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No. S257844

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

CHRISTI KOPP, ET AL.,
Defendants and Appellants.

Fourth Appellate District, Division One, Case No. D072464
San Diego County Superior Court, Case No. SCN327213
The Honorable Harry M. Elias, Judge

ANSWER TO AMICUS BRIEFS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The parties agree, with respect to the first issue presented in this case, that courts must consider a criminal defendant's ability to pay before imposing financial obligations such as fines or fees. The parties differ, however, as to the consequences of a judicial finding that a defendant cannot pay. Appellant Hernandez has argued that the Constitution categorically forbids the imposition of a financial obligation of any type on any defendant who lacks the immediate ability to satisfy it—a principle Hernandez viewed as required under all three constitutional provisions in this case: the Excessive Fines Clause, Equal Protection Clause and Due Process Clause. (OBM 19-62; RBM 11-35.)

The People, however, have observed that governing precedent requires a more nuanced conclusion. Where a financial obligation is imposed as punishment, a defendant's inability to pay is an important consideration under the Excessive Fines Clause; but it must be balanced with other factors to reach an overall conclusion about whether the "fine" is excessive to legitimate punishment goals. (ABM 28-31.) Many fines that defendants cannot pay will indeed be excessive under that framework. But a fine that is not excessive under that framework is not invalid under the Excessive Fines Clause or the Due Process and Equal Protection Clauses simply because the defendant cannot pay it right away. (ABM 31-36.) In contrast, other financial obligations are imposed on criminal defendants to fund court operations and administrative functions. Those obligations do not serve punishment functions and cannot be

justified with reference to proportionate punishment. (ABM 24-28.) The Equal Protection and Due Process Clauses, however, require such "fees" to advance their fundraising purpose in a rational manner that does not without reason discriminate against criminal defendants in comparison to similarly situated persons—here, civil litigants. (ABM 37-41.) The imposition of fees on criminal defendants who would qualify for civil fee waivers due to their indigence fails that test, and is therefore prohibited. (*Ibid.*)

Amici's arguments against that analysis are unconvincing. Amici emphasize that high fees and fines can have severe adverse effects on defendants, their families, and their communities. The People agree. (See ABM 12-13, 35.) Such concerns have caused the Legislature to take a hard look at criminal fees and fines, enacting some reforms already and considering others for the future.[1] But this case concerns the constitutional restrictions that apply in the absence of such policy-based reforms. And as a matter of precedent and principle, Amici are incorrect that heightened scrutiny applies to and requires invalidation of financial obligations that do not deprive defendants of access to judicial proceedings or result in their incarceration.

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[1] See, e.g., Stats. 2020, ch. 92 (A.B. 1869); Stats. 2017, ch. 678 (S.B. 190); Legislative Analyst's Office, Improving California's Criminal Fine and Fee System (Jan. 5, 2016) <https://lao.ca.gov/Publications/Report/3322>.

With respect to the second issue presented, Hernandez has argued that if the law recognizes ability to pay as relevant, then responsibility to raise the issue and establish relevant facts should lie solely with the government—and that all defendants represented by appointed counsel should be presumed unable to pay any amount. (OBM 63-82.) The People's more modulated approach recognizes that legal and practical considerations do not support completely relieving defendants of their responsibility to raise and establish inability to pay, but do support certain court-ordered processes to assist them in making the requisite showing. To remedy the constitutional defect relevant to fees, courts should provide defendants with the same simple, clear forms used in the civil context, requesting basic information that would entitle many such defendants to automatic exemptions. (ABM 51-52.) With respect to fines, courts (and defense counsel) should be required to advise defendants of their right to raise inability to pay and provide them a reasonable opportunity to present information relevant to their financial status (on the same forms used to establish inability to pay fees) before imposition. The court would then be required to consider this financial information, together with additional information bearing on the other factors in the excessiveness inquiry, in deciding whether the fine is grossly disproportionate. (ABM 43-45.)

Amici's arguments against that approach should be rejected. It is true that, for defendants represented by appointed counsel, the prior determination that they are unable to afford private

representation will have some bearing on an ability-to-pay assessment. But the procedural and substantive features of a determination regarding eligibility for counsel argue against according that determination the weight of a formal presumption on the issues relevant to the defendant's ability to pay particular fees. More importantly, if the burden to prove ability to pay were reversed, Amici propose no realistic and timely way in which prosecutors could gather and submit in admissible form even basic information about defendants' financial circumstances. In most cases, efficient and accurate determinations by the court will require some submission by defendants of the information that only they can practically and efficiently supply.

As concrete examples from two paradigmatic cases show (see *infra* pp. 35-40), the People's proposal would provide a fair, practical, and effective way to secure defendants' constitutional rights until such time as the Legislature or Judicial Council provides a more precise procedure.

ARGUMENT

I. COURTS MUST CONSIDER THE DEFENDANT'S ABILITY TO PAY UNDER THE PROPER CONSTITUTIONAL FRAMEWORK BEFORE IMPOSING A FINE OR FEE

As all parties and Amici agree, courts must consider the defendant's ability to pay before imposing a fine or fee. The nature and consequences of that consideration, however, depend on the type of financial obligation at issue.

A. The defendant's inability to pay a fine may render the fine unconstitutionally excessive

1. Inability to pay is a factor under the Excessive Fines Clause

The defendant's ability to pay is a factor relevant to determining whether a fine is grossly disproportionate and hence excessive under the Excessive Fines Clause. (ABM 28; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) Sometimes, a fine that is beyond a defendant's ability to pay will have such long-lasting or severe effects that it will be unconstitutionally excessive as punishment for that defendant's crime. (ABM 30; see, e.g., *infra* pp. 35-38 [discussing facts in *People v. Dueñas* (2019) 30 Cal.App.5th 1157]; UCI Clinic ACB 29-36 [noting potential consequences from nonpayment such as garnishment, interest and late-payment charges, damage to credit ratings, and psychological distress].) Ability to pay is not, however, dispositive in every case. Other relevant factors—in particular, "'the defendant's culpability'" and "'the harm'" caused by the offense—will sometimes justify the imposition of a fine beyond the defendant's current means. (ABM 28-31, quoting *R.J. Reynolds*, 37 Cal.4th at p. 728.)

This Court confirmed that principle in *People v. Potts* (2019) 6 Cal.5th 1012. The defendant there complained that his fine was invalid due to his inability to pay it. This Court rejected that argument. The trial court "was permitted to conclude that the monetary burden the restitution fine imposed on defendant was outweighed by other considerations" such as the gravity of the offenses and the harm they caused. (*Id.* at pp. 1056-1057.)

"Given the force of this competing consideration, and that this rationale accounts for defendant's ability to pay," this Court held, "the fine would not be excessive, deny defendant due process, or deny him equal protection of the laws." (*Id.* at p. 1057, fn. 13.) In short, courts must consider the defendant's inability to pay, but may find that factor outweighed by others in serious cases and, in that event, may impose a substantial fine.[2]

2. Due process and equal protection do not require a broader, categorical prohibition on fines

Amici argue for a broader rule. In their view, equal protection and due process categorically prohibit courts from imposing upon any defendant a monetary punishment that the defendant cannot satisfy. (UC Irvine ACB 31-43; Public Counsel ACB 7-19.) This Court rejected that proposition in *Potts*, as noted above. (*Potts*, 6 Cal.5th at pp. 1056-1057 & fn. 13 [holding that a fine the defendant was "unable to pay" did not "deny defendant due process, or deny him equal protection of the laws"].) Amici's arguments here do not undercut that decision.[3]

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[2] The People do not maintain that a defendant who is "likely *never* to be able to pay" his fine should be considered able to pay it based on fictions about his "'*plausible* future resources.'" (Beverly Hills Bar Assn. ACB 10.) The People's emphasis on the defendant's "plausible" resources (ABM 30) is intended to underscore that unsupported speculation about future resources is inappropriate.

[3] Amici claim that the People have argued "that due process and equal protection do not apply to punitive fines." (Public Counsel ACB 11.) In fact, the People agree that the Due Process

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Amici argue that California's Constitution "recognizes wealth as a suspect class and subjects wealth-based discrimination to the strictest level of scrutiny." (Public Counsel ACB 12.) The People have explained why that is incorrect. (ABM 31-36.) Neutral financial requirements are generally reviewed for mere rationality. Heightened scrutiny is reserved for exceptional circumstances, such as where nonpayment of a financial obligation blocks access to judicial remedies,[4] subjects one to physical custody that a wealthier person could avoid,[5] or

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and Equal Protection Clauses apply to punitive fines. The parties' dispute is about what those clauses prohibit.

[4] See, e.g., *Griffin v. Illinois* (1956) 351 U.S. 12 [requiring state to provide trial transcript so indigent criminal defendant can pursue appeal]; *Burns v. Ohio* (1959) 360 U.S. 252 [requiring waiver of filing fee for indigent's direct appeal in criminal case]; *Smith v. Bennett* (1961) 365 U.S. 708 [requiring waiver of indigent's filing fee for habeas petition]; *Gideon v. Wainwright* (1963) 372 U.S. 335 [requiring state to provide trial counsel for indigents charged with felony offenses]; *Douglas v. California* (1963) 372 U.S. 353 [requiring state to provide indigent defendant with counsel for first appeal as of right]; *Boddie v. Connecticut* (1971) 401 U.S. 371 [requiring relief from court fees for indigents seeking civil divorce]; *Little v. Streater* (1981) 452 U.S. 1 [requiring state-subsidized paternity test for indigent defendant in civil paternity case]; *M.L.B. v. S.L.J.* (1996) 519 U.S. 102 [requirement to waive record-preparation fee in parental rights termination action].

[5] See, e.g., *Williams v. Illinois* (1970) 399 U.S. 235 [forbidding state from incarcerating indigent defendant beyond statutory maximum solely for nonpayment of fines]; *In re Antazo* (1970) 3 Cal.3d 100 [forbidding imprisonment for indigent probationer due to inability to pay fine]; *Tate v. Short* (1971) 401

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leads the State to deprive a person of such fundamental rights as the rights to vote and to access basic education.[6] (ABM 33-36.)

In arguing that strict scrutiny applies to financial obligations more broadly, Amici rely on two cases: *In re Antazo* and *Serrano v. Priest*. (Public Counsel ACB 12.) Although *Antazo* contained broad language about wealth as a suspect classification, that language was in the context of deciding only the legality of the "*imprisonment* resulting from [the defendant's] inability, due to his indigency, to pay the fine and penalty assessment." (*Antazo*, *supra*, 3 Cal.3d at p. 117, italics added; see also *id.* at pp. 114, 116 & fn. 13 [stating that "we do not hold that the imposition upon an indigent offender of a fine and penalty assessment . . . constitutes of necessity in all instances a violation of the equal protection clause," and noting existence of methods other than imprisonment to promote collection from indigents].) And *Serrano* held that "discrimination *in educational opportunity* on the basis of district wealth involves a suspect classification" because "*education* is a fundamental interest." (*Serrano v. Priest*,

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U.S. 396 [prohibiting incarceration solely for indigent's nonpayment of fine]; *Bearden v. Georgia* (1983) 461 U.S. 660 [forbidding incarceration of indigent probationer solely for failure to pay fine and restitution]; *In re Humphrey* (2021) 11 Cal.5th 135 [forbidding pretrial detention of defendant based solely on inability to afford bail].

[6] *See Harper v. Va. State Bd. of Elections* (1966) 383 U.S. 663, 670 ["the right to vote is too precious, too fundamental" to be "burdened or conditioned" on ability to pay a fee]; *Serrano v. Priest* (1976) 18 Cal.3d 728, supplemented (1977) 20 Cal.3d 25.

supra, 18 Cal.3d at pp. 765-766, italics added). Neither case established any principle of heightened scrutiny in other contexts. The lack of any such conclusion is evident from the principle that "cases are not authority for propositions not considered." (*B.B. v. Cty. of Los Angeles* (2020) 10 Cal.5th 1, 11, citation and internal quotation marks omitted). It also clear from *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142. (See *id.* at p. 1161, fn. 9 [stating that Court was not aware of any "federal or state constitutional" provision "that would place financial or economic status on the same footing with" categories such as racial and gender discrimination], superseded on other grounds by Civ. Code, § 51; see *ibid.* [citing *San Antonio School Dist. v. Rodriguez* (1972) 411 U.S. 1, 28-29 for the observation that "discrimination based on wealth does not possess the traditional indicia of a suspect classification under equal protection clause analysis"].)[7]

Amici further argue that under *James v. Strange*, "courts must carefully scrutinize statutes that deprive indigent defendants of basic liberties," such as "the 'hope[] . . . for self-sufficiency and self-respect.'" (Public Counsel ACB 9, quoting *James v. Strange* (1972) 407 U.S. 128, 141-142, alterations in amicus brief.) But *James* did not hold that the statute at issue was unconstitutional for undermining a defendant's hope for self-

[7] Nor would expansion of heightened scrutiny to neutral financial obligations in *Serrano* or *Antazo* have made logical sense. Such a principle would call into question the constitutionality of commonplace financial obligations such as college tuition, library fines, and municipal utility fees.

sufficiency and self-respect. The problem in *James* was that the State provided an insufficiently "even treatment of indigent criminal defendants with other classes of debtors." (*James*, 407 U.S. at p. 141.) That was the "discriminatory fashion" in which the state was "blight[ing]" the "hopes of indigents for self-sufficiency and self-respect." (*Id.* at pp. 141-142; see ABM 40.) As we have noted, California's fee statutes suffer from a similar deficiency, in that criminal defendants facing court fees are treated differently than litigants subject to court fees in civil cases. (ABM 37-41.) California's fine statutes, which respond to unique penological goals of the criminal justice system and have no civil counterpart, feature no similarly irrational discrimination.

Amici contend that a fine that the defendant cannot pay unconstitutionally prevents or delays the defendant's ability to complete her punishment, arguing that "the 'access'" issue addressed in *Griffin*, *supra*, "is about having a fair chance at participating in *and ultimately exiting* the criminal process." (Public Counsel ACB 11, italics added.) Such a reading goes well beyond the high court's decisions in *Griffin* and similar cases, which in fact concerned the requirement that States grant defendants "a meaningful right of *access to the courts*," in fulfillment of each State's "obligation to 'afford to all individuals a meaningful *opportunity to be heard*' in its courts." (*Tennessee v. Lane* (2004) 541 U.S. 509, 532-533 [quoting *Boddie v. Connecticut* (1971) 401 U.S. 371, 379, and discussing *Griffin* and other cases],

italics added].)[8] To leap from that well-established right to a novel right to "exit" the process of criminal punishment would be extraordinary. Whether he pays his fees or not, Hernandez's custodial sentence of 81 years to life (see ABM 16) will pose a significant likelihood of him never "exiting" the process of criminal punishment. For such serious crimes, Amici do not explain why it is any less rational to impose a financial penalty that the defendant will need years to satisfy than to impose a lengthy prison sentence. What matters ultimately is whether the punishment is proportionate to the crime. Sometimes fines like the ones imposed on Hernandez for his crimes will meet that test, notwithstanding that they are beyond the defendant's means to satisfy. (See *infra* pp. 38-40.)[9]

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[8] See also, e.g., *M.L.B. v. S.L.J.*, *supra*, 519 U.S. at p. 120 [discussing "[t]he Court's decisions concerning *access to judicial processes*, commencing with *Griffin*"], italics added; *Boddie*, *supra*, 401 U.S. at p. 382 [problem in *Griffin* was "the requirement of a transcript beyond the means of the indigent that blocked *access to the judicial process*"], italics added.

[9] Amici argue that deductions to cover court-ordered financial obligations deprive inmates of funds they would otherwise use for supplemental food and hygiene materials. (ACLU ACB 22-23.) Inmates have a right under the Cruel and Unusual Punishments Clause to be provided by prison authorities with appropriate necessities. In contrast, they have no right to escape the financial consequences of their intentional, harmful acts. (Cf. 11 U.S.C. § 523(a)(6) [forbidding bankruptcy discharge of debts "for willful and malicious injury by the debtor to another entity or to the property of another entity"]; *Kelly v. Robinson* (1986) 479 U.S. 36 [forbidding bankruptcy discharge of restitution amounts ordered in criminal case].)

Amici argue that the "principle of 'equal justice' for indigent defendants . . . applies to all aspects of 'administration . . . of criminal law[]'" (Public Counsel ACB 8, quoting *Griffin v. Illinois*, *supra*, 351 U.S. at p. 19), and that a State may not punish a person "on the basis of their poverty" (Public Counsel ACB 10). Both principles are correct. They explain why States must provide indigent defendants with a means to equally access judicial remedies, and why States may not imprison someone for nonpayment caused by indigency. But they do not require courts to equalize the disparate effects that proportionate and equal sentences inevitably have on people of different circumstances. (ABM 32-33.)[10] Courts should certainly consider such individualized factors when choosing a sentence from within the applicable statutory range and when determining whether a punishment is cruel or a fine excessive.[11] But there is no duty to achieve the unobtainable goal of equalizing the effect of punishments that are proportional and non-excessive.

Finally, Amici challenge the entire concept of distinguishing fines from fees. They observe that defendants' lives are equally affected regardless of how a given financial obligation is characterized. (Poverty Law Scholars ACB 31.) Amici overlook

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[10] Cf. *In re Smiley* (1967) 66 Cal.2d 606, 622 ["we cannot say it is significantly less 'severe' to impose an effective sentence of 445 days in jail on a man in his sixties . . . than to sentence a young scofflaw to 900 days"].

[11] See, e.g., Pen. Code, § 1202.4, subd. (b)(1) [felony restitution fine range of $300 to $10,000]; *infra* p. 37.

the legal advantage that flows to defendants from the distinction that the People have highlighted. As previously explained (ABM 37) and discussed below (*infra* pp. 20-22), recognizing that fees (unlike fines) do not serve a punishment purpose means that punishment cannot be raised as a justification for the unpayable fee. The result is that it is unconstitutional to deprive criminal defendants of relief from fees that they cannot pay.[12] In contrast, precedent is clear that where a *fine* proportionally punishes the defendant, an additional intent or effect of raising money does not render it constitutionally invalid.

B. Fees that a defendant cannot pay must be waived in criminal cases just as they are in civil cases

1. California's fee system fails rationality review

In contrast to the fines discussed above, fees do not serve a punitive function. (ABM 24-28.) Instead, they pay for the processes used in the defendant's case. That non-punitive, fund-raising function is evident from their design: Fees are imposed based on the services used in a particular class of cases, rather than based on the defendant's culpability. (See e.g., Gov. Code,

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[12] Although Amici's arguments for treating fees as punitive thus do not further indigent defendants' ability to achieve relief from such fees, the arguments also rest on a misconception. The fact that fees are imposed only on convicted defendants does not reflect a punitive function; it instead represents "an effort to achieve elemental fairness" in light of the other costs that even an unsuccessful prosecution imposes on most defendants. (*Fuller v. Oregon* (1974) 417 U.S. 40, 50.)

§ 29550, subd. (a)(1) [tying criminal justice administrative fee to "the actual administrative costs, including applicable overhead costs . . . incurred in booking or otherwise processing arrested persons"].) It can also be determined by the language of the relevant statute and the historical circumstances and legislative history surrounding the fee's enactment. (See ABM 24-28.) Because fees lack a punishment function, the State is allowed to alter and impose fees in criminal cases in circumstances where similar actions as to fines would be prohibited by constitutional prohibitions on ex post facto laws and double jeopardy. (See ABM 25, 27-28 [discussing *People v. Alford* (2007) 42 Cal.4th 749, and *People v. McCullough* (2013) 56 Cal.4th 589].) However, the lack of a punishment function means that such fees can be justified only by their fundraising purposes—not as a means to effect punishment or deterrence—regardless of whether punishment in an equivalent amount would have been appropriate if enacted as a fine. (ABM 37.)

Like other governmental actions, a fee system that does not further its functions in a rational manner, or that draws irrational distinctions, is unconstitutional. (ABM 39.) Here, the attempt to fund court processes through the imposition of fees on criminal defendants who cannot pay them is fundamentally irrational, in light of the exemptions that the State provides to civil parties unable to afford similar fees. (ABM 37-40.) To remedy that unjustifiable discrimination—at least until the Legislature provides some other rational method—courts should extend to criminal defendants the same fee-waiver system that

the Legislature granted to civil parties. (ABM 51.) Under that system, those who receive specified public benefits or have an income below 125% of the poverty level are automatically exempted from responsibility for court fees, and others are entitled to the elimination of any portion of the fee that would require diversion of "moneys that normally would pay for the common necessaries of life for the applicant and the applicant's family." (Gov. Code, § 68632, subds. (a), (b), (c); see ABM 38.) The application of equivalent standards in the criminal justice context would effectively eliminate criminal justice fees entirely for those defendants who are least able to afford them.

2. This Court need not decide additional issues as to fees

Amici observe that some fees might also be subject to the additional limitations of the Excessive Fines Clauses, notwithstanding the lack of a punitive purpose. (See, e.g., Colgan ACB 18-28.) That may be true, but given the equal protection shortcomings the People have identified in California's existing fee system, the presence of additional limitations under the Excessive Fines Clause would not appear to provide a defendant any additional protection or advantage. (See also *supra* p. 20 & fn. 12.)[13]

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[13] Amici argue that the People's analysis would allow "a legislature concerned" about losing funding from user fees to "simply describe them as punishment to avoid the constitutional limitations" that the State has recognized. (Public Counsel ACB 16.) But the People's analysis turns not on mere nomenclature, but also on a statute's structure and history. (See, e.g., ABM 23-

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Amici also raise a variety of policy criticisms of user fees. They argue that court budgets should be funded through higher taxes rather than the imposition of fees (Poverty Law Scholars ACB 16-19), and that efforts to collect user fees "'divert'" law enforcement and court officials "'from their core responsibilities'" (*id.* at p. 26) and "erode[] the public's confidence in the judiciary" (Beverly Hills Bar Assn. ACB 15). Amici also object that the growth in fines and fees has outpaced wage gains for lower-income workers. (Poverty Law Scholars ACB 16-21.) These views are worthy of legislative consideration, but provide no constitutional basis for striking down the existing fee statutes. (See, e.g., *James v. Strange*, *supra*, 407 U.S. at p. 134 ["[w]hether the returns" of a fee-recovery system "justify the expense, time, and efforts of state officials is for the ongoing supervision of the legislative branch"]; *Quelimane Co., Inc. v. Stewart Title Guar. Co.*

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24 [noting that the "laboratory analysis fee" and "drug program fee" imposed in Hernandez's case in fact function as fines, given this Court's analysis of the enacting statutes' language, history, and structure in *People v. Ruiz* (2018) 4 Cal.5th 1100].) Where an obligation does not seem designed to punish—for instance, because it is linked not to the severity of the crime but rather to the types of court services provided—a court could reject any putative punishment purpose and apply the restrictions on fees that we have discussed. And even where an obligation is treated as a fine, it is still subject to constitutional scrutiny. Fines (unlike fees) are subject to double jeopardy and ex post facto limitations, in addition to the Excessive Fines Clause's protection against financial obligations disproportionate to culpability. (See *supra* pp. 12, 21.)

(1998) 19 Cal.4th 26, 43 [noting Legislature's role in making judgments as to "matters of complex economic policy"].)

II. DEFENDANTS BEAR A BURDEN TO RAISE AND PRESENT SOME EVIDENCE OF THEIR INABILITY TO PAY CRIMINAL FEES AND FINES

With respect to the second question presented—the allocation of burdens of proof—the People have proposed a simple method to ensure that courts are able to recognize and intelligently adjudicate ability-to-pay issues, so that indigent defendants' rights, and the State's right to fund its court system and appropriately punish criminal behavior, are each observed. (ABM 43-53.) A defendant must be notified of the right to request relief from fees and fines that she is unable to pay. Armed with that information—and knowing as well both the amount of fees and fines under consideration in her case and her own personal and familial financial circumstances—the defendant is responsible for asserting inability to pay, so the court will know that an ability-to-pay determination is needed. With respect to fees, the defendant should be provided the opportunity to submit basic financial information on a simple form similar to what the Judicial Council has established for those requesting civil fee waivers. (See ABM 38, 51.) In many cases, the information on that form will result in the defendant's automatic and complete fee waiver under the applicable civil standards—and in others, it would provide a basis for the court to request additional information, for the court to grant a partial fee waiver, or for the prosecution to contest the veracity or consequence of the information the defendant provided. With

respect to fines, the same form could similarly conclusively decide the ability-to-pay issue for many defendants, allowing the judge to weigh that factor in connection with the other Excessive Fines Clause factors identified by this Court, including the defendant's culpability.

Amici propose a substantially different regime. While the details of each proposal may differ, various Amici would exempt defendants from any responsibility to raise inability to pay, and would require the prosecution to assert and prove defendants' ability to pay fines and fees in the first instance; some Amici would further excuse defendants from providing any information about their financial circumstances, except as necessary to rebut the prosecution's evidence on the subject. Such proposals are neither practical nor legally supported.

A. Defendants should be able to raise and establish their inability to pay fees by filling out simple forms, similar to those in the civil context

Defendants are informed of the fees and fines that may be imposed in their case.[14] Defendants should also be informed of their right to seek a waiver of those fines and fees based on their

[14] See, e.g., Cal. Rules of Court, rule 4.411.5(a)(12) [requiring presentence investigation report to include a "statement of mandatory and recommended restitution, restitution fines, other fines, and costs to be assessed against the defendant"]; *People v. Walker* (1991) 54 Cal.3d 1013, 1022 [amount of potential restitution fine is among the "direct consequences of [a] plea" that defendant must be admonished about], overruled on other grounds by *People v. Villalobos* (2012) 54 Cal.4th 177.

inability to pay. A variety of means for such notice can be envisioned—including standard forms, discussion in probation reports, consultation with counsel, and an admonishment from the judge during plea and sentencing proceedings. (See ABM 50.)

Armed with such information, defendants with financial challenges will be well positioned to aid the court by singling out the cases in which an ability-to-pay inquiry will be appropriate. The defendant knows his or her own financial circumstances better than the prosecutor can be expected to know them. The defendant should be responsible for raising inability to pay. (ABM 50-51.)

Defendants should also provide the basic financial information that will allow the trial court to adjudicate such claims. As to criminal fees, the simple and short forms that are used to determine eligibility for civil fee waivers provide an apt model, since eligibility for criminal fee waivers would be based on the same criteria that apply in civil cases. (ABM 51-52.)

In many cases, that form will conclusively settle the issue of whether criminal fees must be waived, since the civil-fee statutes require automatic exemption for many parties, including those who receive certain public benefits or whose income is below 125% of the poverty level. (ABM 38.) For defendants who do not meet the automatic-exemption requirements, courts would need to determine whether the fees at issue would be paid from money that would otherwise "pay for the common necessaries of life for the [defendant] and the [defendant's] family." (Gov. Code, § 68632, subd. (c).) The defendant's ability to pay fees would in

most cases be decided by reference to the form—but where the prosecution had reason to question the accuracy or completeness of the defendant's information, it could seek admissible evidence to challenge the defendant's representations. And any denial of the defendant's request for an exemption would have to be accompanied by reasoning sufficient to permit appellate review. (*Cf. Earls v. Superior Ct.* (1971) 6 Cal.3d 109, 114-115 [when adjudicating requests for civil fee waivers, "[a] statement of reasons for denial is essential . . . to provide an appellate court with a basis for reviewing the trial court's denial"].)

Some Amici, however, argue that the burden to identify ability-to-pay issues and provide initial financial information should instead rest on the prosecution. (See Public Counsel ACB 18-19; ACLU ACB 15.) That would be extraordinarily impractical. Amici do not explain how a prosecutor could be expected to obtain information to affirmatively raise and establish a defendant's ability to pay fines or fees in the substantial number of cases where there is no probation report, or where the plea and sentencing occurred during the defendant's first appearance in court. (Cf. Rules Prof. Conduct, rule 3.1(a)(1) [lawyer should not "assert a position in litigation . . . without probable cause"].) If those Amici's point is that prosecutors should simply "raise" ability to pay and issue subpoenas (or more radically yet, call the defendant to testify) in nearly every case, it is hard to see how that poses any advantage—to defendants or the court—over defendants asserting inability to pay and filling out a simple form themselves. (Cf. Colgan ACB 46 [stating that

"[a]dministrative considerations would support a placement of the burden of raising excessive fines claims on the person upon whom they will be imposed so long as adequate notice is provided"].) The People's proposal would allow courts to quickly and accurately identify those defendants who should be relieved of responsibility for fees. Amici's proposal would result either in vast underenforcement of the Legislature's statutes as to defendants who in fact can afford their fees, or in unjustifiable delay and expense.

B. Defendants' obligation to present a prima facie case of inability to pay fines should be modest

With respect to fines, the notice and forms discussed above would likewise equip defendants to raise and support any claim that they are unable to pay the fines at issue or would encounter serious hardship in doing so. With fines, however, having information on the defendant's ability to pay does not end the court's analysis: The ultimate decision on a fine's constitutionality depends on the relationship between the defendant's ability to pay and the other factors relevant to determining whether a financial punishment is excessive. (See *supra* pp. 12-13 [discussing *People v. Potts*, *supra*, 6 Cal.5th 1012]; ABM 28 [discussing *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., supra*, 37 Cal.4th 707.) Defendants would presumably seek to bolster their argument for an exemption from legislatively set fines by explaining to the court how certain consequences of a long-lasting financial obligation would result in punishment that is grossly disproportionate to their culpability.

(See, e.g., *infra* pp. 37-38 & fn. 22 [discussing *People v. Dueñas*].) Those are arguments that defendants have the incentive and ability to make and are properly charged with making.

C. Amici's counterarguments are unconvincing

Amici's arguments against requiring defendants to bear these modest burdens are unconvincing.

Amici assert that defendants whom the public defender or court has deemed eligible for appointed counsel should be presumed unable to afford any fines or fees, and such defendants should not be required to assert inability to pay or substantiate that claim in any way. (See, e.g., ACLU ACB 32-35; Colgan ACB 52, fn. 49.) Determinations that were made at the outset of a case about a defendant's ability to afford counsel will certainly have relevance to a court's determination of that defendant's ability to afford particular fines and fees—especially when the defendant was determined to be unable to pay even small amounts, such as the statutorily set registration fee or the cost to defend a factually simple case with a minor charge. (ABM 52-53.)[15] But a determination of eligibility for appointed counsel generally would not suffice, by itself, to establish the facts that are relevant to distinguish defendants who have valid inability-to-pay claims from those who do not. Publicly funded counsel must be provided based on the possibility of a complete

[15] A defendant's history of being unable to pay prior court assessments for fees, fines, and contributions to defense costs also would be extremely relevant. (See, e.g., *People v. Dueñas*, *supra*, 30 Cal.App.5th at p. 1161.)

investigation, pretrial motion practice, and trial regarding all original and potential future charges. (See generally *In re Smiley*, *supra*, 66 Cal.2d at p. 620 [decision on defendant's ability to afford counsel must take into account "the standards of the community, the complexity of the case, and the expenses necessary for defense"]; Pen. Code, § 1009 [allowing amendments after initial charges].) At sentencing, in contrast, fines and fees involve a definite amount that may relate to only one count of what was previously a more complex case.[16] The amounts will not always be unaffordable for a defendant for whom counsel was appointed.[17] To recognize as much is not to deny the serious effect that even small payment requirements may have on many defendants. It is simply to point out that case-by-case evaluation is needed—and will require information that often only the defendant can provide.

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[16] In addition, "a defendant's financial circumstances may change" as a case proceeds. (*People v. Rodriguez* (2019) 34 Cal.App.5th 641, 645 [explaining reasoning behind Penal Code section 987.8, subdivisions (b), (c)(1)].)

[17] For instance, a restitution fine of $150 (see § 1202.4, subd. (b)(1)) could be paid off with six monthly payments of $25 or ten monthly payments of $15. Such payments would respectively constitute 2.6% or 1.5% of the average monthly income for a client of the Alameda County Public Defender, and a smaller percentage for those with an income that is above the average. (See ACLU ACB 18.) The practical impact of such payments on a defendant's overall financial situation could vary widely depending on the defendant's other personal circumstances.

Amici argue further that "[g]iven the initial financial screening by the public defender office, it is duplicative, and a waste of court and parties' time and resources to conduct ability to pay hearings for all criminal defendants during or after sentencing." (ACLU ACB 34.) But the People do not propose that *all* sentencing hearings should include ability to pay inquiries. Defendants would initially determine the cases in which such inquiries might occur by choosing whether to assert inability to pay—and where they do, the question could usually be resolved on the defendant's submission of a simple form. (*Cf. Earls v. Superior Ct.*, *supra*, 6 Cal.3d at pp. 114-115 ["whenever a motion to proceed in forma pauperis is supported by an affidavit sufficient on its face to show indigency the court must grant the motion unless it has good reason to doubt the truthfulness of the factual allegations in the affidavit, and in that event it may decide the matter on conflicting affidavits, or in unusual circumstances order a hearing for the purpose of inquiring into the matter"].) It is Amici's proposal that would needlessly increase the expenditure of judicial resources—and cause inordinate delay—by requiring prosecutors to assert a defendant's ability to pay, and to gather supporting evidence by issuing subpoenas for documents and testimony, in cases where the defendant's own statement could settle the issue more easily. (ABM 48-50; cf. Code Civ. Proc., § 708.010 et seq. [procedures for debtor's examination].)[18]

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[18] Amici argue that the People's proposal would "pose the (continued…)

Nor would judicial scrutiny of inability-to-pay claims pointlessly "duplicat[e]" what was already determined in the process of appointing counsel. (ACLU ACB 34.) As Amici recognize, many determinations of eligibility for counsel will have been made entirely "by the public defender office" (*ibid.*) without any review by a judge.[19] Moreover, even a judge's decision as to the appointment of counsel would have considered only information that the defendant submitted confidentially and which no representative of the State had any opportunity to challenge or even see. (ABM 49; see Pen. Code, § 987, subd. (c).) Such a procedure is necessary at the appointment-of-counsel

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(…continued)

danger of humiliating clients who may be subjected to public discussions of their poverty in open court." (ACLU ACB 34.) But the People's proposal would allow most defendants to resolve their inability to pay claims by submitting forms that would obviate any need for in-depth discussion. In contrast, if the prosecution were required to obtain and present evidence in the first instance, defendants would often be subjected to far more intrusive processes, such as the subpoenaing of employers and family members.

[19] See Gov. Code, § 27707 [allowing public defender to make determination of the defendant's inability to employ counsel, and stating that the court "*may*" reexamine that determination and "make the final determination"], italics added; see, e.g., Santa Barbara County Public Defender's Office, Frequently Asked Questions <https://www.countyofsb.org/defender/faqs.sbc> ["In many courts [the defendant's Financial Declaration and Application] is provided directly to the judge to review and decide if the Public Defender should be appointed to the case. In other courts, the Public Defender attorney reviews the application and makes the call, referring close cases to the court for review."].)

stage. (See generally *People v. Canfield* (1974) 12 Cal.3d 699.) But the product of such a process, without more, would not adequately protect the State's interest in collecting fees and fines from those who can afford them. (See *In re Smiley*, *supra*, 66 Cal.2d at p. 619 ["in trial courts with heavy case loads the inquiry will normally be a cursory one," and "most judges will accept a defendant's assessment of his ability to retain his own counsel"]; *People v. Amor* (1974) 12 Cal.3d 20, 27 [noting the possibility of "'fraudulent concealment of assets and false assertions of indigency'" in requests for court-appointed counsel, quoting *James v. Strange*, *supra*, 407 U.S. at p. 141].) To the extent a defendant's financial situation remains similar to that which caused a determination of eligibility for counsel earlier, defendants could satisfy their obligations by providing in this context essentially the same information previously provided—an extremely light burden that would be easy to satisfy and that would allow more accurate determinations than reliance on Amici's proposed presumption.

Amici assert that defendants lack sufficient information to predict their ability to earn prison wages and the occupational consequences of their convictions. (See, e.g., Colgan ACB 48-49.) To whatever extent special measures regarding such questions might be warranted (cf. *ibid.* [observing that the State could "create general materials setting out the relevant county or state practices"]), that would not relieve defendants of the responsibility to produce evidence as to the subjects they do know

about.[20] In any event, the possibility of special treatment with respect to such matters is not necessary to decide. With respect to fees, future prison wages should be irrelevant to defendants whose current financial situation would entitle them to relief under the civil fee-waiver statutes. (See *supra* p. 22.) And with respect to fines, this case does not seek to resolve questions about particular categories of income and expenses that should be considered relevant to affordability under the Excessive Fines Clause, making determinations about who should bear the burden as to unique types of income premature. (See ABM 44-45, fn. 16.)

Finally, Amici argue, in essence, that trial courts cannot be trusted to fairly assess claims of indigence. They report that in one large county, "'some judges simply refuse to make ability to pay findings or grant fee waivers in any situation.'" (ACLU ACB 33-34.) Other judges, Amici report, vary widely both in their procedures for determining ability to pay and in their likelihood of finding a defendant unable to pay. (*Ibid.*; see also UCI Clinic ACB 37-42.) In the civil-fee context, Amici allege, some judges have simply disregarded legal duties that are clear in the statute.

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[20] See, e.g., *Van Atta v. Scott* (1980) 27 Cal.3d 424, 438 [in determining suitability for own-recognizance release, the prosecutor must produce information on the defendant's criminal record and past failures to appear, but the defendant must produce evidence of ties to the community because he "is clearly the best source for this information and for names of individuals who could verify such information"], superseded on other grounds by constitutional amendment as recognized by *In re York* (1995) 9 Cal.4th 1133, 1143, fn. 7.

(UCI Clinic ACB 45.) Such concerns are serious. But they would not justify unreasonable presumptions or placing the burden of production on a party that lacks relevant information. Judges who disregard the law should be corrected by appellate courts, as happened in the civil-fee-waiver cases Amici cite. (See UCI Clinic ACB 44-45, citing *C.S. v. W.O.* (2014) 230 Cal.App.4th 23, and *Cruz v. Superior Ct.* (2004) 120 Cal.App.4th 175.) To the extent further fine-tuning is necessary, the Legislature and Judicial Council are well-equipped to consider a variety of approaches, and could do so after this Court identifies the relevant constitutional rights. (Cf., e.g., *People v. Franklin* (2016) 63 Cal.4th 261, 277 [discussing Penal Code provisions that Legislature added after *Miller v. Alabama* (2012) 567 U.S. 460].)

III. THE PEOPLE'S PROPOSAL WOULD APPROPRIATELY PROTECT DEFENDANTS' RIGHTS UNTIL FURTHER REFINEMENTS ARE ENACTED BY THE LEGISLATURE OR JUDICIAL COUNCIL

The facts of two cases—that of the defendant in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 and that of Hernandez here—provide useful illustrations of how the People's proposal would operate to efficiently and accurately protect the rights at issue.

The defendant in *Dueñas* was convicted of a misdemeanor charge of driving with a suspended license. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1161.) She was required to pay two fees, totaling $70. (*Id.* at p. 1162.) As punishment for her crime, she was sentenced to 36 months of summary probation and a $150 restitution fine, with an additional $150 probation revocation fine imposed but stayed. (*Ibid.*; see Pen. Code, § 12022.44.) Because

she was unable to pay to reinstate her license between her plea and sentencing, the judge also punished her by including, as a condition of probation, that she serve 30 days in jail if she paid an additional $300 fine, or serve 39 days in jail in lieu of that fine. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1161-1162.) Dueñas chose to spend the extra nine days in jail, rather than add to her total of unaffordable fines. (*Id.* at p. 1162.) She submitted an "uncontested declaration concerning her financial circumstances," which led the court to find her unable to contribute to her defense costs under a statutory standard. (*Id.* at p. 1163.)

Under the People's proposed procedures, the sentencing court in *Dueñas* would have quickly and accurately determined that the fees and fines it was considering were unconstitutional. At her plea and sentencing, Dueñas would have been advised of her right to have unaffordable fees waived, and to have her inability to pay considered in connection with her fines. She would have been provided with a simple form that prompted her to list certain types of public benefits received and to state her assets, income, and expenses. She could have completed the form based on the same personal knowledge that allowed her to apply for a public defense earlier—and information in the record makes clear that she would have obtained an automatic waiver of the $70 in fees simply by checking certain boxes on the form.[21]

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[21] Compare *Dueñas*, *supra*, 30 Cal.App.5th at p. 1161 [Dueñas's family received food stamps and CalWORK benefits], with Judicial Council Form FW-001 [Request to Waive Court Fees] and Gov. Code, § 68632, subds. (a)(2) & (3) [providing
(continued…)

With respect to the $150 to $450 in fines that the court was considering, Dueñas's entitlement to relief would not have been automatic. But the imposition of a fine in that range on someone in her situation could not be reasonably viewed as anything other than excessive punishment, considering the relevant factors. (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, *supra*, 37 Cal.4th at p. 728.) Dueñas, who drove on a license that was suspended because of her financial circumstances rather than any risk she posed to others, acted with low "culpability," and her offense caused little "harm." (See *ibid.*) And there was no culpability at all in the fact that she did not reinstate her license between her plea and sentencing by paying fees she could not afford. In contrast, her inability to pay meant that the fines at issue—despite their negligible effect for many others—would have drastic effects on her and her family. (See generally *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1161, 1168.) The trial court would have deemed Dueñas's fines unconstitutionally excessive; and if

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(…continued)

automatic exemption from civil filing fees for recipients of either benefit]. Dueñas also would have qualified for an automatic exemption based on her family income, which was well below 125% of the poverty line for a family of four as reflected in the figures given on the Judicial Council form. (See Form FW-001, *supra*; Gov. Code, § 68632, subd. (b); *Dueñas*, *supra*, 30 Cal.App.5th at p. 1160-1161 [stating that Dueñas and her husband were unemployed and noting the amounts they received in public benefits].)

it for some reason failed to do so, Dueñas's publicly provided counsel would properly have filed an appeal and prevailed.[22]

Analysis of the financial obligations imposed on Hernandez here, however, might yield a somewhat different result. Hernandez was convicted of assault with a deadly weapon, assault by means likely to produce great bodily injury, conspiracy to commit murder, conspiracy to dissuade a witness, and furnishing a controlled substance, and the jury made true findings as to gang allegations. (Slip opn. 2.) Hernandez was informed of his possible financial exposure through the presentence report (4 CT 844), and presumably also in discussion with his attorney. The trial court should also have informed Hernandez of his right to seek reduction or remission of fines and fees based on his inability to pay. (See *supra* pp. 25-26.) Nonetheless, any such failure was harmless, as Hernandez's counsel expressly asked the court to "stay all fees and fines due to Mr. Hernandez's inability to pay." (4 CT 854, capitalization altered.) As punishment for his crimes, Hernandez was sentenced to 81 years to life in prison, plus a restitution fine of $10,000, additional $615 and $205 penalties relating to his drug conviction, and a stayed $10,000 parole revocation fine. (ABM

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[22] See *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1072, fn. 28 ["If the probationer in *Dueñas* had raised a constitutional challenge based on the Eighth Amendment, it would have surely led to the trial court's conclusion that the fines and fees imposed in that case were grossly disproportionate and excessive given the undisputed facts about the probationer's dire financial circumstances and minimal criminal culpability."].

16-17, 21-24.) He was also required to pay fees totaling $364. (ABM 16-17, 24-28.)[23]

With respect to the fees, Hernandez should have been provided with the same simple form that is provided for fee waivers in civil cases. The record does not reveal what his answers on that form would have stated, and the fact that he was represented by a Deputy Public Defender (see 4 CT 840) in this complex, multi-defendant case does not by itself allow a confident prediction of whether he would have been entitled to a waiver of fees. However, the form at issue would have been simple to fill out, and he could have relied on the same type of personal knowledge that he used earlier in his ex parte application to the court or public defender for his publicly funded defense. The information thus submitted could have entitled him to an automatic waiver of his fees if the circumstances in Government Code section 68632, subdivisions (a) or (b) applied. He could also have obtained a waiver if his answers showed that he could not "pay court fees without using moneys that normally would pay for the common necessaries of life" for himself and his family. (Gov. Code, § 68632, subd. (c).) Because the trial court was not

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[23] Although Hernandez was also ordered to pay restitution (see ABM 17), his victims apparently declined to provide restitution information to the court. (4 CT 835.) Given the injuries Hernandez inflicted (4 CT 843), that may reflect Hernandez's gang status and crimes (4 CT 831) rather than a lack of compensable harm. In any event, ability-to-pay issues relating to restitution are not at issue in this case. (See Order, Nov. 13, 2019 [limiting the issues to be briefed and argued to those involving "fines, fees, and assessments"].)

aware of this possibility, Hernandez should be allowed the opportunity to complete such a form and receive consideration of his ability to pay fees on remand.

With respect to fines, however, Hernandez would face a significantly different inquiry than Dueñas. Hernandez's level of culpability was high: For the benefit of his criminal gang, he caused serious injury to one victim, and instructed an associate to kill another so as to avoid prosecution for that crime. (ABM 14-15.) He committed these crimes just a week after being released from his most recent, 11-year prison stay, and after a long history of violent offenses including a prior prison killing. (4 CT 836-839, 843.) To the extent that Hernandez raised ability to pay as a possible defense to his fines, he was entitled to be heard and the Court of Appeal was correct to order that such proceedings take place on remand. (See ABM 18, 29.) But when those proceedings do occur, the sentencing court may well determine that requiring him to spend many years satisfying his financial punishment is no more inappropriate than requiring him to spend decades satisfying his custodial punishment.

CONCLUSION

The Court should vacate the judgment below and remand for further proceedings as described above.

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May 13, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Amicus Briefs uses a 13 point Century Schoolbook font and contains 8,586 words.

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s/ Joshua A. Klein

JOSHUA A. KLEIN
Deputy Solicitor General

May 13, 2021

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Case No.: **S257844**

We declare:

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On May 13, 2021, A. Cerussi served the attached **ANSWER TO AMICUS BRIEFS** by transmitting a true copy via electronic mail (TrueFiling).

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In addition, Tamara Yeh placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, 1300 I Street, Suite 125, Sacramento, California 95814, addressed as follows:

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We declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 13, 2021, at Sacramento, California.

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Declarant for Service by E-Mail	Signature
Tamara Yeh	*/s/ Tamara Yeh*
Declarant for Service by U.S. Mail	Signature

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Supreme Court of California

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Supreme Court of California

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Case Number: **S257844**
Lower Court Case Number: **D072464**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/13/2021

Date

/s/Ann Cerussi

Signature

Klein, Joshua (226480)

Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

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