review. (*Id.* at 17-18.) The Court noted that appellate review was an “integral part” of the state’s judicial system, and as such, “affording equal justice to all and special privileges to none in the administration of its criminal law” required that defendants be “afforded as adequate appellate review as defendants who have money enough to buy transcripts.” (*Id.* at 18-19.)

Similarly, in *James*, the Court faced a due process and equal protection challenge by an indigent defendant to a Kansas attorneys' fees recoupment statute that excluded criminal defendants owing court debt from certain judgment protections afforded to civil debtors. (407 U.S. at 135.) The Court described the liberty interest at stake by noting that its precedents long recognized "the potential of certain garnishment proceedings to 'impose tremendous hardship on wage earners with families to support.'" (*Id.* at 135-36 [quoting *Sniadach v. Fam. Finance Corp.* (1969) 395 U.S. 337, 340].) In holding that the challenged statute violated equal protection, the Court reasoned that "[f]or Kansas to deny protections such as these to the once criminally accused is to risk denying him the means needed to keep himself and his family afloat." (*Id.* at 36; see also *id.* at 35 [defining "wages" as "sustenance, with which [an indigent defendant] supports himself and his family"].)

In weighing the interests at stake, the *James* Court showed particular solicitude for defendants, recognizing that criminal convictions, especially those that result in a prison sentence, "usually limit[] employment opportunities" and that "[i]t is in the interest of society and the State that such a defendant, upon satisfaction of the criminal penalties imposed, be afforded a reasonable opportunity of employment, rehabilitation and return to useful citizenship." (*Id.* at 139.) The Court acknowledged the state's legitimate interest in recoupment but found that such "interests are not thwarted by requiring more even treatment of indigent criminal defendants," and "need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect." (*Id.* at 141-42.)

All of these cases support the principle that a state may not “inflict punishment” – broadly construed – “on indigent convicted criminal defendants solely on the basis of their poverty.” (*Bearden* at 665.) As with other constitutional guarantees, this principle prohibits not only explicitly discriminatory state action, but also policies that “may appear to apply equally to both the rich offender and the poor one” but actually “constitute[] invidious discrimination on the basis of wealth.” (*Antazo*, 3 Cal.3d at 103–104.) And *Griffin* and *James* make clear that administrative charges that do not constitute part of a person’s sentence are equally subject to due process and equal protection.

None of these cases support the State’s argument that due process and equal protection do not apply to punitive fines. *Bearden* drew no distinction between punitive and non-punitive fines. And *Griffin* and *Strange* were not about the “punishment” functions of the criminal system – they were about administrative financial programs that could nevertheless deprive an indigent of meaningful appellate review and/or his livelihood. The State describes *Griffin* as guaranteeing mere “access to court proceedings” (Ans. Br. at 33–34) as if the defendant were just a spectator seeking entrance to a courtroom. This reading is far too narrow; the “access” in *Griffin* is about having a fair chance at participating in and ultimately exiting the criminal process. The State acknowledges that the sentencing process is supposed to allow indigent defendants access to “a point at which they are expected to have fulfilled their obligations to society – and to be released, as a result, from restraints.” (Ans. Br. at 40–41.) But though the State finds fault with “unpayable user fees

[as] an obligation without end” (*id.* at 41), the same is true of so-called punitive fines as well. The scheme proposed by the State—which conditions “the constitutional analysis of a criminal payment order [] on the function that the order serves as a matter of design and legislative intent” (Ans. Br. at 13) is not only contrary to these precedents, but comes from thin air.

## **II. The California Constitution is a separate and even stronger source of protection for indigent defendants.**

The rights of indigent defendants that are protected under the U.S. Constitution are likewise protected by the California constitution, art. I, section 7(a). California due process and equal protection are “analyzed in a similar fashion” to their federal counterparts. (See *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 207.) But California’s constitution also goes further. It is even more protective of the rights of indigent defendants than its federal counterpart because California’s version of equal protection recognizes wealth as a suspect class and subjects wealth-based discrimination to the strictest level of scrutiny. (See *In re Antazo* (1970) 3 Cal.3d 100, 112-12; *Serrano v. Priest* (1970) 18 Cal.3d 728, 764-65.) In *Antazo*, this Court invalidated the application of a statute requiring a defendant to “pay a fine and a penalty assessment . . . [or] serve them out in jail at a specified rate per day because he is unable to pay them.” (3 Cal.3d at 103). The Court held that this “discrimination based on poverty” involves a “suspect classification[.]” warranting strict scrutiny. (*Id.* at 112.) In such cases, “the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions

drawn by the law are necessary to further its purpose.” (*Id.* at 111.) The *Antazo* court made clear that even if the state has an interest that is “substantial and legitimate” in collecting fines, requiring the indigent to serve time if they cannot pay is unconstitutional unless imprisonment for nonpayment is “necessary to promote” its stated interests. (*Id.* at 112.) In other words, imprisonment cannot be simply an automatic punishment for those who lack funds.

*Antazo*’s reasoning is not limited to statutes with consequences of imprisonment, nor could it be. The case was decided primarily under equal protection principles; it holds that a statute that punishes indigent defendants more harshly in comparison to similarly situated defendants with financial means offends the equal justice required by the California constitution. (*Id.* at 112.) The consequences of the fees at issue here are just as harmful if not more so to the basic liberties necessary to conduct one’s life as is imprisonment.

Imposing a fine that exceeds a defendant’s ability to pay punishes that defendant differently from a defendant who has the means to pay the same fine. As the State notes in conceding that unpayable *fees* are unconstitutional, “[a]n obligation that can be quickly and easily paid off by a defendant who is gainfully employed or has money in the bank may be impossible for another defendant to ever satisfy.” (Ans. Br. at 12.) It also “lay[s] a debt trap for the poor,” who already struggle to pay for food, shelter, healthcare, and other basic needs for their families. (*Dueñas*, 30 Cal.App.5th at 1163 (quoting *Rivera*, 832 F.3d at 1112, fn. 7).) This trap has an outsized impact on people of color, particularly African

Americans, who are disproportionately poor in our society,<sup>9</sup> arrested three times as often as white people and make up a disproportionate share of the population on probation. (M. Lofstrom et al., *Racial Disparities in California Arrests* (2019) Pub. Policy Inst. of Cal.; Viet Nguyen et al., *California Probation in the Era of Reform* (2017) Pub. Policy Inst. of Cal.) As Ms. Dueñas’s case illustrates, unpayable fines can give rise to further criminal consequences that incur even more unpayable debt, a cycle “as predictable and counterproductive as it is intractable.” (*Dueñas*, 30 Cal.App.5th at 1163 (quoting *Rivera*, 832 F.3d at 1112, fn. 7).) The California constitution prohibits the imposition of obligations that indigent defendants can never satisfy.

The State’s brief inaccurately characterizes Petitioner as seeking to “equalize punishment across varied circumstances.” (Ans. Br. at 33.) The criminal justice system could never be entirely precise, and Petitioner is not asking it to be. What the state constitution requires is far less exact: an end to sentencing practices that trap indigent defendants in a perpetual cycle of punishment. And it is well established that courts are empowered to tailor sentences to each individual defendant’s circumstances. (*See People v. Foster* (1988) 201 Cal.App.3d 20, 27 [“A sentencing court considers not only the circumstances of the crime, but circumstances individual to each defendant”].)

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<sup>9</sup> E.g., Kaiser Family Found., “Poverty Rate by Race/Ethnicity” (as of March 1, 2021) <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

**III. Due process and equal protection require consideration of ability to pay before imposing criminal fines and fees on indigent defendants.**

The State's brief describes two functions of the criminal fines and fees regime in California. The first is about punishment: The State emphasizes the role of so-called "punitive fines" in crafting sentences that "reflect[] a crime's seriousness." (Ans. Br. at 33.) The second is about public finance: The State acknowledges that a "primary function" of so-called "user fees" is to "raise money to pay for the criminal-justice process[]." (*Id.* at 13.) Over eight pages of its brief, the State tries to characterize each of the seven fines and fees imposed on Petitioner Jason Hernandez as part of the punishment function *or* the public finance function. (*Id.* at 20-28.) This protracted analysis reaches the counterintuitive conclusion that a laboratory analysis fee and a drug program fee, which are used to fund crime labs and prevent drug abuse, are part of the punishment aspect of a sentence. (*Id.* at 24.) According to the State, the constitutional rights of indigent defendants depend on such an analysis of each of the fines and fees authorized in California.

The constitutional rights at stake here are not contingent on such an arbitrary and fragile analysis. The State's categorization relies heavily on the Legislature's purported intention to define fines and fees as either punishment or court-funding tools. (Ans. Br. at 22.) While this intent might be relevant in other contexts, it does not matter in the context of a collection of fines and fees that are only imposed on individuals who are convicted of crimes. From the defendant's perspective, an unpayable fine that is intended as

punishment carries with it the same consequences as one that purports “to fund the processes involved in [the defendant’s] prosecution and conviction.” (Ans. Br. at 24.) And the same is true from the State’s perspective: all of the criminal debt at issue here goes back to the State. The moral hazard inherent in the State’s scheme is obvious: a legislature concerned about losing what little funding it captures from “user fees” could simply describe them as punishment to avoid the constitutional limitations that the State agrees should apply to “user fees.” This linguistic sleight of hand should not be permitted to deprive defendants of important rights.

The State argues that judges need to have fines as an option in order to “impose a sentence that reflects a crime’s seriousness without relying on incarceration alone” and threatens that “[w]ithout that capability, judges might need to rely more on custodial sentencing elements.” (Ans. Br. at 33.) To the extent the State suggests that waiving unpayable fines will lead judges to order longer incarceration for indigent defendants, that practice would be plainly unconstitutional even under the State’s narrow view of due process and equal protection precedents. The State’s position clings to the system’s current level of punishment as optimal, in the face of broad consensus that California punishes people, especially indigent people of color, too harshly.<sup>10</sup> Judges do not “need” to enact a

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<sup>10</sup> *E.g.*, “Governor Newsom Announces New Policing and Criminal Justice Reforms,” Office of Gov. Gavin Newsom (Jun. 5, 2020), <https://www.gov.ca.gov/2020/06/05/governor-newsom-announces-new-policing-and-criminal-justice-reforms>; Anne Irwin, “California setting a positive tone for criminal justice reform,” CalMatters (Sept. 25, 2020), <https://calmatters.org/commentary/my-turn/2020/09/california-setting-a-positive-tone-for-criminal-justice-reform>.

certain level of punishment at the expense of fair processes that protect constitutional rights. And they have many non-custodial options, such as probation, to determine an appropriate sentence.

The State cannot punish indigent defendants without upholding their rights to due process and equal protection any more than it can impose so-called “user fees” without such considerations. All unpayable fines and fees are “an obligation without end, subjecting indigent defendants to the unique harm of an unsatisfied criminal obligation, without any relationship to culpability or the goals of punishment.” (Ans. Br. at 41.) Whether a fine is labeled “punitive” or not under analyses that the State imports from other constitutional contexts is irrelevant.

**IV. The State should bear the burden of proving ability to pay with the assistance of presumptions and affidavits.**

The second issue presented in this appeal is who should bear the burden of proof with respect to ability to pay. The Court should set parameters for this process that guarantee the constitutional rights of indigent defendants. These parameters include: 1) the use of presumptions where information about defendants’ financial circumstances is readily available; 2) the use of standard forms that allow defendants to self-affirm their income level and/or receipt of public benefits; and 3) placing the burden on the State to challenge these presumptions or affidavits. Because of the reality that most criminal defendants in California are indigent, these presumptions and allocations of burden will minimize administrative burdens and reduce the risk that indigent defendants will be deprived of their constitutional rights.

A presumption of indigence should apply to public defender clients (Am. Br. of Public Defenders at 34-35) and individuals receiving certain public benefits. Defendants are screened for financial eligibility at the outset of their criminal cases, Gov. Code § 27706(a), and most public defender clients are not only unable to afford representation but are extremely indigent. (*See* Am. Br. of Public Defenders at 32-33.) For instance, in Alameda County, public defender clients have an average monthly income of \$966 and more than half of those who met the income guidelines for public defense services were unemployed. (*Id.* at 33.) In Contra Costa County, clients have an average monthly income of \$843, and 70% were unemployed. (*Id.*) Given the high cost of living in California and the effects of a criminal conviction on employment prospects, it is reasonable to presume that individuals with these financial circumstances would not be able to pay criminal fines and fees.

Similarly, recipients of need-based public assistance should be presumed unable to pay criminal fines and fees. Individuals experiencing homelessness, living in shelters or transitional living facilities, or sentenced to state prison should also be presumed unable to pay. Defendants who are not public defender clients and do not fall into any of these other categories should have the option of filling out a standard form in which they attest to their indigence under penalty of perjury.

When a presumption attaches or when an individual has provided an affidavit declaring their indigence, the State should bear the burden of proving that the defendant has the ability to pay fines and fees. As the American Bar Association has concluded,

ability to pay determinations should be based on objective, concrete criteria assessed at the time of sentencing, not what the court thinks that a person might be able to pay prospectively or under different circumstances.<sup>11</sup> Speculation about wages that a person might earn in prison – at a rate of eight cents to one dollar an hour – should not factor into a court’s analysis of ability to pay.

For the reasons described above, the burden of proof should in no way depend on whether fines and fees are “punitive” under the State’s proposed framework. (*See* Ans. Br. at 14.) Nor is it rational to require defendants – the vast majority of whom are indigent – to “raise a purported inability to pay in the first instance, and to support it with evidence about their income, expenses and assets.” (*See id.*) Such a requirement would waste court resources, duplicate information already in the state’s possession, and promote arbitrary decisions based on judges’ subjective assessments of what constitutes poverty and whether individuals “deserve” to attempt to work off their fines indefinitely. (*See* Am. Br. of Public Defenders at 33-34.)

## CONCLUSION

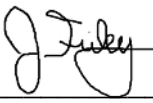
For the foregoing reasons, the undersigned economic justice organizations support Petitioner in this matter and urge the Court to hold that due process and equal protection prohibit the imposition of fines and fees on indigent criminal defendants without

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<sup>11</sup> Am. Bar. Ass’n Presidential Task Force on Building Public Trust in the American Justice System, *Ten Guidelines on Court Fines and Fees* at 12 n.18 (2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/Is\\_sc\\_lai\\_d\\_ind\\_10\\_guidelines\\_court\\_fines.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/Is_sc_lai_d_ind_10_guidelines_court_fines.pdf).

consideration of ability to pay. Further, the Court must set parameters for courts to use in making ability to pay determinations so that defendants' constitutional rights are protected and effectuated.


DATED: March 1, 2021

By  \_\_\_\_\_

Jesselyn K. Friley  
Kathryn A. Eidmann  
Mark D. Rosenbaum  
PUBLIC COUNSEL

## CERTIFICATE OF COMPLIANCE

Under Rule 8.204 and 8.504 of the California Rules of Court, I hereby certify that this brief contains 5,100 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare this brief.

By  \_\_\_\_\_  
Jesselyn Friley

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I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 610 S. Ardmore Avenue, Los Angeles, CA 90005.

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Executed on March 1, 2021, at Los Angeles, California.



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Rocio Garcia

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Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
Supreme Court of California

Case Name: **PEOPLE v. KOPP**

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Lower Court Case Number: **D072464**

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Date

/s/Jesselyn Friley

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Signature

Friley, Jesselyn (319198)

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Last Name, First Name (PNum)

Public Counsel

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Law Firm