

Case No. S257844

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHRISTI J. 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

APPLICATION TO FILE AMICI CURIAE BRIEF
and
BRIEF OF *AMICI CURIAE* POVERTY LAW SCHOLARS IN
SUPPORT OF DEFENDANTS–APPELLANTS

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CERTIFICATE OF INTERESTED PARTY

Pursuant to Sections 8.208(e) and 8.488 of the California Rules of Court (“Rule”), Poverty Law Scholars *Amici* certify that they know of no other person or entity that has a financial or other interest in this case.

March 01, 2021

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Amici Poverty Law Scholars are law professors and scholars of the history and treatment of poverty in the law. *Amici* teach, research, and write about the law's treatment of the poor, the history of anti-poverty programs, and the constitutional principles relevant to those subjects. *Amici* include the authors of leading books, articles, and studies on poverty and the law as well as past and present officers of the Poverty Law Section of the Association of American Law Schools. Many of the *Amici* also have extensive experience in practicing law for poor people and some have served in government positions involving anti-poverty policy. A complete list of *Amici*'s names, titles, and affiliations is set forth as Attachment A.

Amici present this brief to provide history, context, and analysis regarding the imposition of fines and fees on the indigent. *Amici* believe this brief will assist the Court in considering this matter from the perspective of its place within the landscape of poverty and anti-poverty policy, connecting monetary sanctions to other policies and practices that ensnare the poor within an inescapable system of racial injustice, surveillance, perpetual ties to the criminal justice system, and ongoing impoverishment.

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

Pursuant to Rules 8.360(f) and 8.200(c) of the California Rules of Court, *amici* Poverty Law Scholars respectfully apply for permission to file the Amicus Curiae brief contained herein.

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INTRODUCTION

One of the two questions on which this Court granted review is whether a trial court must consider a defendant's ability to pay before imposing or executing fines, fees, and assessments upon that defendant. In its Answering Brief, Respondent concedes that courts cannot impose "user fees" upon those who cannot pay them (Respondent's Brief (hereinafter "RB") at 13, 37), but insists that the size and extent of financial obligations characterized as "punishment" are limited only by the Eighth Amendment (*Id.* at 12-13) and that "a fine that may appear to be unpayable at the time of sentencing may still serve the goals of punishment." (*Id.* 30.)¹ To the contrary, as *Amici* demonstrate herein, imposing legal financial obligations ("LFOs") on those who cannot pay them violates due process and should be barred, regardless of how the obligation is characterized.

As scholars of poverty and the law, *Amici* demonstrate how LFOs perpetuate poverty, injure low-income communities, perpetuate racial discrimination, and often cost as much or more to administer than they recoup. Moreover, as history and current experience shows, any line

¹ Notably, Respondent concedes that "there will certainly be cases where a defendant's inability to pay is decisive of a fine's constitutionality," such as "where a fine exceeds not only the defendant's currently available resources but also any plausible future resources. . . ." (*Id.*) This concession likely covers a significant majority of defendants, including the 60-90 percent of criminal defendants who are indigent (Brief of *Amici Curiae* Public Defenders and Civil Rights Organizations 15 & n.3) as well as many infraction defendants like Velia Dueñas, who faced fines and fees of \$220 although her family of three subsisted on only \$350 per month in CalWORKs benefits and \$649 in CalFresh food benefits (*People v. Dueñas*, 30 Cal. App. 5th 1157, 1161 (2019)). It also likely covers those serving sentences, who have no possibility of earning any significant wages at California's prison wage of \$0.08 to \$1.00 per hour. (*See* S. Con. Res. 69, 2019-2020 Leg., Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SCR69.)

between purported punitive and nonpunitive LFOs is nonexistent, or at best imperceptible to those upon whom the LFO is imposed. This Court should hold that courts cannot constitutionally impose LFOs on defendants who cannot pay them, regardless of how the LFO is characterized.

ARGUMENT

I. IMPOSING UNPAYABLE LEGAL FINANCIAL OBLIGATIONS ON THE POOR PERPETUATES POVERTY

There is abundant evidence that indigent criminal defendants simply cannot pay the sizeable LFOs that California imposes. Taking into account California's high cost of living, U.S. Census Bureau data indicate that over the most recent three years (2017-2019), California has had the highest average poverty rate in the nation at 17.2 percent, or nearly one in every five persons. (Liana Fox, "The Supplemental Poverty Measure: 2019," U.S. CENSUS BUREAU table 5 (Sept. 25, 2020), <https://www.census.gov/library/publications/2020/demo/p60-272.html>.) The federal poverty level for a single person is \$12,880 per year, or \$1073 per month (Off. of the Assistant Sec'y of Educ., "Poverty Guidelines," U.S. DEP'T OF HEALTH & HUM. SERV. (Jan. 15, 2021), <https://aspe.hhs.gov/poverty-guidelines>), while the level for a family of three is \$21,960 per year, or \$1830 per month. (*Id.*) Families living at this level are not remotely capable of affording California's median rent of \$1614 per month, in addition to food, transportation, medical care, and other life necessities. (*See* U.S. Census Bureau, "American Community Survey, Median Gross Rent By Bedrooms," Table B25031 (2019), <https://data.census.gov/cedsci/table?q=Renter%20Costs&g=0400000US06&tid=ACSDT1Y2019.B25031&hidePreview=true>.)

Yet despite these sobering cost, income, and poverty figures,

California’s fines and fees are among the country’s highest.² As described in this section, the situation has only worsened in recent years as fines and fees have grown while incomes have stagnated. And the COVID-19 pandemic has added yet another layer of financial precarity to the lives of our state’s most vulnerable residents.

A. LFOs have grown dramatically in recent years while incomes have stagnated

Crushing fines and fees have not always been a feature of our criminal justice system. The rise in fines and fees in California can be traced directly back to the passage of Proposition 13. (Ellen Seljan and Colin McCubbins, *Fee for Service: Proposition 13 and Municipal Revenue Substitution*, 7(2) CAL. J. POL. & POL’Y 1 (2015), <https://doi.org/10.5070/P2cjpp7225814> (finding “strong evidence for a causal link between the adoption of Proposition 13 and revenue substitution with charges and fees”); Karin D. Martin, *Monetary Myopia: An Examination of Institutional Response to Revenue from Monetary Sanctions for Misdemeanors*, 29 CRIM. JUST. POL’Y REV. 630 (May 2018) (“Rather than the primary function of monetary sanctions being to achieve bona fide punishment goals (i.e., deterrence, retribution, restitution, or rehabilitation), they are instead used to generate money for the state.”); Mike Maciag, “Addicted to Fines,” GOVERNING (Sept. 2019), <https://www.governing.com/archive/gov-addicted-to-fines.html>.)

In addition to the general growth in fees, LFOs in particular have grown exponentially in America in recent decades.³ A 2014 National

² See Comm’n on the Future of California’s Ct. Sys., *Report to the Chief Justice*, JUD. BRANCH OF CALIFORNIA 71 (April 1, 2017), <https://www.courts.ca.gov/documents/futures-commission-final-report.pdf>.

³ See Catherine E. Lhamon, et al., *Targeted Fines and Fees Against Low-Income Communities of Color: Civil Rights & Constitutional Implications*,

Public Radio (NPR) project, based on a yearlong investigation NPR conducted with the National Center for State Courts and the Brennan Center for Justice, documented that all but three states increased criminal fines and fees between 2010 and 2014. (NPR, “State-By-State Court Fees” (May 19, 2014), <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>.)

The trend accelerated after the 2008 recession, as “[r]eductions in state and local court budgets . . . caused local jurisdictions to fund courts through the imposition and collection of fines and fees.” (USCCR Rpt, *supra* note 3, at 7.) California’s Legislative Analyst noted in 2016 that “[o]ver the past decade, the number and size of charges added to the base fine have increased significantly—resulting in increases in the total amount owed by individuals convicted of criminal offenses.” (Mac Taylor, *Improving California’s Fine and Fee System*, LEG. ANALYST’S OFF. [hereafter “LAO”] 6-7 (Jan. 2016), <https://lao.ca.gov/reports/2016/3322/criminal-fine-and-fee-system-010516.pdf>.) As of 2017, California had 58 different criminal fees and surcharges, more than in 42 other states. (Crim. Just. Pol’y Program at Harvard Law School, *50-State Criminal Justice Debt Reform Builder* (2017), <https://cjdebtreform.org/national-comparison>.) In total, “California now has over 269 dedicated funding streams for court fines, fees, forfeitures, surcharges and penalty assessments that may be levied on offenders and violators.” (Marcus Nieto, *Who Pays For Penalty*

(hereinafter “USCCR Rpt”), U.S. COMM’N ON CIV. RTS. 8 (Sept. 2017) https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf; See also Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors’ Prisons*, 51 HARVARD CIV. RTS.-CIV. LIBERTIES L. REV. 189, 194 (2016), https://harvardcrcl.org/wp-content/uploads/sites/10/2009/06/HLC102_crop.pdf.

Assessment Programs in California?, CAL. RSCH. BUREAU 7 (Mar. 2006), https://www.library.ca.gov/Content/pdf/capublications/CSP_2006_03.pdf.)
As a result, a base fine of \$100 for an infraction offense triggers \$390 in fees, for a total of \$490 owed. This amount grows to \$815 if a defendant misses the initial payment deadline. (Back on the Road Coal., *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California*, LAW. COMM. FOR CIV. RTS. OF THE SAN FRANCISCO BAY AREA 10 (2015) <http://www.lccr.com/not-just-ferguson-problem-how-traffic-courts-drive-inequality-in-california/>.)⁴

⁴ Scholars (including many *amici* on this brief) have also noted the trend with alarm. (See, e.g., Peter Edelman, *Not a Crime to Be Poor: The Criminalization of Poverty in America* (The New Press, Oct. 31, 2017); Bryan Adamson, *Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System*, 15 NW J. L. & SOC. POL'Y 305 (2020); Laura Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 Boston Coll. L. Rev. 1483 (2016); Tamar R. Birckhead, "The New Peonage," 72 Wash. & Lee L. Rev. 1595 (2015); Courtney E. Lollar, *Eliminating the Criminal Debt Exception for Debtor's Prisons*, 98 N. CAROLINA L. REV. 427 (2020); Meghan M. O'Neil and J.J. Prescott, *Targeting Poverty in the Courts: Improving the Measurement of Ability to Pay*, 82 L. & CONTEMP. PROBS. 199-226 (2019); Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N. CAROLINA L. REV. 401, 402-3 (2020); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt and Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486 (2016).) The most comprehensive recent collections of scholarship and empirical evidence regarding fines and fees are the volumes issued by the Arthur Liman Center for Public Interest Law at Yale Law School since 2018. (See The Arthur Liman Ctr. for Pub. Int. L., *Money and Punishment, Circa 2020*, AM. L. 27 (2020), <https://digitalcommons.law.yale.edu/amlaw/27/>; Judith Resnik, et al., *Ability to Pay*, THE ARTHUR LIMAN CTR. FOR PUB. INT. L. (Mar. 2019), https://law.yale.edu/sites/default/files/area/center/liman/document/liman_colloquium_book_combined_cover_march_21_2019.pdf; Judith Resnik, et al., *Who Pays: Fines, Fees, Bail, and the Cost of Courts*, THE ARTHUR LIMAN CTR. FOR PUB. INT. L. (Apr. 2018),

The skyrocketing growth of fines and fees, which falls so heavily on those without means, is especially striking when compared to the decline or lack of growth in other sources of state revenue which are often more equitable or are graduated to the resources of the payor, such as property taxes. In 1978, for example, just before Proposition 13 was passed, property taxes made up 27% of California's revenues. By 1980, they had dropped to 14%, where they remain today, nearly 20% lower than the national average of 17%. (Richard C. Auxier, et al., *California's State and Local Revenue System*, URBAN INST. 4 (July 2020), https://www.urban.org/sites/default/files/publication/102584/californias-state-and-local-revenue-system_1.pdf.)

While LFOs have soared, incomes in California and the nation have not kept up. Between 1979 and 2019, "real wages rose at the top of the [income] distribution, whereas wages rose at lower rates or fell at the middle and bottom." (CONG. RSCH. SERV., R45090, REAL WAGE TRENDS, 1979 TO 2019 (updated Dec. 28, 2019) at "Summary," <https://fas.org/sgp/crs/misc/R45090.pdf>.) In fact, the title of a recent Pew Research Center report tells the story at a glance: "For most U.S. workers, real wages have barely budged in decades." (Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RSCH. CTR. (August 7, 2018), <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/>.) Using data from the U.S. Bureau of Labor Statistics, the Pew researchers concluded that 2018's "real average wage (that is, the wage after accounting for inflation) has about the same purchasing power it did 40 years ago. And what wage gains there have been have mostly flowed to the highest paid

https://law.yale.edu/sites/default/files/area/center/liman/document/full_liman_05.02.18.pdf.)

tier of workers.” (*Id.*)

While California and other states dramatically increased fines and fees, therefore, those least able to pay them saw no increase in their real wages, making the fines ever more onerous.

The effects of the COVID-19 pandemic have only worsened these trends. Unemployment in California now stands at nine percent, the third-highest rate in the nation and two and a half times that of the same month a year earlier.⁵ Some three-quarters of a million Californians are currently receiving unemployment benefits, according to California Employment Development Department data reported by the Los Angeles Times. (*See* Los Angeles Time Staff, “Tracking How the Coronavirus Crushed California’s Workforce,” LOS ANGELES TIMES (Nov. 17, 2020), <https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/unemployment/>.) Hundreds of thousands of already poor Californians have become dramatically poorer during the last twelve months and the job losses have been concentrated among the lower-income sectors. For example, the Legislative Analyst’s Office found that “more than half of workers who have lost their jobs are members of lower-income households (less than \$50,000 in annual earnings)” and the unemployment rate for workers in those households “is five times higher than the estimated unemployment rate for workers in higher-income households.”⁶ The job losses have also been most severe for women and workers of color. (*See*

⁵ *See* Emp. Dev. Dep’t (EDD), “California Unemployment Increased 0.9% Since November 2020” (Jan. 22, 2021), <https://edd.ca.gov/newsroom/unemployment-december2-2020.htm>; Bureau of Labor Statistics, “Unemployment Rates for States,” U.S. DEP’T OF LAB. (Jan. 26, 2021) <https://www.bls.gov/web/laus/laumstrk.htm>.

⁶ Gabriel Petek, *How Has COVID-19 Affected Renters and Homeowners?*, LAO 2 (Jan. 19, 2021), <https://lao.ca.gov/reports/2021/4312/COVID-19-renters-homeowners-011921.pdf>.

generally Alissa Anderson, *Women and People of Color Take Biggest Hits in California's Job Losses*, CAL. BUDGET AND POL'Y CTR. (June 2020), <https://calbudgetcenter.org/resources/women-poc-take-hits-in-californias-job-loss/>.)

Not only have some of the poorest Californians lost income in the pandemic, they have accrued massive debts, notably for unpaid rent. While precise figures do not exist, the LAO estimated that as of December 2020, the back rent owed by Californians unable to pay because of COVID-related job losses is approximately \$400 million.⁷ Of course, as the pandemic continues, that number continues to grow.

As if the direct effects of the poverty and high cost of living in California were not severe enough, collection of LFOs can undermine the very benefits intended to assist low-income families. For example, although a temporary moratorium is in place during the pandemic, California's LFOs are normally collectible by the Franchise Tax Board (FTB) through interception of (*inter alia*), the Earned Income Tax Credit otherwise due to low-income working families.⁸

⁷ *Id.* at 5. Others have estimated the figure as much higher. (*See, e.g.*, Adam Beam and Don Thompson, "California Lawmakers Agree to Help Cover Some Unpaid Rent," AP NEWS (January 28, 2021) <https://apnews.com/article/california-legislation-coronavirus-pandemic-gavin-newsom-cb6f16ad4a36b15edcbfc10a70532011> (noting that the advocacy group Housing NOW! California estimates the unpaid rent at \$3.6 billion).)

⁸ *See* Western Ctr. on L. and Poverty, "California's Franchise Tax Board to Halt Debt Collection Immediately," (March 30, 2020), <https://wclp.org/californias-franchise-tax-board-to-halt-debt-collection-immediately/#:~:text=Sacramento%2C%20CA%E2%80%94%20State%20Controller%20Betty,will%20go%20into%20effect%20immediately.> (explaining temporary halt and illustrating FTB's normal collection process.)

B. Unpayable fines and fees extract wealth from low-income communities and lead to pernicious policies in pursuit of revenue

Not only do unpayable LFOs saddle the poor with lifelong debt, they directly affect economic mobility and community stability. Scholars and popular press writers have focused increased attention in recent years on the ways in which government policies have systematically prevented economic mobility and the accumulation of wealth in low-income communities, especially communities of color. (*See, e.g.*, Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright, May 2, 2017) (documenting government promotion of segregation from the New Deal through the present, limiting and often preventing the accumulation of home equity by Black Americans); Heather McGhee, *The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together* (One World, Feb. 16, 2021) (discussing how historical disinvestment in public resources such as libraries and parks, stemming from government-sponsored and government-sanctioned Jim Crow laws and policies, have disadvantaged both Black and white Americans).) It is well-known that a home is the single largest asset most Americans will ever own and the greatest source of wealth. (*See, e.g.*, Pew Rsch. Ctr., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, Chapter 3 (July 2011), <https://www.pewresearch.org/social-trends/2011/07/26/chapter-3-net-worth-by-type-of-asset/#median-net-worth-of-individual-assets> (“[H]ome equity is the single largest contributor to household wealth.”)) Yet fines and fees can contribute directly to the loss of wealth, the loss of opportunity to accumulate wealth, and in extreme cases even to the loss of housing by some of the nation’s poorest residents.

The shocking experience of California resident Maria Rivera is a case in point. After one of her sons was held in juvenile detention for more than a year, Ms. Rivera was billed more than \$16,000 in detention costs and court-appointed attorney costs. (*Rivera v. Orange County Probation Dep't*, 832 F.3d 1103, 1104 (9th Cir. 2016).) Although she was unemployed and unable to make payments, the county continued to bill her. Ms. Rivera sold her house, paid the county more than \$9000, and eventually filed for bankruptcy. (*Id.* at 1105; *see also* Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N. CAROLINA L. REV. 401, 402-3 (2020), <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6769&context=nclr>.) Even though the debt was discharged, the county contended that the juvenile fee was a nondischargeable “domestic support obligation” and persuaded the bankruptcy court to reopen the bankruptcy. (*Rivera*, 832 F.3d at 1105.) Eight years after her son’s detention, the Ninth Circuit reversed the bankruptcy court, rejected the claim that the juvenile fee was a nondischargeable support obligation, and discharged the debt. (*Id.* at 1111-12.) Although speaking of Ms. Rivera’s situation in particular, the Ninth Circuit’s rebuke of Orange County’s actions highlights a central paradox of most if not all fines and fees imposed upon the poor:

In relentlessly pursuing the debt's collection and opposing its discharge, the County raises yet another obstacle to Rivera's efforts to provide her son with the support about which the County claims to be so deeply concerned. That “betray[s] a misguided sense of values.”

The County's actions also highlight a recurring problem of public entities imposing fiscal burdens on those who can least afford them. Orange County's public budget shows that the Probation Department relies on self-generated revenue for more than 40% of its financing. Seeking to obtain that revenue by unremittingly pursuing legal actions against disadvantaged individuals—the counterproductive practice at issue here—can have damaging effects on the

community. Not only does such a policy unfairly conscript the poorest members of society to bear the costs of public institutions, operating “as a regressive tax,” but it takes advantage of people when they are at their most vulnerable, essentially imposing “a tax upon distress.” Moreover, experience shows that the practice undermines the credibility of government and the perceived integrity of the legal process.

Id. at 1112 (citation and footnotes omitted).⁹

Researchers, scholars, and courts have also documented the distorting effects of LFOs on the criminal justice system itself. (*See, e.g.*, Judith Resnik and David Marcus, *Inability to Pay: Court Debt Circa 2020*, 98 N. CAROLINA L. REV. 361, 363 (2020), <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6765&context=nclr> ([“In some jurisdictions, judges have become partners with law enforcement in what could sadly be termed a joint “fundraising” endeavor that treats individuals charged with offenses and infractions as sources of revenue instead of as needing to be helped and heard by law.”])) The Conference of State Court Administrators noted in a recent Policy Paper (produced by a committee that included the Administrative Director of the Judicial Council of California) that some of the most abusive LFO practices have occurred at the hands of courts. For example, in 2014, a Harpersville, Alabama town court was condemned by a higher court as a “judicially sanctioned extortion racket” because of its ever-increasing focus on fines and fees “at the cost of basic fairness.” (Arthur W. Pepin, *The End of Debtor’s Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations*, CONF. OF STATE CT. ADM’RS 8 (2015-16), https://cosca.ncsc.org/_data/assets/pdf_file/0014/26330/end-of-debtors-prisons-2016.pdf.) The Alabama court is also discussed in Hannah

⁹ As discussed at p.32 *infra*, California has recently eliminated juvenile probation fees.

Rappleye and Lisa Riordan Seville, “The Town That Turned Poverty Into a Prison Sentence,” THE NATION (Apr. 14, 2014), <https://www.thenation.com/article/archive/town-turned-poverty-prison-sentence/>. Similarly, the U.S. Department of Justice found in its 2015 investigation of Ferguson, Missouri, that “[t]he municipal court does not act as a neutral arbiter of law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City’s financial interests.” (Civil Rights Division, *Investigation of the Ferguson Police Department*, (hereinafter “*Ferguson Rpt*”), U.S. DEP’T OF JUST. 7 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.)

Likewise, the Fifth Circuit Court of Appeals found in two cases in 2019 that criminal court judges in New Orleans had an unconstitutional conflict of interest because of the court’s receipt of fines and fees and a percentage of bail bond values. (*Cain v. White*, 937 F.3d 446 (5th Cir. 2019) (holding that judicial imposition of fines and fees that comprised a substantial part of a discretionary Judicial Expense Fund which paid for salaries for court personnel and made up a significant portion of the court budget violated the Due Process Clause); *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019) (holding that parish criminal court’s practice of using money generated from commercial bond fees to pay judicial expenses created a conflict of interest that violated the Due Process Clause).) The Fifth Circuit’s decisions relied in part on *Tumey v. State of Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), two cases in which the Supreme Court held that due process was violated when magistrates or judicial officers had pecuniary interests in the imposition of fines or fees on defendants, even if the pecuniary interest was institutional rather than personal.

Police practices can also be affected. For example, in its Ferguson report, the Department of Justice found that police were pressured to issue more tickets, and judges to issue higher fines, to generate revenue. (*Ferguson Rpt* at 9-15.) The Department of Justice observed that this focus on revenue generation had “erode[d] police legitimacy and community trust.” (*Id.* at 15.) Likewise, the Brennan Center for Justice at NYU found in a recent national study that “[c]ollection and enforcement efforts divert police, sheriff’s deputies, and courts from their core responsibilities.” (Matthew Menendez et al., *The Steep Cost of Criminal Justice Fees and Fines* (hereinafter “*Steep Cost*”), BRENNAN CTR. FOR JUST. 5 (Nov. 21, 2019), https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf.)

Imposing unpayable fines and fees on the poor damages lives, communities, and respect for the integrity and neutrality of the court system. This Court should reject the practice.

II. IMPOSING UNPAYABLE FINANCIAL OBLIGATIONS ON THE POOR IS IRRATIONAL BECAUSE THE COSTS OF DOING SO OFTEN EXCEED THE POSSIBLE RECOVERY

It is a bitter irony that while fines and fees are often justified as a way to raise revenue for necessary public services such as courts, they resoundingly fail to do so when imposed on those too poor to pay. As the presiding judge of the San Bernardino Superior Court pointedly observed, “the whole concept is getting blood out of a turnip.” (Jones and Sugarman, “Courts, Counties Dealing with Increase in Uncollected Fines and Penalties,” *DAILY J.* (Jan. 6, 2015).) Moreover, as explained in detail in the brief of *amici* Public Defenders and Civil Rights Organizations at 22-32, saddling indigent criminal defendants with court debt not only threatens the ability of ex-offenders to remain housed and keep their families together, it also leads to collateral consequences—such as harsh debt collection

practices, lowered credit scores, and late fees—that make it even less likely that they will be able to pay into the system at all.¹⁰ Substantial research also suggests that criminal justice debt paradoxically increases the likelihood of recidivism.¹¹

Many investigations and studies across the nation have shown that

¹⁰ Until 2017, these consequences also included loss of drivers' licenses, a particularly counterproductive policy that in the words of former Governor Brown often resulted in "the inability to legally drive to work or take one's children to school." (See Associated Press, "California No Longer Will Suspend Driver's Licenses for Traffic Fines," LOS ANGELES TIMES (June 29, 2017), <https://www.latimes.com/local/lanow/la-me-ln-driver-license-fees-20170629-story.html> (describing AB 103 and quoting Governor Brown.))

¹¹ See, e.g., sources collected in Stephanie Campos-Bui, et al., *Making Families Pay: The Harmful, Unlawful, and Costly Practice of Charging Juvenile Administrative Fees in California*, UC BERKELEY PUB. L. RSCH. PAPER 38, n106 (Mar. 20, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937534, including Alex R. Piquero and Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15(3) YOUTH VIOLENCE AND JUV. JUST. 325-340 (2017). See also Tamar R. Birckhead, *The New Peonage*, 72(4) WASH. & LEE L. REV. 1595 (2015), <https://scholarlycommons.law.wlu.edu/wlulr/vol72/iss4/3/> (describing how mandatory fees for youth in the juvenile court system can create insurmountable fee burdens, increasing the likelihood of recidivism); Stacy Hoskins Haynes, et al., *Juvenile Economic Sanctions: An Analysis of Their Imposition, Payment, and Effect on Recidivism*, 13(1) CRIMINOLOGY & PUB. POL'Y 31, 37-38 (Feb. 2014) (describing studies showing that the burdens of economic sanctions "might interfere with a juvenile's ability to reenter society successfully after a conviction, thereby increasing the risk of recidivism"); R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, MINNESOTA L. REV. 1779, 1796, 1811-12 (2015), <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1268&context=mlr> (describing how the imposition of economic sanctions increases the likelihood of recidivism for all offenders).

charging criminal justice fees to the indigent costs a great deal and recoups little. For example, the Brennan Center’s 2019 Steep Cost study mentioned above found that the Texas and New Mexico counties it examined “effectively spend more than 41 cents of every dollar of revenue they raise from fees and fines on in-court hearings and jail costs alone, [which is] 121 times what the Internal Revenue Service spends to collect taxes and many times what the states themselves spend to collect taxes.” (*Steep Cost, supra*, at 5.) Indeed, one New Mexico county covered in the Steep Cost study “spends at least \$1.17 to collect every dollar of revenue it raises through fees and fines, meaning that it loses money through this system.” (*Id.*)

Similarly, a very recent study of Pennsylvania’s practices over ten years, conducted by professors from Temple and Rutgers Universities in conjunction with the American Civil Liberties Union of Pennsylvania, found that “most of the fines, costs, and restitution imposed in Pennsylvania go uncollected, even after a decade.” (Jeffrey T. Ward, et al., *Imposition and Collection of Fines, Costs, and Restitution in Pennsylvania Criminal Courts*, ACLU OF PENNSYLVANIA 2 (Dec. 18, 2020) , https://www.aclupa.org/sites/default/files/field_documents/fines_and_costs_report_12.18.2020_0.pdf (finding that ten years after imposition, 86% of fines, 45% of costs, and 70% of restitution remain unpaid).) The 66 percent of defendants who used public defender services (and who are therefore by definition indigent), were able to pay an average of only \$492 each over the ten-year period studied. (*Id.*) Another study found that a 2004 Minnesota program spent \$13,000 to collect \$7261 in LFOs.¹² Some of the most

¹² Julia Silverman, “Pay to Stay in Jails is Gaining Popularity,” WASHINGTON POST (June 6, 2004), <https://www.washingtonpost.com/archive/politics/2004/06/06/pay-to-stay-in-jails-is-gaining-popularity/9c3d80a0-6630-4dad-bcd8-30793cd23b1e/>.

extreme examples involve the costs of jailing those who cannot pay. For example, the Vera Institute of Justice found in a 2017 study that New Orleans spent \$6.4 million jailing people who could not pay fines and fees, recouping only \$4.5 million. “In other words, the city spent \$1.9 million more than criminal justice agencies reaped.” (Mathilde Laisne, et al., *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans*, VERA INST. OF JUST. (Jan. 2017), <https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf>.)

California authorities have likewise jailed or threatened to jail those who cannot pay LFOs, even when their desperate poverty is obvious. For example, in 2019, the Second Appellate District decided *People v. Dueñas*, 30 Cal. App. 5th 1157 (2019). The defendant Velia Dueñas, a married mother with cerebral palsy, subsisted on public benefits totaling \$1009 per month for herself, her husband, and their two children. Ms. Dueñas incurred repeated citations over several years for driving on a suspended license after being unable to pay three citations she had received years earlier as a juvenile. (*Id.* at 1160.) In connection with those suspended license citations, Ms. Dueñas served a total of 51 days in jail after being offered the “ostensible choice” between fines she could not afford and jail time. (*Id.* at 1161.) Certainly, the public costs of those seven weeks in jail, not to mention the repeated court proceedings necessary to adjudicate the matters, far exceeded any funds Ms. Dueñas could pay.¹³

¹³ In *Dueñas*, the Court of Appeal held that due process requires that the court determine that a criminal defendant has the ability to pay before imposing fees or executing restitution fines. (30 Cal. App. 5th at 1160.) However, some lower courts have disagreed with *Dueñas* and it is therefore certain that some defendants remain caught in the Hobson’s choice between jail and an unpayable fine that Ms. Dueñas faced and that the *Dueñas* court

News reports document that Ms. Dueñas’ case is hardly unique. (See, e.g., Molly Hennessy-Fiske, “County Spent \$13,000 to Chase \$1004,” LOS ANGELES TIMES (March 4, 2009) <https://www.latimes.com/archives/la-xpm-2009-mar-04-me-probation-fees4-story.html> (detailing county probation department’s engagement of private lawyers to pursue grandmother for debts incurred by granddaughter in juvenile court proceedings).) The same article reported that in 2008, Los Angeles County spent nearly \$900,000 (*excluding* legal fees) to collect only \$2.6 million of a total \$23.6 million in juvenile probation debt. (*Id.* See also Brentin Mock and Laura Bliss, “An Effort to Abolish Court Fees Grows in California,” BLOOMBERG CITY LAB (July 29, 2020), <https://www.bloomberg.com/news/articles/2020-07-29/los-angeles-leads-latest-push-to-end-court-fees> (describing Los Angeles County’s money-losing effort to collect fees from the poor and profiling one person, arrested for selling marijuana while on probation, who reported that the main reason he was doing so was to pay his court costs).)

Each year in California, the total balance of outstanding court debt “grows . . . as some amount of newly imposed court-ordered debt goes unpaid and is added to the amount of unresolved debt accumulated from prior years.” (LAO, *Improving California’s Fine and Fee System*, *supra*, at 8.) The LAO observed “that a large portion of this balance may not be collectable as the costs of collection could outweigh the amount that would actually be collected.” (*Id.*)

The non-cost-effectiveness of collection efforts, combined with the pernicious effects on families of harassing collections like those undergone by Ms. Rivera, helped persuade the California Legislature to abolish

condemned. (See, e.g., *People v. Valles*, 49 Cal. App. 5th 156 (2020) (op. of Ramirez, P.J.).)

juvenile court fees as of January 1, 2018. (SB 190, Stats. 2017, ch. 678.) As an Assembly Committee found in evaluating the bill, “[g]overnment resources can be wasted in futile collection attempts. . . . Simply put, criminal defendants can generally not produce a substantial flow of money for fines. That well will quickly run dry.”¹⁴ While issued in the context of juvenile fees, the comment applies to all LFOs imposed upon the poor. This Court should reject the imposition of these unpayable obligations on the indigent.

III. THE STATE’S SUGGESTION THAT SOME UNPAYABLE LFOs MAY BE IMPOSED ON INDIGENT DEFENDANTS IS IRRATIONAL, ESPECIALLY FROM THE PERSPECTIVE OF THOSE SUBJECTED TO THEM

While the People concede that imposing “user fees” on those who cannot pay them “does not meet standards of even basic rationality under the equal protection and due process clauses,” (RB 13), they contend that fines meant to punish should be evaluated differently. Respondents urge that the size and extent of punitive assessments are subject only to Eighth Amendment analysis and that “inability to pay [a punitive fine] does not, by itself, bar imposition of a fine...” (*Id.* at 12.)

Appellants and *amici* Civil Rights Organizations have comprehensively rebutted this argument as a legal matter. As a practical matter, the LFOs are indistinguishable from the perspective of the people facing them, who are ordered to make lump sum payments; the apportionment of their payments towards various LFOs is often opaque. (Alexes Harris, *Framing the System of Monetary Sanctions as Predatory: Policies, Practices and Motivations*, 4(1) UCLA CRIM. JUST. L. REV. 1, 7 (2020) (“monetary sanctions’ precise role and administration is neither

¹⁴ ASSEM. COMM. ON PUBLIC SAFETY, Report on SB 190 (as amended June 20, 2017) at 4.

clear to the people sentenced, nor the people citing, sentencing, collecting, and punishing”).) Here, *amici* Poverty Law Scholars illustrate that the purported lines between criminal and other LFOs are highly blurred, place that unconvincing distinction into historical context, and provide additional reasons why such any such distinction regarding California’s LFOs is unwarranted.

From the earliest days of the American colonial Poor Laws, there has been an association of poverty with criminality. (See, e.g., Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66(4) TULANE L. REV. 631 (1992) (describing colonial vagrancy legislation punishing the poor); cf. *Edwards v. California*, 314 U.S. 160 (1941) (invalidating state statute that criminalized bringing “paupers” into the state).) More recently, there has been a long and disgraceful history of subjecting the poor, especially those seeking public assistance, to requirements, conditions, and practices, however labeled, that most citizens would consider self-evidently punitive and contradicted by the purported rights of free citizens to be protected against unwarranted government punishment, intrusion and surveillance. Speaking of this present-day phenomenon, Professor Kaaryn Gustafson, in an influential article, notes that “criminalization [of the poor] includes state policies and practices that involve the stigmatization, surveillance, and regulation of the poor; that assume a latent criminality among the poor; and that reflect the creep of criminal law and the logics of crime control into other areas of law, including the welfare and immigration systems.” (Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 UC IRVINE L. REV. 297, 300 (2013), <https://www.law.uci.edu/lawreview/vol13/no2/gustafson.pdf>.)

This “creep of criminal law” is reflected in many aspects of the lives of the poor. For instance, welfare recipients have long been subject to warrantless searches of their homes by welfare and law enforcement officials. (*See e.g., Sanchez v Cnty. of San Diego*, 464 F.3d 916 (9th Cir. 2006) (upholding mandatory “walk through” of the homes of welfare applicants by District Attorney investigator (a sworn peace officer) including inspection of contents of closets and cabinets); *cf. Wyman v James*, 400 U.S. 309 (1971) (upholding New York welfare “home visit” program by social workers but noting visit did not involve law enforcement officers or inspection of the home).)

Welfare recipients have also been subject to suspicionless drug testing and fingerprinting in many states. California fingerprinted food stamp applicants for more than a decade before abandoning the practice in 2011, and fingerprinted CalWORKs welfare applicants until 2018. (*See* Greg Lucas, “California To End Food Stamp Fingerprinting,” REUTERS (October 6, 2011), <https://www.reuters.com/article/us-california-foodstamps/california-to-end-food-stamp-fingerprinting-idUSTRE7960KM20111007> (describing AB 6, Stats. 2011, ch. 501, sec. 1) (abolishing food stamp fingerprinting); SB 89, Stats. 2017, ch. 24 (abolishing CalWORKs fingerprinting).) According to the National Conference of State Legislatures (NCSL), at least fifteen states have passed legislation permitting or requiring drug testing or screening of welfare recipients. (NCSL, “Drug Testing for Welfare Recipients and Public Assistance” (Mar. 24, 2017), <https://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx>.) The programs in at least two states were enjoined as unconstitutional searches. (*See Lebron v. Sec’y, Florida Dep’t of Children & Families*, 710 F.3d 1202 (11th Cir. 2013); *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *aff’d by an equally divided court*, 60 F. App’x 601 (6th Cir. 2003)

(enjoining Michigan’s warrantless drug testing program).) Professor Gustafson has noted that:

While welfare use has always borne the stigma of poverty, it now also bears the stigma of criminality. . . .

Perhaps no state has been tougher on welfare fraud than California. California is one of the most aggressive states not only in investigating and prosecuting welfare fraud cases, but also in welcoming law enforcement into the welfare system. Even before receipt of a first issuance of a grant, an applicant for welfare is reminded of the welfare system's punitive rules and undergoes state scrutiny otherwise limited to criminal offenders. A welfare recipient has likely signed documents informing her that her welfare grant will be reduced or terminated if she has a boyfriend move in without informing the state, if she fails to vaccinate her children, or if she is convicted of a drug charge. She has probably signed a document stating that any child she conceives and gives birth to while on welfare will be excluded from calculations of household financial need. Her Social Security number has been matched against state and national criminal records to make sure that she is not someone who should be incarcerated, that she does not have an outstanding arrest warrant, and that she has not been convicted of a drug-related crime. The financial information she has provided has been matched against various employment databases, IRS records, and Franchise Tax Board records to see that her lack of income is verifiable. Her personal information has been entered into the welfare system's database, which may be accessed by law enforcement officers without any basis for suspicion that she has engaged in any wrongdoing. She has been photographed and fingerprinted. And all of this has occurred before she has received a single welfare check.

(Kaaryn Gustafson, *The Criminalization of Poverty*, 99(5) J. CRIM. L. & CRIMINOLOGY 643, 644-45 (2009), <https://www.law.uci.edu/news/in-the-news/2019/Gustafson-The-Criminalization-of-Poverty.pdf>. See also Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S.CAL. INTERDISC. L. J. 363, 364 (2016), <https://gould.usc.edu/why/students/orgs/ilj/assets/docs/25-2-Cammett.pdf>. (“[I]t is insufficient to understand the incursion of mass criminalization

into the lives of poor black women without analyzing the interplay of the criminal justice system and other state systems. These systems include welfare offices, public schools, child welfare agencies, public housing, and the family courts, to name just a few.”))

Humiliating inspection of the intimate lives of the poor has also been common. For example, in 1968 the Supreme Court decided *King v. Smith*, 392 U.S. 309 (1968), rejecting Alabama’s imputation of income to welfare families from purported “substitute fathers” (the boyfriends of mothers on welfare) whose status was determined based on “‘frequent’ or ‘continuing’ sexual relations between the so-called ‘substitute father’ and the mother receiving assistance.” (*Id.* at 314.) Testimony in the case included the opinions of various officials as to how frequently the mother and the “substitute father” needed to have sexual relations for him to be attributed this status. (*Id.*) While the Court overturned the imputation of income from unrelated persons based on federal law, it rendered no comment on these invasive inquiries and noted that “not at issue in the case is the question of Alabama’s general power to deal with conduct it regards as immoral and with the problem of illegitimacy.” (*Id.* at 320.)

In addition to this history of treating the poor like criminals and of linking involvement with the criminal justice system to consequences across a host of other domains including housing, public benefits, employment, and education, there is also a shameful history in America of using the criminal law against the poor to address actual or invented civil wrongs. The most egregious example, of course, is the peonage system that developed in the post-Civil War South to punish and hold in debt bondage those former slaves who quit jobs in search of better pay or working conditions. (See Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1606 (2015) (describing “network of criminal and penal statutes that effectively turned over convicted defendants--most of them

newly freed slaves--to private employers, whether plantation owners or industrial corporations, ostensibly to “pay off” their criminal debts through enforced labor.”); Pete Daniel, *The Shadow of Slavery: Peonage in the South, 1901-1969* at 67 (University of Illinois Press, 1972) (detailing the development of Southern legislation that facilitated the peonage system.)

Although the Supreme Court held these peonage schemes unconstitutional in the early years of the 20th century, (*Bailey v. Alabama*, 219 U.S. 219 (1911) (invalidating state law treating breach of work contract as prima facie evidence of fraud); *United States v. Reynolds*, 235 U.S. 133 (1914) (invalidating “criminal surety” law allowing peonage)), Professor Birckhead notes that these decisions did not actually end the practice, and she explicitly connects the history of peonage to today’s legal financial obligations, illustrating that “the reconfiguration of the South's judicial system after the Civil War, which entrapped African Americans in a perpetual cycle of coerced labor, has direct parallels in the two-tiered system of justice that exists in the juvenile and criminal courtrooms of today” by “trapping momentarily errant individuals in an unyielding web of legal strictures.” (Birckhead, *supra* at 16.)

Abuses of the criminal law to punish poverty are not only historical artifacts. In October 2020, the nonprofit investigative journalism organization ProPublica published a lengthy story on an Arkansas law that permits criminal misdemeanor charges against tenants who fail to pay rent and do not vacate a property within ten days of receiving a notice from the landlord.¹⁵ ProPublica reported that between March and October 2020,

¹⁵ Maya Miller and Ellis Simani, “When Falling Behind on Rent Leads to Jail Time,” PROPUBLICA (Oct. 26, 2020), <https://www.propublica.org/article/when-falling-behind-on-rent-leads-to-jail-time#:~:text=Between%20mid%2DMarch%20and%20mid,criminal%20evi>

more than 200 new “failure to vacate” criminal complaints under this law had been filed. At least seven tenants were detained or sentenced to jail for not appearing in court. (*Id.*) Since 2018, ProPublica reports, Arkansas “authorities [have] issued more than 200 warrants related to evictions. . . . Judges have issued 37 jail sentences for not appearing in court for rent payment hearings, according to a review of court hearings.” (*Id.*)

While California thankfully does not share Arkansas’ use of the criminal law to punish breach of a rental contract, our state has routinely allowed use of the criminal justice system and the imposition of large LFOs to enforce (for example) breach of building and zoning codes, and the application of these statutes often targets the poor. For instance, a lawsuit brought by the Institute for Justice and a five-part newspaper article in 2017 in *The Desert Sun* exposed a years-long for-profit policing scheme in the Inland Empire. A private law firm had persuaded cities to enter a sort of “bounty” system under which the law firm would prosecute minor code violations and collect thousands of dollars in attorneys’ fees from the defendants. (*See* Brett Kelman, “They Confessed to Minor Crimes. Then City Hall Billed Them \$122k in ‘Prosecution Fees,’” *THE DESERT SUN* (Nov. 15, 2017),

https://www.desertsun.com/story/news/crime_courts/2017/11/15/he-confessed-minor-crime-then-city-hall-billed-him-31-k-his-own-prosecution/846850001/; J. Justin Wilson, “Indio Agrees to Settle Prosecution-Fees Lawsuit; Will Return All Fees to Residents,” *INST. FOR JUST.* (Dec. 21, 2018) <https://ij.org/press-release/indio-agrees-to-settle-prosecution-fees-lawsuit-will-return-all-fees-to-residents/>.)

The law firm promised cities “cost neutral or even revenue-

tion%20filings%20against%20them.&text=The%20pandemic%20economy%20has%20hit,the%20eviction%20churn%20than%20ever.

producing” housing code prosecution services once cities amended their codes to allow the firm to collect fees from defendants.¹⁶ (Wilson, “Indio Agrees to Settle Prosecution-Fees Lawsuit,” *supra*.) As plaintiffs’ counsel explained, “that led to [the law firm] billing residents thousands if not tens of thousands of dollars for mundane code enforcement matters that could have otherwise been resolved with a simple phone call, or at worst, a simple ticket without drawing up criminal charges.” (*Id.*) One homeowner received a \$3000 attorneys’ fees bill, which ballooned to \$6000 after she appealed it, in connection with a \$75 citation for having chickens in her yard. (Inst. for Just., “Class Action Lawsuit Challenges California Cities’ For-Profit Prosecution Scheme,” <https://ij.org/case/indio-fines/>.) Another paid a \$900 fine for a code violation involving an unpermitted expansion of one room in his home, only to be faced with a \$26,000 bill for the prosecution’s legal fees, which rose to \$31,000 after his appeal. Kelman, “They Confessed to Minor Crimes,” *supra*.

Other examples of the criminalization and heavy punishment of what should be, at most, regulatory violations abound. Scholars have pointed to trends such as the prosecution and incarceration of low-income parents who enroll their children in schools in affluent school districts (and to data noting the racially disproportionate prosecutions of these “crimes”). (See, e.g., LaToya Baldwin Clark, *Education as Property*, 105 VIRGINIA L. REV. 397, 398 (Apr. 10, 2019), https://www.virginialawreview.org/wp-content/uploads/2020/12/BaldwinClark_Book.pdf (noting that “the end result” of conceptualizing education as a commodity that can be “stolen” by parents “is a regime of surveillance, discipline, and punishment that reproduces race and class stratification.”); Kaaryn Gustafson, *Degradation*

¹⁶ After the Desert Sun’s exposé and the filing of the class action lawsuit, the California Legislature prohibited cities from charging residents for prosecution fees in criminal code enforcement cases. Penal Code § 688.5.

Ceremonies, supra, at 321-27 (detailing prosecutions, incarceration, and LFOs imposed upon parents or grandparents for fraud or “education theft” in seven jurisdictions).)

Truancy can also lead to LFOs and jail time for California parents under a 2010 statute (Ed. Code § 48263.6) promoted by then-Attorney General candidate Kamala Harris and signed by Governor Schwarzenegger. Anecdotal evidence suggests that many of those prosecuted have been low-income parents of color, and often parents of children with disabilities or chronic illnesses which cause school absences. (*See, e.g.*, Molly Redden, “The Human Costs of Kamala Harris’ War on Truancy,” THE HUFFINGTON POST (Mar. 27, 2019), https://www.huffpost.com/entry/kamala-harris-truancy-arrests-2020-progressive-prosecutor_n_5c995789e4b0f7bfa1b57d2e (profiling Black mother prosecuted for child’s absences, many of which were caused by hospitalizations for sickle-cell anemia).)

Attending school can also bring poor children face to face with the criminal justice system, as the stationing of police officers in schools and the use of criminal charges to address school disciplinary offenses attests. (*See, e.g.*, Peter Edelman, *The Criminalization of Poverty and the People Who Fight Back*, 26(2) GEORGETOWN J. POVERTY L. & POL’Y 213, 223 (2019) (describing federal government’s spending of “\$750 million to add 6,500 School Resource Officers (“SRO”) in three thousand schools across the country” since the Columbine school shooting in 1999).) Indeed, the use of the justice system to address the disciplinary problems of poor children, especially poor children of color, has become so notorious that it has spawned its own term: the “school to prison pipeline.” (*See, e.g.*, Fatema Ghasletwala, *Examining the School-to-Prison Pipeline: Sending Students to Prison Instead of School*, 32 J. CIV. R. & ECON. DEV. 19 (2018), <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1819&conte>

xt=jcred; Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICHMOND L. REV. 1063 (2016), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=3108&context=lawreview>.)

Likewise, scholars, advocates, and journalists alike have chronicled the growing use of criminal statutes against homeless people, especially in California, for such offenses as sitting or sleeping on the sidewalk, panhandling, or performing acts necessary for human survival in public. (See, e.g., Eric Tars, et al., *Can I Get Some Remedy? Criminalization of Homelessness and the Obligation to Provide an Effective Remedy*, 45 COLUMBIA HUM. RTS. L. REV. 738 (2014); Maria Foscarinis, et al., *Out of Sight—Out of Mind? The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEORGETOWN J. ON POVERTY L. & POL’Y 145 (1999); Farida Ali, *Limiting the Poor’s Right to Public Space: Criminalizing Homelessness in California*, 21 GEORGETOWN J. ON POVERTY L. & POL’Y 197 (2014); Sarah Gerry, *Jones v. City of Los Angeles: A Moral Response to One City’s Attempt to Criminalize, Rather than Confront, its Homelessness Crisis*, 42 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 239 (2007); Editorial Board, “L.A. County Should Not Want In On Criminalizing Homeless People Sleeping on the Streets,” LOS ANGELES TIMES (Sept. 17, 2019), <https://www.latimes.com/opinion/story/2019-09-16/la-county-criminalizing-homeless-boise>; Shayla R. Myers, “Making Homelessness a Crime is No Way For Los Angeles to Fix Its Crisis,” LOS ANGELES TIMES (Sept. 14, 2018), <https://www.latimes.com/opinion/oped/la-oe-myers-criminalizing-homelessness-in-los-angeles-20180914-story.html>.)

In addition to erasing any discernable line between criminal and regulatory violations, imposition of unpayable LFOs, however labeled, prolongs the involvement of infractors or ex-offenders with the criminal

justice system and limits their ability to access criminal record-clearing relief. Courts often condition the completion of both formal and court supervision on complete payment of LFOs, prolonging criminal system involvement. (See, e.g., Mary Patillo and Gabriela Kirk, *Pay Unto Caesar: Breaches of Justice in the Monetary Sanctions Regime*, 4 UCLA CRIM. JUST. L. REV. 49, 57 (2020), <https://escholarship.org/uc/item/2wb6d1zq#author> (“[B]ecause people are not released from criminal justice supervision until their accounts are fully paid, monetary sanctions prolong supervision, increasing the likelihood of probation violation infractions, worsening punishment for any new criminal conduct, and leading to incarceration for nonpayment.”); Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STANFORD J. CIV. RTS. CIV. LIBERTIES 237, 262 (2015), https://www-cdn.law.stanford.edu/wp-content/uploads/2015/09/SJCRCL_When-the-Fallout-of-a-Criminal-Conviction-Goes-too-Far-Challenging-Collateral-Consequences.pdf (describing “vicious cycle” in which ex-offenders cannot secure employment until they expunge criminal records, cannot expunge until they pay LFOs, but cannot pay LFOs without wages).) Inability to pay can also lead to violation or revocation of probation, as well as civil assessments, fees for payment plans, and arrest warrants. (See, e.g., Alexes Harris, *supra* at 6 (“[N]onpayment can result in additional legal consequences, such as extended court supervision, probation, and incarceration.”); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern Day Debtors’ Prisons*, 75 MD. L. REV. 486, 504 (2016) (providing examples).) In no sense do persons laboring under an unpayable mountain of debt find logic in a system that allows such debt to be imposed so long as it is not formally

labeled “punitive.”¹⁷

All of this blurring of any sensible line between criminal and regulatory violations, and the paradoxical system of purportedly non-punitive fees sometimes being many times higher than the fines,¹⁸ makes a mockery out of the notion that only some LFOs should be subject to ability to pay analysis.

Welfare applicants subject to a home search by law enforcement agents, poor mothers who can’t get food assistance without being fingerprinted, persons prosecuted for sitting or sleeping in public, parents or grandparents who spent years paying debt for their children’s offenses, children prosecuted for school disciplinary offenses, and those who accrue crushing debt even for minor traffic infractions all share at least one experience in common: that of impotence before the relentless power of the state and its indifference to their need and human dignity. It matters not whether the state calls some of its measures criminal and others preventative, or some punitive and others administrative. From the point of view of those subject to them, such distinctions are meaningless. This Court should reject the purported constitutional distinction between criminal fines and user fees, and hold that all such measures are prohibited unless the government proves that the defendant can pay them.

¹⁷ Indeed, if this Court were to adopt the formalistic principle Respondent urges, allowing the label “fine” or “fee” on a particular LFO to determine whether that LFO is subject to ability to pay analysis, it could even have the perverse effect of encouraging a cash-strapped legislature to simply label all LFOs as fines. Some measure of this already exists in California, as Appellants explain. (Appellants’ Reply Brief at 32-35 (discussing supposed “punitive” fees that fund state and court operations).)

¹⁸ See, e.g., *Not Just a Ferguson Problem*, *supra*, at 10 (discussing how base fee of \$100 for traffic offense becomes \$390 with fees added).

CONCLUSION

For all of the foregoing reasons, *amici* Poverty Law Scholars respectfully request that this Court hold that no court may impose an LFO on a criminal defendant without determining that the defendant has the ability to pay that LFO.

Dated: March 01, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520 (c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed Amici Curiae Brief, counsel certifies that the text of this (including footnotes) was produced used 13-point type and contains 8,267 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amici Curiae Brief required under Rule 8.200(c)(1-3), this certificate, and the signature blocks. *See* Rule 8.204(c)(3).

March 01, 2021

By: /s/ Clare Pastore
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EXHIBIT A

EXHIBIT A: Names and affiliations of *amici* Poverty Law Scholars
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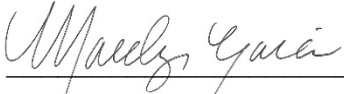
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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on March 01, 2021, at Los Angeles, California.



Marelyn Garcia

STATE OF CALIFORNIA
Supreme Court of California

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Date

/s/Clare Pastore

Signature

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