SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. CHRISTI KOPP et al., Defendants-Appellants.	Case No. S257844 Court of Appeal No. D072464 San Diego County Case No. SCN327213

APPEAL FROM SAN DIEGO COUNTY SUPERIOR COURT
HONORABLE HARRY M. ELIAS, JUDGE

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Jason Hernandez argued in his opening brief on the merits ("AOBM") that trial courts must hold ability-to-pay hearings before imposing legal financial obligations (LFOs) on criminal defendants. The hearings are necessary, he argued, because imposing unpayable LFOs would violate defendants' due process rights, their equal protection rights and their rights not to be subjected to excessive fines, under both the U.S. and California constitutions. Mr. Hernandez also argued that the state should bear the burden of proving a defendant's ability to pay in all cases.

Respondent partially agrees, asserting that trial courts must consider a criminal defendant's ability to pay before imposing fines and fees, if the defendant objects that he or she cannot pay. [Answering Brief on the Merits "ABM" at 19-20.] At the same time, however, respondent contends that the constitutional limits on LFOs differ depending on whether an

LFO is a punitive fine or an allegedly non-punitive "user fee." [ABM 20-41.] Respondent also partially agrees that the state should bear the burden of proving ability pay: According to respondent, when the Legislature has placed the burden of proof on the state, the state must prove ability to pay, but when the Legislature has failed to do so, the defendant should bear the burden. [ABM 41-53.]

Thus, while the parties have presented this Court with important and helpful areas of agreement, they disagree on the legal foundations for their conclusions. This Court should accepts the parties' agreements and resolve the parties' remaining disputes over the nature of the constitutional rights under consideration.

In addressing the contested issues at hand, respondent presents those questions as two false dichotomies: First, respondent argues that every LFO is either a user fee or a punitive fine. Second, respondent argues that the U.S. and California constitutions offer indigent defendants different levels of protection from unpayable fines and fees depending on whether their LFOs are classified as user fees or as punitive fines. Specifically, respondent argues that punitive fines may only be challenged under the Eighth Amendment's excessive fines clause [ABM 28-36] – even if they are unpayable – but that unpayable user fees are impermissible under the state's equal protection clause. [ABM 37-41.]

These dichotomies are false. Controlling precedent has never relied on any such distinctions between and among LFOs,

nor would it make sense to do so, as fines and fees imposed at a sentencing hearing have multiple purposes, including punishment and raising funds for governmental operations. The United States Supreme Court's tests confirm that what respondent calls "user fees" are in fact partially punitive. California's statutes confirm that so-called punitive fines are used to fund government operations. As such, there is no constitutional justification for limiting indigent defendants' constitutional protections based on these false categories.

As Mr. Hernandez explained in his AOBM and elaborates in more detail *infra,* the due process clause prohibits courts from unfairly subjecting indigent defendants to greater punishment based solely on their indigency; the equal protection clause bars courts from punishing indigent defendants more harshly than non-indigent defendants simply because they are poor; and the excessive fines clause bars courts from imposing LFOs that are grossly disproportionate to the offense because they threaten to bankrupt the defendant or make him unable to pay for life's necessities. All three clauses apply to all LFOs and should be considered when determining which LFOs, if any, a court may impose on a defendant.

In addition, this Court should reject respondent's request to place any burden of proof on defendants at ability-to-pay hearings. To the extent that the Legislature has placed the burden of proof on defendants in some statutes and on the state in other statutes, those distinctions have not been sufficiently informed by appropriate legal or practical considerations. Indeed,

to the extent that statutes place the burden of proof on defendants, they generally rely on an unjustified presumption that defendants can pay.

This Court should hold that courts must hold ability to pay hearings for all defendants, that the imposition of all LFOs is constrained by the due process, equal protection and excessive fines clauses, and that the state must prove a defendant can pay LFOs before the court imposes them.

I.

RESPONDENT IMPLICITLY CONCEDES THAT THE FOURTEENTH AMENDMENT BARS IMPOSITION OF UNPAYABLE USER FEES

As Mr. Hernandez argued in his AOBM, the Fourteenth Amendment's due process and equal protection clauses bar the imposition of unpayable LFOs on criminal defendants. This conclusion flows from two cases and their progeny: *Bearden v. Georgia* (1983) 461 U.S. 660, which held that the Fourteenth Amendment's due process and equal protection clauses work together to prohibit the state from incarcerating people simply because they are too poor to pay their LFOs, and *Griffin v. Illinois* (1956) 351 U.S. 12, which held that criminal defendants cannot be denied free transcripts to appeal their convictions simply because they are too poor to pay for them. These cases explained that the state treats indigent defendants unfairly by forcing them to abide by a fundamentally unfair set of rules, regardless of how it treats other defendants – the due process problem – and by treating poor people differently than wealthier

people – the equal protection problem. (See *Ross v. Moffitt* (1974) 417 U.S. 600, 608-09.)

In *Evitts v. Lucey* (1985) 469 U.S. 387, finding defendants have a right to the effective assistance of counsel on appeal, the U.S. Supreme Court explained *Griffin*'s intersection of due process and equal protection this way:

> In cases like *Griffin* . . ., due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants – indigent ones – differently for purposes of offering them a meaningful appeal.

(*Evitts, supra*, at p. 405.)

Mr. Hernandez has argued that the *Bearden-Griffin* line of cases stands for the proposition that courts may not treat poor people unfairly, in any aspect of the criminal justice system, simply because they are poor, nor may the courts treat poor people differently from rich people. Respondent does not seriously disagree with this general proposition or affirmatively argue that courts may treat indigent people unfairly or differently simply because they are poor. Respondent's sole response to this argument is that *Bearden* and *Griffin* do not apply to punitive fines, claiming that Mr. Hernandez limited his Fourteenth Amendment challenge to punitive fines. [ABM 33-36.] Mr.

Hernandez's challenge was not so limited. Mr. Hernandez argued that the Fourteenth Amendment prohibits the imposition of ***all*** unpayable LFOs, including both punitive fines and user fees. [AOBM 19-32.] By failing to address the applicability of Mr. Hernandez's Fourteenth Amendment arguments to the imposition of user fees, respondent has implicitly conceded that the due process and equal protection clauses prohibit the imposition of any LFO that respondent characterizes as a user fee. (*People v. Bouzas* (1991) 53 Cal.3d 467, 480 [stating that the People "apparently concede" a point made by the defendant to which they did not respond, either in briefing or in oral argument].)

II.

DUE PROCESS AND EQUAL PROTECTION BAR IMPOSITION OF UNPAYABLE LFOs REGARDLESS OF THEIR PURPOSE

Respondent argues that the due process and equal protection principles described in the *Bearden-Griffin* line of cases have no application to punitive fines, asserting that the due process / equal protection analysis only applies when defendants are threatened with incarceration or with unequal access to the courts. [ABM 31-36.] Respondent is wrong. Due process and equal protection work together to prohibit courts from treating poor people differently based on their indigence in any manner. To the extent that this Court might construe respondent's punitive fines argument as challenging the applicability of the *Bearden-Griffin* cases to any LFOs, including "user fees," that

argument again is wrong. This Court should find that equal protection and due process prohibit courts from imposing unpayable LFOs of any kind on criminal defendants.

A. The U.S. Supreme Court developed its due process - equal protection LFO analysis in response to the imposition of unpayable punitive fines.

Despite respondent's attempt to exclude punitive fines from a due process / equal protection challenge, the three leading Supreme Court cases on unpayable LFOs – which all rely on a hybrid due process / equal protection analysis – involve challenges to expressly punitive fines. *Bearden v. Georgia* (1983) 461 U.S. 660, *Williams v. Illinois* (1970) 399 U.S. 235, and *Tate v. Short* (1971) 401 U.S. 395 each refute the claim that the hybrid due process / equal protection limits on LFOs only apply to non-punitive LFOs. In *Bearden*, the court addressed a $500 fine[1] and $250 in restitution. (*Bearden* at p. 662.) In *Tate*, the court addressed $425 in fines for traffic infractions. (*Tate* at p. 396.) In *Williams*, the defendant was given a $500 fine and $5 in court costs. (*Williams* at p. 236.) Each case found that the due process and equal protection clauses prohibited the state from exacting extra punishment from these defendants because they were unable to pay punitive fines.

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[1] While none of these cases discussed any possible distinction between punitive fines and user fees, this Court has said, "Fines arising from [criminal] convictions are generally considered punishment." (*People v. Alford* (2007) 42 Cal.4th 749, 757.)

Respondent concedes that the imposition of unpayable user fees has no rational basis. [ABM 40-41.] Imposing unpayable punitive fines is just as irrational because in neither case will the poor defendant be able to pay nor will the alleged purpose of the LFO be served. An unpayable user fee does not help the state fund its court operations, and an unpayable fine does not accomplish any goals of punishment. [AOBM 26-27.] And any type of unpayable LFO exacts enormous collateral costs on indigent defendants that are not borne by the wealthy.

All unpayable LFOs treat poor defendants unfairly and differently solely because of their indigence and thus violate the due process / equal protection principles explained in *Bearden* and *Griffin*.

B. Due process and equal protection guarantees apply beyond the specific fact patterns of *Bearden* and *Griffin*.

Respondent contends that the due process and equal protection principles described in *Bearden* and *Griffin* don't apply to LFOs because they only apply when an indigent defendant is threatened with incarceration for failing to pay his fines or is denied access to the courts. [ABM 34-35.] Respondent premises this argument on the observation that *Bearden*, *Williams* and *Tate* all involved defendants who were incarcerated for their failure to pay LFOs.

Bearden, however, spoke directly to the issue of imposing unpayable LFOs, not just executing them, precisely because defendants' due process protections operate at sentencing.

> When the court is ***initially considering what sentence to impose,*** a defendant's level of financial resources is a point on a spectrum rather than a classification. . . . The more appropriate question is whether ***consideration of a defendant's financial background in setting or resetting a sentence*** is so arbitrary or unfair as to be a denial of due process.

(*Bearden,* supra, 461 U.S. at p. 666 fn. 8, emphasis added.) The *Bearden* court never limited its holding to threats of incarceration for failure to pay. Similarly, in *Mayer v. Chicago* (1971) 404 U.S. 189, the state asked the court to treat the indigent defendant's request for free transcripts differently because he was not threatened with incarceration but only a fine. The Court refused, saying, "A fine may bear as heavily on an indigent accused as forced confinement." (*Id.* at pp. 196-197.)

The *Griffin* line of cases also sweeps more broadly than just protecting access to the courts. *Williams* and *Bearden* expressly relied on *Griffin* to invalidate processes that punished poor defendants differently than wealthier defendants. (See *Williams,* 399 U.S. at p. 241; *Bearden*, 461 U.S. at p. 664.) Further, the U.S. Supreme Court held in *Douglas v. California* (1963) 372 U.S. 353 that courts violate *Griffin* when they require defendants to prove they have meritorious issues to appeal before offering them appointed counsel. (*Id.* at pp. 357-358.) *Douglas* emphasized that the courts must treat indigent defendants fairly, holding that "[w]hen an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair

procedure." (*Ibid.*) The indigent defendants in *Douglas* were not denied access to appeals; they were required to follow a procedure that was neither fair nor equal to that imposed on wealthy defendants, who did not need to make a threshold showing of merit at all, let alone without the assistance of counsel.

On several occasions, the United States Supreme Court has relied on *Griffin* to define the rights of indigent people in contexts that have nothing to do with the courts, let alone access to the courts. *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1, 4, examined the *Griffin* case line in relation to a challenge to Texas' public-school financing system. The Supreme Court recognized that under *Griffin* and its progeny, it would be unconstitutional to absolutely deprive people of education based on their inability to pay tuition. (*Id*. at pp. 20–21, 25 n. 60.) The Supreme Court also cited *Griffin* and *Douglas* when it held that Virginia could not condition the right to vote on the payment of a poll tax. (*Harper v. Virginia State Bd. of Elections* (1966) 383 U.S. 663, 668.) In *Lubin v. Parish* (1974) 415 U.S. 709, 719-720, Justice Douglas found in his concurrence that *Griffin* supported the court's ruling that California could not require a candidate for public office to pay a filing fee.

Aside from its importation into non-court contexts, *Griffin*'s plain language shows that it applies to the LFOs imposed in criminal cases:

> "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. . . There can be no equal justice where

> the kind of trial a man gets depends on the amount of money he has."

(*Griffin*, *supra*, 351 U.S. at pp. 17, 19.)

When California's courts impose unpayable LFOs on criminal defendants, they discriminate against those defendants by saddling them with additional punishment that they would not face if they had more resources, and they punish poor defendants more harshly than wealthier defendants. All unpayable LFOs violate both due process and equal protection.

C. Due process and equal protection prohibit unpayable fines even if the government itself does not impose the consequences of the unpayable fines.

Respondent also claims the hybrid due process / equal protection analysis has no application here because most of the adverse consequences of unpayable LFOs – such as homelessness, inability to care for family members, or loss of work – are imposed by private actors rather than by the state. As such, respondent suggests, the *Bearden-Griffin* line of cases does not prohibit the state from imposing any LFOs so long as a failure to pay does not

lead the state to incarcerate the defendant.[2] [ABM 36.] Respondent is wrong.

This Court condemned a state law that led to private-actor deprivations in *In re Taylor* (2015) 60 Cal.4th 1019, 1040-1043. There, this Court held that blanket enforcement of sex offender residency laws violated the petitioners' federal due process rights by, in part, making an unreasonable number of them homeless because they could not find suitable housing. The law being challenged did not direct that sex offenders become homeless. It created a set of rules that made private residences functionally unavailable to sex offenders, which then made those sex offenders homeless. This Court found a due process violation without a direct deprivation by the state.

The history of the excessive fines clause also supports the notion that private consequences of government action can prove

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[2] Respondent does not argue that an unpayable LFO is constitutional under the Fourteenth Amendment if it prevents a defendant from terminating his probation or obtaining an expungement. Respondent does contend, though, that this Court should not consider the unavailability of relief under Penal Code section 1203.4 as a consequence of unpayable LFOs because Mr. Hernandez is not on probation. [ABM 36, fn. 12.] On the contrary, this Court framed the questions presented in this case quite broadly. It did not ask whether the trial court should have inquired into Mr. Hernandez's ability to pay three specific LFOs; it asked whether trial courts, plural, must make ability-to-pay determinations before imposing fines and fees. Since this case addresses statewide issues of the constitutional limitations on LFOs, this Court should consider all the possible adverse consequences of unpayable LFOs, even if Mr. Hernandez might not suffer them.

a constitutional violation. The excessive fines clause, which implicates potential government overreach, has its roots in Magna Carta, and Magna Carta barred the government from imposing economic sanctions so great that they would "deprive an offender of his livelihood." (*Timbs v. Indiana* (2019) ___U.S.___ [139 S.Ct. 682, 688, 203 L.Ed.2d 11, 17].) Depriving an offender of his livelihood is a consequence triggered by state action, like the imposition of unpayable LFOs, but is not an actual "government deprivation" as respondent characterizes it. [See ABM 35-36.] *Timbs* also cited with approval a statement from Blackstone's Commentaries on the Laws of England that "no man shall have a larger amercement[3] imposed upon him, than his circumstances or personal estate will bear." (*Timbs*, ___ U.S. ___, 139 S. Ct. at 688 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 372 (1769)). In other words, Blackstone noted that the state should consider the private consequences of its actions when determining whether a fine was appropriate, and the U.S. Supreme Court approved that language.

Timbs and Blackstone underline the principle that this Court should not ignore the effects of unpayable LFOs upon criminal defendants, whether or not those effects can be characterized as a government deprivation. The Chief Justice recognized these principles in her 2019 State of the Judiciary address, in which she said, "We must ensure that income inequality doesn't translate into a two-tiered justice system; we

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[3] Amercements are the medieval predecessors of fines. (*United States v. Bajakajian* (1998) 524 U.S. 321, 335.)

must ensure that fines and fees no longer fall on those least able to afford them; [and] we must ensure that minor traffic offenses don't turn poor drivers into poor criminals." (https://newsroom.courts.ca.gov/news/california-chief-justice-delivers-2019-state-judiciary-address.)

The fact that a particular LFO will make a defendant homeless is certainly relevant to the question of whether an LFO is unfair, particularly under Magna Carta, as is the fact that a term of incarceration will make a defendant lose his job and thus lose the ability to earn money and pay LFOs. Mr. Hernandez can rely on the private consequences of state action to prove his due process / equal protection claims.

D. The availability of an excessive fines challenge does not preclude due process and equal protection challenges.

Even if this Court agrees with respondent that some LFOs are purely punitive, it should not agree that defendants can only challenge punitive fines under the excessive fines clause. [See ABM at 33 et seq.] The U.S. Supreme Court has never placed any such limitation on constitutional challenges to LFOs.

This Court should reject any invitation to find that some constitutional provisions only apply to certain types of LFOs. The due process, equal protection and excessive fines clauses each protect against different kinds of harms, and all three can and do apply to any LFO imposed by the state against a criminal defendant. The due process clause protects defendants from unfair treatment by the courts. In this case, that protection

implicates the right not to be subjected to additional punishment simply because a defendant is poor. The equal protection clause protects defendants from unequal treatment by the courts. Here, that protection implicates the right not to be punished more harshly than similarly situated defendants simply because a defendant is poor. And the excessive fines clause protects a defendant from grossly disproportionate LFOs, based on their ability to pay as well as other factors that do not play a role in the due process and equal protection analyses. The separate functions of each constitutional provision require that all three be applied to all LFOs, regardless of whether the LFOs can be characterized as punitive fines or user fees.

This Court also should reject respondent's attempt to restrict the application of multiple constitutional provisions to LFOs becasue the U.S. Supreme Court has made clear that a particular state action may implicate more than one constitutional protection. (*Soldal v. Cook County* (1992) 506 U.S. 56, 70 ["Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn"].) In *United States v. James Daniel Good Real Prop.* (1993) 510 U.S. 43, 46, 49-50, the court held that the availability of Fourth Amendment arguments did not shield the government from Fifth Amendment arguments that it owed property owners notice and a hearing before seizing real property.

It said, "We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another." (*Id.* at p. 49.)

In *Loving v. Virginia* (1967) 388 U.S. 1, 12, the U.S. Supreme Court found Virginia's anti-miscegenation law violated both the Lovings' equal protection rights and their due process rights under the 14th Amendment, even though *Loving* did not present a hybrid due process / equal protection claim like that presented here. The equal protection and due process claims were separate. More recently, the U.S. Supreme Court invoked the intersection of due process and equal protection to strike down laws prohibiting gay marriage. (*Obergefell v. Hodges* (2015) 576 U.S. 644, 672. See also, e.g., *United States v. Salerno* (1987) 481 U.S. 739, 746 [addressing excessive bail claim under both the Fourteenth Amendment and Eighth Amendment]; *Colorado Christian University v. Weaver* (10th Cir. 2008) 534 F.3d 1245, 1266 [recognizing that "statutes involving discrimination on the basis of religion … are subject to heightened scrutiny whether [a claim] arise[s] under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause" (citations omitted)].)

Thus, in *Walker v. City of Calhoun* (11th Cir. 2018) 901 F.3d 1245, 1259-1260, the Eleventh Circuit found it could reach the plaintiff's challenge to unpayable bail terms under *Bearden*, even though the Eighth Amendment addresses excessive bail. It noted,

> "Walker's claim . . . challenges not the amount and conditions of bail per se, but the process by which

> those terms are set, which Walker alleges invidiously discriminates against the indigent. . . . The sine qua non of a *Bearden*- or *Rainwater*-style claim, then, is that the State is treating the indigent and the non-indigent categorically differently. Only someone who can show that the indigent are being treated systematically worse "solely because of [their] lack of financial resources," *id.* at 661 – and not for some legitimate State interest – will be able to make out such a claim. Those who simply find their own bail conditions too onerous must proceed under the Eighth Amendment's Excessive Bail Clause unless they can point to a separate due process violation."

The fact that the excessive fines clause applies to all LFOs does not affect the application of the due process and equal protection clauses to LFOs.

E. Unpayable LFOs separately violate the equal protection clauses of both the state and federal constitutions.

Respondent argues a standalone equal protection claim is not viable here because Mr. Hernandez has failed to identify any state-created "classification" that treats similarly situated defendants differently. Instead, respondent contends, LFOs are generally imposed based on their offenses, even though the same LFOs may affect those who can pay differently from those who cannot. [ABM 31-32.] Respondent is wrong.

In *M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 106, the Supreme Court explained that the unequal impact of a facially neutral law creates an equal protection violation.

> The Court recognized in *Griffin* that "a law nondiscriminatory on its face may be grossly discriminatory in operation," 351 U.S. at 17, n. 11, and explained in *Williams v. Illinois*, 399 U.S. 235, 242, 26 L. Ed. 2d 586, 90 S. Ct. 2018, that an Illinois statute it found unconstitutional in that case "in operative effect exposed only indigents to the risk of imprisonment beyond the statutory maximum." Like the sanction in *Williams*, the Mississippi prescription here at issue is not merely disproportionate in impact, but wholly contingent on one's ability to pay, thereby "visit[ing] different consequences on two categories of persons." *Ibid*.

Thus, in *Griffin*, the statute under attack did not state that poor people could not appeal and rich people could. It said, in a facially neutral manner, "that it is necessary for the defendant to furnish the appellate court with a bill of exceptions or report of proceedings at the trial certified by the trial judge." (*Griffin* at pp. 13-14.) As Illinois conceded, it is sometimes impossible to prepare such bills of exceptions or reports without a stenographic transcript of the trial proceedings, and Illinois did not provide free transcripts to anyone other than capital defendants. (*Id*. at p. 14.) *Griffin* found an equal protection violation based on the

unequal ***effect*** of the laws on indigent and non-indigent noncapital defendants.

In the same vein, none of the LFO schemes thrown out in *Bearden*, *Williams* and *Tate* evidenced any improper classification. Instead, the defendants in those cases were punished under facially neutral laws for failing to comply with the terms of their sentences, even though they had no ability to comply with the fines. Each was incarcerated for failure to pay a fine.

Respondent also suggests equal protection does not bar statutes that were not enacted with any intent to discriminate. [ABM 32.] This position fails to account for the holdings in *Bearden*, *Williams*, *Tate, Griffin*, *Douglas* and *Mayer,* none of which discussed any apparent intent to discriminate based on wealth and all of which condemned statutes that effectively discriminated against the poor. This Court recognized the impact of those cases in *Serrano v. Priest* (1971) 5 Cal.3d 584, 602, saying, "[N]one of the wealth classifications previously invalidated by the United States Supreme Court or this court has been the product of purposeful discrimination. Instead, these prior decisions have involved 'unintentional' classifications whose impact simply fell more heavily on the poor."

Respondent does not separately address Mr. Hernandez's state equal protection arguments, except to agree that user fees are unconstitutional under the state equal protection clause because they treat criminal and civil defendants differently. [ABM 37.] Instead, respondent argues that the state and federal

equal protection analyses are the same for punitive fines and do not bar the imposition of unpayable punitive fines. [ABM 31 fn. 9.] Mr. Hernandez has refuted respondent's criticisms of his federal equal protection argument here and shown why they are wrong. For the same reasons set forth *supra*, the state equal protection clause applies to all unpayable LFOs imposed as part of a system that does not intentionally discriminate but still adversely affects poor defendants more harshly than wealthier defendants.

III.
LEGAL FINANCIAL OBLIGATIONS SHOULD NOT BE CLASSIFIED AS "PUNITIVE FINES" OR "USER FEES"

Respondent joins a chorus of lower courts – including the dissent in Mr. Hernandez's case – in arguing that "punitive fines" may only be challenged as grossly disproportionate under the Eighth Amendment's excessive fines clause and may not be challenged under the due process / equal protection rubric. [ABM 28-36; e.g., *People v. Valles* (2020) 49 Cal.App.5th 156, 162; *People v. Cowan* (2020) 47 Cal.App.5th 32, 42-43 [holding that restitution fines and all assessments may only be challenged as excessive fines]; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1069-1072.) This argument relies on the false premise that LFOs can be classified either as punitive fines or user fees. But user fees can be punitive and purportedly punitive fines can be used to fund court operations. Because the punitive - non-punitive

distinction is neither extant nor justifiable, this Court should decline to make it.

Respondent defines "user fees" as LFOs whose primary function is to raise money to pay for criminal justice operations. [ABM 13.] Respondent defines "punitive fines" as LFOs imposed with the intent to punish. [ABM 24.] While this Court has adopted similar definitions over the years, see, e.g., *People v. Ruiz* (2018) 4 Cal.5th 1100, 1110-1119, 1122, it has not examined these punitive - non-punitive distinctions within the context of deciding whether the constitution prohibits imposition of unpayable LFOs. And as this Court explained in *Ruiz*, context is everything: "[T]he method courts use to determine what constitutes punishment varies depending upon the context in which the question arises." (*Ruiz* at p. 1108.)

> Criminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional constraints.

(*Dep't of Revenue of Mont. v. Kurth Ranch* (1994) 511 U.S. 767, 778.) Contrary to respondent's arguments, all of the LFOs imposed at criminal sentencing proceedings are both punitive and used to fund court and other governmental operations. Respondent's proposed dichotomy is false.

A. So-called "user fees" are partially punitive under well-established U.S. Supreme Court precedent.

Respondent relies on double jeopardy and ex post facto cases to make the argument that certain LFOs – in this case, the restitution fine, parole revocation fine, laboratory analysis order, and drug program order – are purely punitive. [ABM 21-24.][4] Using the same analysis, in *People v. Alford* (2007) 42 Cal.4th 749, 757-759, this Court found that the court security fee imposed under Penal Code section 1465.8 does not constitute punishment because it does not impose an affirmative disability or restraint and does not serve any retributive or deterrent purpose. But *Alford* was an ex post facto case, and the test for punishment under the ex post facto clause is different from that under the excessive fines clause, particularly because an LFO need only be partially punitive to be regulated under the Eighth Amendment. (See *Timbs v. Indiana* (2019) ___ U.S. ___, 139 S.Ct. 682, 203 L.Ed.3 11.)

To determine whether a statute is punitive for purposes of the ex post facto clause, courts consider seven detailed factors:

> (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically

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[4] Respondent does not state whether the "user fees" are punitive in part or in whole. Since respondent agrees that the imposition of unpayable "user fees" violates equal protection, ABM 37-41, any separate excessive fines analysis of those LFOs could be seen as unnecessary. However, Mr. Hernandez undertakes that analysis here to demonstrate why this Court should reject respondent's punitive - non-punitive dichotomy.

> been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment--retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

(*Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 168-169.) In *Hudson v. United States* (1997) 522 U.S. 93, the Supreme Court adopted the same analysis for double jeopardy challenges, explaining that courts should look at both the legislative intent and the *Mendoza-Martinez* factors to determine whether a statute is punitive. (*Id.* at pp. 99-100.) "[T]hese factors must be considered in relation to the statute on its face," [citation] and "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. (*Ibid.*)

In *Austin v. United States* (1993) 509 U.S. 602, however, the U.S. Supreme Court found the *Mendoza-Martinez* test does not apply when litigants want to challenge a statute under the Eighth Amendment. (*Id.* at pp. 607-609.) Instead, the Court held that the Eighth Amendment's excessive fines clause applies to civil actions that punish, even if those actions are partially remedial and partially punitive. (*Id.* at p. 610.) The Supreme Court later applied *Austin* and the double jeopardy cases to find

that civil forfeiture does not constitute punishment under the double jeopardy clause. (*United States v. Usery* (1996) 518 U.S. 267, 292.) The *Usery* court emphasized that it uses different tests to determine when the double jeopardy clause and the excessive fines clause apply. (*Id.* at p. 287.)

Under *Austin*, then, even California's many "user fees" are subject to excessive fines limitations. A sanction is partially punitive when it is only imposed as part of a criminal sentence. The U.S. Supreme Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." (*United States v. Reorganized CF & I Fabricators of Utah, Inc.* (1996) 518 U.S. 213, 224.) Court fees and costs imposed in a criminal sentence fall within this definition: they are part of the state's punishment for a crime. (*Jones v. Governor of Fla.* (11th Cir. 2020) 975 F.3d 1016, 1038. See also *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1321 [civil penalties of $767,000 for housing code violations partially punitive for purposes of excessive fines challenge].)

Here, of course, the "user fees" are only imposed on people who are convicted of crimes. (E.g., Pen. Code, § 1465.8: "To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense"; Gov. Code, § 70373: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense.") Many of the "user fees" appear in state codes dedicated in large

part to identifying and punishing criminal offenses: the Penal Code, the Health and Safety Code, the Vehicle Code.

At least one Court of Appeal has held that "user fees" qualify as punitive fines. In *People v. Cowan* (2020) 47 Cal.App.5th 32, the First Appellate District explained, "Because these assessments are 'conditioned on the commission of a crime' (*Department of Revenue of Mont. v. Kurth Ranch* (1994) 511 U.S. 767, 781 [128 L. Ed. 2d 767, 114 S. Ct. 1937]), we think they can only be explained as serving, in part, to punish. Accordingly, we conclude that, under *Austin*, the assessments, as well as the restitution fine, must be treated as 'fines' for purposes of the excessive fines prohibitions in the federal and state Constitutions." (*Cowan* at p. 45. See also *People v. Cota* (2020) 45 Cal.App.5th 786, 800-801 (Dato, J., conc.) [assessments subject to Eighth Amendment challenge because they are at least partially punitive]; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1040 (Benke, J., conc.) [all LFOs imposed as part of a sentence are reviewable as punishment under the Eighth Amendment].)

This Court should find that all LFOs imposed as part of a criminal sentence are partially punitive and thus subject to excessive fines limitations.

B. The state uses "punitive fines" to fund state and court operations.

Following the inverse of the preceding analysis, the LFOs labeled by respondent as "punitive fines" are both partially punitive and partially used to fund court operations. Respondent has no problem agreeing that the restitution fine, the laboratory

analysis fee, and the drug program fee are punitive fines. [ABM 22-24.] But those statutory fines also fund government services.

The restitution fine, for example, funds the state's Restitution Fund, which provides reimbursement to the state's crime victims – not to any particular victim of a crime committed by the defendant. Thus, the money a defendant pays for his restitution fine goes into a statewide pot of money that funds an aspect of state operations – the legislative policy choice – that assists crime victims across the state. (*People v. Franco* (1993) 19 Cal.App.4th 175, 184-185.) Money from the restitution fund is also used to fund other government services, such as trauma recovery centers. (Gov. Code, § 13963.1, subd. (c).) The restitution fund is so divorced from punishment that even the perpetrator of a victimless crime will have to pay it.

Similarly, although this Court has held that the laboratory analysis and drug program assessments are punitive, *People v. Ruiz* (2018) 4 Cal.5th 1100, 1122, those assessments subsidize state prosecution operations. Assessments collected pursuant to Health and Safety Code section 11372.5 are used

> to fund (1) costs incurred by criminalistics laboratories providing microscopic and chemical analyses for controlled substances, in connection with criminal investigations conducted within both the incorporated or unincorporated portions of the county, (2) the purchase and maintenance of equipment for use by these laboratories in performing the analyses, and (3) for continuing education,

> training, and scientific development of forensic scientists regularly employed by these laboratories. Moneys in the criminalistics laboratory fund shall be in addition to any allocations pursuant to existing law.

(Health & Saf. Code, § 11372.5, subd. (b).)

Government Code section 70372, found to be punitive for purposes of an ex post facto analysis (e.g., *People v. Soto* (2016) 245 Cal.App.4th 1219, 1240), was enacted as part of Senate Bill 1732, which created the Court Facilities Trust Fund to provide state funding of county courthouse facilities. Indeed, section 70372 was enacted as part of the same bill that created Government Code section 70373, which respondent concedes is a user fee. The Senate Judiciary Committee's April 16, 2002, report on SB 1732 noted the bill was important because "[c]ontrolling both operations and facilities ensures that all costs are considered when decisions are made, and ensures economical, efficient, and effective court operations."

In other words, SB 1732 created user fees and a mechanism for trying to make state funding of court operations and construction more efficient. There is no principled reason for arguing that Government Code section 70373 is a user fee and Government Code section 70372 is punitive fine. Yet under respondent's formulation, courts would treat these two assessments differently.

Similarly, the courts found Government Code section 76000 to be punitive, *People v. Soto, supra,* even though it was enacted

as part of 1991's Assembly Bill 544, another trial court funding bill enacted in conjunction with AB 1297, the "Trial Court Realignment and Efficiency Act of 1991." In 1994, the Senate Judiciary Committee explained, "The Trial Court Realignment and Efficiency Act of 1991[5] (AB 1297-Isenberg), with follow-up legislation in 1992, increased the state's share of the total cost of court operations in consideration of specified reforms and efficiencies, including deposit with the state of a portion of court revenues collected offsetting increased general fund obligations." (Report of Sen. Comm. On Judiciary, 1993-94 Regular Session, AB 2544 (Isenberg), as amended April 21, 1994.)

This brief survey demonstrates that when the state collects purportedly punitive fines, it uses those moneys, at least in part, to subsidize operations it chooses not to fully fund with tax revenues. Just like the "user fees," these LFOs are partially punitive and partially tools for recouping the costs of running a government that prosecutes and punishes criminal offenders.

C. Legislative intent is not determinative.

Respondent also asks this Court to defer to the Legislature's intent to impose either punitive or remedial LFOs to determine which constitutional limitations apply to each LFO.

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[5] According to a 1997 report on the history of trial court funding, the Trial Court Realignment and Efficiency Act of 1991 was enacted to increase state funding of trial court operations by five percent each year until the state reached a 70 percent funding level. (https://www.courts.ca.gov/partners/documents/TCFWG11-February1997LegislativeBriefingonTrialCourtFunding.pdf.)

[ABM 12, 20.] This Court did so when it conducted its ex post facto analysis in *People v. Alford* (2007) 42 Cal.4th 749, 757 and considered "what constitutes punishment" in a variety of other contexts. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 795 [ex post facto examination of sex offender registration]; *People v. Hanson* (2000) 23 Cal.4th 355, 362-363 [double jeopardy examination of restitution fines].)

But the U.S. Supreme Court has determined that legislative intent is not controlling when it comes to determining when the excessive fines clause applies. (*United States v. Bajakajian* (1998) 524 U.S. 321, 331, fn. 6.) This Court should reject respondent's argument because the excessive fines clause test is far more appropriate here than the ex post facto test.

IV.

THE STATE SHOULD BEAR THE BURDEN OF PROOF AT AN ABILITY-TO-PAY HEARING

Although respondent agrees with Mr. Hernandez that the state bears the burden of proving ability to pay some LFOs, respondent insists that defendants should have the burden of proving inability to pay other LFOs. Respondent appears to argue that this Court should adopt three different burdens of proof. First, if the Legislature has expressly placed the burden of proving ability to pay on the government, the burden of proof should remain on the government. Second, if the Legislature has been silent on the burden of proof or has placed it on the defendant, it should be placed on the defendant. And third, if the LFO is punitive, the defendant should bear the burden of proving

a proposed fine is constitutionally excessive. [ABM 41-53.] Respondent's burden of proof proposal would create a complicated and unworkable patchwork of litigation, particularly in cases in which courts impose LFOs with different legislatively created burdens of proof.

As Mr. Hernandez explained in his AOBM, placing the burden of proof on the state makes sense for the following reasons: (1) the state hopes to benefit from collection of the LFOs; (2) a significant number of current statutes place the burden on the state; (3) statutes placing the burden on defendants necessarily rely on an unjustified presumption that all defendants are able to pay LFOs; (4) the state has substantial control over whether incarcerated defendants will be able to earn money; and (5) unpayable LFOs constitute unauthorized sentences. Respondent fails to undermine the force of Mr. Hernandez's arguments on these points. This Court should reject respondent's arguments.

A. The state should bear the burden of proving LFOs do not violate due process and equal protection.

Respondent contests Mr. Hernandez's argument that because the Legislature has assigned the burden of proof to the state for some LFOs, "it must generally have intended to 'assign[] the burden of proof to the state" for all such payments. [ABM 43, fn. 15.] Although respondent is correct that many statutes do not place the burden of proof on the state, the fact that a significant number of statutes place the burden of proof on the state constitutes strong evidence that it is reasonable for the state to

bear that burden. And respondent provides no basis for distinguishing between and among the statutes that place the burden on the state versus the statutes that place the burden on the defendant.

Respondent also ignores the fact that the Legislature agreed to place the burden of proof on the government when it overwhelmingly passed Assembly Bill 927 in 2019, [see AOBM 68-70, ABM 43, fn. 15], more evidence supporting the reasonableness of placing the burden on the state.

Respondent brushes off Mr. Hernandez's argument that placing the burden of proof on defendants creates a de facto presumption that all defendants are able to pay LFOs and attempts to convert Mr. Hernandez's presumption argument into an *Apprendi*[6] claim. [ABM 45-46.] Mr. Hernandez is not arguing that defendants have a right to a jury trial on their ability to pay. He is pointing out that the only court to discuss the burden of proof in an ability-to-pay hearing expressly found the statute implies a presumption of ability to pay. [AOBM 70.] That presumption of an ability to pay is unjustified. Courts, scholars, governmental entities and advocacy organizations all agree that far too many people caught up in the criminal justice system cannot afford to pay LFOs. (E.g., Beckett, K., and Harris, A. (2011) *On cash and conviction: Monetary sanctions as misguided policy*. Criminology & Public Policy 10(3): 505–537; Pepin, Arthur

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[6] *Apprendi v. New Jersey* (2000) 530 U.S. 466, addressing when defendants have a right to a jury trial on facts affecting their sentence.

W. (2016) "*The End of Debtors' Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations*." Policy Paper. Williamsburg, Va.: National Center for State Courts, Conference of State Administrators; Martin, K.D., Smith S.S., Still, W. (2017) *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create*. New Think. Community Correct. Bull. NCJ 249976, US Dep. Justice Natl. Inst. Justice, Washington, D.C.) This Court should decline to adopt any burden of proof that implicitly or explicitly presumes that most or all defendants can pay all LFOs.

B. The state should bear the proving of proving LFOs are not excessive under the Eighth Amendment.

To the extent that this Court analyzes the burden of proof under the Eighth Amendment differently than it analyzes it under the due process and equal protection clauses, this Court should not accept respondent's request to apply cruel and unusual punishment burdens of proof to excessive fines claims. [ABM 43-44.]

While the case law so far has required defendants to prove that their custodial sentences are grossly disproportionate, e.g., *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1197, no case yet has examined which party bears the burden of proving an LFO is excessive under the excessive fines clause. In fact, the U.S. Supreme Court looks at excessive fines claims differently than it views cruel and unusual challenges to custodial sentences. (See *Alexander v. United States* (1993) 509 U.S. 544, 558.) At least one commentator has pointed out that "the fact that the Framers

expressly prohibited, in adjacent clauses, excessive bail and excessive fines without also prohibiting excessive terms of imprisonment is strong textual evidence of an intent to treat fines and imprisonment differently under the Eighth Amendment." (Johnson, Barry, *Article: Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-based Constitutional Limits on Forfeiture after United States v. Bajakajian,* 2000 U. Ill. L. Rev. 461, 512.)

Johnson's article also provides persuasive reasons for declining to defer to the Legislature when determining which party bears the burden of proof. Johnson notes that because LFOs benefit the state and custodial sentences cost the state, the state has more incentive to be careful when it enacts laws establishing custodial penalties than it has when it enacts laws establishing LFOs. (Johnson*, supra*, at pp. 509-512.) "[W]here punishment is even better than cost-free, the Court can have little confidence that legislatures are even attempting to make the tough policy decisions that *Rummel*, *Hutto*, and *Harmelin*[7] [cases applying the Eighth Amendment to custodial sentences] presuppose. Further, prosecutors cannot be trusted to exercise

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[7] *Rummel v. Estelle* (1980) 445 U.S. 263, *Hutto v. Davis* (1982) 454 U.S. 370, and *Harmelin v. Michigan* (1991) 501 U.S. 957 address Eighth Amendment cruel and unusual challenges to custodial sentences. The Court in those cases granted broad deference to legislative determinations of custodial sentences based on the assumption that legislatures are better positioned than courts to set the proper penalties for crimes.

the restraint necessary to ameliorate the effects of exceedingly broad legislative forfeiture schemes." (*Ibid.*)

Beyond the application of the cruel and unusual punishment clause, respondent analyzes the burden of proof question under *Mathews v. Eldridge* (1976) 424 U.S. 319 and concludes that placing the burden of proof on defendants satisfies procedural due process. [RB 47-50.] But the U.S. Supreme Court held in *Medina v. California* (1992) 505 U.S. 437, 443, that *Mathews* does not provide the appropriate mechanism for assessing state procedural rules, like allocating the burden of proof. Instead, *Medina* embraced an analysis that considers the historical treatment of the burden of proof in similar proceedings and the operation of the rule under consideration. (*Medina* at p. 446.)

Here, operation of an ability-to-pay hearing involves the state trying to collect funds to subsidize its government operations. It has expressly acknowledged the reasonableness of it being forced to prove a defendant's ability to pay under some circumstances. (E.g., Gov. Code, § 29550; Health & Saf. Code, § 11372.7; Pen. Code, § 1202.51.) And it retains virtually complete control over whether and how incarcerated defendants will be able to earn money to pay off LFOs. For these reasons, and those set forth in Mr. Hernandez's opening brief on the merits, this Court should place the burden of proving ability to pay on the state.

CONCLUSION

The parties agree that trial courts must hold ability-to-pay hearings before imposing LFOs and must place the burden of proof, at least some of the time, on the state. This Court should further agree with Mr. Hernandez that unpayable LFOs violate the due process / equal protection rights embodied in *Bearden*, *Griffin*, and their progeny, that all LFOs are subject to excessiveness limitations under the Eighth Amendment, and that the state should bear the burden of proving a defendant's ability to pay.

Respectfully submitted,

Dated: January 28, 2021 By:

REBECCA P. JONES
Attorney for Appellant
JASON HERNANDEZ

CERTIFICATE OF COMPLIANCE

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Respectfully submitted,

By:

REBECCA P. JONES
Attorney for Defendant-Appellant
JASON HERNANDEZ

PEOPLE V. KOPP et al.
Case No. S257844

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